IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MAHMOAD ABDAH, *et al.*,
Petitioners,

v.

GEORGE W. BUSH, *et al.*,
Respondents.

Civil Action No. 04-CV-1254 (HHK)

PETITIONERS' REPLY MEMORANDUM IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

Respondents' opposition to the instant motion rests on their claim that Petitioners have no cause for concern, and that even if Petitioners have cause for concern they have no judicially enforceable rights. As discussed below, Petitioners have ample cause for concern. Beyond Mr. Wahab's account of being threatened with rendition for torture are the recommendations for such rendition by government agents in the factual returns for these Petitioners. This Court, moreover, has ruled that Petitioners have judicially enforceable rights under the Due Process Clause and, to some extent, under the Geneva Conventions. Although Respondents have sought interlocutory review of that ruling, "the pendency of an appeal does not diminish the *res judicata* effect of a judgment rendered by a federal court." *Hunt v. Liberty Lobby, Inc.*, 707 F.2d 1493, 1497 (D.C. Cir. 1983). Respondents are bound by the Court's ruling and may not relitigate it on this motion. Because Respondents have enforceable rights and have properly invoked the jurisdiction of this Court, the Court has jurisdiction to protect its jurisdiction to adjudicate their claims and to protect them from removal from Guantánamo by Respondents without affording them notice and the opportunity to be heard.

INTRODUCTION

All Petitioners seek on this motion is *notice* of Respondents' intention to remove one or more of them from Guantánamo during the pendency of these proceedings. Their fear that Respondents will remove them to a foreign country where they may be tortured or indefinitely detained is entirely realistic. Beyond the torrent of press reports recounting the government's secret "rendition" and "ghost detainee" programs, classified information *specific to the Petitioners* confirms that their fears are well founded. Given the sorry history of Respondents' conduct in these cases – *e.g.*, using Guantánamo to avoid the jurisdiction of Article III courts, and flatly denying in the Supreme Court that the government tortures detainees – Respondents' suggestion that Petitioners are victims of their own hyperactive imaginations cannot be accepted.

On Friday, March 11, 2005, Petitioners filed with Judge Rosemary M. Collyer, as the emergency motions judge, an *ex parte* application for a temporary restraining order. Petitioners filed their motion after learning from a report in the *New York Times* that the government might imminently transfer hundreds of detainees to prisons in Saudi Arabia, Pakistan and Yemen. Copies of the TRO motion (without exhibits) and supporting declaration are attached as Exhibit A. The TRO motion sought an order preventing Respondents from removing Petitioners from Guantánamo before this Court could hear the instant motion on March 24, 2005. On March 12, 2005, after considering the moving papers and Respondents' memorandum opposing the motion now before this Court, Judge Collyer issued a TRO to remain in effect for ten days or until the date of the hearing on this motion, whichever is sooner. *See* Ex. B (Memorandum Opinion); Ex. C (Amended Temporary Restraining Order). In granting the TRO, Judge Collyer rejected

Respondents' argument, *see* Opp. Mem. at 10 n.10, that the District Court did not have jurisdiction to grant injunctive relief during the pendency of the interlocutory appeal. *See* Ex. B at 7.

STATEMENT OF FACTS

The relief Petitioners request is modest but fundamental: 30 days' advance notice by Respondents of any intention to remove Petitioners from Guantánamo. In requesting such notice, Petitioners seek only to preserve the status quo so as to be able, if advisable, to contest the legality of any such removal before it becomes a *fait accompli*. Without the requested relief, Petitioners' ability to enforce their rights in these proceedings will be at risk. The opposition papers filed by Respondents do nothing to negate the need for the requested relief.

In their motion, Petitioners pointed to a threat reported by Abd Al Malik Al Wahab that he would be removed to Egypt or Jordan for interrogation under torture. According to Respondents, however, such concerns are "pure speculation" that is "refuted" by the proffered declarations of two "high level" government officials. Opp. Mem. at 1. In declarations as conclusory as they are self-serving, these "high level" officials state that it is government "policy" not to transfer detainees to countries where it is "more likely than not" that they will be tortured. Prosper Decl. ¶ 4; Waxman Decl. ¶ 6.

