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[NOT SCHEDULED FOR ORAL ARGUMENT]

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

CHAMAN Appellant, v. BARACK OBAMA, et al., Appellees.	No. 10-5130
AMINULLAH Appellant, v. BARACK OBAMA, et al., Appellees.	No. 10-5131
MUSTAFA AHMED HAMLILY Appellant, v. LEON E. PANETTA, et al., Appellees.	No. 10-5179

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BENJAMIN HABASHI, et al., Appellants, v. BARACK OBAMA, et al., Appellees.	)	No. 10-5182
AHMED ZAID SALEM ZUHAIR Appellant, v. BARACK OBAMA, et al., Appellees.	)	No. 10-5183
MOHAMMED SULAYMON BARRE Appellant, v. BARACK OBAMA, et al., Appellees.	)	No. 10-5203 ~~FILED UNDER SEAL~~

APPELLEES' OPPOSITION TO PETITIONERS' MOTION TO GOVERN

[redacted]

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Appellees respectfully oppose petitioners Zuhair's (No. 10-5183) and Barre's (No. 10-5203) motions to remand these cases to the district court.[2]

1. The procedural and factual background of these cases is set out in our motion for summary affirmance filed on August 29, 2011 and again in our motion to govern filed on May 15, 2012.

2. Petitioners Zuhair and Barre have moved for remand to the district court. Remand is unnecessary in both cases. As a matter of law, petitioners' claims are moot under *Gul*, which considered and rejected all of the arguments for collateral consequences raised by various petitioners in the district court. *Gul v. Obama*, 652 F.3d 12 (D.C. Cir. 2011).

Zuhair and Barre argue that remand is appropriate because, in their view, *Gul* "explored certain facts and circumstances surrounding the Gul / Hamad petitioners' collateral consequences claims to determine whether they might be redressed in habeas" and that remand is necessary for factual development specific to his case.

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[2] Petitioner Hamlily (No. 10-5179) initially filed a motion to continue abeyance of his case for 60 days. Since that time, he moved for the voluntary dismissal of his appeal, which this Court granted, so his prior motion to hold in abeyance is now moot. Three petitioners in these consolidated cases, Chaman (No. 10-5130), Aminullah (No. 10-5131), and Benjamin Habashi (No. 10-5182), filed no motions to govern, and their appeals should be summarily affirmed for the reasons stated in the government's prior motions.

Zuhair Mot. at 6; *see also* Barre Mot. at 2–3. Contrary to petitioners' contentions, *Gul* did not inquire into the specific facts and circumstances of petitioners' alleged collateral consequences. Instead, it considered each of their arguments for collateral consequences, and held, for reasons that are applicable to each former detainee, that a transferred detainee suffers no collateral consequences of detention. There are no facts that any petitioners here have alleged, or could allege, that would alter this analysis.

The collateral consequences to which Zuhair and Barre refer underscore this point. All of Zuhair's alleged collateral consequences were already rejected by this Court in *Gul* [redacted] and none turn on facts that would require any further development. Barre's only alleged collateral consequence is a non-sequitur and does not present any harm redressable in these habeas actions.

a. Zuhair contends that there are four separate alleged collateral consequences of his detention: (1) he is statutorily barred from seeking entry to the United States; (2) he suffers stigma as a result of his prior detention; (3) he was imprisoned by the Saudi Arabian government and though now released, is subject to continuing restrictions; and (4) he is unable to bring a civil damages action for his detention. Zuhair Mot. at 3–4. Each of these was rejected in *Gul* [redacted]

[redacted] in a manner that applies equally to other petitioners.

With respect to the immigration bar, Zuhair is presumably referring to 8 U.S.C. § 1182(a)(3)(B), which denies entry to anyone who "has engaged in a terrorist activity . . . is a member of a terrorist organization . . . [or] has received military-type training . . . from or on behalf of [one]." *Gul* rejected the argument that this bar constituted a collateral consequence of detention, noting that "that determination 'involves a separate legal standard than the question of whether an individual was detainable'; 'there are a number of factors in the immigration laws which [the Government] look[s] at in order to determine whether someone is excludable' and designation as an enemy combatant, unlike involvement with terrorism, 'is not one of them.'" *Gul*, 652 F.3d at 20 (quoting government brief). "Therefore, the possibility the appellants will be denied entry into this country because of their prior detention or continuing designation, even if it were imminent, is too speculative to sustain the exercise of our jurisdiction." *Id.* The exact same reasoning applies here.

