

No. 07-1520

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

ZAYN AL ABIDIN MUHAMMAD HUSAYN,
PRISONER, Guantánamo Bay Naval Station, Guantánamo Bay, Cuba,
Petitioner/Plaintiff,

v.

ROBERT M. GATES,
SECRETARY OF DEFENSE OF THE UNITED STATES OF AMERICA,
Respondent/Defendant.

**AMENDED PETITION FOR RELIEF UNDER THE DETAINEE
TREATMENT ACT OF 2005,
AND, IN THE ALTERNATIVE, FOR WRIT OF HABEAS CORPUS**

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1. Petitioner, Zayn Al Abidin Muhammad Husayn ("Abu Zubaydah") ("Petitioner"), seeks the Great Writ.

2. All of the information that appears in this Petition comes from sources in the public domain. The sources include newspapers, magazines, television programs, television interviews, written reports, and, in a very limited number of instances, anecdotal reports. No information contained in the Petition is based on counsel's access to or review of any classified information. Indeed, counsel have not yet received any classified information regarding this case, and have not yet had access to the Petitioner. All the information presented was obtained publicly and is set forth here to document Petitioner's need for a habeas corpus hearing. An index of the documents and sources is attached hereto as Exhibit 1.

3. In March 2002, Petitioner was living in Pakistan. Petitioner was well known in his community and widely believed to be mentally challenged. Petitioner was so well known, it is remarkable that the CIA was unable to locate him. A former FBI agent who has reviewed the file on Petitioner is on record stating: "This guy is insane, certifiable, split personality . . . He was like a travel agent, the guy who booked your flights . . . the greeter . . . Joe Louis in the lobby of

Caesar's Palace, shaking hands.”¹ Petitioner is said to have sustained a serious head injury in the years preceding the events of September 11, 2001.²

4. On or about March 28, 2002, Petitioner was attacked and shot three times by combined Pakistani and United States forces that, on information and belief, included agents of the Central Intelligence Agency (“CIA”). Wounded and in critical condition from gunshots to the groin, thigh, and stomach,³ Petitioner became a prisoner in a secret program conducted by the Central Intelligence Agency (“CIA”), initiated after September 11, in which alleged suspects were jailed and systematically tortured at secret prisons outside the United States known as “black sites.”⁴

5. Since March 2002, Petitioner has been held incommunicado in the unlawful custody of the CIA at various black sites around the world, including

¹ Ron Suskind, *The One Percent Doctrine: Deep Inside America's Pursuit of Its Enemies Since 9/11*, at 100 (New York: Simon & Schuster 2006).

² *Id.* at 95.

³ Brian Ross, *CIA- Abu Zubaydah: Interview with John Kiriakou: Transcript*, ABC NEWS, Dec. 10, 2007, http://abcnews.go.com/images/Blotter/brianross_kiriakou_transcript1_blotter071210.pdf.

⁴ Dan Froomkin, *Bush's Exhibit A for Torture*, Wash. Post, Dec. 18, 2007, <http://www.washingtonpost.com/wp-dyn/content/blog/2007/12/18/BL2007121800862.html>; *see also* Dana Priest, *CIA Holds Terror Suspects in Secret Prisons*, Wash. Post, Nov. 2, 2005, A1, <http://www.washingtonpost.com/wp-dyn/content/article/2005/11/01/AR2005110101644.html>.

Pakistan, Thailand, Diego Garcia, Poland and Northern Africa (most probably Morocco).⁵ During his captivity, Petitioner has been subjected to various forms of torture over extended periods of time, including, but not limited to, waterboarding, isolation, exposure to temperature extremes, and sleep and sensory deprivation.⁶

⁵ Dick Marty, *Secret detentions and illegal transfers of detainees involving Council of Europe member states: Second report*, Council of Europe Parliamentary Assembly, June 7, 2007, http://assembly.coe.int/CommitteeDocs/2007/Emarty_20070608_NoEmbargo.pdf; Brian Ross and Richard Esposito, *EXCLUSIVE: Sources Tell ABC News Top Al Qaeda Figures Held in Secret CIA Prisons*, ABC News, Dec. 5, 2007, <http://abcnews.go.com/WNT/Investigation/story?id=1375123>; *CIA Shuffled Prisoners Out of Poland*, Global Pulse, Dec. 5, 2005, http://www.globalpulse.net/archives/security/cia_shuttled_pr_000087.php; Jason Burke, *Secret World of U.S. Jails*, Observer, June 13, 2004, <http://observer.guardian.co.uk/international/story/0,6903,1237589,00.html>; *Enforced Disappearance, Illegal Interstate Transfer, and Other Human Rights Abuses Involving the UK Overseas Territories: Executive Summary*, Reprieve, available at <http://www.reprieve.org.uk/documents/FinalReprieveFASCExecutiveSummary.pdf>.

