

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ABU BAKKER QASSIM, et al.,	:	Civil Action No. 05-0497
	:	
Plaintiffs,	:	December 12, 2005
	:	
v.	:	
	:	2:30 p.m.
GEORGE BUSH, et al.,	:
Defendants	:	
.....	:	

TRANSCRIPT OF STATUS CONFERENCE
BEFORE THE HONORABLE JAMES ROBERTSON
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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Proceedings reported by machine shorthand, transcript produced by computer-aided transcription.

3 versus Bush. Sabin Willett present for the plaintiff, and Susan
4 Manning, Terry Marcus Henry present for the defendant.

5 THE COURT: Good afternoon, everybody. There are two
6 recent pending motions in this case; one is for an order
7 amending the access procedures for counsel under the protective
8 order, the other is for access by the petitioners to
9 representatives of the United Nations Commission on Human
10 Rights.

11 I issued a memorandum order nearly four months ago in
12 this case laying out what seemed to me then and still seems to
13 me to be a genuine dilemma. The petitioners in this case are
14 two Uighurs, ethnic Chinese Muslims from the western part of
15 China. They were apprehended somewhere in Afghanistan or
16 Pakistan, taken to Guantanamo Bay, held at Guantanamo Bay as
17 combatants for a long time, then went through the Combatant
18 Status Review Tribunal procedure, and at some point declared to
19 be, quote, "no longer enemy combatants," closed quote, a term of
20 art invented by the military at Guantanamo to describe people
21 who are not enemy combatants, without admitting or denying that
22 they ever were enemy combatants to begin with.

23 The government says it has no place to send them. At
24 an early hearing in this matter I pressed the government for
25 what power it had to hang on to them even another day longer,

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1 and the best that Mr. Henry could come up with at the time was,
2 quote, "The executive's necessary power to wind up wartime
3 detentions in an orderly fashion," closed quote. That's the
4 government's power for hanging on to these people.

5 I issued a memorandum order, as I said, nearly
6 four months ago on August the 19th declining to decide whether
7 the government really had such a wind-up power, because the

8 parties were in agreement that both Hakim and Qassim should be
9 and would be released. But that hasn't happened. As far as I
10 can tell, nothing is happening.

11 My first instinct when I heard this case was I didn't
12 want to hear ex parte representations from the government. I
13 didn't really want to have a public/private part of this, and my
14 suspicions, my instincts were correct for reasons that I didn't
15 expect. They were correct because what I heard ex parte wasn't
16 any different from what I was hearing in the courtroom. There
17 isn't any -- the government, if it's making any progress at all,
18 doesn't even want to tell me about it ex parte.

19 So the petitioners insist that I should follow the
20 literal language of the habeas statute, 28 U.S.C. 2243, and
21 recently they have urged that I do so before Congress amends the
22 habeas statute, and order their bodies produced here for a
23 hearing. The government has opposed that suggestion all along,
24 arguing first that the scope of the habeas writ is still
25 undecided by the Court of Appeals, and second that in any event,

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1 only the executive can say who enters the United States.

2 The most recent information I have from counsel about
3 their clients is that they met with their clients at Guantanamo
4 on November the 16th, that conditions are essentially unchanged,
5 that in the words of, I think, Ms. Manning's affidavit, they
6 have television but no reception, no radio, no telephone, cut
7 off from the world.

8 Now, let me address the two most recent pending
9 motions. The first is the motion for access to the UNCHR
10 representatives. The government first says, well, it's moot.
11 The motion was filed on the 15th; counsel went down there on the

12 16th, they had their meeting. The motion was that they be
13 permitted to go with counsel. The mootness point is rejected.
14 It's not moot, if for no other reason than hopefully counsel
15 will have access to go down there again.

16 The government's more important argument is that the
17 petitioners don't have any authority for the motion that they
18 make, which I think is a correct -- I think they're correct on
19 that proposition. I also think they're correct that an order
20 like that would, in the words of several Supreme Court cases,
21 embarrass the executive in the conduct of foreign relations and
22 interfere with the executive foreign policy role. So the motion
23 for access to the UNCHR representative must be and will be
24 denied. That's the motion number 44.

25 The motion to amend the access procedures asked for an

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1 overhaul of the protective order which petitioners say is built
2 on the faulty premise that they are dangerous people.
3 Petitioners want to reverse the presumption that all
4 communication with the petitioners are classified, they want to
5 allow non-citizens who would otherwise be eligible for clearance
6 to visit with the detainees, they want to allow counsel to
7 provide petitioners with written materials, letters, books,
8 newspapers, magazines, photographs of their children, electronic
9 materials, et cetera.

