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Edited by Karen J. Greenberg , Joshua L. Dratel
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THE ENEMY COMBATANT PAPERS: AMERICAN JUSTICE, THE COURTS,
AND THE WAR ON TERROR

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PART ONE. "BATTLEFIELD" CAPTURES

CHAPTER 1

Rasul v. Bush

On January 11, 2002, an army transport plane descended from a cloudless Caribbean sky and touched down at the U.S. naval base at Guantanamo Bay, Cuba. Heavily armed Marines surrounded the plane as it taxied to a stop. A Navy helicopter hovered overhead with a gunner hanging off the side. Twenty prisoners stepped unsteadily from the plane. Shackles at their wrists were linked to chains encircling their waists, which connected to chains that ran down their legs and around their ankles – what the military calls a “three-piece suit.” They were dressed in orange jumpsuits and wore oversize, blacked-out goggles so they could not see, soundproof earmuffs so they could not hear and heavy mitts strapped to their hands so they could not feel. One official described them as “wobbly and disoriented.” In the days and weeks to come, more planes would drop from the sky, delivering their human cargo in much the same fashion.

In time, each of the prisoners was allowed to send a single-page letter to his family, censored by the United States and delivered by the International Red Cross. Australian David Hicks wrote to his father, Terry, who in turn contacted Stephen Kenny, a lawyer in Adelaide. Mr. Kenny contacted a group of attorneys nationwide that had come together in recent weeks – Michael Ratner and Steven Watt from the Center for Constitutional Rights, based in New York; Clive Stafford Smith, from New Orleans; and me, a civil rights lawyer in Minneapolis. We met in New York in late January to organize a law suit in response to the plan for military tribunals as described by the president and senior administration officials.

Mr. Kenny, who joined us by phone from Australia, pressed us to challenge Hicks’s detention as quickly as possible. When he first learned that Mr. Hicks had been brought to Guantanamo, Mr. Kenny asked the U.S. government for word about his welfare, and for an immediate statement of the allegations against him that justified his detention. Mr. Kenny’s inquiries were met with silence. The United States did not even officially acknowledge that Mr. Hicks was their prisoner, let alone permit him any contact with the outside world. This legal limbo could not be allowed to persist, Mr. Kenny said, and had to be challenged in court.

But Mr. Hicks had not yet been brought before a military tribunal. I wondered whether we could challenge a process that had not yet begun. Mr. Kenny was indignant. “They’ll never start the tribunals if they don’t have to,” he said. The rules governing the tribunals were still years from completion. Should we do nothing until the trials began? And what incentive did the United States have to start costly and potentially embarrassing military trials if they could hold the prisoners for as long as they saw fit, with no means by which a prisoner could challenge the lawfulness of his detention? In short, what did they lose by simply maintaining the status quo? The immediate legal challenge, Mr. Kenny said, was not to some tribunal that loomed in the uncertain future,

but to Mr. Hicks's present, indefinite detention without legal process. He was quite right. The litigation in *Rasul, et al. v. Bush* – named for Shafiq Rasul, a British prisoner who arrived three days after Hicks, and which was brought on behalf of two British citizens and two Australians – began with that call.

The team of attorneys filed *Rasul* on February 19, 2002, in the United States District Court for the District of Columbia. We sought a writ of habeas corpus, the time-honored means by which a prisoner may challenge the factual and legal basis for his incarceration. We argued, and have always argued, that while the president may have the authority to hold people seized in connection with the conflict in Afghanistan, he cannot hold them without a lawful process before a neutral tribunal that rationally separates wheat from chaff. A few weeks later, I received a call from Neil Koslowe, an attorney at the Washington, D.C., office of Shearman and Sterling. His firm had been retained to represent a group of Kuwaiti prisoners at Guantanamo and he wanted to know whether our team would be willing to collaborate with theirs. I readily agreed, and the two groups have worked shoulder to shoulder ever since. They filed their case that April.

The litigation eventually made its way to the Supreme Court. Theodore Olson, the solicitor general of the United States whose wife was killed in the 9/11 attacks, represented the government. The federal courts, he insisted, were powerless in this matter. The prisoners could be held under any conditions that the military may devise, for as long as the president saw fit, because the petitioners – like all the men and boys at Guantanamo – were foreigners beyond the technical sovereignty of the United States.

