

United States Court of Appeals

for the

District of Columbia Circuit

No. 04-5393

SALIM AHMED HAMDAN,

Appellee,

v.

DONALD H. RUMSFELD, United States Secretary of Defense;
JOHN D. ALTENBURG, Appointing Authority for Military
Commissions, Department of Defense; THOMAS L. HEMINGWAY,
Brigadier General, Legal Advisor to the Appointing Authority for
Military Commissions; JAY HOOD, Brigadier General Commander
Joint Task Force, Guantanamo, Camp Echo, Guantanamo Bay, Cuba;
GEORGE W. BUSH, President of the United States,

Appellants.

*Appeal from the United States District Court for the District of Columbia
in Case No. 04cv01519 James Robertson, United States District Judge*

**BRIEF OF AMICI CURIAE HUMAN RIGHTS FIRST, PHYSICIANS FOR
HUMAN RIGHTS, ET AL. IN SUPPORT OF PETITIONER-APPELLEE**

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DECEMBER 29, 2004

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici

1. *Amici* are individuals and organizations with expertise in the practice of prolonged detention and its effects on physical and psychological health.
2. All parties and *Amici* appearing before the District Court are listed in the Brief for the Appellants.

B. Rulings Under Review.

This appeal is from the district court's order in *Hamdan v. Rumsfeld, et al.*, No. 04-CV-1519, 2004 U.S. Dist. LEXIS 22724 (D.D.C. Nov. 8, 2004) (Robertson, J.). The notice of appeal was filed on November 12, 2004.

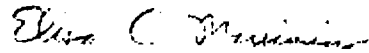
C. Related Cases

There are several related cases brought by detainees at the Guantanamo Naval Base pending in the district court in this Circuit:

1. *Hicks (Rasul) v Bush*, S.Ct.; D.C. Cir. No. 02-5284; No. 02-CV-0299 (D.D.C.) (J. Kollar-Kotelly)

2. *Al-Odah v. United States*, No. 02-CV-0828 (D.D.C.) (J. Kollar-Kotelly)
3. *Habib v. Bush*, No. 02-CV-1130 (D.D.C.) (J. Kollar-Kotelly)
4. *Kurnaz v. Bush*, No. 04-CV-1135 (D.D.C.) (J. Huvelle)
5. *O.K. v. Bush*, No. 04-CV-1136 (D.D.C.) (J. Bates)
6. *Begg v. Bush*, No. 04-CV-1137 (D.D.C.) (J. Collyer)
7. *Khalid (Benchellali) v. Bush*, No. 04-CV-1142 (D.D.C.) (J. Leon)
8. *El-Banna v. Bush*, No. 04-CV-1144 (D.D.C.) (J. Roberts)
9. *Gherebi v. Bush*, No. 04-CV-1164 (D.D.C.) (J. Walton)
10. *Boumediene v. Bush*, No. 04-CV-1166 (D.D.C.) (J. Leon)
11. *Anam v. Bush*, No. 04-CV-1194 (D.D.C.) (J. Kennedy)
12. *Almurbati v. Bush*, No. 04-CV-1227 (D.D.C.) (J. Walton)
13. *Abdah v. Bush*, No. 04-CV-1254 (D.D.C.) (J. Kennedy)
14. *Belmar v. Bush*, No. 04-CV-1997 (D.D.C.) (J. Collyer)
15. *Al-Qosi v. Bush*, No. 04-CV-1937 (D.D.C.) (J. Friedman)
16. *Jarallah Al-Marri v. Bush* (recently or shortly filed to be filed in the federal district court of the District of Columbia)
17. *Al-Marri v. Bush*, No. 04-CV-2035-GK (D.D.C.) (J. Kessler)
18. *Paracha v. Bush*, No. 04-CV-2022-PLF (D.D.C.) (J. Friedman)
19. *Zemiri v. Bush*, No. 04-CV-2046-CKK (D.D.C.) (J. Kollar-Kotelly)

Counsel is not aware at this time of any other related cases within the meaning of D.C. Cir. Rule 28(a)(1)(C).



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Patricia B. Sutker, et al., <i>Cognitive Deficits and Psychopathology Among Former Prisoners of War and Combat Veterans of the Korean Conflict</i> , 148(1) <i>Am. J. Psych.</i> 67 (1991).....	16
Philip E. Kubzansky, <i>The Effects of Reduced Environmental Stimulation on Human Behavior: A Review</i> , in <i>The Manipulation of Human Behavior</i> (A.D. Biderman and H. Zimmer, eds. 1961).....	13
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Stuart Grassian, *Psychopathological Effects of Solitary Confinement*,
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Stuart Grassian & Nancy Friedman, *Effects of Sensory Deprivation in
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and Psychiatry 49 (1986) 12

Miscellaneous

Central Intelligence Agency, Human Resources Exploitation Training
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<http://www2.gwu.edu/~nsarchiv/NSAEBB/NSAEBB122/index.htm> 14

Central Intelligence Agency, KUBARK Counterintelligence
Interrogation, July 1963, *available at*
<http://www2.gwu.edu/~nsarchiv/NSAEBB/NSAEBB122/index.htm> 14

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International Committee of the Red Cross, *Guantanamo Bay:
Overview of the ICRC's Work for Internees* (Jan. 30, 2004),
available at
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[ORAL ARGUMENT SCHEDULED FOR MARCH 8, 2004]

**IN THE UNITED STATES COURT OF APPEALS
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No. 04-5393

**SALIM AHMED HAMDAN,
Petitioner-Appellee,**

v.

