

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SAIFULLAH PARACHA,)	
)	
)	
Petitioner,)	
)	
v.)	Civil Action No. 04-CV-2022 (PLF)
)	
GEORGE W. BUSH,)	
President of the United States,)	
<i>et al.</i> ,)	
)	
Respondents.)	

**OPPOSITION TO PETITIONER'S MOTION FOR PRELIMINARY
INJUNCTION ORDERING HIS REMOVAL FROM ISOLATION
AND PROHIBITING HIS RENDITION**

INTRODUCTION

Despite the fact that the Court has stayed this case, Petitioner has filed a Motion For Preliminary Injunction Ordering His Removal From Isolation And Prohibiting His Rendition ("Motion for Preliminary Injunction") in which he seeks an order transferring him to the least onerous conditions of confinement available at the United States Naval Base at Guantanamo Bay, Cuba ("GTMO") and prohibiting his removal from GTMO without thirty days' notice.

Petitioner's Motion for Preliminary Injunction should be denied in its entirety because Petitioner has failed to provide a sufficient factual or legal basis to justify departure from the stay in this case for purposes of the requested relief. Issues underlying the purported legal basis for Petitioner's challenge to the manner in which he is confined are being reviewed on appeal by the D.C. Circuit in related cases involving other detainees. Further, the asserted factual basis for Petitioner's complaint about the nature of his confinement is insufficient to justify the Court's intrusion into the decisions of military authorities regarding the appropriate level of security in which to detain Petitioner. The Court should also refrain from intervening in the Executive's determinations regarding releases or transfers of detainees when the evidence is that the Department of Defense does not transfer detainees from GTMO to be tortured and there is no credible evidence to the contrary, and when such judicial intervention would transgress the principle of separation of powers. Accordingly, Petitioner's Motion for Preliminary Injunction is inappropriate, unsound, and should be denied.¹

¹ The arguments presented herein support a denial of Petitioner's Motion For Preliminary Injunction under the traditional four-factor analysis requiring an assessment of (1) the movant's likelihood of success on the merits; (2) the possibility of irreparable harm to the movant without interim relief; (3) the harm to others should the injunction be granted; and (4) the public interest. See, e.g., Mova Pharm. Corp. v. Shalala, 140 F.3d 1060, 1066 (D.C. Cir. 1998). Petitioner fails to explicitly address these factors in his Motion For Preliminary Injunction, and an extensive factor-by-factor analysis is not necessary to deny the Motion.

BACKGROUND

Petitioner, a citizen of Pakistan currently detained as an enemy combatant at GTMO, initiated this action by filing a Petition for Writ of Habeas Corpus on November 17, 2004. On that same day, Petitioner filed a Motion or Application for a Temporary Restraining Order and for a Preliminary Injunction requesting an order that would prohibit Respondents from removing Petitioner from the Court's jurisdiction. In that motion, Petitioner posited that if Respondents moved Petitioner to another part of the world, Respondents would argue that the Court lacked jurisdiction to hear his case and that he would lose the benefits of the Court's procedures designed to facilitate communications between Petitioner and counsel. See Petitioner's Motion or Application for a Temporary Restraining Order and for a Preliminary Injunction (dkt. no. 2) (Nov. 17, 2004). On December 7, 2004, after full briefing and oral argument, the Court denied Petitioner's motion concluding that "petitioner had not met the standards for a preliminary injunction and particularly that his irreparable harm argument was speculative and conjectural." See Order (dkt. no. 10) (Dec. 7, 2004).

On December 16, 2004, the Amended Protective Order and Procedures for Counsel Access to Detainees at the United States Naval Base in Guantanamo Bay, Cuba, In re Guantanamo Detainee Cases, 344 F. Supp.2d 174 (D.D.C. 2004) ("Protective Order"), which was previously adopted by Senior Judge Joyce Hens Green in the coordinated GTMO detainee cases, was entered in this case. See Order (dkt. no. 13) (Dec. 16, 2004). Petitioner subsequently moved to vacate the Protective Order (dkt. no. 20), but the Court denied that motion on March 23, 2005. See Order (dkt. no. 49) (Mar. 23, 2005).

Respondents filed a motion to dismiss Petitioner's habeas petition and a factual return

explaining the basis for Petitioner's detention as an enemy combatant on January 18, 2005. See Response to Amended Petition for Habeas Corpus and Motion to Dismiss or for Judgment as a Matter of Law and Supporting Memorandum (dkt. no. 22) (Jan. 18, 2005); Respondents' Factual Return to Petition for Writ of Habeas Corpus by Petitioner Saifullah Paracha and Notice of Submission of Factual Return Under Seal ("Respondents' Factual Return") (dkt. no. 21) (Jan. 18, 2005). A Combatant Status Review Tribunal ("CSRT") found Petitioner to be affiliated with the al Qaeda terrorist organization after reviewing evidence related to such matters, including (1) that Petitioner was involved in an al Qaeda plan to smuggle explosives into the United States; (2) that Petitioner held and managed large amounts of al Qaeda money given to him by known al Qaeda operatives; and (3) that Petitioner recommended to an al Qaeda operative that nuclear weapons be used against U.S. troops and suggested where such weapons might be obtained.²

Respondents' Factual Return, Ex. A.³

On January 19, 2005, Judge Richard Leon of this Court issued a Memorandum Opinion and Order granting respondents' Motion to Dismiss or For Judgment As A Matter of Law in two other GTMO detainee cases. See Khalid v. Bush, Boumediene v. Bush, Nos. 04-CV-1142 (RJL), 04-CV-1166 (RJL), 355 F. Supp.2d 311 (D.D.C. 2005). Judge Leon held that "no viable legal theory exists" by which the Court "could issue a writ of habeas corpus" in favor of the GTMO detainees. Id. at 314. In reaching this decision, Judge Leon concluded that aliens held at GTMO,

² Additionally, Petitioner's son, Uzair Paracha, has been indicted for providing material support to a foreign terrorist organization, among other offenses. See United States v. Paracha, 03-cr-1197 (S.D.N.Y.).

