IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

In re* Guantanamo Detainee Cases (*except 04-CV-1519 (JR), 04-CV-1142 (RJL), and 04-CV-1166 (RJL)	)	**Civil Action Nos. 02-CV-0299 (CKK), 02-CV-0828 (CKK), 02-CV-1130 (CKK), 04-CV-1135 (ESH), 04-CV-1136 (JDB), 04-CV-1137 (RMC), 04-CV-1144 (RWR), 04-CV-1164 (RBW), 04-CV-1194 (HHK), 04-CV-1227 (RBW), 04-CV-1254 (HHK), 04-CV-1897 (RMC), 04-CV-1937 (PLF), 04-CV-2022 (PLF), 04-CV-2035 (GK), 04-CV-2046 (CKK), 04-CV-2215 (RMC), 05-CV-22 (JR), 05-CV-23 (RWR)**

MOTION AND MEMORANDUM FOR CERTIFICATION OF JANUARY 31, 2005 INTERLOCUTORY ORDERS FOR APPEAL PURSUANT TO 28 U.S.C. § 1292(b) AND FOR STAY OF PROCEEDINGS PENDING APPEAL

Respondents hereby respectfully move this Court to certify for interlocutory appeal, pursuant to 28 U.S.C. § 1292(b), its January 31, 2005 Order (and Memorandum Opinion) Denying in Part and Granting in Part Respondents' Motion to Dismiss or for Judgment as a Matter of Law and Requesting Briefing on the Future Proceedings in These Cases, and its January 31, 2005 Order Granting November 8, 2004 Motion to Designate "Protected Information" and Granting November 18, 2004 Motion for Access to Unredacted Factual Returns, which, *inter alia*, determined, contrary to the recent decision of Judge Leon in two other Guantanamo Bay detainee cases,[1] that constitutional "due process" protections apply to aliens detained at Guantanamo Bay and that the Combatant Status Review Tribunal proceedings the military has used to confirm petitioners' status as enemy combatants do not satisfy these due process requirements. Furthermore, respondents request a stay of proceedings in the cases in

[1] *See Khalid v. Bush*, No. 04-CV-1142 (RJL), *Boumediene v. Bush*, No. 04-CV-1166 (RJL), 2005 WL 100924 (D.D.C. Jan. 19, 2005).

which the Court's January 31, 2005 orders were entered, as well as in the other pending Guantanamo Bay detainee cases, as explained herein.[2]

Section 1292(b) provides for certification of interlocutory appeal of orders "involv[ing] a controlling question of law as to which there is substantial ground for difference of opinion . . . an immediate appeal from . . . [which] may materially advance the ultimate termination of the litigation." These requirements are met here. The issues decided in the Court's January 31, 2005 orders are fundamentally controlling as to further proceedings, if any, in these cases, and their resolution through an immediate appeal will materially advance the ultimate termination of the litigation. Indeed, if the issues are decided in a contrary fashion from the January 31, 2005 orders, the litigation of these habeas cases will come to an end. Further, substantial ground for difference of opinion exists regarding the core issues decided in the orders, including the proper interpretation of the Supreme Court's decision in *Rasul v. Bush*, 124 S. Ct. 2686 (2004), the proper role of the courts in reviewing the detention of aliens determined by the military to be enemy combatants during ongoing hostilities, and the interpretation and effect of the Third Geneva Convention in the circumstances of these cases. This substantial ground for difference of opinion is reflected primarily in Judge Leon's contrary decision on the constitutional issues, as well as contrary opinions issued by the Fourth Circuit and judges on the D.C. Circuit on the Geneva Convention issues.

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[2] As explained *infra* at 30-31, respondents do not oppose entry of the November 8, 2005 Amended Protective Order and Procedures for Counsel Access To Detainees at the United States Naval Base In Guantanamo Bay, Cuba, and the filing of factual returns in three of the most recent cases in order to facilitate counsel visits to Guantanamo Bay during the pendency of an appeal.

Furthermore, a stay of proceedings pending appeal is warranted on a number of grounds. Upon certification of the January 31, 2005 orders for appeal, the government will promptly apply for appeal to the D.C. Circuit, *see* 28 U.S.C. § 1292(b), and will seek to have the appeal proceed on an expedited basis. Further, the issues raised in the orders otherwise already are, or shortly will be, before the D.C. Circuit either in the pending expedited appeal in *Hamdan v. Rumsfeld*, 344 F. Supp. 2d 152, 165 (D.D.C. 2004), *appeal pending* No. 04-5393 (D.C. Cir.) (concerning the Geneva Convention) or the impending appeal by petitioners in Judge Leon's cases. The Court's January 31, 2005 orders contemplate significant further proceedings in these cases that present grave separation of powers concerns, as well as serious practical burdens on and potential harms to the government, and proper resolution of the issues raised in the orders will affect how all of the Guantanamo Bay detainee cases should proceed, if at all. The harms occasioned by the proceedings contemplated under the Court's January 31, 2005 orders should not be imposed pending expedited guidance from the D.C. Circuit.

Respondents' request for certification of the Court's orders for interlocutory appeal and a stay of proceedings outlines respondents' view as how they believe these cases should proceed and thus reflects respondents' response the Court's January 31, 2005 order requesting briefing on further proceedings in these cases.[3]

[3] Additionally, respondents believe the cases should continue to proceed in a coordinated fashion, through the services of the current Coordinating Judge or, upon her departure, another Judge appointed to coordinate the cases, at least pending resolution of appeals. Further, in the event respondents' motion may be denied, respondents request that they be given at least 30 days from any final ruling of the Court of Appeals regarding a stay of proceedings in the cases in which the Court's January 31, 2005 orders were entered in which to submit a revised plan as to how these cases should proceed.

Counsel for respondents has consulted or attempted to consult with counsel for petitioners. Counsel for petitioners in 17 cases have stated they will oppose respondents' motion.

BACKGROUND

On January 31, 2005, this Court issued a decision denying in part and granting in part respondents' motion to dismiss or for judgment as a matter of law in eleven of these coordinated cases. *See* Memorandum Opinion Denying in Part and Granting in Part Respondents' Motion to Dismiss or for Judgment as a Matter of Law (filed Jan. 31, 2005) ("Mem. Op."). In its decision, the Court concluded that constitutional "due process" protections apply to aliens detained at Guantanamo Bay and that the Combatant Status Review Tribunal ("CSRT") proceedings the military has used to confirm petitioners' status as enemy combatants – subject to what the Court described as potentially indefinite detention – do not satisfy constitutional "due process" requirements. Mem. Op. at 18-68.

