

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE:

PETITIONERS SEEKING
HABEAS CORPUS RELIEF
IN RELATION TO PRIOR
DETENTIONS AT
GUANTANAMO BAY

Misc. No. 08-0444 (TFH)

Civil Action Nos.

02-cv-1130, 04-cv-1135, 04-cv-1144, *04-cv-1194*,*
04-cv-1227, *04-cv-1254*,* *05-cv-0023*, 05-cv-0345,
05-cv-0490, *05-cv-0520*, 05-cv-0584, 05-cv-0586,
05-cv-0621, 05-cv-0640, 05-cv-0665,* 05-cv-0714,
05-cv-0723, *05-cv-0764*, 05-cv-0878, *05-cv-0883*,
05-cv-0887, 05-cv-0888,** *05-cv-0891*, 05-cv-0998,**
05-cv-1001, 05-cv-1008, 05-cv-1009, *05-cv-1124*,
05-cv-1237, 05-cv-1242, 05-cv-1243, 05-cv-1246,
05-cv-1311, 05-cv-1493, *05-cv-1505*, *05-cv-1509*,
05-cv-1635, 05-cv-1667, 05-cv-1668, 05-cv-1714,
05-cv-1779, 05-cv-1806, 05-cv-1864, 05-cv-1894,*
05-cv-2029, *05-cv-2104*, 05-cv-2197, 05-cv-2216,
05-cv-2336, *05-cv-2367*, 05-cv-2369, *05-cv-2384*,
05-cv-2385, *05-cv-2386*, 05-cv-2452, 05-cv-2458,
05-cv-2466, *05-cv-2479*, 06-cv-1675, 06-cv-1677,
06-cv-1678, 06-cv-1679, 06-cv-1681, 06-cv-1683,
06-cv-1685, 06-cv-1687, 06-cv-1763, 06-cv-1768,
06-cv-1769, *08-cv-1185*, *08-cv-1223*, *08-cv-1229*,
08-cv-1231, *08-cv-1628*

**PETITIONERS' CONSOLIDATED BRIEF REGARDING JURISDICTION OVER
HABEAS PETITIONS OF PETITIONERS TRANSFERRED FROM
GUANTANAMO BAY**

* Al Abdullah al Tays (ISN 062), the only transferred Petitioner in Case No. 04-cv-1194, has voluntarily dismissed his claims. *See* Dkt. 174 (filed Jan. 23, 2007). Sadeq Mohammed Said (ISN 069), the only transferred Petitioner in Case No. 04-cv-1254, filed a consent Motion to Dismiss his claims which has been granted. *See* Dkt. 247 (filed Jul. 10, 2008). The cases *Ahmed v. Bush*, No. 05-cv-665 and *Hamoud v. Bush*, No. 05-cv-1894, were dismissed without objection on October 10, 2008. *See* Dkt. 39 (05-cv-665), Dkt. 49 (05-cv-1894). Counsel for Petitioner Abdullah Alhamiri, No. 08-cv-1231 has stipulated dismissal of his petition. *See* Dkt. 36 (filed January 23, 2009).

** Case Nos. 05-cv-888 and 05-cv-998 were added to Misc. No. 08-mc-444 by Minute Orders of the Court on February 4, 2009 and January 22, 2009, respectively, and are added to the caption and joined on this brief by request of Petitioners' counsel. Claims of transferred Petitioners in the case numbers listed in italics were part of 08-mc-442 at the time of the Court's Order of Jan. 12, 2009 (Dkt. 1504 in 08-mc-442) but were moved to 08-mc-444 by the Court's Order of Jan. 22, 2009 (Dkt. 80 in 08-mc-444).

The Court ordered Petitioners in these coordinated cases to “file one consolidated brief addressing the issue of whether the Court’s constitutionally-based jurisdiction over a habeas corpus petition filed by a foreign national detained at Guantanamo Bay, as recognized in *Boumediene v. Bush*, 128 S. Ct. 2229 (2008), is eliminated by the petitioner’s transfer or release from Guantanamo Bay.” Order, Dkt. 1504, No. 08-mc-442 (Jan. 12, 2009).

The brief that follows sets forth the general legal standards governing the determination whether the Court continues to have jurisdiction over habeas petitions of transferred detainees. This consolidated brief does not attempt to set out the facts peculiar to each case that support continued jurisdiction. An actual determination whether jurisdiction persists in any given case can only be made by the Merits Judges.¹

ARGUMENT

Within the terms of the habeas corpus statute,² habeas jurisdiction unquestionably attaches where, at the time of filing, the petitioner is in custody. *See* 28 U.S.C. § 2241(c); *Zalawadia v. Ashcroft*, 371 F.3d 292, 297 (5th Cir. 2004) (“The Supreme Court has made it clear that the ‘in custody’ determination is made at the time the *habeas* petition is filed.” (citing *Spencer v. Kemna*, 523 U.S. 1, 7 (1998))). The statutory term “custody” has been construed to

¹ For this reason, all Petitioners in these cases object to the Court’s Order limiting them to a single consolidated brief. Moreover, some cases consolidated in the Court’s January 12 Order do not lend themselves to a generalized response. For example, Salah Ali Abdullah Ahmed Al Salami (ISN 693), the petitioner in Case No. 05-cv-2452, died in United States custody. Counsel for Petitioner Al Salami has separately briefed the issue of mootness before Judge Friedman. *See* Dkt. 61 (filed July 25, 2008).

² As Petitioners have consistently asserted before this Court, “the habeas corpus statute sets out the basic framework for adjudicating all challenges to federal executive detention brought under § 2241(c).” *See* Petitioners’ Joint Memorandum of Law Addressing Procedural Framework Issues, Dkt. 206 (filed July 25, 2008) at 5-6; *Hamdi v. Rumsfeld*, 542 U.S. 507, 525 (2004) (plurality opinion) (“[A]ll agree that § 2241 and its companion provisions provide at least a skeletal outline of the procedures to be afforded a petitioner in federal habeas review.”).

include not only actual, physical incarceration but also other restraints on liberty, including various forms of supervised release and other forms of supervision including community service requirements. *See Hensley v. Mun. Ct.*, 411 U.S. 345, 349 (1973) (pre-trial release); *Barry v. Bergen County Prob. Dep't*, 128 F.3d 152, 159 (3d Cir. 1997) (community service).

Where the statutory preconditions for habeas jurisdiction are met at the time of filing, the court's power to grant relief does not vanish simply because the petitioner is released from physical custody. *Carafas v. LaVallee*, 391 U.S. 234, 238-39 (1968) (noting that 28 U.S.C. § 2243 “contemplate[s] the possibility of relief other than immediate release from physical custody” and holding that “once the federal jurisdiction has attached in the District Court, it is not defeated by the release of the petitioner prior to completion of proceedings on such application”). The mootness inquiry that courts have undertaken in these circumstances has allowed cases to continue where petitioners have suffered either continuing restraints that satisfy the custody requirement, or where petitioners suffer or are at risk of suffering collateral consequences as a result of their unlawful detention. *See Sibron v. New York*, 392 U.S. 40, 55 (1968) (actual collateral consequences need not be proven where the mere possibility that such consequences may exist is sufficient to preserve a live controversy); *DePompei v. Ohio Adult Parole Auth.*, 999 F.2d 138, 140 (6th Cir. 1993) (“mere possibility that [collateral] consequences could exist is sufficient to preserve a live controversy”); *Gerren v. Arn*, 839 F.2d 300, 302 (6th Cir. 1988) (mere possibility of adverse collateral consequences sufficient to preserves a live controversy).

