No. 03-9969

In the

United States Supreme Court

Supreme Court, U.S.
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RIDUOANE KHALID and MOHAMMED KHALID, As Next Friend Of RIDUOANE KHALID

Petitioners,

v.

GEORGE WALKER BUSH, President of the United States; DONALD RUMSFELD, Secretary, United States Department of Defense; MAJ. GEN. GEOFFERY MILLER, Commander, Joint Task Force GTMO Guantánamo Bay Naval Station Guantánamo Bay, Cuba; ARMY COL. NELSON J. CANNON, Commander, Camp Delta Guantánamo Bay Naval Station, Guantánamo Bay, Cuba,

Respondents.

On Petition For Extraordinary Writ of Habeas Corpus

PETITION FOR EXTRAORDINARY WRIT OF HABEAS CORPUS

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SUPREME COURT, U.S.

QUESTION PRESENTED

Whether United States courts lack jurisdiction to consider challenges to the legality of the detention of foreign nationals captured abroad in connection with hostilities and incarcerated at the Guantánamo Naval Base, Cuba.

LIST OF PARTIES TO THE PROCEEDINGS

The following person imprisoned at Guantánamo Bay Naval Station is a petitioner in this Court: Riduoane Khalid. Mohammed Khalid, is the brother of detainee Riduoane, also appears as next friend.

The following persons appear in this Court as respondents: George W. Bush, President of the United States; Donald H. Rumsfeld, Secretary of Defense; Army Brigadier General Jay Hood, Commander of Joint Task Force-GTMO; and Army Colonel Nelson J. Cannon, Commander, Camp Delta, Guantánamo Bay Naval Station, Cuba.

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PETITION FOR EXTRAORDINARY WRIT OF HABEAS CORPUS

Petitioners Riduoane Khalid and Mohammed Khalid respectfully request that this Court entertain their petition for an extraordinary writ of habeas corpus and grant relief finding jurisdiction in United States district courts under 28 U.S.C. § 2241.

I. RELATED OPINIONS BELOW

The opinion of the D. C. Circuit Court of Appeals governing Petitioners' claims is reported as *Al Odah v. United States*, 321 F.3d 1134 (D.C. Cir. 2003). A copy of the opinion is included in the Appendix hereto. P.A.39a.[1] The orders denying the petition for reconsideration by the panel and the petition for rehearing *en banc* are unreported, but are reprinted at P.A.72a. The opinion of the district court is reported at *Rasul v. Bush*, 215 F. Supp. 2d 55 (D.D.C. 2002). P.A.74a.

II. STATEMENT OF THE BASIS FOR JURISDICTION

This Court has jurisdiction over this original petition pursuant to 28 U.S.C. §§ 2241(a) and 2241(c) (3). *See also Felker v. Turpin*, 518 U.S. 651, 658-62 (1996).

III. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves 28 U.S.C. § 2241, which provides in relevant part:

> (a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. . . .
>
> * * * *
>
> (c) The writ of habeas corpus shall not extend to a prisoner unless –
> 1. He is in custody under or by color of the authority of the United States . . .; or

[1] References to the Appendix to the Petition for Extraordinary Writ of Habeas Corpus are denoted P.A.__.

* * * *

> 3. He is in custody in violation of the Constitution or laws or treaties of the United State . . .

This case also involves the Due Process Clause of the Fifth Amendment, U.S. Const. amend. V (P.A.109a); the Suspension Clause, U.S. Const. art. I, §9, cl. 2 (P.A.190a); 5 U.S.C. § 702 (P.A.111a); Geneva Convention III Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 (113a); Geneva Convention IV Relative to the Protection of Civilian Persons in Times of War, Aug. 12, 1949, 6 U.T.S. 3516, 75 U.N.T.S. 287 (P.A.115a); International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), 21 U.N. GAOR. Supp. No. 16, at 52, U.N. Doc. A/6316 (1966) (P.A.112a); and *Enemy Prisoners of War, Retained Personnel, Civilian Internees, and Other Detainees*, U.S. Army Regulation 190-8 (applicable to the Departments of the Army, the Navy, the Air Force, and the Marine Corps) (October 1, 1997) (P.A.116a).

