UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SHAFIQ RASUL, SKINA BIBI, as Next Friend of Shafiq Rasul, et al.,	)	
Petitioners	)	
v.	)	Civil Action No. 02-0299(CKK)
GEORGE WALKER BUSH, President of the United States, et al.,	)	
Respondents.	)	

RESPONDENTS' MOTION TO DISMISS PETITIONERS' FIRST AMENDED PETITION FOR WRIT OF HABEAS CORPUS

Respondents hereby move to dismiss petitioners' first amended petition for a writ of habeas corpus, for the reasons set forth below, and submit the following points and authorities in support of this motion to dismiss.[1]

INTRODUCTION

While the hostilities in Afghanistan remain active and ongoing, petitioners, who are aliens captured abroad during those hostilities and their representatives, ask this Court to intervene to examine the legality of the President's military actions and ultimately seek to have this Court order their release. A number of legal doctrines, as well as common sense, make clear that this Court does

[1] This motion to dismiss is addressed to the Court's lack of jurisdiction to entertain the petition. If the Court denies respondents' motion to dismiss and determines that it has jurisdiction to address the merits of some of the claims raised by petitioners, respondents would address the merits of any such claims at that time.

not have jurisdiction to consider this petition for a writ of habeas corpus, or to order the relief petitioners seek. This Court should dismiss the petition for four reasons.

First, none of the detained petitioners is being held pursuant to the military order that is the focal point of their petition. The petition is largely directed at the President's Military Order of November 13, 2001 (Military Order) concerning the detention, treatment, and military trial of aliens captured overseas in connection with the current hostilities. But, as petitioners themselves acknowledge (Amend. Pet. ¶ 39), the President has not designated any of them for detention or military trial pursuant to that Order. Accordingly, to the extent that petitioners challenge the Military Order, their challenge is premature and jurisdictionally barred under both the standing and ripeness doctrines. Moreover, if any of the detained petitioners is designated for trial by military commission, the military commissions would provide the proper forum for their complaints.

Second, the detained petitioners are aliens held abroad. Accordingly, none of their claims—including their premature challenges to the Military Order—are within the subject matter jurisdiction of this Court, or any United States court. The Supreme Court has squarely held that the United States courts lack jurisdiction over the habeas petitions of aliens detained outside the sovereign territory of the United States. See Johnson v. Eisentrager, 339 U.S. 763 (1950). As the District Court for the Central District of California recently concluded in considering a petition for habeas corpus filed on behalf of the detainees at Guantanamo (including the detained petitioners here), Eisentrager is "controlling" here, because "[i]n all key respects, the Guantanamo detainees are like the petitioners in Johnson." Coalition of Clergy v. Bush, No. CV 02-570, 2002 WL 272428 (C.D. Cal. Feb. 21, 2002), slip op. at 16, 19, appeal filed (No. 02-55367) (slip op. attached).

Third, the extraordinary circumstances in which this action arises and the particular relief that petitioners seek implicate core political questions about the conduct of the war on terrorism that the

Constitution leaves to the President as Commander in Chief. Petitioners ask this Court to opine on the legality of the President's military operations and to release individuals who were captured during hostilities and the military has determined should be detained. Particularly where the hostilities that led to their capture remain ongoing, the courts have no jurisdiction, and no judicially-manageable standards, to evaluate or second-guess the conduct of the President and the military. These questions are constitutionally committed to the Executive Branch.

Fourth and finally, even if this Court found that it would otherwise have jurisdiction over this petition, it would need to transfer the case because no custodian responsible for the detained petitioners is present within the District of Columbia. Federal courts can only grant habeas relief within "their respective jurisdictions." 28 U.S.C. 2241(a). The only respondent named in the petition who is both present in the United States and amenable to suit is the Secretary of Defense, who is present for habeas purposes where the Pentagon is located, i.e., within the Eastern District of Virginia. However, because the transfer statute, 28 U.S.C. 1631, requires the transferee court to have subject matter jurisdiction, this Court need not reach the transfer issue if it agrees that — consistent with principles of ripeness, standing, the Supreme Court's decision in Eisentrager, and the political question doctrine—no United States court has jurisdiction over this petition.

BACKGROUND

1. On September 11, 2001, members of the al Qaida terrorist network savagely attacked the United States, killing thousands of United States citizens. In the wake of those attacks, the President, acting in his capacity as Commander in Chief and with the full backing of Congress (see Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224), dispatched the armed forces of the United States to Afghanistan to seek out and debilitate the al Qaida terrorist network and the Taliban

regime in Afghanistan that had chosen to support and protect that network. In the course of those ongoing military operations, the United States military and its allies have captured or secured the surrender of thousands of persons fighting as part of the al Qaida terrorist network or to support, protect, or defend the al Qaida terrorists. United States armed forces have taken control of many such persons, who are being held under the President's authority as Commander in Chief and under the laws and usages of war, which permit holding combatants in connection with an armed conflict.

Some of the individuals of which the United States military has taken control in connection with the military campaign in Afghanistan have been transferred by the military to the United States Naval Base at Guantanamo Bay, Cuba (Guantanamo). The Guantanamo Naval Base is in the sovereign territory of the Republic of Cuba. The United States uses and occupies the base under a 1903 lease agreement with Cuba continued in effect by a 1934 treaty.[2] The Lease Agreement provides that Cuba retains sovereignty over the leased lands:

> While on the one hand the United States recognizes the continuance of the ultimate sovereignty of the Republic of Cuba over the [leased area], on the other hand the Republic of Cuba consents that during the period of the occupation by the United States of said areas under the terms of this agreement the United States shall exercise complete jurisdiction and control over and within said areas * * *.

[2] See Lease of Lands for Coaling and Naval Stations, Feb. 16-23, 1903, U.S.-Cuba, T.S. No. 418, 6 Bevans 1113 (Lease Agreement); Treaty on Relations with Cuba, May 29, 1934, U.S.-Cuba, art. III, 48 Stat. 1682, 1683, T.S. No. 866 (extending lease "[u]ntil the two contracting parties agree to the modification or abrogation of the stipulations").

Under a supplementary agreement, the United States agreed to additional lease terms, including a limit on establishing commercial or industrial enterprises on the lands. See Lease of Certain Areas for Naval or Coaling Stations, July 2, 1903, U.S.-Cuba, art. III, T.S. No. 426.