With respect to the stigma from prior detention, *Gul* rejected stigma alone as a basis of jurisdiction, explaining that, "'when injury to reputation is alleged as a secondary effect of an otherwise moot action, we [require] some tangible concrete effect . . . susceptible to judicial correction' before we assert jurisdiction." *Id.* at

20–21 (quoting *McBryde v. Comm. to Rev. Circuit Council Conduct*, 264 F.3d 52, 57 (2001)) (alterations in original).

With respect to prior imprisonment by Saudi Arabia or current hypothetical restrictions, *Gul* explicitly rejected these asserted collateral consequences as well, for reasons applicable to Zuhair and any other former detainee. Under *Gul*, to demonstrate continued justiciability of their claims, petitioners must at least allege that they are suffering redressable collateral consequences today. *Gul*, 652 F.3d at 17 ("A former detainee, like an individual challenging his parole, must instead make an actual showing his prior detention or continued designation burdens him with 'concrete injuries.'"). There is no claim here that petitioners are being detained at the behest of the United States. Prior detention by Saudi Arabia plainly does not establish continuing collateral consequences of detention.

Further, to the extent petitioner is alleging continued restrictions imposed by Saudi Arabia, petitioners made those same allegations in *Gul*, and this Court held that such restrictions are not redressable in a habeas action against the United States. In *Gul*, petitioners claimed to be subject to various restrictions imposed by foreign governments in the countries in which they live. *Id.* This Court rejected that argument, explaining that, even if true, "the harm does not meet the

case-or-controversy requirement because it is caused not by a party before the court but by a stranger to the case, and is therefore beyond the power of the court to redress." *Id.* (citing *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41–43 (1976)). And, as explained in declarations that this Court credited in *Gul* and elsewhere, "when a detainee is transferred out of Guantanamo, he is 'transferred entirely to the custody and control of the [receiving] government.'" *Id.* (quoting declaration). Therefore, *Gul* held that "any travel restrictions imposed upon Gul and Hamad are traceable to the act of a foreign sovereign, and that any decision to lift those restrictions will depend upon an 'exercise of broad and legitimate discretion [a] court[] cannot presume either to control or to predict.'" *Id.* (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 562 (1992) (alterations in original).

Those same declarations, credited by the Court in *Gul*, are applicable to all former detainees, including Zuhair and the other petitioners here. Petitioners were released from United States custody and control and transferred entirely to the custody and control of foreign governments. Therefore, even if Zuhair or other petitioners were subject to confinement or any other restriction on liberty, it would be the result of the independent actions of foreign sovereigns and not redressable in a habeas case against the United States.

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Finally, with respect to the civil damages bar, Zuhair is presumably referring to 28 U.S.C. § 2241(e)(2), which provides that "no court, justice, or judge shall have jurisdiction to hear or consider 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 and has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination."

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[redacted] Zuhair has not identified any damages action he maintains that is barred or any timely claim that he plans to assert, so the effects of such a bar are speculative. And even if he had brought such an action, the statute would apply to him regardless of the outcome of a habeas action. As the district court held below, the language in § 2241(e)(2) is plainly retrospective, and looks only to whether an individual "was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant." *See In re Pet'rs Seeking Habeas Corpus Relief in Relation to Prior Detentions at Guantanamo Bay*, 700 F. Supp. 2d 119, 136–37 (D.D.C. 2010) ("In [§ [2241(e)(2)], the term 'United States' unmistakably refers to

the Executive Branch, not the judiciary," and "the determination by the 'United States' [that a detainee was an enemy combatant] is not subject to court review."); *see also Al Janko v. Gates*, --- F. Supp. 2d ---, 2011 WL 6440906, at *4 (D.D.C. Dec. 22, 2011) (finding that determinations of two separate CSRTs that plaintiff was an enemy combatant "more than satisfy the statutory requirements of [§ 2241(e)(2)]"), *appeal pending*, No. 12-5017 (D.C. Cir.); *Al-Zahrani v. Rumsfeld*, 684 F. Supp. 2d 103, 110 (D.D.C. 2010) ("Here, Al-Zahrani and Al-Salami were determined by properly constituted CSRTs [Combatant Status Review Tribunals] to be enemy combatants, and as such, the plain language of § 2241(e)(2) precludes this Court from hearing their claims."), *aff'd on other grounds*, 669 F.3d 315 (D.C. Cir. 2011).