10 They want a seven-day turnaround for mail instead of
11 having mail disappear into a black hole someplace, they want to
12 allow faxes, they want to allow visits by counsel to Camp
13 Iguana, I think it is, where the detainees are housed, instead
14 of in Camp Echo in chains.

15 They want the government to pay for travel and
16 accommodation costs of counsel visits, since the government

17 won't produce them in the United States; they want to provide a
18 telephone line that will allow access to calls to and from
19 counsel, family, and friends; and they want to allow the
20 petitioners to be recorded, video and audio tape, so that other
21 countries -- so that their family will know that they're safe.

22 I will hear some argument on this point, but I want you
23 to know before I hear it that I'm more interested in another
24 part of this, which I'll get to. Because it isn't that I'm not
25 interested in this subject, it is first that this court has

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1 decided, as a court, that issues relating to the protective
2 order should be handled by Magistrate Judge Kay. I could carve
3 this case out of that, but I'm a little reluctant to do that.

4 And furthermore, I just, as a matter of judicial
5 philosophy, don't think that judges ought to get into the nuts
6 and bolts, the daily details of managing individual detainees,
7 prisoners, prisons, schools, institutions, anything else. We're
8 not managers, we're not on the ground, we don't know the
9 situation in Guantanamo Bay. The Defense Department has enough
10 problem enforcing the security regulations it has for everybody
11 without having to start making exceptions in individual cases.
12 It doesn't seem to me like a subject that frankly is fit for the
13 fashioning of decrees from Washington that will govern what
14 happens in Guantanamo.

15 I am more interested today in the fundamental
16 underlying question, which is the basic motion to vacate the
17 stay order and issue a writ directing the immediate release of
18 the petitioners. It is getting to be time, and it may be time
19 now, to fish or cut bait on this motion. I think the premise on
20 which I declined to decide this three or four months ago was

21 that the government was making good faith efforts, and that
22 something would happen, and that we were not thinking about
23 indefinite detention of these people because the government
24 wants them released.

25 The time has stretched out to the point where

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1 indefinite is not an inappropriate word to describe what's
2 happened, and the question is whether I or anybody can or should
3 tolerate that situation. And if it's intolerable, what I or
4 anybody else can do about it.

5 From the standpoint of the petitioners at Guantanamo
6 Bay, it clearly is intolerable. It seems to me that I basically
7 have three options. There's a fourth option, and the fourth
8 option is let's wait a few more months, and I don't frankly
9 think that's an option. I think we've had enough time.

10 I think I have three options. The first is to deny the
11 petition for habeas corpus because I don't have any power to do
12 anything, and at least free Mr. Hakim and Mr. Qassim to go to
13 the Court of Appeals with an appealable order; the second is to
14 follow petitioners' suggestion that I order, in the words of the
15 statute, the bodies of Mr. Hakim and Qassim - the living,
16 breathing bodies, I hasten to say - before this court so we can
17 have a hearing on the motion for their immediate release. The
18 third is simply to order them released and see what happens, see
19 how the government responds to it.

20 The government has its own set of options. It could,
21 as the petitioners suggested from the get-go, release them into
22 the general population at Guantanamo Bay. It refuses to do
23 that, and I declined to order them to do that. It could release
24 them, and I have to put the "release" in quotations, to the
25 detention facility which exists, as I understand, on the same

1 Guantanamo facility where there are other stateless persons or
2 persons who cannot be relocated wandering around in some state
3 of freedom.

4 It could bring them here in something like the status
5 of the Cuban Mariel boat prisoners, it could send them back to
6 China. I don't know what other options the government has, but
7 the government -- such an order, an order simply to release
8 them, would put it to the government as to how to release them
9 and where to release them. But, of course, since the government
10 already accepts the proposition that they should be released,
11 you might say that the government considers itself already under
12 that order. It's a self-imposed order, it just doesn't know how
13 to do it.

14 Moving back to the second option, bring them here, the
15 government has made a number of arguments why I cannot do that,
16 because it would violate a whole line of cases making clear that
17 the courts have no authority to overrule exclusion orders.
18 This, of course, is not such a case, and an order to bring them
19 here under the authority of the habeas statute would not violate
20 or reverse an exclusion order, it would simply provide that the
21 Uighur petitioners would have to be brought here to this
22 courthouse in some sort of legal fictional bubble that would --
23 that lawyers and judges have been inventing for centuries. The
24 fact that their feet touch the ground in the United States has
25 no significance, if, as a matter of law, they are deemed, as the

1 Mariel boat people are deemed, never to have arrived in the
2 United States.

3 But my problem -- so I think I could do that. My
4 problem with that alternative, that middle alternative of the
5 three, is that I can't see where it goes from there. The
6 petitioners suggest that I would then hold a hearing to make a
7 determination whether the petitioners are, as the government
8 insists that they are, maybe no longer enemy combatants, but not
9 necessarily nice people and dangerous people, and that I would
10 then make a determination as to whether they should be released
11 to the general population in this country.

