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)

RESPONDENTS' MEMORANDUM IN OPPOSITION TO PETITIONERS' MOTION FOR ORDER REQUIRING ADVANCE NOTICE OF ANY REPATRIATIONS OR TRANSFERS FROM GUANTANAMO

Respondents hereby respond to petitioners' March 1, 2005 motion for an order "requiring respondents to provide counsel for petitioners and the Court with 30-days' advance notice of any intended removal of petitioners from Guantanamo." The Court should not entertain petitioners' motion because District Court proceedings in this case are "stayed for all purposes pending resolution of all appeals in this matter" and petitioners have not moved to lift the stay or otherwise articulated why the stay should not apply. In the event the Court does reach the merits of the motion, the motion should be denied. It is based on pure speculation that is refuted by sworn declarations of high-level United States Government officials submitted herewith. Moreover, the only rationale petitioners offer for requiring advance notice is to enable or facilitate future motions aimed at having the Court stop any repatriation or transfer of petitioners. There is no legal basis for judicial intervention in the processes by which enemy combatant detainees are repatriated or transferred, and any such interference would illegitimately encroach on the foreign relations and national security prerogatives of the Executive Branch. Accordingly, there is basis for ordering advance notice to enable and facilitate such intervention.

BACKGROUND

A. Detention of Enemy Combatants at Guantanamo

Following the terrorist attacks of September 11, 2001, pursuant to his powers as Commander in Chief and with congressional authorization, see Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001), the President dispatched the United States Armed Forces to Afghanistan to engage in military operations against the Taliban regime that had harbored the al Qaeda terrorist organization responsible for the September 11 attacks. In the course of those hostilities, the United States captured or took custody of a number of enemy combatants, including the twelve[1] Yemeni nationals who are petitioners in the instant case. Petitioners and other enemy combatants are being held at the Guantanamo Bay Naval Base in Cuba. Petitioners' enemy combatant status was recently confirmed in Combatant Status Review Tribunals.

B. United States Policy Regarding Transfer of Guantanamo Detainees

Although the laws of war permit the United States to hold enemy combatants in detention for the duration of hostilities, the United States has no interest in detaining enemy combatants longer than necessary. See Declaration of Deputy Assistant Secretary of Defense for Detainee Affairs Matthew C. Waxman ("Waxman Decl.") ¶ 3; Declaration of Ambassador Pierre-Richard Prosper ("Prosper Decl.") ¶ 2. The Department of Defense ("DoD") is conducting at least annual reviews of each Guantanamo detainee to determine whether continued detention is warranted

[1] The petition in this matter names thirteen detainees as petitioners. However, respondents have no record of any detainee corresponding to one of the thirteen individuals named – Aref Abd Il Rheem – and have asked petitioners' counsel for, but not received, additional identifying information.

based on factors such as whether the detainee continues to pose a threat to the United States and its allies. Waxman Decl. ¶¶ 3, 7; Prosper Decl. ¶ 2. Those annual reviews include those currently being conducted through Administrative Review Boards. See Waxman Decl. ¶¶ 3, 7; see generally Memorandum dated September 14, 2004, re: Implementation of Administrative Review Procedures for Enemy Combatants Detained at U.S. Naval Base Guantanamo Bay, Cuba, available at <<http://www.defenselink.mil/news/Sep2004/ d20040914adminreview.pdf>>. As part of the Administrative Review Board process, counsel who represent detainees have been invited to make written submissions concerning whether further detention is appropriate in which they are free to raise any concerns about transfer or repatriation, and have in fact made such submissions.

Where continued detention is not warranted, a detainee may be transferred to the control of another government, in general the government of his country of citizenship, for release. Waxman Decl. ¶ 3; Prosper Decl. ¶ 3. The United States also transfers Guantanamo detainees, under appropriate conditions, to the control of other governments for investigation and possible prosecution and continued detention when those governments are willing to accept responsibility for ensuring, consistent with their laws, that the detainees will not pose a threat to the United States and its allies. Waxman Decl. ¶ 3; Prosper Decl. ¶ 3. Such governments can include the government of a detainee's country of citizenship, or another country that may have law enforcement or prosecution interest in the detainee. Waxman Decl. ¶ 3; Prosper Decl. ¶ 3. The ultimate approval for transfer of any Guantanamo detainee to the control of another government is made by a senior Department of Defense official after consultation with various agencies. Waxman Decl. ¶¶ 6-7; Prosper Decl. ¶¶ 2-3, 7. Over 200 Guantanamo detainees to date have

been transferred in the manner described above. Waxman Decl. ¶ 4; Prosper Decl. ¶ 2.

In any such transfer, a key concern is whether the foreign government will treat the detainee humanely and in a manner consistent with its international obligations. Prosper Decl. ¶ 4; Waxman Decl. ¶ 6-7. With respect to any such transfer, it is the policy of the United States not to repatriate or transfer a detainee to a country where the United States believes it is more likely than not that the individual will be tortured. Prosper Decl. ¶ 4; Waxman Decl. ¶ 6. Once the Department of Defense approves a transfer and requests the assistance of the Department of State, the Department of State initiates transfer discussions with the foreign government concerned. Prosper Decl. ¶ 6. These discussions include an effort by the Department of State to seek assurances that the United States Government considers necessary and appropriate for the country in question, including assurances of humane treatment and treatment in accordance with the international obligations of the foreign government accepting transfer. Id. The Department of State considers whether the nation in question is a party to relevant treaties such as the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and pursues more specific assurances if the nation concerned is not a party or other circumstances warrant. Id.

