IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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| MAHMOAD ABDAH, *et al.* | ) | |
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| Petitioners, | ) | |
| | ) | |
| v. | ) | Civil Action No. 04-CV-1254 (HHK) |
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| GEORGE W. BUSH, *et al.*, | ) | |
| | ) | |
| Respondents. | ) | |
| | ) | |

**RESPONDENTS' RESPONSE TO THE COURT'S MARCH 16, 2005 ORDER AND MOTION TO VACATE TEMPORARY RESTRAINING ORDER AND MEMORANDUM IN SUPPORT THEREOF**

Respondents hereby respond to the Court's March 16, 2005 Order requiring respondents to indicate whether they consent to an extension of the March 12, 2005 temporary restraining order (dkt. no. 120) ("TRO") in this case through March 24, 2005. Respondents do not consent to an extension of the TRO.[1] Rather, because the TRO was entered, and rests, upon an erroneous factual predicate and because there is no need for a TRO in this matter, as explained below, respondents hereby move to vacate the TRO.[2]

**BACKGROUND**

On Friday, March 11, 2005, in the dark of night, and without inquiry to respondents' counsel regarding the veracity of facts upon which they were acting, petitioners' counsel moved

[1] The TRO may not expire by its terms until March 25, 2005, *see Flying Cross Check, L.L.C. v. Central Hockey League, Inc.*, 153 F. Supp. 2d 1253, 1258 (D. Kan. 2001) (TROs under FED. R. CIV. P. 65(b) expire after ten business days, as calculated under FED. R. CIV. P. 6(a)) (citing cases); nonetheless, respondents object to any extension of it. The TRO should be vacated.

[2] Respondents' counsel has conferred with petitioners' counsel regarding the motion to vacate the TRO. Petitioners' counsel does not consent to the motion.

for entry of a TRO preventing the allegedly imminent transfer of petitioners from the U.S. Naval Base at Guantanamo Bay, Cuba ("GTMO"), to another country (dkt. no. 121). Government counsel was not notified of the motion, either prior to or upon its filing. The afternoon of the next day, Judge Collyer, acting as emergency motions judge, entered a TRO restraining respondents from removing petitioners from GTMO pending a March 24, 2005 hearing on petitioners' previously pending motion for 30-days' advance notice of any transfer of petitioners,[3] or for ten days, whichever was less. The TRO was entered without prior notice to government counsel, though counsel was notified by the Court through telephone voicemail and the ECF system once the TRO was entered. In the Memorandum Opinion supporting the TRO (dkt. no. 118), Judge Collyer recounted the alleged factual basis for the TRO, stating:

> [T]he *New York Times* ran a story on March 11, 2005, describing a proposal by the Pentagon and Secretary of Defense Donald Rumsfeld to transfer more than half of the GTMO detainees to prisons in Saudi Arabia, Afghanistan, and Yemen. Petitioners' counsel also learned from co-counsel at the Center for Constitutional Rights, "citing information from a person, who, for professional reasons, refuses to make her sources public – that the government intends to transfer many detainees very quickly." Petitioners' *Ex Parte* Motion for Temporary Restraining Order to Prevent Respondents From Removing Petitioners From Guantanamo Until Petitioners' Motion for Preliminary Injunction Is Decided ("Pets.' Motion"), Declaration of Marc D. Falkoff ("Falkoff Decl.") ¶ 3. Petitioners seek an *ex parte* TRO "because they are apprehensive that a public filing will provoke respondents to initiate the exact dark-of-night transfers that petitioners seek to prevent." Pets.' Motion at 2.

TRO Mem. Op. at 2. Judge Collyer rested her TRO, and apparently the lack of notice to government counsel regarding the TRO motion, upon the correctness of these allegations. She acknowledged that FED. R. CIV. P. 65(b) permits a TRO to be entered without notice to a party only where facts are shown that irreparable injury "will result to the applicant before the adverse

[3] *See* dkt. no. 115.

party or that party's attorney can be heard in opposition." *Id.* at 3, 8. The Court stated that it "pause[d] over whether the Petitioners ha[d] shown the immediacy of potential harm that justifies a TRO before the Government or its attorney could be heard," given that "the only evidence of immediacy here is third- or fourth-hand hearsay" from co-counsel at the Center for Constitutional Rights. *See id*. at 7. Noting, however, that petitioners had filed their TRO motion *ex parte* "to avoid precipitating any hasty action by the Government to avoid addressing" in Court the issue of a transfer, and citing the Government's general objection to providing prior notice of any transfer of detainees to petitioners' counsel,[4] the Court found a risk of irreparable harm "sufficiently immediate to warrant" a TRO. *Id*. at 8-9.

**ARGUMENT**

The TRO should be vacated because the factual basis on which it rests is erroneous. As provided in the declaration of DoD's Deputy Assistant Secretary for Detainee Affairs, there is no plan being considered, nor has a plan been considered in the recent past, to effect an immediate transfer of large numbers of DoD detainees held at GTMO ("GTMO detainees"), such as petitioners, out of GTMO, including to other countries. *See* Second Declaration of Matthew C. Waxman ¶ 4 (attached as Exhibit A). Further, no transfer of any current habeas petitioner in this case, or the other pending individual GTMO habeas cases, would happen, if at all, for several

[4] Respondents opposed petitioners' motion seeking advance notice of transfers on various grounds, including that no legal basis for such notice in view of judicial review exists and that judicial review of proposed transfers would violate separation of powers considerations. *See* Respondents' Memo. in Opp. to Petrs' Mot. for Order Requiring Advance Notice of Any Repatriations or Transfers from Guantanamo (dkt. no. 116) ("Respondents' Opp. to PI").

weeks, at a minimum.[5] *Id*.[6] Thus, the representations of petitioners' counsel to the Court in their TRO motion concerning alleged DoD plans for an impending mass transfer of GTMO detainees were, and remain, erroneous.