⁶ David Johnston, *At a Secret Interrogation, Disputes Flared Over Tactics*, N.Y. TIMES, Sept. 10, 2006, <http://www.nytimes.com/2006/09/10/washington/10detain.html?pagewanted=1>; Dan Eggen and Walter Pincus, *FBI, CIA Debate Significance of Terror Suspect: Agencies Also Disagree On Interrogation Methods*, Wash. Post, Dec. 18, 2007, at A1, <http://www.washingtonpost.com/wp-dyn/content/article/2007/12/17/AR2007121702151.html>; see also Brian Ross and Richard Esposito, *CIA's Harsh Interrogation Techniques Described – Sources Say Agency's Tactics lead to Questionable Confessions, Sometimes to Death*, ABC News, Nov. 18, 2005, <http://abcnews.go.com/WNT/Investigation/story?id=1322866>; Dick Marty, *Secret detentions and illegal transfers of detainees involving Council of Europe member states: Second report*, Council of Europe Parliamentary Assembly, June 7, 2007, http://assembly.coe.int/CommitteeDocs/2007/Emarty_20070608_NoEmbargo.pdf.

Indeed, the government has admitted to waterboarding Petitioner. The government also has admitted to videotaping hundreds of hours of Petitioner's torture and interrogations and destroying same.⁷ In addition to his torture, he has been subjected to cruel, inhumane, and degrading treatment and physical and psychological interrogation techniques specifically designed to isolate him from the world, reduce him to a state of learned helplessness, and render him wholly dependent on his captors.⁸ He has now been imprisoned without charge for nearly six years.

6. Currently, Petitioner is being held virtually incommunicado in Respondent's unlawful custody at Guantánamo.

7. Respondent Gates, U.S. Secretary of Defense, is either ultimately responsible for or has been charged with the responsibility of maintaining the custody and control of Petitioner at Guantánamo.

⁷ Scott Shane and Mark Mazetti, *CIA Tapes Lived and Died to Save Image*, N.Y. Times, Dec. 30, 2007, at A1, http://www.nytimes.com/2007/12/30/washington/30intel.html?_r=1&oref=slogin.

⁸ Jane Mayer, *The Black Sites: A rare look inside C.I.A.'s secret interrogation program*, The New Yorker, Aug. 13, 2007, http://www.newyorker.com/reporting/2007/08/13/070813fa_fact_mayer; Katherine Eban, *Rorschach and Awe*, Vanity Fair, July 17, 2007, <http://www.vanityfair.com/politics/features/2007/07/torture200707>.

I.
JURISDICTION

8. Petitioner invokes this Court's jurisdiction under 28 U.S.C. §§ 2241 and 2242. Petitioner also relies upon 28 U.S.C. §§ 1331, 1651, 2201, and 2202; 5 U.S.C. § 702; as well as the Fifth, Sixth, and Eighth Amendments to the United States Constitution; the International Covenant on Civil and Political Rights; the American Declaration on the Rights and Duties of Man; and customary international law. Because he seeks declaratory relief, Petitioner also relies on Fed. R. Civ. P. 57.

9. This Court is empowered under 28 U.S.C. § 2241 to grant the Writ of Habeas Corpus and to entertain this Petition. This Court is further empowered to declare the rights and other legal relations of the parties herein by 28 U.S.C. § 2201, and to effectuate and enforce declaratory relief by all necessary and proper means by 28 U.S.C. § 2202, as this case involves an actual controversy within the Court's jurisdictions.

II.
PARTIES

10. On information and belief, Petitioner was born in Riyadh, Saudi Arabia, on March 12, 1971. Presently, Petitioner is incarcerated and held in Respondent's unlawful custody at Camp VII, Guantánamo.

11. Robert M. Gates (“Respondent”) is the Secretary of the United States Department of Defense. Respondent Gates has been charged with maintaining the custody and control of the Petitioner. He is sued in his official capacity.

III. STATEMENT OF FACTS

12. Petitioner is not, and never has been, an enemy alien, lawful or unlawful belligerent, or combatant of any kind.

13. Petitioner is not, and never has been, an “enemy combatant” who was “part of or supporting forces hostile to the United States or coalition partners in Afghanistan. He was never engaged in an armed conflict against the United States there.” See *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

14. At the time of his detention, Petitioner was not a member of either the Taliban or al Qaeda. He did not cause or attempt to cause any harm to American personnel or property at any time prior to his illegal detention. Petitioner did not have a weapon when he was taken into illegal custody. Petitioner was not in Afghanistan at the time of his detention, but was taken into custody in Pakistan after he was wrongfully attacked, shot, and severely injured by U.S. forces, including the CIA.