The determination whether it is more likely than not an individual would be tortured by a receiving foreign government, including, where applicable, evaluation of foreign government assurances, involves senior level officials and takes into account a number of considerations, including whether the nation concerned is a party to certain treaties; the expressed commitments of officials of the foreign government accepting transfer; the particular circumstances of the transfer, the country, and the individual concerned; any concerns regarding torture that may arise;

the views of the State Department's Bureau of Democracy, Human Rights, and Labor (which drafts the U.S. Government's annual Human Rights Reports), and the views of the relevant State Department regional bureau, country desk, or U.S. Embassy. Prosper Decl. ¶¶ 6-8; Waxman Decl. ¶ 7. When evaluating the adequacy of any assurances, State Department officials consider the identity, position, or other information concerning the official relaying the assurances; political or legal developments in the foreign country concerned that provide context for the assurances; and the foreign government's incentives and capacity to fulfill its assurances to the United States. Prosper Decl. ¶ 8. In an appropriate case, the State Department may consider various monitoring mechanisms for verifying that assurances are being honored. Id. If a case were to arise in which the assurances obtained from the receiving government were not sufficient when balanced against treatment concerns, the United States would not transfer a detainee to the control of that government unless the concerns were satisfactorily resolved. Waxman Decl. ¶ 7; Prosper Decl. ¶ 8. Indeed, circumstances have arisen in the past where the Department of Defense decided not to transfer detainees to their country of origin because of torture concerns. Waxman Decl. ¶ 7; Prosper Decl. ¶ 8.

The Department of State's ability to seek and obtain assurances from a foreign government depends on its ability to treat its dealings with the foreign government with discretion. Prosper Decl. ¶ 9; Waxman Decl. ¶ 8. Obviously, diplomatic sensitivities surround the Department's communications with foreign governments concerning allegations relating to torture. Prosper Decl. ¶ 9; Waxman Decl. ¶ 8. The United States Government does not unilaterally make public any specific assurances or other precautionary measures obtained, because such disclosure would have a chilling effect on and cause damage to our ability to

conduct foreign relations. Prosper Decl. ¶ 9. If the United States Government were required to disclose its communications with a foreign government relating to particular mistreatment or torture concerns outside appropriate Executive Branch channels, that government, sources within that government, and potentially other governments, would likely be reluctant to communicate frankly with the United States concerning such issues in the future.[2] Prosper Decl. ¶¶ 9-10; Waxman Decl. ¶ 8. As a result, disclosure could impede our country's ability to obtain vital cooperation from concerned governments with respect to military, law enforcement, and intelligence efforts related to the war on terrorism. Waxman Decl. ¶ 8; Prosper Decl. ¶ 12.

It is important to recognize that when the Department of Defense transfers a Guantanamo 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. Waxman Decl. ¶ 5. As such, once transferred, a detainee is no longer subject to the control of the United States. Id.[3]

C. The Instant Petition and Motion

Petitioners filed this habeas corpus action on July 27, 2004, through their next friends, family and relatives who reside in Yemen and urged in next-friend affidavits that petitioners be

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[2] Another reason such disclosure would be harmful is that the State Department's recommendation concerning transfer relies heavily on facts and analyses provided by Embassies and other State Department offices, and confidentiality is necessary to ensure that the advice and analysis provided by those offices are useful and informative for the decision-maker. Prosper Decl. ¶ 11. Disclosure of their assessments could chill important sources of information and interfere with the ability of our foreign relations personnel to interact effectively with foreign state officials. Id.

[3] For reasons discussed below, it would not be appropriate to comment in this forum on the nature or status of discussions, if any, between the United States and a foreign sovereign government regarding any specific case of possible repatriation or transfer to that government.

released and sent home to Yemen. This case was then coordinated with a number of other habeas corpus petitions on behalf of Guantanamo detainees. On October 4, 2004, as part of a global filing in all the coordinated cases, respondents responded to the petition and moved to dismiss it or for judgment as a matter of law. Petitioners opposed the motion, arguing, among other things, that respondents had violated the Third Geneva Convention "[b]y failing to repatriate [the Yemeni] Petitioners 'without delay' now that the hostilities in Afghanistan have been concluded."[4] Petitioners' Supp. Mem. in Opp. to Mot. to Dismiss, filed Nov. 26, 2004 (dkt. no. 78), at 3.

