IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WASIM, *et al.* Petitioners, v. GEORGE W. BUSH, President of the United States, *et al.*, Respondents.	Civil Action No. 06-CV-1675 (RBW)
ACHRAF SALIM ABDESSALAM, Petitioner, v. GEORGE W. BUSH, President of the United States, *et al.*, Respondents.	Civil Action No. 06-CV-1761 (ESH)
SAED FARHAN AL-MALIKI, *et al.* Petitioners, v. GEORGE W. BUSH, President of the United States, *et al.*, Respondents.	Civil Action No. 06-CV-1768 (RWR)

Dockets.Justia.com

KHALED MALLOUH SHAYE ALGAHTANI, *et al.* Petitioners, v. GEORGE W. BUSH, President of the United States, *et al.*, Respondents.	)	Civil Action No. 06-CV-1769 (RCL)

RESPONDENTS' OPPOSITION TO MOTION FOR ENTRY OF PROTECTIVE ORDER

Respondents hereby oppose the motions for entry of protective orders filed by petitioners Wasim, Achraf Salim Abdessalam ("Abdessalam"), Saed Farhan Al-Maliki ("Al-Maliki"), and Khaled Mallouh Shaye Algahtani ("Algahtani") in the above-captioned cases.[1] The Court lacks jurisdiction over these cases because petitioners' *habeas* petitions were not properly filed in this Court, and the Court should not proceed to grant petitioners the relief they request – entry of the protective orders used for other *habeas* cases that were entered at a time when the District Court retained *habeas* jurisdiction of petitions brought by Guantanamo Bay detainees.[2]

[1]Pet'r's Mot. for Entry of a Protective Order, *Wasim v. Bush*, No. 06-CV-1675 (RBW) (dkt. no. 5); Pet'r's. Mot. for Entry of a Protective Order, *Abdessalam v. Bush*, No. 06-CV-1761 (ESH) (dkt. no. 5); Pet'r's Mot. for Entry of Protective Order, *Al-Maliki v. Bush*, No. 06-CV-1768 (RWR) (dkt. no. 3); Pet'r's Mot. for Entry of Protective Order, *Algahtani v. Bush*, No. 06-CV-1769 (RCL) (dkt. no. 3).

[2] *See In re Guantanamo Detainee Cases*, 344 F. Supp. 2d 174 (D.D.C. Nov. 8, 2004) ("Amended Protective Order"); Order Supplementing and Amending Filing Procedures Contained in November 8, 2004 Amended Protective Order in *In re Guantanamo Detainee Cases*, No. 02-CV-0299, *et al.* (D.D.C. Dec. 13, 2004); Order Addressing Designation

These cases were initiated by the filing of petitions for writs of *habeas corpus* on September 29, 2006, and October 16, 2006.[3] The petitions purport to be filed on behalf of Wasim, Abdessalam, Al-Maliki, and Algahtani, detainees at the United States Naval Base at Guantanamo Bay, Cuba, who have been determined to be enemy combatants.[4] *See* Wasim Petition; Abdessalam Petition; Al-Maliki Petition; Algahtani Petition; Declaration of Karen Hecker (attached as Exhibit A). None of the petitions, however, is either signed or verified by the petitioners seeking relief.[5] See Wasim Petition; Abdessalam Petition; Al-Maliki Petition; Algahtani Petition; 28 U.S.C. § 2242.

The Detainee Treatment Act of 2005, Pub. L. No. 109-148, tit. X, 119 Stat. 2680 (10 U.S.C. § 801 note) ("DTA"), enacted on December 30, 2005, amended the habeas statute, 28

Procedures for "Protected Information" in *In re Guantanamo Detainee Cases*, No. 02-CV-0299, *et al.* (D.D.C. Nov. 10, 2004).

[3] The Wasim petition was filed on September 29, 2006. Pet. for Writ of Habeas Corpus, *Wasim v. Bush*, No. 06-CV-1675 (RBW) (Wasim Petition) (dkt. no. 1). The Abdessalam, Al-Maliki, and Algahtani petitions were filed on October 16, 2006. Pet. for Writ of Habeas Corpus, *Abdessalam v. Bush*, No. 06-CV-1761 (ESH) (Abdessalam Petition) (dkt. no. 1); Pet. for Writ of Habeas Corpus, *Al-Maliki v. Bush*, No. 06-CV-1768 (RWR) (Al-Maliki Petition) (dkt. no. 1); Pet. for Writ of Habeas Corpus, *Algahtani v. Bush*, No. 06-CV-1769 (RCL) (Algahtani Petition) (dkt. no. 1).

