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

IN RE:)	
)	
GUANTANAMO BAY)	Misc. No. 08-442 (TFH)
DETAINEE LITIGATION)	
)	
AL HALMANDY, <i>et al.</i> ,)	
)	
Petitioners,)	No. 05-CV-2385 (RMU)
)	
v.)	
)	
BUSH, <i>et al.</i> ,)	
)	
Respondents.)	
)	

**PETITIONER MUHAMMED SAAD IQBAL MADNI'S RESPONSE
TO COURT ORDER TO SHOW CAUSE WHY HIS PETITION
SHOULD NOT BE DISMISSED AS MOOT**

Petitioner Muhammed Saad Iqbal Madni (ISN 743) hereby responds to the court's Order to show cause why his Petition should not be dismissed as moot, and in support thereof states as follows:

I. BACKGROUND

A. Mr. Madni's Petition for Writ of Habeas Corpus

On December 13, 2005, Mr. Madni, a Pakistani man imprisoned at Guantanamo Bay, Cuba, filed a Petition for Writ of Habeas Corpus ("Petition") seeking his immediate release as well as injunctive and declaratory relief. Petitioner alleged, among other violations of United States and international law, that he was being held under conditions that violated his

constitutional and international rights to dignity and freedom from torture and from cruel, inhuman, and degrading treatment or punishment. (Petition ¶¶ 92.)

Mr. Madni's Petition enumerates several causes of action. In particular, the First, Second, Third, and Fourth claims allege violations of common law and constitutional due process and violations of international law, including illegal incarceration by the respondents, and unlawful conditions of confinement. All four counts request declaratory and injunctive relief, as well as any other relief the court may deem appropriate¹. Three of the first four counts also request habeas relief.

The Fifth, Sixth, Seventh, Eighth, Ninth, and Seventeenth claims for relief are brought under the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, and request relief to be determined at trial as well as habeas, declaratory, and injunctive relief. In particular, the Fifth claim alleges torture, the Sixth claim alleges war crimes, the Seventh claim alleges cruel, inhuman, or degrading treatment, the Eighth claim alleges arbitrary arrest and prolonged arbitrary detention, the Ninth claim alleges enforced disappearance, and the Seventeenth claim alleges rendition. The Tenth claim for relief also alleges unlawful detention based upon a separate legal theory pursuant to Article II of the U.S. Constitution, and likewise seeks four remedies from the court, including, habeas, declaratory, injunctive, and other appropriate relief.

Administrative Procedure Act ("APA"), 5 U.S.C. § 500, *et seq.*, claims for relief are set forth in the Eleventh, Twelfth, and Thirteenth causes of action. These counts allege violations of the APA in the form of arbitrary and capricious detention, arbitrary and capricious denial of due process, and torture. Petitioner requests habeas relief for two of the three Administrative

¹ Part of the relief sought by Petitioner is an order requiring Respondents to return personal articles taken from Mr. Madni by the government, and to provide him with a copy of his medical records created while he was imprisoned at Guantanamo. Undersigned counsel have requested such items from Respondents and have not yet received a response to that request.

Procedure Act claims, and requests declaratory, injunctive, and any other relief the court may deem appropriate for all three APA claims.

B. Relevant Procedural History and Related Background

On September 2, 2008, the government notified undersigned counsel that Mr. Madni had been transferred from U.S. custody to the custody of Pakistan. On the same date, the government filed notice with this court that Mr. Madni had been transferred and withdrew an earlier request that the related Stipulation and Order it had filed with the court under seal on August 20 be treated as protected information. On September 5, 2008, the court issued a Minute Order to the Petitioner to show cause why his petition should not be dismissed as moot. This brief is provided in response to that Order.

Undersigned counsel have no knowledge regarding the terms and conditions of the agreement under which Mr. Madni's physical custody was transferred to Pakistan. Respondents have not submitted any evidence to the court regarding the nature of Mr. Madni's transfer or his current status in Pakistan. Accordingly, undersigned counsel does not know whether as part of his transfer the United States required that Mr. Madni continue to be imprisoned, or after what period of time or under what condition he might be released. Furthermore, undersigned counsel does not know whether Mr. Madni has at all times since his transfer remained imprisoned in Pakistan.

II. ARGUMENT

Although Mr. Madni has allegedly been transferred to the custody of Pakistan, such transfer does not necessarily moot the habeas jurisdiction of this court because, among other things, the government has proffered no evidence that would allow the court to determine whether Respondents have met their burden to prove that the court's habeas jurisdiction has been defeated. Accordingly, Petitioner urges the court not to prematurely preclude Mr. Madni from

demonstrating that notwithstanding the transfer, he, as a matter of fact and law, is still entitled to an adjudication of his habeas petition.