The range of collateral consequences that historically have been recognized as sufficient to underlie post-custodial habeas jurisdiction is broad, and has extended to purely stigmatizing consequences. Courts have recognized the sufficiency of collateral consequences ranging from:

criminal disabilities as part of the parole process (address registration requirements, periodic reporting requirements, and restrictions on travel), *see Jones v. Cunningham*, 371 U.S. 236, 241-43 (1963); to civil disabilities (disenfranchisement, disqualification from jury service, disqualification as a union official), *see Carafas*, 391 U.S. at 237; to purely stigmatizing status determinations, *see Demjanjuk v. Petrovski*, 10 F.3d 338 (6th Cir. 1993). Petitioners in the present cases suffer from a variety of such consequences as a result of their enemy combatant designations (whether current or previous), the mere fact of their detention at Guantánamo, and the terms of their transfer from Guantánamo.

While any factual disputes regarding these individual Petitioners' fates should be ultimately determined before the Merits Judges, the burden of establishing mootness belongs upon the government, as habeas courts examining the stigmatizing effect of criminal convictions have always held. Even in those individual cases where Petitioners are not in proxy detention and cannot point to conditions imposed by Respondents that restrict their freedom after transfer, the burden of proof rests on the government to disprove the existence of collateral consequences sufficient to sustain jurisdiction. It is well-established that the presence of collateral consequences sufficient to sustain habeas jurisdiction is *presumed* in cases challenging past criminal convictions; the status determinations Petitioners challenge here are the equivalent. All litigants asserting mootness bear a "heavy burden"; in fact, the threshold to establish initial standing is higher than that required to defeat an assertion of mootness. *See Friends of the Earth, Inc. v. Laidlaw Env'tl. Serv. (TOC), Inc.*, 528 U.S. 167, 189-92 (2000). The government must show that there is "no possibility," *Sibron*, 392 U.S. at 57, that any collateral consequences—even those "remote and unlikely to occur," *Spencer*, 523 U.S. at 8—will affect Petitioners. Such

consequences need not occur by operation of law; courts have recognized stigmatic injury as well.

I. Detainees Transferred into Proxy Detention

A number of Petitioners transferred from Guantánamo to the custody of other nations claim that their continued physical detention by those nations is directed by or otherwise at the behest of the United States.³ For example, every Afghan Guantánamo detainee repatriated since June 2007⁴ has upon his arrival been sent into detention at the Afghan National Detention Facility (“ANDF”), otherwise known as Block D, a wing of Pul-i-Charki prison built by the United States government at a cost of approximately \$20 million “for Afghans to hold and

³ Three Petitioners who are in the category of detainees transferred into proxy detention—two who are subject to this Order to file a Consolidated Brief and one who is not—have already briefed the issue of jurisdiction in their individual cases. Mohammed Mosa Yaakoobi, a detainee joined in this Consolidated Brief, who has been transferred into proxy detention in Afghanistan, has already briefed it in his Motion to Reopen pending before Judge Richard W. Roberts in this Court. *See* Motion to Reopen Case, Dkt. 23, *Yakoobi v. Obama*, No. 06-cv-1683 (RWR) (Sept. 26, 2008). Mahbub Rahman, joined in this Consolidated Brief, who has also been transferred into proxy detention in Afghanistan, has briefed the issue of jurisdiction in his Response to Order to Show Cause pending before Judge James Robertson in this Court. *See* Response to Order to Show Cause, Dkt. 42, *Rahman v. Obama*, No. 08-cv-1223 (JR) (Dec. 19, 2008). Petitioner Abdul Wahab is not subject to the Order to file the Consolidated Brief. He has fully briefed the identical jurisdiction issue before Judge Emmet G. Sullivan in this Court. *See* Petitioner Wahab’s Memorandum of Points and Authorities in Opposition to Respondent’s Motion to Set Aside Obligation to File Factual Return, Dkt. 76, *Wahab v. Obama*, No. 05-cv-0886 (EGS) (Oct. 14, 2008). Because of the similarity of the Motions pending before Judges Sullivan, Roberts and Robertson, and in light of the more developed record before Judge Sullivan, Petitioners Yaakoobi and Rahman have moved this Court to reassign their Petitions to Judge Sullivan for a limited purpose. *See* Motion to Reassign Case and Consolidate for Hearing and Decision on Motions Regarding Mootness and/or Jurisdiction of Certain Petitioners Incarcerated in Afghanistan, Dkt. 87 (Feb. 6, 2009). Granting this Motion to Reassign would allow Judge Sullivan to decide the issue of continuing jurisdiction over detainees transferred to proxy detention in the factually developed setting of these individual cases.

⁴ *See* Petitioner Wahab’s Memorandum of Points and Authorities in Opposition to Respondent’s Motion to Set Aside Obligation to File Factual Return, Dkt. 76, *Wahab v. Obama*, No. 05-cv-0886 (EGS) (Oct. 14, 2008).

prosecute former Guantánamo and Bagram detainees under Afghan law.”⁵ This Court clearly may exercise habeas jurisdiction over their petitions.

As this Court recognized in *Abu Ali v. Ashcroft*, 350 F. Supp. 2d 28, 49 (D.D.C. 2004), any “analysis of the ‘in custody’ language of the habeas statute must start with the proposition that the Supreme Court has ‘very liberally construed the ‘in custody’ requirement for purposes of federal habeas.” *Maleng v. Cook*, 490 U.S. 488, 492 (1989); *see also Peyton v. Rowe*, 391 U.S. 54, 65 (1968) (holding that the “in custody” requirement of the habeas statute “should be liberally construed” because of the remedial goals of the statute). In *Abu Ali*, the petitioner alleged that he was detained in a foreign prison due to the actions of the United States. The government argued that jurisdiction could only attach if a U.S. official was the “immediate custodian” or, alternately, where the petitioner was in the “actual physical custody of a United States official.” 350 F. Supp. 2d at 42, 46.