[4] Based on the information provided in their petitions, respondents have identified petitioners Wasim, Abdessalam, Al-Maliki, and Algahtani as having Internment Serial Numbers ("ISNs") 338, 263, 157, and 439, respectively. Detainee ISN 157 (petitioner Al-Maliki) is no longer detained at Guantanamo Bay, and counsel for respondents have notified counsel for petitioner Al-Maliki of this fact. Counsel for petitioner have represented that they are in the process of consulting with the next friend petitioner in the Al-Maliki action to determine whether they will withdraw the petition for habeas corpus filed on petitioner Al-Maliki's behalf.

[5] Each of the Wasim, Al-Maliki, and Algahtani petitions purports to be filed by the petitioner on his own behalf and through a relative acting as next friend. Wasim Petition at 4; Al-Maliki Petition at 2; Algahtani Petition at 2. The Abdessalam petition purports to be filed by the petitioner on his own behalf. Abdessalam Petition at 2.

U.S.C. § 2241, to provide that "no court, justice, or judge shall have jurisdiction" to consider either (1) a habeas petition filed by an alien detained by DoD at Guantanamo, or (2) "any other action against the United States or its agents relating to any aspect of the detention" of such aliens. *See* DTA § 1005(e)(1). While the Supreme Court in *Hamdan v. Rumsfeld*, 548 U.S. __, 126 S. Ct. 2749, 2762-69 (2006), held that this particular aspect of the amendment to the habeas statute did not apply to habeas petitions pending prior to the enactment of the Act, the petitions in these cases were filed on September 29, 2006, and October 16, 2006, well after enactment of the Act. *See* DTA § 1005(h)(1) (provision withdrawing court jurisdiction "take[s] effect on the date of enactment" of the DTA). In addition, the Detainee Treatment Act created an exclusive review mechanism in the D.C. Circuit to address the validity of the detention of such aliens held as enemy combatants: section 1005(e)(2) of the Act states that the D.C. Circuit "shall have exclusive jurisdiction to determine the validity of any final decision of a Combatant Status Review Tribunal that an alien is properly detained as an enemy combatant," and it further specifies the scope and intensiveness of that review.

On October 17, 2006, the President signed into law the Military Commissions Act of 2006, Pub. L. No. 109-366 ("MCA"). The MCA, among other things, again amends 28 U.S.C. § 2241 to provide that "no court, justice, or judge shall have jurisdiction" to consider either (1) habeas petitions "filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination," or (2) "any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States who has been determined by the United

States to have been properly detained as an enemy combatant or is awaiting such determination," except as provided in section 1005(e)(2) and (e)(3) of the DTA.[6] *See* MCA § 7(a). Further, the new amendment to § 2241 takes effect on the date of enactment and applies specifically "*to all cases, without exception, pending on or after the date of the enactment of this Act* which relate to any aspect of the detention, transfer, treatment, trial, or conditions of detention of an alien detained by the United States since September 11, 2001."[7] *Id.* § 7(b) (emphasis added).

This Court, by the explicit terms of the habeas statute, has lacked jurisdiction over these four cases since they were filed. Indeed, at the time the cases were filed, the DTA provided that "no court, justice, or judge" had jurisdiction to consider either a habeas petition filed by an alien detained by DoD at Guantanamo or "any other action against the United States or its agents relating to any aspect of the detention" of such an alien. *See* DTA § 1005(e)(1). Moreover, since then, the habeas statute has been amended again by the MCA to provide that "no court, justice, or judge shall have jurisdiction" to consider either a habeas petition or any other action "relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien . . . detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination." MCA § 7(a)

---

[6] As noted above, DTA § 1005(e)(2) provides that the Court of Appeals "shall have exclusive jurisdiction to determine the validity of any final decision of a Combatant Status Review Tribunal that an alien is properly detained as an enemy combatant," while DTA § 1005(e)(3), as amended by the MCA, provides that the Court of Appeals "shall have exclusive jurisdiction to determine the validity of any final decision rendered by a military commission," *id.* § 1005(e)(3).