The Court interpreted the Supreme Court's opinion in *Rasul v. Bush*, 124 S. Ct. 2686 (2004), including footnote 15 of the case, which was extensively addressed in the parties' briefing on respondents' motion to dismiss or for judgment, as at least implicitly recognizing that aliens and citizens alike are entitled to certain fundamental constitutional rights in Guantanamo Bay. The Court further concluded that due process of law is such a fundamental right. Mem. Op. at 18-38. And relying on *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004), which had addressed the due process rights of an American citizen held in this country as an enemy combatant, the Court found that the CSRT procedures were deficient or potentially deficient in at least three respects. First, the Court determined that due process requires that each detainee be permitted

access, if not directly, at least through counsel, to all material evidence, even classified evidence, upon which the CSRT relies in affirming the detainee's status as an enemy combatant. According to the Court, given that the detainees were not made privy to all classified evidence concerning their combatant activities, the failure of the military to permit the participation of counsel on behalf of the detainee – and to fully confront classified evidence on the detainee's behalf – violates the constitutional due process right of detainees as a matter of law.[4] Mem. Op. at 45-55.

Second, based on allegations by petitioners in various filings in these cases and another case (*Boumediene*) recently dismissed by Judge Leon, it was possible, the Court believed, that in some cases the CSRT may not have sufficiently considered whether evidence presented to it was the product of coercion or torture. Mem. Op. at 55-59. According to the Court, "[a]t a minimum . . . due process requires a thorough inquiry into the accuracy and reliability of statements alleged to have been obtained through torture." Mem. Op. at 56. The Court held that whether such a constitutional violation occurred with respect to any particular petitioner required further litigation. Mem. Op. at 55-59.

Third, the Court took issue with the definition of "enemy combatant" used in the CSRT proceedings. The Court believed that the definition was vague and overbroad, such that it could be applied to individuals "based solely on their membership in anti-American organizations,

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[4] Relatedly, the Court entered a separate order granting petitioners' motion that counsel be permitted access to especially sensitive classified information that the government had redacted for national security reasons from the classified portions of the CSRT records submitted as factual returns in the cases, finding that such information "is relevant to the merits of this litigation." Order Granting November 8, 2004 Motion to Designate "Protected Information" and Granting November 18, 2004 Motion for Access to Unredacted Factual Returns (filed Jan. 31, 2005) at 2 ("Access Order").

rather than on actual activities supporting the use of violence against the United States." Mem. Op. at 61. According to the Court, the "indefinite" detention of an alien at Guantanamo solely because of his ties to individuals or organizations associated with terrorism, as opposed to his aiding, abetting, or personally undertaking terrorist activity, would violate "due process."[5] The Court concluded that any inappropriate detentions under this definition would have to be litigated on a detainee-specific basis. Mem. Op. at 59-67.

In reliance on *Hamdi*, the Court set forth its view that "in the absence of military tribunal proceedings that comport with constitutional due process requirements, it is the obligation of the court receiving a habeas petition to provide the petitioner with a fair opportunity to challenge the government's factual basis for his detention," and the Court requested input from counsel as to how these cases should proceed. Mem. Op. at 68. As note *supra* note 4, the Court also apparently took the first step in providing that opportunity to petitioners when it granted petitioners' motion that counsel be permitted access to classified information that the government had redacted for national security reasons from the classified portions of the CSRT records submitted as factual returns in the cases. *See* Access Order at 2.

Regarding the claims of certain petitioners under the Geneva Conventions, the Court agreed that the Geneva Conventions do not apply to al Qaeda, since al Qaeda is not a party to the Conventions. Thus, aliens in Guantanamo Bay who are being held solely because of their relationship with al Qaeda could not mount a habeas claim based on the Conventions. Mem. Op.

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[5] On this point, the Court rejected that the Court's role should be limited to determining whether "some evidence" exists demonstrating "that [the detainee] participated in terrorist activities" because the CSRTs do not provide an adequate opportunity for the detainee to challenge the evidence against him. Mem. Op. at 63 n.36.

at 70. However, because Afghanistan is a party to the Conventions, the Court took a different tack with regard to detainees held because of their relationship with the Taliban, including detainees associated with both the Taliban and al Qaeda. The Court adopted the reasoning of Judge Robertson in *Hamdan v. Rumsfeld*, 344 F. Supp. 2d 152, 165 (D.D.C. 2004), *appeal pending* No. 04-5393 (D.C. Cir.), to conclude that the Conventions are "self-executing" and can provide petitioners with a claim in a habeas action. Mem. Op. at 70. The Court, relying on *Hamdan*, rejected the President's authority to make a categorical determination that the Taliban are not entitled to prisoner-of-war status under the Third Geneva Convention and held that the Convention requires an individualized determination by a competent tribunal with regard to each Taliban-associated detainee. The Court further concluded that the CSRT records for "many of those petitioners" found to have been Taliban did not contain specific findings regarding whether the petitioner was entitled to prisoner-of-war status. Mem. Op. at 68-73.

The Court dismissed petitioners' remaining claims, including claims under the Sixth, Eighth, and Fourteenth Amendments, under the Suspension Clause, under other international treaties, and under the Alien Tort Statute and the Administrative Procedure Act. Mem. Op. at 73-74.

The Court's January 31, 2005 decision applies in the eleven cases in which it was entered,[6] and it affects eight subsequently filed cases. *See* Mem. Op. at 15; *infra* at 27-31. It also directly conflicts in substantial respects with the recent decision of Judge Richard Leon of this

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[6] *Hicks*, No. 02-CV-0299; *Al Odah*, No. 02-CV-0828; *Habib*, No. 02-CV-1130; *Kurnaz*, No. 04-CV-1135; *O.K.,* No. 04-CV-1136; *Begg*, No. 04-CV-1137; *El-Banna*, No. 04-CV-1144; *Gherebi*, No. 04-CV-1164; *Anam*, No. 04-CV-1194; *Almurbati*, No. 04-CV-1227; and *Abdah v. Bush*, No. 04-CV-1254.

Court in two other Guantanamo Bay detainee cases. *See Khalid v. Bush*, Nos. 04-CV-1142 (RJL), 04-CV-1166 (RJL), 2005 WL 100924 (D.D.C. Jan. 19, 2005). Specifically, Judge Leon concluded that the Supreme Court has "repeatedly reaffirmed its holding" in *Johnson v. Eisentrager*, 339 U.S. 763 (1950), that constitutional protections do not extend to aliens outside sovereign United States territory. Thus, under that precedent, aliens held in Guantanamo Bay, that is, outside the sovereign territory of the United States, are not possessed of constitutional rights. 2005 WL 100924 at *6-*7. Judge Leon further held that the *Rasul* decision did not overrule these repeated holdings of the Supreme Court so as to extend constitutional rights to aliens detained at Guantanamo Bay. Judge Leon concluded that *Rasul* expressly limited its holding to the statutory right of petitioners to file a writ of habeas corpus and did not address any substantive constitutional rights of petitioners. He also concluded that footnote 15 of *Rasul*, in context, was consistent with this view. In Judge Leon's words, "the Supreme Court [in *Rasul*] chose to only answer the question of jurisdiction, and not the question of whether these same individuals possess any substantive rights on the merits of their claims." *Id.* at *7-*8.