IV. INTRODUCTORY STATEMENT

Petitioners submit this petition to provide an alternative basis for the Court's jurisdiction to hear the important question on which it has already granted certiorari in the companion cases of *Rasul v. Bush,* No. 03-334, and *Al Odah v. United States of America*, No. 03-343, scheduled for argument before this Court on April 20, 2004. The petition is being filed in response to the government's efforts to defeat this Court's jurisdiction in the *Rasul* and *Al Odah* cases and thereby evade judicial scrutiny of the actions it has taken with regard to the detention of foreign nationals at Camp Delta, Guantánamo Bay Naval Base, Guantánamo, Cuba (hereafter "Guantánamo"). Specifically, soon after the Court announced its decision on November 10, 2003, granting the petitions for certiorari submitted in *Rasul* and *Al Odah*, the government announced its intention to release at least 140 persons from detention at Guantánamo. Nancy Gibbs, *Inside The Wire*, TIME MAG., Dec. 8, 2003, at

40. Thereafter, the government announced its planned release of Shafiq Rasul and Asif Iqbal, petitioners in *Rasul*. Kamal Ahmed, et al., *Terror Camp Britons To Be Sent Home: Guantánamo Bay Deal 'By Christmas,'* THE OBSERVER (LONDON), Nov. 30, 2003, at 1. These petitioners were ultimately released from detention on March 9, 2004. U.S. Dep't of Defense, *Transfer of British Detainees Complete*, News Release, Mar. 9, 2004, *available at* http://www.defenselink.mil/releases/2004/nr20040309-0443.html. On July 3, 2003, Respondents designated David Hicks, one of the remaining two Guantánamo detainees named as petitioners in the *Rasul* case, as detained under and subject to a military commission pursuant to the President's Military Order of November 13, 2001 concerning the "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism." 66 Fed. Reg. 57,831. *See* Mike Allen & Glenn Frankel, *Bush Halts Military Proceedings Against 3*, WASH. POST, Jul. 19, 2003, at A15. On March 22, 2004, Respondents announced that they are likely to charge David Hicks and Mamdouh Habib, the remaining two Guantánamo detainees named as petitioners in the *Rasul* case. Mike Seccombe and Brigid Delaney, *Hicks, Habib still a threat, says US*, The Sydney Morning Herald, Mar. 22, 2004, *available at* http://www.smh.com.au/articles/2004/03/21/1079823240102.html.

The present petition raises precisely the same legal issue as that briefed in *Rasul* and *Al Odah*: Whether United States courts lack jurisdiction to consider challenges to the legality of the detention of foreign nationals captured abroad in connection with hostilities and incarcerated at the Guantánamo Naval Base, Cuba. The factual circumstances of the Petitioners' detentions at Guantánamo and all other factual allegations in the present petition are indistinguishable from the facts before the Court on the pleadings in *Rasul* and *Al Odah*; the legal claims and grounds for them are identical in those cases and this one; exactly the same jurisdictional and substantive issues, on exactly the same record, are

decisive in *Rasul*, *Al Odah*, and the present case. The briefs filed in this Court in *Rasul* and *Al Odah* speak with identical relevance to the present case; and the oral argument scheduled in those cases could proceed in this one with no difference save for the name used to call the case. The government's similar treatment of all of the approximately 610 detainees currently held at Guantánamo makes appropriate this Court's exercise of its jurisdiction under 28 U.S.C. § 2241 and Supreme Court Rule 20.4.

In compliance with Supreme Court Rule 20.4(a), Petitioners state that they are concomitantly filing a Petition for Writ of Habeas Corpus in the District Court for the District of Columbia on behalf of three Guantanamo detainees, including the Petitioner in this action.[2]

In all, three habeas petitions are being filed by Petitioners detained at Guantánamo: i) a petition for a writ of habeas corpus in the district court (subject to dismissal by that court in light of the decision rendered in *Al Odah v. United States of America*, 321 F.3d 1134 (D.C. Cir. 2003)); ii) this petition for extraordinary writ of habeas corpus filed in this Court pursuant to Supreme Court Rule 20, seeking relief on behalf of Ridouane Khalid, one of the petitioners also named in the district court petition; and iii) a second petition for extraordinary writ of habeas corpus filed in this Court pursuant to Supreme Court Rule 20 seeking relief for four other individuals detained at Guantánamo. These petitions are being filed simultaneously so as to provide the Court with a choice of vehicles through which it may exercise its Article III and statutory jurisdiction in order for the Court to avoid being disabled from deciding the issue it accepted for review and consideration in *Rasul* and *Al Odah*.