2. On November 13, 2001, the President, acting in his capacity as Commander in Chief, issued a Military Order concerning the "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism." 66 Fed. Reg. 57,831. In the Order, the President recounted the grave acts of terrorism inflicted on the Nation and found, inter alia, that "[t]he ability of the United States to protect the United States and its citizens * * * from * * * further terrorist attacks depends in significant part upon using the United States Armed Forces to identify terrorists and those who support them," and that "[t]o protect the United States and its citizens, and for the effective conduct of military operations and prevention of terrorist attacks, it is necessary for individuals subject to this order * * * to be detained, and, when tried, to be tried for violations of the laws of war and other applicable laws by military tribunals." § 1(d) and (e), 66 Fed. Reg. at 57,833. The Order further states that "an extraordinary emergency exists for national defense purposes." § 1(g), 66 Fed. Reg. at 57,833-57,834. The Order delegates to the Secretary of Defense the authority to promulgate "orders and regulations as may be necessary to carry out any of the provisions of th[e] order." § 6(a), 66 Fed. Reg. at 57,835; see also § 4(b), (c), 66 Fed. Reg. at 57,834.

The Military Order applies only to individuals who are expressly designated by the President. The Order states that "[t]he term 'individual subject to this order' shall mean any individual who is not a United States citizen with respect to whom I determine from time to time in writing that:

(1) there is reason to believe that such individual, at the relevant times,

(i) is or was a member of the organization known as al Qaida;

> (ii) has engaged in, aided or abetted, or conspired to commit, acts of international terrorism, or acts in preparation therefor, 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) or (ii) of subsection 2(a)(1) of this order; and
>
> (2) it is in the interest of the United States that such individual be subject to this order.

§ 2(a), 66 Fed. Reg. at 57,834. The President has not yet made such a determination with respect to anyone detained at Guantanamo. The United States military and other authorities are gathering and evaluating information concerning whether individuals should be made subject to the Order. That process is complicated not only by the scope and urgency of the military operations underway, but also by the refusal of many of the detainees to cooperate with military authorities.

3. On February 19, 2002, petitioners filed a petition for a writ of habeas corpus in this Court. The petition was filed by individuals claiming to be the parents of three Guantanamo detainees, petitioners Shafiq Rasul, Asif Iqbal, and David Hicks. Amend. Pet. ¶¶ 1, 5-17.[3] Rasul, Iqbal, and Hicks (collectively, the "detained petitioners") are aliens who were apprehended during the course of the military campaign in Afghanistan. Amend. Pet. ¶¶ 26-27. The petition alleges that Iqbal and Rasul are citizens of the United Kingdom, and that Hicks is a citizen of Australia, and that they have conveyed requests to their parents to obtain legal assistance on their behalf. Amend. Pet. ¶¶ 22-24, 48-49. The petition seeks, inter alia, an order releasing them from custody, an order declaring the

[3] On March 12, 2002, petitioners filed a First Amended Petition for Writ of Habeas Corpus (Amend. Pet.). The citations in this memorandum are to the amended petition. Petitioners also have filed a Motion for Access to Counsel and Motion to Provide the Detained Clients with Notice of the Pending Litigation. A separate response opposing both of those motions is filed with this motion to dismiss.

President's Military Order unlawful, an order preventing the United States military from interrogating petitioners, and certain other relief. Amend. Pet. 23-24. The named respondents are the President of the United States, Secretary of Defense, and two military commanders present at Guantanamo. Amend. Pet. ¶¶ 18-21.[4]

4. Two days after the petition in this case was filed, the District Court for the Central District of California dismissed a habeas petition filed in January 2002, purportedly on behalf of all Guantanamo detainees captured in Afghanistan (including the detained petitioners here), by a coalition of clergy, lawyers, and law professors. Coalition of Clergy v. Bush, supra. The court concluded both that the coalition lacked standing to proceed on behalf of the detainees on a next-friend basis, and that even if the coalition possessed such standing, the court lacked habeas jurisdiction because none of the named respondents was within the court's territorial jurisdiction. Slip op. at 3-4. In considering whether it could transfer the case to another forum pursuant to 28 U.S.C. 1631, the Coalition of Clergy court further held that "[n]o federal court would have jurisdiction over petitioners' claims" (Slip op. at 4) under the rule of Johnson v. Eisentrager, 339 U.S. 763 (1950), which, as explained below, holds that the United States courts lack jurisdiction to consider the claims of aliens held outside the United States.

[4] The petition also seeks an order granting the parents of Rasul, Iqbal, and Hicks next-friend status to proceed on behalf of the detained petitioners. Amend. Pet. 23. Because the petition should be dismissed for the reasons explained below, the Court need not consider that request.

ARGUMENT

I. THE COURT LACKS JURISDICTION TO CONSIDER PETITIONERS' PREMATURE CHALLENGE TO THE PRESIDENT'S MILITARY ORDER

Much of petitioners' challenge in this case focuses on the President's Military Order. See Amend. Pet. ¶¶ 22-24, 34-40; Mem. in Supp. of Pet. (Mem.) 1-2, 17, 20-28. In particular, Claims I, II, III, IV, and VII of the petition include express challenges to the Military Order, and paragraphs 7, 9, 12, and 13 of the Prayer for Relief seek a declaration that the Order is unlawful. As they themselves acknowledge (Amend. Pet. ¶ 39), however, the detained petitioners are not subject to the Order. As a result, to the extent that the petition challenges the Military Order, the Court lacks jurisdiction to entertain that challenge due to both lack of standing and lack of ripeness.

As noted above, the Military Order applies only to individuals who are determined by the President "in writing" to be subject to that Order. § 2(a), 66 Fed. Reg. at 57,834. The President, however, has not yet designated in writing that any of the detained petitioners is subject to the Military Order. The detained petitioners are being held, not under the Order, but under the President's authority as Commander in Chief and under the laws and usages of war. The ultimate course of action remains to be determined with respect to each of the detainees at Guantanamo, and may include any of a number of different possible options, including, inter alia, detention and trial pursuant to the Military Order, trial by other means such as a civilian court, repatriation, release, or continued detention under legal authority other than the Order. Military authorities and other government personnel are obtaining and assessing information pertaining to those considerations, not only from individual detainees but also from other intelligence gathering efforts that are underway by the United States and its allies in Afghanistan and in other parts of the world.

Because the detained petitioners are not subject to the Military Order, petitioners' challenges to the Order are premature and should be dismissed for lack of jurisdiction. Article III of the Constitution limits the jurisdiction of the federal courts to actual "Cases" or "Controversies." U.S. Const. Art. III, § 2. In giving effect to the Constitution's case-or-controversy requirement, the courts have developed several interrelated "justiciability doctrines" to identify premature or hypothetical claims, including the standing and ripeness doctrines. See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 180 (2000); Allen v. Wright, 468 U.S. 737, 751 (1984); Wyoming Outdoor Council v. United States Forest Serv., 165 F.3d 43, 49 (D.C. Cir. 1999); National Treasury Employees Union (NTEU) v. United States, 101 F.3d 1423, 1427 (D.C. Cir. 1996). Petitioners' challenge to the Military Order is jurisdictionally defective from the standpoint of both the standing and ripeness doctrines.