On January 31, 2005, the Court, per coordinating Judge Joyce Hens Green, granted respondents' motion in part and denied it in part. In re Guantanamo Detainee Cases, 2005 WL 195356 (D.D.C. Jan. 31, 2005) (dkt. nos. 101, 102).[5] The Court subsequently certified its January 31, 2005, order for interlocutory appeal pursuant to 28 U.S.C. § 1292(b). The Court simultaneously ordered "that the proceedings in the eleven above-captioned cases are stayed for all purposes pending resolution of all appeals in this matter." Order dated Feb. 3, 2005 (dkt. no. 106). On February 7, 2005, petitioners moved for reconsideration of the stay order, but that motion was denied (dkt. no. 107). Respondents have filed in the D.C. Circuit a petition for appeal of the Court's January 31, 2005 order pursuant to 28 U.S.C. § 1292(b). That petition is, as

[4] Respondents dispute that the Third Geneva Convention applies in these circumstances and that hostilities have concluded.

[5] Meanwhile, another Judge of this Court granted the same motion to dismiss in its entirety in two of the cases that had been coordinated. Khalid v. Bush, 2005 WL 100924 (D.D.C. Jan. 19, 2005), on appeal, No. 05-5063 (D.C. Cir.).

of the date of this memorandum, fully briefed and under submission.[6]

While the global motion to dismiss was being litigated, respondents also filed and served on petitioners' counsel factual returns that show the basis for the classification of each petitioner as an enemy combatant subject to detention. Respondents also afforded counsel for petitioners an opportunity to travel to Guantanamo to meet with their clients. Counsel in this case met with their clients in November and December 2004 and January of this year.

Petitioners now come into this Court, at a time when a petition for appeal has been filed and proceedings herein are stayed "for all purposes," and ask for an order requiring 30 days' notice to the Court and petitioners' counsel before any movement of any of them out of Guantanamo. Petitioners allege "[o]n information and belief" that "Respondents have contemplated or are contemplating removal of some or all Petitioners from Guantanamo to foreign territories for torture or indefinite imprisonment without due process of law." Petrs' Mem. at 1. In particular, reversing their previous position that the United States was obligated to repatriate them "without delay," petitioners, all Yemeni nationals, now say they "have reason to fear that they will be transferred into the custody of the government of Yemen or a third country for continued illegal detention without due process of law." Petrs' Mem. at 4.[7]

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[6] Answering respondents' petition for appeal, petitioners argued that the Court of Appeals should not accept the appeal, but that, if it did, the Court of Appeals should review not only the issues contested by respondents, but "all issues resolved by the January 31 Order." Petitioners-Appellees' Joint Answer and Cross-Petition to Respondents-Appellants' Petition for Interlocutory Appeal, filed Feb. 22, 2005, in D.C. Cir. No. 05-8003.

[7] To the extent petitioners may try to reconcile their disparate positions by saying that when they previously insisted on repatriation they meant they wanted to be returned to their native country and allowed to walk free there, that explanation fundamentally misunderstands the nature of repatriation in this context. After the Department of Defense returns a detainee to his home country, it no longer controls that detainee and likewise does not control the actions or

ARGUMENT

I. The Court Should Not Entertain this Motion Given that Proceedings in this Court are Stayed for All Purposes and Petitioners Have Neither Moved to Lift the Stay Nor Presented Grounds that Would Justify Lifting the Stay.

Petitioners completely ignore the procedural posture of this case and treat the stay that is in effect and on which they unsuccessfully moved for reconsideration as if it simply did not exist. When it certified its order for interlocutory appeal, the Court stayed further proceedings in this case "for all purposes." It is unfathomable how petitioners could construe "all purposes" as not including the filing, briefing, argument, and adjudication of the instant motion. Yet petitioners do not even attempt to articulate an argument why this motion should fall outside the stay. Nor have they moved to lift the stay. Indeed, there are no grounds for doing so: there has been no change of circumstances since the stay was entered on February 3; the Court's reasons for imposing the stay remain as valid today as they were then; there is no emergency;[8] the instant motion is based on the most makeweight of foundations;[9] and if the Court of Appeals accepts the

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decisions of a foreign sovereign government with respect to release or further custody of that detainee. Waxman Decl. ¶ 5. A foreign sovereign government may well have independent reasons, such as anticipation of prosecution, for detaining a national of that country upon his return. Id.

[8] This petition has been pending for over seven months. As the basis for their motion, petitioners mainly cite newspaper and magazine stories that are months, and in some cases, years old, as well as an alleged threat (itself undated) that one of the twelve petitioners told counsel about in a meeting that would have occurred, at the latest, in January (the last time such meetings occurred in this case).

[9] See infra Section II.B (detailing why petitioners fail to show irreparable harm).

appeal, its ruling may well moot the instant motion.[10] Cf. Canady v. Erbe Elektromedizin GmbH, 271 F. Supp. 2d 64, 74 (D.D.C. 2002) ("When circumstances have changed such that the court's reasons for imposing the stay no longer exist or are inappropriate, the court may lift the stay."). Because the case is stayed "for all purposes pending resolution of all appeals," and petitioners have barely acknowledged the stay, let alone presented any justification for lifting it, the Court should deny petitioners' motion summarily.

II. In the Alternative, Petitioners' Motion Should be Denied Because There is No Legal or Factual Basis for the Extraordinary Judicial Intervention They Seek.