The Court rejected this view, finding it “as striking as it is sweeping. The full contours of the [government’s] position would permit the United States, at its discretion and without judicial review, to arrest a citizen of the United States and transfer her to the custody of allies overseas in order to avoid constitutional scrutiny” *Id.* at 40. The Court found that the government’s “immediate custodian” arguments were foreclosed by *Rumsfeld v. Padilla*, 542 U.S. 426 (2004), and *Rasul v. Bush*, 542 U.S. 466 (2004), *see Abu Ali*, 350 F. Supp. 2d at 42-45, and found the “actual physical custody” argument foreclosed by the terms of the statute itself, *id.* at 46-47,⁶ and the tradition of broad judicial interpretation of the habeas statute:

⁵ Human Rights First, *Arbitrary Justice: Trials of Bagram and Guantánamo Detainees in Afghanistan* ii (2008); Kebriaei Declaration, Dkt. 25-1, *Yakoobi v. Obama*, No. 06-cv-1683 (Sept. 25, 2008).

⁶ “Section 2241(c)(1) expressly expands the compass of habeas jurisdiction to any petitioner who is ‘in custody *under or by color of the authority* of the United States,’ not just to

In summary, then, given the accepted breadth of the habeas statute, the imperative to construe the “in custody” requirement expansively in favor of the petitioner and without regard for formalisms, the absence of any language in the text that carves out an exception where the physical custodian is a foreign body, the many circumstances in which habeas jurisdiction has been found where the individual was not in the immediate possession of the respondent, and the decisions in which habeas jurisdiction was found when the executive or some other government official was working through the intermediary of a State (*Braden*), a private individual (*Jung Ah Lung*) or a private corporation (*Stokes*), the Court cannot find any basis in the habeas statute for denying jurisdiction merely because the executive is allegedly working through the intermediary of a foreign ally.

Id. at 49. The Court concluded that petitioner was entitled to “expeditious jurisdictional discovery . . . to further explore [his] contentions” that he was held at “the behest and ongoing supervision” of American officials. *Id.* at 30; accord *United States v. Karake*, 281 F. Supp. 2d 302, 309 (D.D.C. 2003) (finding the defendants “entitled to evidence that may demonstrate cooperation between the United States and Rwandan governments sufficient to reveal an agency relationship”). The statute and the caselaw support continued habeas jurisdiction over the petitions of the many detainees transferred from Guantánamo who currently claim to be physically detained by foreign powers at the behest or direction of the United States.

II. Detainees Transferred with Conditions Imposed by the United States

A number of petitioners allege that they have been returned home and released from imprisonment under conditions imposed by the United States. Indeed, the government has conceded that transfer of men from Guantánamo can involve conditions that restrict their

those strictly in the custody of the United States. 28 U.S.C. § 2241(c)(1) (emphasis added). *Section 2241(c)(3)* sweeps even more broadly, encompassing any individual who is ‘in custody’ -- without the limitation of ‘under or by color of the authority of the United States’-- so long as the custody is ‘in violation of the Constitution or laws or treaties of the United States.’ 28 U.S.C. § 2241(c)(3). No one doubts that there must be some involvement of United States officials under either provision to satisfy the ‘in custody’ requirement. However, any attempt to read a requirement that the individual be in the actual physical custody of the United States does not find footing in the text of the statute itself.” *Abu Ali*, 350 F. Supp. 2d at 46-47.

freedom. These petitioners stand in the same position as the many habeas petitioners before the Supreme Court who successfully asserted that restraints on their liberty falling short of direct physical incarceration nonetheless satisfied the “custody” requirement of the habeas statute.⁷

As described by U.S. Ambassador Clint Williamson, the process of transfer involves negotiation between the United States and the receiving country:

Detainees have been transferred to their governments of nationality for possible detention, investigation, prosecution or control, as appropriate, when those governments were willing to accept responsibility for insuring, consistent with their laws, that the detainees will not continue to pose a threat to the United States and its allies.

See Ex. A (Decl. of Clint Williamson, Ambassador-at-Large for War Crimes Issues, U.S. Dep’t of State ¶ 2 (June 8, 2007), attached to Notice of Transfer and Motion to Dismiss for Want of Jurisdiction, *Hamad v. Gates*, No. 07-1098 (D.C. Cir.) (Dec. 13, 2007) (“Williamson Decl.”)). Ambassador Williamson’s declaration also states as follows: “My office seeks assurances that the United States government considers necessary and appropriate for the country in question.” Williamson Decl. ¶ 6.

The extent of United States government involvement in establishing the conditions under which prisoners are sent home from Guantánamo is further developed in the declaration of Joseph Benkert, Principal Deputy Assistant Secretary of Defense for Global Security Affairs in the Department of Defense, that was submitted as an attachment to the government’s Notice of Transfer in one of the instant cases. *See Ex. A* (Decl. of Joseph Benkert (June 8, 2007), attached to Notice of Transfer and Motion to Dismiss for Want of Jurisdiction, *Hamad v. Gates*, No. 07-1098 (D.C. Cir.) (Dec. 13, 2007) (“Benkert Decl.”)). In that declaration, Mr. Benkert stated that dialogue takes place between the United States and the receiving government, whose purpose

⁷ *See Hensley*, 411 U.S. at 349 (pre-trial release); *Mabry v. Johnson*, 467 U.S. 504 (1984).

is to ascertain or *establish* what measures the receiving government intends to take, pursuant to its own domestic laws and independent determinations, that will ensure that the detainee will not pose a continuing threat to the United States and its allies.

Id. (Benkert Decl.) ¶ 5 (emphasis added); *see also* Decl. of Sandra L. Hodgkinson, Deputy Assistant Secretary of Defense for Detainee Affairs ¶ 3, attached as Ex. 1 to Status Report In Response to Court’s July 3, 2008 Order, Dkt. 28 (July 14, 2008) (“Hodgkinson Decl.”). Mr. Benkert also states that once a transfer is made

the detainee is transferred entirely to the custody and control of the other government, and once transferred, is no longer in the custody and control of the United States; the individual is detained, if at all, by the foreign government pursuant to its own laws and not on behalf of the United States.

Ex. A (Benkert Decl.) ¶ 5. This statement, however, is belied by the terms of the repatriation agreement in the one instant case in which such an agreement was disclosed to counsel, the case of Adel Hassan Hamad, No. 05-cv-1009.

In the course of his work on behalf of Mr. Hamad, counsel for Mr. Hamad and his staff spoke and met with the Sudanese Ambassador to the United States and the Ambassador’s deputy. *See* Ex. B (Decl. of William J. Teesdale ¶ 2 (Nov. 9, 2007)). During a series of meetings with Ambassador Ukek and Deputy Ambassador Elguneid, Federal Public Defender Attorney and Investigator William J. Teesdale was informed that negotiations regarding an agreement for the repatriation of Mr. Hamad commenced on or about February 21, 2006. *Id.* ¶ 4. The United States continued pressing the Sudanese for more assurances through November 2007. *Id.* ¶¶ 9-13. Deputy Ambassador Elguneid stated that United States State Department wanted a written memorandum of understanding between the two countries. *Id.* ¶ 4.