**DONALD H. RUMSFELD, U.S. SECRETARY OF DEFENSE, ET AL.,
Respondent-Appellants.**

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

**BRIEF OF AMICI CURIAE HUMAN RIGHTS FIRST, PHYSICIANS FOR
HUMAN RIGHTS, ET AL. IN SUPPORT OF PETITIONER-APPELLEE**

STATEMENTS OF INTEREST OF AMICI CURIAE¹

Amici are individuals and organizations with expertise in monitoring the practice of prolonged detention and its effects on physical and psychological health.

¹ Pursuant to Fed. R. App. Proc. 29 and Circuit Rule 29(b) of the U.S. Court of Appeals for the District of Columbia, Amici state that the parties in this case have consented to the filing of this brief, and that this brief is filed within 60 days of the docketing of this case in the Court.

Since 1978, Human Rights First, formerly the Lawyers Committee for Human Rights, has worked in the United States and abroad to create a secure and humane world by advancing justice, human dignity and respect for the rule of law. Human Rights First (HRF) works to support human rights activists who fight for basic freedoms and peaceful change at the local level; ensure that domestic legal systems incorporate international human rights protections; and help build a strong international system of justice and accountability for the worst human rights crimes. Since 2002, HRF has consulted with the Pentagon in the formulation of military commission rules and procedures, has been one of a handful of international organizations invited to observe military commission proceedings at Guantanamo Bay, and has been working closely with interested parties there to promote compliance with fair trial procedures under U.S. and international law.

Physicians for Human Rights (PHR) has worked as a non-profit organization since 1986 to investigate and expose violations of human rights worldwide using medical and scientific methods. PHR's work includes efforts to stop torture, disappearances, and political killings by governments and opposition groups; to improve health and sanitary conditions in prisons and detention centers; to investigate the physical and psychological consequences of violations of humanitarian law in internal and international conflicts; to defend medical neutrality and the right of civilians and combatants to receive medical care during

times of war; to protect health professionals who are victims of violations of human rights; and to prevent medical complicity in torture and other abuses. In 1997, PHR shared in the Nobel Prize for Peace as part of the Steering Committee of the International Campaign to Ban Landmines.

Founded in 1990 by a group of volunteer physicians, Doctors of the World-USA is an international health and human rights organization working where health is diminished or endangered by violations of human rights and civil liberties. Doctors of the World mobilizes the health sector to provide essential care and services while training community residents to carry on the mission of health and to promote basic human rights in the United States and abroad. Since 1993, Doctors of the World has provided medical and psychological support to torture victims. In 2002, Doctors of the World provided evaluation services to more than 350 survivors of torture and other human rights violations in the United States.

Advocates for Survivors of Torture and Trauma (ASTT) has been treating survivors of torture and severe trauma since 1994 – work for which it has become widely recognized. ASTT has developed an extensive network of partnerships among organizations and professionals who serve torture survivors, and has been instrumental in assisting clients to cope with the consequences of having been tortured and, in many cases, to obtain political asylum in the United States. ASTT

has also been involved in training others to treat torture survivors, both in the United States and Guatemala.

The Boston Center for Refugee Health and Human Rights (the Center) was established in 1998 to provide medical and psychological assistance to anyone who had been subjected to torture and related trauma. The Center's work includes providing comprehensive health care for refugees and survivors of torture, educating and training agencies and professionals who serve these communities, conducting clinical, epidemiological, and legal research, and advocating for the promotion of health and human rights.

Global Lawyers and Physicians (GLP), founded in 1996, is a non-profit non-governmental organization that focuses on health and human rights issues. GLP was formed to reinvigorate the collaboration of the legal and medical/public health professions to protect the human rights and dignity of all persons. GLP works at the local, national, and international levels on issues with a focus on health and human rights, patient rights, and human experimentation.

Rocky Mountain Survivors Center (RMSC), located in Denver, Colorado, assists survivors of torture and war, and their families, to create a new future. Since 1996, the center has achieved this by providing mental health counseling, and by coordinating access to health care, legal and social support services. RMSC

also provides training to personnel from mainstream and expatriate community organizations that assist refugees and immigrants.

The Torture Abolition and Survivors Support Coalition International (TASSC) is the only organization founded by and for survivors. It was established on the guiding principles that torture is a crime against humanity and that survivors are among the strongest and most effective voices in the campaign to end the practice of torture. The mission of TASSC is to end the practice of torture wherever it occurs. TASSC operates independently of any political ideology, government, or economic interest. TASSC was founded in 1998 and is a non-profit organization.

Dr. Allen S. Keller is a recognized expert in the evaluation and treatment of victims of torture and other human rights abuses. He is Assistant Professor of Medicine at New York University School of Medicine and Society Master for the May Chinn Society for Bioethics and Human Rights, NYU School of Medicine Master Scholars Program. He is the founder and Director of the Bellevue/NYU Program for Survivors of Torture, which provides comprehensive, medical, mental health and social services to refugees and asylum seekers who have suffered from torture and other human rights abuses. Since the program began in 1995, more than 1,300 men, women and children from more than 70 countries have received care. The Program has established an international reputation for excellence in its

clinical, educational and research activities. In 2003, Dr. Keller received the Barbara Chester Award from the Hopi Foundation in recognition of his outstanding work for torture victims. Recently, Dr. Keller completed a study examining the health impact of prolonged detention of asylum seekers in the United States.