A. Petitioners Lack Standing To Challenge The Military Order

Standing is determined "at the outset of the litigation." Friends of the Earth, 528 U.S. at 180. "[T]o satisfy Article III's standing requirements, a plaintiff must show (1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." Id. at 180-181; see NTEU, 101 F.3d at 1427. A plaintiff bears the burden of establishing standing with respect to each claim or request for relief. See Friends of the Earth, 528 U.S. at 185; Lewis v. Casey, 518 U.S. 343, 358-359 n.6 (1996); see also Blum v. Yaretsky, 457 U.S. 991, 999 (1982).

Petitioners lack standing to challenge the President's Military Order because they have not been made subject to that Order. Assuming the allegations establish a constitutionally adequate injury

by virtue of their detention, that injury is not "fairly traceable," or indeed at all traceable, to the President's Military Order, because petitioners are not subject to that Order. See California Ass'n of the Physically Handicapped, Inc. v. FCC, 778 F.2d 823, 827 (D.C. Cir. 1985) (where injury "cannot tenably [be] trace[d]" to alleged misconduct, there is no Article III standing). Similarly, granting petitioners' request (see Amend. Pet. 23-24) for a declaration that the Military Order is unlawful would not "redress" any alleged injury stemming from their current detention, because petitioners are not detained pursuant to that Order. See, e.g., Action for Children's Television v. FCC, 827 F. Supp. 4, 12 (D.D.C. 1993) (entities not subject to certain proceedings lack standing to challenge the proceedings), aff'd, 59 F.3d 1249, 1258 (D.C. Cir. 1995), cert. denied, 516 U.S. 1072 (1996); Dellums v. U.S. Nuclear Regulatory Comm'n, 863 F.2d 968, 976 (D.C. Cir. 1988) ("It is clear that the pursuit of a potential avenue of redress, even if it is the 'only hope,' will not present a case or controversy under Article III if there is not a substantial likelihood of redressability.").

Furthermore, the possibility that the President may determine at some point in the future that the detained petitioners should be detained pursuant to the Military Order is not sufficient to confer standing either. See MacArthur Foundation v. FBI, 102 F.3d 600, 606 (D.C. Cir. 1996) ("It is not enough for the [plaintiff] to assert that it might suffer an injury in the future, or even that it is likely to suffer an injury at some unknown future time. Such 'someday' injuries are insufficient [to establish Article III standing]."). To establish standing on the basis of an alleged "threatened harm," a plaintiff must show that the "harm is 'certainly impending.'" Ibid. (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 564 n.2 (1992)). Although the President may determine to make petitioners subject to the Military Order, as opposed to taking other, mutually exclusive action with respect to them, such a determination is far from certain.

B. Any Challenge To The Military Order Is Not Ripe

Petitioners' challenge to the Military Order also suffers from a lack of ripeness. "A claim is not ripe for adjudication if it rests upon 'contingent future events that may not occur as anticipated, or indeed may not occur at all.'" Texas v. United States, 523 U.S. 296, 300 (1998); see Whitmore v. Arkansas, 495 U.S. 149, 158 (1990) ("Allegations of possible future injury do not satisfy the requirements of Art. III."). In that regard, "the ripeness requirement serves 'to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.'" Pfizer, Inc. v. Shalala, 182 F.3d 975, 978 (D.C. Cir. 1999) (quoting Ohio Forestry Ass'n v. Sierra Club, 523 U.S. 726, 732-733 (1998)); see Reno v. Catholic Soc. Servs., Inc., 509 U.S. 43, 57 n.18 (1993) ("[R]ipeness doctrine is drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction.").

The detained petitioners have not been affected by the Military Order in any "concrete way." They are not being detained pursuant to the Order, and it is possible that that event "may not occur at all." Texas, 523 U.S. at 300. At the same time, while the President may determine that the detained petitioners should be made subject to the Order, judicial review of petitioners' challenges to the Order—to the extent that such judicial review is available, consistent with the considerations discussed below—would benefit from waiting to see if that contingency occurs. Under the circumstances, the detained petitioners lack a ripe challenge to the Order. In addition, individuals who are made subject to the Military Order may have an opportunity to challenge their detention or trial pursuant to procedures established pursuant to the Military Order. See § 4(c), 66 Fed. Reg. at

57,834-57,835. Proceedings under the Order may be particularly well-suited to examine the necessarily sensitive issues surrounding, inter alia, alleged crimes against the United States. There is no basis for a court to entertain a challenge to an individual's detention or trial pursuant to the Military Order before, at a minimum, a detainee has had an opportunity to exhaust any challenges he may raise under such procedures.

The D.C. Circuit has stated that, "[p]rudentially, the ripeness doctrine exists to prevent the courts from wasting our resources by prematurely entangling ourselves in abstract disagreements, and, where, as here, other branches of government are involved, to protect the other branches from judicial interference until their decisions are formalized and their 'effects felt in a concrete way by the challenging parties.'" NTEU, 101 F.3d at 1431 (quoting Abbott Labs. v. Gardner, 387 U.S. 136, 148-149 (1967)); see ibid. ("Article III courts should not make decisions unless they have to."); City of Williams v. Dombeck, 151 F. Supp. 2d 9, 15-16 (D.D.C. 2001). Such prudence is especially called for in this case, where petitioners seek to challenge a Military Order that was issued by the President acting in his capacity as Commander in Chief in response to an unprecedented terrorist attack on the Nation. At an absolute minimum, before a court questions that exercise of core presidential power, it should insist upon a detainee who is in fact subject to the Military Order.[5]

[5] As a prudential matter, in evaluating the ripeness of particular claims, courts also consider "the hardship to the parties of withholding court consideration." Abbott Labs., 387 U.S. at 149; see Pfizer, Inc., 182 F.3d at 979. Petitioners, however, will not suffer any hardship if this Court dismisses their challenge to the extent it is directed to the Military Order. Because they are not subject to the Order, petitioners are not adversely affected by the Order.

Petitioners here ask the Court to embark on a highly sensitive constitutional inquiry for the purpose of issuing what would amount to an advisory opinion on the legality of the President's Military Order. That request should be rejected at the outset.

