UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

MOHAMMED ABDULLAH TAHA MATTAN ***(ABDAL RAZAK ALI)*** **Petitioners,** **vs.** **BARACK OBAMA,** ***et al,*** **Respondents.**	**No: 09- 745 (RCL)**

PETITIONER ABDAL RAZAK ALI'S MOTION FOR RECUSAL PURSUANT TO 28 U.S.C. 455(a)

Now comes the Petitioner, Abdal Razak Ali, through his Counsel and respectfully requests that this Court recuse itself from this matter pursuant to 28 USC 455 (a) for the following reasons:

1. Pursuant to 28 U.S.C. 455(a) and the Judicial Code of Conduct Canon 3 A. (1) and (6) Petitioner respectfully moves for an order of recusal by this Court. Counsel for Petitioner understands the gravity of this request and under takes this request in good faith:
   - Section 28 U.S.C. 455 (a) states that "Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality *might reasonably be questioned*." (*emphasis added*)
   - Judicial code of conduct Canon 3 provides in relevant part:

     A. <u>Adjudicative Responsibilities</u>.

     (1) A judge should be faithful to and maintain professional competence in the law, and should not be swayed by partisan interests, public clamor, or fear of criticism.

     (6) A judge should avoid public comment on the merits of a pending or impending action, requiring similar restraint by court personnel

> subject to the judge's direction and control. This proscription does not extend to public statements made in the course of the judge's official duties, to the explanation of court procedures, or to a scholarly presentation made for purposes of legal education.[1]

2. Petitioner herein is being held at Guantanamo Bay Prison and has been so held *without charge* for almost eight years. Petitioner has a habeas petition that was transferred to this Court on April 21, 2009 and is currently pending before this Court. Despite fears attributed to this Court in the media, Petitioner is not a terrorist nor has the Government even accused him of engaging in so much as a single act of terrorism.

3. As the Supreme Court has explained, the relevant test for recusal is objective, and not dependent on the judge's intentions or actually evincing bias "but its appearance." *Liteky* v. *United States*, 510 U.S. 540, 548 (1994). "This inquiry is an objective one, made from the perspective of a reasonable observer who is informed of all the surrounding facts and circumstances." *Microsoft Corp. v. United States*, 530 U.S. 1301, 1302 (2000). Thus, the inquiry to be made is "whether a reasonable person perceives a significant risk that the judge will resolve the case on a basis other than the merits." *Hook v. McDade*, 89 F.3d 350, 354 (7th Cir.1996) (citation omitted). This inquiry is made based on a reasonable person standard, as opposed to "a hypersensitive or unduly suspicious person." *Id.* (citation omitted)

4. Counsel for Petitioner does not believe that this Motion contains any trivial facts nor is this Motion made lightly. News accounts dated January 24, 2010 (see Ex. A) have quoted this Court as "urging Congress to act on indefinite terrorism detentions." This Court is quoted as saying "If they meet the definition of enemy combatant, then under our traditional legal authority they're held for the duration of hostilities," but "how long will the duration of hostilities here last? I don't know, and I don't think anybody on the face of the earth knows. So it makes it difficult for a legal judgment, and I think better suited for a legislative judgment about what other kinds of options might be available."[2]

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[1] Counsel understands that this Courts remarks were made in the context of a presentation at the American Bar Association, nevertheless Counsel believes that the nature of the comments went beyond the permissible subject for public comment under the scholarly presentation exception.

[2] Counsel states that all she has are the published accounts of what this Court stated which of course are not admitted into evidence and which might properly be viewed as hearsay. Counsel sought unsuccessfully to obtain the actual transcript from the ABA interview. Clearly if this Court were to assert that it was misquoted and never made the remarks that are attributed to

5. In those same news accounts this Court is quoted as saying "the judges are struggling "to adapt legal principles to a whole new sphere of human existence that we've never witnessed in history as far as I know" and this Court went on to ask "How confident can I be that if I make the wrong choice that he won't be the one that blows up the Washington Monument or the Capitol?"