12 And that is where I have a real issue as to whether I
13 have the legal power to do it. I would bring them to this
14 country and have a hearing, but I don't see that I've got power
15 to carry out the result of the hearing.

16 So the word "dilemma," which is, I think, a Greek word
17 that implies a problem that has no obvious solution, applies
18 perfectly, I think, to the situation that's before me. The one
19 thing I am sure of is that one way or another, one side or
20 another has to have an appealable order, and that for the matter
21 to remain pending before me does no service to anybody, since
22 obviously in some sense I'm just a weigh station to the Court of
23 Appeals anyway.

24 Now, I invited you in to argue and I've been doing all
25 the talking. Mr. Willett, I would like to hear from you.

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1 MR. WILLETT: Good afternoon, Your Honor.

2 THE COURT: Good afternoon.

3 MR. WILLETT: Let's start with option one. That's the
4 one where you deny our petition. The one thing that I think is
5 easiest to resolve in this dilemma is option one, because if we
6 ignore all the metaphysicians who have been arguing about what
7 Rassoul means and we go to what they told me in law school I'm

8 supposed to read, which is the mandate, the order, the order in
9 Rassoul is in the last sentence: "We reverse the judgment of
10 the Court of Appeals and remand for the District Court,"
11 footnote, not a lieutenant colonel somewhere, "the District
12 Court to consider in the first instance the merits of the
13 petitioners' claims." And they dropped a footnote to make
14 clear, merits doesn't mean test the pleadings, merits means what
15 we all know it means. It means facts.

16 So in a precisely parallel case, with the exception
17 that we didn't have the government's concession in that case
18 that in fact they're not enemy combatants, everything else is
19 parallel. We know that Your Honor has jurisdiction to decide
20 the case, and so we're back to -- I don't think you've decided
21 this, but I think we've talked about, is there a lawful basis
22 for detention. There is none. If that is Your Honor's finding
23 and ruling, then I don't see how you could deny the petition for
24 habeas corpus.

25 So we go to options two and three. Now, you might

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1 wonder why I don't leap at option three, and it's because I
2 think the most measured, the most legally clear course lies
3 through option two, the one where you bring them here for
4 another hearing where they're present. And that's because we
5 can begin with a statute that makes the production of the body
6 mandatory, that says that the jailer shall produce the body.
7 All you're doing is applying an act of Congress. I don't think
8 anybody could question this court in a case where the Supreme
9 Court has said you have jurisdiction, and an act of Congress
10 says that the presumption is that the bodies shall be produced.
11 No case ever says that the bodies shall not be produced.

12 So to go just to that limited next step of we're all
13 here with the petitioners present, there's no conceivable legal
14 challenge that I could think of to that.

15 So then where do we go? well, then we are in a dilemma
16 where the courts have actually been before in the somewhat
17 analogous situation of deportation; what do you do when the
18 Attorney General rightly wants to deport someone but no one will
19 take them? And Zadvadus is that case.

20 Now, Zadvadus is a case where we've got a pretty
21 seriously bad guy, we have a career criminal, convicted thug.
22 He's been convicted of everything from attempted burglary to
23 possession of cocaine. He's got a long rap sheet, and so Latvia
24 doesn't want him and Germany doesn't want him back, and they
25 have nowhere to send him.

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1 Even in that case, says the Supreme Court, you can't
2 hold him in prison indefinitely. You've got to fashion some
3 kind of release until the day they find a Latvia or a Germany to
4 take him. So we get to that interim step in option two where
5 the men are present.

6 We're kind of in that deportation situation where
7 Mr. Henry wants to effectively deport our clients, but there is
8 no appropriate country to take them. I hesitate to add, they
9 are in no way, shape, or form criminals. There's no accusation
10 of any wrong-doing. They're just unfortunates.

11 So then where do we go? where we go is a very small
12 step, and that is to the interim release; in effect the parole
13 that Baker v. Sard and Mapp v. Reno spell out. The idea is that
14 the habeas case is not over; Your Honor retains jurisdiction of
15 it, and one day when Mr. Henry can report that indeed they have
16 lined up Holland or Sweden or someone to take these men as

17 refugees, there's a case, they have to report to you, and
18 ultimately, in effect, they will be deported.