Subsequent to Mr. Hamad’s repatriation, Hassan EI Mogummer, the Director of Civic Aid International Organization in Khartoum, Sudan, met with Sudanese State Minister for Foreign Affairs Elsamani Elwasia Elsammi, who permitted Mr. EI Mogummer to review a copy

of the agreement entered into between the United States and Sudanese governments regarding the repatriation of Mr. Hamad and Saleem Adem, another Sudanese prisoner in Guantánamo.

Mr. EI Mogummer informed Mr. Hamad's counsel that the document included:

- a. The Sudanese government's agreement to retain all of the detainee's travel documentation;
- b. The Sudanese government's agreement with the United States to supervise Mr. Hamad and Mr. Adeem at all times;
- c. The Sudanese government's agreement that the detainees would not be allowed to join any organization or institution that had any possible animosity towards the United States or its allies;
- d. The United States government's request that the Sudanese not allow the detainees travel outside of Sudan; and
- e. The United States' government's reservation of the right to rearrest the detainees if they joined any organization with animosity toward the United States or its allies and the right to continue investigation of the detainees at any time.

Ex. C (Decl. of William J. Teesdale ¶ 3 (Feb. 13, 2008)). These provisions are consistent with the one other publicly-disclosed agreement the undersigned counsel are aware of governing the transfer of a Guantánamo detainee. Yasser Hamdi, ISN 009, is a United States citizen of Saudi ethnicity who was transferred to a detention facility within the continental United States and then, after several years of litigation, transferred to Saudi Arabia under, *inter alia*, the following conditions:

9. Hamdi agrees to remain and reside in the Kingdom of Saudi Arabia for a period of five (5) years from the official date of this Agreement without travel outside the Kingdom of Saudi Arabia.
10. Hamdi agrees never to travel to Afghanistan, Iraq, Israel, Pakistan, Syria, the West Bank, or the Gaza Strip. He further agrees not to travel to the United States for ten (10) years and, after that time, to receive the express permission of the Secretary of Defense or his designee and the Secretary of the Department of Homeland Security or his designee prior to initiating travel to the United States (in addition to applying for any and all necessary visas or travel documents).

11. For fifteen (15) years from the official date of this Agreement, Hamdi agrees to report to the United States Embassy (or any official of the Kingdom of Saudi Arabia so designated by the United States) any intent or plans to travel outside the Kingdom of Saudi Arabia at Least thirty (30) days in advance of such proposed travel.
12. Hamdi agrees that if he does not fulfill any of the conditions of this Agreement, he may be detained immediately insofar as consistent with the law of armed conflict.

Ex. D (Agreement (Sept. 15, 2004), Exhibit A to Motion to Stay Proceedings, Dkt. 78, *Hamdi v. Rumsfeld*, No. 02-cv-439 (E.D. Va. filed Sept. 24, 2004)).

Indeed, the regulations promulgated by the Department of Defense for CSRT and ARB proceedings in Guantánamo contemplate and expressly allow continued restrictions on former detainees' liberty following transfer. For prisoners who have been designated enemy combatants, such as Mr. Hamad, the annual ARB review can lead to a decision that the prisoner can be removed from the prison in Guantánamo under two circumstances. *See* Ex. E (Dep't of Defense, Memo: Implementation of Administrative Review Procedures for Enemy Combatants Detained at U.S. Naval Base Guantanamo Bay, Cuba Sept. 14, 2004)), Encl (3) at 1. First, he may be "release[d] . . . without limitation." *Id.* Second, he may be "transfer[red]" to the custody of another country, "with conditions agreed upon between that State and the United States." *Id.* The regulations make clear that a critical distinction between "release" and "transfer" is the existence of conditions or the lack of conditions. *Id.*

For prisoners found not to be enemy combatants by a CSRT, the Secretary of Defense "or his designee shall so advise the Secretary of State, in order to permit the Secretary of State to coordinate the transfer of the detainee for release to the detainee's country of citizenship or other disposition" Ex. F (Paul Wolfowitz, Deputy Secretary of Defense, Memo: Order Establishing Combatant Status Review Tribunal (July 7, 2004)) at 3-4. The government has recognized, albeit not in the precise language of the CSRT and ARB regulations, the distinction

between outright release and conditional transfer in pleadings filed before this Court in these Guantánamo habeas corpus cases. *See, e.g.*, Ex. A (Benkert Decl.) ¶ 3; Williamson Decl. ¶ 3; Hodgkinson Decl. ¶ 3. With respect to the men who have been determined to be enemy combatants, the government has admitted that it “transfer[s] . . . detainees from Department of Defense Control at Guantánamo Bay to other governments either for release or for possible detention, investigation, prosecution or control, as appropriate.” Williamson Decl. ¶ 2.

Again, Mr. Hamad’s case provides a typical, illustrative example. When Mr. Hamad was approved for removal from Guantánamo by the ARB in November 2005, it was for transfer, not release. *See* Petr’s Status Report at 3, Dkt. 101, *Hamad v. Bush*, No. 05-cv-1009 (July 15, 2008). The fact that Mr. Hamad’s transfer did not exonerate him and remove the enemy combatant designation was made explicit in the notice provided to him on February 22, 2007, which stated only that he was “approved to leave Guantánamo”: “As you know, such a decision does not equate to a determination that your client is not an enemy combatant, nor is it a determination the he does not pose a threat to the United States or its allies.” Ex. G (Email from Capt. Matthew Digiacomo to Patrick Ehlers, et al., dated Feb. 22, 2007). The government’s “Notice of Transfer,” submitted in Mr. Hamad’s Circuit Court case on December 13, 2007, also makes clear that Mr. Hamad was transferred, not released. *See* Ex. A (Notice of Transfer and Motion to Dismiss for Want of Jurisdiction) at 1 (“the United States has relinquished custody and control of petitioner Adel Hassan Hamad (ISN 940) and *transferred* him to the control of the Government of Sudan.”) (emphasis added). It is important to note that the government’s submission uses the language of “transfer” from the ARB regulations that were applicable to Mr. Hamad, rather than the language of “transfer for release” used in the CSRT regulations. *Id.*

Indeed, the vast majority of men cleared to leave Guantanamo have been cleared for “transfer,” not cleared for “release.”⁸

Tellingly, the small number of individuals determined to be “No Longer Enemy Combatants” by the initial round of CSRTs (held in the wake of the *Rasul* decision) and subsequently transferred to Albania *are* allowed to travel freely internationally, although their Albanian travel documents make it difficult to gain entry to many countries. At least one has managed to acquire a Swedish visa and travel to Sweden from Albania.⁹ The fact that transferred detainees labeled “no longer enemy combatants” are allowed to leave Albania is suggestive of the fact that the agreements restricting travel may be predicated on “enemy combatant” status. This and the structure of the regulations provide strong reason to believe that a judicial annulment of “enemy combatant” status would impact the ability of a transferred detainee to travel internationally.