In addition and independent of Petitioner's habeas claims, the alleged transfer does not moot judicial consideration of Mr. Madni's claims pursuant to the Alien Tort Statute, claims pursuant to the Administrative Procedure Act, claims for declaratory and injunctive relief, and the other causes of action that have been pleaded. In light of these outstanding claims, and the failure of the government to meet its burden of demonstrating that Petitioner's habeas claims are moot, Mr. Madni's Petition has not been mooted by his transfer to Pakistan and his Petition should not be dismissed.

A. Respondents Have Not Provided Sufficient Evidence to Meet Their Burden to Prove Petitioner's Habeas Claims Are Moot

The "heavy burden of persua[ding]" this court "that the challenged conduct cannot reasonably be expected to start up again lies with the party asserting mootness." *Friends of the Earth, Inc. v. Laidlaw Env'tl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000). Accordingly, in this case the government must overcome a "heavy" burden to demonstrate that Mr. Madni's habeas claims are moot. *See County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979); *Doe v. Harris*, 696 F.2d 109, 112 (D.C. Cir. 1982). Respondents have neither met their burden, nor have they indicated to the court that they could.

1. Transfer from United States Territory Does Not Moot Habeas Jurisdiction

It is well settled that a non-citizen's departure from the United States does not deprive a habeas court of jurisdiction because the "in-custody requirement must be satisfied only at the time the petition was filed." Hiroshi Motomura, *Immigration Law & Fed. Court Jurisdiction Through the Lens of Habeas Corpus*, 91 CORNELL L. REV. 459, 484 (2006) (collecting cases); *see also Carafas v. LaVallee*, 391 U.S. 234, 238-39 (1968) (noting that 28 U.S.C. § 2243

“contemplate[s] the possibility of relief other than immediate release from physical custody,” and holding that “once the federal jurisdiction has attached in the District Court, it is not defeated by the release of the petitioner prior to completion of proceedings on such application”); *Zalawadia v. Ashcroft*, 371 F.3d 292, 297 (5th Cir. 2004) (citing *Spencer v. Kemna*, 523 U.S. 1, 7 (1998), and explaining that “[t]he Supreme Court has made it clear that the ‘in custody’ determination is made at the time the habeas petition is filed”); *Zegarra-Gomez v. I.N.S.*, 314 F.3d 1124, 1127 (9th Cir. 2003) (finding petitioner’s deportation does not moot habeas claim where petition was filed prior to release from custody); *Smith v. Ashcroft*, 295 F.3d 425, 428 (4th Cir. 2002) (explaining that petitioner need only have been in custody at time habeas petition filed to avoid jurisdiction challenge); *Leitao v. Reno*, 311 F.3d 453, 455-56 (1st Cir. 2002) (concluding that where Petitioner was in custody when habeas petition filed it was “enough to satisfy the jurisdictional custody requirement”); *Chong v. District Dir., I.N.S.*, 264 F.3d 378, 382-86 (3d Cir. 2001) (subsequent deportation did not defeat jurisdiction where petitioner was in custody on the date her petition was filed).

Therefore, even if jurisdiction in this case were predicated solely on the habeas statute (which it is not), the transfer of Mr. Madni to Pakistan does not eliminate the court’s habeas jurisdiction to review the issues presented by Mr. Madni’s Petition, and to provide appropriate relief. The governing legal principle is that even if a person is released from custody, a habeas corpus petition remains justiciable and not moot throughout the period required to adjudicate the petition at trial, on appeal, and on certiorari so long as, at the time the federal petition was filed, the petitioner was subject to incarceration. *See* R. Hertz & J. Leibman, *Federal Habeas Corpus Practice & Procedure*, §8.2b-2d, at 407 (Matthew Bender, 5th Ed.).

2. Petitioner May Still Be In Respondents' Constructive Custody

A separate and continuing basis for habeas jurisdiction is Respondents' failure to confirm whether or not Mr. Madni is still in the constructive custody of the government. It is entirely reasonable, without further evidence from the government, to assume that Mr. Madni may be constructively in the custody of the United States. Incarceration and other restraints imposed as part of Mr. Madni's transfer to Pakistan would constitute custody and an independent basis for both initial and continued habeas jurisdiction.

