UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MONA MALLOUK, *et al.,*

Petitioners,

v.

BARACK H. OBAMA, *et al.,*

Respondents.

No. 08-cv-2003 (JR)

PETITIONERS' RESPONSE TO MOTION TO DISMISS

Introduction

As of the time of this writing, an American citizen has been detained abroad for over seven months by a close ally of our government without explanation as to what he has done to deserve this fate, other than entirely vague allegations that he has been involved in terrorism. Petitioners credibly allege that he was tortured, that an American official was present during the torture, and now also that his detention continues only at the behest of the U.S. government.

In response, Respondents have failed to submit a declaration stating that no agency of the U.S. government requested Mr. Hamdan's detention. Instead, they assert without evidence that the U.A.E. is solely responsible because it charged Mr. Hamdan through its criminal process, one week after this case was filed. But the timing of his transfer to criminal custody speaks louder than the government's half-hearted denial, as does the fact that his case remains in limbo -- he remains detained without having been told when he will go to trial, what conduct of his was criminal, and what evidence the government will offer against him.

Under these circumstances, Petitioners have credibly alleged that Mr. Hamdan remains detained at the behest of the U.S. government, and alternatively that the U.S. government has placed Mr. Hamdan in danger insofar as it contributed to his torture and the resulting interrogation. This Court should allow discovery in order to determine the extent of the U.S. government's involvement in Mr. Hamdan's detention, interrogation, and torture. Indeed, doing so may be the only way to prevent a grave injustice against a U.S. citizen, perpetrated by his own government.

I. Petitioners Have Adequately Pled Constructive Custody for Purposes of Habeas Jurisdiction.

The government first argues that Petitioners have failed to "establish" sufficient jurisdictional facts in order to support a theory of constructive custody. Respondents' Motion to Dismiss (hereinafter "Resp. MTD") at 1. This argument is incorrect for several reasons. First, it mistakes what Petitioners must ultimately "establish" with what they have to *allege*, at the motion to dismiss stage. Petitioners have undoubtedly alleged constructive custody sufficient to survive this motion to dismiss. Second, even if something more than mere allegations were required in cases such as this, Petitioners have provided substantial evidence in addition to the allegations, and certainly have presented enough to show that the claims are "colorable" and therefore merit at least limited discovery. [1]

[1] Petitioners recognize that, as in *Abu Ali*, their allegations have necessarily evolved as the factual circumstances have changed and as they have learned more about Mr. Hamdan's plight. *See Abu Ali v. Ashcroft*, 350 F.Supp. 2d 28, 67-69 (D.D.C. 2004). Petitioners request that the Court treat the allegations and evidence that they have submitted in the briefs and pleadings filed after the petition as incorporated into the original document. For example, just as the government has treated its motion to dismiss as a return to the writ, Petitioners request that the Court treat the allegations in this brief as though they were part of a traverse. Should the Court be inclined to

A. Petitioners Need Only Allege Facts Supporting Jurisdiction.

Although the government cites no cases that stand for the proposition, it appears to suggest that Petitioners must actually *prove* the jurisdictional facts *prior to discovery* in order to state a proxy detention claim. *See* Resp. MTD at 7. This is obviously incorrect; this Court may not dismiss the petition by resolving disputed facts without permitting discovery concerning those facts. "To avoid dismissal of his complaint under Fed. R. Civ. P. 12(b)(6), [plaintiff] need not plead the facts sufficient to prove his allegations and evidence that will ultimately be used at trial." *In re Sealed Case*, 494 F.3d 139, 148 (D.C. Cir. 2007). This is the rule in habeas cases as well. *See generally Harris v. Nelson*, 394 U.S. 286, 300 (1969) ("where specific allegations before the court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is confined illegally and is therefore entitled to relief, it is the duty of the court to provide the necessary facilities and procedures for an adequate inquiry."); *Al Ansi v. Bush*, 585 F. Supp. 2d 121, 124 (D.D.C. 2008) (authorizing discovery in Guantanamo habeas petition).

That this case involves a motion to dismiss for lack of jurisdiction does not alter this rule. Indeed, it has long been the law in the D.C. Circuit that the district court should not resolve a

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accept the arguments presented here, but nonetheless feel compelled to dismiss the petition because it does not explicitly incorporate the allegations contained in Petitioners' more recent filings, Petitioners request an opportunity to amend the petition to incorporate both the factual allegations and legal theories set forth in the subsequent pleadings, including this one. If the Court grants this request, Petitioners will also amend the petition to name Naji Hamdan as the Petitioner, given that he has now explicitly authorized this lawsuit. *See* Exh. 20 at 5, ¶ 21 (Dec. of Reem Salahi) (attached as Exhibit to Reply to Respondents' Opposition to Petitioners' Motion to Disclose *Ex Parte* Evidence).

motion to dismiss for lack of jurisdiction by deciding disputed facts without allowing the parties an opportunity to discover the relevant facts.

> [S]hould the trial court look beyond the pleadings, it must bear in mind what procedural protections could be required to assure that a full airing of the facts pertinent to a decision on the jurisdictional question may be given to all parties. Indeed, this Court has previously indicated that ruling on a Rule 12(b)(1) motion may be improper before the plaintiff has had a chance to discover the facts necessary to establish jurisdiction. . . . In many instances it may be necessary to hold evidentiary hearings in resolving particularly complicated factual disputes rather than to rely on affidavits alone.

Herbert v. National Academy of Sciences, 974 F.2d 192, 198 (D.C. Cir. 1992) (citing, *inter alia*, *Collins v. New York Central System*, 327 F.2d 880 (D.C. Cir. 1963)).

Not surprisingly, the cases the government cites to support its radical position that the Court should dismiss this case on disputed facts without conducting discovery provide no support for its position. The government cites *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94-95 (1998), however, that case establishes only that jurisdiction is a threshold issue. That the Court must resolve jurisdiction before the merits says nothing about whether or not the Court may allow discovery on the jurisdictional question before resolving it.