At no point in their opposition papers or supporting declarations, however, do Respondents deny that the government renders detainees to foreign countries for the purpose of extracting information by torture. At no point do they deny the accuracy of Mr. Wahab's statement or that government agents have contemplated and recommended the removal of Mr. Wahab and other Petitioners to foreign countries for interrogation under torture. Respondents make no such denials because they cannot truthfully be made.

On the contrary, a classified document in the factual return of petitioner Majid Mahmud Abdu Ahmad,[1] for example, demonstrates beyond doubt that the Department of Defense, as recently as March 17, 2004, contemplated rendering Mr. Ahmad to a foreign country for interrogation under torture. [redacted] There is only one meaning that can be gleaned from this passage: The government believes that Mr. Ahmad has information that the government wants but believes cannot be extracted without torture, and for that reason they may remove Mr. Ahmad to a country where the information can be extracted by torture.

Respondents likewise deny that the government removes detainees to foreign countries for the purpose of continued detention. "It is important to recognize," they intone, "that when the Department of Defense transfers a Guantánamo detainee to the control of another government, the Department of Defense does not ask or direct the receiving government to hold the individual on behalf of the United States. As such, once transferred, a detainee is no longer subject to the control of the United States." Opp. Mem. at 6 (citing Waxman Decl. ¶ 5). This

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1 Mr. Ahmad is listed in the habeas petition as Majid Mahmoud Ahmed. To avoid confusion, we use the names used by the Government in identifying the petitioners.

was also the government's litigation position in the *Abu Ali* litigation before Judge Bates. Judge Bates found the facts in that case sufficiently disturbing to order jurisdictional discovery on the issue of control. *Abu Ali v. Ashcroft*, 350 F. Supp. 2d 28, 31 (D.D.C. 2004). The government mooted Judge Bates' order by securing the return of Mr. Abu Ali to the United States.

Classified documents from the factual returns in this habeas case demonstrate that Respondents' assertions are not credible here:

- [redacted]
- [redacted]
- [redacted]

2 [redacted]

3 [redacted]

4 [redacted]

These examples, from the classified returns that Respondents themselves produced to Petitioners and yet disregard in their submissions to this Court, demonstrate the unreliability of the Respondents' representations. The examples make plain that the Department of Defense dictates to the receiving government when and whether the detainees will be released – a policy that has even given birth to a new military acronym, TRCD, for "Transfer to the Control of Another Country for Continued Detention."

Beyond the record in this case, there is the blizzard of press accounts that, over the past two months, have begun to outline the contours of the government's secret rendition program:

- Douglas Jehl, *Rule Change Lets C.I.A. Freely Send Suspects Abroad to Jails*, N.Y. Times, Mar. 6, 2005 (describing Administration's secret program to transfer detainees to foreign countries including Egypt, Syria, Saudi Arabia, Jordan and Pakistan, where former detainees report being brutalized). Ex. H.

- Michael Hirsh, et al., *Aboard Air CIA*, Newsweek, Feb. 28, 2005 (discussing evidence of the CIA's global "ghost prison system" and noting that some officials do not believe "assurances" from U.S. allies, such as Egypt and Jordan, "that they were not mistreating prisoners"). Ex. I.

- Jane Mayer, *Outsourcing Torture*, The New Yorker, Feb. 14, 2005 (detailing the history and ongoing practice of "extraordinary rendition"). Ex. J.

- Megan K. Stack & Bob Drogin, *Detainee Says U.S. Handed Him Over for Torture*, L.A. Times, Jan. 13, 2005, at A1 (describing "renditions" based on agreements between United States and foreign governments "that agree to have local security services hold certain terror suspects in their facilities for interrogation by CIA and foreign liaison officers"). Ex. K.

- Dana Priest, *Jet Is an Open Secret in Terror War*, Wash. Post, Dec. 27, 2004 (reporting that a Gulfstream jet has been used to whisk suspected terrorists from one country to another and noting congressional testimony by CIA officials that since September 11, 2001, "renditions have become a principal weapon in the CIA's arsenal against suspected al Qaeda terrorists"). Ex. L.