[7] The Court of Appeals in certain of the pending Guantanamo detainee appeals, *Boumediene v. Bush*, No. 05-5062 (D.C. Cir.), and *Al Odah v. United States*, No. 05-5064 (D.C. Cir.), has ordered the parties to submit supplemental briefing regarding the significance of the MCA. This briefing was completed on November 20, 2006.

(amending 28 U.S.C. § 2241). Thus, both the DTA, when these cases were filed, and the MCA, currently, have provided unambiguously that District Court jurisdiction does not exist over any of the above-captioned cases.[8]

Thus, District Court jurisdiction over these cases has never existed. "'Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause.'" *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998) (quoting *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1869)). Accordingly, the Court should not proceed to exercise jurisdiction and enter the protective order regime requested by petitioners' counsel. Entry of the protective orders in these cases, and the concomitant assertion of jurisdiction by this Court, would directly conflict with MCA's clear and unequivocal denial of District Court jurisdiction over these cases. It would disrupt the jurisdictional scheme intended and provided by the amended habeas statute and unduly interfere with the exclusive jurisdiction

---

[8] Petitioners Abdessalam, Al-Maliki and Algahtani attempt to circumvent the fact that they filed their cases after enactment of the DTA by arguing they were included as petitioners in *John Does 1-570 v. Bush*, Case No. 05-CV-313 (CKK), a case filed prior to enactment of the DTA purportedly seeking *habeas* relief on behalf of hundreds of unnamed Guantanamo detainees. See Abdessalam Petition ¶ 11; Al-Maliki Petition ¶ 11; Algahtani Petition ¶ 11. This argument fails for several reasons. First, on October 31, 2006, Judge Kollar-Kotelly granted respondents' motion to dismiss the *Doe* case. *See* Memorandum Opinion and Order (dkt. nos. 30, 31). Judge Kollar-Kotelly dismissed the *Doe* case with prejudice in its entirety, concluding that counsel who initiated the litigation did not have standing to bring suit on behalf of unspecified "John Doe" detainees. *See id.* Consequently, petitioners cannot look to the *Doe* case for purposes of attempting to circumvent the DTA's effective date provision. Second, even aside from the DTA, the MCA clearly provides that the Court currently lacks jurisdiction over this case.

of the Court of Appeals.[9] *See Telecomms. Research & Action Ctr. v. FCC*, 750 F.2d 70, 75, 78-79 (D.C. Cir. 1984) (holding that when a statute assigns review authority to the Court of Appeals, the Court of Appeals has exclusive jurisdiction to review any suit seeking relief that might affect its future jurisdiction, and the District Court cannot exercise concurrent jurisdiction); *cf. id.* at 77 ("By lodging review of agency action in the Court of Appeals, Congress manifested an intent that the appellate court exercise sole jurisdiction over the class of claims covered by the statutory grant of review power."); *id.* at 78 (noting that concurrent District Court jurisdiction could lead to "duplicative and potentially conflicting review and the delay and expense incidental thereto" (citation omitted)). Moreover, entry of the requested orders would result in substantial prejudice to respondents by imposing sizeable burdens upon respondents respecting counsel access to detainees at Guantanamo Bay.[10]

---

[9] Any protective order and counsel access regime should be properly tailored for purposes of the type of review proceeding provided for pursuant to statute. Wholesale importation of a regime developed for *habeas* proceedings at a time when the District Court legitimately exercised *habeas* jurisdiction unconstrained by limits now set by statute would be inappropriate. *Cf. Telecomms. Research & Action Ctr.*, 750 F.2d at 75, 77, 78-79. As mentioned above, litigation in the Court of Appeals concerning the scope of such a protective order is currently pending; thus, entry of the District Court protective orders in cases such as these, which clearly belong in the Court of Appeals, would infringe upon the Court of Appeals' exclusive jurisdiction.