Judge Leon also indicated that, assuming petitioners did possess constitutional rights, the CSRTs afford petitioners appropriate process as explained in the *Hamdi* plurality opinion. *Id.* at *8 n.16, *13. Judge Leon also rejected challenges by petitioners in those cases to the alleged breadth of the military's detention power, concluding that Congress did not place geographic limitations on the Executive's power to detain enemy combatants, *id*. at *5-*6, and that petitioners' detention should not be overseen by the judiciary merely because of its potentially lengthy duration, *see id*. at *5 n.10 (concern over duration of detention may require reevaluation by the political branches, not the judiciary). Judge Leon also determined that "the Court's role in

reviewing the military's decision to capture and detain a non-resident alien is, and must be, highly circumscribed," and that the Court would "not probe into the factual basis for the petitioners' detention." *Id*. at *12. As stated by Judge Leon, the Constitution allocates exercise of war powers "among Congress and the Executive, not the Judiciary," and such separation of powers concerns necessarily limit any role of the Court in reviewing challenges of non-resident aliens to their detention as enemy combatants in the midst of ongoing armed conflict. *Id.* at *13.

ARGUMENT

I. THE COURT SHOULD CERTIFY ITS JANUARY 31, 2005 ORDERS FOR INTERLOCUTORY APPEAL UNDER 28 U.S.C. § 1292(b)

This Court may certify an order for interlocutory appeal if it is of the opinion that the order "involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b); *Trout v. Garrett*, 891 F.2d 332, 335 n.5 (D.C. Cir. 1989). These three factors should be applied flexibly and viewed together. *See* 16 C. Wright, A. Miller & E. Cooper, FEDERAL PRACTICE AND PROCEDURE § 3930 at 415-16 (2d ed. 1996). And while certification of an order under § 1292(b) is discretionary, it is "the duty of the district court . . . to allow an immediate appeal to be taken when the statutory criteria [in § 1292(b)] are met." *Ahrenholz v. Board of Trustees*, 219 F.3d 674, 677 (7th Cir. 2000). The standards for interlocutory appeal are met here.

A. This Court's Orders Contain Controlling Questions Of Law.

A "controlling question of law" under § 1292(b) "is one that would require reversal if decided incorrectly or that could materially affect the course of litigation with resulting savings of the court's or the parties' resources." *Judicial Watch, Inc. v. Nat'l Energy Policy Dev. Group,*

233 F. Supp. 2d 16, 19 (D.D.C. 2002). While "[c]ontrolling questions of law include issues that would terminate an action if the district court's order were reversed,"

> The resolution of an issue need not necessarily terminate an action in order to be "controlling," *Klinghoffer* [*v. S.N.C. Achille Lauro,* 921 F.2d 21] at 24 [(2d Cir. 1990)], but instead may involve a procedural determination that may significantly impact the action. *See In re The Duplan Corp.,* 591 F.2d 139, 148 n.11 (2d Cir. 1978) (a "controlling question of law" includes procedural determination affecting the conduct of an action); *Judicial Watch,* 233 F. Supp. 2d at 19 (citing *Johnson v. Burken,* 930 F.2d 1202, 1206 (7th Cir. 1991) (a question of law can be controlling if it determines the outcome "or even the future course of the litigation")); *see also* 16 Wright, Miller & Cooper, Federal Practice & Procedure, § 3930 at 426 (1996) ("A steadily growing number of decisions ... have accepted the better view that a question is controlling ... if interlocutory reversal might save time for the district court, and time and expense for the litigants.").

APCC Services, Inc. v. AT&T Corp., 297 F. Supp. 2d 101, 105 (D.D.C. 2003). In addition, the potential "impact" an interlocutory appeal of the issues involved will have on other cases is a factor supporting a conclusion that the question is controlling. *See id.* (citing *Klinghoffer,* 921 F.2d at 24).

The Court's January 31, 2005 orders present "controlling question[s] of law" under § 1292(b). If the Court's ruling on either the fundamental issue of whether due process protections of the Constitution apply to aliens detained at Guantanamo Bay or whether the CSRTs provide due process were reversed, the course of this litigation would be materially affected – indeed, the litigation would likely come to an end, as reflected in Judge Leon's disposition of the *Khalid* and *Boumediene* cases. The issues are truly controlling in these cases. *See also Hamdi v. Rumsfeld*, 256 F. Supp. 2d 218, 222-23 (S.D.N.Y. 2003) (certifying for interlocutory appeal rulings pertaining to how review of enemy combatant status of American citizen would proceed).

The resolution of these issues forms the basis of how these cases will proceed, from the types of disclosures or discovery due petitioners (or their counsel), to the need for and nature of evidentiary hearings the Court would undertake to review whether each petitioner should continue to be detained. The Court's resolution of the issues led it to require the disclosure of all classified information contained in the CSRT records, submitted as factual returns, to petitioners' counsel. Mem. Op. at 45-55; Access Order at 2.[7] The resolution of the issues also set the stage for the Court's review of the military's factual basis for each detention to determine whether they are based on allegedly inaccurate or unreliable statements obtained through "torture," on allegedly overbroad constructions of the definition of "enemy combatant," or on other factors that might be alleged to violate due process. *See* Mem. Op. at 67-68. Were the due process-related issues decided differently than reflected in the January 31, 2005 orders, petitioners' challenges to the fact of their detention would be resolved in the government's favor and litigation on that point would terminate, as reflected in Judge Leon's decision in *Khalid*.

Furthermore, resolution of the issues raised in the January 31, 2005 orders is controlling with respect to and will potentially impact in a material way not just the eleven cases in which the orders were entered, but the remaining eight Guantanamo Bay detainee habeas cases, as well. *See infra* at 27-31. The same would be true with respect to any future habeas cases filed on behalf of the hundreds of other Guantanamo Bay detainees who have yet to file such cases. *See*

[7] This aspect of the Court's orders, standing alone, would be sufficient to constitute a controlling question of law appropriate for certification of the orders for interlocutory appeal. It is clearly a determination of a substantive right that will "significantly impact" the course of the litigation. *See APCC Services*, 297 F. Supp. 2d at 105.