³ The Court is referred to the classified version of Respondents' Factual Return, on file with the Court, for further detail regarding the evidence supporting Petitioner's enemy combatant classification.

that is, outside the sovereign territory of the United States, are not possessed of constitutional rights.⁴ Furthermore, Judge Leon determined that “the Court’s role in reviewing the military’s decision to capture and detain a non-resident alien is, and must be, highly circumscribed,” and that the Court would “not probe into the factual basis for the petitioners’ detention.” Id. at 329. According to Judge Leon, the Constitution allocates exercise of war powers “among Congress and the Executive, not the Judiciary,” and such separation of powers concerns necessarily limit any role of the Court in reviewing challenges of non-resident aliens to their detention in the midst of ongoing armed conflict. Id. Judge Leon also noted that petitioners’ challenges to the conditions of their custody did not support the issuance of a writ of habeas corpus because such claims, even if true, would not render the custody itself unlawful. Id. at 324-25.

On January 31, 2005, Judge Green entered a Memorandum Opinion and Order in eleven other pending GTMO habeas cases denying in part and granting in part Respondents’ Motion to Dismiss or For Judgment As A Matter of Law. See Memorandum Opinion Denying in Part and Granting in Part Respondents’ Motion to Dismiss or for Judgment as a Matter of Law, No. 02-CV-0299, et al., In re Guantanamo Detainee Cases, 355 F. Supp.2d 443 (D.D.C. 2005). In contrast to Judge Leon’s decision, Judge Green held that “the detainees at Guantanamo Bay have the fundamental right to due process of law under the Fifth Amendment” to challenge the legality of their detention through petitions for writs of habeas corpus. Id. at 463. Based on this decision, Judge Green concluded that the CSRT proceedings the Military has used to confirm petitioners’ status as enemy combatants do not satisfy procedural due process requirements. Id.

⁴ Judge Leon also indicated that assuming petitioners did possess constitutional rights, the CSRT proceedings the Military has used to confirm petitioners’ status as enemy combatants afford petitioners appropriate process. See Khalid, 355 F. Supp.2d at 323 n.16.

at 465-78. Judge Green also adopted the reasoning of Judge Robertson in Hamdan v. Rumsfeld, 344 F. Supp.2d 152, 165 (D.D.C. 2004), appeal pending No. 04-5393 (D.C. Cir.), to conclude that Articles 4 and 5 of the Third Geneva Convention are “self-executing” and can provide some petitioners – those held because of their relationship with the Taliban, but not those held as al Qaeda – with a judicially enforceable claim in a habeas action to a hearing consistent with Article 5 of the Third Geneva Convention to determine whether the detainee qualifies for “prisoner of war” protections, as defined by Article 4 of the Convention. Id. at 478-80. Finally, Judge Green dismissed petitioners’ remaining claims under the Sixth, Eighth, and Fourteenth Amendments, the Suspension Clause, other international treaties, and under Army Regulation 190-8, the Alien Tort Statute and the Administrative Procedure Act. Id. at 480-81.

On February 3, 2005, in response to a motion filed by respondents, Judge Green certified for interlocutory appeal her January 31, 2005 opinion and stayed proceedings in the eleven cases coordinated in In re Guantanamo Detainee Cases for all purposes pending the resolution of all appeals. Various petitioners in the eleven cases sought reconsideration of Judge Green’s stay order, arguing that the Court should permit factual development and proceedings regarding detainee living conditions to go forward, but Judge Green denied the motion for reconsideration

in light of the substantial resources that would be expended and the significant burdens that would be incurred should this litigation go forward, and . . . [in] recognition that a reversal of the Court’s January 31, 2005 rulings would avoid the expenditure of such resources and incurrence of such burdens

See In re Guantanamo Detainee Cases, Order Denying Motion for Reconsideration of Order Granting Stay Pending Appeal (Feb. 7, 2005).

On February 9, 2005, pursuant to Judge Green’s certification, respondents filed a petition

for interlocutory appeal of the January 31, 2005 decision with the D.C. Circuit, see 28 U.S.C. § 1292(b), and requested that the appeal proceed on an expedited basis. Petitioners, in the coordinated cases, in responding to the petition for interlocutory appeal, filed their own cross-petition for interlocutory appeal. On March 10, 2005, the D.C. Circuit granted the petition and cross-petition for interlocutory appeal, and set an expedited briefing schedule that concludes on June 28, 2005.⁵

On March 23, 2005, the Court in the present case granted Respondents' motion to stay and stayed this case pending resolution of all appeals of Judge Green's January 31, 2005 decision in In re Guantanamo Detainee Cases and of Judge Leon's January 19, 2005 decision in Khalid v. Bush. See Order (dkt. no. 49) (Mar. 23, 2005).⁶

On April 5, 2005, Petitioner filed his current Motion For Preliminary Injunction (dkt. no. 50). In this motion, Petitioner complains about the conditions of his detainment specifically asserting that he is improperly being held in solitary confinement. Petitioner also repeats his previous request that the Court protect its jurisdiction by preventing Respondents from removing Petitioner from the GTMO detention facility. As relief, Petitioner requests a preliminary injunction transferring him to the least onerous conditions of confinement reasonably available at GTMO and an injunction prohibiting Respondents from removing Petitioner from GTMO, or

⁵ This appeal has been docketed with the Court of Appeals as case number 05-5064. Additionally, the D.C. Circuit set a briefing schedule for the appeal of Judge Leon's decision dismissing all detainee claims in Khalid v. Bush, No. 04-CV-1142 (RJL) and Boumediene v. Bush, No. 04-CV-1166 (RJL), 355 F. Supp.2d 311 (D.D.C. 2005), appeals docketed, Nos. 05-5062, 05-5063 (D.C. Cir. Mar. 2, 2005). Briefing concludes in these appeals on June 8, 2005.

⁶ The Court noted that motions for emergency relief would be exempted from the stay. Id.

requiring 30 days' advance notice to counsel and the Court of any such transfer, unless he is set free in Karachi, New York, or Washington. See Petitioner's Proposed Order ¶¶ A-B.⁷

ARGUMENT

I. JUDICIAL INTERFERENCE WITH THE CONDITIONS OF PETITIONER'S CONFINEMENT AT GTMO IS NOT WARRANTED.

A. The Court Should Not Address Petitioner's Complaint About the Nature of His Confinement While the Asserted Legal Bases for His Claims Could be Resolved or Determined by the Appeals to the D.C. Circuit and the Case is Stayed.