[10] The protective order establishes a regime, *inter alia*, governing the handling of classified information in the litigation, requiring the government to seek Court permission to have certain information maintained under seal, and controlling issues related to counsel access to represented detainees. The counsel access procedures appended as Exhibit A to the protective order ("Access Procedures") also, *inter alia*, contemplate that the government permit qualifying counsel privileged face-to-face access to represented detainees, require the government to establish and operate a system of privileged "legal mail" between qualified counsel and represented detainees, command a government team to conduct classification review of certain materials on certain schedules, impose on the government a presumption that counsel may share classified information across cases in certain circumstances, and otherwise limit in significant ways the discretion the military would normally exercise with respect to mail and in-person

Respondents' opposition to petitioners' motions for entry of a protective order regime is not intended to thwart altogether counsel access to petitioners. However, a regime for counsel access should be developed or ordered by a forum court that, consistent with MCA and DTA, has jurisdiction with respect to claims brought on behalf of petitioners. That forum is the Court of Appeals. As explained above, the only review mechanism available to petitioners is the exclusive review provided in the Court of Appeals of final Combatant Status Review Tribunal ("CSRT") decisions determining the detainees to be enemy combatants. *See supra* note 4 & accompanying text. The petitioners in these cases have received final CSRT decisions concluding that they are enemy combatants. *See* Declaration of Karen Hecker. Thus, there is no obstacle to petitioners filing petitions for review in the Court of Appeals and seeking entry of appropriate protective orders governing counsel access and handling of classified and sensitive information. Several Guantanamo detainees have already filed such petitions in the Court of Appeals, and briefing concerning a protective order governing counsel access in those proceedings was completed on November 13, 2006. *See Bismullah v. Rumsfeld*, Case No. 06-1197 (D.C. Cir.). Petitioners have ample means to obtain access to counsel without an improper exercise of jurisdiction by this Court.

Petitioners assert that the absence of District Court jurisdiction pursuant to statute in this case is unconstitutional or improper in various respects,[11] *see, e.g.*, Wasim Petition ¶ 11

---

access to wartime detainees.

[11] *But see, e.g.*, *Khalid v. Bush*, 355 F. Supp. 2d 311, 320-21 (D.D.C. 2005) (aliens detained at Guantanamo are not possessed of constitutional rights); *see also Swain v. Pressley*, 430 U.S. 372, 381 (1977) (substitute remedy "which is neither inadequate nor ineffective to test the legality of a person's detention" does not violate Suspension Clause).

(asserting DTA's withdrawal of District Court jurisdiction violated Suspension Clause), but this does not mean that petitioners are entitled to ignore the governing statute and obtain the requested relief, entry of a protective order regime by the Court, as if the DTA and MCA do not exist. For one thing, whatever arguments may be marshaled in favor of the existence of some form of jurisdiction ancillary to that in the Court of Appeals provided by the DTA and MCA, it is clear that such jurisdiction would not reside in the District Court. *See Telecomms. Research & Action Ctr.*, 750 F.2d at 75, 78-79. In any event, consistent with the directives of the Supreme Court in *Steel Co.* and *Ex parte McCardle*, the most the Court should do at this point is conduct proceedings to deal with the jurisdictional issue, *i.e.*, establish a schedule for a motion by respondents and follow-on briefing addressing the issue of the Court's jurisdiction in detail, while staying all other proceedings in this case, including with respect to petitioners' request for entry of a protective order regime. Respondents' jurisdictional arguments warrant appropriate consideration, and they are in no way immaterial or premature. Alternatively, the Court should await consideration of the jurisdictional issue under the DTA and MCA by the Court of Appeals in the cases pending before it, *see supra* note 7, while staying all proceedings in these cases – including with respect to petitioners' requests for entry of protective orders.

***

For the reasons stated above, petitioners' motions for entry of protective orders should be denied.

Dated: November 24, 2006

Respectfully submitted,

PETER D. KEISLER
Assistant Attorney General

DOUGLAS N. LETTER
Terrorism Litigation Counsel

/s/ JAMES C. LUH
JOSEPH H. HUNT (D.C. Bar No. 431134)
VINCENT M. GARVEY (D.C. Bar No. 127191)
TERRY M. HENRY
JAMES J. SCHWARTZ
PREEYA M. NORONHA
ROBERT J. KATERBERG
NICHOLAS J. PATTERSON
ANDREW I. WARDEN (IN Bar No. 23840-49)
EDWARD WHITE
JAMES C. LUH
Attorneys
United States Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Ave., N.W.
Washington, DC 20530
Tel: (202) 514-4938
Fax: (202) 616-8460
Attorneys for Respondents