Petitioners are also concerned that the U.S. government may eventually seek to move them to a new U.S.-built prison in Yemen:

- Dana Priest, *Long-Term Plan Sought for Terror Suspects*, Wash. Post, Jan. 2, 2005, at A1 (government is contemplating the transfer of "large numbers of Aghan, Saudi and Yemeni detainees from the military's Guantánamo Bay, Cuba, detention center into new U.S.-built prisons in their home countries"). Ex. M.

- Douglas Jehl, *Pentagon Seeks to Shift Inmates from Cuba Base*, N.Y. Times, Mar. 11, 2005, at A1 (reporting that the government intends to transfer hundreds of detainees to prisons in Saudi Arabia, Pakistan and Yemen). Ex. N.

In short, Respondents' self-serving and conclusory declarations seeking to negate Petitioners' concerns – documented in the record and supported by press accounts – cannot be accepted.

ARGUMENT

As Petitioners demonstrated in their opening memorandum, a preliminary injunction is warranted because the balance of hardships tips decidedly toward Petitioners and "the [movant] has raised questions going to the merits so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation and thus for more deliberative investigation." *Wash. Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 844 (D.C. Cir. 1977) (citation omitted). In such circumstances, "[t]here is substantial equity, and need for judicial protection, whether or not movant has shown a mathematical probability of success." *Id.* at 844.

1. Petitioners have raised questions going to the merits so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation.

Respondents assert that Petitioners are improperly using the All Writs Act as a bootstrap to create jurisdiction where none exists. Opp. Mem. at 14 n.14. But the Supreme Court has held that Petitioners have the right to invoke the habeas jurisdiction of this Court, and

that Petitioners have stated a claim upon which relief can be granted, *Rasul v. Bush*, 124 S. Ct. 2686, 2698 & n.15 (2004); and this Court – through Judge Green – has ruled that all of the Petitioners have enforceable rights under the Due Process Clause, and that at least some may also have enforceable rights under the Geneva Conventions. This easily meets the "fair ground for litigation" standard.

That Respondents disagree with this Court's ruling could not be more plain. But Respondents may not use their disagreement with this Court's ruling as a basis for opposing the instant motion. They are bound by that ruling and may not relitigate it here. That Respondents have appealed the Court's ruling is also immaterial: "Under well-settled law, the pendency of an appeal does not diminish the *res judicata* effect of a judgment rendered by a federal court." *Hunt*, 707 F.2d at 1497. Respondents may not oppose the instant motion by arguing that Petitioners seek to protect non-existent rights.

2. Petitioners have properly invoked the All Writs Act because, under the law of the case, they have enforceable rights.

Petitioners have asked the Court to exercise its powers under the All Writs Act, 28 U.S.C. § 1651, to protect its jurisdiction in the matter. *See SEC v. Vision Communications, Inc.*, 74 F.3d 287, 291 (D.C. Cir. 1996). Invocation of the All Writs Act is proper because the Court's jurisdiction under the federal habeas statute, 28 U.S.C. § 2241, would be threatened by the unnoticed removal of litigants from the properly invoked jurisdiction of the Court. Petitioners' right to invoke the habeas jurisdiction of this Court to enforce their substantive rights would have little meaning if the Court could not preserve its jurisdiction to adjudicate Petitioners' claims.

In an analogous situation, the Supreme Court in *Ex parte Endo*, 323 U.S 283 (1944), established that "when the government moves a habeas petitioner after she properly files a petition naming her immediate custodian, the District Court retains jurisdiction and may direct the writ to any respondent within its jurisdiction who has legal authority to effectuate the prisoner's release." *Padilla v. Rumsfeld*, 124 S. Ct. 2711, 2721 (2004). Otherwise, as Justice Kennedy noted, "if the Government did inform the lawyer where a prisoner was being taken but kept moving him so a filing could not catch up to the prisoner . . . habeas jurisdiction would lie in the district or districts from which he had been removed." *Id.* at 2729 (Kennedy, J., concurring).