II. THE COURT LACKS JURISDICTION UNDER JOHNSON V. EISENTRAGER TO CONSIDER A HABEAS PETITION FILED ON BEHALF OF ALIENS WHO HAVE BEEN SEIZED AND HELD OUTSIDE THE UNITED STATES

Wholly apart from the standing and ripeness defects inherent in petitioners' central challenge to the Military Order, Johnson v. Eisentrager, 339 U.S. 763 (1950), precludes any attempt by petitioners to secure habeas relief in any United States court, for any claim. In Eisentrager, the Supreme Court ruled emphatically that the courts of the United States lack jurisdiction to entertain habeas corpus petitions filed on behalf of aliens who are held outside the sovereign territory of the United States. These detainees are aliens, and Guantanamo lies outside the sovereign territory of the United States. Eisentrager thus forecloses jurisdiction with respect to claims made by the detainees in this or any other United States court.

Eisentrager declined to exercise jurisdiction over a habeas petition filed by German nationals who had been seized by United States armed forces in China after the German surrender in World War II and subsequently imprisoned in a United States military prison in Landsberg, Germany. See 339 U.S. at 765-767. The Court held that the prisoners could not file a petition for habeas corpus in any United States court because they were aliens without connection to the United States who had been seized and held outside the sovereign territory of the United States. The Court emphasized that aliens have been accorded rights under the Constitution and laws of the United States only as a consequence of their presence within the United States. As the Court put it, "in extending constitutional protections beyond the citizenry, the Court has been at pains to point out that it was the

alien's presence within its territorial jurisdiction that gave the Judiciary power to act." Id. at 771. Eisentrager held that the writ of habeas corpus was unavailable because "these prisoners at no relevant time were within any territory over which the United States is sovereign, and the scenes of their offense, their capture, their trial and their punishment were all beyond the territorial jurisdiction of any court of the United States." Id. at 778. The Court also held that the prisoners could not invoke the writ to vindicate the Fifth Amendment, because, as aliens abroad, they had no Fifth Amendment rights. See id. at 781.[6]

Eisentrager also emphasized that entertaining a petition of enemy aliens seized by the military in an armed conflict would raise grave questions of interference with the President's powers as Commander in Chief. The writ of habeas corpus by its very nature contemplates that the custodian may be required to produce the prisoner before the court—which in cases like this and Eisentrager would require the military, at the direction of a civilian court, to find means of transporting combatants intent on destroying the United States into the territorial confines of the Nation. As the Court explained, "[i]t would be difficult to devise more effective fettering of a field commander than to allow the very enemies he is ordered to reduce to submission to call him to account in his own civil

[6] Eisentrager remains one of the pivotal decisions delimiting the territorial reach of constitutional protections and the rights of aliens, and the Court continues to rely on it in addressing those issues. See, e.g., Zadvydas v. Davis, 121 S. Ct. 2491 (2001) (relying on Eisentrager); United States v. Verdugo-Urquidez, 494 U.S. 259, 269 (1990) (relying on Eisentrager to hold that the Fourth Amendment does not apply extraterritorially); see also Harbury v. Deutch, 233 F.3d 596, 602-604 (D.C. Cir. 2000), cert. granted on other grounds, 122 S. Ct. 663 (2001).

courts and divert his efforts and attention from the military offensive abroad to the legal defensive at home." 339 U.S. at 779.

Eisentrager controls this case and makes clear that there is "no basis for invoking federal judicial power in any district." 339 U.S. at 790. The holding in Eisentrager rested on the dual factors that the prisoners were aliens without connection to the United States and they were held outside United States territory. Both factors apply equally to the detainees here. Indeed, another court recently considered the application of Eisentrager to these very detainees, and found the case "controlling." Coalition of Clergy, slip op. at 16. As Judge Matz concluded: "In all key respects, the Guantanamo detainees are like the petitioners in Johnson: They are aliens; they were enemy combatants; they were captured in combat; they were abroad when captured; they are abroad now; since their capture, they have been under the control of only the military; they have not stepped foot on American soil; and there are no legal or judicial precedents entitling them to pursue a writ of habeas corpus in an American civilian court." Id. at 19. Petitioners' efforts to distinguish Eisentrager are unavailing.

A. The Detainees Were Seized And Held Outside The United States

Petitioners state that the detained petitioners are being held "at the United States Naval Base, in Guantanamo Bay, Cuba." Amend. Pet. ¶ 41; see Amend. Pet. ¶ 42. By filing their habeas petition in the District of Columbia, petitioners have implicitly acknowledged that there is no district court with territorial jurisdiction over Guantanamo or the detained petitioners. The territory of every federal district court is defined by statute, see 28 U.S.C. 81-131 (1994); 48 U.S.C. 1424, 1424b, 1821-1826 (1994 & Supp. V. 1999), and Guantanamo is not within the territory defined for any district. Petitioners, nonetheless, insist that "Guantanamo is within the territorial jurisdiction of the United States." Mem. 6. However, the relevant international agreements make clear that Guantanamo Bay lies outside the sovereign territory of the United States and outside the territorial jurisdiction of any United States court.

The United States uses and occupies the land and waters forming the Guantanamo Bay Naval Base under a lease from the Republic of Cuba entered into in 1903. See note 2, supra. That Lease Agreement makes plain that the United States has no claim of sovereignty over the leased areas. It expressly provides that, although Cuba "consents" that the "United States shall exercise complete jurisdiction and control over" the leased areas, at the same time "the United States recognizes the continuance of the ultimate sovereignty of the Republic of Cuba over" the land. Lease Agreement art. III, T.S. No. 418 (6 Bevans 1113). The "jurisdiction and control" that the United States exercises is plainly distinct from the concept of sovereignty that the Lease Agreement expressly reserves to the Republic of Cuba.

The terms of the Lease Agreement are definitive on the question of sovereignty. As the Supreme Court has explained, the "determination of sovereignty over an area is for the legislative and

executive departments," and not a question on which a court may second-guess the political branches. Vermilya-Brown Co. v. Connell, 335 U.S. 377, 380 (1948); see United States v. Spelar, 338 U.S. 217, 221-222 (1949); Jones v. United States, 137 U.S. 202, 212 (1890). Accordingly, as in Eisentrager, the detainees are not "within any territory over which the United States is sovereign" (as the Lease Agreement makes explicit), and the "scenes" of their detention are "beyond the territorial jurisdiction of any court of the United States." 339 U.S. at 778.