Judicial Watch, 233 F. Supp. 2d at 19 (controlling question of law is one that "could materially affect the course of litigation with resulting savings of the court's or the parties' resources").

Accordingly, the Court's January 31, 2005 orders present controlling questions of law.[8]

B. An Interlocutory Appeal Will Materially Advance The Litigation.

The issue of whether an order presents a controlling question of law and whether an interlocutory appeal will materially advance the litigation are closely related and, indeed, blend together. *See* 16 C. Wright, A. Miller & E. Cooper, FEDERAL PRACTICE AND PROCEDURE § 3930 at 415-16 (2d ed. 1996). For the same reasons that the January 31, 2005 orders present controlling questions of law in these cases, an interlocutory appeal of the orders will materially advance this litigation.

As Judge Leon's contrary resolution of the issues demonstrates, were the due process-related issues decided differently than reflected in the January 31, 2005 orders, petitioners' challenges to the fact of their detention would be resolved. On the other hand, not permitting an appeal of the orders will result in unprecedented proceedings involving numerous intrusive burdens on the Executive that encroach on separation of power principles. The orders contemplate that, going forward in the absence of an appeal, the government will be forced to disclose to petitioners' counsel especially sensitive classified information that it has heretofore refused to disclose in order to protect intelligence sources and methods. *See* Respondents' Response to Petitioners' Motion for Access to Unredacted Factual Returns (filed Nov. 22, 2004 in the coordinated cases) at 5-17. The orders contemplate that future proceedings will involve the Court injecting itself deeply into core military matters, with likely protracted proceedings in

[8] Of course, under § 1292(b), an order need only contain "a" controlling question of law.

which the parties pursue or defend against detailed inquiries into the genesis of each piece of evidence relied on by a CSRT in making its enemy combatant finding regarding a petitioner. Petitioners are already seeking wide-ranging discovery on alleged torture and mistreatment of detainees generally, *see* Motion for Leave to Take Discovery and for Preservation Order (filed Jan. 10, 2005), and further proceedings in the cases under the Court's rulings could include exploration of the circumstances of interrogations and potentially involve testimony by participants to interrogations.[9] Proceedings might also require presentations by intelligence experts regarding whether evidence in a particular case sufficiently supports a petitioner's designation as an enemy combatant.[10] The proceedings additionally could involve other yet to be seen due process challenges to the bases for petitioners' detention.

Proceedings such as these would not only present numerous practical burdens and involve a significant expenditure of judicial resources and the resources of the parties, but would present significant separation of powers concerns. Such concerns would arise not only with respect to the judicially compelled disclosure of classified information, but also in connection with the Court's review of quintessentially military judgments made for the purpose of waging war successfully – judgments that implicate the safety of the Nation's troops and, ultimately, its citizens, as well as the safety and support of allied and coalition forces and countries.

An interlocutory appeal would determine whether such protracted and problematic proceedings should go forward at all. Resolution on appeal of issues raised in the Court's

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[9] The government does not necessarily agree that such proceedings would be appropriate even under the January 31, 2005 orders.

[10] One group of petitioners has already demanded security clearance forms for potential "experts" in their cases, perhaps with this possibility in mind.

January 31, 2005 orders, thus, would advance the appropriate resolution of the litigation in all of these cases, as well as the likely future (perhaps hundreds of) Guantanamo Bay detainee cases.

C. Substantial Ground for Difference of Opinion Exists With Respect to the Issues Raised in the Court's Orders.

Respondents respectfully submit that substantial ground for difference of opinion exists with respect to the issues decided in the Court's January 31, 2005 orders. Notably, the issues raised in the orders are significant and essentially of first impression, at least in the unique and unprecedented context in which they are raised. That substantial ground for difference of opinion exists is reflected primarily in the fact that another Judge of this Court reached a different decision with respect to the very core issues raised in the orders. As discussed, *supra* at 7-9, contrary to the conclusions in the Court's January 31, 2005 orders, Judge Leon interpreted Supreme Court precedent as directing that constitutional protections do not extend to aliens outside sovereign United States territory, including to aliens detained in Guantanamo Bay. He further held that the *Rasul* decision did not overrule these repeated holdings of the Supreme Court, but rather expressly limited its holding only to the statutory right of petitioners to file a writ of habeas corpus. Judge Leon further held that separation of powers concerns necessarily limit any role of the Court in reviewing challenges of aliens to their detention as enemy combatants and prevent the judiciary from second-guessing the factual basis of such detention. This conflicting and fundamental difference of rationale and result between two reasoned opinions by Judges of this Court on the same issues, as further explained below, evidence substantial ground for difference of opinion warranting an interlocutory appeal of the Court's January 31, 2005 orders.

As to the issue of whether constitutional rights extend to aliens detained in Guantanamo Bay outside the sovereign territory of the United States, the Court in its January 31, 2005 orders essentially relied not upon a direct holding in *Rasul* regarding the application of constitutional rights to Guantanamo Bay, but upon inferences from the Supreme Court's opinion, including that the Court scrutinized *Eisentrager* extensively without reiterating the holding in that case that constitutional rights are inapplicable outside United States territory. *See* Mem. Op. at 32-34, 35. Judge Leon, however, relied upon a different view of *Rasul*, based upon language in the opinion that expressly limited the Court's holding to the statutory right of petitioners to file habeas petitions and that declined to comment on further proceedings in the district court regarding merits issues. *Khalid*, 2005 WL 100924 at *7-*8. Thus, a substantial ground for a difference of opinion exists as to how *Rasul* should be interpreted.

Substantial ground for difference of opinion also exists with respect to the nature of the process the Court determined petitioners were due. As explained above, Judge Leon indicated that even assuming petitioners possessed constitutional rights, the CSRTs afford petitioners appropriate process as explained in the *Hamdi* plurality opinion. *Id.* at *8 n.16, *13. Aside from that, however, other substantial ground for difference of opinion exists with respect to the Court's determination in its January 31, 2005 orders regarding the process due petitioners. The Court essentially determined that aliens detained as enemy combatants in the context of an ongoing war are entitled to the same process as American citizens. The Court described the *Hamdi* case, which involved a citizen-detainee, as "the core of this Court's consideration of what process is due the Guantanamo detainees," and concluded that there should be no distinction in analysis between "incarceration at the hands of one's own government and incarceration at the

hands of a foreign government." Mem. Op. at 39. Significantly, this issue is also one of first impression in the unique context of these cases. No controlling precedent was cited on the issue, and respondents respectfully submit that there is a sharp distinction between citizen and alien, especially in the context of detention in an ongoing war. For example, aliens such as petitioners are not parties to the social contract between the people and the government reflected in the Constitution; they have not joined the people of the United States, have no duties of allegiance or other correlative obligations entailed in such a relationship, and, therefore, should not have the same constitutional protections enjoyed by citizens. *See* Response to Petitions for Writ of Habeas Corpus and Motion to Dismiss or for Judgment as a Matter of Law and Memorandum in Support (filed Oct. 4, 2004 in coordinated cases) at 21-22.