19 But the question is in the interim period what we do
20 with those men is we order some set of conditions that's
21 appropriate for release. Mapp and Baker talk about this, and
22 it's probably a scenario that Your Honor is familiar with, more
23 familiar than I in criminal cases. So perhaps they need to
24 report on a regular basis to the United States Marshal Service,
25 perhaps there are limitations on travel, perhaps you need to be

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1 assured as to where they're going to be housed and how they're
2 going to work and be fed and things like that, all of which we
3 can do.

4 The case isn't over. It's still your case. And as I
5 say, if it takes Mr. Henry another year to solve this
6 diplomatically, ultimately it gets solved that way.

7 THE COURT: Well, I don't want to excessively
8 pigeonhole these cases, Mr. Willett, but Baker vs. Sard is a
9 criminal case.

10 MR. WILLETT: Indeed.

11 THE COURT: In a criminal case in the United States, a
12 criminal defendant has a constitutional right to bail, which is
13 constrained, powerfully constrained, by the Bail Reform Act, and
14 as a concession to the constitutionality of the right to bail,
15 Congress enacted this whole structure giving an accused person a
16 right to be released on appropriate conditions. Neither Qassim
17 nor Hakim is an American citizen, they're not accused of crime.
18 The Bail Reform Act doesn't apply. If you got them into this
19 courtroom and then argued to me that they had a right to be
20 released, I would ask you where that right comes from.

21 MR. WILLETT: And Your Honor, I would say, as I think
22 the Court of Appeals said in Baker, it is inherent in the common
23 law writ, quote, "When an action pending in a United States
24 court," that's what we have, "seeks release from what is claimed
25 to be illegal detention," we have that, "the Court's

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1 jurisdiction to order release as a final disposition of the
2 action includes an inherent power to grant relief pendente lite
3 to grant bail or release pending determination of the merits,"
4 not, I believe, linked to any statutory right of bail or even to
5 any constitutional right.

6 THE COURT: Yeah, except that the defendant is
7 presumably putatively an American citizen already on American
8 soil.

9 MR. WILLETT: Perhaps. Although at least that was not
10 expressly necessary to the Court's reasoning in Baker.

11 Then if you go to Mapp, where you have an alien case,
12 not a citizen, a case that's more akin to what we have here,
13 where they are seeking to deport, I think to Tobago, a resident
14 alien, the Court again reviews authorities from the fifth
15 circuit, from this circuit, and concludes that you have that
16 inherent power as a part of your power as the habeas judge to
17 enter that relief.

18 And I think it fair to say, Your Honor, that the
19 Supreme Court has also noted that habeas is a flexible remedy,
20 one in which courts are encouraged to cut through the forms, I
21 think as Holmes said, to the tissue of the matter, and find a
22 way to alleviate the essential wrong, which is the unlawful
23 imprisonment.

24 I was going to start today by talking about what we're
25 observing in our clients. I think Your Honor captures it from

1 our papers, but we have proceeded from what was almost elation
2 on their part in August after long years of, as one of them
3 said, feeling like he had evaporated from the world - all of a
4 sudden there were hearings and lawyers, things were happening -
5 we've proceeded from elation to frustration. And that's
6 natural, and it's our job as lawyers to try to explain things to
7 our clients.

8 But I'm deeply concerned about the human impact of the
9 indefinite nature of this, and I do think that the remedy we ask
10 for is a limited one. As you say, it adds nothing to whatever
11 right they have today with respect to asylum. I mean, if they
12 have a right today to say that Rassoul's jurisdictional holding
13 gives them an entry to make an asylum petition, which I'm sure
14 Mr. Henry would say they don't, they're not going to get that
15 right because as an interim basis of habeas relief they've been
16 released from the prison. I think they'll have whatever rights
17 they have today.

18 In any event, as I understand asylum, it's
19 discretionary anyway, so we're only talking about whether they
20 have standing to make an asylum petition. And then if there was
21 some basis for exercising discretion to deny it, the government
22 would do that.

23 So as a practical matter, I don't see how the interim
24 release while we wait for this diplomatic solution really causes
25 much problem to the government, and it's the only thing anyone

1 has been able to come up with that alleviates this really
2 pressing harm that they're suffering.

3 I should say, Your Honor, yesterday I sat in church,
4 and it occurred to me that yesterday my clients entered into
5 their fifth year of incarceration.