For more than 100 years, the United States has leased Guantanamo from Cuba. The lease says that Cuba retains “ultimate sovereignty” over the base while the United States exercises “complete jurisdiction and control” for as long as it wants. No one quite knows what these terms mean but, in practice, they mean nothing – former Cuban President Fidel Castro ordered the United States to close the base and leave Cuba, to no avail. In the meantime, Guantanamo has developed into a fully American enclave, with all the trappings of a small American city. For years, the United States has described it as “practically . . . a part of the Government of the United States.” It is entirely self-sufficient, with its own water plant, power supply, schools, and transportation system. It has a number of commercial centers with a McDonalds, a movie theater and a Starbucks. With a total area of over 45 square miles, the base is larger than the island of Manhattan and nearly half the size of the District of Columbia, with a full time population of nearly 10,000. At one court appearance, a lawyer for the government protested that even Paris has a Starbucks, which does not suggest that Paris is part of the United States. I whispered to my colleague that Guantanamo is much more like Paris, Texas than Paris, France. During the course of the litigation, I came to refer to the suggestion that the base was – despite all appearances to the contrary – really just like Paris as “the Guantanamo fiction.”

On June 28, 2004, the Supreme Court issued its decision. By a six-to-three margin, the Court held that the prisoners could challenge the lawfulness of their detention in federal court, a stunning reversal for the president. The Court quickly dispatched the Guantanamo fiction, concluding that Cuba's “ultimate sovereignty” did not deprive the federal courts of the power to act. “What matters,” Justice Anthony Kennedy explained in a thoughtful concurrence, “is the unchallenged and indefinite control that the United States has long exercised over Guantanamo Bay. From a practical perspective, the indefinite lease of Guantanamo Bay has produced a place that belongs to the United States. . . .”

The decision in *Rasul* did not end our struggle to bring the rule of law to Guantanamo. Instead, the administration created “Combatant Status Review Tribunals” that

purported to review the cases there. At the same time, Congress has become involved. In December 2005, the Republican Congress passed the Detainee Treatment Act (or “DTA”), with provisions to strip the courts of jurisdiction over habeas actions brought by prisoners at Guantanamo. In June 2006, the Supreme Court held in *Hamdan v. Rumsfeld* that the DTA did not apply to cases that were already pending when the act was passed. Congress responded the following October, just before the November elections, by passing the Military Commissions Act (or “MCA”). On February 20, 2007, five years and a day after we filed the litigation in *Rasul*, the D.C. Circuit Court of Appeals held that the MCA stripped the federal courts of jurisdiction over all habeas actions filed by prisoners at Guantanamo. As of this writing, the Supreme Court has again heard oral arguments. When it issues its decision, we will once again learn – one hopes for all time – whether Guantanamo is a prison beyond the law.

Joseph Margulies
MacArthur Justice Center
Northwestern University School of Law
Chicago, Illinois

2/19/2002: PETITION FOR WRIT OF HABEAS CORPUS*

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA		
SHAFIQ RASUL,)	
Detainee, Camp X-Ray)	
Guantanamo Bay Naval Base)	
Guantanamo Bay, Cuba)	
SKINA BIBI,)	
as Next Friend of Shafiq Rasul)	
)	
)	
ASIF IQBAL,)	PETITION FOR WRIT
Detainee, Camp X-Ray)	OF HABEAS CORPUS
Guantanamo Bay Naval Base)	
Guantanamo Bay, Cuba)	No. _____
MOHAMMED IQBAL,)	
as Next Friend of Asif Iqbal)	
)	
)	
DAVID HICKS,)	
Detainee, Camp X-Ray)	
Guantanamo Bay Naval Base)	
Guantanamo Bay, Cuba)	
TERRY HICKS,)	
as Next Friend of David Hicks)	
)	
)	
Petitioners,)	
v.		
GEORGE WALKER BUSH,)	
President of the United States)	
The White House)	
)	
)	
DONALD RUMSFELD,)	
Secretary, United States)	
Department of Defense)	
)	
)	
BRIGADIER GEN. MICHAEL LEHNERT,)	
Commander, Joint Task Force-160)	
Guantanamo Bay Naval Base)	
Guantanamo Bay, Cuba)	
COLONEL TERRY CARRICO,)	
Commander, Camp X-Ray,)	
Guantanamo Bay Naval Base)	
Guantanamo Bay, Cuba)	
Respondents)	
All sued in their official)	
and individual capacities.)	