[2] A copy of the petition for a writ of habeas corpus filed in the United States District Court for the District of Columbia in *Sassi v. Bush*, 04-CV-___, is included in the Appendix at P.A.2a.

This case presents a question of surpassing importance: Whether there is a role for judicial review – and the prospect of judicial review – to make the Executive Branch aware of its obligation to conform national-security policies to the rule of law.

The United States has created a prison on Guantánamo Bay that operates entirely outside the law. Within the walls of this prison, foreign nationals may be held indefinitely, without charges or evidence of wrongdoing, without access to family, friends or legal counsel, and without opportunity to establish that they are being held unlawfully. The Government claims that no court in the country has jurisdiction to review the cause for their detention, and the lower court in *Al Odah* agreed.

Seized in ostensible connection with the "war on terrorism," the Petitioner in U.S. custody at Guantánamo has never been charged and has no recourse to any legal process. Apart from censored letters from his family, he has been held *incommunicado* for nearly two years. The government has presented no evidence to justify the detention under either military or civilian law, and claims it is under no obligation to do so. It also claims it may hold Petitioner under these conditions indefinitely, and the D.C. Circuit Court of Appeals agreed.

In accepting for consideration the petitions for certiorari filed in *Rasul* and *Al Odah*, this Court properly determined that issues so critical to the vitality of democracy in this country must be decided within the parameters of our constitutional tripartite structure. This petition thus presents the "exceptional circumstances that warrant the exercise of this Court's discretionary powers." S. Ct. Rule 20.4(a). Petitioners therefore respectfully request that the Court accept the petition, reach the issue accepted for adjudication in *Rasul* and *Al Odah*, and find that United States courts have

jurisdiction to consider challenges to the legality of the detention of foreign nationals captured abroad and incarcerated at Guantánamo.

Proceedings in *Rasul v. Bush* and *Al Odah v. United States*

Through their next friends, Petitioners Rasul, Iqbal, and Hicks filed a petition for writ of habeas corpus in the district court for the District of Columbia on February 19, 2002. The Petitioners alleged that prolonged and potentially indefinite detention in Guantánamo violated the Due Process clause of the Fifth Amendment, as well as other provisions of domestic and international law. They requested, *inter alia*, an evidentiary hearing to the extent Respondents contested the facts, a declaratory judgment that the current detention is unlawful, an order permitting them to confer privately with counsel, and an order releasing them from unlawful custody.

On March 18, 2002, the Government moved to dismiss the First Amended Petition on various grounds, including lack of jurisdiction. On May 1, 2002, while the Government's motion was pending, twelve Kuwaiti prisoners on the base, through their next friends, filed *Al Odah v. United States*, No. 02cv00828 (D.D.C.), as a related case. The Government moved to dismiss that suit as well, and the cases were consolidated for the consideration of the motions to dismiss. On June 10, 2002, Petitioner Habib, through his next friend, filed a Petition for Writ of Habeas Corpus in *Habib v. Bush*, No. 02cv01130 (D.D.C.), raising the same violations and seeking the same relief as Petitioners in *Rasul*, except that Habib requested release from unlawful custody "unless respondents commence a legally sufficient process adequate to establish the legality of his continued detention."

On July 30, 2002, the district court dismissed *Rasul* and *Al Odah* for lack of subject matter jurisdiction. P.A.74a. On August 8, 2002, the court dismissed *Habib*. All parties filed timely appeals

to the Court of Appeals for the District of Columbia, which consolidated *Habib* and *Rasul* and heard argument in all cases on December 2, 2002.