Detainees sent home under restrictive conditions imposed by the United States as a condition of their transfer suffer restrictions that are a direct result of the agreements required by the United States. As such, the action of the United States has caused a limitation on their freedom which can therefore be redressed, at least in part,¹⁰ by the Court through these habeas

⁸ See Exhibit 5 and Corrected Exhibit 6, Joint Status Report, Dkt. 170-3 and 192-2 (filed July 21 and July 23, 2008) (listing 9 Uighur detainees as cleared for transfer to the control of another government for release, and 37 detainees as cleared for transfer “To The Control Of Another Government For Possible Detention, Investigation, and/or Prosecution As That Government Deems Appropriate Under Its Own Laws”).

⁹ See *Sweden denies asylum to Chinese Uighur, former detainee at Guantanamo Bay*, International Herald Tribune, June 19, 2008, available at <http://www.ihl.com/articles/ap/2008/06/19/news/Sweden-Guantanamo-Chinese-Muslim.php>.

¹⁰ As the Supreme Court has explained, “a plaintiff satisfies the redressability requirement when he shows that a favorable decision will relieve a discrete injury to himself. He need not show that a favorable decision will relieve his *every* injury.” *Larson v. Valente*, 456 U.S. 228,

petitions. The conditions imposed are indistinguishable from the sorts of conditions of supervised release that the Supreme Court has repeatedly held to constitute “custody” for purposes of establishing habeas jurisdiction. *See Hensley*, 411 U.S. at 349 (pre-trial release); *Jones v. Cunningham*, 371 U.S. 236, 241-43 (1963) (parole conditions including address registration requirements, periodic reporting requirements, and restrictions on travel); *United States v. Trotter*, 270 F.3d 1150 (7th Cir. 2001) (possibility of shortening period of supervised release sufficient to support jurisdiction); *Barry v. Bergen County Prob. Dep’t*, 128 F.3d 152, 159 (3d Cir. 1997) (community service conditions as form of custody). Conditional release is, for purposes of determining whether habeas jurisdiction continues, the equivalent of no release at all.¹¹

Restrictions on all international travel appear to be a commonplace condition of repatriation for Guantánamo detainees who, like Mr. Hamad, remain designated as “enemy combatants.” For example, the *New York Times* obtained a copy of a confidential diplomatic note negotiated in 2005 between the United States and Afghanistan, in which the United States requested that the Afghan government share any intelligence information obtained from former Guantánamo detainees, “utilize all methods appropriate and permissible under Afghan law to surveil or monitor their activities following any release” and “confiscate or deny passports and take measures to prevent each national from traveling outside Afghanistan.” Tim Golden, “Foiling U.S. Plan, Prison Expands in Afghanistan,” N.Y. TIMES, Jan. 7, 2008, *available at* <http://www.nytimes.com/2008/01/07/world/asia/07bagram.htm>. Former detainees residing in

243 n.15 (1982) (emphasis in original); *see also Meese v. Keene*, 481 U.S. 465, 476 (1987) (finding standing where requested injunction “would at least partially redress” plaintiff’s injury).

¹¹ Thus the *Carafas* court indicated that courts had (in prior rulings) declined to exercise jurisdiction “if there has been, or will be, an *unconditional* release from custody before inquiry can be made into the legality of detention.” *Carafas*, 391 U.S. at 238 n.12.

other countries have experienced similar prohibitions. For example, British national Moazzam Begg had his passport privileges revoked upon his return to the United Kingdom, as did his countrymen Martin Mubanga and Feroz Abassi. See MOAZZAM BEGG, ENEMY COMBATANT 371 (The Free Press 2006) (Begg); “Two Guantanamo Britons refused passports,” *Daily Telegraph*, Feb. 16, 2005, available at <http://www.telegraph.co.uk/news/1483563/Two-Guantanamo-Britons-refused-passports.html> (Mubanga and Abassi).¹²

Similar restrictions on travel have been found sufficient to support habeas relief for deported aliens. See *Spencer v. Kemna*, 523 U.S. at 8 (collateral consequences of conviction sufficient to avoid mootness include risk of deportation, exclusion, or denial of naturalization); *Zalawadia v. Ashcroft*, 371 F.3d 292, 298 (5th Cir. 2004) (alien’s dismissed habeas petition presented a live case or controversy and was not moot even though he was removed while his appeal was pending, where his removal barred him from seeking reentry into the United States for five years); *Zegarra-Gomez v. INS.*, 314 F.3d 1124, 1127 (9th Cir. 2003) (custody continued based on inability to return to the United States following deportation).¹³

Indeed, the immigration code may bar the future admission to the United States of a transferred Petitioner. See 8 U.S.C. § 1182(a)(3)(B) (“Any alien . . . who has engaged in a terrorist activity. . . [or] is a member of a [listed] terrorist organization . . . [or] has received military-type training . . . from or on behalf of [the same] . . . is inadmissible”). Because the

¹² See also Laurel E. Fletcher & Eric Stover, *Guantánamo and its Aftermath: U.S. Detention and Interrogation Practices and Their Impact on Former Detainees* 62 (Nov. 2008), available at <http://hrc.berkeley.edu/pdfs/Gtmo-Aftermath.pdf> (noting that some former detainees “had their passports confiscated”).

¹³ See also *Garcia-Flores v. Gonzales*, 477 F.3d 439, 441 n.1 (6th Cir. 2007); *Alwan v. Ashcroft*, 388 F.3d 507, 511 (5th Cir. 2004); *Leitao v. Reno*, 311 F.3d 453, 456 (1st Cir. 2002); *Perez v. Greiner*, 296 F.3d 123, 126 (2d Cir. 2002); *Chong v. Dist. Dir., I.N.S.*, 264 F.3d 378, 385-86 (3d Cir. 2001); *Tapia Garcia v. I.N.S.*, 237 F.3d 1216, 1218 (10th Cir. 2001).

Authorization of Military Force (“AUMF”) limits the President’s use of military force—including detention—to those nations, persons and organizations that engaged in the massive terrorist attacks of September 11, 2001, and those nations and organizations that harbored the attackers, 115 Stat. 224 (Sept. 18, 2001), the label “enemy combatant” imprints the detainee with a determination that he engaged in terrorist activity as defined in 8 U.S.C. § 1182(a)(3)(B)(i)(I). Even one who engaged in no terrorist act *per se*, but merely in conventional combat on behalf of Taliban armed forces or al Qaeda following our invasion of Afghanistan, likely would then come within the definition of subpart IV of section 1182(a)(3)(B)(i) as a “representative” of a terrorist organization.

That the label is wrong factually or legally; that the detainee never had a chance to demonstrate, as dozens of detainees in this Court now have, that the label was wrong; that the detainee sought to show its error and was precluded from doing so by the government’s unilateral transfer—all of these facts are as a practical matter irrelevant if the label survives. For the survival of the label, based on a hasty status determination made by a CSRT in 2004 or 2005, will render the person inadmissible to the United States under section 1182. The bar is real, and thus the damage material, regardless of the degree of discretion retained by the executive to admit or deny admission in individual cases.¹⁴

Even more material, however, may be the impact *abroad* of an unremedied “enemy combatant” label. Other nations, like our own, may bar asylum and other forms of similar relief to those affiliated with terrorist organizations. An applicant in Germany or Finland will have no way to obtain U.S. military records that show he was an innocent civilian. The “enemy

¹⁴ Again, “a plaintiff satisfies the redressability requirement when he shows that a favorable decision will relieve a discrete injury to himself. He need not show that a favorable decision will relieve his *every* injury.” *Larson v. Valente*, 456 U.S. 228, 243 n.15 (1982) (emphasis in original).

combatant” label, wrongfully conferred in a trailer at Guantánamo during a summary CSRT hearing, may as a practical matter be impossible to scrub clean in an asylum proceeding years later in Europe or Canada.