The government also cites cases holding that a court may consider facts outside the complaint and may resolve disputed facts when deciding a motion to dismiss for lack of jurisdiction under Fed. R. Civ. Proc. 12(b)(1), but these cases do not support the view that such disputed facts may be resolved *without discovery*. Resp. MTD at 7 (citing *Coalition for Underground Expansion v. Mineta*, 333 F.3d 193, 198 (D.C. Cir. 2003) and *Koutny v. Martin*, 530 F. Supp. 2d 84, 87 (D.D.C. 2007)). Indeed, *Coalition for Underground Expansion* explicitly did *not* approve of the practice of resolving a motion to dismiss on disputed facts without

discovery, and instead decided the case on the ground that those facts, even if proven true, could not have established jurisdiction. *See id*. at 198 ("As for the lack of discovery, the Coalition has made no allegation which, if substantiated, would establish standing to sue under the APA.").[2]

Thus, the caselaw in this Circuit clearly establishes that Petitioners are entitled to discovery as long as they have provided detailed and specific allegations to support their jurisdictional theory. As explained below, Petitioners have met that burden.

B. Petitioners' Allegations and Evidence Are Substantial Enough to Warrant Discovery.

The Petition for Writ of Habeas Corpus along with the supplemental pleadings to date unequivocally allege that Mr. Hamdan was detained at the behest of the U.S. government, was interrogated and tortured with the knowledge of and participation of U.S. government officials, and remains detained now, ostensibly awaiting trial, still at the behest of the U.S. government.

The initial petition clearly alleged detention at the behest of the U.S. government. *See* Petition for Writ of Habeas Corpus (hereinafter "Pet.") at 1, ¶ 1 ("This case involves the detention of an American citizen at the behest of the United States government."); *id.* at 2, ¶ 4 ("The most elemental legal principles by which we govern ourselves cannot countenance the lawless detention of a United States citizen at the behest of his own government."); *see also id.* at 24, ¶ 51; *id.* at 26, ¶ 57.

[2] It is unclear why Respondents cite *Koutny*, given that the plaintiffs in that case prevailed against a motion to dismiss on jurisdictional grounds under Fed. R. Civ. Proc. 12(b)(1). *Koutny*, 530 F. Supp. 2d at 88. Plaintiffs lost only on the ground that they did not allege a constitutional violation. The case is wholly inapposite.

Petitioners also alleged, based on the subsequent pleadings and accompanying declarations, that Mr. Hamdan's interrogation and torture while detained by the U.A.E.'s State Security forces occurred with the knowledge and participation of U.S. officials. *See* Notice Regarding Status of Naji Hamdan (hereinafter "Notice of Status") at 2-3. Petitioners allege that at least one agent of the U.S. government participated in Mr. Hamdan's interrogation and witnessed his torture. Notice of Status at 2; Exh. 13A at 6 (Naji Hamdan's Statement to Mr. Cooper – Consul) (attached as Exhibit to Notice of Status); Exh. 20 at 5-6; ¶¶ 22-23 (Dec. of Reem Salahi) (stating that Mr. Hamdan "firmly believes that the interrogator was an American" and that the interrogator "spoke native American English, and he did not speak in Arabic.").

In addition, Petitioners now allege that Mr. Hamdan's continued detention in the U.A.E., pursuant to a criminal proceeding that has never specified what conduct was illegal and now appears to have inexplicably stalled, is also occurring at the behest of the U.S. government. Petitioners make this allegation based on several newly-discovered facts. First, a U.A.E. government official who does not wish to reveal his name has stated that Mr. Hamdan's detention was at the behest of the U.S. government. *See* Exh. 25 at ¶ 4 (Dec. of Mohamed-Idris Traina) (attached). Second, the U.S. government continues to investigate Mr. Hamdan's financial transactions in the United States. In late December 2008, the FBI subpoenaed Daniel Sieu, Mr. Hamdan's loan officer in Los Angeles, for his file on a loan he gave to Mr. Hamdan. Exh. 23 at ¶ 5 (Dec. of Daniel K. Sieu) (attached). Third, upon information and belief, the prosecutor responsible for convicting Mr. Hamdan in the U.A.E. has communicated with U.S. officials about the situation. In February 2009, the U.A.E. head prosecutor assigned to Mr. Hamdan's case, Mr. Khaled Al Sha'ali, traveled to the United States. Exh. 20 at 1, ¶ 6; 2-3, ¶ 10 (Dec. of Reem Salahi). Finally, Petitioners' research into U.A.E. law confirms that the timing of

Mr. Hamdan's transfer strongly suggests that U.S. government officials, in response to the filing of this lawsuit against the United States, participated in the decision to transfer Mr. Hamdan into U.A.E. criminal custody. Contrary to the government's assertion, under U.A.E. law, the U.A.E. State Security forces had authority to continue Mr. Hamdan's incommunicado imprisonment for a total of six months. Exh. 21 at Art. 35 (Decree by Federal Law No. 1 of 2004 on Combating Terrorism Offences (U.A.E.)) (attached); Exh. 22 at ¶¶ 13-14 (Dec. of Abou El Fadl) (attached).[3] The fact that the U.A.E. officials released Mr. Hamdan one week after Petitioners sued U.S. officials in this case, thereby ending Mr. Hamdan's incommunicado detention by State Security forces, but continuing his indefinite detention through the U.A.E.'s criminal process, strongly suggests U.S. involvement. Notice of Status at 2-3. Petitioners allege that the purpose of this transfer was in part to shield Mr. Hamdan's continued detention from the scrutiny of the American judicial system.[4]

[3] Respondents contend that the timing of Mr. Hamdan's charging and transfer from U.A.E. State Security to criminal custody is consistent with U.A.E. law. Michelle Bernier-Toth's declaration claims that, based on her understanding, U.A.E. law allows for detention for "questioning for extended periods of time and specifically to detain individuals for up to 90 days without further proceedings" and that Mr. Hamdan's "extended detention was not itself inconsistent with the laws of the U.A.E." Dec. of Michelle Bernier-Toth at 3, ¶ 8. Petitioners have found no such support in U.A.E. law for Ms. Bernier-Toth's claim. In fact, the counter-terrorism law under which Mr. Hamdan is charged allows the government to detain terrorism suspects for questioning and without charge for up to *six months*. Petitioners can locate no such ninety day requirement in governing U.A.E. law. *See* Exh. 22 at ¶ 14 (Dec. of Khaled Abou El Fadl) (stating "There is no legal requirement that necessitates further proceedings or release after ninety days of detention in state security cases in the U.A.E.").