The D.C. Circuit affirmed the dismissals on March 11, 2003, holding that Petitioners have no enforceable rights, "under the due process clause or otherwise." P.A.52a. The "consequence" of this conclusion, the Court held, is that "no court in this country has jurisdiction to grant habeas relief, under 28 U.S.C. §2241, to the Guantánamo detainees...". *Id.* The court then denied the timely requests for reconsideration and rehearing *en banc* on June 2, 2003. P.A.72a.

Petitioners filed a timely Petition for Writ of Certiorari on September 2, 2003, and this Court granted certiorari on November 10, 2003. *Rasul v. Bush*, 124 S.Ct. 534 (2003). Petitioners filed their opening briefs on January 14, 2004, and the Government filed its brief on the merits on March 3, 2004. Oral argument is scheduled for April 20, 2004.

ALLEGATIONS AND STATEMENT OF FACTS

As set forth in the habeas petition filed in the district court for the District of Columbia on his behalf and incorporated by reference herein, Petitioner Ridouane Khalid is a French citizen presently incarcerated and held in Respondents' unlawful custody at Camp Delta, United States Naval Base, Guantánamo Bay, Cuba. Pursuant to either the November 13, 2001 Military Order or the President's authority as Commander in Chief and under the laws and usages of war, Respondents George W. Bush, President of the United States, Donald H. Rumsfeld, Secretary of Defense, Army Brigadier General Jay Hood, Commander of Joint Task Force-GTMO, and Army Colonel Nelson J. Cannon, Commander, Camp Delta, Guantánamo Bay Naval Station, Cuba, are either ultimately responsible for

or have been charged with the responsibility of maintaining the custody and control of Petitioner Ridouane Khalid at Camp Delta, Guantánamo Bay Naval Station, Cuba (hereafter "Guantánamo").

Petitioner Mohammed Khalid is Ridouane's brother and is also a French citizen. Because his brother cannot secure access either to legal counsel or to the courts of the United States, Mohammed Khalid acts as Next Friend. Through counsel, Paul-Albert Iweins and Jacques Debray, Mohammed Khalid has tried repeatedly to contact his brother to learn more about his condition and status and to gain access to him. The United States has either rebuffed or ignored counsel's requests. On August 25, 2003, in the first response to numerous inquiries, Petitioners' counsel finally received a letter signed by Mr. Alejandro Wolff, in the absence of U.S. Ambassador to France Howard Leach, stating that all persons detained at Guantánamo are "enemy combatants" who are "being held in accordance with the laws and customs of war, which permit the United States to hold enemy combatants at least for the duration of hostilities." The letter also states that the United States will not comment on the specific circumstances surrounding the capture or transfer of any person detained at Guantánamo. In regard to counsel's request to visit the French detainees, the letter states that "[c]onsular, family and attorney visits are not permitted," and that as an enemy combatant, Ridouane would "have no right of access to counsel or the courts to challenge [his] detention." *See* District Court Habeas Petition. P.A.6a.

Petitioner Ridouane Khalid is not, nor has he ever been, an enemy alien, a combatant or an unlawful combatant. In August 2001, Ridouane travelled to Pakistan for an intensive course in the Arabic language. Because it is possible to learn Arabic in an intensive program over several months in Pakistan, Ridouane intended that his stay in Pakistan would be a brief one. Ridouane went to

language school when he arrived in Pakistan. He was arrested and detained there, but his family does not know by whom or why. At some point after his arrest, Ridouane came into the custody of agents of the United States government. Ridouane's parents first heard of his arrest in late 2001, when two French government officials called to advise them of the fact that their son was being held by the United States military. In early 2002, Ridouane's family learned that the United States military was holding him at Guantánamo. Ridouane has been held in United States custody at Guantánamo since that time. *See* Exhibit C, Affidavit of Mohammed Khalid, attached to the District Court petition. P.A.26a.