15. From the time of his initial detention in Pakistan to the present, Petitioner has not been afforded any procedures that would satisfy even the most

basic notions of due process and procedural fairness, let alone the requirements imposed by the Due Process Clause of the Fifth Amendment to the United States Constitution. Had Petitioner received a hearing consistent with the standards and procedures specified by Respondent for Combatant Status Review Tribunals, or had those procedures been consistent with the Constitution and laws of the United States, Respondent would not have been able to prove by any standard that Petitioner either was, or should be classified as, an “enemy combatant.”

A. NEITHER THE CONGRESSIONAL AUTHORIZATION FOR THE USE OF MILITARY FORCE NOR THE EXECUTIVE ORDER OF NOVEMBER 13, 2001, AUTHORIZED PETITIONER’S DETENTION

16. In the wake of the September 11, 2001, attacks on the United States, a Joint Resolution of Congress authorized President Bush to use force against the “nations, organizations, or persons” that “planned, authorized, committed, or aided the terrorist attacks on September 11, 2001, or [that] harbored such organizations or persons.” Authorization for Use of Military Force, Pub. Law 107-40, 115 Stat. 224 (Sept. 18, 2001) (“AUMF”). Petitioner did not participate in an armed conflict against the United States nor was he arrested during the course of an armed conflict. He did not plan, authorize, commit, or aid any attacks on the United States, nor has he “harbored” persons who did. Therefore, he is not properly detained pursuant to the AUMF.

17. On November 13, 2001, President Bush issued a Military Order authorizing Respondent Rumsfeld to detain indefinitely “any individual who is not a United States citizen with respect to whom [the President] determine[s] from time to time in writing” that there is “reason to believe . . . at the relevant times:”

- i. is or was a member of the organization known as al Qaeda;
- ii. has engaged in, aided or abetted, or conspired to commit, acts of international terrorism, or acts in preparation therefore, that have caused, threaten to cause, or have as their aim to cause, injury to or adverse effects on the United States, its citizens, national security, foreign policy, or economy; or
- iii. has knowingly harbored one or more individuals described in subparagraphs (i) and (ii).

Military Order, Detention, Treatment, and Trial of Certain Non-Citizens in the War against Terrorism, 66 Fed. Reg. 57,833 (Nov. 13, 2001) (“Military Order”).

Pursuant to the plain language of the Order, President Bush must make in writing the determination contemplated by the Military Order. The Military Order was neither authorized nor directed by Congress and is beyond the scope of the AUMF.

18. On information and belief President Bush has never certified or determined in any manner, whether in writing or otherwise, that Petitioner is subject to the Executive Order.

19. Petitioner is not properly subject to detention pursuant to the Executive Order issued by President Bush.

20. Petitioner has not been, and is not being, detained lawfully either pursuant to the Executive Order, President Bush's authority as Commander-in-Chief and/or under the laws and usages of war.

B. PETITIONER'S SEIZURE IN PAKISTAN AND TRANSFER TO THE CUSTODY OF THE CIA

21. Petitioner was captured March 28, 2002, in Faisalbad, Pakistan.⁹ He suffered three gunshot wounds after being attacked by Pakistani and American forces during his capture and arrest.¹⁰

22. Former CIA agent John Kiriakou, who was a co-leader of the team of American and Pakistani forces that shot and took custody of Petitioner, described Petitioner as "a very friendly guy," who wrote poetry and was keen to talk about

⁹ *United States' "Disappeared" CIA Long-term "Ghost Detainees"*, Human Rights Watch, available at <http://www.hrw.org/backgrounder/usa/us1004/index.htm>; Dan Eggen and Walter Pincus, FBI, *CIA Debate Significance of Terror Suspect: Agencies Also Disagree on Interrogation Methods*, Wash. Post, Dec. 18, 2007, at A1, <http://www.washingtonpost.com/wp-dyn/content/article/2007/12/17/AR2007121702151.html>; John F. Burns, *A Nation Challenged: The Fugitives; In Pakistan's Interior, a Troubling Victory in Hunt for Al Qaeda*, N.Y. Times, April 14, 2002, <http://query.nytimes.com/gst/fullpage.html?res=9A00EFDA123CF937A25757C0A9649C8B63>.

¹⁰ David Johnston, *At a Secret Interrogation, Dispute Flared Over Tactics*, N.Y. TIMES, Sept. 10, 2006, <http://www.nytimes.com/2006/09/10/washington/10detain.html?pagewanted=1>; *Pakistan: Musharraf's Risky Gambit*, Newsweek, Oct. 29, 2007, <http://www.newsweek.com/id/64441> (noting that "Pakistan's own Inter-Services Intelligence directorate was kept largely in the dark about the operation").