SUMMARY OF THE ARGUMENT

As individuals and organizations with expertise in the practice and health effects of prolonged detention, Amici believe there are compelling reasons for rejecting Respondent-Appellants' ("Appellants'") request that this Court abstain from deciding this case at this time. Petitioner-Appellee Salim Ahmed Hamdan ("Mr. Hamdan") has now been held for three years by U.S. forces – more than two years before being charged with any offense, and almost another full year in solitary confinement. Whatever the legal consequences of such indefinite detention and prolonged solitary confinement, its physical and psychological toll is profound. Especially where, as here, Mr. Hamdan has raised a substantial question regarding the legality of the military commissions as constituted, and the conditions of his confinement are so onerous, federal abstention is inequitable and inappropriate.

The U.S. Supreme Court, along with our allies abroad and practitioners in detention and psychiatric care, has long recognized the devastating mental and physical health effects of indefinite detention and prolonged isolation. Indeed,

experience in both criminal punishment and wartime internment over the past two centuries has shown that prolonged solitary confinement can produce confusion, paranoia, and hallucinations, as well as severe agitation and impulsive violence (including suicide) – effects that can be long term. Uncertainty while awaiting punishment, and the mental anxiety that accompanies an indeterminate fate, can be similarly destructive. It was for precisely this reason – the effectiveness of indefinite detention and solitary confinement in provoking anxiety and psychiatric instability – that the CIA included them among its principal techniques of coercion in now repudiated manuals on interrogation dating from the 1960’s. And it has been for the same reasons that courts have found certain such conditions of confinement to violate the Eighth Amendment prohibition against cruel and unusual punishment.

In this case, the risks to Mr. Hamdan are especially acute. Since his capture in Afghanistan in late 2001, Mr. Hamdan alleges that he has been subject to beatings by U.S. forces, made to sit motionless for days, dressed inadequately in subfreezing temperatures, and threatened with death, torture, and imprisonment. From December 2003 until late October 2004, just days before the district court heard oral arguments in this case, Mr. Hamdan was held in solitary confinement at the U.S. Naval Base at Guantanamo Bay (“Guantanamo”) in an eight-by-five foot steel detention cell, denied contact with other detainees, and permitted only very

limited access to a translator. He was initially denied outdoor exercise during daylight and denied medical treatment despite his repeated requests. Mr. Hamdan's appointed military lawyer, Lt. Cmdr. Charles Swift, described his client during that time as suffering "uncontrollable weeping at inappropriate times, undirected anger, and unresponsiveness," and as expressing a desire to kill himself. During his period of solitary confinement, Mr. Hamdan lost on the order of 50 pounds.

While Appellants effected Mr. Hamdan's return to the general Guantanamo prison population shortly before the U.S. federal district court heard oral arguments in his case, the damage Mr. Hamdan has already suffered, the continued uncertainty of his fate (which may include a death sentence or life imprisonment), and the real risk of torture or other forms of abuse at Guantanamo make it essential that this Court act promptly to resolve the legal questions presented in his case.

ARGUMENT

I. FEDERAL ABSTENTION IS INAPPROPRIATE WHERE FURTHER DELAY WOULD CAUSE IRREPARABLE HARM

In rejecting Appellants' argument that federal abstention is required in this case pending the completion of all military proceedings, the district court concluded that "[n]one of the policy factors identified by the Supreme Court as supporting"

abstention in such a context is applicable in Mr. Hamdan's case. *Hamdan v. Rumsfeld*, No. 04-1519, 2004 U.S. Dist. LEXIS 22724, at *10 (D.D.C. Nov. 8, 2004) (quoting *New v. Cohen*, 129 F.3d 639, 643 (D.C. Cir. 1991)). Indeed, critical policy factors animating a federal court's decision to abstain from judgment pending collateral proceedings – fundamentally a question of “principles governing equitable relief,” *Schlesinger v. Councilman*, 420 U.S. 738, 754 (1975) – make abstention inappropriate in this case.

As the federal courts have recognized in multiple contexts, the risk of ongoing harm or imminent injury to a party may be grounds for rejecting a motion for abstention. *Councilman* itself recognized that abstention may be inappropriate where “the harm sought to be averted is ‘both great and immediate.’” *Councilman*, 420 U.S. at 756 (quoting *Fenner v. Boykin*, 271 U.S. 240, 243 (1926)); *see also* *Younger v. Harris*, 401 U.S. 37, 45 (1971) (asserting that federal courts could grant injunction to stay state criminal proceedings in “circumstances, where the danger of irreparable loss is both great and immediate.”); *Ohio Civil Rights Comm’n v. Dayton Christian Sch.*, 477 U.S. 619, 620 (1986) (allowing for federal review in pending administrative state actions if there is great and immediate irreparable injury); *cf. Lawrence v. McCarthy*, 344 F.3d 467, 472 (5th Cir. 2003) (noting that equitable federal jurisdiction can be asserted in a court martial if plaintiff will suffer irreparable harm).