6 THE COURT: That's hard to imagine. Well, see, you've
7 got them in here -- I've postulated bringing them in here in
8 some legal cocoon --

9 MR. WILLETT: Whatever Your Honor orders.

10 THE COURT: -- but you say once they're here, they can
11 petition for asylum?

12 MR. WILLETT: I think that's the government's concern.

13 THE COURT: Well, it's your intent, too, is it not?

14 MR. WILLETT: Your Honor, I don't have an intent beyond
15 getting beyond this hearing and getting them out of Guantanamo.

16 But the fact of the matter is if we're a year from
17 today and they're existing in a kind of parole limbo in the
18 U.S., I mean, someone is going to have to figure out what to do.
19 And I suppose --

20 THE COURT: Well, what if they're in parole limbo in
21 some detention center someplace? How would you feel about that?

22 MR. WILLETT: I don't think we would like that very
23 much. I mean, that doesn't solve the problem of --

24 THE COURT: Or if they're in parole status with the
25 Mariel boat people?

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1 MR. WILLETT: Your Honor, it's a continued
2 incarceration. It doesn't solve the problem.

3 THE COURT: So when you say you want them brought here,
4 what you're saying is you want them brought here and released?

5 MR. WILLETT: Well, yes. What I want is the
6 opportunity to show you conditions of release, of interim
7 release, which will satisfy you that there's no danger or harm

8 to anyone and no risk that the government's ultimate effective
9 deportation could be achieved as long as it's not back to China.

10 I can bring into this courtroom resident alien Uighur
11 expatriates who have offered us bedrooms for these men, who have
12 offered us jobs, who have called us on the phone to say how can
13 we help. We can show you -- we can't have a hearing without
14 them coming, frankly, Your Honor. We can show you a community
15 of people who can make this work at a practical level, and leave
16 Your Honor with the power to allow for the ultimate
17 deportation --

18 THE COURT: Now, this hearing that you postulate,
19 you're going to show me conditions. Is the government not going
20 to want to demonstrate why these people should not be released?

21 MR. WILLETT: I don't have any doubt that they'll want
22 to do that.

23 THE COURT: I mean, you've moved to strike the
24 affidavit of, what was it, General Hood?

25 MR. WILLETT: I did. Well, General Hood made

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1 statements about what they were doing in Afghanistan, and no one
2 can cross-examine General Hood. He wasn't in Afghanistan.

3 I don't care whether you strike the affidavit or not.
4 But if my clients were here, they could tell you what they were
5 doing in Afghanistan, and it had nothing to do with the Taliban.
6 which is all sort of academic in light of the NEC finding.

7 But the point is, if they're here, they can address any
8 of these sort of innuendoes, I think as they put it, that
9 they're not benign people. I think that's what it said. If
10 that's a concern for the Court, we want to be able to address it
11 with the real guys.

12 THE COURT: Well, all of that begs the question of
13 whether even if I thought they were the sweetest guys in the
14 world, I would have the power to order them released into
15 American society under any circumstances or any conditions.

16 MR. WILLETT: Well, I think it clear you do.

17 THE COURT: What I need from you is what your best case
18 is for the proposition that you think I have the power to do
19 that.

20 MR. WILLETT: The first case is *Rassoul*, which says you
21 have jurisdiction to decide the merits. Well, the merits of a
22 habeas case is, are we opening the jail or not.

23 THE COURT: Well, the only merits that are left to this
24 case, as I understand it, is the merits of the government's
25 assertion that their power to hang on to them at Guantanamo is

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1 the power to orderly wind up a war.

2 MR. WILLETT: Right.

3 THE COURT: That's a legal question.

4 MR. WILLETT: Well, I mean, Your Honor will make a
5 ruling on that. And if you find, as we've urged, that there is
6 no such power, then you would issue a ruling --

7 THE COURT: Then I'm right back where I started from.
8 Then I would issue a ruling saying what?

9 MR. WILLETT: That they have to be -- well, what you
10 would do is we would suggest that you would grant these interim
11 conditions of release until such time as the ultimate
12 resettlement is arranged.

13 So *Rassoul*, first case. Second case --

14 THE COURT: Well, the dichotomy here is release from
15 custody in Guantanamo Bay is one issue; release them on American
16 soil where they then encounter rights to asylum and whatever

17 else is another question. You see those as the same issue?

18 MR. WILLETT: I think that once the Supreme Court says
19 you have jurisdiction over their case, they're here. They're in
20 this courtroom. So if the order is for release, then I think
21 it's that door we all walk out of, and we figure it out from
22 there. I don't think it's you bringing them here; I think
23 they're here. They're here because the government brought them
24 to Guantanamo, and all you can do, as Holmes said, is ignore the
25 forms and cut through the tissue. And the tissue here is --

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1 THE COURT: You Boston guys keep quoting Holmes to me.