A request for preliminary injunctive relief "is an extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion." Mazurek v. Armstrong, 520 U.S. 968, 972 (1997); Cobell v. Norton, 391 F.3d 251, 258 (D.C. Cir. 2004). To prevail in a request for a preliminary injunction, a movant "must 'demonstrate 1) a substantial likelihood of success on the merits, 2) that [he] would suffer irreparable injury if the injunction is not granted, 3) that an injunction would not substantially injure other interested parties, and 4) that the public interest would be furthered by the injunction.'" See Katz v. Georgetown Univ., 246 F.3d 685, 687-88 (D.C. Cir. 2001) (quoting CityFed Financial Corp. v. Office of Thrift Supervision, 58 F.3d 738, 746 (D.C. Cir. 1995)). Petitioners fail to meet their burden on all four prongs of the standard.

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[10] Further, if and when the Court of Appeals grants the pending petition for appeal, this Court will cease to have jurisdiction over those aspects of the case involved in the appeal. See Griggs v. Provident Consumer Discount Co., 459 U.S. 56, 58 (1982); Princz v. Federal Republic of Germany, 998 F.2d 1, 1 (D.C. Cir. 1993).

A. Petitioners Cannot Show a Likelihood of Success

To obtain preliminary injunctive relief, petitioners must show, inter alia, "a substantial likelihood of success on the merits." Katz v. Georgetown Univ., 246 F.3d 685, 687-88 (D.C. Cir. 2001). For purposes of this motion, "likelihood of success on the merits" is not satisfied by a showing, even assuming it could be made, that the detention of petitioners is unlawful or that petitioners are not enemy combatants. Rather, petitioners must show that they are likely to succeed in establishing a judicially enforceable entitlement to veto the same repatriation that they previously told the Court respondents were required to conduct. Petitioners' Supp. Mem. in Opp. to Mot. to Dismiss, at 3. Absent such an entitlement, it makes no sense to order advance notice the only purpose of which would be to enable enforcement of such an entitlement.

Obviously, that "[p]etitioners have properly invoked the jurisdiction of this Court" under Rasul v. Bush, 124 S. Ct. 2686 (2004) (Petrs' Mem. at 6) does not even go one inch toward showing likelihood of success on the merits, because "[j]urisdiction is necessary to deny a claim on its merits as matter of law as much as to adjudge that liability exists," Feres v. United States, 340 U.S. 135, 140-41 (1950). Nor does it suffice to simply point to the ruling by Judge Green that is currently on appeal. There is nothing in that opinion that suggests that petitioners have some judicially enforceable right to insist that they be kept at Guantanamo Bay or to block or dictate the terms of their repatriation or transfer.

Petitioners' only other likelihood-of-success-on-the-merits argument is that "[f]or the United States Government to remove Petitioners to countries that would afford no such

protections"[11] would "violate basic international legal norms embodied not only in the Geneva Conventions but also in the International Covenant on Civil and Political Rights ["ICCPR"] and the Convention Against Torture and Other Cruel and Degrading Treatment and Punishment ["CAT"]." Petrs' Mem. at 6. This assertion is so riddled with flaws that it is difficult to know where to begin cataloguing them.

First, the premise is flatly wrong. As explained in the accompanying sworn declarations of high-level Department of State and Department of Defense officials, Guantanamo detainees are not transferred, repatriated, or otherwise sent to countries where it is more likely than not that they will be tortured. Not only is petitioners' premise wrong, but it is inconsonant with the nature of the relief sought, which would interfere with any movement of a petitioner from Guantanamo (including transfer to any nation, or even transfer to another facility under the control of the United States), not just "movement to countries that would afford no such protections."

Second, the cited treaties do not create judicially enforceable rights. With respect to the ICCPR, Judge Green dismissed petitioners' "remaining treaty-based claims," including without limitation their claims based on the ICCPR, "primarily for the reasons stated by the respondents in their motion to dismiss," to wit, because the ICCPR does not create rights enforceable in federal court. In re Guantanamo Detainee Cases, — F. Supp. 2d —, 2005 WL 195356, *33

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[11] By "countries that would afford no such protections," we assume that petitioners mean countries where individuals are likely to be tortured. To the extent "such protections" means protections under the Due Process Clause, petitioners' argument is simply frivolous. Other nations obviously are not bound by the Due Process Clause of the United States Constitution. Nor would there be any greater warrant for the Court to engage in a roving examination of how foreign sovereign governments' justice systems rate with respect to American due process standards than exists for the Court to undertake a similar inquiry about the likely conditions of confinement in a foreign country. See infra at 15-18.