As an initial matter, the Court should not entertain the legal challenges to the conditions of Petitioner's confinement at GTMO when the legal bases for any such claims at all are involved in the appeal to the D.C. Circuit. Although not entirely clear from Petitioner's Points and Authorities in Support of Petitioner's Motion for Preliminary Injunction Ordering His Removal From Isolation and Prohibiting His Rendition ("Petitioner's Memorandum"), Petitioner appears to rely on the Due Process Clause of the Fifth Amendment and the Third Geneva Convention to support his Motion For Preliminary Injunction⁸; however, he ignores the fact that appeals are presently pending in the D.C. Circuit that will address the scope of these rights as applied to alien

⁷ Although Petitioner's Proposed Order omits any reference to a request for 30 days' notice of any transfer and is instead phrased in terms of an injunction completely barring Petitioner's removal from GTMO, unless he is set free entirely, see Petitioner's Proposed Order ¶ A, the first paragraph of Petitioner's Motion For Preliminary Injunction requests 30 days' notice, see Motion For Preliminary Injunction at 1. Although not entirely clear, Respondents presume Petitioner is seeking both remedies.

⁸ Petitioner makes various references to "due process" and cites to several cases such as Sandin v. Conner, 515 U.S. 472 (1995), and Hatch v. District of Columbia, 184 F.3d 846 (D.C. Cir. 1999), that discuss due process concerns regarding the imposition of administrative or disciplinary segregation on prisoners. See Petitioner's Memorandum at 6-7. Petitioner also explicitly references the Third Geneva Convention. Id. at 9-10.

enemy combatants detained at GTMO.⁹

As noted above, in Khalid v. Bush and Boumediene v. Bush, Nos. 04-CV-1142 (RJL), 04-CV-1166 (RJL), 355 F. Supp.2d 311 (D.D.C. 2005), Judge Leon held that “no viable legal theory exists” by which the Court “could issue a writ of habeas corpus” in favor of the GTMO detainees. Id. at 314. In reaching this decision, Judge Leon concluded that aliens held at GTMO, “possess no cognizable constitutional rights” including rights under the Fifth Amendment Due Process Clause. Id. at 321. The petitioners in those cases also conceded that the Geneva Convention did not apply to them because they were not captured in the zone of hostilities around Afghanistan. Id. at 326.

Conversely, with respect to the issue of constitutional rights, Judge Green, in In re Guantanamo Detainee Cases, 355 F. Supp.2d 443 (D.D.C. 2005) found only that “the detainees at Guantanamo Bay have the fundamental right to due process of law under the Fifth Amendment” to challenge the legality of their detention through petitions for writs of habeas

⁹ To the extent Petitioner contests the nature of his detention based on Army Regulation 190-8, see Petitioner's Memorandum at 10, such a challenge plainly lacks merit. Both Judge Leon's decision in Khalid and Judge Green's decision in In re Guantanamo Detainee Cases determined that Army Regulation 190-8 did not provide a viable basis on which GTMO detainees could obtain relief. See Khalid, 355 F. Supp.2d at 326 (finding that Army Regulation 190-8 does not create a private right of action); In re Guantanamo Detainee Cases, 355 F. Supp.2d at 480-81 (rejecting claim based on Army Regulation 190-8, citing arguments explaining that determinations of whether the Military has complied with Army Regulation 190-8 are better left to the Executive, not the Judiciary). And to the extent Petitioner asserts that the manner in which he is confined violates the Eighth Amendment's prohibition against cruel and unusual punishment, such a claim also lacks any merit. In Khalid, Judge Leon determined that the non-resident aliens detained at GTMO have no cognizable constitutional rights whatsoever, thus precluding any claim under the Eighth Amendment. Khalid, 355 F. Supp.2d at 321. And Judge Green rejected petitioners' Eighth Amendment claims because the Eighth Amendment applies only after an individual is convicted of a crime, and none of the petitioners, including Mr. Paracha, have been. See In re Guantanamo Detainee Cases, 355 F. Supp.2d at 480-81.

corpus. Id. at 463.¹⁰ Judge Green also adopted the reasoning of Judge Robertson in Hamdan v. Rumsfeld, 344 F. Supp.2d 152, 165 (D.D.C. 2004), appeal pending No. 04-5393 (D.C. Cir.), to conclude that Articles 4 and 5 of the Third Geneva Convention are “self-executing” and can provide some petitioners – only those, unlike Petitioner, held because of their relationship with the Taliban – with a judicially enforceable claim in a habeas action to a hearing consistent with Article 5 of the Third Geneva Convention to determine whether the detainee qualifies for “prisoner of war” protections, as defined by Article 4 of the Convention. Id. at 478-80.

The D.C. Circuit granted interlocutory appeal in Judge Green's case and will determine in that case and in the appeal of Judge Leon's cases, on an expedited basis, whether and to what extent detainees at GTMO have any rights under the Fifth Amendment and whether the Third Geneva Convention gives rise to any judicially enforceable rights, either generally or with respect to al Qaeda- or Taliban-associated detainees. In light of the potential for the D.C. Circuit's ruling to moot or at least significantly impact the legal bases for the present motion, the likelihood that any decision by this Court regarding Petitioner's right to challenge the nature of his confinement would have to be relitigated or revisited once the Court of Appeals provides guidance on the Fifth Amendment or Geneva Convention issues, and for the other reasons discussed infra, the Court should not consider Petitioner's current challenge to the conditions of his confinement at GTMO until the appeals are resolved. As demonstrated, allowing Petitioner to contest the nature of his detention would be at odds with the Court's order staying this case pending resolution of the appeals of Judge Leon's and Judge Green's decisions. See Order (dkt. no. 49) (March 23,

¹⁰ Because Judge Green held that the GTMO detainees have a Fifth Amendment right merely to challenge the legality of their confinement, her decision does not directly authorize detainees to contest the conditions of their confinement.

2005).¹¹ Accordingly, to avoid any needless expenditure of any further judicial and litigation resources, the Court should deny Petitioner's Motion for Preliminary Injunction.

B. The Factual Record Does Not Warrant the Court's Involvement in the Conditions of Petitioner's Confinement.

Regardless of the pendency of the appeals involving the core legal bases for Petitioner's motion, the record here does not warrant the Court's involvement in Petitioner's conditions of confinement, that is, Petitioner has not made a sufficient showing of irreparable harm.

Petitioner's counsel's assertion that Petitioner is being held in "solitary confinement" is an inaccurate characterization of the nature of Petitioner's detention and fails to justify the Court's intervention into military determinations of the appropriate level of security necessary to detain particular individuals at GTMO. Contrary to Petitioner's suggestions, the mission of military authorities operating the detention center is the safe, secure, and humane treatment of all detainees at GTMO, including Petitioner.