The Joint Resolution

In the wake of September 11, 2001, the United States, at the direction of Respondent Bush, began a massive military campaign against the Taliban government, then in power in Afghanistan. On September 18, 2001, a Joint Resolution of Congress authorized the President to use force against the "nations, organizations, or persons" that "planned, authorized, committed, or aided the terrorist attacks on September 11, 2001, or [that] harbored such organizations or persons." Authorization for Use of Military Force, Joint Resolution, Public Law 107-40, 115 Stat. 224 (2001). The Resolution did not authorize the indefinite detention of persons who were not engaged in hostilities against the United States.

Petitioner Ridouane Khalid is not, and has never been, a member of Al Qaeda or any other terrorist group. Prior to his detention, he did not commit any violent act against any American person or espouse any violent act against any American person or property. Nor was he involved in the ensuing armed conflict. He had no involvement, direct or indirect, in either the terrorist attacks on the

United States on September 11, 2001, or any act of international terrorism attributed by the United States to Al Qaeda or any terrorist group.

Petitioner Ridouane Khalid is not, nor has he ever been, an enemy alien, lawful or unlawful belligerent, or combatant of any kind. He has had no military or terrorist training. He at no time voluntarily joined any terrorist force. He was not initially taken into custody by American forces, but was taken into custody against his will and handed over to the Americans. There is no evidence that he engaged in combat against American forces.

The detained Petitioner Ridouane Khalid promptly identified himself by his correct name and nationality to the United States. He requested that the United States provide him with access to his family and to legal counsel. Mr. Khalid was kept blindfolded against his will for lengthy periods while being taken involuntarily to Guantánamo. In the course of being taken to Guantánamo, Mr. Khalid believes he was transported via other American territory.

The Detention Order

On November 13, 2001, Respondent Bush issued a Military Order authorizing indefinite detention without due process of law. The Order authorizes Respondent Rumsfeld to detain anyone Respondent Bush has "reason to believe":

i. is or was a member of the organization known as al Qaeda;

ii. has engaged in, aided or abetted, or conspired to commit, acts of international terrorism, or acts in preparation therefor, that have caused, threaten to cause, or have as their aim to cause, injury to or adverse effects on the United States, its citizens, national security, foreign policy, or economy; or

iii. has knowingly harbored one or more individuals described in subparagraphs (i) and (ii).

See Military Order of November 13, 2001. The President must make this determination in writing. The Order was neither authorized nor directed by Congress, and is beyond the scope of the Joint Resolution of September 18, 2001.

The Military Order vests the President with complete discretion to identify the individuals that fall within its scope. It establishes no standards governing the use of his discretion. Once a person has been detained, the Order contains no provision for the person to be notified of the charges he may face. On the contrary, the Order authorizes detainees to be held without charges. It contains no provision for detainees to be notified of their rights under domestic and international law, and provides neither the right to counsel, nor the right to consular access. It provides no right to appear before a neutral tribunal to review the legality of a detainee's continued detention and no provision for appeal to an Article III court. In fact, the Order expressly bars review by any court. The Order authorizes indefinite and unreviewable detention, based on nothing more than the President's written determination that an individual is subject to its terms.

The Military Order was promulgated in the United States and in the District of Columbia, the decision to detain Petitioner Ridouane Khalid was made by Respondents in the United States and in the District of Columbia, the decision to detain Petitioner at Guantánamo was made in the United States and in the District of Columbia, and the decision to continue detaining Petitioner was, and is, being made by Respondents in the United States and in the District of Columbia.

Respondent Bush has never certified or determined in any manner, in writing or otherwise, that Petitioner Ridouane Khalid is subject to this detention order. The detained Petitioner is not properly subject to this detention order.

In the related case of *Rasul v. Bush*, 215 F. Supp. 2d 55 (D.D.C. 2002), respondents contended that the petitioners are being detained not pursuant to the President's Military Order but rather under the President's authority as Commander in Chief and under the laws and usages of war. However, Petitioner Ridouane Khalid in this matter was not arrested or detained by the United States in the course of the armed conflict. Rather, Petitioner was detained by Pakistani authorities and was arrested by them not in Afghanistan, but Pakistan, nowhere near the battlefield. Accordingly, Petitioner Ridouane Khalid is not properly detained under the President's authority as Commander in Chief and under the laws and usages of war.