Indeed, the Supreme Court has often distinguished analyses regarding the constitutional entitlements of aliens versus citizens. *See*, *e.g.*, *United States v. Verdugo-Urquidez*, 494 U.S. 259, 273 (1990) (noting that constitutional protections are not extended to aliens to the same degree as citizens); *Harisiades v. Shaughnessy*, 342 U.S. 580, 584-89 (1952) (rejecting argument that aliens are entitled to same due process rights as citizens, noting that aliens continue to be citizens of and owe allegiance to other countries and are able to call on those countries for assistance); *see also Mathews v. Diaz*, 426 U.S. 67, 78 (1976) ("The fact that all persons, aliens and citizens alike, [within the United States] are protected by the Due Process Clause does not lead to the further conclusion that all aliens are entitled to enjoy all the advantages of citizenship or, indeed, to the conclusion that all aliens must be placed in a single homogeneous legal classification. For a host of constitutional and statutory provisions rest on the premise that a legitimate distinction between citizens and aliens may justify attributes and benefits for one class

not accorded to the other; and the class of aliens is itself a heterogeneous multitude of persons with a wide-ranging variety of ties to this country.") (footnote omitted); *Eisentrager,* 339 U.S. at 769 ("even by the most magnanimous view, our law does not abolish inherent distinctions recognized throughout the civilized world between citizens and aliens"). Such distinct analyses regarding the extent of protections enjoyed by aliens versus citizens would be all the more in order with respect to aliens detained as enemy combatants in the midst of ongoing hostilities. *See Harisiades*, 342 U.S. at 587 (war "is the most usual occasion" for treating aliens and citizens differently); *cf. Ludecke v. Watkins*, 335 U.S. 160 (1948) (approving unreviewable executive power to detain enemy aliens in a time of war).

Similarly, respondents submit that substantial ground for difference of opinion exists with respect to the Court's granting petitioners due process rights equivalent to, and in some respects exceeding, rights accorded criminal defendants. The Court's January 31, 2005 orders contemplate that petitioners, *inter alia*, are entitled, through counsel, to all classified information considered by the CSRTs in assessing a petitioner's enemy combatant status. Substantial arguments exist, however, that such disclosure is not a requirement of due process even in federal criminal cases. In such cases, the mere assertion of relevance does not lead to the automatic disclosure of classified information involved in a case. Rather, the law contemplates a number of intermediary steps, including *ex parte*, *in camera* review as to the materiality of the information, the use of unclassified summaries, and other alternatives, and, in any event, disclosure of classified information cannot be compelled, even to counsel. *See*, *e.g.*, *United States v. Yunis*, 867 F. 2d 617, 623-624 (D.C. Cir. 1989) (citing Classified Information Procedures Act, 18 U.S.C. App. 3). In this same vein, this Circuit has determined that a court should not "plunge

ahead" to decide a constitutional right of access to classified information in the abstract, where alternatives exist so that the question can be avoided, however more difficult those alternative procedures may be. *See Stillman v. CIA*, 319 F.3d 546, 548 (D.C. Cir. 2003). Thus, substantial ground for difference of opinion exists with respect to the disclosure requirement.

Further, the Court's determination that due process prohibits the government's use of statements obtained through mistreatment and determined to be unreliable is grounded in the criminal law; indeed, the Court's discussion of this issue cites exclusively cases involving involuntary confessions procured in connection with criminal proceedings. The *Hamdi* case could be interpreted to distinguish enemy combatant proceedings from criminal proceedings, however. *See* 124 S. Ct. at 2646, 2648 (rejecting that enemy combatant process should "approach the process that accompanies a criminal trial"). In addition, judicial inquiry based upon allegations of mistreatment or torture, with the purpose of addressing whether information was legitimately considered in CSRT proceedings, essentially results in detainees obtaining private, judicial enforcement of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT"), Nov. 20, 1994, Treaty Doc. 100-20, 1465 U.N.T.S. 85, 23 I.L.M. 1027, in the absence of implementing legislation and in the face of Congress's specific declarations that the CAT is not self-executing, that is, not subject to judicial enforcement.[11] Thus, substantial ground for difference of opinion exists with respect to this issue.

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[11] *See* S. Exec. Rep. 101-30, at 31 (1990); 136 Cong. Rec. S17486-01, S17491-92 (Oct. 27, 1990); Declarations and Reservations at http://www.ohchr.org/english/countries/ratification/9.htm#reservations; *see also* Reply Memorandum in Support of Motion to Dismiss or for Judgment as Matter of Law (filed Nov. 16, 2004 in coordinated cases) at 30.

Additionally, there is substantial ground for difference of opinion with respect to the Court's ruling that it will undertake a thorough review of the evidence supporting a detention where the basis of detention is perceived by the Court to be something less than clear, "direct[] support[]" of terrorist activities. Mem. Op. at 61-62, 64. As noted above, Judge Leon rejected challenges by petitioners in his cases to the alleged breadth of the military's detention power, concluding that petitioners' detention should not be overseen by the judiciary merely because of its potentially lengthy duration, *see Khalid*, 2005 WL 100924 at *5 n.10 (concern over duration of detention may require reevaluation by the political branches, not the judiciary). Judge Leon also determined that "the Court's role in reviewing the military's decision to capture and detain a non-resident alien is, and must be, highly circumscribed," and that the Court would "not probe into the factual basis for the petitioners' detention." *Id*. at *12. As stated by Judge Leon, the Constitution allocates exercise of war powers "among Congress and the Executive, not the Judiciary," and such separation of powers concerns necessarily limit any role of the Court in reviewing challenges of non-resident aliens to their detention in the midst of ongoing armed

conflict.[12] *Id.* at *13. The Court has stated its contrary resolution of the issue, but these factors point to substantial ground for difference of opinion on the matter.