Counsel's contention that Petitioner is being held in solitary confinement or

¹¹ Other GTMO detainees have attempted unsuccessfully to raise similar challenges to the conditions of their confinement. In Al Odah, et al. v. United States, Case No. 02-0828 (CKK), Judge Green, acting as coordinating judge, twice rejected petitioners' requests to assert claims objecting to their confinement conditions in light of the appeals pending in the D.C. Circuit and the fact that the case was stayed. See Al Odah, et al., Order Denying Motion for Reconsideration of Order Granting Stay Pending Appeal (Feb. 7, 2005) (preventing claims regarding conditions of confinement to proceed "in light of the substantial resources that would be expended and the significant burdens that would be incurred should this litigation go forward"). Petitioners' third attempt to litigate their conditions of confinement claims is currently pending. See Plaintiffs-Petitioners' Motion For a Preliminary Injunction and Provisional Motion to Modify Stay Pending Appeals, filed Mar. 11, 2005, in Al Odah, et al. In O.K. v. Bush, 344 F. Supp.2d 44, 60-63 (D.D.C. 2004), Judge Bates rejected a detainee's request for an order requiring an independent medical examination and production of medical records finding that petitioner had not alleged a substantive violation of a legal right and had not offered sufficient competent evidence of medical neglect.

administrative segregation is problematical. Counsel for Petitioner has not yet visited GTMO, and his assertion is based entirely on Petitioner's unsworn, conclusory assertion in his CSRT record that he is being held in "isolat[ion]" at GTMO. See Petitioner's Memorandum at 6. Petitioner's statement, however, fails to provide any details about the true conditions of his detention at GTMO beyond his general description of being in isolation. The factual support offered by Petitioner's counsel is not sufficient to conclude that Petitioner is being detained in isolation, which Petitioner's counsel characterizes as "solitary confinement," or that Petitioner's physical or mental condition requires immediate Court intervention.

Contrary to counsel's description of Petitioner being held in "solitary confinement," Petitioner is not "segregated" from the general population of detainees as in a typical solitary confinement situation. Instead, Petitioner is merely housed with certain other detainees in a maximum security facility.¹² While Respondents do not contest that Petitioner is housed in an individual cell, he does have access to an outdoor exercise yard for approximately one hour each day. See Kathleen T. Rhem, "Detainees Living in Varied Conditions at Guantanamo," American Forces Information Service, February 16, 2005 (attached as Exhibit A). And like all other detainees at GTMO, Petitioner is treated humanely and receives adequate shelter, food, water and medical care at all times. See Declaration of John A. Hadjis ¶¶ 2-3 (attached as Exhibit B) (originally submitted in O.K. v. Bush, Case No. 04-1136 (JDB)). Petitioner is also afforded the

¹² Detainees at GTMO are divided into four levels based on their compliance with camp rules, with Level 1 being the most compliant and Level 4 being the most non-compliant. See Kathleen T. Rhem, "Detainees Living in Varied Conditions at Guantanamo," American Forces Information Service, February 16, 2005 (attached as Exhibit A). The detainees are housed in three different types of camps with varying levels of security. Id. The maximum security facility houses Level 4 detainees and detainees with high intelligence value. Id.

necessities to maintain personal hygiene, including time for showers. Id. ¶ 3. Moreover, the detention center hospital and medical staff are available to provide medical care twenty-four hours a day. Id.; see also Declaration of Dr. John S. Edmondson ("Edmondson Decl.") (attached as Exhibit C) (originally submitted in O.K. v. Bush, Case No. 04-1136 (JDB)).¹³

Counsel's discussion of the psychological impact of solitary confinement is also misleading and inapplicable in this case. See Petitioner's Memorandum at 11-12. There is simply no evidence in the record that Petitioner is suffering from any psychological affliction. The affidavit of Petitioner's so-called expert, a professor of linguistics, makes no specific reference to Petitioner, nor does it discuss Pakistanis in particular, but rather makes sweeping generalizations about "the probable impact of solitary confinement on persons from the middle east." See Affidavit of Margaret K. (Omar) Nydell (attached to Petitioner's Memorandum). Importantly, the affidavit does not define the contours of what the expert means by "solitary confinement" or relate it to Petitioner's specific situation. This speculative, overgeneralized opinion is an insufficient basis to justify the Court's intervention into the conditions of Petitioner's confinement through a preliminary injunction. In any event, the detention center hospital is supported by a twenty-one member Behavioral Health Service (BHS) staff, including a board-certified psychiatrist and a Ph.D. psychologist, to address any psychological issues presented by the detainees. Edmondson Decl. ¶ 4.

Accordingly, regardless of the label used to describe the terms of Petitioner's

¹³ The Edmondson Declaration is the version filed on the public record in O.K. v. Bush, which has health information specific to petitioner O.K. redacted. See O.K. v. Bush, Respondents' Motion to Designate as "Protected Information" Certain Information in Memorandum of Points and Authorities in Opposition to Petitioner's Application for Preliminary Injunction and Two Declarations in Support Thereof (dkt. no. 116) (Apr. 13, 2005).

confinement, Petitioner has failed to make a showing of irreparable harm or to offer any evidence that Petitioner's physical or mental condition warrants departure from the stay in this case or compels the granting of Petitioner's request for the extraordinary relief of a preliminary injunction.¹⁴ 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) (emphasis in original). Petitioner

¹⁴ Even if the Court were to conclude that it is justified in reviewing Petitioner's allegations regarding his conditions of confinement, there is no reason for the Court, itself, to procure statements directly from the Petitioner regarding those conditions. Petitioner's counsel's request that the Court obtain directly from Petitioner a handwritten account of his general conditions of confinement, see Petitioner's Memorandum at 13, is based on the false premise that counsel are prohibited from meeting or communicating with their detainee clients. Contrary to counsel's assertions, a heavily negotiated protective order has been entered in this case and all the other cases involving GTMO detainees, which allows for security-cleared counsel to communicate and visit with their clients provided that certain procedures are followed. See Order (dkt. no. 13) (Dec. 16, 2004) (adopting Amended Protective Order and Procedures for Counsel Access to Detainees at the United States Naval Base in Guantanamo Bay, Cuba, In re Guantanamo Detainee Cases, 344 F. Supp.2d 174 (D.D.C. 2004)). As explained more fully in Respondents' Opposition to Motion to Vacate Order Entered December 16, 2004 Applying Protective Order (dkt. no. 35) (Feb. 15, 2005), the procedural requirements contained in the Protective Order are necessary to protect classified national security information and other protected information while permitting counsel to access the GTMO detainees.

