Supreme Court, U.S.
FILED
APR 26 2004
OFFICE OF THE CLERK

No. 03-9970

In the
United States Supreme Court

JAMIL EL-BANNA; SABAH SUNNRQROUT, As Next Friend Of JAMIL EL-BANNA; BISHER AL-RAWI; JAHIDA SAYYADI, As Next Friend Of BISHER AL-RAWI; MOURAD BENCHELLALI; AMEL BENCHELLALI As Next Friend Of MOURAD BENCHELLALI; MURAT KURNAZ; RABIYE KURNAZ, As Next Friend Of MURAT KURNAZ,
Petitioners,

v.

GEORGE WALKER BUSH, President of the United States; DONALD RUMSFELD, Secretary, United States Department of Defence; 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

JOSEPH MARGULIES*
COUNSEL OF RECORD
MARGULIES & RICHMAN, PLC
2520 Park Avenue, South
Minneapolis, MN 55404
(612) 872-4900

MICHAEL RATNER
BARBARA J. OLSHANSKY
STEVEN WATT
CENTER FOR CONSTITUTIONAL RIGHTS
666 Broadway
New York, NY 10012
(212) 614-6430

MACARTHUR JUSTICE CENTER
UNIVERSITY OF CHICAGO LAW SCHOOL
1111 East 60th Street
Chicago, IL 60637
(773) 702-9560

JOHN J. GIBBONS
GITANJALI S. GUTIERREZ
GIBBONS, DEL DEO, DOLAN,
GRIFFINGER & VECCHIONE, P.C
One Riverfront Plaza
Newark, NJ 07102
(973) 596-4700

*Member, Supreme Court Bar

Attorneys for Petitioners

10/

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.

PETITION FOR EXTRAORDINARY WRIT OF HABEAS CORPUS

Petitioners Mourad Benchellali; Murat Kurnaz; Jamil El-Banna; Bisher Al-Rawi; Amel Benchellali, sister of Mourad Benchellali; Rabiye Kurnaz, mother of Murat Kurnaz; Jahida Sayyadi, mother of Bisher Al-Rawi; and Sabah Sunnrqrout, wife of Jamil El-Banna, respectfully request that this Court entertain their original petition for a 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 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.93a.[1] The orders denying petitions for reconsideration by the panel and rehearing *en banc* are unreported, but are reprinted at P.A.126a. The opinion of the district court is reported at *Rasul v. Bush*, 215 F. Supp. 2d 55 (D.D.C. 2002). P.A.128a.

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. . . .

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

* * * *

(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

* * * *

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

This case also involves the Due Process Clause of the Fifth Amendment, U.S. Const. amend. V (P.A.163a); the Suspension Clause, U.S. Const. art. I, §9, cl. 2 (P.A.163a); 5 U.S.C. §702 (P.A.165a); 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 (P.A167a); 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.169a); 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. 166a); 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. 170a).

INTRODUCTION

Petitioners submit this petition to provide an alternative basis for the Court's jurisdiction to hear the important questions 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 & 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 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 have not filed this application in the District Court for the District of Columbia. 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) a petition for extraordinary writ of habeas corpus filed in this Court pursuant to Supreme Court Rule 20, seeking relief for one of the petitioners named in the district court petition (Ridouane Khalid); 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 (the present petition). 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.*

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," Petitioners in U.S. custody at Guantánamo have never been charged and have no recourse to any legal process. Apart from censored letters from their families, they have been held *incommunicado* for nearly two years. The government has presented no evidence to justify the detentions under either military or civilian law, and claims it is under no obligation to do so. It also claims it may hold Petitioners 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 detained at Guantánamo, 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.160a. On August 8, 2002, the court dismissed *Habib*. All parties filed timely appeals to the District of Columbia Circuit, 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.106a. 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.126a.

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

Petitioners Mourad Benchellali, Murat Kurnaz, Bisher Al-Rawi, and Jamil El-Banna (the "detained Petitioners"), incarcerated at Camp Delta, Guantánamo, seek the Great Writ. 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, U.S. 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 the detained Petitioners at Guantánamo.