2 MR. WILLETT: Well, he seems to age well, Your Honor.

3 But the point is, we look for a practical solution.

4 And when we talk about this interim release, it really is a very
5 limited solution; you still have the case, someone can run in
6 here and say there's a parole violation, and, in fact, if I
7 don't persuade you at that hearing that conditions for interim
8 release are appropriate, I suppose back they go to Norfolk and
9 Guantanamo.

10 THE COURT: Let's see. I want to give Mr. Henry a
11 chance to talk before it gets too long here, but if I see
12 there's a parole violation, the probation department isn't going
13 to have jurisdiction over these people, pretrial services isn't
14 going to have jurisdiction over these people. Who oversees this
15 parole we're talking about?

16 MR. WILLETT: Well, there is not an elaborate
17 jurisprudence of parole in habeas cases, it's true. We're all
18 kind of making this up as we go along. But I suppose in the
19 worst case you suspend the release.

20 THE COURT: Okay. Thank you, Mr. Willett.

21 MR. WILLETT: Thank you, Your Honor.

22 THE COURT: Mr. Henry?

23 MR. HENRY: Thank you, Your Honor. As Your Honor has
24 recognized, there are a number of difficult issues associated
25 with this case, and I'm happy to talk about them. I think the

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1 legal landscape is a little more cut and dry than Mr. Willett
2 would make it seem.

3 But I did want to inform the Court that the diplomatic
4 efforts with respect to potential resettlement of the Uighurs is
5 ongoing, and we are prepared to report to the Court in camera as
6 to the progress of those efforts if you want to hear them.

7 THE COURT: The only report I want is if they've been
8 released. If you can't make that report to me, I don't want it
9 in camera. The last time I heard a report in camera -- I don't
10 want to be in that position. I just don't want to be in that
11 position. As I say, it's time to fish or cut bait.

12 MR. HENRY: Well, Your Honor, as you know, the
13 diplomatic situation does involve issues that we are not -- it's
14 not appropriate to discuss on the public record. And so we make
15 the offer for Your Honor to hear an in camera report with
16 counsel, and should you change your mind on that, we're happy to
17 provide that.

18 But as to the legal landscape here, I think it is much
19 more straightforward than counsel would have you believe.
20 Counsel made the statement that we're all kind of making this up
21 as we go along. Actually, that's not the case, Your Honor. As
22 Your Honor previously indicated, our position is, of course,
23 that the Court does lack the authority to bring the petitioners
24 to the United States.

25 And I would point out that currently the petitioners

1 are not in the United States. According to the immigration
2 statutes, the United States is defined specifically, and it does
3 not include Guantanamo Bay. That's 8 USC 1101(A)38, where the
4 U.S. is defined for purposes of entry, exclusion, deportation,
5 all those kind of things.

6 And so what this case is, it's not a deportation
7 situation, it's not a removal situation. It does not involve a
8 statutory situation as was involved in the Zadvadus case, but
9 rather the question of bringing the petitioners here involves a
10 question of entry into the United States.

11 And there is a Supreme Court case that is as close as
12 we've found to be on point. It's Shaughnessy vs. Mezei,
13 345 U.S. 206 from 1953. That case involved an alien who had --
14 who was refused entry into the United States, and according to
15 the Court, he was stranded - and the Court used that term,
16 "stranded" - on Ellis Island for it looks like, reading the
17 opinion, a matter of years, because other countries would not
18 take him.

19 The question before the Supreme Court was whether
20 habeas would afford the detainee some sort of relief, whether
21 his continued indefinite detention there on Ellis Island was
22 unlawful so as to permit his entry into the U.S. temporarily on
23 bail, if you would, pending the government's efforts to find a
24 place for resettlement for him. The answer there was clearly
25 no.

1 And as I said, that case seems to be the most analogous
2 to this case, far more analogous than a Zadvadus type case that

3 involves deportation or removal, where there are specific
4 statutes governing the situation.

5 And as we've pointed out in our briefs back in August
6 on this, there's a long line of case law as well as statute
7 saying that entry into the United States is an executive matter,
8 it's a decision, a discretionary decision, that is reserved to
9 the executive, and Congress has specifically precluded judicial
10 review even through habeas with respect to those discretionary
11 decisions regarding the entry of an alien into the U.S.