Numerous attorneys for other petitioners held at GTMO have already complied with the Protective Order procedures and have visited with their clients and communicate with them on an ongoing basis. Indeed, Petitioner's counsel was recently authorized to receive his security briefing that would enable him to possess interim secret level clearance, but he informed the court security officers for the GTMO litigation matters that he did not want his security clearance at this time. As soon as Petitioner's counsel receives his security clearance and complies with the procedures in the Protective Order, he will be permitted to send and receive legal mail to and from his client and to visit his client at GTMO if he wishes. Petitioner's counsel, rather than the Court, thus will be able to obtain information directly from his client. Accordingly, there is no reason for the Court to undertake to conduct Petitioner's litigation efforts for counsel by requiring the submission of a handwritten report from Petitioner, and this request should be denied.

Petitioner's additional request that the Court order Respondents to file a report on Petitioner's general conditions of confinement, see Proposed Order ¶ C, should be denied for the same reasons. Moreover, Respondents already have described Petitioner's confinement conditions above.

has failed to make an appropriate showing here.

C. The Court Should Not Grant Petitioner's Requested Relief When He Cannot Demonstrate a Likelihood of Success and the Requested Relief Would Impose Significant Harms on the Military and the Public Interest.

Petitioner's request for a preliminary injunction regarding his conditions of confinement also should be denied because Petitioner cannot demonstrate a likelihood of success generally and because the requested relief would impose significant harms on the government and the public interest by improperly interfering with the judgment of the Military regarding the detention of enemy combatants.

1. The Authority Cited by Petitioner Does Not Support Departure From the Stay and Imposition of a Preliminary Injunction.

Petitioner attempts to graft the Supreme Court's analysis in Sandin v. Conner, 515 U.S. 472, 484 (1995), which indicates that due process is required when prison authorities impose "atypical and significant hardship on [an] inmate in relation to the ordinary incidents of prison life," onto the circumstances surrounding his own confinement at GTMO.¹⁵ In Sandin, the

¹⁵ Petitioner's reliance on the doctrine of "jus cogens" and customary international law is also unavailing. See Petitioner's Memorandum at 9-10. Jus cogens is "[a] mandatory or peremptory norm of general international law accepted and recognized by the international community as a norm from which no derogation is permitted." Black's Law Dictionary (8th ed. 2004). Customary international law results from a general, consistent, and widely accepted practice of states, followed out of a sense of legal obligation and not merely because the practice may be politically desirable, morally required, or just a good idea. See Committee of U.S. Citizens Living in Nicaragua v. Reagan, 859 F.2d 929, 940 (D.C. Cir. 1988); Buell v. Mitchell, 274 F.3d 337, 372-73 (6th Cir. 2001). The existence of customary international law does not authorize the free-wheeling exercise of judicial power over and against domestic legal norms or government action, however. In the United States, "[i]t has long been established that customary international law is part of the law of the United States to the limited extent that 'where there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations.'" United States v. Yousef, 327 F.3d 56, 92 (2d Cir. 2003) (quoting The Paquete Habana, 175 U.S. 677, 700 (1900)) (emphasis in original). The President's legitimate exercise of his powers under the Constitution and Congress's Authorization

Supreme Court determined that convicted criminals are entitled to due process protections when being punished for disciplinary reasons, but only if the nature of the punishment constitutes an "atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." Sandin, 515 U.S. at 484. This standard is frequently employed to evaluate challenges to the imposition of solitary confinement or disciplinary segregation by incarcerated prisoners. This standard, however, does not apply in Petitioner's case because he is not a convicted criminal and the particular conditions of his confinement have not been imposed on him as a method of "punishment" for disciplinary reasons. To the contrary, Petitioner is an alien enemy combatant who is being detained, not in solitary confinement, but in a maximum security facility at GTMO in order to prevent him from assisting in the enemy's battle against the United States. See Hamdi v. Rumsfeld, 124 S. Ct. 2633, 2640 (2004) (plurality opinion) (detention of enemy combatants is not punishment nor penal in nature, but is to "prevent captured individuals from returning to the field of battle and taking up arms once again."). Accordingly, the analysis in Sandin does not apply to the circumstances of Petitioner's confinement and cannot provide a basis for granting a

for Use of Military Force ("AUMF"), Pub. L. No. 107-40, 115 Stat. 224 (2001), which consented to the President's use of "all necessary and appropriate force against those nations, organizations, or persons" involved in the September 11, 2001 terrorist attacks, constitute "controlling executive or legislative acts" that permit the detention of enemy combatants in maximum security facilities and negate any need to resort to customary international law. See Hamdi v. Rumsfeld, 124 S. Ct. 2633, 2640 (2004) (plurality opinion) (indicating that detention of enemy combatants is "so fundamental and accepted an incident of war as to be an exercise of . . . 'necessary and appropriate force'"). Moreover, Petitioner cites to no clear evidence of a mandatory or preemptory international norm, or even a consistent and widespread norm, that prevents placement of non-prisoner-of-war enemy combatants in maximum security confinement during a worldwide war against terrorist organizations. Accordingly, Petitioner's "jus cogens" and customary international law argument provides no basis for his requested relief.

preliminary injunction.¹⁶

Even if the standard articulated in Sandin were somehow applicable to Petitioner, the nature of his confinement is not a per se constitutional violation. Petitioner portrays all incidents of solitary confinement or disciplinary segregation as per se constitutional violations, but courts frequently uphold the imposition of such confinement conditions. In Sandin itself, the Supreme Court determined that placement of an inmate for thirty days in a single-person cell in a Special Holding Unit used for disciplinary segregation did not constitute an atypical and significant hardship on the inmate that would trigger due process protections. 515 U.S. at 475-76 n.2, 486. Many other courts have also found no constitutional problems with inmates subjected to various forms of disciplinary segregation. See, e.g., Bonner v. Parke, 918 F. Supp. 1264, 1270 (N.D. Ind. 1996) (finding that placement of prison inmate in disciplinary segregation for term of three years did not impose atypical and significant hardship on inmate, as would create liberty interest protected by due process clause on part of inmate in remaining in general prison population); Smith v. District of Columbia, 1996 WL 61775, * 2 (D.D.C. 1996) (holding that no liberty interest was created by placement of inmate into segregation for three months); Novak v. Beto, 453 F.2d 661, 665 (5th Cir. 1971) (concluding that solitary confinement in a lightless cell, with limited bedding and minimal food did not constitute cruel and unusual punishment where the inmate was not deprived of the basic elements of hygiene and noting the "long line of cases . . . holding that solitary confinement *per se* is not 'cruel and unusual.'" (emphasis in original).