Respondents also respectfully submit that a substantial ground for difference of opinion also exists with respect to the Court's conclusion that the Third Geneva Convention is self-executing and that the President cannot determine that the Taliban is not entitled to prisoner-of-war status under the Convention. As noted in respondents' reply brief in support of our motion to dismiss or for judgment, *see* Reply Memorandum in Support of Motion to Dismiss or for Judgment as Matter of Law (filed Nov. 16, 2004 in coordinated cases) at 30-32, 37-40, both the Fourth Circuit and Judges Randolph and Bork of the D.C. Circuit have issued opinions concluding that the Convention is not self-executing. Also, the President's power to make a categorical determination regarding the prisoner-of-war status of the Taliban was treated

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[12] Indeed, we are aware of no case in which a court has undertaken substantive judicial review of whether the military has correctly interpreted the facts in classifying an alien as an enemy combatant. Even in cases involving not mere preventive detention as an enemy combatant, but a more severe deprivation, *i.e.*, a death sentence following conviction by a military commission, the courts have uniformly eschewed such inquiry. *Cf. Ex parte Quirin*, 317 U.S. 1, 25 & n.4 (1942) (refraining, in case reviewing conviction and death sentence by military commission, from considering petitioners' defense that they "had no intention to obey the [sabotage] orders given them by the officer of the German High Command," because "[w]e are not here concerned with any question of the guilt or innocence of petitioners"); *Application of Yamashita*, 327 U.S. 1, 8 (1946) (holding, in context of conviction and death sentence by military commission: "If the military tribunals have lawful authority to hear, decide and condemn, their action is not subject to review merely because they have made a wrong decision on disputed facts. Correction of their errors of decision is not for the courts but for the military authorities which are alone authorized to review their decisions."); *Johnson v. Eisentrager*, 339 U.S. 763, 786 (1950) ("It is not for us to say whether these prisoners were or were not guilty of a war crime, or whether if we were to retry the case we would agree to the findings of fact or the application of the laws of war made by the Military Commission."). It naturally follows that whether the military has made an accurate determination of enemy combatant status for a given petitioner, based on an intensive review of the facts surrounding his circumstances of capture and the best available intelligence, is a decision properly left to the Executive, consistent with Judge Leon's conclusions.

deferentially and accepted by the district court in *United States v. Lindh*, 212 F. Supp. 2d 541, 557-58 (E.D. Va. 2002). *See APCC Services*, 297 F. Supp. 2d at 107 ("substantial ground for dispute . . . exists where a court's challenged decision conflicts with decisions of several other courts").

* * *

For these reasons, the Court's January 31, 2005 orders involve controlling questions of law as to which there is substantial ground for difference of opinion, and an immediate appeal from the orders will materially advance the ultimate termination of this litigation. The issues raised in the orders are serious, implicating the Executive's ability to successfully wage war and, thus, the safety of United States' forces and, ultimately, its citizens, as well as those of our allies. Accordingly, the Court should certify its orders for interlocutory appeal under 28 U.S.C. § 1292(b). *See Long Island Lighting Co. v. Transamerica Delaval, Inc.*, 648 F. Supp. 988, 999 (S.D.N.Y. 1986) (interlocutory appeals appropriate for exceptional cases).

II. THE COURT SHOULD GRANT A STAY OF THE GUANTANAMO BAY DETAINEE CASES PENDING APPELLATE REVIEW

In light of the extraordinary issues presented in these cases that must be resolved on appeal, respondents seek a stay of the pending Guantanamo Bay cases, which all present issues affected directly or indirectly by the Court's January 31, 2005 orders. *See infra* at 27-31 (addressing scope of stay). In deciding whether to grant a stay pending appeal, a court considers: "(1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the court grants the stay; and (4) the public interest in granting the stay." *Cuomo v. United States Nuclear Regulatory Comm'n*, 772 F.2d 972, 974 (D.C. Cir. 1985).

These factors are not prerequisites to be met, but rather considerations to be balanced. Thus, "[a] stay may be granted with either a high probability of success and some injury, or vice versa." *Id.* at 974. As we explain below, a balancing of the applicable factors support a stay pending appeal.

For the reasons discussed in our motion for § 1292(b) certification, including the fact that another Judge of this Court resolved in respondents' favor many of the same issues raised in the Court's January 31, 2005 orders, respondents have demonstrated a likelihood of success on the merits on appeal. And the likelihood of harm to the government and to the public interest, which blend together in the unique circumstances of these cases, overwhelming counsel caution and a stay pending appeal. The Court's January 31, 2005 orders contemplate significant further proceedings in these cases that present grave separation of powers concerns, as well as serious practical burdens on and potential harms to the government.

As an initial matter, failure to stay the Court's order contemplating disclosure of classified information previously withheld from petitioners' counsel in order to protect especially sensitive intelligence sources and methods would irreparably damage the government by denying it the opportunity for appellate review prior to imposition of the harms occasioned by the disclosure. *See Providence Journal Co. v. FBI*, 595 F.2d 889, 890 (1st Cir. 1979) ("Meaningful review entails having the reviewing court take a fresh look at the decision of the trial court before it becomes irrevocable. . . . Once the documents are surrendered pursuant to the lower court's order . . . [t]he status quo could never be restored."); *cf. Church of Scientology v. United States*, 506 U.S. 9, 12-13 (1992) (once documents disclosed pursuant to district court order, invasion of

privacy occasioned by disclosure cannot be remedied). Thus, the order requiring disclosure of the information must be stayed.[13]

Even beyond the issues raised by such specific disclosures, the course the Court has charted in its January 31, 2005 orders is that of undertaking a potentially detailed and protracted evidentiary inquiry regarding each petitioner. Inquiry is contemplated into allegations of mistreatment, as well as resolution of questions of whether any such mistreatment impeaches the reliability of information obtained with respect to a petitioner. The inquiry would amount essentially to serial suppression proceedings *ad infinitum* with respect to every statement from petitioner, another detainee, or other human source that found its way into materials considered by each CSRT. The circumstances of interrogations may be explored; petitioners would no doubt demand that participants and witnesses to the interrogations be called upon to testify. The Court would opine upon interrogations and interrogation techniques implicated in any case before it, to determine which interrogation sessions and techniques were acceptable, producing fruits that may be legitimately used to permit the detention of an individual as an enemy combatant. This inquiry, meanwhile, could very well bear other fruit of its own: a surreptitious enemy who we have reason to believe has no qualms about fabricating allegations of mistreatment to manipulate judicial proceedings could be given unprecedented insights into our interrogation methods, enabling it to enhance its own counter-interrogation methods and techniques. Litigation of such matters also may well incline foreign sources to decline further

[13] Such a stay is warranted regardless of whether the Court stays other proceedings in these cases.

cooperation with the United States, to this country's severe detriment. *See CIA v. Sims*, 471 U.S. 159, 175-77 (1985).