[4] As noted *supra* at note 1, this Court should treat this brief as a traverse to the extent that it chooses to treat the government's motion to dismiss as a return to the writ. As such, this document is also a pleading.

As explained *supra* Section I(A), Petitioners disagree with the government's suggestion that they have to prove facts sufficient to establish this Court's jurisdiction without the benefit of discovery. While Petitioners accept that their allegations must be colorable, Petitioners have already established sufficient facts to support a finding that their allegations are colorable, and therefore warrant further discovery. The Petition itself describes how Mr. Hamdan was closely scrutinized by the Federal Bureau of Investigations (FBI) for many years, beginning in 1999, apparently for counterterrorism-related reasons. Pet. at 12-15, ¶¶ 26-35; Exh. 3 at 2-7, ¶¶ 15-38 (Dec. of Hossam Hemdan) (attached as Exhibit to Petition). The Petition further describes that once Mr. Hamdan relocated to the United Arab Emirates, he was arbitrarily detained in Lebanon by the Lebanese intelligence service at the behest of a "prominent foreign agency." Pet. at 14-15, ¶¶ 32, 34. Subsequently, the Petition states (and the government has confirmed) that two FBI agents flew to the U.A.E. to interrogate Mr. Hamdan at the U.S. Embassy there. Pet. at 15, ¶ 35. Approximately six weeks later, according to the dates supplied by the Public Declaration of Michael J. Heimbach, Assistant Director, Counterterrorism Division, FBI, *see* Dec. of Michael J. Heimbach at 3, ¶ 7 (attached as Exhibit to Resp. MTD), Mr. Hamdan was arrested and detained by the U.A.E. State Security forces (the "Amn Al-Dawla"). Pet. at 15-16, ¶ 36.

Finally, Mr. Hamdan's detention at the behest of the U.S. government falls squarely within a well-documented pattern and practice of proxy detention, whereby the U.S. government requests that foreign governments detain terrorism suspects, so as to avoid the constraints on such detention created by our judicial system. Petitioners alleged this in the original petition, *see* Pet. at 19-23; ¶¶ 45-48; *id.* at 21-22, ¶ 47, and have also provided further support for those allegations through the Declaration of Khaled Abou El Fadl. Exh. 22 at ¶¶ 15-24 (attached).

The government never responds directly to this evidence, but argues instead that its own declarations are sufficient to establish the absence of any U.S. involvement, without further discovery. However, as explained in the briefing concerning the government's classified evidence, the declarations do not come close to establishing the absence of U.S. involvement. While the government asserts that "the Heimbach Declaration makes clear that the *United States Government* did not request that the UAE detain or arrest Hamdan," *see* Resp. MTD at 8 (emphasis added), that assertion finds no support in the Heimbach Declaration, which mentions only the FBI and does nothing to disclaim the involvement of the other United States agencies that might have been involved, such as the CIA or various components of the Department of Defense. Respondents' Motion to Dismiss also repeatedly conflates the FBI's involvement with the involvement of any U.S. government official. *See, e.g.*, Resp. MTD at 9 n.8 (asserting that Petitioners have to prove that the official present during Mr. Hamdan's torture was "an FBI agent").[5] In addition, wholly apart from the fact that the declarations do not deny that other U.S. officials have caused Mr. Hamdan's detention, the Heimbach Declaration does not foreclose the possibility that the FBI itself "requested" that the UAE investigate him or that it "expressed an[] opinion" favoring his detention. Dec. of Michael Heimbach at 3.[6]

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[5] This conflation is particularly striking given that the petition and subsequent filings in this case made repeated reference to proxy detention at behest of the "United States," and did not limit the claim to detention at the behest of the FBI. *See, e.g.*, Pet. at ¶¶ 4, 51. *See also* Notice of Status at 3 (referring to the "role of any United States government employees or contractors in his interrogation and torture").

[6] To be precise, the Heimbach Declaration states that "[t]he FBI did not direct the UAE to investigate Hamdan or direct actions taken by the UAE during their investigation" (¶ 9), but does not deny that the FBI requested, suggested, encouraged, or facilitated that investigation. Likewise, the Heimbach Declaration states that the FBI did not "request that the UAE detain or arrest Hamdan" (¶ 10), but does not deny that the FBI suggested, encouraged, or facilitated that

Taken together, Petitioners' detailed allegations, the facts they have already adduced, and the obvious gaps in the government's declarations suffice to allege that Mr. Hamdan is in the constructive custody of the United States. At this stage of the proceedings, Petitioners must do nothing more to defeat the government's motion to dismiss. As explained more fully *infra*, this Court has jurisdiction over a habeas petition as long as the petitioner alleges either that he is detained by or under color of authority of the United States, or that he is in custody in violation of the Constitution, laws, or treaties of the United States. Petitioners have pled facts sufficient to establish habeas jurisdiction.

C. *Abu Ali* Supports Petitioners' Jurisdictional Theory.

The government also argues that this Court's decision in *Abu Ali* establishes a threshold set of factors for finding constructive custody, and that Petitioners have failed to meet that standard. *See* Resp. MTD at 4 (suggesting that *Abu Ali* required a finding of four factors); *id*. at 7-8 ("even in the absence of Respondents' declarations, Petitioners' evidence and unsupported allegations would not meet the standard of *Abu Ali*, rendering habeas jurisdiction absent").