Petitioners' counsel's accusation in their TRO motion that DoD would undertake transfers of GTMO detainees in the "dark of night" as part of a calculated effort to attempt to strip the Court of jurisdiction also was, and is, false. As Mr. Waxman declares, there is no plan to effect transfers of GTMO detainees in order to thwart the jurisdiction of any court. *Id*. The only transfer of GTMO detainees since March 8, 2005, has been the release of three detainees who were determined by DoD no longer to be enemy combatants. *Id*. ¶ 2; *see* DoD News Release (Mar. 12, 2005), available at <<www.defenselink.mil/releases/2005/nr20050312-2226.html>>. The transfer and repatriation of GTMO detainees began and has continued for several years based on considerations not related to court proceedings. *See* Respondents' Opp. to PI , Declaration of Deputy Assistant Secretary of Defense for Detainee Affairs Matthew C. Waxman ¶¶ 3-7; DoD News Releases (Oct. 28, 2002 – Mar. 12, 2005), available at <<www.defenselink.mil/news/detainees.html>>. Thus, the situation on Saturday, March 12,

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[5] This statement should not be construed as confirming that DoD is contemplating any transfer of petitioners in this case, each of whom has been confirmed by military Combatant Status Review Tribunals to be an enemy combatant subject to detention. Regardless, however, for the reasons stated in respondents' opposition to petitioners' motion seeking advance notice, it is not appropriate that respondents provide advance notice of transfers solely to enable counsel to attempt to exercise a veto over any such transfers through involvement of judicial process. *See* Respondents' Memo. in Opp. to Petrs' Mot. for Order Requiring Advance Notice of Any Repatriations or Transfers from Guantanamo (dkt. no. 116).

[6] Petitioners' counsel were made aware of this fact on Monday, March 14, 2005, *see* E-mail from Terry M. Henry (attached as Exhibit B), yet have not consented to the motion to vacate the TRO.

2005, when the TRO was issued, was no different than that that had existed since this case was filed, and well before.

Furthermore, to the extent the TRO was based on a fear of transfer of any petitioners to countries where they would be subjected to torture, at the behest of the United States or otherwise, the sworn declarations previously submitted in this case make clear that United States' policy with respect to GTMO detainees is not to repatriate or transfer individuals to other countries where it believes it is more likely than not that they will be tortured. *See* Respondents' Opp. to PI at 2-6 & Declaration of Deputy Assistant Secretary of Defense for Detainee Affairs Matthew C. Waxman ¶ 5 (GTMO detainees transferred to other countries for continued detention are no longer subject to the control of the United States once transferred; most of the 65 detainees so transferred have subsequently been released); *id.* ¶ 6 (noting policy); *id.* Declaration of Ambassador Pierre-Richard Prosper ¶¶ 3-9 (noting policy and practice).[7]

Accordingly, the factual bases for the entry of the TRO in this case were, and are, erroneous. No transfer of any petitioner would occur for weeks, at least, providing more than enough time for the Court to address the issues raised in petitioners' motion for advance notice of

[7] Petitioners' counsel also attempted to convey a sense of emergency based on "information that [he] learned from viewing classified documents concerning Petitioners this afternoon [the day of filing the TRO motion] at the Secure Facility in Crystal City, Virginia." Falkoff Decl. ¶ 4. That information, however, had been continuously available to counsel for almost four months (the classified factual returns in this case were deposited at the Secure Facility on November 15, 2004). Judge Collyer did not explicitly rely on any such information in her TRO and Memorandum Opinion. In any event, the information cited at page 4, and pages 5-6, of petitioners' TRO motion plainly does not support the inferences petitioners draw from it. The information quoted at pages 5-6 is perfectly consistent with the fact that a detainee transferred to the control of a foreign government is no longer subject to the control of the United States. Likewise, the year-old document cited at page 4 simply does not rebut the clear policy of the United States as set forth in two sworn declarations of high-level officials in two different Executive Branch agencies.

transfers in an orderly fashion. Indeed, although a large number of motions for preliminary injunctions requiring advance notice regarding transfers were precipitated by the *New York Times* article as interpreted by the TRO filings in this case, no other Judge of this Court has entered a TRO, based on the government's representations – consistent with those herein – regarding the timing of any transfers. Rather, the matters are proceeding on a preliminary injunction motion schedule. There is similarly no need for a TRO in this case.

Had counsel for respondents been notified of the pendency of petitioners' TRO motion and been provided an opportunity to respond, even through a telephone conference, counsel could have exposed the erroneous factual premise on which the TRO motion was based and perhaps averted the issuance of an unnecessary order in this matter of public moment and interest. This incident demonstrates the dangers of *ex parte* reliance upon "third- and fourth-hand hearsay" and of crediting such information even over the integrity of agencies of the Executive Branch and their counsel.[8]

**CONCLUSION**

For the foregoing reasons, respondents do not consent to extension of the March 12, 2005 TRO and respectfully request that the TRO be vacated.

Dated: March 16, 2005

Respectfully submitted,

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[8] *Cf. National Archives and Records Admin. v. Favish*, ___ U.S. ___, 124 S. Ct. 1570, 1581-82 (2004) (Court applies "general working principle" that presumption of legitimacy attaches to conduct of government officials and "clear evidence" is required to overcome it).

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