The Conditions of Detention at Guantánamo

From the dates when the United States military transferred the detained Petitioners to Guantánamo, where they have been held ever since, Petitioners have been in the custody of Respondents Bush, Rumsfeld, Hood, and Cannon. Since gaining control of Petitioner Ridouane Khalid, the United States military has held him virtually *incommunicado*. He has been or will be interrogated repeatedly by agents various United States departments and agencies, though he has not been charged with an offense, nor has he been notified of any pending or contemplated charges. He has made no appearance before either a military or civilian tribunal of any sort, nor has he been provided counsel or the means to contact counsel. Petitioner Khalid has not been informed of his rights under the United States Constitution, the regulations of the United States Military, the Geneva

Convention, the International Covenant on Civil and Political Rights, the American Declaration on the Rights and Duties of Man, or customary international law. Indeed, Respondents have taken the position that he, like all others detained in Guantánamo, should not be told of these rights. As a result, Mr. Khalid is completely unable either to protect, or to vindicate his rights under domestic and international law.

The detained Petitioners have been forced to provide involuntary statements to Respondents' agents at Guantánamo. Mr. Khalid has been held under conditions that violate his international and constitutional rights to dignity and freedom from cruel, unusual and degrading treatment or punishment. He has been housed throughout his detention in accommodation that fails to satisfy both domestic and internationally accepted standards of accommodation for any person subject to detention. He was initially forced to use a bucket for a toilet, and was not provided with basic hygienic facilities. He has been refused meaningful access to his family. He has not been provided with the opportunity fully to exercise his religious beliefs. He has been exposed to the indignity and humiliation of the cameras of the national and international press, brought to Guantánamo with the express consent and control of Respondents.

In compliance with 28 U.S.C. § 2242(2) and Supreme Court Rule 20.4(a), Petitioner states that he is simultaneously filing a substantively identical petition for a writ of habeas corpus in the District Court for the District of Columbia, and is filing the present original petition for a writ of habeas corpus in this Court to enable the Court to hear and decide the matter on the schedule already set for the *Rasul* and *Al Odah* cases, a matter of urgent necessity.

Here, as in *Rasul*, Petitioners allege that Respondents, acting under color of law, have violated and continue to violate the Fifth Amendment to the United States Constitution by ordering the prolonged, indefinite, and arbitrary detention of individuals without Due Process of Law. Petitioners allege that the Executive Order violates the Fifth Amendment both on its face and as applied to Petitioner Ridouane Khalid.

Petitioners also allege that Respondents, acting under color of law, have violated and continue to violate customary international law, specifically Arts. 9 and 14 of the International Covenant on Civil and Political Rights, and Arts. XXVIII, XXV, and XXVI of the American Declaration on the Rights and Duties of Man, American Declaration of the Rights and Duties of Man, art. XXV, O.A.S.T.S. XXX, adopted by the Ninth International Conference of American States (1948), *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L/V/II82 Doc. 6 rev. 1 at 17 (1992). Respondent Bush has ordered the prolonged, indefinite, and arbitrary detention of Petitioners, without legal process, in violation of binding obligations of the United States under international law. Respondents Rumsfeld, Hood, and Cannon are likewise acting in violation of international law, because they act at the President's direction. Petitioners allege that the Executive Military Order violates international law both on its face and as applied to Ridouane Khalid.

Petitioners allege that Respondents, acting under color of law, have violated and continue to violate the rights accorded to persons seized by the United States Military in times of armed conflict, as established by, *inter alia*, Army Regulation 190-8, Articles 4 and 5 of Geneva Convention III, Geneva Convention IV, and customary international law.

Petitioners further allege that, by the conduct described above, Respondents, acting under color of law, have exceeded the constitutional authority of the Executive Branch and have violated and continue to violate the War Powers Clause by ordering the prolonged and indefinite detention of the Petitioner without Congressional authorization.

Finally, Petitioners allege that to the extent the Military Order of November 13, 2001, disallows any challenge to the legality of Petitioner's detention by way of habeas corpus, the Order and its enforcement constitute an unlawful Suspension of the Writ, in violation of Article I of the United States Constitution.