Virtually any restraint on a habeas petitioner's liberty is sufficient to defeat mootness and to maintain habeas petition proceedings. *See, e.g., Maleng v. Cook*, 490 U.S. 488, 492-94 (1989) (holding that habeas petitioner could challenge state sentences even though not presently serving them because incarcerated in federal prison on federal charges); *Jones v. Cunningham*, 371 U.S. 236, 242 (1963) (reasoning that petitioner's release from physical confinement was not unconditional where petitioner had to report to parole officer, remain in particular community, residence, and job, and refrain from certain activities); *Jackson v. Coalter*, 337 F.3d 74, 79 (1st Cir. 2003) (petitioner "remains under supervised probation...[and] [t]hus, he is still sufficiently 'in custody' to pursue federal habeas corpus relief"); *Matus-Leva v U.S.*, 287 F.3d 758, 761 (9th Cir. 2002), *cert. denied.*, 537 U.S. 1022 (holding that petitioner, who had completed term of incarceration was "still subject to supervised release, and thus he is 'in custody'" for habeas corpus purposes); *Barry v. Bergin County Probation Dep't*, 128 F.3d 152, 159-62, (3d Cir. 1997), *cert. denied*, 522 U.S. 1136 (1998) (determining that court-ordered community service constituted 'custody' even though the only consequence of violation of the court-ordered community service would be a fine); *see also* Federal Habeas Corpus Practice & Procedure, *supra*, at 409-415, & n.40-60. Respondents have not met their burden, and the Petitioner should

not be precluded from engaging in the discovery necessary to show that he continues to be subjected to continuing restraint.

3. Petitioner's Habeas Counts Are Not Moot Due to the Collateral Consequences of His Imprisonment and the Adjudications Upon Which His Imprisonment Was Based

Mr. Madni continues to suffer the collateral consequences arising from the government's illegal conduct, with respect to both his imprisonment and transfer to Pakistan. These collateral consequences preclude a finding a mootness. *See Zalawadia*, 371 F.3d at 298 (holding that alien's dismissed habeas petition presented a live case or controversy and was not moot even though he was removed while his appeal was pending, where his removal barred him from seeking reentry into the United States for five years); *Zegarra-Gomez*, 314 F.3d at 1127 (finding that alien suffered sufficient collateral consequences where administrative determination that he was aggravated felon rendered him ineligible to seek cancellation of removal for twenty years); *Leitao*, 311 F.3d at 455-56 (determining permanent bar from readmission to U.S. was collateral consequence sufficient to confer jurisdiction over habeas petition after alien no longer in U.S. custody); *Chong*, 264 F.3d at 382-86 (explaining the ten-year ban on readmission sufficient collateral consequence to preserve live case of controversy even after deportation of prisoner).

Release from incarceration does not defeat continued consideration of, and jurisdiction over, a habeas petition if the incarceration or the official administrative or judicial judgment that lead to that incarceration may have any collateral consequences. *See Spencer v. Kemna*, 523 U.S. 1, 8 (1998) (“[W]e have been willing to presume that a wrongful criminal conviction has continuing collateral consequences (or ... to count collateral consequences that are remote and unlikely to occur.”); *DePompei v. Ohio Adult Parole Auth.*, 999 F.2d 138, 140 (6th Cir. 1993) (explaining that “the mere possibility that [collateral] consequences could exist is sufficient to preserve a live controversy”).

In the present case, the government's adjudicatory proceedings, in the form of a CSRT and ARB(s), have had the practical consequence of causing Mr. Madni's probable continued incarceration in Pakistan. Continued incarceration in another jurisdiction or another country is a collateral consequence for which habeas jurisdiction continues. *See Haitian Refugee Ctr. v. Civiletti*, 503 F.Supp. 442, 466 n. 46 (S.D. Fla. 1980), *aff'd and judgment modified sub nom.*, *Haitian Refugee Ctr. v. Smith*, 676 F.2d 1023 (5th Cir. 1982).

In addition, Respondents' adjudications Mr. Madni is an enemy combatant has the additional consequence of precluding his entry into the United States under, for example, 8 U.S.C. §1182 (a)(3)(B), and to travel to other countries upon his release in Pakistan. This also constitutes a collateral consequence that preserves habeas jurisdiction. *See Spencer*, 523 U.S. at 8.

Therefore, even if Respondents provide evidence to this court (which they have not) that the government has relinquished its *de facto* and *de jure* custody and control of Mr. Madni, Respondents cannot meet their significant burden of proving that Mr. Madni has not suffered any collateral consequence due to his imprisonment.

B. Petitioner's Non-Habeas Claims Are Not Mooted By His Transfer

It is well established that the mooting of one issue in a case does not moot the entire case, even if a party's primary injury is resolved. *See, e.g., University of Texas v. Camenisch*, 451 U.S. 390, 394 (1981). In accordance with this rule, even if this court finds that Petitioner's habeas claims are mooted by his transfer, Mr. Madni's non-habeas claims for relief survive and must be resolved by the court.

1. Alien Tort Statute Claims

As set forth *supra*, the Petition contains several counts alleging violations of the Alien Tort Statute, 28 U.S.C. § 1350. The ATS confers jurisdiction in this court to hear actions by an

alien for a tort committed in violation of the law of nations or a treaty of the United States. *Id.* Petitioner's ATS counts allege that Respondents engaged in acts that directed, ordered, confirmed, or ratified, and/or conspired to bring about the cruel, degrading and/or inhumane treatment of Mr. Madni, and that such acts violated specific provisions and Protocols of the Geneva Conventions, including Common Article III, customary international laws, certain other multilateral treaties and international instrument, international and domestic judicial decisions, and other authorities. Mr. Madni is entitled to review of these claims by this court, particularly in light of the Supreme Court's confirmation of the applicability of the Conventions in *Hamdan v. Rumsfeld*, 548 U.S. 557, 625-632 (2006).