6. The questions this Court publicly raised at the very moment that this Court is sitting as a judge in Petitioner's case begs this compound question "How confident can Petitioner be that he will be accorded a fair hearing and will this Court be willing to enter the great writ in his case if the Government does not meet its burden or will this Court hold Petitioner indefinitely in fear that it might make a mistake?

7. Petitioner has waited almost eight years for his chance to prove his innocence and to be freed so that he can just quietly return to his home. However, based upon the public statements made by this Court it appears to be difficult for Petitioner, or anyone else for that matter, to reasonably conclude that the Petitioner will get a fair hearing after this Court publicly proclaimed its discomfort not only with hearing the merits of the Guantanamo cases but in actually setting a man free from Guantanamo, even if the Court believes the evidence so indicates, based upon a fear that the Court might make a mistake. Intertwined with this Court's fear of making a mistake is the Court's call for Congressional intervention which a reasonable person might conclude appears to be asking Congress to "act" and provide guidance in this area with the intended "default position" not of enumerating rights of Petitioner but of permanently codifying "indefinite detention," so as not to place all of the perceived "political risks" upon this Court.

8. These statements attributed to this Court and made in a public forum also unfortunately echo a current political debate that is occurring in the United States right now, a debate that questions whether or not our federal courts can fairly and adequately adjudicate habeas corpus claims from men in Petitioner's position. Even as indicated in the very same news article, large

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this Court then Counsel would promptly withdraw this motion with apologies to this Court. However, Counsel waited almost a week after reports of this Court's remarks surfaced to give this Court an opportunity to publicly disclaim the statements. Under the circumstances and because of the seriousness of the underlying statements to the potential outcome of her client's habeas petition, Counsel can only assume the truth of the news accounts and believes it is in her client's best interest that she move forward with this motion, *post-haste*.

portions of the public simply believe that everyone who is or has been detained at Guantanamo Bay is a terrorist, notwithstanding that in the vast majority of cases, the Government or the courts have concluded otherwise. The fact that this Court, while as the same time as being the Judge in Petitioners case, has taken an apparent public stand in this debate and publicly stated its opinion that these cases could well be too difficult for the judiciary because of this Court's own expressed fears of some catastrophic terrorist act committed in the indefinite future by someone whose petition it grants, places this Court's impartiality into question.

9. In addition, this Court's rhetorical question as to "how confident" it can be in releasing one of the Guantanamo prisoners further strongly suggests that this Court will be unable to fairly adjudicate claims raised by Petitioner because of this Court's fear of error that might result in some hypothetical catastrophic terrorist act.

10. The very purpose of Section 455 (a) is to promote confidence in the judiciary by avoiding even the appearance of impropriety whenever possible. Violations that cast doubt on the integrity of the judicial process may well give rise to a violation under Section 455(a). (*United States vs. Microsoft* 253 F.3d 34, 109-117 (D.C. Cir. (2001))

11. As mentioned above, given the context of this Court's apparent request for Congress to intervene, while at the same time discussing the struggles this Court faces with the concept of indefinite detention, could be read as a request to Congress to further codify "indefinite detention" rather than placing all of the perceived "political" risks on this Court. This question pre-supposes that the Constitutional right to habeas corpus needs some kind of supplemental congressional action. It does not. Even if that was not what this Court had in mind when it asked for Congressional help, the First Circuit reviewed a similar possibly ambiguous statement in *In Re: Boston's Children First*, 244 F3d 164, 167-171 (1st Cir. 2001). In *Boston's Children* the trial judge made a statement to the press comparing and distinguishing the difficulty between a pending case and a case that had already been disposed of, a statement which might have been interpreted as commenting on the merits of the pending case. After emphasizing that a judge should avoid public comment on the merits of a pending case, especially in newsworthy cases where tensions might be high, that court found that "the comments were sufficiently open to misinterpretation so as to create the appearance of

partiality even when no actual prejudice or bias existed." (*Id*. at 170) In other words, the First Circuit found that, to an objective observer, the statements appeared to put the judge in the role of advocate and create the appearance of impartiality, even where the judge herself had absolutely no such intention, and the statement could just as easily be interpreted another way.