Zuhair has been determined by the United States to have been an enemy combatant by a properly constituted CSRT. Even if a habeas action were to result in an order that the United States not treat petitioner as an "enemy combatant" prospectively, this would not change the fact that petitioner had previously been "determined by the United States to have been properly detained as an enemy combatant." *Cf. Gul*, 652 F.3d at 19 (noting that, with respect to petitioners' possible inclusion on the No Fly List, 49 U.S.C. § 44903(j)(2)(C)(v), retrospective language in the statute requiring No Fly list status for any individual who was a detainee held

at Guantanamo Bay means that petitioners would "be barred from flights entering the United States regardless whether a court declares they were unlawfully detained" and therefore any harm was not redressable).

b. Barre's only alleged collateral consequence of detention is "the U.S. government's refusal to provide an OFAC license to his counsel to provide various forms of support to him aimed at facilitating his readjustment to life after Guantánamo, via correspondence conveying the clear implication that counsel or similarly-inclined third parties would risk criminal sanctions for providing any assistance to Mr. Barre based on his prior detention at Guantanamo." Barre Mot. at 3. Whatever harm Barre is claiming here is both too speculative and plainly not redressable in a habeas claim regarding the legality of prior detention.

OFAC refers to the Office of Foreign Assets Control, which is a component of the United States Department of the Treasury and which is principally responsible for administering United States economic sanctions programs, primarily directed against foreign states and nationals. OFAC maintains a List of Specially Designated Nationals and Blocked Persons ("SDN List") which includes "individuals and companies owned or controlled by, or acting for or on behalf of, targeted countries," as well as "individuals, groups, and entities, such as terrorists and narcotics traffickers

designated under programs that are not country-specific." Office of Foreign Assets Control, SDN List, *available at* http://www.treasury.gov/resource-center/sanctions/SDN-List/Pages/default.aspx. The assets of those on the SDN List are blocked and United States persons are generally prohibited from dealing with them. *Id.* While individual members of a designated terrorist organizations may not themselves be listed on the SDN List, United States persons are prohibited from engaging in any transaction or dealing with for the benefit of the designated organization. *See, e.g.*, 31 C.F.R. §§ 594.201, 594.204, 595.201, 595.204. To the extent that a transaction with an undesignated member of such an organization results in a direct or indirect benefit to the organization, this prohibition would apply. Thus, as a general matter, any individual—whether they are on the list or not—is subject to sanctions if they are a member of a designated terrorist organization.

OFAC provides a general license authorizing counsel to provide legal services to individuals and entities on the SDN List. 31 CFR §§ 594.506, 595.506, 597.505. Thus, even assuming Barre is a member of a designated terrorist organization, his counsel do not need a license to represent Barre or provide him with legal services. Moreover, Barre is not on the SDN List. *See* SDN List at 99, *available at* http://www.treasury.gov/ofac/downloads/t11sdn.pdf.

Nonetheless, as the attached correspondence to which Barre is referring explains, Barre's counsel sought a license to provide Barre and another former detainee money to assist in their repatriation. Letter from Andrea Gacki, Assistant Director of Licensing, to Shayana D. Kadidal (Attachment B). OFAC responded by noting that, in general, no license is required to deal with someone who is not on the SDN List, but that not every member of a designated terrorist organization is on the list, and that transactions with persons owned or controlled by, or acting for or on behalf of, a designated terrorist organization would be prohibited under federal law. Such transactions are not licensable as a general matter (with limited exceptions, such as the general license for legal services, noted above), as OFAC does not provide licenses for specific payments to members of designated terrorist organizations. *Id.* Thus, all the letter states is the law—that Barre is not on the SDN List, but that if he is a member of a designated terrorist organization, transactions with him would be unlawful unless licensed or otherwise authorized by OFAC.