(D.D.C. Jan. 31, 2005) (citing respondents' Motion to Dismiss at 71-72).[12] Likewise, the overwhelming weight of authority, including the recent opinion of Judge Leon in two of the Guantanamo detainee cases, holds that the CAT does not create judicially enforceable rights. Khalid v. Bush, — F. Supp. 2d —, 2005 WL 100924, *10 (D.D.C. Jan. 19, 2005), on appeal, No. 05-5063 (D.C. Cir.); Auguste v. Ridge, 395 F.3d 123, 132 n.7 (3d Cir. 2005); Hawkins, 33 F. Supp. 2d at 1257; 997 F. Supp. at 1386-87; Cheung, 968 F. Supp. at 802-03 & n.17; see also U.S. Senate Resolution of Ratification, 136 Cong. Rec. S17486-01, at S17492 (Oct. 27, 1990) (conditioning advice and consent to the CAT upon, inter alia, declaration "that the provisions of Articles 1 through 16 of the Convention are not self-executing"). 136 Cong. Rec. S17486-01, at S17492 (Oct. 27, 1990).[13]

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[12] Accord Sosa v. Alvarez-Machain, 124 S. Ct. 2739, 2767 (2004) (ICCPR was "ratified on the express understanding that it was not self-executing and so did not create obligations enforceable in the federal courts"); Khalid v. Bush, — F. Supp. 2d —, 2005 WL 100924, *10 (D.D.C. Jan. 19, 2005), on appeal, No. 05-5063 (D.C. Cir.). While petitioners have asked the Court of Appeals, if it accepts respondents' petition for appeal under 28 U.S.C. § 1292(b), to include in that appeal review of rulings adverse to them, such as on the ICCPR, the prospect of such appellate review only serves to underscore the wisdom of the stay that is in effect. See supra Section I.

[13] As Judge Green noted in her January 31, 2005 opinion, the issue of whether the Geneva Conventions impliedly create judicially enforceable rights is currently before the D.C. Circuit Court of Appeals in Hamdan v. Rumsfeld, No. 04-5393 (D.C. Cir.). Judge Green decided in the meantime that the Geneva Conventions do create such rights, although she further held that those rights could be invoked only by "Taliban fighters" and not by detainees found by Combatant Status Review Tribunals to be members of al Qaeda. In re Guantanamo Detainee Cases, 2005 WL 195356, at *32-*33. Respondents respectfully disagree that the Geneva Conventions create such rights enforceable by any detainees, have so argued in Hamdan, and will so argue to the Court of Appeals if and when their pending petition for appeal is granted. See Johnson v. Eisentrager, 339 U.S. 763, 789 n.14 (1950); Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 808-10 (D.C. Cir. 1984) (Bork, J., concurring). In any event, and more importantly, petitioners have not pointed to any provision of the Geneva Conventions that would preclude a repatriation or transfer.

Third, even if any of these treaties were judicially enforceable, there is no prospect of a violation of any of them that would merit Court intervention. Respondents' procedures and practices, as explained in the accompanying declarations, are designed to comply fully with the United States' policy that individuals not be transferred to countries where it is more likely than not that they will be tortured. See Waxman Decl. ¶ 6; Prosper Decl. ¶ 4. The CAT requires no more where it applies. See CAT Article 3 ("No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture."); Resolution of Ratification, 136 Cong. Rec. S17486-01, at S17492 (conditioning advice and consent to CAT on the understanding that the phrase "where there are substantial grounds for believing that he would be in danger of being subjected to torture" in Article 3 means "if it is more likely than not that he would be tortured"). Nor is this policy inconsistent with the other cited treaties. Petitioners' reliance on the Geneva Conventions to enable them to block, inter alia, their repatriation, is particularly incoherent given their previous admonition that respondents had violated the Geneva Conventions "[b]y failing to repatriate Petitioners 'without delay'." Petitioners' Supp. Mem. in Opp. to Mot. to Dismiss, at 3 (emphasis added).[14]

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[14] Having failed to identify any valid treaty or statutory basis for Court intervention into the circumstances of any repatriation or transfer, see infra, petitioners cannot conjure up a likelihood of success on the merits by bootstrapping from the general All Writs Act, 28 U.S.C. § 1651. See Petrs' Mem. at 5. After all, the All Writs Act does not give rise to an independent substantive claim; it merely enables courts "to issue such commands . . . as may be necessary or appropriate to effectuate and prevent the frustration of orders it has previously issued in its exercise of jurisdiction otherwise obtained." United States v. N.Y. Tel. Co., 434 U.S. 159, 172 (1977); see also SEC v. Vision Comms., Inc., 74 F.3d 287, 291 (D.C. Cir. 1996) (striking down injunction because "while the All Writs Act, 28 U.S.C. § 1651(a), empowers a district court to issue injunctions to protect its jurisdiction, the injunction in this case protects jurisdiction the

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Furthemore, even if some valid claim or other legal basis existed for judicial involvement in transfer or repatriation decisions with respect to enemy combatants held abroad, or for an advance notice requirement to support and facilitate such involvement, the separation of powers would bar such relief. "[I]t is beyond the judicial function for a court to review foreign policy decisions of the Executive Branch." People's Mojahedin Org. v. Dep't of State, 182 F.3d 17, 23 (D.C. Cir. 1999) (citing Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp., 333 U.S. 103 (1948)); see also Holmes v. Laird, 459 F.2d 1211, 1215 (D.C. Cir. 1972) ("In situations such as this, '[t]he controlling considerations are the interacting interests of the United States and of foreign countries, and in assessing them [the courts] must move with the circumspection appropriate when [a court] is adjudicating issues inevitably entangled in the conduct of our international relations.'") (quoting Romero v. International Terminal Operating Co., 358 U.S. 354, 383 (1959)).[15] If the Court were to entertain petitioners' claims, it would have to inject itself into the most sensitive of diplomatic matters. Such judicial review could involve scrutiny of United States officials' judgments and assessments on the likelihood of torture in a foreign

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[14](...continued)
district court did not have"). In these circumstances, as explained infra, this Court has no jurisdiction to police the Government's determination, based on sensitive foreign policy considerations, whether to end a detainee's custody by the United States and repatriate him to his country of nationality.

