

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

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ABDULLATIF NASSER,	:	
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Petitioner,	:	
	:	
v.	:	Civil Action No. 05-cv-0764 (CKK)
	:	
BARACK OBAMA, <i>et al.</i> ,	:	
	:	
Respondents.	:	
	:	
_____	x	

**REPLY BRIEF IN SUPPORT OF  
EMERGENCY MOTION FOR ORDER EFFECTING RELEASE**

Thomas Anthony Durkin (IL. Bar No. 697966)  
DURKIN & ROBERTS  
2446 N. Clark St.  
Chicago, IL 60614  
(312) 913-9300  
[tdurkin@durkinroberts.com](mailto:tdurkin@durkinroberts.com)  
*Attorney for Petitioner Nasser*

*Neither prisoners nor persons accused, but simply “detainees,” they are the object of a pure de facto rule, of a detention that is indefinite not only in the temporal sense but in its very nature as well, since it is entirely removed from the law and from judicial oversight. The only thing to which it could possibly be compared is the legal situation of the Jews in the Nazi Lager [camps], who along with their citizenship, had lost every legal identity, but at least retained their identity as Jews. As Judith Butler has effectively shown, in the detainee at Guantanamo, bare life reaches its maximum indeterminacy.*

— Giorgio Agamben, *State of Exception*<sup>1</sup>

Bare life in its maximum indeterminacy, indeed. A man’s life hangs in the balance because we have no Secretary of Defense. The government admits that on December 28, 2016, the Department of State and the Department of Defense received an affirmative response to State’s diplomatic note regarding the security assurances required for Petitioner’s transfer to be effectuated. Nevertheless, as the government also concedes in its Response, “because of the timing of this response, which was less than 30 days before the Secretary of Defense would leave office, *the Secretary of Defense did not make a final decision regarding the transfer...as he elected to leave that decision to his successor.*” (Dkt. #259, pp. 6-7) (emphasis added) In short, the United States appears now to have no Secretary of Defense until next week—or at least one willing to exercise his sworn official duties. As such, as a matter of equity, law and simple decency, this Court should act for him and order Petitioner’s immediate release.

Due to the little window of time left for this important and extraordinary issue to be resolved; that is, the wrongful and continued detention of a man who as the September 9, 2016, Joint Status Report of this pending habeas case stated was no longer necessary, counsel would respectfully ask leave to adopt the legal arguments filed in the Reply Brief (Dkt. #284, filed

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<sup>1</sup> The University of Chicago Press (2003), pp. 3-4.

01/17/17) of co-detainee, Sufyian Barhoumi (ISN 694) in the companion case simultaneously filed before Judge Collyer in Civil Action No. 05-1506 (RMC). A copy of said pleading is attached hereto as Exhibit A.

Counsel further acknowledges that this morning, Barhoumi's motion was denied in a Memorandum Opinion issued by Judge Collyer. (Dkt. #285) A copy of said opinion is also attached hereto as Exhibit B. Nevertheless, counsel strongly suggests that the factual differences between Barhoumi's case where the Secretary of Defense affirmatively decided not to accept the recommendation of the PRB—as compared to the Secretary's refusal to act in this instance only because of the 30 day requirement of the NDAA—necessitates a different conclusion. That conclusion, the only equitable one under the totality of these circumstances, is that this court should use the “court order” exception of the NDAA to effectuate Petitioner's immediate release.

A decision to permit Petitioner's continued detention will only render Petitioner, as Agamben suggests, “entirely removed from the law and from judicial oversight.” *Id.* For once, if only once, a detainee should be released by way of judicial oversight. To do nothing is to permit him to fall into what can only be considered a “legal black hole.” *See, e.g.,* Andrew Kent, *Disappearing Legal Black Holes and Converging Domains: Changing Individual Rights Protection in National Security and Foreign Affairs*, 115 COLUM. L. REV. 1029, 1030, 1034 n.23 (2015) (quoting the terms “legal black hole” and “legal grey hole,” and also attributing the creation of the terms to professor David Dyzenhaus who stated “there are some legal constraints on executive action—it is not a lawless void—but the constraints are so insubstantial that they pretty well permit the government to do as it pleases”). Judicial oversight is the only restraint left. It is the right thing to do.

Dated: January 18, 2017

Respectfully Submitted,

/s/ Thomas Anthony Durkin

Thomas Anthony Durkin (IL. Bar No. 697966)

DURKIN & ROBERTS

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Chicago, IL 60614

(312) 913-9300

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*Attorney for Petitioner Nasser*