

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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ELHAM BATTAYAV,	)	
	)	
Petitioner,	)	
	)	
v.	)	Civil Action No. 05-714 (RBW)
	)	
GEORGE W. BUSH, et al.,	)	
	)	
Respondents.	)	
	)	

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**RESPONDENTS' MEMORANDUM IN OPPOSITION TO PETITIONER'S MOTION  
TO VACATE ORDER OF MAY 3, 2005 DENYING PRELIMINARY INJUNCTION**

Respondents oppose petitioner’s motion to vacate this Court’s prior Order dated May 3, 2005 (see dkt. no. 23), denying petitioner’s motion for a preliminary injunction requiring advance notice of any repatriation or transfer from Guantanamo. This Court previously denied such a preliminary injunction after finding that “[t]he petitioner’s legal arguments and factual predicates in this motion are substantially identical to those that this Court recently rejected in denying a similar motion in another case. See Almurbati v. Bush, 366 F. Supp. 2d 72 (D.D.C. Apr. 14, 2005).” Petitioner’s legal arguments and factual predicates remain substantially identical to those the Court already rejected in Almurbati, and petitioner presents no valid basis for the Court to reconsider its earlier decision in this matter.

**A. LEGAL STANDARD**

While the Court may revise its interlocutory orders “as justice requires,” this phrase is “a shorthand for more concrete considerations.” Singh v. George Washington Univ., Civ. A. No. 03-1681(RCL), 2005 WL 2009875, \*1 (D.D.C. Aug. 23, 2005). Specifically, “[j]ustice may require revision when the Court has ‘patently misunderstood a party, has made a decision outside

the adversarial issues presented to the Court by the parties, has made an error not of reasoning but of apprehension, or where a controlling or significant change in the law or facts [has occurred] since the submission of the issue to the Court.” Id. (citing Cobell v. Norton, 224 F.R.D. 266, 272 (D.D.C. 2004)). “Errors of apprehension may include a Court’s failure to consider ‘controlling decisions or data that might reasonably be expected to alter the conclusion reached by the court.’” Id. (citing Shrader v. CSX Transp., Inc., 70 F.3d 255, 257 (2d Cir. 1995)).

Importantly, “the district court’s discretion to reconsider a non-final ruling is, however, limited by the law of the case doctrine and subject to the caveat that where litigants have once battled for the court’s decision, they should not be required, nor without good reason permitted, to battle for it again.” Id. (citing In re Ski Train Fire, 224 F.R.D. 543, 546 (S.D.N.Y. 2004) (internal quotation marks and citation omitted)).

## **B. ARGUMENT**

The Court correctly denied petitioner’s motion for a preliminary injunction seven months ago. In his current motion, petitioner resurrects the previously rejected themes made in his earlier motion that, absent an injunction, petitioner is at risk of the United States “rendering” him to his own country for torture and continued detention by the United States. This Court previously found that the sworn declarations by high-level United States officials that respondents submitted “directly refute the petitioners’ allegations of their potential torture, mistreatment and indefinite detention to which the United States will in some way be complicit.”

Almurbati, 366 F. Supp. 2d at 78.<sup>1</sup> The supplemental factual allegations petitioner now introduces do not approach the level of a “controlling or significant change in the law or facts since the submission of the issue to the Court.” Singh, 2005 WL 2009875, \*1 (internal quotation marks omitted). Indeed, petitioner’s new allegations mirror similar allegations made by the petitioners in Almurbati, a parallel that only reinforces the Court’s previous conclusion that the issues in the two cases are substantially identical.

In particular, petitioner relies most heavily on allegations that on several occasions beginning in early 2002 and ending in January 2004, he was threatened by certain individuals – individuals who, in all but one case, are not even alleged to be employees of the United States – with the prospect of being returned to his home country.<sup>2</sup> Petitioner ignores, however, that similar types of allegations were, indeed, before the Court in Almurbati:

[O]ne petitioner alleges that he was told by an unidentified United States official at Guantánamo Bay that “he would be sent to a prison where he would be raped.” *Id.* at 2 (citing Declaration of Joshua Colangelo-Bryan dated March 15, 2005 (“Colangelo-Bryan Decl.”) ¶ 2). Another petitioner alleges that he was also told by an unidentified United States official at Guantánamo Bay that “he would be sent to a prison that would turn him into a woman.” *Id.* (citing Colangelo-Bryan Decl. ¶ 3).

Almurbati, 366 F. Supp. 2d at 76. The Court discounted these allegations because “[n]otably, however, the petitioners do not allege that these statements were made by officials who will play a role in determining where they will be sent upon their release.” *Id.* Exactly the same is true

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<sup>1</sup> The Declaration of former Ambassador Pierre-Richard Prosper has been filed in this case at dkt. no. 7, ex. 1C (4/25/05). An updated version of the Declaration of Deputy Assistant Secretary of Defense Matthew C. Waxman has been filed in this case as dkt. no. 16 (7/11/05).

<sup>2</sup> Respondents do not concede the truth of these allegations, but take them at face value, arguendo, for purposes of this motion.

here: petitioner fails to allege that any of the statements he cites were made by officials of the United States who set and implement policy and/or who will play a role in determining whether he will be released or transferred, and if so, to where. Further, as the Court previously recognized, respondents' sworn declarations of high-level officials explain how the process actually does work, and refute any notion that the individuals who petitioner alleges threatened him would have decision-making authority in this regard.