This argument distorts the holding of *Abu Ali*. In the passage on which the government relies, the *Abu Ali* decision makes clear that it is not creating any new threshold set of requirements. The full quotation is as follows:

> The jurisdiction of this Court requires a finding that Abu Ali is in the actual or constructive custody of the United States. The case law indicates that this

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detention. Most curiously, the Heimbach Declaration states that "[t]he FBI has not expressed any opinion to the UAE about Hamdan's *continued* detention or trial by the UAE" (¶ 12) (emphasis added), but does not deny that the FBI had "expressed an opinion" to the UAE regarding Mr. Hamdan's *initial* detention or his detention prior to the filing of the petition for habeas corpus.

> inquiry will entail a consideration of several factors, including whether: (i) Abu Ali was detained at the behest of United States officials; (ii) his ongoing detention is at the direction of the United States enlisting a foreign state as an agent or intermediary who is indifferent to the detention of the prisoner; (iii) he is being detained in the foreign state to deny him an opportunity to assert his rights in a United States tribunal; and (iv) he would be released upon nothing more than a request by the United States. . . . Any one of these factors may not be sufficient to establish jurisdiction.

Abu Ali v. Ashcroft, 350 F. Supp. 2d 28, 68 (D.D.C. 2004) (internal citations omitted).

As the context makes abundantly clear, *Abu Ali* held that the court would have jurisdiction upon a showing of "actual or constructive custody," and set forth the factors solely as issues to consider, none of which would necessarily be dispositive. *See Abu Ali,* 350 F. Supp. 2d at 68 n. 42 ("The Court does not mean to imply that it has set out a comprehensive list of the factors that are relevant to the inquiry."). As set forth in detail *supra*, Petitioners have established jurisdiction under a constructive custody theory. A close reading of the relevant passage reveals that *Abu Ali* requires nothing more. Indeed, this Court has found constructive custody in the absence of all four of these factors in at least one other case. *See Idema v. Rice*, 478 F. Supp. 2d 47, 52-53 (D.D.C. 2007) (denying motion to dismiss in suit challenging detention under color of foreign conviction where petitioner alleged, *inter alia*, that U.S. officials exerted "undue influence" over Afghan judicial process).

In any event, Petitioners here have alleged the same set of factors present in *Abu Ali*; indeed, this case poses the precise problem that Judge Bates described in that case. Just as with *Abu Ali*, Petitioners here allege that Mr. Hamdan was initially detained at the behest of the U.S. government, that his detention remains at the behest of the U.S. government and would cease but for the U.S. government's continued involvement, that he is being denied access to American courts both to contest the assertion that he has engaged in any kind of terrorist activity and to

obtain redress for his torture, and that he would be released upon the request of the U.S. government. While all of these factors (particularly the third) are not required to find constructive custody, they are present in this case.

II. That a Foreign Sovereign is Mr. Hamdan's Nominal Custodian Does Not Undermine This Court's Jurisdiction.

The government's alternative argument that this Court lacks jurisdiction because Mr. Hamdan remains detained in the nominal custody of the United Arab Emirates, although at the behest of the United States government, is meritless. Indeed, most of the defects in the argument were clearly described by this Court in *Abu Ali*, which rejected this "sweeping" argument. *Abu Ali*, 350 F. Supp. 2d at 31.

As an initial matter, the text of the federal habeas statute does not require that a detainee be held in U.S. custody. This is obvious from the many state post-conviction habeas cases heard in federal court, and also from the fact that habeas petitions have long been brought against private actors detaining people at the behest of the federal government. *See, e.g.*, *U.S. v. Jung Ah Lung*, 124 U.S. 621 (1888).

That the statute does not require detention by U.S. officials is also plain from its terms. Section 2241 provides jurisdiction *either* if the detainee is in the custody of the United States *or* if the detainee is held in violation of the Constitution, laws, or treaties of the United States. *Compare* 28 U.S.C. 2241(c)(1) (writ for prisoners held in U.S. custody) *with* 28 U.S.C. 2241(c)(3) (writ for prisoners held in violation of U.S. law). *See also* Pet. at ¶ 12; *Abu Ali v. Ashcroft*, 350 F. Supp. 2d 28, 45 (D.D.C. 2004) ("a district court cannot issue a writ of habeas corpus to an individual unless the individual 'is in custody' either 'under or by color of the authority of the United States' or 'in violation of the Constitution or laws or treaties of the

United States'"). The historical provenance of the two provisions makes clear that this distinction is no accident. While the federal courts have had jurisdiction over cases involving prisoners in U.S. custody since their creation in 1789 under what is now Section 2241(c)(1), jurisdiction for people held in violation of U.S. law arose when Congress expanded the statute in 1866, and is now codified in Section 2241(c)(3). *See generally Flores-Miramontes v. INS*, 212 F.3d 1133, 1141 (9th Cir. 2000) (citing, *inter alia*, WILLIAM F. DUKER, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS (1980); Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 Harv. L.Rev. 1362, 1395-7 (1953)).

Here, Petitioners have alleged that Mr. Hamdan's ongoing detention violates several statutory and Constitutional requirements, including the Due Process Clause. Under these circumstances, this Court has jurisdiction even though his nominal custodian remains the United Arab Emirates.

The government cannot and does not explicitly dispute that this Court retains habeas jurisdiction even in cases where a detainee is not in U.S. custody (whether real or nominal). Instead, it argues for an implicit limitation in the federal habeas scheme, asserting that the statute "is clearly premised on the fact that habeas relief is available in United States courts only to challenge the detention of petitioners who are in the custody of custodians subject to the laws of the United States and only where the actual custodians are subject to the jurisdictions of United States courts." Resp. MTD at 13.