Here, in stark contrast to Councilman’s claim of harm from an unjust deprivation of liberty (which was found to be “a matter entirely of conjecture” at the pretrial stage), Mr. Hamdan’s extraordinary conditions of detention mean that he has faced and continues to face harms of constitutional magnitude (discussed in detail, *see infra* Part III) that are not remotely conjectural, and are far beyond those incident to a normal criminal proceeding. *See, e.g., United States v. Dreyer*, 533 F.2d 112, 116 (3d Cir. 1976) (dismissing indictment and finding Sixth Amendment violation due to prejudice where 29-month trial delay caused defendant “feelings of helplessness, anxiety, depression and isolation” and suicide attempt); *Jones El v. Berge*, 164 F. Supp. 2d 1096 (W.D. Wis. 2001) (preliminary injunction to address conditions of confinement that “deprive prisoners of the ‘minimal civilized measure of life’s necessities’”); *Ruiz v. Johnson*, 37 F. Supp. 2d 855 (S.D. Tex. 1999) (daily psychological harm suffered through total deprivation from human contact and mental stimulus is cruel and unusual punishment), *rev’d on other grounds*, 243 F.3d 941 (5th Cir. 2001), *adhered to on remand*, 154 F.Supp.2d 975 (S.D. Tex. 2001); *Madrid v. Gomez*, 889 F. Supp. 1146, 1265 (N.D. Cal. 1995) (lack of social contact, isolated location, lengthy and indefinite sentences of inmates at Pelican Bay prison violates Eighth Amendment rights of inmates who are mentally ill or have borderline personality disorders) (“If the particular conditions of [confinement] being challenged are such that they inflict a serious

mental illness, greatly exacerbate mental illness, or deprive inmates of their sanity, then defendants have deprived inmates of a basic necessity of human existence – indeed, they have crossed into the realm of psychological torture.”). Under the circumstances, abstention would be imprudent and inequitable.

In all events, where delay may increase the risk of presenting a question of constitutional import, this Court should act expeditiously to minimize the risk of error. *Cf. Lackey v. Texas*, 514 U.S. 1045 (1995) (Stevens, J., respecting denial of certiorari) (imposing punishment following prolonged detention as a result of delays in the resolution of the case may amount to cruel and unusual punishment in violation of the U.S. Constitution); *Foster v. Florida, et al.*, 537 U.S. 990, 990 (2002) (Breyer, J., dissenting from denial of certiorari) (“[T]he combination of uncertainty of execution and long delay is arguably ‘cruel.’”).²

II. PROFOUNDLY NEGATIVE PHYSICAL AND PSYCHOLOGICAL HARMS ACCOMPANY PROLONGED ISOLATION AND INDEFINITE DETENTION

The profound mental and physical health effects of prolonged isolation and indefinite detention are well documented and long understood. U.S. experience

² Our allies share this interest in avoiding prolonged delay in resolution of a case. See *Foster v. Florida, et al.*, 537 U.S. 990 (2002) (Breyer, J., dissenting from denial of certiorari) (citing *United States v. Burns*, [2001] 1 S.C.R. 283, 353 (Can.); *Pratt v. Att’y Gen.*, [1994] 2 A.C. 1, 4 (P.C. 1993); *Soering v. United Kingdom*, 11 Eur. Ct. H.R. (ser. A) at 439, 478 (1989)); see also *S v. Makwanyane*, 1995 (6) BCLR 665 (SA) (two years in prison awaiting death sentence is “intolerable situation” making it “essential that it be resolved one way or another without further delay”).

with prolonged incarceration in general, and solitary confinement in particular, grew from late eighteenth century efforts to rehabilitate ‘social deviants’ of the age. Larry E. Sullivan, *The Prison Reform Movement* 5-9, 12-13 (1990). The so-called “Philadelphia System,” which relied on “the complete isolation of the prisoner from all human society,” produced incidences of psychiatric disturbance that were so severe and widespread that “its main feature of solitary confinement was found to be too severe.” *In re Medley*, 134 U.S. 160, 168 (1890); *see also* Sullivan, *supra*, at 12-13.

Research by late nineteenth and early twentieth-century clinicians revealed that prisoners held under such circumstances suffered from anxiety, confusion, paranoia, and hallucinations, as well as from severe agitation and aimless violence. *See* Stuart Grassian & Nancy Friedman, *Effects of Sensory Deprivation in Psychiatric Seclusion and Solitary Confinement*, 8 Int’l J. of Law and Psychiatry 49, 53-56 (1986) (noting clinicians’ “thousands of descriptions of psychosis associated with solitary confinement” and identifying the significance of the perceived or anticipated goal of confinement in affecting a prisoner’s mental state); *see also* Stuart Grassian, *Psychopathological Effects of Solitary Confinement*, 140 Am. J. of Psychiatry 1450, 1450-51 (1983).

The U.S. Supreme Court recognized as much in holding that a statutory solitary confinement provision adopted during this era after a defendant committed the charged crime constituted additional punishment for *ex post facto* purposes:

A considerable number of the prisoners fell, after even a short confinement, into a semi-fatuous condition, from which it was next to impossible to arouse them, and others became violently insane; others still, committed suicide; while those who stood the ordeal better were not generally reformed, and in most cases did not recover sufficient mental activity to be of any subsequent service to the community.

In re Medley, 134 U.S. at 168.