These issues have no relationship to Barre's former detention and do not demonstrate continuing, redressable collateral consequences. Barre is not on the SDN List, has not alleged that he is a member of a designated terrorist organization, nor alleged any threat of prosecution, so his counsel has not alleged any actual harm

to which he has been subject. Moreover, even if Barre had alleged actual harm, that harm would not be redressable in this habeas proceeding. Whether Barre is a member of a terrorist organization today is a different question from the issue presented in Barre's habeas case—whether he was lawfully held by the United States as part of the Taliban, al-Qaida, or associated forces at the time of his capture under the Authorization for the Use of Military Force ("AUMF"), Pub. L. 107-40, 115 Stat. 224 (2001), as informed by the laws of war. A determination in this habeas case that the United States did not establish by a preponderance of the evidence that Barre's detention was lawful at the time he was captured would not resolve whether he is a member of any designated terrorist organization today, and therefore could not insulate him from OFAC sanctions or his counsel from the need to comply with those sanctions. It therefore cannot be a basis for continued justiciability of his habeas case. *Cf. Gul*, 652 F.3d at 20 (explaining that, "[a]lthough the legality of detention might be relevant to the Executive's determination" under the immigration terrorism bars, because that determination "'involves a separate legal standard than the question of whether an individual was detainable,'" the possibility of future application of those bars does not establish a continuing redressable harm).

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CONCLUSION

For the foregoing reasons, the government respectfully requests that this Court deny Barre and Zuhair's motions to remand.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 7, 2012, I filed and served the foregoing with the Clerk of the Court by causing an original and four copies to be hand-delivered to the Court. I also hereby certify that I caused a copy of the foregoing to be served to counsel for petitioners-appellants, listed below:

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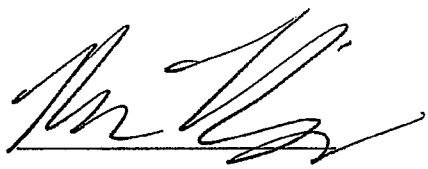

Benjamin S. Kingsley

ATTACHMENT A

[The entirety of Attachment A is under seal]

ATTACHMENT B

DEPARTMENT OF THE TREASURY
WASHINGTON, D.C. 20220

CASE No. SDGT-1329

Shayana D. Kadidal, Esq.
Center for Constitutional Rights
666 Broadway, 7th Floor
New York, NY 10012

Dear Ms. Kadidal:

This is in reply to your January 29, 2010 letter to the Department of the Treasury's Office of Foreign Assets Control ("OFAC") requesting a specific license to provide $[redacted] to Mohammed Sulaymon Barre [redacted] former detainees at the U.S. Naval Base at Guantanamo Bay, to aid in their social reintegration now that they have been repatriated to Somalia. The Center for Constitutional Rights ("CCR") intends to coordinate the fund distribution and use [redacted]

You have indicated that neither Mr. Barre [redacted] appears on the Specially Designated Nationals and Blocked Persons List ("SDN List"). While no license is required in order for U.S. persons, including U.S. charities, to engage in transactions with persons whose property or interests in property have *not* been blocked pursuant to 31 C.F.R. Chapter V or any Executive order or statute administered by OFAC, the SDN list does not encompass the name of every member of designated terrorist organizations. A U.S. individual or organization may not engage in transactions with persons or entities owned or controlled by or acting on behalf of a designated terrorist organization, regardless of whether or not they appear on the SDN List. CCR may not provide or receive payment on behalf, directly or indirectly, to or from any entity or individual whose property or interests in property are blocked, including any entity or individual named or designated pursuant to the Antiterrorism and Effective Death Penalty Act of 1996, Executive Order 12947 of January 23, 1995, or Executive Order 13224 of September 23, 2001, unless authorized by OFAC. It would not be customary for OFAC to issue a specific license for payments to members of designated terrorist organizations, regardless of whether or not they are individually listed on the SDN List.

Sincerely,

Andrea Gacki
Assistant Director for Licensing
Office of Foreign Assets Control

Mar. 10, 2010
Date