* Redactions on this page have been added for privacy purposes. – Eds.

PETITION FOR WRIT OF HABEAS CORPUS

1. Petitioners David Hicks, Asif Iqbal, and Shafiq Rasul seek the Great Writ. They act on their own behalf and through their Next Friends: Skina Bibi acts for her son Shafiq Rasul, Mohammed Iqbal acts for his son Asif, and Terry Hicks acts for his son David. David Hicks is a citizen of Australia. Mr. Iqbal and Mr. Rasul are citizens of the United Kingdom. They are being held virtually *incommunicado* in respondents' unlawful custody.

I.
JURISDICTION

2. Petitioners bring this action under 28 U.S.C. §§2241 and 2242, and invoke this Court's jurisdiction under 28 U.S.C. §§1331, 1350, 1651, 2201, and 2202; 5 U.S.C. §702; as well as the Fifth and Fourteenth Amendments to the United States Constitution, the International Covenant on Civil and Political Rights ("ICCPR"), the American Declaration on the Rights and Duties of Man ("ADRDM"), and Customary International Law. Because they seek declaratory relief, Petitioners also rely on F. R. Civ. P. 57.

3. This Court is empowered under 28 U.S.C. §2241 to grant the Writ of Habeas Corpus, and to entertain the Petition filed by Terry Hicks, Mohammed Iqbal, and Skina Bibi as Next Friend under 28 U.S.C. §2242. This Court is further empowered to declare the rights and other legal relations of the parties herein by 28 U.S.C. §2201, and to effectuate and enforce declaratory relief by all necessary and proper means by 28 U.S.C. §2202, as this case involves an actual controversy within the Court's jurisdiction.

II.
VENUE

4. Venue is proper in the United States District Court for the District of Columbia, since at least one respondent resides in the district, a substantial part of the events or omissions giving rise to the claim occurred in the district, at least one respondent may be found in the district, and all respondents are either officers or employees of the United States or any agency thereof acting in their official capacities. 28 U.S.C. §§1391(b); 1391(e).

III.
PARTIES

5. Petitioner David Hicks is an Australian citizen presently incarcerated and held in respondents' unlawful custody at Camp X-Ray, United States Naval Base, Guantanamo Bay, Cuba. *See* . . . Birth Certificate of David Hicks.

6. Petitioner Terry Hicks is David Hicks' father. He too is an Australian citizen. Terry Hicks has received a letter from his son, delivered through the Australian Red Cross, asking for legal assistance. Because his son cannot secure access either to legal counsel or the courts of the United States, the elder Mr. Hicks acts as Next Friend. *See* . . . Affidavit of Terry Hicks, incorporated by reference herein.

7. Through counsel, Terry Hicks has tried repeatedly to contact his son, and to learn more about his condition and status. The United States has either rebuffed or ignored counsel's requests. In a letter dated January 17, 2002, for instance, Steven Kenny, Australian counsel for Terry and David Hicks, asked the Australian Government to confirm, *inter alia*, whether David Hicks was being held at Guantanamo, whether the United

States intended to charge him with any offense, and whether the Australian Government could work with counsel to secure representation for Mr. Hicks. In the same letter, Mr. Kenny asked the Australian Government to “arrange contact between David and his family.” See Exhibit C, Affidavit of Stephen Kenny, Australian Counsel for Petitioners; Letter from Stephen Kenny to Hon. Daryl Williams, Attorney-General (Jan. 17, 2002), all correspondence incorporated herein by reference. The following day, the Australian Government advised counsel that Mr. Hicks was being held in Guantanamo, that he “does not currently have legal representation due to the nature and circumstances of his detention,” and that “the matter of access to Mr. Hicks by his family” was “ultimately a matter for the United States.” *Id.* at Letter from Robert Cornall, Attorney-General’s Department (Jan. 18, 2002).