12. The Tenth Circuit has also had occasion to weigh in on the subject of a federal judge speaking publicly on issues relating to a pending case in *United States vs. Cooley* 1 F.3d 985 (10th Cir. 1993). In *Cooley* the Court entered a preliminary injunction barring protesters from blocking a Kansas clinic. When the Court learned that protesters intended to violate his order the Judge appeared on a national news show as part of his campaign to ensure his order was enforced. Some of the protesters that were later arrested were assigned to that same Judge. The court refused to recuse itself, maintaining that it knew nothing about the particular facts of the defendants' cases and had no predisposition as to the defendants' guilt or innocence. In recusing the judge the appellate court did not find that the judge had shown any predisposition in the matter. The court in *Cooley* first noted that there was little guidance on when public comments create an appearance of partiality because judges are generally loath to discuss pending cases with the media *(Id.* at 995). However, because the judge appeared on a national television show the appellate court concluded that the judge created the appearance that he had become an active participant ….rather than remaining as a detached adjudicator and therefore a reasonable person would harbor a justified doubt as to his impartiality in the case. *(Id.* At 995)

13. Counsel for Petitioner has no doubt that being a District Court Judge in this case is a difficult job. Hearings regarding the writ of habeas corpus will never be easy, and they were not so intended. They were meant to be fair and to give individuals the opportunity for freedom from unlawful restraint. As Justice Kennedy stated in *Boumediene vs. Bush* 128 S. Ct. 2229, 171 L.Ed.2d 41 (2008) "the Great Writ is a fundamental precept of liberty" and "we do consider it uncontroversial, [ ] that the privilege of habeas corpus entitles the prisoner to a meaningful opportunity to demonstrate that he is being held pursuant to "the erroneous application or interpretation" of relevant law. *St. Cyr*, 533 U. S., at 302. And the habeas court must have the power to order the conditional release of an individual unlawfully detained—though release

need not be the exclusive remedy and is not the appropriate one in every case *in which the writ is granted. (Boumediene at 2238)*

14. *T*he Supreme Court also recognized that this Court's task was not easy. As Judge Kennedy held, "Indeed, common-law habeas corpus was, above all, an adaptable remedy. Its precise application and scope changed depending upon the circumstances. See 3 Blackstone *131 (describing habeas as "the great and efficacious writ, in all manner of illegal confinement"); see also *Schlup* v. *Delo*, 513 U. S. 298, 319 (1995) (Habeas "is, at its core, an equitable remedy"); *Jones* v. *Cunningham*, 371 U. S. 236, 243 (1963) (Habeas is not "a static, narrow, formalistic remedy; its scope has grown to achieve its grand purpose"). (*Boumediene* at 2267)

15. The Supreme Court also gave this Court specific guidance applicable to Guantanamo cases. "For the writ of habeas corpus, or its substitute, to function as an effective and proper remedy in this context, the court that conducts the habeas proceeding must have the means to correct errors that occurred during the CSRT proceedings. This includes some authority to assess the sufficiency of the Government's evidence against the detainee. It also must have the authority to admit and consider relevant exculpatory evidence that was not introduced during the earlier proceeding. Federal habeas petitioners long have had the means to supplement the record on review, even in the post conviction habeas setting. See *Townsend* v. *Sain*, 372 U. S. 293, 313 (1963), overruled in part by *Keeney* v. *Tamayo-Reyes*, 504 U. S. 1, 5 (1992). Here that opportunity is constitutionally required. We make no attempt to anticipate all of the evidentiary and access-to-counsel issues that will arise during the course of the detainees' habeas corpus proceedings. We recognize, however, that the Government has a legitimate interest in protecting sources and methods of intelligence gathering; and we expect that the District Court will use its discretion to accommodate this interest to the greatest extent possible. Cf. *United States* v.*Reynolds*, 345 U. S. 1, 10 (1953) (recognizing an evidentiary privilege in a civil damages case where "there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged"). (*Boumediene* at 2276)

16. Most importantly, the Supreme Court of the United States felt that this Court was well equipped to deal with these difficult issues "*These and the other remaining questions are within the expertise and competence of the District Court to address in the first instance." (Boumediene* at 2276*)* Unfortunately, given the public statements made by this Court, expressing trepidation in the event it

grants the habeas petitions before it, a reasonable person could well conclude that this Court will not be able to fairly adjudicate this matter.