However, the only citation provided for the government's asserted implicit limitation on the habeas statute is the Supreme Court's decision in *Rasul v. Bush*, 542 U.S. 466, 481-82 (2004), which does not adopt such a rule, even in dicta. Indeed, the section of *Rasul* cited by the

government does not appear relevant for purposes of determining jurisdiction in this case; it does not discuss detention by actors other than United States agents and does not purport to describe the outer limits of the habeas statute's reach. To the extent it is relevant, *Rasul* notes that the government conceded that the territorial constraint it argued for would not apply to U.S. citizens (such as Mr. Hamdan), *id.* at 481, and that at common law (when there was no authority analogous to that set forth in Section 2241(c)(3)) the focus rested "on the practical question of the exact extent and nature of the jurisdiction or dominion exercised in fact by the Crown." *Id.* at 482 (internal citations omitted). Here, Petitioners allege that, as a "practical" matter, Mr. Hamdan is detained by the United States insofar as the United States government is the cause of his detention and could cause his release by ceasing its support for his continued detention. To the extent *Rasul*'s discussion is even relevant, it requires nothing more. To be clear, Petitioners do not dispute that this Court must be able to grant effective relief. However, it can do so in this case, as explained *infra* Section III. Given that relief is available, nothing in the text or caselaw concerning the habeas statute supports the government's new-found additional restriction on its scope.

The government also argues that, as a general matter, this Court lacks habeas corpus jurisdiction whenever the petitioner is in the custody of a foreign sovereign because "a separate sovereign and its officials are not subject to the direction of the United States." Resp. MTD at 13. But this obviously begs the very question at the heart of this case. Petitioners contend that the U.A.E. authorities detaining Mr. Hamdan *are* acting at the direction or behest of the United States. Thus, the Court cannot dismiss this case for lack of jurisdiction without determining whether or not Petitioner is in the constructive custody of the United States, even if he is detained under the criminal laws of the U.A.E. Petitioners believe that discovery will confirm

that the United States is responsible for the U.A.E.'s actions, and that the U.A.E. would release Mr. Hamdan absent U.S. requests that he remain detained. If these facts are true, this Court has jurisdiction.

The government cites several cases in support of its rule, none of which require dismissal here. The first case, which Petitioners discussed in their Reply Brief concerning the classified evidence (*see* Reply to Respondents' Opposition to Petitioners' Motion to Disclose *Ex Parte* Evidence) (discussing both *Keefe* and *Wilson v. Girard*, 354 U.S. 524 (1957)) actually acknowledged the possibility of a constructive custody theory of habeas jurisdiction. *United States ex rel. Keefe v. Dulles*, 222 F.2d 390, 392 (D.C. Cir. 1954) (describing the first question presented as "whether Keefe is held in actual or constructive custody by the respondents named in the petition, or by any other person or persons subject to the jurisdiction of the District Court"). *Keefe* involved an American serviceman who was tried and convicted of a crime by French authorities. *Id.* at 391. While his wife's habeas petition challenged the failure by the United States to obtain his release, it did not allege that the United States was responsible for his detention. *Id.* As this Court explained in *Abu Ali*, "[t]he holding in *Keefe* that there was no 'custody or constructive custody' where the only involvement of the United States is assumed to be its refusal to intervene on behalf of a citizen held by a foreign government can hardly be read as precedent for the notion that there can never be 'custody or constructive custody' even if (as petitioners allege here) the United States is actively involved in arranging the arrest and ongoing detention of a citizen." *Abu Ali v. Ashcroft*, 350 F. Supp. 2d 28, 56 (D.D.C. 2004). *See also id.* at 55 ("[*Hirota* and *Keefe*] do not remotely stand for the proposition that a United States citizen in the hands of a foreign government has no right to file a petition for habeas corpus regardless of the involvement of the United States in his ongoing detention.").

That *Keefe* acknowledged the possibility of a constructive custody theory is hardly surprising, given that "[t]here are, in fact, many circumstances in which courts have found actual or constructive custody notwithstanding the fact that the petitioner was not in the physical custody of the respondent government official. . . . In some of these cases, the petitioner was not in the physical control of the petitioner, but was in the physical control of some other entity. In others, the petitioner was not in the physical control of any entity at all. Nevertheless, in all of these decisions, the petitioner was found to be in the actual or constructive custody of the respondent within the meaning of the habeas statute because the respondent was responsible for significant restraints on the petitioner's liberty." *Abu Ali*, 350 F. Supp. 2d at 47 (collecting cases from a variety of contexts).

The government also cites a district court case from Delaware in support of its rule. *See* Resp. MTD at 15 (citing *United States v. Sinclair*, 702 F. Supp. 477 (D. Del. 1989)). However, *Sinclair* involved a petition to collaterally attack a federal criminal conviction under 28 U.S.C. 2255. Even if it were otherwise controlling, it could not as a technical matter resolve the issue in this case, as it involves a different statute. *Id.* at 479. In addition, there was no suggestion in *Sinclair* that the detention was being done to evade lawful processes otherwise available to the U.S. citizen. On the contrary, the petitioner was detained pursuant to a demand for his extradition. *Id.* Here, in contrast, Petitioners credibly allege that Mr. Hamdan was tortured in the presence of an American official who participated in his interrogation during that torture, and that he is unable to seek redress for that egregious harm because he remains detained in the U.A.E. at the behest of the U.S. government. This Court found *Sinclair* distinguishable on that basis in *Abu Ali*, and the same rationale applies here. *Abu Ali*, 350 F. Supp.2d at 55 (stating that "this case is not at all like [Sinclair] . . . [because] a citizen is allegedly being detained at the

direction of the United States in another country without any opportunity at all to vindicate his rights.").[7]