In particular, courts have found that placements of inmates in maximum security prisons,

¹⁶ As a result, Petitioner's discussion of a suggested baseline comparison to use to determine if his confinement conditions are "atypical" under Sandin, including his references to the confinement conditions of World War II prisoners of war, is irrelevant.

similar to the facility in which Petitioner is detained, do not implicate due process rights of the Fifth or Fourteenth Amendments nor do they violate the Eighth Amendment's prohibition against cruel and unusual punishment. See, e.g., Meachum v. Fano, 427 U.S. 215, 225 (1976) (finding that prisoners who were transferred from medium to maximum security prisons did not have due process interests to challenge the transfer and recognizing that such transfer decisions "traditionally have been the business of prison administrators rather than of the federal courts."); Donaldson v. Ducote, 2004 WL 2320073 at ** 2 (5th Cir. 2004) (holding that transfer of prisoner to confinement in a maximum security cellblock was not an atypical significant hardship that would trigger due process protections); Hill v. Pugh, 2003 WL 22100960 at ** 4-** 5 (10th Cir. 2003) (finding that federal prisoner's placement in a maximum security prison where he was isolated in his cell for twenty-three hours a day and suffered from sensory deprivation did not implicate due process rights under the Fifth Amendment or constitute cruel and unusual punishment under the Eighth Amendment where prisoner's minimal physical requirements for food, shelter, clothing, and warmth were satisfied)¹⁷; Campbell v. District of Columbia, 874 F. Supp. 403, 407 (D.D.C. 1994) (holding that prisoner's confinement for ten months in a maximum security cellblock where he was restricted to his cell for twenty-three hours a day did not violate the Fifth or Eighth Amendments). Thus, even under the standard proposed by Petitioner, he has failed to demonstrate that his conditions of confinement warrant judicial relief and, especially, preliminary injunctive relief.

As explained above, Petitioner's reference to the due process discussion in Sandin is

¹⁷ Consistent with the rules of the Fifth and Tenth Circuit Courts of Appeals, the unpublished opinions in Donaldson and Hill are cited for their persuasive value. See 5th Cir. R. 47.5.4; 10th Cir. R. 36.3 (B).

inapplicable and unavailing in the present case in which Petitioner is making a general conditions of confinement complaint that merely focuses on one aspect of his confinement – the alleged solitary nature of it. Petitioner also cannot demonstrate a likelihood of success based on other potential sources of law. Neither Judge Leon nor Judge Green in either of their opinions addressed conditions of confinement claims or decided what legal standard should govern them. In fact, because no court has ever determined that enemy combatants detained by the Military can even bring conditions of confinement claims, no court has determined what legal standard should be applied to evaluate such claims brought by enemy combatants detained by the Military. The Supreme Court has explained that constitutional challenges to conditions of confinement brought by convicted criminals are analyzed under the Eighth Amendment’s “deliberate indifference” standard, which requires a prisoner to establish that prison officials “were knowingly and unreasonably disregarding an objectively intolerable risk of harm to the prisoners’ health or safety.”¹⁸ Farmer v. Brennan, 511 U.S. 825, 834-35, 846 (1994); see also Ingram v. Wright, 430 U.S. 651, 664 (1977) (holding that the Eighth Amendment applies only to “those convicted of crimes”). In contrast, the constitutional standard of care owed to “pretrial detainees” in the criminal justice context – defined by the Supreme Court as “those persons who have been

¹⁸ This standard is applicable both to claims alleging inadequate medical care as well as challenges to general conditions of confinement, such as inadequate food, clothing, and cell temperature. See Wilson v. Seiter, 501 U.S. 294, 303 (1991) (“Whether one characterizes the treatment received by the prisoner as inhumane conditions of confinement, failure to attend to his medical needs, or a combination of both, it is appropriate to apply the ‘deliberate indifference’ standard articulated in Estelle [v. Gamble], 429 U.S. 97 (1976)”). The two-prong deliberate indifference test requires the moving party to establish first that “the deprivation alleged must be, objectively, sufficiently serious, . . . a prison official’s act or omission must result in the denial of the minimal civilized measure of life’s necessities”; second, a prison official must have a “sufficiently culpable state of mind” – “one of deliberate indifference to inmate health or safety.” Farmer, 511 U.S. at 834 (internal quotations omitted).

charged with a crime but who have not yet been tried on that charge” – is governed by the Due Process Clause of the Fifth Amendment. Bell v. Wolfish, 441 U.S. 520, 523, 536 (1979).

“[W]here it is alleged that a pretrial detainee has been deprived of liberty without due process, the dispositive inquiry is whether the challenged condition, practice, or policy constitutes punishment, for under the Due Process Clause, a detainee must not be punished prior to an adjudication of guilt in accordance with due process of law.”¹⁹ Block v. Rutherford, 468 U.S. 576, 583 (1984) (internal quotations omitted); see also Brogdsdale v. Barry, 926 F.2d 1184, 1188 n.4 (D.C. Cir. 1991).

Neither of these two standards, however, clearly applies to the GTMO detainees and, in any event, would not provide Petitioner with a likelihood of success on his claim. As discussed, Petitioner has not been convicted of any crime, thus he cannot rely on the Eighth Amendment as a basis for his conditions of confinement claim. See In re Guantanamo, 355 F. Supp.2d at 465-78 (dismissing Eighth Amendment claims). Similarly, Petitioner is not a “pretrial detainee,” as defined by the Supreme Court, because he has not been charged with a crime, nor is he being detained as part of the criminal justice system. See Hamdi v. Rumsfeld, 124 S. Ct. 2633, 2640 (2004) (detention of enemy combatants is not punishment or penal in nature). Furthermore, the criminal justice interests served by confining “pretrial detainees” are completely distinct from the military and national security interests served by detaining Petitioner as an “enemy combatant.”

¹⁹ Although the Supreme Court has never resolved the precise relationship between these two tests, see City of Canton v. Harris, 489 U.S. 378, 389 n.8 (1989) (reserving “whether something less than the Eighth Amendment’s ‘deliberate indifference’ test may be applicable in claims by [pretrial] detainees asserting violations of their due process right to medical care while in custody”), the Court has explained that “the due process rights of a pretrial detainee are at least as great as the Eighth Amendment protections available to a convicted prisoner.” County of Sacramento v. Lewis, 523 U.S. 833, 849-50 (1998).