While prolonged use of solitary confinement was thus largely abandoned in the United States by the turn of the twentieth century, Grassian, *supra*, at 1450, a new set of psychiatric studies emerged in the 1950's and 1960's finding similar effects from the detention of political prisoners in the former Soviet Union and in China, and of American prisoners held during the Korean War. *See, e.g.*, Philip E. Kubzansky, *The Effects of Reduced Environmental Stimulation on Human Behavior: A Review*, in *The Manipulation of Human Behavior* 51 (A.D. Biderman and H. Zimmer, eds. 1961); Christopher Burney, *Solitary Confinement* (1952) (describing the author's eighteen months in Fresnes, in occupied France, during World War II). It is precisely for this reason – the effectiveness of indefinite detention and solitary confinement in provoking anxiety and psychiatric instability

– that the CIA included them among its principal techniques of coercive interrogation in its 1962 and 1983 manuals on counterintelligence interrogation.³

Contemporary research confirms the harmful consequences of detention environments that physically segregate inmates from the larger detainee population, require detainees to eat all meals alone, restrict access to the outside to one hour a day, and allow for no face to face visits with family members. *See, e.g.,* Craig Haney, *Mental Health Issues in Long-Term Solitary and ‘Supermax’ Confinement*, 49 (1) *Crime & Delinq.* 124, 130-32 (2003) (reviewing studies). Effects again range from depression and anxiety, to difficulties in concentration and memory, to hypersensitivity to external stimuli, hallucinations and perceptual distortions, paranoia, and problems with impulse control. *Id.*; *see also* Davenport

³ *See, e.g.,* Central Intelligence Agency, KUBARK Counterintelligence Interrogation, July 1963, at 90

An early effect of [solitary confinement] is anxiety.... The interrogator can benefit from the subject’s anxiety. As the interrogator becomes linked in the subject’s mind with the reward of lessened anxiety, human contact, and meaningful activity, and thus with providing relief for growing discomfort, the questioner assumes a benevolent role.... The result, normally, is a strengthening of the subject’s tendencies toward compliance.

available at <http://www2.gwu.edu/~nsarchiv/NSAEBB/NSAEBB122/index.htm> (accessed Dec. 22, 2004); *see also* Central Intelligence Agency, Human Resources Exploitation Training Manual, 1983, at § K-1, *available at* <http://www2.gwu.edu/~nsarchiv/NSAEBB/NSAEBB122/index.htm> (accessed Dec. 22, 2004).

v. DeRobertis, 844 F.2d 1310, 1316 (7th Cir. 1988) (reviewing court decisions finding less than five hours a week of outside exercise to violate the Eighth Amendment); *Perri v. Coughlin*, No. 90-1160, 1999 U.S. Dist LEXIS 20320, at *7 (N.D.N.Y. June 11, 1999) (describing the psychological effects of solitary confinement on plaintiff to include refusal to eat solid foods, injuries to self, and depression); Decl. of Daryl Matthews, M.D., Ph.D., *Swift v. Rumsfeld*, No. 04 Civ. 0777L (W.D. Wash. Mar. 31, 2004), ¶¶ 13-16. Indeed, a literature review of studies documenting the psychological effects of solitary confinement concluded that “there is not a single published study of solitary or supermax-like confinement in which nonvoluntary confinement lasting for longer than 10 days, where participants were unable to terminate their isolation at will that failed to result in negative psychological effects.”⁴

⁴ Craig Haney, *Mental Health Issues in Long-Term Solitary and ‘Supermax’ Confinement*, 49 (1) *Crime & Delinq.* 124, 130-32 (2003) (reviewing empirical studies)

[D]irect studies of prison isolation have documented an extremely broad range of harmful psychological reactions. These effects include increases in the following potentially damaging symptoms and problematic behaviors: negative attitudes and affect, insomnia, anxiety, panic, withdrawal, hypersensitivity, ruminations, cognitive dysfunction, hallucinations, loss of control, irritability, aggression, and rage, paranoia, hopelessness, lethargy, depression, a sense of impending emotional breakdown, self-mutilation, and suicidal ideation and behavior.

(internal citations omitted).

While some of the most severe symptoms of prolonged isolation may ease following reintegration into a broader population, many may suffer permanent harm from prolonged solitary detention – including an inability to engage in normal social interaction. Studies of former prisoners of war reveal long-term effects of such confinement, from symptoms of post traumatic stress to an inability to tolerate social interaction. See Patricia B. Sutker, et al., *Cognitive Deficits and Psychopathology Among Former Prisoners of War and Combat Veterans of the Korean Conflict*, 148(1) Am. J. Psych. 67, 67-72 (1991) (former prisoners of war 40 years after release from detention suffered symptoms of anxiety, confusion, depression, suspiciousness, and detachment from social interaction). One recent study of Danish prisoners likewise found that for those held in solitary confinement for longer than four weeks:

the probability of being admitted to the prison hospital for a psychiatric reason was about 20 times as high as for a person [in a mainline prison], leading the researchers to conclude that individuals detained [in solitary confinement] are forced into an environment that increases their risk of [psychiatric] hospitalization.

Haney, *supra*, at 144 (internal citation omitted).