The orders also contemplate the second-guessing of conclusions of the military as to the level of activity or association with potential terrorism and other combatant activities that warrants detention of an individual so as to effectively subdue and incapacitate the enemy. The government presumably could be required to supplement the extensive CSRT proceedings in order to justify the appropriateness of a particular detention to the satisfaction of members of the Judiciary experienced in their field, but lacking the institutional competence and accountability to make such military judgments at the core of the war-making powers. And such proceedings would be undertaken in cases of potentially scores of petitioners, and potentially hundreds more in the not-so-distant future. The practical burdens imposed upon the military in such an undertaking would be staggering.

Furthermore, in the contemplated proceedings the Court would be injecting itself deeply into core military matters, including into methods of obtaining and using information about the enemy and into judgments about what is required to successfully disable and defeat the enemy, both of which are inescapable aspects of the exercise of war powers, functions committed by the Constitution to the political branches. *See Hamdi*, 124 S. Ct. at 2647 (the "Constitution recognizes that core strategic matters of warmaking belong in the hands of those who are best positioned and most politically accountable for making them"); *see also Eisentrager*, 339 U.S. at 779 (noting that litigation by enemy combatants over the propriety of their detention could result in "a conflict between judicial and military opinion highly comforting to the enemies of the United States"). The judicial role envisioned, thus, implicates the safety of the Nation's troops

and citizens, and those of coalition partners; it potentially damages the Executive's ability to obtain cooperation and information from other nations; and it ultimately impairs the military's ability to wage war successfully.

A stay to address these separation of powers concerns, as well as the practical burdens, is appropriate. *See Landis v. North American Co.*, 299 U.S. 248, 256 (1936) (noting propriety of stay in cases "of extraordinary public moment"). Indeed, the Supreme Court has recently noted the propriety of the even more drastic step of issuing writs of mandamus in order to prevent interference with the ability of a co-equal branch of government to discharge its constitutional responsibilities. *See Cheney v. United States District Court*, 124 S. Ct. 2576, 2586-88 (2004).

Finally, any potential for harm to petitioners, that is, continued detention during appellate proceedings, would not outweigh the need for stay. For one thing, though subject to continued detention as enemy combatants, each petitioner (not subject to charge for potential violations of the law of war) is or will be receiving a hearing in the coming months to assess whether he should be released, transferred, or continue to be detained in spite of his enemy combatant status. Consistent with the nature of the determination and other factors, such Administrative Review Board procedures will permit each enemy combatant to explain why he believes he is no longer a threat to the United States and its allies in the ongoing armed conflict against al Qaeda and its affiliates and supporters or why his release would otherwise be appropriate. The process will also involve permitting petitioner's counsel and, where not inconsistent with national security interests, a petitioner's home country and relatives, to submit information to the Board. *See* Response to Petitions for Writ of Habeas Corpus and Motion to Dismiss or for Judgment as a Matter of Law and Memorandum in Support (filed Oct. 4, 2004 in coordinated cases) at 17-18 &

n.20. Furthermore, appellate proceedings can be expedited to hasten resolution of the issues raised by the January 31, 2005 orders, as the D.C. Circuit's expedition of the appellate proceedings in *Hamdan* makes clear. Indeed, the government intends to seek such expedition of any appeal in these cases.

At bottom, the extensive harms to the government and the public interest involved in further proceedings envisioned by the Court in these cases, and the likelihood of respondents' success on the merits of appeal, especially in light of Judge Leon's decision, strongly warrant a stay pending appeal.

Yet another significant factor also supports entry of a stay in these cases, namely, that certain of the issues decided in the Court's January 31, 2005 orders are, or shortly will be, before the D.C. Circuit in other cases. The issue of whether, as the Court held, the Third Geneva Convention gives rise to individual rights enforceable in Court is currently before the D.C. Circuit in *Hamdan*. Further, it is the understanding of respondents' counsel that petitioners in the *Khalid* and *Boumediene* cases dismissed by Judge Leon intend to appeal Judge Leon's decision. Thus, a number of the issues addressed in this Court's January 31, 2005 orders should soon be before the D.C. Circuit. Of course, decisions from the D.C. Circuit through these appeals, and the interlocutory appeal for which respondents seek certification in these cases, will provide guidance regarding how these cases should proceed, if at all. Any proceedings in these case that came before the D.C. Circuit's rulings in the appeals would need to be reevaluated in light of the D.C. Circuit's decisions. In the interests of the efficient and appropriate use of judicial and party resources, further proceedings in these cases, therefore, should await the guidance resulting from

the appeals.[14] *See Landis*, 299 U.S. at 254-55 (1936) ("The power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants.").

Scope of the Requested Stay. For the reasons stated above, the Court should stay these cases pending appeal of the Court's January 31, 2005 orders (and resolution of the related appeals). The Court should, of course, stay the cases in which the orders were entered, *i.e.*, *Hicks*, No. 02-CV-0299; *Al Odah*, No. 02-CV-0828; *Habib*, No. 02-CV-1130; *Kurnaz*, No. 04-CV-1135; *O.K.*, No. 04-CV-1136; *Begg*, No. 04-CV-1137; *El-Banna*, No. 04-CV-1144; *Gherebi*, No. 04-CV-1164; *Anam*, No. 04-CV-1194; *Almurbati*, No. 04-CV-1227; and *Abdah v. Bush*, No. 04-CV-1254. With respect to *Begg*, *Habib*, *Al Odah*, and *El-Banna*, however, respondents do not seek a complete stay. Rather, all of the petitioners in *Begg* and *Habib*, one petitioner in *Al Odah*, and one petitioner in *El-Banna* have been transferred from the custody of the United States to other countries, and respondents have filed motions in each of the cases seeking dismissal of these petitioners' claims as moot. The Court should permit any briefing and ruling on those motions to dismiss to go forward given that those petitioners' claims no longer present live controversies.

Furthermore, although the Court noted that its January 31, 2005 decision on respondents' motion to dismiss or for judgment "technically applies only to the eleven cases contained in the

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[14] The Court previously entered stays in *Al-Qosi*, No. 04-CV-1937, and, in part, in *Hicks*, No. 02-CV-0299, pending a decision in the *Hamdan* appeal given that *Hamdan* involves the same issues as those cases regarding the trial of petitioners by military commission. *See* Order of Dec. 15, 2004 in *Hicks*; Order of Dec. 17, 2004 in *Al-Qosi*. The Court likewise should stay proceedings in the cases before it pending further guidance from the D.C. Circuit in *Hamdan*, *Khalid*, and *Boumediene.*

[opinion's] caption," the Court nevertheless acknowledged that the opinion "addresses issues common" to the eight most recently filed Guantanamo Bay detainee cases that did not participate in the briefing and oral argument that resulted in the Court's opinion. Mem. Op. at 15. Because these eight cases raise legal issues similar to those addressed by the Court's January 31, 2005 orders, and because appellate review of the Court's decisions on these issues will directly affect the outcome of the eight cases, respondents request that proceedings in those cases be stayed as explained below pending the resolution of all appeals.