The Supreme Court has already addressed the status of leased United States military installations abroad and held that they lie outside the sovereign territory of the United States. In Spelar, the Supreme Court held that the Federal Tort Claims Act (FTCA) does not apply to a United States base leased in Newfoundland because the lease "effected no transfer of sovereignty with respect to the military bases concerned." 338 U.S. at 221-222. The Court held that the base was a "foreign country" under the FTCA, and concluded that, "[w]e know of no more accurate phrase in common English usage than 'foreign country' to denote territory subject to the sovereignty of another nation," and not "to the sovereignty of the United States." Id. at 219.[7]

[7] There is no basis for distinguishing Guantanamo from the base at issue in Spelar. Indeed, Spelar noted that the lease between the United States and Great Britain governing the Newfoundland base involved "the same executive agreement and leases discussed at length in Vermilya-Brown,"

which addressed the United States base in Bermuda. 338 U.S. at 218. And in Vermilya-Brown, the Supreme Court noted that "[t]he United States was granted by the Cuban lease substantially the same rights as it has in the Bermuda lease." 335 U.S. at 383; see id. at 405 (Jackson, J., dissenting) (relying on the similarities of Guantanamo and the base in Bermuda). Moreover, although petitioners attempt to rely on cases applying United States law extraterritorially, see Mem. 6, Spelar makes clear that the questions whether laws apply outside the United States and whether territory is part of the sovereign territory of the United States are different questions. 338 U.S. at 221-222. The former issue was implicated in Vermilya-Brown, while the latter concept was at issue in Spelar and is what is relevant under Eisentrager.

To the extent that there is direct precedential authority on the question, courts have reached the unremarkable conclusion that Guantanamo is not part of the sovereign territory of the United States.[8] The Eleventh Circuit, for example, relied on the terms of the Lease Agreement to hold that Guantanamo is not "United States territory," and flatly rejected any suggestion that "'control and jurisdiction' is equivalent to sovereignty." Cuban Am. Bar Ass'n v. Christopher, 43 F.3d 1412, 1425 (11th Cir.), cert. denied, 515 U.S. 1142 (1995); see ibid. (noting that Guantanamo was a leased base "under the sovereignty of [a] foreign nation[]"); Bird v. United States, 923 F. Supp. 338, 343 (D. Conn. 1996) ("sovereignty over the Guantanamo Bay does not rest with the United States"). Most recently, the district court in Coalition of Clergy held that "sovereignty over Guantanamo Bay remains with Cuba." Coalition of Clergy, slip op. at 23. As a result, the court concluded that, "petitioners' claim that the Guantanamo detainees are entitled to a writ of habeas corpus is foreclosed by the Supreme Court's holding in Johnson [v. Eisentrager]." Ibid.

B. There Is No Basis For Distinguishing Eisentrager

[8] The three cases on which petitioners primarily rely for their claim that Guantanamo should be considered part of sovereign United States territory, see Mem. 4-8, have all been vacated or reversed and have no precedential value. See Haitian Ctrs. Council, Inc. v. McNary, 969 F.2d 1326 (2d Cir. 1992), vacated as moot, Sale v. Haitian Ctrs. Council, Inc., 509 U.S. 918 (1993); United States v. Wilmot, 29 C.M.R. 777, 781 (U.S.A.F. Rev. Bd. 1960), reversed, United States v. Wilmot, 29 C.M.R. 514 (Ct. Mil. App. 1960); see also Cuban Am. Bar Ass'n, 43 F.3d at 1424 n.8 (noting that the decision in Haitian Centers Council, Inc. v. Sale, 823 F. Supp. 1028 (E.D.N.Y. 1993)—the district court decision in McNary—was also vacated by stipulated order).

Petitioners insist that the detained petitioners "are not, nor have they ever been, enemy aliens," Amend. Pet. ¶ 22, but the result in Eisentrager did not depend on the fact that the prisoners were "enemy aliens." Although the Court addressed the long tradition of limiting the legal rights of enemy aliens, see 339 U.S. at 769-777 & n.2, in stressing that the key to its analysis was that the prisoners before it were aliens held abroad, the Court emphasized that "the privilege of litigation has been extended to aliens, whether friendly or enemy, only because permitting their presence in the country implied protection," id. at 777-778 (emphasis added); see also Bridges v. Wixon, 326 U.S. 135, 161 (1945) (Murphy, J., concurring) (noting that "an alien obviously brings with him no constitutional rights"). The Court, moreover, has not subsequently treated the analysis in Eisentrager as somehow limited to the narrow class of "enemy aliens." Rather, the Court has cited Eisentrager as a seminal decision defining the application of the Constitution to all aliens outside the territory of the United States. See, e.g., Zadvydas v. Davis, 121 S. Ct.2491, 2500 (2001); United States v. Verdugo-Urquidez, 494 U.S. 259, 269 (1990). For example, in Verdugo-Urquidez, the Court both reaffirmed Eisentrager and applied its reasoning to the Fourth Amendment claims of a Mexican citizen, who was quite obviously not an enemy alien. The D.C. Circuit, moreover, in affirming this Court in relevant part has expressly rejected the argument that Eisentrager applies only to the "rights of enemy aliens during wartime." Harbury v. Deutch, 233 F.3d 596, 604 (2000). "[T]he Supreme Court's extended and approving citation of Eisentrager [in Verdugo-Urquidez] suggests that its conclusions regarding extraterritorial application of the Fifth Amendment are not so limited." Ibid.[9]

[9] The relevant constitutional line is not between enemy aliens and non-enemy aliens, but

between aliens abroad and citizens abroad. "Neither the Constitution nor the laws passed in pursuance of it have any force in foreign territory unless in respect of our own citizens." United States v. Curtiss-Wright Export Co., 299 U.S. 304, 318 (1936).

In any event, despite the petitioners' bare assertions to the contrary, the detained petitioners here plainly qualify as "enemy aliens" for purposes of Eisentrager. Petitioners acknowledge that "Mr. Hicks, Mr. Iqbal, and Mr. Rasul were apprehended," "[i]n the course of the military campaign" conducted by United States forces in Afghanistan, Amend. Pet. ¶ 26, and allege that "the Northern Alliance captured David Hicks in Afghanistan," Amend. Pet. ¶ 27. The detained petitioners were seized in the course of hostilities against United States and allied forces. That is sufficient to establish their status as enemies under Eisentrager. See Coalition of Clergy, slip op. at 19.[10] Nothing in Eisentrager suggests that an "enemy alien" is limited to a national of a country that has formally declared war on the United States. Although the Court noted that under international law all nationals of a belligerent nation become "enemies" of the other upon a declaration of war, see 339 U.S. at 769-773 & n.2, the Court stressed that it did not need to rely on that "fiction" because the prisoners were "actual enemies, active in the hostile service of an enemy power." Id. at 778. The same is true of the detained petitioners here. Moreover, any suggestion that Eisentrager should apply only to the forces of a nation in a declared war with the United States would be irrational. It would suggest that those involved in the attack on Pearl Harbor would be eligible for more favorable treatment than Japanese soldiers captured after war had been declared by Congress, or that while lawful combatants of a nation that had declared war could seek no recourse in our courts, the courts would somehow be more accessible to rogue forces or members of an international terrorist network. Nothing in Eisentrager suggests that bizarre result.