Petitioner Mourad Benchellali is a French citizen in Respondents' unlawful custody. In July 2001, Mourad travelled to Pakistan to undertake an intensive religious training course. Toward the end of January 2002, Petitioner's parents were contacted by the International Committee of the Red Cross ("ICRC") and told that Mourad was in the custody of the United States military at Guantánamo. In April 2002, Mourad's father was invited to a meeting at the French Ministry of Foreign Affairs. At this meeting, he learned that Mourad had been arrested by the Pakistani police in Pakistan and turned over to the custody of the U.S. Military. *See* Affidavit of Amel Benchellali. P.A.1a. On an unknown date in 2002, and for reasons unknown, the United States transferred Mourad to its detention facility at Guantánamo. Mr. Benchellali has been held in United States custody at Guantánamo since that time. *See* Affidavit of Jacques Debray, French Counsel for Petitioners Mourad Benchellali and Amel Benchellali and attachments thereto. P.A.6a.

Petitioner Amel Benchellali is Mourad's sister and is also a French citizen. Amel Benchellali has received letters from her brother, delivered through the ICRC, expressing concern

over his detention. Because her brother cannot secure access either to legal counsel or to the courts of the United States, Amel Benchellali acts as Next Friend. Through counsel, Jacques Debray, Amel Benchellali has tried repeatedly to contact her 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, Mourad would "have no right of access to counsel or the courts to challenge [his] detention." *See* Affidavit of Jacques Debray, French Counsel for Petitioners Mourad Benchellali and Amel Benchellali and attachments thereto. P.A.8a.

At the time of his detention, Mourad Benchellali was not a member of either the Taliban government armed forces or Al Qaeda. He did not cause or attempt to cause any harm to American personnel or property prior to his capture. Mr. Benchellali was not in Afghanistan at the time of his detention, but was taken into custody in Pakistan, turned over to the custody of the U.S. Military, and transported to Guantánamo. *See* Affidavit of Amel Benchellali. P.A.1a.

Petitioner Murat Kurnaz is a Turkish citizen in Respondents' unlawful custody. On October 3, 2001, Murat departed Bremen, Germany, where he has lived for his entire life, for Karachi, Pakistan in order to learn more about his Muslim faith. Murat did not intend to stay long in Pakistan; his plan was to spend several weeks there and then return home to Bremen. In early 2002, Murat's family learned that Murat was in the custody of the U.S. Military at Guantánamo. Murat's family believes that he has been held in United States custody at Guantánamo since January 2002. *See* Affidavit of Rabiye Kurnaz. P.A.58a.

Petitioner Rabiye Kurnaz is Murat's mother. She too is a Turkish citizen. Rabiye Kurnaz has received several letters from her son, delivered through the ICRC, expressing concern over his detention. Because her son cannot secure access either to legal counsel or to the courts of the United States, Rabiye Kurnaz acts as his Next Friend. *See* Affidavit of Rabiye Kurnaz. P.A.58a.

On her own and through German Counsel, Bernhard Docke, Rabiye Kurnaz has tried repeatedly to contact her son, to learn more about his condition and status and to gain access to him. The United States has either rebuffed or ignored these requests. *See* Affidavit of Rabiye Kurnaz. P.A.58a; Affidavit of Bernhard Docke, German Counsel for Petitioners Murat Kurnaz and Rabiye Kurnaz. P.A.62a. The United States has provided no information either to Ms. Kurnaz or to German Counsel regarding the date and circumstances of Murat Kurnaz's arrest or the specific reasons for his continued detention at Guantánamo. *See* Affidavit of Bernhard Docke, German Counsel for Petitioners Murat Kurnaz and Rabiye Kurnaz. P.A. 62a.

At the time of his detention, Murat Kurnaz was not a member of either the Taliban government armed forces or Al Qaeda. He did not cause or attempt to cause any harm to

American personnel or property prior to his capture. Mr. Kurnaz was not in Afghanistan at the time of his detention, but was taken into custody in Pakistan, turned over to the custody of the U.S. Military, and transported to Guantánamo. *See* Affidavit of Rabiye Kurnaz. P.A.58a.