Similarly, in the context of deportable aliens, federal courts have issued orders pursuant to the Act to prevent the government from deporting individuals before the federal courts could review the legality of the underlying order of deportation. *See, e.g., Michael v. INS*, 48 F.3d 657, 664 (2d Cir. 1995). Petitioners must be afforded the opportunity for their claims to be heard: "[D]ue process requires, at a minimum, that . . . persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard." *Boddie v. Connecticut*, 401 U.S. 371, 377–78 (1971).[5]

Moreover, under the Court's ruling, those Petitioners who have been accused of association with the Taliban or with both the Taliban and al Qaida possess rights under the Geneva Conventions. *See* Memorandum Opinion Denying in Part and Granting in Part Respon-

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[5] *Cf. INS v. St. Cyr*, 533 U.S. 289, 314 (2001) (refusing to interpret statute as repealing habeas jurisdiction, because doing so would leave petitioners with no judicial forum for their claims, which "would raise serious constitutional questions").

dents' Motion to Dismiss or for Judgment as a Matter of Law, No. 02-CV-0299, *et al.*, 2005 WL 195356, at *18 (D.D.C. Jan. 31, 2005) (adopting Judge Robertson's reasoning in *Hamdan v. Rumsfeld*, 344 F. Supp. 2d 152, 165 (D.D.C. 2004)). As presumptive prisoners of war, therefore, Petitioners are entitled, *inter alia*, to the following enforceable rights under the Third Geneva Convention:

- Under Article 12, prisoners of war "may only be transferred by the Detaining Power to a Power which is a party to the Convention and after the Detaining Power has satisfied itself of the willingness and ability of such transferee Power to apply the Convention. . . . [If the Power accepting them] fails to carry out the provisions of the Convention in any important respect, the Power by whom the prisoners of war were transferred shall, upon being notified by the Protecting Power, take effective measures to correct the situation or shall request the return of the prisoners of war."
- Under Article 13, prisoners of war "must at all times be humanely treated."
- Under Article 17, no "physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatever."
- Under Article 46, the Detaining Power, "when deciding upon the transfer of prisoners of war, shall take into account the interests of the prisoners themselves, more especially so as not to increase the difficulty of their repatriation. The transfer of prisoners of war shall always be effected humanely and in conditions not less favourable than those under which the forces of the Detaining Power are transferred."

Again, the hope of Respondents' that the Court's decision will be overturned on appeal cannot defeat the instant motion to maintain a status quo in which Petitioners have been held to have rights enforceable in this Court. *Washington Metro.*, 559 F.2d at 844.

Respondents assert that Petitioners' reliance on the Geneva Conventions is "incoherent" because Petitioners now seek to "block" their repatriation notwithstanding an earlier demand that they be repatriated without delay. There is of course no inconsistency. Petitioners sought, and still seek, repatriation into freedom. What they resist is repatriation into torture.

3. Petitioners also assert enforceable rights under the Convention Against Torture.

The Foreign Affairs Reform and Restructuring Act of 1998 ("FARRA"), which implements the Convention Against Torture, provides that "[i]t shall be the policy of the United States not to expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture, regardless of whether the person is physically present in the United States." Pub. L. No. 105-277, § 2242(a) (1998). Whether or not the CAT is self-executing, "FARRA gives the CAT domestic effect. FARRA and the regulations are now the positive law of the United States, and, as such, are cognizable under habeas." *St. Fort v. Ashcroft*, 329 F.3d 191, 202 (1st Cir. 2003).

Only by ignoring FARRA can Respondents assert that "the overwhelming weight of authority . . . holds that the CAT does not create judicially enforceable rights." Opp. Mem. at 13. None of the cases cited by the Respondents address whether rights under the CAT can be redressed on habeas. *In re Extradition of Cheung*, 968 F. Supp. 791 (D. Conn. 1997), predated FARRA, and the Second Circuit later held that "federal courts have jurisdiction under § 2241 to consider claims arising under CAT, as implemented by FARRA." *Wang v. Ashcroft*, 320 F.3d 130, 142 (2d Cir. 2003). *Hawkins v. Comparet-Cassani*, 33 F. Supp. 2d 1244 (C.D. Cal. 1999), was a civil suit for money damages against the County of Los Angeles, not a habeas action under FARRA; the Ninth Circuit later held that "[t]he FARR Act does not preclude judicial review of the Secretary's implementation of the Torture Convention." *Cornejo-Barreto v. Seifert*, 218 F.3d 1004, 1013 (9th Cir. 2000), *vacated as moot*, 389 F.3d 1307 (2004) (en banc). Finally, *Auguste v. Ridge*, 395 F.3d 123, 132 (3d Cir. 2005), held only that the CAT is not self-executing, which is

irrelevant because of FARRA. The same court reaffirmed its prior decision in *Ogbudimkpa v. Ashcroft*, 342 F.3d 207, 220 (3d Cir. 2003), stating that "those individuals whose detention violates FARRA may challenge their detention under 28 U.S.C. § 2241."