12 But beyond the situation of the power of the Court to
13 do as the petitioners request and bring the petitioners here for
14 some sort of hearing, I think if you take a look at the legal
15 standards in the cases that the petitioner cites - for example,
16 the Mapp case - and if you kind of get beyond the analogies or
17 general principles that the petitioners argue and look at the
18 actual legal standards that apply in a request for interim
19 release in a habeas context, like I said in Mapp, you'll see
20 that in order to attain interim release, number one, that relief
21 under Baker vs. Sard is tied to the Court's ultimate authority
22 to award whatever the final relief would be. And I think Your
23 Honor reflected that there were some serious issues with that.

24 But even beyond that, on the question of interim
25 release, under the Mapp case you have to have a showing of

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1 extraordinary circumstances, and the interim relief, the release
2 on bail, whatever you want to call it, has to be necessary to
3 make the final habeas remedy effective.

4 And what that means is a situation such as in a case
5 called Boyer vs. City of Orlando, which 402 f 2nd, 966. It's
6 the fifth circuit, 1968. There you had a petitioner who had
7 been sentenced to a 120-day sentence; the Court ordered interim

8 relief because it was going to take a lot longer than 120 days
9 for his habeas petition to be resolved. In other words, his
10 case would have been moot before it could have been heard, so
11 the Court decided that interim relief was appropriate. But we
12 don't have anything like that here.

13 And again, I think Your Honor hit on the point, you've
14 got to think about what the purpose of such a hearing would be
15 and what the end game would be. The legal cocoon idea that was
16 floated a little bit earlier, I think there's serious question
17 as to whether the Court would have the power to create such a
18 cocoon. We certainly would have some arguments, you know, with
19 respect to that, but the statutes in the immigration context are
20 almost always keyed on the presence of an individual within the
21 United States.

22 So were you to bring petitioners here, there would be a
23 significant argument that their standing under the various
24 immigration statutes, under asylum law, that sort of thing, had
25 been inalterably changed such that they could be invested with a

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1 status that would not otherwise be available to either aliens
2 who had never entered the United States, or especially in kind
3 of the unique circumstances of this case, wartime detainees that
4 the executive is trying to find a place for resettlement.

5 THE COURT: Am I not correct that the Mariel boat
6 detainees are deemed never to have set foot in the United
7 States, even though they're locked up somewhere in Pennsylvania?

8 MR. HENRY: I'm not exactly sure about that, Your
9 Honor, quite frankly. I know that a lot of those individuals
10 for a number of years were held in prison.

11 Just as a practical matter, our position would be that

12 the conditions in Guantanamo Bay and Camp Iguana -- and let me
13 point out just a couple of facts on the side. Counsel are
14 permitted to meet with their detainees in Camp Iguana. There
15 are no security restraints during those meetings, they meet with
16 them in a rec hall.

17 And also there was a representation that somehow these
18 guys had entered their fifth year of detention, unless I
19 misheard. I'm not quite sure how that's possible, since the war
20 in Afghanistan didn't start until late in 2001. I believe
21 these individuals --

22 THE COURT: well, it's late in 2005. That's four years
23 ago. Entering the fifth year means finished four, starting the
24 fifth.

25 MR. HENRY: I think these individuals were captured in

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1 2002.

2 But in any event, again the Mariel boat people, I don't
3 have a specific answer on that. I can certainly find out. But
4 I know for a number of years those folks were kept in a
5 penitentiary, and we believe that the conditions in Camp Iguana
6 are much better.

7 And again, we are -- the government is serious about
8 finding a place for resettlement of these petitioners. Its
9 diplomatic efforts are ongoing, and we're happy to report those
10 to the Court whenever you would like to hear them.

11 But in the meantime, for the reasons that we've argued
12 in our brief, based on the Shaughnessy case, we don't believe
13 the Court has the power to bring the petitioners here. And even
14 if the Court did have the power, I think if you look at the
15 factors in the Mapp case, there's not a good reason to exercise
16 your power to do it, and lots of reasons not to.

17 If I could just comment, in closing, on a couple of
18 points. As far as the legal authority that the petitioners
19 cite, they refer to footnote 15 in the *Rassoul* case, they refer
20 to kind of these common law rights to be released, that sort of
21 thing. I just point out that all of those are involved in the
22 Court of Appeals case, and so hopefully sometime soon we'll get
23 a decision from the Court of Appeals on that. I had hoped to
24 have it sooner rather than later, but given that the
25 government's diplomatic efforts are serious and ongoing, and for

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1 all the reasons I've talked about, I don't believe that it would
2 be appropriate for Your Honor to order that the petitioners be
3 brought here.