[10] Cf. United States v. Terry, 36 C.M.R. 756, 761 (N.B.R. 1965) ("The term 'enemy' applies to any forces engaged in combat against our own forces."), aff'd, 36 C.M.R. 348 (C.M.A. 1966). Moreover, the status of forces as enemies is a political question on which the courts are bound by the actions of the political branches, see, e.g., The Three Friends, 166 U.S. 1, 63 (1897); The Prize Cases, 67 U.S. (2 Black) 635, 670 (1862).

As in Eisentrager, exercise of habeas jurisdiction over these detainees would interfere with the foreign affairs and Commander-in-Chief powers of the Executive. Indeed, the interference here would be even greater because this habeas petition has been filed within months of the detainees' capture and detention, while the Eisentrager petition, in contrast, did not reach the Court until years after hostilities had ceased. Recognizing the jurisdiction denied in Eisentrager would allow "the very enemies [that the Secretary of Defense] is ordered to reduce to submission to call him to account in his own civil courts," and would divert the military's "efforts and attention from the military offensive abroad to the legal defensive at home." 339 U.S. at 779. This Court should not allow that unprecedented intrusion into the President's Commander-in-Chief authority.

III. THE COURT SHOULD DISMISS THE PETITION AS NONJUSTICIABLE UNDER THE POLITICAL QUESTION DOCTRINE

Even in the absence of Eisentrager, the political question doctrine would prohibit the Court from exercising jurisdiction and granting the extraordinary relief requested by petitioners in the circumstances of this case. The detained petitioners are aliens captured overseas who seek access to American courts while the same hostilities that led to their capture are still being waged. Justifiably, courts have allowed the President to make the difficult decisions concerning the capture, detention, and questioning of such captives in the course of conducting the war, including the decision whether to try such individuals before a military tribunal. Petitioners here seek to involve this Court in the conduct of the war immediately on the heels of their capture, while the fighting continues and before any military trials have been conducted. The threat of interference with the delicate and vital military and foreign affairs determinations that continue to be made fully justifies application of the political question doctrine in this case.

The political question doctrine is one of a number of principles "that cluster about Article III" to give effect to the case-or-controversy requirement and its underlying separation-of-powers "concern about the proper—and properly limited—role of the courts in a democratic society." Allen v. Wright, 468 U.S. 737, 751 (1984) (internal quotation marks omitted); see Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 215 (1974). In Baker v. Carr, 369 U.S. 186 (1962), the Supreme Court identified several factors that may render a case nonjusticiable under the political question doctrine, including:

> [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; [2] a lack of judicially discoverable and manageable standards for resolving it; [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Id. at 217. The presence of any one of these factors may justify dismissal of a case as nonjusticiable. Ibid. In this case, petitioners' claims implicate all the Baker factors.

The Constitution makes the President Commander in Chief of the armed forces and commits to his discretion their use in defense of national security. U.S. Const. Art. II, § 2, Cl. 1. See, e.g., Orloff v. Willoughby, 345 U.S. 83, 90-92 (1953) (holding commissioning and control of military officers "is a matter of discretion within the province of the President as Commander in Chief"); Industria Panificadora, S.A. v. United States, 763 F. Supp. 1154, 1161 (D.D.C. 1991) ("[J]udicial review of executive branch decisions pertaining to the nature, conduct, and implementation of a presidentially-directed military operation in a foreign country * * * goes to the heart of the political question doctrine."). The President is also "the sole organ of the federal government in the field of

international relations." United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 320 (1936). Accordingly, courts will avoid intrusions upon the authority of the Executive in military and national security affairs, particularly where, as here, that authority involves ongoing United States military operations abroad. Luther v. Borden, 48 U.S. (7 How.) 1, 43 (1849) ("After the President has acted and called out the militia," if "a Circuit Court of the United States [is] authorized to inquire whether his decision was right," then "the guarantee contained in the Constitution * * * is a guarantee of anarchy, and not of order."); see also Sanchez-Espinoza v. Reagan, 770 F.2d 202, 209 (D.C. Cir. 1985) (challenge to President's decision to provide military support to Contras in Nicaragua presented nonjusticiable political question); Crockett v. Reagan, 720 F.2d 1355 (D.C. Cir. 1983) (per curiam) (action challenging military aid to El Salvador raised nonjusticiable political question), aff'd, 558 F. Supp. 893 (D.D.C. 1982).[11]

[11] Furthermore, as the D.C. Circuit has emphasized, the Supreme Court has long recognized that "'any policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government. Such matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.'" Bruno v. Albright, 197 F.3d 1153, 1159 (D.C. Cir. 1999) (quoting Harisiades v. Shaughnessy, 342 U.S. 580, 588-589 (1952)); see Eisentrager, 339 U.S. at 774 ("Executive power over enemy aliens, undelayed and unhampered by litigation, has been deemed, throughout our history, essential to war-time security.").

Petitioners' challenge to their capture and detention clearly implicates the President's core Commander-in-Chief and foreign-affairs powers and questions determinations left to the President's sole discretion. The hostilities in Afghanistan against al Qaida and Taliban forces are ongoing, and the United States military continues to capture aliens in connection with those hostilities and hold them for questioning pending an eventual determination as to how individual captives will be processed. The President's actions are based on his determination as to what is necessary for the successful conduct of the war and the protection of innocent Americans both at home and abroad. A judicial inquiry into the exact circumstances of the detained petitioners' capture could intrude into his conduct of the war by, for example, requiring the testimony of military personnel currently engaged in the field of combat or in interfering with the questioning of detainees to discover information necessary to his successful conduct of the war and protection of America and its allies from further terrorist threats. Where armed conflict is ongoing and the detainees captured on the battlefield are being held abroad for questioning and have not yet been designated as subject to any particular procedure for trial or punishment, any exercise of jurisdiction would intolerably interfere with determinations that the Constitution commits to the political branches.[12]

[12] The President's authority to act in this sphere is only bolstered by the Joint Resolution of Congress recognizing the President's "authority under the Constitution to take action to deter and

prevent acts of international terrorism against the United States," and stating that "the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons." Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224; see Dames & Moore v. Regan, 453 U.S. 654, 668-669 (1981); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635-638 (1952) (Jackson, J., concurring). The detention and interrogation of aliens captured in the midst of the ongoing hostilities is a necessary component of that charge, not to mention an elementary responsibility in fulfilling the President's constitutional role as Commander in Chief.