All of the eight cases in which the Court's orders were not entered, similar to the eleven cases in which the orders were entered, are petitions for habeas corpus filed on behalf of foreign nationals detained as enemy combatants in connection with hostilities involving al Qaeda, the Taliban, and their supporters, and held at Guantanamo Bay.[15] *See Belmar v. Bush*, No. 04-CV-1897 (RMC); *Al-Qosi v. Bush*, No. 04-CV-1937 (PLF); *Paracha v. Bush*, No. 04-CV-2022 (PLF); *Al-Marri v. Bush*, No. 04-CV-2035 (GK); *Zemiri v. Bush*, No. 04-CV-2046 (CKK); *Deghayes v. Bush*, No. 04-CV-2215 (RMC); *Mustapha v. Bush*, No. 05-CV-22 (JR); *Abdullah v. Bush*, No. 05-CV-23 (RWR). Several of the cases are in a similar procedural posture as those in which the Court's orders were entered, namely, respondents have filed responses to the petitions (including factual returns), and motions to dismiss based on the legal issues that were addressed in the Court's January 31, 2005 opinion. *See Belmar*, *Paracha*, *Al-Marri*, *Zemiri*. In one of these cases, the sole petitioner-detainee was transferred from the custody of the United States to

[15] Pursuant to the August 17, 2004 Order by the Calendar and Case Management Committee and the September 14, 2004 Resolution of the Executive Session of the United States District Court for the District of Columbia, most of these cases have already been transferred to Judge Green for coordination and management. *Al-Qosi*, which is already stayed, and one of the most recently filed cases, *Mustapha*, have not been transferred.

the United Kingdom, and respondents have filed a motion to dismiss his petition as moot. *See Belmar*.[16] In the most recently-filed cases, no scheduling order has been entered. *See Deghayes*, *Mustapha*, *Abdullah*. Another case, which also challenges the legality of military commission procedures, is presently stayed pending appeal of the *Hamdan* case. *See Al-Qosi*. Regardless of their immediate procedural posture, the petitions in all of the eight cases raise legal issues that were squarely addressed by the Court's opinion: (1) whether the petitioners have stated valid claims under the Fifth Amendment to the United States Constitution and, if so, whether the procedures implemented by respondents violate their Fifth Amendment rights;[17] (2) whether the petitioners have stated valid claims under the Third Geneva Convention;[18] and (3) whether the petitioners have stated valid claims based on various other legal theories, including other Constitutional provisions, other international treaties, Army Regulation 190-8, the Alien Tort Statute, the Administrative Procedure Act, and customary international law.[19] Moreover, respondents' intended appeal of the Court's January 31, 2005 Access Order requiring disclosure

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[16] Accordingly, as with the *Begg* and *Habib* cases, *see supra* at 27, respondents seek a stay in *Belmar* except with respect to briefing and resolution of respondents' motion to dismiss the case as moot.

[17] *See Belmar* Petition ¶¶ 39-42; *Al-Qosi* Petition ¶¶ 207-11; *Paracha* First Amended Petition ¶¶ 13-14; *Al-Marri* Petition ¶¶ 32-36; *Zemiri* Petition ¶¶ 39-45; *Deghayes* Petition ¶¶ 77-80; *Mustapha* Petition ¶¶ 36-42; *Abdullah* First Amended Petition ¶¶ 34-40.

[18] *See Belmar* Petition ¶¶ 47-48; *Al-Qosi* Petition ¶¶ 212-14; *Paracha* First Amended Petition ¶¶ 17-18; *Al-Marri* Petition ¶¶ 43-46; *Zemiri* Petition ¶¶ 46-50; *Deghayes* Petition ¶¶ 85-86; *Mustapha* Petition ¶¶ 43-47; *Abdullah* First Amended Petition ¶¶ 41-45.

[19] *See Belmar* Petition ¶¶ 43-52; *Al-Qosi* Petition ¶¶ 194-206, 215-24; *Paracha* First Amended Petition ¶¶ 15-25; *Al-Marri* Petition ¶¶ 28-31, 37-42, 47-50; *Zemiri* Petition ¶¶ 51-91; *Deghayes* Petition ¶¶ 81-90; *Mustapha* Petition ¶¶ 48-88; *Abdullah* First Amended Petition ¶¶ 46-89.

of all classified information contained in the factual returns to counsel for petitioners also has direct consequences on these eight cases, since factual returns have already been filed for some petitioners, and will be filed for other petitioners if the cases proceed.

As the Court recognized, the issues presented by the eight Guantanamo Bay detainee cases in which the Court's January 31, 2005 orders were not entered are common to those raised in the eleven cases in which the orders were entered, and the issues were squarely addressed by the Court. Thus, these eight cases should be stayed pending the resolution of all appeals of the Court's decisions. Such a course of action is within the power of the Court, and will contribute to judicial efficiency and the preservation of litigation resources. *See Landis*, 299 U.S. at 254-55 ("The power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants."). And the need for and propriety of such a stay is all the more clear given that petitioners in *Abdullah* have recently filed a motion requesting, *inter alia*, that the Court apply its January 31, 2005 decision to that case and have joined in a motion for leave to take discovery in certain of the other pending cases. *See Abdullah*, docket entries nos. 5, 7.

(With respect to several of the eight cases, limited exceptions to a complete stay would be appropriate. In *Belmar* briefing and resolution of respondents' motion to dismiss the case as moot should proceed given petitioner's transfer from United States custody. And in *Deghayes*, *Mustapha*, and *Abdullah*, respondents do not object to entry of the Court's November 8, 2005 Amended Protective Order and Procedures for Counsel Access To Detainees at the United States Naval Base In Guantanamo Bay, Cuba, in the cases and the filing of factual returns within a reasonable time thereafter. This would permit counsel in those cases, pending appeals, the

opportunity to visit their petitioners at Guantanamo Bay upon compliance with the Protective Order, and would provide counsel factual bases for petitioners' detention.[20])

CONCLUSION

For these reasons, the Court should certify its January 31, 2005 orders for interlocutory appeal and stay proceedings in the above-captioned cases as requested.

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[20] With respect to petitioner Abdullah in the *Abdullah* case, respondents have no record indicating that petitioner is a detainee. Counsel for respondents have asked counsel for petitioner for additional information that may assist in identifying petitioner. In the absence of such information and identification, it would be impossible for the government to submit a factual return for petitioner Abdullah.

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