[15] In Holmes, U.S. citizen servicemembers sued to prevent the United States government from surrendering them to West German authorities to serve sentences for convictions by West German courts on criminal charges relating to their conduct while stationed in West Germany. Even in this situation involving U.S. citizens, the District Court and D.C. Circuit rejected the plaintiffs' invitation to examine the fairness of their treatment by the West German courts and declined to enjoin the transfer, the latter court holding that "the contemplated surrender of appellants to the Federal Republic of Germany is a matter beyond the purview of this court." 459 F.2d at 1225.

country, including judgments on the reliability of information and representations or the adequacy of assurances provided, and confidential communications with the foreign government and/or sources therein. Prosper Decl. ¶¶ 9-12. Disclosure and/or judicial review of such matters could chill important sources of information and interfere with our ability to interact effectively with foreign governments. Prosper Decl. ¶¶ 9-12; Waxman Decl. ¶ 8. In particular, the foreign government in question, as well as other governments, would likely be reluctant to communicate frankly with the United States in the future concerning torture and mistreatment concerns. Prosper Decl. ¶¶ 10, 12. This chilling effect would jeopardize the cooperation of other nations in the war on terrorism. Prosper Decl. ¶¶ 10, 12; Waxman Decl. ¶ 8.

Because of these foreign relations implications, as developed most extensively in the analogous context of extradition, courts have uniformly eschewed inquiry into "'the fairness of a requesting nation's justice system'" and "'the procedures or treatment which await a surrendered fugitive in the requesting country.'" United States v. Kin-Hong, 110 F.3d 103, 110 (1st Cir. 1997) (quoting Arnbjornsdottir-Mendler v. United States, 721 F.2d 679, 683 (9th Cir. 1983)). This principle is sometimes called the Rule of Non-Inquiry. For example, in Ahmad v. Wigen, 910 F.2d 1063 (2d Cir. 1990), a United States citizen was extradited from the United States to Israel to stand trial for an alleged terrorist attack. While the district court upheld the extradition only after receiving testimony and extensive documentation concerning Israel's law enforcement system and treatment of prisoners, the Second Circuit held that such inquiry was improper. "The interests of international comity are ill-served," the Second Circuit explained, "by requiring a foreign nation such as Israel to satisfy a United States district judge concerning the fairness of its laws and the manner in which they are enforced." Id. at 1067. "It is the function of the Secretary

of State to determine whether extradition should be denied on humanitarian grounds." Id. Accord Escobedo v. United States, 623 F.2d 1098, 1107 (5th Cir. 1980) (refusing to bar extradition based on allegations that appellant "may be tortured or killed if surrendered to Mexico," because "the degree of risk to [Escobedo's] life from extradition is an issue that properly falls within the exclusive purview of the executive branch" (internal quotation marks omitted)); Peroff v. Hylton, 563 F.2d 1099, 1102 (4th Cir. 1977); Matter of Extradition of Sandhu, 886 F. Supp. 318, 321-23 (S.D.N.Y. 1993). See generally Jacques Semmelman, Federal Courts, the Constitution, and the Rule of Non-Inquiry in International Extradition Proceedings, 76 Cornell L. Rev. 1198 (1991).[16]

The force of these principles is not diminished by the fact that the relief petitioners seek covers any kind of prospective transfer or repatriation – indeed, any "removal" from Guantanamo – not merely an extradition.[17] The considerations that underlie the Rule of Non-Inquiry are not

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[16] In Cornejo-Barreto v. Seifert, 218 F.3d 1004 (9th Cir. 2000), two Judges on a panel of the Ninth Circuit stated in dicta that a permanent resident within the United States facing extradition could seek judicial review of his claim that he would be tortured if extradited. But see id. at 1017 (Kozinski, J., concurring) (not joining this part of the panel opinion). However, in a later appeal growing out of the same case, another panel of the Ninth Circuit disagreed with that dicta and held, consistent with previous Ninth Circuit precedent, Lopez-Smith v. Hood, 121 F.3d 1322 (9th Cir. 1997), that the Rule of Non-Inquiry barred judicial review of such a claim. Cornejo-Barreto v. Seifert, 379 F.3d 1057 (9th Cir. 2004). While that appeal was still pending (the Ninth Circuit having granted rehearing en banc), the case became moot when the foreign government seeking extradition withdrew its request. Accordingly, the Ninth Circuit dismissed the appeal, vacating as moot the 2004 panel opinion and the district court opinion it reviewed. Cornejo-Barreto v. Seifert, 389 F.3d 1307 (9th Cir. 2004).