Petitioner Bisher Al-Rawi is an Iraqi citizen and a permanent resident of the United Kingdom in Respondents' unlawful custody. In November 2002, Bisher departed the U.K. for Gambia in order to meet his brother and commence work on a joint business project involving the establishment of a peanut oil processing plant there. *See* Affidavit of Jahida Sayyadi. P.A.64a. The project had received approval from the Gambia government and had been registered with the Gambian authorities. With him on the trip were two travelling companions. Both individuals were colleagues involved in the same business project. Upon his arrival at the Banjul Airport in Gambia, the three travellers and Mr. Al-Rawi's brother, Wahab, who was present to meet them, were all detained by the Gambian authorities. After being detained for nearly a month, two of the four were released but Bisher Al-Rawi and one of his associates, Jamil El-Banna, remained in Gambian detention. *See* Affidavit of Gareth Peirce, British Counsel for Petitioners Bisher Al-Rawi and Jahida Sayyadi. P.A.67a.

In early 2003, British Counsel for Bisher Al-Rawi was advised that Mr. Al-Rawi and Jamil El-Banna had been secretly transferred from Gambia to the U.S. Air Force Base in Bagram, Afghanistan. *See* Affidavit of Gareth Pierce, British Counsel for Petitioners Bisher Al-Rawi and Jahida Sayyadi. P.A.69a-70a. Their transfer took place while a habeas petition filed on their behalf was pending in the courts in the U.K. Thereafter, some time in 2003, Mr. Al-Rawi's family

was made aware that Mr. Al-Rawi had been transferred to Guantánamo along with Mr. El-Banna. *See id.* P.A.72a. Mr. Al-Rawi has been held in U.S. custody at Guantánamo since that time.

Petitioner Jahida Sayyadi is Bisher's mother. She is a British citizen. Because her son cannot secure access either to legal counsel or to the courts of the United States, Jahida Sayyadi acts as his Next Friend. *See* Affidavit of Jahida Sayyadi. P.A.64a. On her own and through counsel, Gareth Peirce, Jahida Sayyadi has tried repeatedly to contact her son, to learn more about his condition and status and to gain access to him. The British Authorities either rebuffed or ignored Ms. Sayyadi's and counsel's requests. *See id.* P.A.66a. The United States has provided no information either to Ms. Sayyadi or to British Counsel regarding the date and circumstances of Bisher Al-Rawi's arrest or the specific reasons for his continued detention at Guantánamo. *See* Affidavit of Gareth Peirce, British Counsel for Bisher Al-Rawi and Jahida Sayyadi. P.A.72a.

At the time of his detention, Mr. Al-Rawi was not a member of either the Taliban government armed forces or Al Qaeda. He did not cause or attempt to cause any harm to American personnel or property prior to his capture. Mr. Al-Rawi was not in Afghanistan at the time of his detention, but was taken into custody in Gambia, turned over to the custody of the U.S. Military, and transported to Guantánamo.

Petitioner Jamil El-Banna is Palestinian and is a permanent resident of the United Kingdom in Respondents' unlawful custody. On November 8, 2002, Jamil departed the U.K. for Gambia in order to meet several business associates with whom he had joined in a business project involving the establishment of a peanut oil processing factory there. With him on the trip were Petitioner Bisher Al-Rawi and Abdullah El Janoudi, both colleagues involved in the same business project.

Upon his arrival in Gambia, Mr. El-Banna and his three business associates (including Wahab Al-Rawi, who was present to meet them) were all detained by the Gambian authorities. *See* Affidavit of Sabah Sunnrqrout, P.A.80a; Affidavit of Gareth Peirce, British Counsel for Jamil El-Banna and Sabah Sunnrqrout. P.A.84a. After being detained for nearly a month, Wahab Al-Rawi and another business associate, both British citizens, were released; Jamil El-Banna, however, remained in detention in Gambia along with one of his business associates, Bisher Al-Rawi. *See* Affidavit of Gareth Peirce, British Counsel for Jamil El-Banna and Sabah Sunnrqrout. P.A.85a.

In early 2003, British Counsel for Jamil El-Banna was advised that both Mr. Al-Rawi and Jamil El-Banna had been secretly transferred from Gambia to the U.S. Air Force Base in Bagram, Afghanistan. *See* Affidavit of Gareth Peirce, British Counsel for Petitioners Jamil El-Banna and Sabah Sunnrqrout. P.A.89a. Thereafter, some time in 2003, Mr. El-Banna's family was made aware that he had been transferred to Guantánamo. *See id.* P.A.89a. Mr. El-Banna has been held in U.S. custody at Guantánamo since that time. *See* Affidavit of Gareth Peirce, British Counsel for Jamil El-Banna and Sabah Sunnrqrout. *Id.* P.A.89a.