4 THE COURT: What about alternative three?

5 MR. HENRY: Alternative three would be to --

6 THE COURT: Order you to release them.

7 MR. HENRY: Well, Your Honor, I guess that presents a
8 number of problems. You order us to release them; we certainly
9 are not at liberty to release them to a foreign sovereign that
10 has not agreed to take them. Again, we think there's serious
11 problems with the Court ordering that they be released into the
12 United States, so --

13 THE COURT: I didn't say into the United States, I said
14 release them, hypothetically.

15 MR. HENRY: Well, Your Honor, I'm having problems
16 thinking of other options. I suppose they could release them on
17 Guantanamo Bay, but that presents its own problems that were
18 addressed, I believe, in our prior filings as far as security
19 both of the detainees themselves and other security issues,
20 since Guantanamo Bay is a military reservation.

21 So as Your Honor pointed out, the authority that we
22 claim to continue to hold these individuals in a Camp Iguana
23 type affair is the authority to wind up these detentions as
24 quickly as possible in an orderly fashion. The Court's order to
25 release them potentially could, I suppose, throw that into

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1 somewhat of a disarray.

2 But I'm really not sure what else could be done; the
3 option of releasing them on a military base is not a good one,
4 we can't get them to a foreign sovereign, certainly the
5 executive is highly unlikely to admit them to the United States
6 of its own accord. And so again, it presents some serious
7 problems which I think counsel that the case, as far as those
8 kind of proceedings, continue to be stayed until we get some
9 guidance from the Court of Appeals or we find a place to
10 resettle them, given that the efforts are serious and ongoing.

11 THE COURT: All right, sir. Thank you. Mr. Willett,
12 anything further?

13 MR. WILLETT: Yes, sir. A couple of points in
14 response. According to Mr. Qassim, he was taken into custody by
15 U.S. forces in Pakistan on December 11, 2001.

16 While Mr. Henry was speaking, I leafed through to
17 Justice Kennedy's concurring opinion in *Rassoul*. Everybody
18 talks about whether or not you can bring them here, as though
19 they're not already here, here in the United States. Justice
20 Kennedy says, first, "Guantanamo Bay is in every practical
21 respect a United States territory." He goes on, "From a
22 practical perspective, the indefinite lease of Guantanamo Bay
23 has produced a place that belongs to the United States,
24 extending the implied protection of the United States."

25 So that is, I think, authority for the proposition that

1 they're already here in the law. I don't know why Your Honor
2 couldn't fashion an order that says your order shall not be
3 deemed an entry to the extent one hasn't been made already, and
4 people may fight about what that means one day.

5 Mezei, the Shaughnessy case, is one that Zadvadus
6 distinguishes because he was a guy who had come here voluntarily
7 to Ellis Island. I apologize, I don't have the cite, but
8 there's an interesting book, and I'll try to find the cite about
9 that case, and it is speculated that somebody simply opened the
10 door, because he disappeared from Ellis Island. The case
11 ultimately was dismissed, and presumably he's here, his children
12 are alive and well in the United States today. I think there
13 was a movie like that not so long ago.

14 THE COURT: That guy was in the airplane terminal,
15 wasn't he?

16 MR. WILLETT: In the airport they tried to open the
17 door and he wouldn't do it.

18 The point is here that these guys were brought to
19 Guantanamo, they didn't volunteer, so we say they're here.
20 They're in what Justice Kennedy says is in every practical way
21 the United States. And then when you go through the little baby
22 steps, I don't think we're asking for very much to get from that
23 to this interim release.

24 Thank you.

25 THE COURT: All right, counsel. You've done your best.

1 I can't pretend to be pleased at having learned a whole lot that
2 I didn't know when I came in here, but counsel have done their

3 best with what I think is really classically a dilemma.

4 The one thing that I am sure of is that I'm going to
5 act on this motion within the next week or two one way or
6 another. There isn't going to be any more waiting. So if
7 anybody has anything to say to me by way of augmenting the
8 record -- I don't -- thank you, Mr. Henry, for your offer to
9 speak to me off the record, but I don't want that. I'm just not
10 going to be in that position. If you can tell me that they're
11 going to be released on X date, you can tell me that publicly.
12 Or if you can tell me that they're going to be released on X
13 date and you have a date, I'll accept that. But "diplomatic
14 efforts are proceeding," no thank you.

15 Within two weeks, at the most, I'm going to act on this
16 motion. So the matter is submitted, unless anybody has anything
17 else to submit either orally today or in writing in the next
18 week or 10 days. Thank you very much. We're adjourned.

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1 CERTIFICATE OF OFFICIAL COURT REPORTER

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3 I, Rebecca King, certify that the foregoing is a
4 correct transcript from the record of proceedings in the
5 above-entitled matter.

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SIGNATURE OF COURT REPORTER

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