WHEREFORE, because the actions of this Court in announcing in a public setting its discomfort in its ability to handle Petitioner's case and also to rule fairly after a hearing on all of the evidence, this Court's apparent request seeking the intervention of the Congress of the United States to codify the law as it relates to "indefinite detention," and because the statements attributed to this Court go not only to the merits of this pending case but to the possible disposition in this case, this Court's impartiality has been called into question and requires that this Court disqualify itself in this case.

Respectfully submitted,

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EXHIBIT

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Judges Urge Congress to Act on Indefinite Terrorism Detentions

by ProPublica January 24, 2010

Chief Judge Royce Lamberth of the U.S. District Court for the District of Columbia speaks at an American Bar Association breakfast about Attorney General Eric Holder's recent decision to put the reputed Sept. 11 mastermind and four accused henchmen on trial in New York federal court on Dec. 17, 2009. (J. Scott Applewhite/AP Photo)

Three judges on the federal trial court hearing challenges brought by Guantanamo prisoners are calling on Congress and the Obama administration to enact a law to address one of the nation's most perplexing moral and legal dilemmas: When can the United States indefinitely detain terrorism suspects?

In lengthy interviews, Chief Judge Royce Lamberth and two of his colleagues on the U.S. District Court in Washington, D.C., said that deciding whether to release these prisoners raises unprecedented questions about security and liberty that need to be addressed by lawmakers. Their willingness to discuss their concerns in detail -- something federal judges rarely do in cases pending before them -- underscores the seriousness with which they view the lack of guidance from lawmakers.

"Judges aren't in the business of making law -- we interpret law," said Judge Reggie Walton, a George W. Bush appointee. "It should be Congress that decides a policy such as this that has a monumental impact on our society and makes a monumental impression on the world community."

Lamberth, a Reagan appointee, said the judges are struggling "to adapt legal principles to a whole new sphere of human existence that we've never witnessed in history as far as I know." The problem, he and the other judges say, is that the battle against terrorist groups doesn't fit the classic definition of war, with clearly defined enemies who would be released when the conflict was settled. Because U.S. law doesn't currently have any other option for captives held in a conflict without end, terrorism detainees could be locked up for life, the judges say.

The judges also say the risk in ordering a detainee to be released seems much greater than in past conflicts, because a return to the battlefield is not just a return to traditional frontlines but to possible attacks on civilians.

"How confident can I be that if I make the wrong choice that he won't be the one that blows up the Washington Monument or the Capitol?" Lamberth said.

Neither the Obama administration nor Senate Judiciary Committee Chairman Patrick Leahy, D-Vt., whose support would be crucial to passing such a law, responded to requests for comment on the judges' plea. A Leahy aide indicated that congressional Democrats won't act unless the White House does. "The administration has not yet offered a proposal for a system of prolonged detention," the aide said.

Sen. Lindsey Graham at a Senate Judiciary Committee hearing on July 28, 2009. (Win McNamee/Getty Images)

The judges' position drew support from South Carolina Sen. Lindsey Graham, a Republican member of the Judiciary and Armed Services committees who said he'll introduce legislation in the spring to create a legal framework for terrorism detention.

"Our country needs to get a grip on this," said Graham, who for six years was an Air Force lawyer, advising pilots on the law of war during the first Gulf War. "The courts, God bless 'em, are trying to figure out questions that are outside of their lane."

The judges have been working on the Guantanamo cases since 2008, when the Supreme Court ruled that the detainees could contest their detention under the constitutional doctrine of habeas corpus, which protects individuals from unlawful imprisonment by the government. Their task: Determine if the government had enough evidence that a prisoner was involved in al-Qaida or Taliban-linked hostilities to validly detain him as an enemy fighter.