Finally, apart from a cryptic footnote, *see* Resp. MTD at 2 n.1, the government never discusses the other bases for jurisdiction that Petitioners properly pled in the petition. Petitioners asserted jurisdiction under 28 U.S.C. 1331, 28 U.S.C. 1343 (with respect to his Non-Detention Act claim), 28 U.S.C. 1361, and 28 U.S.C. 1651. Pet. at 4, ¶ 8. In addition, the petition alleges violations of the Constitution, including the claim that Respondents have violated the Due Process Clause by causing and then participating in Mr. Hamdan's coercive interrogation and torture. Pet. at 26-29, ¶¶ 56-61; *see also infra* Section III.[8]

Whatever the merits of the government's other claims, this Court must have jurisdiction to consider Petitioners' claims that the U.S. government continues to violate Mr. Hamdan's Due Process rights. While this Court could reject those claims on the merits at an appropriate time, such as on summary judgment after discovery, it cannot do so now. As the Court explained in *Abu Ali*, "[a]t this time, the Court is concerned with its *jurisdiction* to entertain the habeas petition of Abu Ali, not with the *merits* of the habeas petition itself. . . . Therefore, it would be a somewhat strained reading of section 2241(c)(3) in particular that would require the United

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[7] *Duchow v. United States* is also inapposite. That case, from the District Court in the Eastern District of Louisiana, involves an action by a U.S. official charged in a Bolivian drug prosecution. *Duchow v. United States*, No. Civ. 95-2121, 1995 WL 425037 (E.D. La. 1995), *aff'd,* 114 F.3d 1181 (5th Cir. 1997). He sought an order requiring the U.S. officials who apparently accused him of illegal activity to withdraw their accusations. *Id.* at *2. The court found no jurisdiction, citing none of the cases involving constructive custody discussed here or in *Abu Ali*. *Id.* at *5.

[8] If the government makes new arguments concerning these jurisdictional bases in its Reply Brief in support of this motion, Petitioners will request an opportunity to respond to them at that time.

States to play a significantly greater role in an individual's detention for purposes of the Court's *jurisdiction* than would be necessary to support a claim *on the merits* that the petitioner is 'in violation of the Constitution, laws, or treaties of the United States.'" *Abu Ali v. Ashcroft*, 350 F. Supp. 2d 28, 50 (D.D.C. 2004).

III. The Court Has Authority to Grant Effective Relief in This Case.

The Court has authority to grant effective relief in this case, notwithstanding the fact that Mr. Hamdan remains in U.A.E. custody. The Court can grant relief by ordering the U.S. officials who have caused Mr. Hamdan's detention to explicitly withdraw their request that he be detained, and in so doing to make clear that the United States has no interest in or desire that his detention continue. The Court can also grant relief by ordering U.S. officials to un-do the danger they have created by causing his detention and, upon information and belief, participating in his interrogation and torture. Officials could un-do this state-created danger by informing the authorities of the U.A.E. of the circumstances under which Mr. Hamdan was interrogated and tortured, if in fact U.S. officials were present during that interrogation and torture. They could also ameliorate the damage by informing this Court, Mr. Hamdan, and his counsel of those circumstances, thus allowing counsel to use that information to protect Mr. Hamdan through other advocacy. The government cites no authority that would bar this Court from granting those two forms of relief.

A. The Court Has Authority to Order U.S. Officials to Make Clear That They No Longer Request Mr. Hamdan's Detention and Torture.

The Court has authority to grant effective relief in this case, notwithstanding the fact that Mr. Hamdan remains in U.A.E. custody, in at least two ways.

First, Petitioners allege that the U.A.E. continues to detain Mr. Hamdan ostensibly for criminal prosecution only because the United States government has requested his detention. If discovery confirms this allegation, this Court would have the authority to order the U.S. officials who illegally caused his detention to reverse that result by withdrawing their request that he be detained. Both *Abu Ali* and *Idema* presuppose the availability of such relief. *See Idema v. Rice*, 478 F. Supp. 2d 47, 53 (D.D.C. 2007) (ordering the U.S. government to respond to a habeas petition where the petitioner, detained in Afghanistan pursuant to Afghan criminal law, alleged that U.S. officials ordered his arrest and torture, stole exculpatory evidence during his trial and appeal, exerted undue influence over Afghan judges, and ordered judges not to release him); *Abu Ali v. Ashcroft*, 350 F. Supp. 2d 28, 69 (D.D.C. 2004) (granting jurisdictional discovery where petitioner's habeas petition alleged his detention in Saudi Arabia by Saudi officials was at the behest of the U.S.). The possibility of this straightforward relief is sufficient to defeat the government's argument concerning the impossibility of relief.

Second, even if the Court cannot conclude that its order to U.S. officials would result in Mr. Hamdan's release, Petitioners allege that at least one American official was present during Mr. Hamdan's interrogation and torture, and that the false information obtained through that interrogation and torture will be used against him in his criminal trial in the U.A.E., should that trial ever occur. The Due Process Clause requires that, where an American official participates in the torture of an American citizen and the American citizen subsequently becomes subject to imprisonment based on that torture, the U.S. official has an obligation to inform the relevant authorities of the circumstances surrounding the torture, so as to prevent danger to the U.S. citizen in the form of unjust imprisonment based on the use of information obtained through torture. While Petitioners are unaware of cases that explicitly establish this precise obligation, it

follows logically from prior cases concerning the state-created danger doctrine and U.S. involvement in foreign criminal investigations.

The D.C. Circuit has already recognized a substantive due process right to be free from state-created danger. "We join the other circuits in holding that, under the State endangerment concept, an individual can assert a substantive due process right to protection by the District of Columbia from third-party violence when District of Columbia officials affirmatively act to increase or create the danger that ultimately results in the individual's harm." *Butera v. District of Columbia*, 235 F.3d 637, 651 (D.C. Cir. 2001) (citing *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189, 201 (1989)). Here, U.S. government officials have dramatically increased the likelihood of harm to Mr. Hamdan by causing the U.A.E. to detain him at their behest and then, on information and belief, by participating in his torture. Petitioners allege both that Mr. Hamdan's initial detention and torture occurred at the behest of the U.S. government and that his trial, if and when it occurs, will rely largely on information obtained through his initial detention and torture. Exh. 24 at 2, ¶ 9 (Supplemental Dec. of Reem Salahi) (attached). Thus, Petitioners have stated a claim under the Due Process Clause based on the state-created danger theory.