Finally, uncertainty surrounding one's fate in detention can only exacerbate the impact of prolonged isolation. See *Foster*, 537 U.S. at 990 (Breyer, J., dissenting from denial of certiorari) (“[T]he combination of uncertainty of execution and long delay is arguably ‘cruel.’ This Court has recognized that such a

combination can inflict ‘horrible feelings’ and ‘an immense mental anxiety amounting to a great increase of the offender’s punishment.’”) (quoting *In re Medley*, 134 U.S. at 172 (new statutory provision requiring time of execution of sentence to be kept secret from prisoner was additional punishment, as “one of the most horrible feelings to which [one] can be subjected” while awaiting execution is “the uncertainty during the whole of it,” and such “secrecy must be accompanied by an immense mental anxiety amounting to a great increase of the offender’s punishment”)). Indeed, studies of victims of torture and coercive interrogation often find victims reporting that the worst part of their detention was the time between interrogation sessions, “when they were frightened of what was going to happen.” John Conroy, *Unspeakable Acts, Ordinary People: The Dynamics of Torture* 47, 170 (2000) (citing Ole Vedel Rasmussen, *Medical Aspects of Torture*, 37 Danish Med. Bull. 1 (1990)).

III. THE CIRCUMSTANCES OF MR. HAMDAN’S DETENTION MAKE HIM ESPECIALLY VULNERABLE

Since his capture in Afghanistan in late 2001 and transfer to Guantanamo sometime in 2002, *Hamdan*, 2004 U.S. Dist. LEXIS 22724, at *3-4, Mr. Hamdan has been subject to treatment that would be unlawful at any federal detention

facility in the United States.⁵ While his recent return to the general prison population at Guantanamo is welcome, Mr. Hamdan's treatment to date, coupled with the still harsh detention conditions at Camp Delta and the continued uncertainty surrounding his fate, make prompt resolution of his case essential.

Mr. Hamdan maintains that U.S. officials in Afghanistan beat him, forced him to sit motionless for days, dressed him inadequately in subfreezing temperatures, and threatened him with death, torture and imprisonment. Ex. B, Decl. of Charles P. Schmitz, Ph.D., *Swift v Rumsfeld*, No. 04 Civ. 0777L (W.D. Wash. Apr. 4, 2004), at 10 (hereinafter Hamdan Aff.) (translation of Feb. 9, 2004 affidavit of Salim Ahmed Hamdan by Charles P. Schmitz, hired by appointing authority to serve as defense translator for Salim Ahmed Hamdan, from Arabic into English) (originally filed under seal). Upon his arrival at Guantanamo, Mr. Hamdan was held in "Camp Delta," which he describes as "a single cell in a cellblock of 48 men," where the cells were "open to the air." *Id.* As Mr. Hamdan describes it: "I

⁵ See *Bell v. Wolfish*, 441 U.S. 520 (1979) (conditions of pretrial detention violate due process when they amount to punishment); see also *Chambers v. Florida*, 309 U.S. 227, 237 (1940) (listing solitary confinement along with "[t]he rack, the thumbscrew, [and] the wheel," as methods of compulsion used through the centuries to obtain confessions, leaving "their wake of mutilated bodies and shattered minds"); *Gray v. Spillman*, 925 F.2d 90, 93-94 (4th Cir. 1991) (beating or threatening a pretrial detainee in order to extract information is "an absolutely impermissible" governmental justification and would violate the Fifth Amendment); *Wilkins v. May*, 872 F.2d 190, 194 (7th Cir. 1989) (noting "if ever there were a strong case for 'substantive due process,' it would be a case in which a person who had been arrested but not charged or convicted was brutalized while in custody."); *Lock v. Jenkins*, 641 F.2d 488 (7th Cir. 1981) (holding pretrial detainee in a 37 square foot cell for 22 hours a day amounts to punishment); *Campbell v. Cauthron*, 623 F.2d 503 (8th Cir. 1980) (holding 6-8 pretrial detainees in a 130 to 154 square feet cell for 24 hours a day is punishment).

was given 15 minutes a week of exercise in an 8 meter by 7 meter fenced in area.”

Id.

In July 2003, the President designated Mr. Hamdan as eligible for trials before military commissions that had been created by Executive Order in November 2001, and charges were issued a year later, in July 2004. *Hamdan*, 2004 U.S. Dist. LEXIS 22724, at *5. Within months after declaring Mr. Hamdan eligible for military trial -- two years after Mr. Hamdan’s initial detention – Appellants effected Mr. Hamdan’s transfer to solitary confinement in a detention facility at Guantanamo known as “Camp Echo.” *Id.* at *54. Camp Echo consists of eight, windowless huts, each of which is divided into two separate compartments containing steel detention cells of eight feet by five feet. Decl. of Lt. Cmdr. Charles Swift, *Swift v. Rumsfeld*, No. 04 Civ. 0777L (W.D. Wash. May 3, 2004), ¶ 3 (filed originally under seal). During those eleven months, Mr. Hamdan was denied contact with other detainees and permitted only very limited access to a translator. He was initially denied outdoor exercise during daylight and denied medical treatment despite his repeated requests. *Hamdan Aff.*, *supra*, at 11. After two months in solitary, Hamdan explained: “One month is like a year here, and I have considered pleading guilty in order to get out of here.” *Id.* at 12.