Since this Court ruled in Almurbati, another Judge has joined this Court in refusing to credit these types of allegations as a basis for exercising judicial supervision over transfers. In O.K. v. Bush, 377 F. Supp. 2d 102 (D.D.C. 2005), as here, petitioner tried to bolster his motion for advance notice of a transfer and distinguish prior, rejected motions by introducing secondhand allegations that "interrogators threatened petitioner on more than one occasion with transfer to a third country where he would be sexually assaulted." Id. at 117. The Court held:

The issue here is whether the allegation of such threats amount to sufficient evidence of an actual transfer in the imminent future to warrant a different result in this case than the one reached in Al-Anazi. As to this question, the Court notes once again the declarations in the record from high-level officials in the Department of Defense and Department of State that it is not the policy or practice of the United States to transfer detainees for the purpose of torture or any other improper reason. It is this policy and practice that is relevant to whether there is a basis for the Court to issue an order providing thirty days' notice of a transfer, not what an interrogator may have told a detainee in an attempt to induce him to divulge information. Petitioners do not cite any evidence that the interrogators have taken steps to carry out their threat to transfer the petitioner, or that a transfer of petitioner is otherwise imminent. Petitioners also do not cite any facts that rebut the officials' sworn declarations in this case. Thus, the Court rejects this attempt to distinguish the instant case from Al-Anazi, and denies petitioners' motion for notice prior to transfer.

Id. at 117-18.

Petitioner also cites a February 2004 classified document from his factual return, the

unclassified portion of which contains its author's unremarkable recommendation that petitioner be transferred "to the custody of another government for continued detention and monitoring." Such a recommendation is fully consistent with the Waxman and Prosper Declarations, which make clear that one type of transfer of Guantanamo detainees is a transfer for any continued detention, investigation, and/or prosecution, deemed appropriate under its laws. In such cases, "the detainee is transferred entirely to the custody and control of the other government, and once transferred, is no longer in the custody and control of the United States; the individual is detained, if at all, by the foreign government pursuant to its own laws and not on behalf of the United States." Waxman Decl. ¶ 5.<sup>3</sup> Moreover, the interest of the United States in such situations is in ascertaining "what measures the receiving government intends to take pursuant to its own domestic laws and independent determinations that will ensure the detainee will not pose a continuing threat to the United States and its allies." *Id.* The document petitioner cites is 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, and does not remotely support the inference of a looming sinister "constructive custody" arrangement that petitioner attempts to ascribe to it.<sup>4</sup>

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<sup>3</sup> As of the date of the Waxman Declaration, 67 Guantanamo detainees had been transferred to the control of their home governments for further detention, investigation and/or prosecution, Waxman Decl. ¶ 4, most of whom had subsequently been released by their home countries, *id.* ¶ 5. The number of such transfers now stands at 76. *See* U.S. Dep't of Defense News Release dated Nov. 5, 2005, published at <http://www.defenselink.mil/releases/2005/nr20051105-5073.html>.

<sup>4</sup> Ignoring the unambiguous statements to the contrary in the Waxman Declaration, petitioner loads his brief with repeated, loose insinuations that if petitioner were transferred the United States would retain custody of him and would then be detaining him in concert with a foreign government for nefarious ends. *See, e.g.,* Petr's Mem. at 2 (further detention would be "in coordination with United States authorities"), 2 (upon transfer, United States government  
(continued...)

Moreover, the Prosper and Waxman declarations make clear that the policy of the United States is not to repatriate or transfer a detainee to a country when the United States believes, based on a number of factors and considerations, it is more likely than not that the individual will be tortured there. Nothing in the document petitioner cites can be read to create any doubt about whether, before any transfer actually occurred, that policy would be followed.

For the above reasons, the new allegations that petitioner makes would not constitute a sufficient predicate even for an injunction in the first instance, let alone rise to the level of a “controlling or significant change in the . . . facts since the submission of the issue to the Court.” Singh, 2005 WL 2009875, \*1 (internal quotation marks omitted).

### CONCLUSION

Having “once battled for the court’s decision,” the parties “should not be required, nor without good reason permitted, to battle for it again.” Singh, 2005 WL 2009875, at \*1 (internal quotation marks omitted). Respondents respectfully request that petitioner’s motion to vacate the Court’s earlier ruling denying a preliminary injunction be denied.

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<sup>4</sup>(...continued)  
 would continue to exercise “probable control”), 3 (“it is the intent of Respondents to retain some control over this continued detention”), 6 (“further detention and interrogation in coordination with U.S. intelligence officials”), 8 (“they [U.S. officials] would be coordinating Petitioner’s continued detention”), 12 (“it is the intention of the United States to be coordinating or otherwise controlling Petitioner’s continued detention and interrogation”), 12 (arguing that a transfer would constitute an attempt by respondents “to circumvent the Court’s jurisdiction”). Once again, petitioner offers no evidence to support these insinuations, which are clearly contradicted by the sworn declarations in the record, and it is clear that the “underlying basis for [his] claims . . . is [his] basic distrust of the Executive Branch,” “based on nothing more than speculation, innuendo and second hand media reports.” Almurbati, 366 F. Supp. 2d at 78.

Dated: December 6, 2005

Respectfully submitted,

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