Respondents cannot avoid judicial review of the government's CAT compliance by invoking the rule of non-inquiry, because the rule is premised on the existence of an extradition treaty between the relevant states. There is no such treaty between the United States and Yemen. (The rule of non-inquiry is discussed at greater length below.)

Nor can Respondents hide behind the "adequate assurances" that it claims to solicit from potential receiving nations, *see* Opp. Mem. at 4–6, especially when official government documents indicate an intention to remove *these Petitioners* to foreign countries for torture. Although FARRA's implementing regulations limit judicial review of removal decisions made upon receipt of such assurances, *see* 8 C.F.R. § 208.18(c)(2), these regulations do not preclude habeas review. Under *INS v. St. Cyr*, 533 U.S. 289 (2001), and its progeny (*Ogbudimpkpa*, 342 F.3d at 213–15, *Saint Fort v. Ashcroft*, 329 F.3d 191, 199–202 (1st Cir. 2003), and *Wang*, 320 F.3d at 140–42), compliance with the Constitution's Suspension Clause requires that any provision not expressly precluding habeas review be construed to permit such review. To hold otherwise in the context of the CAT would permit rendition to any nation willing to supply a wink and a nod.

Respondents' assurances to the contrary notwithstanding, *see, e.g.*, Opp. Mem. at 12, "there are substantial grounds for believing [Petitioners] would be in danger of being subjected to torture" if transferred to another country. FARRA, Pub. L. No. 105-277, § 2242(a) (1998). Even the U.S. State Department reports that Yemen's "prison conditions are poor and [do] not meet internationally recognized standards" and that torture at the hands of government

officials occurs within the country's detention system. Dep't of State, *Country Reports on Human Rights Practices, Yemen 2004* (Feb. 28, 2005), *available at* http://www.state.gov/g/drl/rls/hrrpt/2004/41736.htm, § 1(c). In the words of Michael Scheuer, a senior CIA counterterrorism official until January 2005, the recipient countries "don't have the same legal system we have. But we know that going into it . . . the idea that we're gonna suddenly throw our hands up like Claude Raines in 'Casablanca' and say, 'I'm shocked that justice in Egypt isn't like it is in Milwaukee,' there's a certain disingenuousness to that." *60 Minutes: CIA Flying Suspects to Torture?* (CBS television broadcast, Mar. 6, 2005), *transcript available at* http://www.cbsnews.com/stories/2005/03/04/60minutes/printable678155.shtml.

In fact, all indications are that the government transfers detainees because of, not in spite of, the government's expectations that they will be tortured. As Scheuer explained, rendition is "convenient in the sense that it allows American policy makers and American politicians to avoid making hard decisions. . . . It's finding someone else to do your dirty work." *Id.* Under even the most deferential standard of review, the Convention Against Torture does not permit the government to outsource torture.

4. An injunction ordering the limited relief requested here does not violate separation-of-powers principles.

Respondents argue, as they have at every other opportunity in the instant litigation, that separation-of-powers doctrine precludes judicial review of any government action that falls within the realm of "foreign policy." Opp. Mem. at 15. This argument sweeps too broadly and flies in the face of this Court's rulings that Petitioners have enforceable Due Process and Geneva Conventions rights, and the Supreme Court's decisions in *Rasul* and in *Hamdi* establish-

ing Petitioners' rights to challenge the lawfulness of their detention by the Executive branch by way of a habeas petition.