Without any laws or legal precedent to guide them, the judges have had to piece together their own standards for everything from what kinds of conduct constitute enemy activity to how to evaluate evidence obtained from harsh interrogations. Individually they've drawn on general principles of law and one another's work to come up with methods they believe are fair. But the judges say they want central guidelines to answer the many difficult questions these cases can raise, such as how to evaluate the unusual intelligence and interrogation evidence involved and how certain they should be of the truth before delivering a judgment.

"It's an honor to have the responsibility of blazing the trail in determining how justice should be administered in these cases," said Judge Ricardo Urbina, a Clinton appointee. "By the same token it's also at times frustrating when not all the rules are clear and not all the specifics of how a matter should be dealt with are before us."

A major appeals court decision this month gave the lower court some guidance, Judge Lamberth said, but -- as the decision's author herself wrote -- many critical questions about how to evaluate the detentions still demand an answer from Congress.

So far judges have decided 41 of the challenges [1] brought by some 200 detainees and have determined that 32 of the men should be released. Only 21 of those prisoners have actually left Guantanamo, however, because the Obama administration, like its predecessor, is resisting the courts' authority to compel their release -- a dispute that's now before the Supreme Court.

Lamberth said one challenge the judges are struggling with is the prospect of keeping someone in prison for life based on far less evidence than the "beyond a reasonable doubt" proof that is required in ordinary criminal cases. Currently prisoners can be held at Guantanamo based solely on secondhand or even thirdhand reports of their hostile activity, and they don't have the right to challenge the government's informants in court.

"If they meet the definition of enemy combatant, then under our traditional legal authority they're held for the duration of hostilities," Lamberth said. But "how long will the duration of hostilities here last? I don't know, and I don't think anybody on the face of the earth knows. So it makes it difficult for a legal

judgment, and I think better suited for a legislative judgment about what other kinds of options might be available."

Graham wants Congress to step in and lift the specter of indefiniteness from the judges' decisions by establishing a process that allows detainees who lose in court to periodically have their cases reviewed.

"Congress should weigh in so that a person is not without a legal remedy forever. That's unacceptable. The detainee should know, the American people should know -- what happens next?" he said.

Graham said legislation should also create clear steps for addressing the greatest fear in these cases: The possibility that someone who is ordered to be released will commit an atrocity.

The judges are duty-bound to set aside such worries because they are allowed to focus only on the facts of the case before them -- the prisoner's activities at the time he was captured, which in these cases was as long as eight years ago.

"I'm sure all of us are concerned about the problem of international terrorism, and all of us were affected one way or the other by the various terrorist acts. But when you have an individual [before you], you can't factor those considerations," Walton said.

U.S. District Judge Ricardo M. Urbina is pictured before the start of a ceremony at the federal courthouse in Washington, on May 1, 2008. (Charles Dharapak/AP Photo)

The public doesn't always understand the limitations of the judges' role, Urbina said.

He said he was reminded of that not long after he issued one of the most publicized rulings in the Guantanamo cases, deciding that a group of Chinese Muslims, known as Uighurs, should be released into the United States.

He said he was pulled aside at his high school reunion by a "terrifically nice, very successful lawyer."

"What are you doing? These people are terrorists!" Urbina said the lawyer told him. "You want to bring them here, to blow up our cities and our homes and put us all at risk?"

Urbina said he tried to explain that he had looked at the evidence and had done what justice required. "Have you read anything about these people?" he asked the lawyer, "These are people who the *government* says are not terrorists."

If Congress doesn't pass a comprehensive detention law, Urbina said, the judges will continue answering the detention questions on their own. Armed with almost no precedent and only the Constitution, "we must turn to our common sense, our sense of reasonableness, our overall sense of what the law is created to achieve, and our own kind of visceral understanding of what's fair and what isn't."

Write to Chisun Lee at Chisun.Lee@propublica.org .

CERTIFICATE OF SERVICE

I, H. Candace Gorman, certify that I today caused a true and accurate copy of Petitioner Motion for Recusal to be served upon the following persons by service Through the ECF.

Nancy Safavi
U.S. Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Ave., NW, Room 7144
Washington, DC 20530

This 29th day of January, 2010.

/s/ H. Candace Gorman

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