Compare Wolfish, 441 U.S. at 536-37 (criminal justice interest served by pretrial detention is to ensure detainees' presence at trial), with Hamdi, 124 S. Ct. at 2640 ("The capture and detention of lawful combatants and the capture, detention, and trial of unlawful combatants is to prevent captured individuals from returning to the field of battle and taking up arms once again.").²⁰ The uncertainty of the law in this area is illustrated by the fact that the only Judge of this Court who has touched on the issue of a condition of confinement claim by a GTMO detainee reserved the question whether "the 'deliberate indifference' doctrine is the correct standard for any constitutional claims that petitioners might raise in this case." O.K. v. Bush, 344 F. Supp.2d 44, 60-63 & n.23 (D.D.C. 2004) (Bates, J.) ("Without concluding that the 'deliberate indifference' doctrine applies" to challenges regarding inadequate medical care, "the Court will draw on this well-developed body of law to guide its analysis"). As explained below, Petitioner cannot demonstrate a likelihood of success even under that standard in this context.

2. Petitioner's Motion Does Not Justify Displacement of the Judgment of the Military Authorities at GTMO Regarding the Manner In Which Petitioner Is Detained.

Petitioner is asking the Court to second-guess the decisions of the Military regarding the manner in which he is detained and the appropriate level of security to be applied to him. Even in the penal context, however, prison administrators are entitled to great deference regarding the ways in which they manage prisons and the means used to detain prisoners. The Supreme Court

²⁰ Detention of enemy combatants is equally important to the gathering of vital intelligence concerning the capabilities, internal operations, and intentions of the enemy. See Howard S. Levie, Prisoners of War in International Armed Conflict, 59 Int'l Law Studies 5, 108-09 (U.S. Naval War College 1977) (explaining that interrogation of enemy detainees is an "important technique in modern warfare"). Such intelligence-gathering is especially critical in the current, unconventional conflict.

has stated that the operation of even domestic “correctional facilities is peculiarly the province of the Legislative and Executive Branches of our Government, not the Judicial,” and has admonished lower courts to avoid becoming “enmeshed in the minutiae of prison operations.” Bell v. Wolfish, 441 U.S. 520, 548, 562 (1979). Only upon a showing that prison conditions or care sink to the level of “deliberate indifference” to an inmate’s health or well-being is a court justified in intervening into the treatment of inmates in the traditional penal prison setting. See Neitzke v. Williams, 490 U.S. 319, 321 (1989). Accordingly, the Supreme Court has directed that prison administrators “should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security.” Wolfish, 441 U.S. at 547; see also Thornburgh v. Abbott, 490 U.S. 401, 408 (1989) (“Acknowledging the expertise of these officials and that the judiciary is ‘ill equipped’ to deal with the difficult and delicate problems of prison management, this Court has afforded considerable deference to the determinations of prison administrators who, in the interest of security, regulate the relations between prisoners and the outside world.”). These same principles counsel that the Court should decline Petitioner’s request to entangle itself in the particulars of the manner in which he is confined at the GTMO detention center. Indeed, in light of the fact that Petitioner is challenging the practices of a military detention center during a time of war, separation of powers principles may require satisfaction of an even more stringent standard before judicial intervention is warranted than in the penal context. See, e.g., Hamdi v. Rumsfeld, 124 S. Ct. 2633, 2647 (2004) (stating that “[w]ithout doubt, our Constitution recognizes that core strategic matters of war-making belong in the hands of those who are best positioned and most politically accountable for making them”);

id. at 2640 (noting that capture and detention of combatants is an "important incident of war"); Ludecke v. Watkins, 335 U.S. 160, 170 (1948) (finding that determination of state of war and status of individual as enemy alien are "matters of political judgment for which judges have neither technical competence nor official responsibility"); cf. Hirota v. MacArthur, 338 U.S. 197, 215 (1949) (Douglas, J., concurring) (stating that "the capture and control of those who were responsible for the Pearl Harbor incident was a political question on which the President as Commander-in-Chief, and as spokesman for the nation in foreign affairs, had the final say."). Petitioner, however, has not satisfied even the "deliberate indifference" standard that would apply in the penal context. The record demonstrates that Petitioner is detained in a manner in which he receives adequate food, shelter, water, hygiene opportunities, medical care, and exercise. See supra Section I. B. Accordingly, Petitioner's request for a preliminary injunction should be denied.²¹

II. THE COURT SHOULD CONTINUE TO NOT INTERVENE IN THE EXECUTIVE'S DECISIONS REGARDING REPATRIATION OR TRANSFER OF ENEMY COMBATANT DETAINEES.

Petitioner is seeking a second bite at the apple with his repeat request for the Court to enjoin Respondents from removing Petitioner from GTMO unless he is released completely to freedom in certain cities. Petitioner, however, fails to present any new and compelling evidence that would warrant the Court to reverse course and issue such an injunction. Even on its merits, the requested injunction should be denied because the Court should not interfere with the foreign

²¹ Respondents have submitted appropriate public record evidence to respond to Petitioner's wholly inadequate factual and legal arguments. Additional information justifying the precise conditions of Petitioner's confinement can be supplied to the Court in a classified format, if warranted.

policy decisions of the Executive Branch. The Court should thus reject Petitioner's attempt to relitigate the prior ruling in this case and deny Petitioner's request for an injunction.

Petitioner admits that his current request for an injunction prohibiting his removal from GTMO is simply a renewal of his previously rejected motion. See Petitioner's Memorandum at 15.²² The Court should once again deny Petitioner's request for a preliminary injunction preventing his removal from GTMO because there is no factual or legal basis for the Court to interfere with the foreign policy and national security decisions of the Executive Branch. As discussed more fully in Respondents' Memorandum in Opposition to Petitioners' Motions for Temporary Restraining Orders and Preliminary Injunctions ("Consolidated Opposition"), which was filed as a consolidated opposition to similar motions filed in fifteen other GTMO habeas cases, and which Respondents incorporate herein by reference and attach hereto as Exhibit D, the United States does not transfer individuals to countries where it is more likely than not that they will be tortured. See Declaration of Matthew C. Waxman ¶ 6 ("Waxman Decl.") (attached as

²² As mentioned previously, Petitioner's current Motion for Preliminary Injunction does also include a request for thirty days' advance notice to the Court and counsel of any planned removal of Petitioner from GTMO, which was not included in Petitioner's previous motion. See Motion For Preliminary Injunction at 1. The request for notice, however, does not materially distinguish his current motion from his previously rejected motion because the sole purpose of the notice request is to allow Petitioner to move for the very same injunction prohibiting his transfer that he unsuccessfully sought previously, and is again seeking now, as soon as he receives such notice.