Petitioner Sabah Sunnrqrout is Jamil's wife. Because her husband cannot secure access either to legal counsel or to the courts of the United States, Sabah Sunnrqrout acts as his Next Friend. *See* Affidavit of Sabah Sunnrqrout. P.A.80a. Through British Counsel, Gareth Peirce, Sabah Sunnrqrout has tried repeatedly to contact her husband, to learn more about his condition and status and to gain access to him. Both the U.S. and the British Authorities either rebuffed or ignored counsel's requests. *See* Affidavit of Gareth Peirce, British Counsel for Jamil El-Banna and Sabah Sunnrqrout. P.A.84a. The United States has provided no information either to Ms.

Sunnrqrout or to British Counsel regarding the date and circumstances of Mr. El-Banna's arrest or the specific reasons for his continued detention at Guantánamo. *See* Affidavit of Sabah Sunnrqrout. P.A.80a.

At the time of his detention, Mr. El-Banna was not a member of either the Taliban government armed forces or Al Qaeda. He did not cause or attempt to cause any harm to American personnel or property prior to his capture. Mr. El-Banna was not in Afghanistan at the time of his detention, but was taken into custody in Gambia, turned over to the custody of the U.S. Military, and transported to Guantánamo.

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 seized on the field of battle.

The detained Petitioners are not, and have never been, members of Al Qaeda or any other terrorist group. Prior to their detention, they did not commit any violent act against any American person or property, or espouse any violent act against any American person or property. Nor were

they involved in the ensuing armed conflict. They 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.

The detained Petitioners are not, nor have they ever been, enemy aliens, lawful or unlawful belligerents, or combatants of any kind. They have had no military or terrorist training. They at no time voluntarily joined any terrorist force. The detained Petitioners were not initially taken into custody by American forces. They were taken into custody against their will and handed over to the Americans. There is no evidence that they had engaged in combat against American forces.

The detained Petitioners promptly identified themselves by their correct names and nationality to the United States. They requested that the United States provide them with access to their families and to legal counsel. The detained Petitioners were kept blindfolded against their will for lengthy periods while being taken involuntarily to Guantánamo. In the course of being taken to Guantánamo, the detained Petitioners believe they were 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. President Bush 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 Petitioners was made by Respondents in the United States and in the District of Columbia, the decision to detain Petitioners at Guantánamo was made in the United States and

in the District of Columbia, and the decision to continue detaining the Petitioners 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 the detained Petitioners are subject to this detention order. The detained Petitioners are 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 in that case 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, Petitioners in this matter were not arrested or detained by the United States in the course of the armed conflict. Petitioners were detained either by Pakistani or Gambian authorities and were arrested by them not in Afghanistan, but in Pakistan or Gambia, nowhere near the battlefield. Accordingly, Petitioners are 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 the detained Petitioners, the United States military has held them virtually *incommunicado*. They have been or will be interrogated repeatedly by agents of various United States departments and agencies, though they have not been charged with an offense, nor have they been notified of any pending or

contemplated charges. They have made no appearance before either a military or civilian tribunal of any sort, nor have they been provided counsel or the means to contact counsel. They have not been informed of their 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 they should not be told of these rights. As a result, the detained Petitioners are completely unable either to protect, or to vindicate their rights under domestic and international law.

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

In compliance with 28 U.S.C. § 2242(2) and Supreme Court Rule 20.4(a), Petitioners state that they are not filing a petition for a writ of habeas corpus in the district court, but are filing the

present petition for extraordinary writ of habeas corpus in this Court because there is insufficient time to proceed through the lower courts in the normal course in a way that would enable this 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 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 the detained Petitioners.

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. XVIII, XXV, and XXVI of the American Declaration on the Rights and Duties of Man, 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, since they act at the President's direction. Petitioners allege that the Executive Order violates international law both on its face and as applied to the detained Petitioners.

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 actions described above, Respondents, acting under color of law, have exceeded the constitutional authority of the Executive 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.