[17] To the extent that petitioners' argument may evolve into a contention that they may not be repatriated or transferred except in accordance with an extradition treaty or statute, such a contention would be wholly without merit. See United States v. Alvarez-Machain, 504 U.S. 655 (1992); Ker v. Illinois, 119 U.S. 436 (1886); Coumou v. United States, 107 F.3d 290, 295 (5th Cir. 1997) (reversing lower court's holding, 1995 WL 2292, *11 (E.D. La. Jan. 3, 1995), that (continued...)

endemic to the specific context of extradition, but instead are "shaped by concerns about institutional competence and by notions of separation of powers." Kin-Hong, 110 F.3d at 110; see also Matter of Requested Extradition of Smyth, 61 F.3d 711, 714 (9th Cir. 1995) ("Undergirding this principle is the notion that courts are ill-equipped as institutions and ill-advised as a matter of separation of powers and foreign relations policy to make inquiries into and pronouncements about the workings of foreign countries' justice systems."); Sandhu, 886 F. Supp. at 321 ("The rule of non-inquiry arises from recognition that the executive branch has exclusive jurisdiction over the country's foreign affairs."); cf. Holmes, 459 F.2d at 1219-23 (holding, in a non-extradition context, that considerations similar to those embodied in the Rule of Non-Inquiry made it improper for the Judiciary to examine allegations of unfairness in a foreign nation's trial of a U.S. citizen). Thus, petitioners do not have a likelihood of success on the merits because their claim necessarily depends on judgments about custodial conditions and/or the adequacy of legal procedures in a foreign country as well as the credibility and adequacy of a foreign government's assurances – matters '"for which the Judiciary has neither aptitude, facilities nor responsibility and have long been held to belong in the domain of political power not subject to judicial intrusion or inquiry.'" People's Mojahedin, 182 F.3d at 23 (quoting Chicago & Southern, 333 U.S. at 111).

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Thus, petitioners have not demonstrated a likelihood of success on the merits. The treaty

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[17](...continued)
"[n]or did the United States, or its officers or agents, have the discretion to deliver an arrested person to the government of Haiti, unless the extradition laws of the United States were followed").

and statute provisions they raise do not create a valid basis for either an injunction against repatriation or transfer, or an order requiring advance notice whose only purpose would be to enable and facilitate the seeking of such an injunction in the future. And, apart from the absence of affirmative legal authority, separation of powers considerations and foreign relations sensitivities preclude a judicial inquiry in which this Court would substitute its judgment regarding the appropriateness of repatriation for that of the appropriate Executive Branch officials.

B. Petitioners Have Not Demonstrated That They Will Suffer Irreparable Injury Absent the Order They Seek

The irreparable harm that must be shown to justify a preliminary injunction "must be both certain and great; it must be actual and not theoretical." Wisconsin Gas v. FERC, 758 F.2d 669, 674 (D.C. Cir. 1985). "Injunctive relief will not be granted against something merely feared as liable to occur at some indefinite time; the party seeking injunctive relief must show that the injury complained of is of such imminence that there is a clear and present need for equitable relief to prevent irreparable harm." Id. (citations and internal quotation marks omitted; emphasis in original).

Here, petitioners fall far short of this standard and offer nothing more than hollow speculation. Their motion generally rests on "upon information and belief" assertions drawn from newspaper and magazine stories and editorials that rely on largely anonymous sources and innuendo to make sensationalistic allegations.[18] The sole asserted basis for any connection to any

[18] Petitioners strive mightily to extract sinister inferences from the case of a United States citizen studying in Saudi Arabia who was arrested in Saudi Arabia by Saudi authorities and detained there by them, before being recently returned to the United States to face criminal (continued...)

of the actual petitioners is an exceedingly vague representation by counsel that one petitioner told counsel that unidentified interrogators, at an unspecified time, in an unspecified context, "threatened" him with "rendition" to Egypt or Jordan. Petrs' Mem. at 1, 2. This allegation of threats is not sworn, is double hearsay, relates only to a single petitioner out of twelve, and is not accompanied by any context that might lend it credibility. More importantly, any notion that such alleged threats will imminently be carried out is more than amply rebutted by the two declarations of high-level United States Government officials submitted herewith that set forth the specific United States policies and procedures with respect to detainees at Guantanamo.[19]

Thus, there is not the slightest basis for concluding that, absent the relief sought, petitioners will experience harm that is certain, great, and imminent. Indeed, what will actually happen absent the advance-notice order requested, is that the United States will comply with its policy reflecting the principles of the Convention Against Torture: petitioners will not be repatriated or transferred if the Executive Branch finds that it is more likely than not that they will be tortured in the country of destination. The United States Government would seek appropriate assurances from their destination country and would evaluate whether they are

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[18](...continued)
charges here. Petrs' Mem. at 4. Notwithstanding petitioners' eagerness to equate a preliminary ruling calling for jurisdictional discovery with a factual finding of constructive custody, and to grasp for some illusory connection to this case, the Abu Ali case – which involved a foreign nation returning an individual that foreign nation had arrested and detained to the United States, rather than the United States repatriating or transferring an individual the United States captured abroad to a foreign nation – has nothing to do with this one.