8. Mr. Kenny responded the same day, repeating his request for information about Mr. Hicks, and seeking the assistance of the Australian Government “with a view to arranging” legal advice for Mr. Hicks. On February 1, 2002, Mr. Kenny renewed his request for “access by [Terry Hicks] to his son. He wishes to see his son face to face but would appreciate being able to make even a telephone call to him. Will you please make a direct request to the United States authorities for such a meeting.” *Id.* at Letter from Stephen Kenny (Feb. 1, 2002). On February 8, 2002, the Australian Government left no doubt that David Hicks, and all detainees, were cut off:

Your request for Mr. Hicks’ family to have access to him was referred to the United States authorities. *The United States has advised that, at this stage, no family access will be allowed any of the detainees held at Guantanamo Bay.*

Id. at Letter from Robert Cornall (Feb. 8, 2002)(emphasis added).

9. In addition to his correspondence with the Australian Government, on January 25, Mr. Kenny wrote to President Bush, asking, *inter alia*, if he would “permit David to be seen by legal counsel,” and if he would allow Terry Hicks “to have contact with his son.” To date, the United States Government has not responded to this request.

10. Petitioner Asif Iqbal is a citizen of the United Kingdom presently incarcerated and held in respondents’ unlawful custody at Camp X-Ray, Guantanamo Bay Naval Station, Guantanamo Bay, Cuba. See . . . Birth Certificate of Asif Iqbal.

11. Petitioner Mohammed Iqbal is Asif Iqbal’s father. He too is a British citizen. Mohammed Iqbal received a telephone call from the Foreign and Commonwealth Office on January 21, 2002, during which he was informed that his son was being detained in Guantanamo Bay. Because his son cannot secure access either to legal counsel or the courts of the United States, Mohammed Iqbal acts as his Next Friend. See . . . Affidavit of Mohammed Iqbal, incorporated by reference herein.

12. Through counsel, Mohammed Iqbal has attempted to gain access to his son. The United States has declined to accede to counsel’s requests. See . . . First Affidavit of Gareth Peirce, United Kingdom Counsel for Petitioners Asif and Mohammed Iqbal and Shafiq Rasul and Skina Bibi.

13. The British Foreign and Commonwealth Office advised Ms. Peirce that any request for access to Mr. Iqbal must be made to the United States Ambassador in London. Immediately upon receiving instructions from Mr Iqbal’s family, on January 25, 2002, Ms. Peirce telephoned and also sent a faxed request to the Ambassador, seeking immediate access to Mr. Iqbal in Guantanamo Bay in order to provide legal advice. In addition, she asked the Foreign and Commonwealth Office in London to pursue this request directly with the United States government. Ms. Peirce has been advised by the Foreign and Commonwealth Office that this request has been passed to the United States government on behalf of Mr Iqbal, together with requests by Mr Iqbal’s Member of Parliament that he and Mr Iqbal’s family be permitted access to him. Counsel is

advised by the Foreign and Commonwealth Office that as of February 13, 2002, these requests have not received a response, and nor has a request for further consular access to Mr Iqbal, i.e. a second consular visit, been granted.

14. Petitioner Shafiq Rasul is a citizen of the United Kingdom presently incarcerated and held in respondents' unlawful custody at Camp X-Ray, Guantanamo Bay Naval Station, Guantanamo Bay, Cuba. *See . . . Birth Certificate of Shafiq Rasul.*

15. Petitioner Skina Bibi is Shafiq Rasul's mother. She too is a British citizen. Ms. Bibi received a telephone call from the Foreign and Commonwealth Office on January 21, 2002, during which she was informed that her son was being detained in Guantanamo Bay. Skina Bibi has also received news of a message from her son, delivered through the Red Cross, asking for legal representation. Because her son cannot secure access either to legal counsel or the courts of the United States, she acts as his Next Friend. *See . . . Affidavit of Skina Bibi, incorporated by reference herein.*

16. Through counsel, Skina Bibi has attempted to gain access to her son. The United States has declined to accede to counsel's requests. *See . . . Second Affidavit of Gareth Peirce, United Kingdom Counsel for the Petitioners Asif and Mohammed Iqbal and Shafiq Rasul and Skina Bibi.*

17. The British Foreign and Commonwealth Office advised Ms. Peirce that any request for access to Mr. Rasul must be made to the United States Ambassador in London. Immediately upon receiving instructions from Mr. Rasul's family, on January 25, 2002, Ms. Peirce telephoned and also sent a faxed request to the Ambassador, seeking immediate access to Mr. Rasul in Guantanamo Bay in order to provide legal advice. In addition, she asked the Foreign and Commonwealth Office in London to pursue this request directly with the United States government. Ms. Peirce has been advised by the Foreign and Commonwealth Office that this request has been passed to the United States government on behalf of Mr. Rasul, together with requests by Mr. Rasul's Member of Parliament that he and Mr. Rasul's family be permitted access to him. Counsel is advised by the Foreign and Commonwealth Office that as of February 13, 2002, these requests have not received a response, and nor has a request for further consular access to Mr Rasul, i.e. a second consular visit, been granted.