III. Detainees Suffering Other Collateral Consequences

Habeas jurisdiction will continue to exist where a transferred petitioner is at risk for suffering collateral consequences from the fact of his prior unlawful detention at Guantánamo, his “enemy combatant” designation (whether he currently continues to be so designated, or is deemed “no longer” an enemy combatant by the United States), or the terms and conditions of his transfer. Statutory habeas jurisdiction attaches at the time of filing, and it is well-settled law that so long as there is a risk that petitioner will suffer some collateral consequences as a result of some aspect of his unlawful custody, his case will not become moot simply because he is no longer in “custody” (broadly defined, as the caselaw surveyed above demonstrates, to include any conditions restricting liberty). *See Sibron*, 392 U.S. at 55 (1968); *DePompei*, 999 F. 2d at 140 (finding that the “mere possibility that [collateral] consequences could exist is sufficient to preserve a live controversy”); *Geren*, 839 F.2d at 302 (same).

In cases involving a challenge to a criminal conviction, the existence of collateral consequences sufficient to satisfy the case-or-controversy requirement is *presumed*. *See Spencer v. Kemna*, 523 U.S. at 8; *Sibron*, 392 U.S. at 55 (“[I]n *Pollard v. United States*, 352 U.S. 354 (1957), the Court abandoned all inquiry into the actual existence of specific collateral consequences and in effect presumed that they existed.”). Criminal convictions typically carry with them a host of civil disabilities, such as a defendant’s inability to engage in certain businesses, to vote, or to serve as a juror. *See Carafas*, 391 U.S. at 237-38. As a result, it is an “obvious fact of life that most criminal convictions do in fact entail adverse collateral legal

consequences” such that a presumption that they exist is justified. *Sibron*, 392 U.S. at 57. The burden is on the government to prove otherwise; a habeas petition challenging a conviction becomes moot “only if it is shown that there is no possibility that any collateral legal consequences will be imposed on the basis of the challenged conviction.” *Sibron*, 392 U.S. at 57;¹⁵ *Spencer*, 523 U.S. at 8 (the court will “count collateral consequences that are remote and unlikely to occur”); cf. *Chacon v. Wood*, 36 F.3d 1459, 1463 (9th Cir. 1994) (“[T]he presumption that collateral consequences flow from *any* criminal conviction’ . . . is an

¹⁵ *Spencer v. Kemna*, 523 U.S. at 7-11 noted the tension between the holdings of the line of cases including *Sibron*, *Evitts v. Lucey*, 469 U.S. 387, (1985), and *Minnesota v. Dickerson*, 508 U.S. 366 (1993), and conventional mootness and standing doctrine, but confined its holding to negatively answering the question “whether the practice of presuming collateral consequences should be extended to challenges of parole termination.” *Id.* at 12. (*Spencer* involved a habeas petition challenging parole revocation *but not the underlying conviction*; the petition was filed during detention, but while the case was pending the original sentence expired and the petitioner was released.). The opinion conspicuously declined to impose a “fastidious approach to collateral consequences,” *id.* at 9, in other contexts.

In *Spencer*, one overriding concern dictated the outcome: the collateral consequences that could result from parole revocation were exclusively confined to the circumstance *where petitioner committed a violation of law* in the future. The Court, as it did in *City of Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983), characterized that contingent injury as excessively “speculative,” but one could equally well characterize the Court’s decision as premised on a desire to avoid using the equitable power of the Court to provide relief for a future situation in which petitioner would necessarily come to the court with unclean hands. Cf. *Spencer*, 523 U.S. at 13 (“in any event, ‘the parole violations that remain a part of respondents’ records cannot affect a subsequent parole determination unless respondents again violate state law, are returned to prison, and become eligible for parole. Respondents themselves are able—and indeed required by law—to prevent such a possibility from occurring.” (quoting *Lane*, 455 U.S. at 633 n.13)); *id.* at 15 (“We *assume* that respondents will conduct their activities within the law and so avoid prosecution and conviction” (quoting *O’Shea v. Littleton*, 414 U.S. 488, 497 (1974))); *Lyons*, 461 U.S. at 111 (“threat that the plaintiff will be *wronged* again . . . [is a] prerequisite of equitable relief” (emphasis added)); Wright & Miller, 13C Federal Practice and Procedure § 3533.4.1 at 180 (3d Ed. 2008).

Put another way, in the parole revocation context, the Court does not assume that collateral consequences exist; instead, it looks to the actual collateral consequences, making an assumption that petitioner will continued to comply with all otherwise “valid criminal laws,” *O’Shea*, 414 U.S. at 497, and using that assumption to eliminate from its consideration all collateral consequences that may result only from petitioner’s future violations of law.

irrebuttable one” (quoting *Hirabayashi v. United States*, 828 F.2d 591, 605-06 (9th Cir. 1987) (emphasis added by *Chacon* Court)).¹⁶

Petitioners in the present cases have all been either detained as “enemy combatants” or individually designated as “enemy combatants” at some time.¹⁷ Moreover, all were detained at

¹⁶ This presumption of collateral consequences following from the stigma of criminal conviction is consistent with a line of decisions allowing habeas corpus claims to proceed after discharge from imprisonment, without further inquiry into the existence of specific adverse consequences, based on the fact that the petitioner “took all possible steps” to challenge his detention before his release, and yet did not receive relief. *Lee v. Stickman*, 357 F.3d 338, 343, 343 n.4 (3d Cir. 2004); see also *Wolfe v. Coleman*, 681 F.2d 1302, 1305-06 (11th Cir. 1982); cf. *Sibron*, 392 U.S. at 53 (“[A] State may not effectively deny a convict access to its appellate courts until he has been released and then argue that his case has been mooted by his failure to do what it alone prevented him from doing.”).