Based on Mr. Hamdan’s affidavits and reports of his attorney, an expert psychiatrist wrote to the federal district court below emphasizing the

precariousness of Mr. Hamdan's condition. Decl. of Daryl Matthews, M.D., Ph.D., *supra*, at ¶ 7. Mr. Hamdan described his mood during solitary confinement as "deteriorating, . . . encompassing frustration, rage (although he has not been violent), loneliness, despair, anxiety, and emotional outbursts." *Id.* at ¶ 11. Mr. Hamdan's appointed military defense counsel, Lt. Cmdr. Charles Swift, described his client's condition as "initially agitated and withdrawn, with a brightening mood as the visit proceeds, but ending with Mr. Hamdan begging him not to leave." *Id.* Lt. Cmdr. Swift also described witnessing significant mood swings, including "uncontrollable weeping at inappropriate times, undirected anger, and unresponsiveness." Decl. of Lt. Cmdr. Charles Swift, *supra*, at ¶ 7. During one period of a month between visits with Lt. Cmdr. Swift, Mr. Hamdan refused to eat, indicating later to Lt. Cmdr. Swift that he wanted to kill himself because he could no longer stand conditions in Camp Echo. *Id.* at ¶ 9. During his period of solitary confinement, Mr. Hamdan lost on the order of 50 pounds. *Bin Laden's Driver Arraigned at Gitmo*, Associated Press, Aug. 24, 2004, available at <http://www.foxnews.com/story/0,2933,129814,00.html> (accessed Dec. 22, 2004).

On this basis, Dr. Matthews concluded that Mr. Hamdan was "at significant risk for future psychiatric deterioration, possibly including the development of irreversible psychological symptoms." Decl. of Daryl Matthews, M.D., Ph.D., *supra*, at ¶ 14. Dr. Matthews noted in particular that "the psychological stress of

the uncertainty he faces over his lack of charges and about the nature and duration of his future confinement.” Decl. of Daryl Matthews, M.D., Ph.D., *supra*, at ¶ 15.

On the last business day before oral arguments were heard in the district court below, Appellants notified the court that Mr. Hamdan had been returned to Camp Delta. *Hamdan*, 2004 U.S. Dist. LEXIS 22724, at *3. While conditions at Camp Delta are a significant improvement over solitary, they remain far harsher than conditions recognized as unconstitutional by U.S. federal courts. *See, e.g., Lock v. Jenkins*, 641 F.2d 488 (7th Cir. 1981) (holding pretrial detainee in a 37 square foot cell for 22 hours a day amounts to punishment); *Campbell v. Cauthron*, 623 F.2d 503 (8th Cir. 1980) (holding 6-8 pretrial detainees in a 130 to 154 square feet cell for 24 hours a day is punishment); *Jones El v. Berge*, 164 F. Supp. 2d 1096 (W.D. Wis. 2001) (severe restrictions on personal possessions, illumination of cells 24 hours, and spending all but four hours in a cell is cruel and unusual punishment).

Dr. Matthews, who was permitted to spend a month observing Guantanamo detainees in 2003, characterizes Guantanamo as “prison plus.” David Rose, *Guantanamo: The War on Human Rights* 65-67 (2004). The maximum security cells in Camp Delta are approximately eight feet by seven feet by eight feet, barely the size of a king-size bed. *See* Lawyers Committee for Human Rights, *Assessing the New Normal: Liberty and Security for the Post-September 11 United States* 53 (Deborah Pearlstein & Fiona Doherty, eds., 2003); Ron Martz, *Guantanamo*

Captives to Get Day in Court This Week, Atlanta J.-Const., Apr. 18, 2004, at 14A.

The cells are enclosed in a green metal box. Rose, *supra*, at 59. Each cell is separated from the other by mesh walls, and each has a sink with running water and a toilet (where detainees can be seen by guards who pass by every 30 seconds).

Id. at 60. The lights remain on at all times. *Id.* There are two recreation/exercise areas for every 48 detainees; currently, detainees are allowed 20 minutes of exercise followed by a shower twice a week. *Id.* at 59; *see generally* Website of

Joint Task Force Guantanamo, *available at* <http://www.nsgtmo.navy.mil/jtfgtmo/d/dlt001.html>.

Under the circumstances, it is unsurprising that mental illness at Guantanamo is widespread. In January 2003, monitors from the International Committee of the Red Cross took the extraordinary step of reporting publicly its observation of a “worrying deterioration in the psychological health of a large number of the internees.” International Committee of the Red Cross, *Guantanamo Bay: Overview of the ICRC’s Work for Internees*, *available at* <http://www.icrc.org/Web/eng/siteeng0.nsf/iwpList74/951C74F20D2A2148C1256D8D002CA8DC> (Jan. 30, 2004). Red Cross observers were clear about the cause:

They have no idea about their fate and they have no means of recourse at their disposal through any legal mechanism. As [they] spend more time in Guantanamo and continue to have no idea what is going to happen to them, we are concerned that the impact on them will get more serious.

Rose, *supra*, at 67 (quoting International Committee of the Red Cross spokesperson Florian Westphal). By the end of September 2003, there had been 32 suicide attempts among Guantanamo detainees. Lawyers Committee for Human Rights, *supra*, at 53. Since then, detainees' efforts to injure themselves have been reclassified as "manipulative self-injurious behavior" – a classification unknown in the psychiatric literature. Rose, *supra*, at 65-6. According to Guantanamo Chief Surgeon Cpt. Stephen Edmonson, the drug most commonly prescribed to Guantanamo detainees is Prozac and analogous mood-enhancers; as of autumn 2003, more than one-fifth of Camp Delta inmates were taking such medications. *See* Rose, *supra*, at 66.