The Petition alleges numerous torts committed against Mr. Madni, a Pakistani national, by Respondents and their agents. Mr. Madni's Petition alleges, among other injuries, torture, abuse, and treatment that violates the norms of human behavior recognized by a consensus of the international community. *See, generally, Enahoro v. Abubakar*, 408 F.3d 877 (7th Cir. 2005); *Alvarez-Machain v. United States*, 107 F. 3d 696 (1997), *cert. denied*, 118 S.Ct. 60; *Hilao v. Estate of Marcos*, 25 F.3d 1467, 1474-1479 (9th Cir. 1994), *cert. denied*, 513 U.S. 1126 (1996); *Abebe-Jira v. Negewo*, 72 F.3d 844 (11th Cir. 1996), *cert. denied*, 117 S.Ct. 96. Petitioner's transfer does not moot these claims.

2. Administrative Procedure Act Claims

The Petition asserts that Respondents violated the Administrative Procedure Act by flagrantly disregarding applicable Army regulations that should have governed detention of Mr. Madni and his treatment at Guantanamo. In particular, the Petition cites Army Regulation 190-8, which prohibits the detention of civilians who were seized away from the field of battle or outside occupied territory or who were not engaged in combat against the United States. Petitioner alleges that by arbitrarily and capriciously detaining him in military custody, in

violation of Army Regulation 190-8, Respondents acted unlawfully in violation of the APA. 5 U.S.C. § 706(2).

Mr. Madni's allegations constitute colorable claims of APA violations, which are actionable, and are not mooted by his transfer. *See Adarand Constructors, Inc. v. Slater*, 528 U.S. 216, 220 (2000) (explaining that even new governing procedures do not moot APA violations unless it is "absolutely clear" that the litigant has no need for any judicial protection).

3. Claims for Declaratory and Injunctive Relief

The court is authorized to award relief to Petitioner on his claims for declaratory and injunctive relief. *See Intrepid v. Pollock*, 907 F.2d 1125, 1131 (Fed. Cir. 1990) ("Mootness of an action relates to the basis of the dispute between the parties, not merely the relief requested. Thus, although subsequent acts may moot a request for particular relief or a count, the constitutional requirement of a case or controversy may be satisfied by the availability of other relief.").

Like a habeas action, a declaratory judgment action is moot only if it is absolutely clear that interim events have completely and irrevocably eradicated the effects of an allegedly improper ruling. *See Friends of Earth*, 528 U.S. at 189; *Cornell v. Shoemaker*, 555 F.2d 483, 486 (5th Cir. 1977). Here, Respondents adjudicated Petitioner an enemy combatant, which he has repeatedly denied. That designation certainly will have a lasting adverse effect on Mr. Madni. Indeed, the stigma of that determination is a collateral consequence sufficient to maintain a live action for declaratory relief. *See Demjanjuk v. Petrovsky*, 10 F.3d 338, 355-56 (6th Cir. 1993); *Cornell v. Shoemaker*, 555 F.2d at 486-487.

In a declaratory judgment case, as in a habeas count, the burden of establishing mootness rests squarely on the party raising it. *Mangual v. Rotger-Sabat*, 317 F.3d 45, 60 (1st Cir. 2003) (citing *U.S. v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953)). The government has not met its

burden of establishing the mootness of Petitioner's various claims for declaratory relief. Mr. Madni seeks a declaration from this court regarding his rights and the unlawfulness of the procedures resulting in his designation as an enemy combatant as well as the designation itself. Petitioner remains entitled to that declaration and any other relief the court deems appropriate.

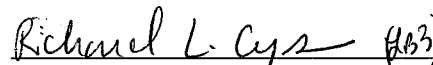
III. CONCLUSION

Respondent's physical transfer of Petitioner to the physical custody of Pakistan does not remedy the years of imprisonment, inhumane conditions, and mistreatment Mr. Madni suffered while imprisoned by the government. Although Mr. Madni's Petition sought his release from Guantanamo, such transfer does not vitiate Petitioner's surviving claims or applicable law on the viability of his habeas, declaratory, and injunctive claims. The burden of demonstrating mootness lies with Respondents, and the government has provided no evidence establishing the absence of jurisdiction over Mr. Madni's Petition.

WHEREFORE, Petitioner Muhammed Saad Iqbal Madni respectfully requests that this court find that his Petition should not be dismissed as moot.

Respectfully submitted,

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