18. Respondent Bush is the President of the United States and Commander in Chief of the United States Military. He is the author of the Order directing that David Hicks, Asif Iqbal, and Shafiq Rasul be detained, and is ultimately responsible for their unlawful detention. He is sued in his official and personal capacities.

19. Respondent Rumsfeld is the Secretary of the United States Department of Defense. Pursuant to the Order described in Para. 18, respondent Rumsfeld has been charged with maintaining the custody and control of the detained petitioners. Respondent Rumsfeld is sued in his official and personal capacities.

20. Respondent Lehnert is the Commander of Joint Task Force-160, the task force running the detention operation at the Guantanamo Naval Station, Guantanamo Bay, Cuba. He has supervisory responsibility for the detained petitioners and is sued in his official and personal capacities.

21. Respondent Carrico is the Commandant of Camp X-Ray, where the detained petitioners are presently held. He is the immediate custodian responsible for their detention, and is sued in his official and personal capacities.

IV.

STATEMENT OF FACTS

22. The detained petitioners are not enemy aliens. David Hicks is an Australian citizen in respondents' unlawful custody. At the time of his seizure by the United States

Government, Mr. Hicks was living in Afghanistan. On information and belief, he had no involvement, direct or indirect, in either the terrorist attacks on the United States September 11, 2001, or any act of international terrorism attributed by the United States to al Qaida or any terrorist group. He is not properly subject to the detention Order issued by respondent Bush, and discussed *infra* in Paras. 28–33.

23. Petitioners Asif Iqbal and Shafiq Rasul are UK citizens in respondents' unlawful custody. No proper or adequate information has been provided by the United States government as to the circumstances of their seizure by U.S. forces. They were in the United Kingdom at all material times before and on September 11, 2001. On information and belief, they had no involvement, direct or indirect, in either the terrorist attacks on the United States on September 11, 2001, or any act of international terrorism attributed by the United States to al Qaida or any terrorist group. They are not properly subject to the detention Order issued by respondent Bush, and discussed *infra* in Paras. 28–33.

Petitioners' Seizure By The United States

24. In the wake of September 11, 2001, the United States, at the direction of respondent Bush, began a massive military campaign against the Taliban, then in power in Afghanistan. On September 18, 2001, a Joint Resolution of Congress authorized the President to use force against the "nations, organizations, or persons" that "planned, authorized, committed, or aided the terrorist attacks on September 11, 2001, or [that] harbored such organizations or persons." Joint Resolution 23, Authorization for Use of Military Force, Public Law 107–40, 115 Stat. 224 (Jan. 18, 2001). The Resolution did not authorize the indefinite detention of persons seized on the field of battle.

25. In the course of the military campaign, and as part of their effort to overthrow the Taliban, the United States provided military assistance to the Northern Alliance, a loosely knit coalition of Afghani and other military groups opposed to the Taliban Government. On information and belief, no American casualties were caused by the Taliban prior to when Mr. Hicks, Mr. Iqbal, and Mr. Rasul were apprehended, and the detained petitioners neither caused nor attempted to cause any harm to American personnel prior to their capture.

26. On or about December 9, 2001, the precise date unknown to counsel but known to respondents, the Northern Alliance captured David Hicks in Afghanistan. On December 17, 2001, the Northern Alliance transferred him to the custody of the United States military. *See* . . . Joint News Release of the Australian Attorney General and the Minister for Defense (December 17, 2001). David Hicks has been held in United States custody since that time.

27. No proper or adequate information has been provided by the United States government as to the date or circumstances of Mr. Iqbal's and Mr. Rasul's seizure by U.S. forces. The precise date of their capture by U.S. forces is unknown to counsel but known to respondents. They have been held in United States custody since that time.

The Detention Order

28. On November 13, 2001, respondent Bush issued a Military Order authorizing indefinite detention without due process of law. The Order authorizes respondent Rumsfeld to detain anyone respondent Bush has "reason to believe":

- 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