Finally, press accounts and internal investigations revealed in recent weeks have now documented an alarming number of incidents of outright abuse at Guantanamo Bay. *See, e.g.*, Neil A. Lewis and David Johnston, *New F.B.I. Files Describe Abuse of Iraq Inmates*, N.Y. Times, Dec. 21, 2004, at A1 (recounting July 2004 F.B.I. agent report describing Guantanamo detainees chained to the floor for 18-24 hours or more without food or water, left to soil themselves, and others subject to freezing temperatures, or temperatures "well over 100 degrees"); Neil A. Lewis, *F.B.I. Memos Criticized Practices at Guantanamo*, N.Y. Times, Dec. 7, 2004, at A19 (reporting cases confirmed by Army and F.B.I. spokesmen in which a female interrogator squeezed one male detainee's genitals and bent back his

thumbs; a prisoner was “gagged with duct tape that covered much of his head”; and a dog was used to intimidate a detainee); Josh White and John Mintz, *Red Cross Cites ‘Inhumane’ Treatment at Guantanamo*, Wash. Post, Dec. 1, 2004, at A10 (describing July 2004 Red Cross report to Pentagon finding use of forced nudity, severe temperatures, and other incidents of psychological and physical abuse at Guantanamo); Letter from T.J. Harrington, Deputy Ass’t Dir., Counterterrorism Division, Federal Bureau of Investigation to Major General Donald J. Ryder, Dep’t of the Army, Criminal Investigation Command 2 (July 14, 2004) (on file with Human Rights First) (describing FBI agents’ November 2002 observation of a detainee, who after more than three months in isolation in “a cell that was always flooded with light,” exhibited “behavior consistent with extreme psychological trauma,” including “talking to non-existent people, reporting hearing voices, crouching in a corner of the cell covered with a sheet for hours on end”).

These reports echo accounts of other prisoners from Guantanamo. *See, e.g.*, Complaint, *Rasul v. Rumsfeld*, No. 04 Civ.1864 (D.D.C. filed Oct. 27, 2004), at 24-38 (alleging treatment suffered by Rasul and others at Guantanamo as including severe beatings, intimidation by dogs, exposure to extreme heat and cold, and up to 30 days in isolation); Petition for Writ of Mandamus and/or Writ of Habeas Corpus, *Al Qosi v. Bush, et al.*, No. 04 Civ.1937 (D.D.C. filed Nov. 8, 2004), at 12-


17 (alleging techniques used on Al Qosi and others as including sexual taunting, isolation in frigid temperatures, threats of transfer to countries known to use torture, and being strapped to the floor wrapped in an Israeli flag – all of which “contributed to a pervasive atmosphere of fear, intimidation and humiliation”). They also indicate that detainees may witness the abuse of their fellow detainees, compounding their fear. *See* Rose, *supra*, at 72 (Briton freed from Guantanamo reported having witnessed multiple beatings by guards: “I have seen people beat up – the swollen faces, the limping back or being dragged back. I’ve seen the effects of it.”) Most important, they add to the urgency of resolving the status of Guantanamo detainees such as Mr. Hamdan.

While the removal of Mr. Hamdan from nearly a year in solitary confinement is a critical step, Mr. Hamdan is aware that Appellants retain the power to return him to those conditions of detention at any time. In the meantime, the uncertainty surrounding his fate – including a potential sentence of death if convicted before military commissions, and a lifetime of detention even if not – contributes to the deleterious effects of his confinement. There can be no question that the legality of military commissions, sooner or later, will be resolved by the U.S. federal courts. The sooner Mr. Hamdan’s case may be resolved, whatever its outcome, the better the chance of mitigating these effects.

CONCLUSION

For the foregoing reasons, Amici urge this Court to reject Appellants' request that it stay proceedings in Mr. Hamdan's case pending the completion of military commission trials at Guantanamo Bay.

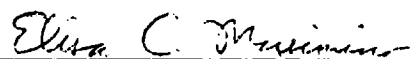
Respectfully submitted,



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**CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)(C)
OF THE FEDERAL RULES OF APPELLATE PROCEDURE**

I hereby certify, pursuant to Fed. R. App. P. 32(a)(7)(C) and D.C. Circuit Rule 32(a), that the foregoing brief is proportionally spaced, has a typeface of 14 point and contains 5774 words (which does not exceed the applicable 7,000 word limit).



Elisa C. Massimino

AFFIDAVIT OF SERVICE

**United States Court of Appeals
for the District of Columbia Circuit
No. 04-5393**

-----)
SALIM AHMED HAMDAN.
Appellee,

v.

DONALD H. RUMSFEL, ET AL
Appellants.
-----)

I, John C. Kruesi, Jr., being duly sworn according to law and being over the age of 18, upon my oath depose and say that:

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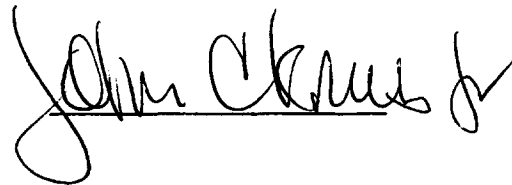
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Unless otherwise noted, 15 copies have been hand-delivered to the Court on the same date as above.

December 29, 2004

A handwritten signature in black ink, appearing to read "John A. Marcus", with a large, stylized initial "J" and a checkmark-like flourish at the end.