The presumption is also consistent with the law regarding mootness occurring because of a defendant’s voluntary cessation of the complained-of conduct. A party may not evade judicial review of questionable conduct by voluntarily ceasing such conduct during review. See, e.g., *City of Mesquite v. Aladdin’s Castle, Inc.*, 455 U.S. 283, 289 (1982). “It is well settled that ‘a defendant’s voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice.’” *Friends of the Earth, Inc. v. Laidlaw Env’tl. Servs. (TOC), Inc.*, 528 U.S. 167, 174 (2000) (quoting *City of Mesquite*, 455 U.S. at 289.). Otherwise, a party would be free to resume the conduct after a challenge was dismissed as moot. *Id.* at 189. To guard against such intentional avoidance of judicial review, the “party asserting mootness” bears the “‘heavy burden of persuading’ the court that the challenged conduct cannot reasonably be expected to start up again.” *Id.* (quoting *United States v. Concentrated Phosphate Exp. Assn.*, 393 U.S. 199, 203 (1968)). In fact, the “stringent” burden on a party asserting mootness is to show that “subsequent events made it absolutely clear that the alleged wrongful behavior could not reasonably be expected to recur.” *Id.* (quoting *Concentrated Phosphate*, 393 U.S. at 203.)

The *Laidlaw* Court specifically noted that there was a higher threshold to establish initial standing to file a case than would be required to maintain a case once the initial threshold had been met: “The plain lesson of these cases is that there are circumstances in which the prospect that a defendant will engage in (or resume) harmful conduct may be too speculative to support standing, but not too speculative to overcome mootness.” *Laidlaw*, 528 U.S. at 190. The seeming incongruity of this result was explained by the fact that cases that are alleged to become moot after filing involve “sunk costs”; to dismiss a case properly filed at the outset “at an advanced stage may prove more wasteful than frugal” of “the scarce resources of the federal courts.” *Id.* at 191-92. The resulting tension is similar to that noted by the *Spencer* court, 523 U.S. at 10-11, but is consistent with “long-recognized exceptions to mootness.” *Laidlaw*, 528 U.S. at 190.

¹⁷ A small number of petitioners were formally designated as “no longer enemy combatants” by the CSRT process.

Guantánamo Bay, one of the world’s most infamous prisons, a place consistently characterized by the government as filled with dangerous terrorists:

“[Guantánamo detainees are the] worst of the worst”;¹⁸

“[The prisoners are] among the most dangerous, best-trained vicious killers on the face of the earth”;¹⁹

“[T]hese are people that would gnaw through hydraulic lines in the back of a C-17 to bring it down . . . these are very, very dangerous people, and that’s how they’re being treated”;²⁰

“These are the worst of the worst, and if let out on the street, they will go back to the proclivity of trying to kill Americans and others.”²¹

A presumption that that such consequences will follow from the fact of detention at Guantanamo and the “enemy combatant” designation, even in the foreign countries petitioners have been transferred to, is “likely to comport with reality,” *Spencer*, 523 U.S. at 12, and therefore the same presumption of collateral consequences should apply to the instant petitions, challenging the lawfulness of that detention and designation.

Courts have recognized a wide variety of specific collateral consequences that will bar a finding of mootness. A host of continuing restrictions on liberty, of the sort that would meet the definition of “custody” as set forth in Part II *infra*, have been held sufficient to allow a habeas

¹⁸ Katharine Seeley, *Some Guantanamo Prisoners Will Be Freed, Rumsfeld Says*, N.Y. TIMES, Oct. 23, 2002, available at <http://query.nytimes.com/gst/fullpage.html?res=9800EFD7143CF930A15753C1A9649C8B63>.

¹⁹ Department of Defense News Briefing - Secretary Rumsfeld Media Availability en route to Guantanamo Bay, Cuba (Jan. 27, 2002), available at <http://www.defenselink.mil/transcripts/transcript.aspx?transcriptid=2320>.

²⁰ Department of Defense News Briefing - Secretary Rumsfeld and Gen. Myers (Jan. 11, 2002), available at <http://www.defenselink.mil/transcripts/transcript.aspx?transcriptid=2031>.

²¹ Department of Defense News Briefing - ASD PA Clarke and Rear Adm. Stufflebeem (Jan. 28, 2002), available at <http://www.defenselink.mil/transcripts/transcript.aspx?transcriptid=1041>.

case to go forward, including restrictions imposed by parole that require registration of address, periodic reporting to a parole officer, and restrictions on travel, *Jones*, 371 U.S. at 241-43, and restrictions on serving as a labor union official, voting, and jury service. *Carafas*, 391 U.S. at 237.²²

However, putting to one side restrictions on liberty resulting from operation of law, the courts have found the stigma from particular status determinations was a sufficient collateral consequence to maintain standing and warrant relief in habeas. For example, in *Demjanjuk*, the Sixth Circuit Court of Appeals relied on established habeas corpus law in ruling that Demjanjuk's acquittal and release in Israel did not moot his claim of unlawful extradition from the United States. *See* 10 F.3d at 355-56. Specifically, the Court found that there were collateral

²² Certain transferred petitioners may also in the future face the argument from the government that their "enemy combatant" designation forecloses relief in any civil damages action they may chose to pursue. Section 2241(e)(2) of the habeas corpus statute states:

Except as provided in paragraphs (2) and (3) of section 1005(e) of the Detainee Treatment Act of 2005 (10 U.S.C. § 801 note), no court, justice, or judge shall have jurisdiction to hear or consider any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

Boumediene invalidated all of Section 2241(e), at least with respect to habeas corpus jurisdiction. *See Boumediene*, 128 S. Ct. at 2275 ("The only law we identify as unconstitutional is MCA § 7, 28 U.S.C. § 2241(e)."). Assuming *arguendo*, however, that subsection 2241(e)(2) continues to be applicable to foreclose civil damages actions for wrongs suffered as a result of Petitioners' detention, the question would arise whether the fact that many transferred detainees were "determined by the United States to have been properly detained as an enemy combatant" would bar such remedial litigation.

If that were the case, courts have recognized that where success on a habeas petition by a released prisoner challenging a conviction is a prerequisite to pursuit of a claim for damages, the petition will not be treated as mooted by release. *See, e.g., Leonard v. Nix*, 55 F.3d 370, 372-73 (8th Cir. 1995); *Mercer v. Jordan*, 1995 U.S. App. LEXIS 36623 at *1 n.1 (7th Cir. 1995). (*Spencer v. Kemna* is not to the contrary. There, as the majority opinion noted, the petitioner might have had a valid civil claim that survived dismissal of his habeas action. *See Spencer*, 523 U.S. at 17.)

consequences in Demjanjuk's having been subjected to the stigma of being found by the district court to be a brutal Nazi prison guard. *Id.*; *cf. Fiswick v. United States*, 329 U.S. 211, 222 (1946) (permitting appeal of a conviction for conspiracy to defraud the United States for concealing membership in the Nazi party, in part, because the conviction stood as "ominous proof" that Fiswick had committed the acts with which he had been charged). Courts have also found the stigma arising from standing accused of certain types of crimes can constitute a "collateral consequence" sufficient to keep a case alive. *See, e.g., White v. White*, 925 F.2d 287, 290 (9th Cir. 1991) (habeas case not moot because of prospect of "possible employment discrimination" in future as a result of "the stigma of a sexual contact with a minor charge"). The stigmatic consequences of merely having been detained at Guantánamo are more than sufficient to meet this standard.²³

For example, between July 2007 and July 2008, researchers at the University of California, Berkeley interviewed 62 detainees formerly held at United States detention facilities in Afghanistan and at Guantánamo. *See Fletcher & Stover, Guantánamo and its Aftermath*, at vii. Ten of the 62 former detainees reported that they were arrested upon arrival in their home countries and incarcerated from periods ranging from three months to two years. Some said that they were physically abused in detention: one was beaten during his initial interrogation while authorities demanded that he confess he was a member of a terrorist organization. *Id.* at 62. According to a former Guantánamo detainee who was imprisoned for a year-and-a half in his home country, "it was like leaving one nightmare to go into another one." *Id.* Additionally, the researchers found that those former detainees who have been released to freedom continue to suffer lingering financial, social and psychological effects of their detention:

²³ Of course, the stigmatic consequences of the CSRT and ARB allegations, the findings of those panels, and any "enemy combatant" designation will be greater still.