In rejecting the separation of powers argument raised by Respondents, the Supreme Court in *Hamdi* noted the pivotal role of the habeas writ in challenging the lawfulness of *Executive* detention specifically, which cannot be diminished or eliminated by Respondents' invocation of "war powers." "At its historical core, the writ of habeas corpus has served as a means of reviewing the legality of Executive detention, and it is in that context that its protections have been strongest." 124 S. Ct. at 2650; *St. Cyr*, 533 U.S. at 301, 304 (right of habeas review to challenge detention by the Executive branch applies no less forcefully to non-citizens).

If Petitioners have rights to judicial review of their detentions by the Executive, and such review does not violate separation of powers, then this Court must be able to protect its ability to conduct such review without running afoul of separation of powers. "Whatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake." *Hamdi*, 124 S. Ct. at 2650.

The cases cited by Respondents do not diminish the force of this principle. In the *People's Mojahedin Org. v. Dep't of State*, 182 F.3d 17, 23–24 (D.C. Cir. 1999), the court decided that it could not entertain an organization's petition for review of its designation as a "foreign terrorist organization" under 29 U.S.C. § 1189 – a petition which bears absolutely no similarity to the claims raised here. Petitioners seek vindication of their most fundamental liberties through a writ of habeas, a far cry from group claims raised under a carefully calibrated adminis-

trative scheme that do not implicate any fundamental rights. Whatever minimized role the court may have had in that context simply has no applicability to Petitioners' habeas claims.

Respondents' reliance on *Holmes v. Laird*, 459 F.2d 1211 (D.C. Cir. 1972), is similarly misplaced. In *Holmes*, the court declined to review the claims of United States servicemen that they should not be removed to West Germany to stand trial in that country for crimes allegedly committed there. The court acknowledged that not every dispute "touching on our foreign relations falls outside the province of the judiciary," *id.* at 1215, but decided that the instant dispute did, since the surrender of the servicemen was required by *treaty*, *id.* at 1218. Here, Respondents are not asking for deference to a treaty or any similar instrument (negotiated by the Executive and ratified by Congress); rather it expects that its broad and unspecific invocation of "foreign relations" and "diplomatic matters" will suffice to thwart already-established judicial review of cases in which Petitioners' liberty and life itself is at stake.

Moreover, both *People's Mojahedin* and *Holmes* considered the question whether judicial review of the group's claim was available – an issue which is simply no longer open to question in this case. The Supreme Court has recognized this Court's jurisdiction over the case, despite separation of powers protestations by Respondents, and this Court may take necessary actions to protect its continuing jurisdiction over these matters.

5. Extradition doctrine and the "rule of non-inquiry" are inapplicable.

The rule of non-inquiry is not an all-purpose separation-of-powers/foreign affairs doctrine. *See* Opp. Mem. at 17. Instead, its application depends entirely on the existence of an extradition treaty, the existence of which "indicates that, at least in some general sense, the executive and legislative branches consider the treaty partners' justice system sufficiently fair to

justify sending accused persons there for trial." *In re Extradition of Howard*, 996 F.2d 1320, 1329 (1st Cir. 1993); *see also Glucksman v. Henkel*, 221 U.S. 508, 512 (1911) (Holmes, J.) ("We are bound by the existence of an extradition treaty to assume that the trial will be fair."). The United States and Yemen have consummated no such extradition treaty to which this Court could defer. It is by no means clear, moreover, that the government would remove Petitioners to another country with which the United States has an extradition treaty.

Ironically, whereas the Respondents insist that the government can render Petitioners with *no* notice, process or review, Opp. Mem. at 3–6, extradition occurs *only* after a statutory process that "interpose[s] the judiciary between the executive and the individual." *Lo Duca v. United States*, 93 F.3d 1100, 1103 (2d Cir. 1996). Once a foreign government requests extradition of a prisoner in United States custody, the government must submit to a judicial authority a formal complaint seeking an arrest warrant and setting forth the legal and factual bases for extradition. The judge must determine, after a hearing, (1) whether the offense is extraditable and (2) whether there is probable cause to support the charged offense. *See* 18 U.S.C. § 3184; Rest. (Third) of Foreign Relations § 478 (1986).