Nor do courts have any discoverable or manageable standards for assessing the propriety of the discretionary military and national security determinations that the President and the Armed Forces have made concerning the control and handling of the detainees under the circumstances of this case. The very fact that decisions about the location of troops, the need to detain captured combatants, and the value of interrogating them are committed to Executive branch and military officials means that courts have no standards by which to assess such actions. See Crockett, 720 F.2d 1356-1357 (affirming trial court holding that it "did not have the resources or expertise" to resolve issues regarding the legality of military aid to El Salvador).

As the Supreme Court recognized long ago, the President as Commander in Chief "is necessarily constituted the judge of the existence of the exigency [requiring particular military actions] in the first instance, and is bound to act according to his belief of the facts." Martin v. Mott, 25 U.S. (12 Wheat) 19, 31 (1829). Indeed, courts have found the absence of judicially manageable standards in a variety of foreign affairs settings. See, e.g., Aktepe v. United States, 105 F.3d 1400, 1404 (11th Cir. 1997) (suit for injuries caused by NATO training exercise), cert. denied, 522 U.S. 1045 (1998); DaCosta v. Laird, 471 F.2d 1146, 1155 (2d Cir. 1973) (challenge to President's decision to mine harbors and bomb targets in North Vietnam); Holtzman v. Schlesinger, 484 F.2d 1307, 1310 (2d Cir. 1973) (challenge to American bombing and other military activity in Cambodia), cert. denied, 416 U.S. 936 (1974); In re Korean Air Lines Disaster of Sept. 1, 1983, 597 F. Supp. 613, 616 (D.D.C. 1984) (national security decisions with respect to the U.S.S.R.); Greenham Women Against Cruise Missiles v. Reagan, 591 F. Supp. 1332, 1337-1338 (S.D.N.Y. 1984) (action seeking injunction against deployment of cruise missiles overseas). Especially where hostilities and military actions are ongoing, the civilian courts of this Nation cannot be a forum for second-guessing the sensitive military

and foreign-affairs decisions challenged by petitioners without undermining the President's ability to conduct the war on terrorism.

Moreover, any order granting petitioners the relief they seek would also necessarily implicate the other Baker factors. Such an order would run counter to, and substantially undermine, the President's foreign policy determinations and military orders at issue in this case, which necessarily involve the exercise of nonjudicial discretion; it would evince a lack of respect for those determinations and orders and would question adherence to vital political decisions already made by the President; it would embarrass the United States in the exercise of its foreign affairs. See Baker, 369 U.S. at 217. The President has determined that the capture and detention of the Guantanamo detainees is necessary to the successful prosecution of the ongoing war on terrorism and vital to the identification and deterrence of additional terrorist threats. Under the circumstances of this case, judicial review of petitioners' claims would detract from and show a lack of respect for the credibility of these Executive Branch determinations, which as discussed above are not appropriate subjects for judicial discretion. See, e.g., Industria Panificadora S.A. v. United States, 763 F. Supp. 1154, 1161 (D.D.C. 1991) (judicial resolution of challenge to reasonableness of military conduct in Panama would "require that this Court second-guess Executive Branch decisions, some of which were made while military personnel were engaged in combat" and "would show a lack of respect due to a coordinate branch").

Further, any such review would also violate the principle that the United States can have only one voice when it speaks in the national security sphere. See Lowry v. Reagan, 676 F. Supp. 333, 340 (D.D.C. 1987) (because a judicial pronouncement on existence of "hostilities" in Persian Gulf "could impact on statements by the Executive that the United States is neutral in the Iran-Iraq war"

and "might create doubts in the international community regarding the resolve of the United States to adhere to this position," court must adhere to rule that Constitution requires a 'single-voiced statement of the Government's views'" in foreign affairs) (citation omitted). As then-Circuit Judge Scalia warned in Sanchez-Espinoza, courts must recognize and guard against "the danger of foreign citizens' using the courts * * * to obstruct the foreign policy of our government." 770 F.2d at 209. He further cautioned that suits such as petitioners have a dramatic ability "to produce * * * 'embarrassment of our government' through 'multifarious pronouncements by various departments on one question.'" Ibid. (internal citations omitted). It is precisely such embarrassment in the conduct of foreign affairs that the political question doctrine is designed to prevent.

IV. THE COURT LACKS HABEAS JURISDICTION BECAUSE NO CUSTODIAN IS WITHIN ITS TERRITORIAL JURISDICTION

This Court also lacks habeas jurisdiction over petitioners' claims because no custodian responsible for the detainees is present within this Court's territorial jurisdiction. The only respondent named in the petition who is both in the United States and amenable to suit in this action is Secretary of Defense Donald Rumsfeld. Secretary Rumsfeld is present for purposes of habeas jurisdiction where the Pentagon is located, in the Eastern District of Virginia, not in the District of Columbia. Accordingly, if this Court concludes, contrary to the arguments discussed above, that this Court has subject matter jurisdiction over petitioners' claims, the Court should transfer the case to the Eastern District of Virginia pursuant to 28 U.S.C. 1631, and allow that court to determine whether it is appropriate to proceed with this action. Of course, Section 1631 permits transfer only where the transferee court would in fact have jurisdiction to hear the case, and thus this Court need not reach issues of territorial jurisdiction and transfer unless it disagrees with respondents' other jurisdictional

arguments. See 28 U.S.C. 1631 (limiting transfer to "court in which the action * * * could have been brought at the time it was filed"); Hadera v. INS, 136 F.3d 1338, 1341 (D.C. Cir. 1998) (rejecting transfer where claims would have been untimely if filed in the transferee court).