Only six of the 62 former detainees have regular jobs. Many have lost homes, businesses, and assets, while others have been shunned by their neighbors or even suspected of being American spies. The “stigma of Guantánamo” infects their future prospects. Two-thirds of the former detainees report residual psychological and emotional trauma. With the exception of a program instituted in Saudi Arabia, no meaningful help has been forthcoming from public or private sources to reintegrate former detainees into their communities.

Id. at vii-viii.

Beyond the stigmatic consequences, some detainees have already experienced actual collateral consequences of their unlawful detention and designation in their home countries. The courts have upheld habeas standing even in cases where the chances that subsequent events will trigger a specific disability are, in the words of *Spencer*, 523 U.S. at 8, “remote and unlikely to occur.” See, e.g., *Minnesota v. Dickerson*, 508 U.S. 366, 371 n.2 (1993) (charges dismissed and records not public, but case not moot, because Department of Public Safety might consider dismissed charge in determining whether to bring future charges against petitioner); *Evitts v. Lucey*, 469 U.S. 387, 391 (1985) (challenged conviction could be “used to impeach [convict’s] testimony ... in a future proceeding”); *Swaby v. Ashcroft*, 357 F.3d 156, 160-61 (2d Cir. 2004) (where habeas petitioner alien is deported during appeal, resulting bar to reentry to United States is sufficient to maintain “case or controversy”).

All of these collateral consequences are matters for further factual exploration, if necessary given the heavy burden borne by the government, before the Merits Judges in these individual cases.²⁴

²⁴ In *Qassim v. Bush*, 466 F.3d 1073 (D.C. Cir. 2006), the Court of Appeals for the D.C. Circuit noted that the collateral consequences doctrine could enable released Guantanamo detainees to continue their litigation. *Id.* at 1076-77. As to the habeas claims, Petitioners apparently argued only that the mootness exception for cases involving “voluntary cessation” by defendants of their illegal conduct. *Id.* at 1075. It is well-established, however, that a necessary element of the “voluntary cessation” exception is that the conduct in question have some chance of recurrence against the specific plaintiffs themselves; where there is “no reasonable expectation that the [illegal] conduct will recur,” the exception will not apply. The Uighur petitioners in that

* * *

Finally, the Court's order requesting this briefing confined itself to asking whether "jurisdiction over a habeas corpus petition . . . is eliminated by the petitioner's transfer or release from Guantanamo Bay." It is, however, worth noting that non-habeas claims remain pending against Respondents in these cases. The initial pleadings in a number of the above-captioned cases were denominated as both a "petition for habeas corpus" and a "complaint for injunctive and declaratory relief." *See, e.g.*, Petition and Complaint, Dkt. 1, *Al-Oshan v. Bush*, No. 05 Civ. 520 (RMU) (D.D.C. filed Mar. 14, 2005).²⁵ All or nearly all of the cases include claims for equitable relief under the Alien Tort Statute and international humanitarian law, and directly under the Constitution.²⁶ Neither the Court's order nor this brief addresses the continuing validity of these claims.

case had been determined by the military to be "no longer enemy combatants" and released; the Court of Appeals found that this showed that "there is no reasonable expectation they will be detained again." *Id.* at 1076.

Petitioners also argued that their *non-habeas* claims for declaratory and injunctive relief were not moot. The Court of Appeals found that released detainees had failed to "allege [a] collateral consequence": "[t]he Uighurs' argument that their claim for declaratory and injunctive relief survives . . . requires the continued existence of a collateral consequence. There is no such consequence." *Id.* at 1076-77. The *Qassim* panel's discussion of collateral consequences was clearly both (1) fact-specific, based on the facts asserted by the released detainees, and (2) specifically confined to the non-habeas claims asserted by the released detainees.

²⁵ For example, the following cases involve petitions jointly denominated as habeas petition and complaint for injunctive and declaratory relief, and contain Alien Tort Statute, international humanitarian law, and direct constitutional claims: 05-520, 05-526, 05-748, 05-998, 05-1458, 05-1704, 05-2370, 05-2371, 08-1224 and 08-1227. (The list is not comprehensive.)

²⁶ The petitions in the following cases were captioned only as habeas petitions, but they explicitly invoked jurisdiction under general federal question jurisdiction per 28 U.S.C. § 1331 and the Alien Tort Statute, *inter alia*, and also directly under several constitutional provisions: 04-1144, 05-1505, 05-2385, 05-2386, 05-2479, 08-1101 and 08-1185. (Again, this list is not comprehensive.)

CONCLUSION

It is often said, in counter to the idea that courts generally fail to protect liberties *during* a national crisis, that the perception is mistaken—that the court system moves slowly but surely, and that its slow pace is an advantage, as decisions will tend to be made after the immediate crisis has passed and the public’s sense of panic has subsided. On this account, relief may often come too late for most of the affected parties, but courts then decide issues in an atmosphere of calm and dispassion, and make decisions that, once entrenched, will protect the rights of future litigants, and cleanse the nation’s soul of the stain of wrongdoing.

That sort of moral victory is *not* what petitioners in these cases seek. They *continue* to suffer as a consequence of the unlawful policies of Respondents. Some languish in foreign prisons at the behest of the United States. Others, while no longer imprisoned, are forced to live under restrictions upon their liberty imposed at the behest of the United States. Still others suffer collateral consequences by operation of law, or by dint of the stigma of having been confined in one of history’s most notorious prisons.

Our government has offered them no apology. (Instead, it requests that they sign agreements upon transfer stating that the men were “detained as an enemy combatant during ... armed conflict.”) It has taken no responsibility for its mistakes. (Indeed, only the lucky few are entitled upon transfer to the label “no longer enemy combatants.”) It has made no attempt whatsoever to make them whole. (In fact, it has asserted that they have no right to damages for injuries up to and including torture, and now asserts that they may not challenge their “enemy combatant” determination after transfer.) The judicial process exists to right these wrongs. Perhaps Guantánamo will be empty within the year. But the Courts have the power and the duty

to assert jurisdiction over these cases until the transferred detainees have a remedy for the injustices they have suffered and continue to suffer from.

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