If the warrant meets these conditions, the court issues a certificate of extradition, which the Secretary of State has discretion to deny or grant for humanitarian or other reasons. *See* 18 U.S.C. § 3186; *Barapind v. Reno*, 225 F.3d 1100, 1105 (9th Cir. 2000). Once an extradition certificate issues, an individual may still petition for habeas relief, and a habeas court must then determine whether "any evidence" supports the extradition. *See United States v. Kin-Hong*, 110 F.3d 103 (1st Cir. 1997). Respondents cannot have it both ways: They cannot invoke extradition's non-inquiry rule but disclaim extradition's rigorous procedural protections.

6. Petitioners face irreparable injury if an injunction is not granted.

"[T]he basis of injunctive relief in the federal courts has always been irreparable harm and inadequacy of legal remedies." *Sampson v. Murray*, 415 U.S. 61, 88 (1974) (citation omitted). Petitioners have established that they face "a significant threat of injury" by being removed from Guantánamo to a foreign country where they may be tortured or detained indefinitely without legal process. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 130 (1969); *see also United States v. W.T. Grant Co.*, 345 U.S. 629. 633 (1953) (requiring moving party to show only "cognizable danger" of violation).

The great and irreparable harm that Petitioners face is obvious: They stand to suffer extreme physical and psychological injury, and perhaps even death. *See Inmates of Attica Corr. Facility v. Rockefeller*, 453 F.2d 12, 22–23 (2d Cir. 1971) (preliminary injunction against prison officials to prevent "beatings, physical abuse, torture . . . harassment, threats, [and] racial slurs"); *Duran v. Anaya*, 642 F. Supp. 510, 525 (D.N.M. 1986) (preliminary injunction to prevent prison staff reductions that risked causing unnecessary deaths, physical trauma, suicides and self-mutilation). By an involuntary transfer from Guantánamo, they also risk the possible loss of their right to an adjudication of their habeas corpus claims in the federal court whose jurisdiction they have properly invoked. *Cf. Orantes-Hernandez v. Smith*, 541 F. Supp. 351, 372 (C.D. Cal. 1982) (preliminary injunction preventing government from coercing "voluntary departure" of asylum-seekers to El Salvador, where they faced violent "acts of Salvadoran authorities").

Petitioners have also demonstrated that the harm they face is imminent. Because Respondents have flatly refused on many occasions to provide advance warning to Petitioners before they are transferred from Guantánamo, and because the timing of any such removal is

within the absolute control of Respondents, Petitioners have sufficiently established that the harm they face could occur at any time. Indeed, were a temporary restraining order not presently in effect, Petitioners could face transportation within hours or days, leaving them immediately without recourse to contest the legality of their removal.

Respondents' assurances about "what will actually happen absent the advance-notice order requested," Opp. Mem. at 20, are empty. First, Respondents do not even contend that they will comply with the CAT; rather, they state only that "the United States will comply with *its policy reflecting the principles of* the Convention Against Torture." *Id.* (emphasis added). Second, the claims made by declarants Prosper and Waxman that "the policy of the United States is structured to guard against exactly the risks that petitioners fear," Opp. Mem. at 21, are belied by both the flood of news accounts and classified documents to which Petitioners have already referred in this memorandum. Of particular concern to Petitioners is the "wink and nod" approach that former government officials have acknowledged is common with respect to rendition and torture matters. *See, e.g.*, Michael Scheuer, *A Fine Rendition*, N.Y. Times, March 11, 2005, at A23 (founder of the "Qaeda detainee/rendition program" writes that he and his colleagues advised government lawyers and policymakers that transferees might be tortured in receiving countries like Egypt, but the response was that they "usually listened, nodded, and then inserted a legal nicety by insisting that each country to which the agency delivered a detainee would have to pledge it would treat him according to the rules of its own legal system"). Ex. P.

In the *Abu Ali* litigation, Judge Bates credited similar allegations that the government permits and may even direct the torture of detainees in other countries. There the habeas petitioner alleged and provided "evidence, of varying degrees of competence and persuasive-

ness" that: (1) he had been detained, and was continuing to be detained in Saudi Arabia at the direction of the United States; (2) during that detention, he had been tortured; and (3) the United States had orchestrated this arrangement to avoid constitutional scrutiny by United States courts. 350 F. Supp. 2d 28, 31 (D.D.C. 2004). This Court deemed the petitioner's evidence sufficient to warrant further jurisdictional discovery. *See id.* at 68–69. Respondents observation that the procedural posture of *Abu Ali* is distinguishable, Opp. Mem. at 19 n.18, while accurate, does nothing to diminish the point that this court has previously found allegations similar to Petitioners' sufficiently credible to warrant further investigation.