While *Butera* and the cases in the other circuits that have recognized the state-created danger theory have arisen in the damages context, nothing about their rationale suggests that they must be limited to that arena. Indeed, a number of courts have held that the Fourth and Fifth Amendments require the suppression of evidence, in criminal cases, where foreign government officials violate the Constitution while acting in a "joint venture" with U.S. officials, or where the foreign officials' involvement is designed to circumvent constitutional constraints. *See, e.g.*,

United States v. Maturo, 982 F.2d 57, 60-61 (2d Cir. 1992) (evidence obtained abroad should be suppressed in U.S. courts under the Fourth Amendment if methods used to obtain it shock the conscience, the foreign officials acted as agents of the U.S. government, or if the conduct at issue was designed to evade constitutional constraints); *United States v. Karake*, 443 F. Supp. 2d 8, 52 n.74, 93 n.114 (D.D.C. 2006) (statements obtained by foreign officials must be suppressed under the Fifth Amendment if obtained through coercion). These cases confirm that relief outside of the damages context may be appropriate to remedy unconstitutional action by U.S. officials directed at U.S. citizens abroad, even if that action occurs in concert with foreign government officials.

Thus, even if this Court does not believe that an appropriate order to American officials would result in Mr. Hamdan's release, it nonetheless has authority to order U.S. officials to correct the danger in which they have placed Mr. Hamdan by disclosing to the authorities in the U.A.E. the information they have about Mr. Hamdan's detention and torture and the United States' role in it, and also by disclosing that information to Mr. Hamdan and his attorneys, who may be able to advocate for his protection through the use of that information.

B. That Mr. Hamdan Remains in U.A.E. Criminal Custody Does Not Prevent this Court from Granting Relief.

The government relies primarily on *Munaf v. Geren*, 128 S. Ct. 2207 (2008), for the proposition that because the Court cannot interfere with a foreign sovereign's criminal processes it cannot grant any relief in this case. This is incorrect for several reasons.

First, *Munaf* rejected the petitioners' claims in that case because the relief they sought was "a court order requiring the United States to shelter them from the sovereign government seeking to have them answer for alleged crimes committed within that sovereign's borders." *Id.*

at 2221. *See also id.* at 2223 (noting that petitioners "request an injunction prohibiting the United States from transferring them to Iraqi custody"). Here, Mr. Hamdan seeks exactly the opposite, at least with respect to his primary claim for relief. He contends that if the U.S. government stops interfering, the U.A.E. will release him. Thus, he seeks no shelter from a foreign sovereign; the only shelter he seeks is from the United States. Alternatively, he claims that the U.S. government should provide information that it has concerning his torture to the U.A.E.'s criminal authorities, as well as to him and his attorneys, because the U.S. government created the danger in which he now finds himself, insofar as it has played a role in that country's criminal process by helping to create the confessions obtained under torture which will be used against him in the event of trial. Nothing in *Munaf* suggests that the petitioners presented allegations of this nature.

Thus, this case is far more like *Idema v. Rice*, 478 F. Supp. 2d 47, 53 (D.D.C. 2007), where this Court asserted habeas jurisdiction notwithstanding the existence of a foreign criminal process, because the petitioner alleged that the U.S. government had extensively interfered with that process. *See id*.

The government also cites *Neely v. Henkel*, 180 U.S. 109 (1901) and *Wilson v. Girard*, 354 U.S. 524 (1957) to support its argument that this Court has no power to grant any relief in this case, but those cases provide no support for the government's position. *Neely* did not involve constructive custody, and the Court did not find it lacked jurisdiction. Rather, it found on the merits that the petitioner could not escape extradition merely because the Cuban criminal justice system did not provide all of the procedural protections afforded by the U.S. Constitution. *Id*. at 122-23. Here, Mr. Hamdan's complaint is not with the U.A.E.'s criminal justice system,

but rather with the fact that the U.S. government has interfered with that system so as to cause his indefinite detention and torture. Similarly, the petitioner in *Wilson* did not allege that he was in the constructive custody of the U.S. government; instead he argued that his transfer to Japanese authorities had occurred in violation of a treaty between the two nations. The Court reviewed that claim on the merits, found that the treaty authorized the transfer, and dismissed the petition on that basis. *Wilson*, 354 U.S. at 530. The case is wholly inapposite.[9]

Finally, even if *Munaf* and the other cases it cites could be read as broadly as the government would like, they cannot dictate the result here because those cases assume that the criminal violation being prosecuted abroad actually took place on foreign soil. *See, e.g.*, *Munaf*, 128 S. Ct. at 2221-22 (stating that "sovereign nation has exclusive jurisdiction to punish offenses against its laws committed *within its borders*" (quoting *Wilson v. Girard*, 354 U.S. 524, 529 (1957)); *Kinsella v. Krueger*, 351 U.S. 470, 479 (1956) (referring to "sovereign right to try and punish for offenses committed *within their borders*"), *Reid v. Covert*, 354 U.S. 1, 15 n.29 (1957) (plurality opinion) (describing foreign nation's "plenary criminal jurisdiction, of course, over all Americans . . . who commit offenses against its laws *within its territory*") (emphases added).