[19] The timing of petitioners' motion itself belies the urgency feigned by petitioners. See supra note 8. Far from legitimately perceiving a risk of imminent irreparable harm, it seems apparent that petitioners are simply jumping on the bandwagon after seeing petitioners in another case file a similar motion.

sufficient or whether additional assurances or other measures are necessary to conclude that they are not likely to be tortured. If specific concerns about the treatment after transfer could not be resolved satisfactorily, the United States would not transfer the individual. Thus, the policy of the United States is structured to guard against exactly the risks that petitioners fear. An injunction requiring 30 days advance notice to the Court and petitioners' counsel in contemplation of judicial supervision or intervention would simply interfere with these policies running their course, resulting potentially in the very "delay" of repatriation that petitioners previously urged violates the Geneva Conventions.

C. An Injunction Would Disserve Both Substantial Governmental Interests and the Public Interest

On this motion, the public interest and harm-to-non-movant factors converge, for the public interest substantially overlaps with the Government's interest in maintaining its prerogative to manage the detention of enemy combatants taken into custody in the worldwide war against al Qaeda and its supporters, as well as to conduct foreign relations with other nations free of interference.[20]

The Executive, acting through the Military, unquestionably has the power to detain enemy combatants to prevent them from returning to the fight and continuing to wage war against the

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[20] The relief petitioners request, far from being supported by the public interest, purely would advance the private interests of enemy aliens. Petitioners address the public interest factor only in cursory fashion, asserting conclusorily that "the public good requires that a federal litigant . . . be provided with a meaningful opportunity to contest his transfer into the hands of those who might torture him or detain him indefinitely." Petrs' Mem. at 6. However, this assertion gratuitously and self-servingly mischaracterizes the issue: as discussed above, any transfer or repatriation of petitioners that could conceivably occur would necessarily be predicated on an informed determination by senior Executive Branch officials that petitioners were not likely to be tortured upon return, based on, where appropriate, suitable assurances to that effect from the receiving government.

United States. Hamdi v. Rumsfeld, 124 S. Ct. 2633, 2640 (2004) (plurality opinion) (quoting Ex parte Quirin, 317 U.S. 1, 28 (1942)). The power to detain necessarily carries with it the power to manage those detentions, including the power to end those detentions by repatriating or transferring the detainees when consistent with the national security interests, foreign relations interests, and policies of the United States. Judicial intervention in such matters would do irreparable harm to these interests in myriad ways. It would prevent the United States from speaking with one voice in its dealings with foreign governments. It would cause foreign governments to become more reluctant to communicate frankly with the United States concerning particular mistreatment or torture concerns, undermining the United States Government's ability to investigate and resolve allegations of mistreatment or torture that come to its attention. Prosper Decl. ¶¶ 9-10; Waxman Decl. ¶ 8. It would undermine the United States' ability to reduce the numbers of individuals under U.S. control and our effectiveness in eliciting the cooperation of other governments in the war on terrorism. Prosper Decl. ¶ 12; Waxman Decl. ¶ 8. And it would encumber and add delay to an already elaborate process leading up to transfers or repatriations. Prosper Decl. ¶ 12.

Even a single instance of judicial intervention would bring about the irreparable harm described above. However, in considering the balance of interests here, it is necessary and appropriate to think not merely in terms of this motion involving twelve detainees, but in the context of the precedent it will inevitably set – particularly if granted on so flimsy a showing – for the over 30 cases pending in this District involving over 100 Guantanamo detainees, or

potentially, all of the over 500 Guantanamo detainees.[21] This motion itself mimics a similar motion filed recently in el-Mashad v. Bush, Civ. A. No. 05-CV-270 (JR), and a motion that is a near clone of this one was recently filed in a third case, Al Adahi v. Bush, Civ. A. No. 05-280 (GK). Based on past experience in these cases, it is reasonably expected that before the ink dries on any injunction issued in this case, petitioners in a number of other cases would run into court to demand similar relief, raising the prospect of pervasive and programmatic judicial management that would essentially reduce the Executive Branch to an advisory role with respect to the transfer and repatriation of wartime detainees. The separation of powers and the public interest cannot tolerate such an arrogation. Therefore, the Court should not institute an advance notice requirement whose only purpose would be to enable and facilitate it.

CONCLUSION

For the foregoing reasons, respondents respectfully request that petitioners' motion be denied.

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Respectfully submitted,

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[21] One recently filed case purports to assert next-friend habeas claims on behalf of unidentified Guantanamo detainees "John Does 1 - 570." Doe v. Rumsfeld, Civil Action No. 1:05-CV-313 (CKK). On March 3, 2005, counsel in Doe brought a motion seeking an order requiring, inter alia, that the Government not move any Guantanamo detainees to any other detention facility without advance notice to counsel so that they can challenge any such movement in court. By here citing Doe, respondents do not mean to imply in any way that it is a legitimate habeas corpus case. However, irrespective of their propriety, the Doe case and the March 3 motion therein serve as an apt illustration of the universal judicial management role that is contemplated by petitioners' counsel and foreshadowed by the instant motion.

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