7. The public interest is best served by granting a preliminary injunction.

Respondents argue that the public interest coincides with their interests in having unfettered discretion to transfer Petitioners from Guantánamo and that, by contrast, Petitioners assert only private, not public interests. Respondents are mistaken.

First, public interests favor providing Petitioners with notice and a meaningful opportunity to challenge their transfer out of Guantánamo. Transfer by the government of the Petitioners from Guantánamo would have the effect of defeating this court's jurisdiction over Petitioners' habeas claims and denying Petitioners their rights under the Due Process Clause and the Geneva Conventions. Given the "fundamental importance of the Great Writ, not to mention the Due Process guarantee, the public interest must favor allowing their habeas petitions to be heard." *See Johnson v. Avery*, 393 U.S. 483, 485–86 (1969). Moreover, "it is always in the public interest to prevent the violation of a party's constitutional rights." *G&V Lounge, Inc. v. Mich. Liquor Control Comm'n*, 23 F.3d 1071, 1079 (6th Cir. 1994).

No public interest is served by allowing the government to overthrow the system of checks and balances. *See United States v. Hastings*, 461 U.S. 499, 527 (1983) (describing the "public interest in the integrity of the judicial process" as "strong"); *United States v. Atkinson*, 297 U.S. 157, 159–60 (1936) (noting the "public interest" in correcting errors that would "seriously affect the fairness, integrity, or public reputation of judicial proceedings"). Such actions by the government would in effect make a mockery of the Supreme Court's decision in *Rasul* that this court has jurisdiction over Petitioners' claims. Finally, allowing the government to secret Petitioners away to other jurisdictions without a moment's notice in an apparent effort to defeat judicial processes only further undermines this nation's already crippled reputation in the international community, which public interests favor protecting.

Second, the interests cited by Respondents, even if they can claim them as "public" interests, do not support their argument that Petitioners should not have notice and an opportunity to be heard. It is puzzling how such minimal procedures would prevent the United States from speaking with one voice or chill discussions with foreign governments about mistreatment or torture concerns. Allowing notice and an opportunity to be heard would only ensure that the government has spoken at all – that it has received the meaningful assurances of proper treatment of Petitioners upon which it purports to rely. Respondents' argument that providing notice would undermine the government's ability to reduce the number of prisoners in its custody and to elicit cooperation from other governments presumes that this Court *will* have a reason to prevent the transfer.

Finally, given the high stakes of these cases – for the integrity of the courts as well as the rights of the Petitioners – Respondents' protestations of delay should not be well

taken. Indeed, it is Respondents who have engendered delay by seeking interlocutory review of this Court's rulings on their motion to dismiss, and by insisting that every aspect of these cases comes to a halt while their appeal is pending. Apparently only when Petitioners seek relief is the prospect of delay intolerable to Respondents.

8. This Court's stay order does not preclude the relief Petitioners seek.

The stay entered by this Court in this matter through Judge Green, even though issued "for all purposes," cannot reasonably be understood to include motions that are made in an effort to preserve the jurisdiction of the Court and to prevent the government from thwarting judicial review. Moreover, the Court did not mean "for all purposes" literally; it declined to stay its order requiring Respondents to provide Petitioners with unredacted copies of the factual returns. If the Court concludes the stay applies, Petitioners will respectfully move that the stay be lifted for the limited purpose of hearing and ruling on their motion for injunctive relief. The "same court that imposes a stay of litigation has the inherent power and discretion to lift the stay," especially where circumstances are such that maintenance of the stay is "inappropriate." *Marsh v. Johnson*, 263 F. Supp. 2d 49, 52 (D.D.C. 2003).

CONCLUSION

For the reasons discussed above, Petitioner's motion should be granted.

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Respectfully submitted,

COVINGTON & BURLING

/s/

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