Here, the government has presented no evidence, and Petitioners are unaware of any, establishing that the U.A.E. is prosecuting Mr. Hamdan for conduct occurring *within the U.A.E.* Petitioners' understanding, consistent with the government's own evidence submitted by State

[9] In a very recent case, the D.C. Circuit noted that it had not decided the question at issue in this case – namely whether a habeas court has authority to grant relief where a detainee is held abroad at the behest of the United States. *Kiyemba v. Obama*, --- F.3d ---, slip op. at 11 * (No. 05-5487) (D.C. Cir. April 7, 2009) (stating that this case "does not involve . . . the transfer of detainees resulting in their continued detention on behalf of the United States in places where the writ does not extend") (internal citations omitted).

Department official Bernier-Toth, is that the charges are vague and say nothing even about what terrorist group or activity is allegedly involved, let alone where the conduct at issue took place. *See* Dec. of Michelle Bernier-Toth at 4, ¶ 12 (stating that Mr. Hamdan has been formally charged by the U.A.E. with "promoting terrorism, participating in the work of a terrorist organization, and assisting a terrorist organization."); Exh. 24 at 2, ¶ 9 (Supplemental Dec. of Reem Salahi) (attached). Thus, the Court cannot dismiss this petition for this reason at this time. Finally, it is worth reiterating that the government's reliance on the U.A.E.'s alleged interest in Mr. Hamdan's criminal prosecution has been undermined by the fact that those criminal proceedings appear at best to be in limbo, and at worst to have virtually stopped. Mr. Hamdan has still not received notice of a set of final charges, and he still has no date set for trial, now over four months since his transfer to criminal custody, and over seven months since his detention. *See* Pet. at 15, ¶ 36; Notice of Status at 1; Exh. 24 at 3, ¶¶ 11-12 (Supplemental Dec. of Reem Salahi) (attached). The vagueness of the charges, the absence of information about any evidence, and the inexplicable delay, coupled with the fact that the prosecutor in his case has traveled to the United States, undermines the government's claim that Mr. Hamdan's continued detention is a product of the routine criminal processes of the U.A.E. *See* Resp. MTD at 20.

C. The Relief Petitioners Seek Would Not Violate the Separation of Powers or International Comity.

Finally, the government cobbles together dicta from a number of cases that do not involve U.S. citizens seeking habeas or similar injunctive relief, to argue that the relief sought would violate both the separation of powers and principles of international comity. These arguments were rejected in *Abu Ali*, and they likewise should be rejected here.

Not one of the cases cited by the government involves a habeas petition filed by a U.S. citizen alleging constructive custody. This is unsurprising. As this Court explained in *Abu Ali*, "There is simply no authority or precedent, however, for respondents' suggestion that the executive's prerogative over foreign affairs can overwhelm to the point of extinction the basic constitutional rights of citizens of the United States to freedom from unlawful detention by the executive." *Abu Ali v. Ashcroft*, 350 F. Supp. 2d 28, 61-62 (D.D.C. 2004) (citing, *inter alia*, *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004) (plurality opinion). Indeed, many of the cases the government relies upon do not involve U.S. citizens deprived of their liberty at all. *See, e.g.*, *People's Mojahedin Org. v. U.S. Dep't of State*, 182 F.3d 17, 23 (D.C. Cir. 1999) (case involving the property of an organization with no presence in the United States).

The cases that do involve interests at least somewhat comparable to those at issue here make clear that the government may not merely assert that a case involves foreign affairs and thereby evade judicial consideration. As the D.C. Circuit explained, immediately after the passage quoted by the government from the same case, "[t]hat is not to say that every dispute touching our foreign relations falls outside the province of the judiciary. As the Supreme Court has characterized its decisions, they seem invariably to show a discriminating analysis of the particular question posed, in terms of history of its management by the political branches, of its susceptibility to judicial handling in the light of its nature and posture in the specific case, and of the possible consequences of judicial action." *Holmes v. Laird*, 459 F.2d 1211, 1215 (D.C. Cir. 1972) (quoting *Baker v. Carr*, 369 U.S. 186, 211-12 (1962) (internal quotations omitted).

Here, the "particular question posed" concerns the unlawful detention, interrogation, and torture of a U.S. citizen at the behest of his own government. None of the cases cited by the

government remotely suggest that cases involving such questions would be non-justiciable, either due to separation of powers considerations or in the name of international comity.

Nor is there merit to the government's assertion that Petitioners are asking this Court to inject itself into U.S. foreign policy with respect to the relief they seek. Resp. MTD at 21. On the contrary, Petitioners ask only that the Court direct its order to U.S. officials, and only require them to withdraw their request for Mr. Hamdan's continued detention, and also to un-do the effects of the danger they created for him. *See supra* Section III(A). Petitioners request nothing beyond the limited remedy necessary to reverse the illegal action of U.S. actors.

Similarly meritless is the government's claim that the action would somehow impugn the U.A.E. Resp. MTD at 21. This Court rejected a similar argument in *Abu Ali*, framed by reference to the act of state doctrine. In rejecting it, the Court stated that

> [T]he assertions by the United States that this habeas petition will impugn and embarrass the Saudis seem overstated and something of a red herring. The federal reporters are filled with cases where countries detain individuals at the behest of their allies. A finding that the Saudis detained an individual at the request of the United States no more declares the Saudis a 'puppet' of the United States than . . . the decision of the United States to arrest two individuals in response to a request for extradition by the Canadian government indicates that the United States is a 'puppet' of Canada. There is simply no warrant for respondents' suggestion that every instance in which the United States is discovered to have worked with another country is so embarrassing to the other country that litigation is barred.

Abu Ali v. Ashcroft, 350 F. Supp. 2d 28, 59-60 (D.D.C. 2004) (internal citations omitted). Judge Bates' analysis again applies here.

* * *

The petition credibly alleges that a U.S. citizen has been imprisoned, interrogated, tortured, and now faces lengthy imprisonment without trial, all because of the actions of his own government. If true, the allegations clearly state federal statutory and constitutional violations. Petitioners are entitled to discovery to prove these allegations. The motion to dismiss should be denied, or deferred pending jurisdictional discovery.

Respectfully submitted,

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