The federal habeas statute provides that courts may grant the writ of habeas corpus only "within their respective jurisdictions." 28 U.S.C. 2241(a) (emphasis added). Because the writ acts "upon the person who holds [the detainee] in what is alleged to be unlawful custody," Braden v. 30th Judicial Circuit Court, 410 U.S. 484, 494-495 (1973), a district court lacks jurisdiction to issue the writ unless the detainee's custodian is present within the territorial jurisdiction of the court. See Schlanger v. Seamans, 401 U.S. 487, 491 (1971) ("the absence of [the] custodian is fatal to * * * jurisdiction"). Generally, habeas jurisdiction exists only in the district in which the "immediate custodian"—e.g., the local prison warden—is present. See Monk v. Secretary of the Navy, 793 F.2d 364, 368 (D.C. Cir. 1986); Guerra v. Meese, 786 F.2d 414 (D.C. Cir. 1986); Blair-Bey v. Quick, 151 F.3d 1036, 1039 (D.C. Cir. 1998); Sanders v. Bennett, 148 F.2d 19, 20 (D.C. Cir. 1945). In very limited circumstances, where the immediate custodian is unknown or unavailable, courts have permitted other officials in the chain of custody to be treated as the "custodian" for jurisdictional purposes. See Demjanjuk v. Meese, 784 F.2d 1114, 1116 (D.C. Cir. 1986) (Bork, J., in chambers) (Attorney General may be treated as "custodian" in the "very limited and special circumstances" where the location of the petitioner was kept confidential); cf. Ex parte Hayes, 414 U.S. 1327, 1328 (1973) (Douglas, J., in chambers); Hirota v. MacArthur, 338 U.S. 197, 202 (1949) (Douglas, J., concurring). But even then, there must be a proper custodian present in the territorial jurisdiction of the district court for that court to exercise jurisdiction. Schlanger, 401 U.S. at 491.

Respondents acknowledge that the "immediate" custodians of the Guantanamo detainees are outside the territorial jurisdiction of the United States and are therefore unavailable. Petitioners, however, have named only two respondents who are present in the United States—President George W. Bush and Secretary of Defense Donald Rumsfeld—neither of whom is subject to this Court's habeas jurisdiction.

It is well settled that the President cannot be compelled by judicial process to perform any official act. See Franklin v. Massachusetts, 505 U.S. 788, 802-803 (1992); Id. at 825 (Scalia, J., concurring); Mississippi v. Johnson, 71 U.S. (4 Wall.) 475, 501 (1866); Swan v. Clinton, 100 F.3d 973, 976-977 (D.C. Cir. 1996). Although the Supreme Court has left open the question whether the President may be subject to an order requiring performance of a purely "ministerial" duty, Franklin, 505 U.S. at 802, the relief petitioners seek is far from "ministerial." See Johnson, 71 U.S.(4 Wall.) at 499 (holding that "duties [that] must necessarily be performed under the supervision of the President as commander-in-chief" are "in no just sense ministerial" but rather are "purely executive and political").

As for Secretary Rumsfeld, even if he can be sued as a "custodian" of the Guantanamo detainees, he is not present within this Court's territorial jurisdiction for habeas purposes. Rather, as the D.C. Circuit has indicated, Pentagon officials such as the Secretary of Defense are "located" in the Eastern District of Virginia for habeas purposes, not in the District of Columbia. Monk, 793 F.2d at 369 n.1 ("Of course, the Secretary of the Navy is located at the Pentagon, which is in Virginia, not the District of Columbia.") (emphasis added); see also Watkis v. West, 36 F.3d 127 (D.C. Cir. 1994) (ordering transfer of Title VII suit against Pentagon officials to the Eastern District of Virginia); Donnell v. National Guard Bureau, 568 F. Supp. 93, 94-95 (D.D.C. 1983) (same); Townsend v.

Carmel, 494 F. Supp. 30, 32 (D.D.C. 1979) (Pentagon located in Arlington, Virginia and so Virginia state law applies under 18 U.S.C. 13); cf. Terry v. United States Parole Comm'n, 741 F. Supp. 282, 283-284 (D.D.C. 1990) (holding that territorial nature of habeas jurisdiction precluded jurisdiction in this Court "[b]ecause both the Parole Commission, whose principal offices are located in Chevy Chase, Maryland, and the Southeast Regional Parole Board, located in Atlanta, Georgia, are outside the territorial confines of the District of Columbia").[13]

[13] In Eisentrager, the court of appeals, after concluding that a United States court could exercise subject matter jurisdiction over the habeas petition in that case, remanded for a determination as to whether any of the named respondents (who included the Secretary of Defense) were within the District of Columbia's habeas jurisdiction. 339 U.S. at 767; see 174 F.2d 961, 967-968. The Supreme Court then reversed and observed that, because there was "no basis for invoking federal judicial power in any district," it would not "debate as to where, if the case were otherwise, the petition should be filed." 339 U.S. at 790-791 (emphasis added).

Some cases have permitted suits against Pentagon officials in non-habeas contexts to be brought in this Court under 28 U.S.C. 1391(e), which permits nationwide service of process on government officers in civil cases. See, e.g., Smith v. Dalton, 927 F. Supp. 1, 6 (D.D.C. 1996); Bartman v. Cheney, 827 F. Supp. 1, 2 (D.D.C. 1993); Mundy v. Weinberger, 554 F. Supp. 811, 817 & n.23 (D.D.C. 1982). However, Section 1391(e)'s liberal venue requirements do not apply to habeas claims. Schlanger, 401 U.S. at 490 n.4 (Section 1391(e) does not "exten[d] habeas corpus jurisdiction"); Chatman-Bey, 864 F.2d at 813 n.7 (same). Moreover, because the D.C. Circuit treats defenses based on territorial jurisdiction as waivable, see Chatman-Bey, 864 F.2d at 813, the mere fact that a court may have entertained a habeas petition in the District of Columbia does not establish this Court's jurisdiction in the present case, where respondents have timely challenged this Court's territorial jurisdiction. Cf. United States ex rel. Albertson v. Truman, 103 F. Supp. 617, 618 (D.D.C. 1951) (exercising jurisdiction in habeas case brought by overseas citizen because government had entered "general appearance," but noting "the proper respondents * * * are not located in the District of Columbia in their official capacity, but maintain their offices in the Pentagon Building in the State of Virginia").

None of the "custodians" over the Guantanamo detainees is present in this district. Their absence is "fatal" to this Court's jurisdiction. Schlanger, 401 U.S. at 491. Accordingly, if (and only if) the Court concludes that, contrary to Eisentrager and the jurisdictional limitations discussed above, United States courts may exercise jurisdiction over petitioners' habeas claims, the Court should transfer the case to the Eastern District of Virginia pursuant to 28 U.S.C. 1631.

CONCLUSION

For the foregoing reasons, petitioners' first amended petition for writ of habeas corpus should be dismissed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the Respondents' Motion to Dismiss the Petitioners' First Amended Petition for Writ of Habeas Corpus has been served by hand delivery upon counsel for petitioners, L. Barrett Boss, Asbill, Junkin, Moffitt & Boss, Chartered, Suite 200 1615 New Hampshire Avenue, N.W., Washington, DC 20009, this 18th day of March, 2002.

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ROBERT D. OKUN