Although this Judge has ordered that thirty days' advance notice of any transfer of petitioners be given to the Court and counsel for petitioners in the related cases Al-Shiry, et al. v. Bush, Civil No. 05-0490, and Al-Wazan v. Bush, Civil No. 05-0329, see Orders dated April 1, 2005, Respondents respectfully submit that the request for such notice by Petitioner in the present case should be denied. As just explained, the only purpose of such notice is to allow Petitioner to seek a preliminary injunction that would outright block his transfer from GTMO, and as demonstrated infra, such an injunction would impermissibly intrude on the Executive Branch's authority over foreign affairs and national security. As a result, the notice would serve no permissible purpose and should be denied.

Exhibit B to Consolidated Opposition); Declaration of Pierre-Richard Prosper ¶ 4 ("Prosper Decl.") (attached as Exhibit C to Consolidated Opposition). To the contrary, if a detainee's transfer out of GTMO is found to be warranted, the Department of Defense undertakes a process in consultation with other agencies regarding the transfer and any concerns regarding possible mistreatment in the destination country that may arise. As part of this process, DoD, through the Department of State, elicits assurances from the country proposed to accept the detainee that the detainee will be treated humanely. See Waxman Decl. ¶ 6; Prosper Decl. ¶ 6. Where sufficient assurances are not forthcoming or concerns about possible mistreatment cannot be resolved, a detainee will not be transferred. See Waxman Decl. ¶ 7; Prosper Decl. ¶ 8.

Additionally, DoD does not effectuate transfers of GTMO detainees for the purpose of circumventing the Court's habeas jurisdiction in these cases. Rather, transfers are typically made when the United States determines that a detainee no longer poses a threat to the United States or its allies, or when another government indicates that it has its own law enforcement interests in the detainee and accepts responsibility for ensuring that the detainee will not pose a threat to the United States or its allies. See Waxman Decl. ¶ 3; Prosper Dec. ¶ 3. When a GTMO detainee is transferred to the control of a foreign government, the Department of Defense does not ask the foreign government to detain the individual on behalf of the United States, and the detainee is no longer subject to either the actual or constructive control of the United States once transferred.

See Waxman Decl. ¶ 5.²³

²³ As an update to certain information provided in the Consolidated Opposition, at last count, 232 detainees have been transferred by the Defense Department from GTMO, of which 167 were transferred for release and 65 were transferred to the control of their home governments for those governments' own law enforcement purposes. Most of those 65 detainees, in turn, have subsequently been released from their detention by their home countries. See Department of

Not only is Petitioner's requested injunction factually unwarranted, it is legally unjustified because it would intrude on the Executive Branch's authority over matters of foreign policy and national security and thus would transgress the fundamental constitutional principle of separation of powers. See Almurbati v. Bush, - - F. Supp.2d - - , 2005 WL 851934, *8 (D.D.C. Apr. 14, 2005) (denying similar motion for preliminary injunction finding that court-ordered injunction requiring notice of detainee transfers or prohibiting such transfers outright would violate the separation of powers doctrine and disregard the deference owed to the Executive regarding military and national security matters); Al-Anazi v. Bush, Case No. 05-0345 (JDB), Memorandum Opinion at 11 (Apr. 21, 2005) (same); Consolidated Opposition at 17-21. If the Court were to entertain Petitioner's 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 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 the United States' ability to interact effectively with foreign governments. Id.; Waxman Decl. ¶ 8. Courts have rightfully left such matters of foreign policy to the judgment of the Executive Branch. See Consolidated Opposition at 17-21; see also, e.g., People's Mojahedin Org. v. Dep't of State, 182 F.3d 17, 23 (D.C. Cir. 1999) (finding that "it is

Defense Press Release, "Detainee Transfer Announced," April 19, 2005, <<<http://www.defenselink.mil/releases/2005/nr20050419-2661.html>>>; Consolidated Opposition at 5 n.3; Waxman Decl. ¶¶ 4-5; Second Declaration of Matthew C. Waxman ¶ 2 ("Second Waxman Decl.") (attached as Exhibit A to Consolidated Opposition).

beyond the judicial function for a court to review foreign policy decisions of the Executive Branch."); Ahmad v. Wigen, 910 F.2d 1063 (2d Cir. 1990) (explaining in an extradition case that "[t]he interests of international comity are ill-served by requiring a foreign nation . . . to satisfy a United States district judge concerning the fairness of its laws and the manner in which they are enforced," and concluding that "[i]t is the function of the Secretary of State to determine whether extradition should be denied on humanitarian grounds."); Matter of Requested Extradition of Smyth, 61 F.3d 711, 714 (9th Cir. 1995) (finding 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.").

Petitioner offers no new significant evidence that would compel the Court to issue the requested injunction now. Petitioner points only to the same unsubstantiated press reports and other matters addressed in Respondents' Consolidated Opposition. Petitioner's sensationalistic accusations, however, are refuted by sworn testimony of senior United States Government officials who state that it is the specific policy of the United States not to transfer any DOD GTMO detainees, such as Petitioner, to places where it is more likely than not that they will be tortured. See Waxman Decl. ¶ 6; Prosper Decl. ¶ 4. And the statements by the President, the Attorney General, and the Director of the C.I.A. cited by Petitioner, see Petitioner's Memorandum at 14, each merely reiterate that U.S. policy is not to send any detainees to countries that do not provide sufficient assurances that they will not torture the detainees. Such statements contradict, rather than support, Petitioner's asserted basis for a preliminary injunction.

Petitioner also relies on such statements to demonstrate that transfers of detainees are ongoing and will continue. The mere fact that transfers of GTMO detainees by DoD are

occurring, however, is far from a new development. In fact, transfers and repatriations of enemy combatants detained at GTMO have been occurring for years, before the Supreme Court's decision in Rasul v. Bush, 124 S. Ct. 2686 (2004), and long before any of the GTMO habeas petitions were filed. See Second Waxman Decl. ¶ 4; see also <<<http://www.defenselink.mil/news/detainees.html>>> (showing chronology of releases and transfers); Al-Anazi v. Bush, Case No. 05-0345 (JDB), Memorandum Opinion at 5 (Apr. 21, 2005) (discussing numbers of detainee transfers from GTMO). Accordingly, there has been no change in the circumstances of this case to warrant the requested relief.

For these and the other reasons set forth in the Consolidated Opposition, Petitioner's requests for either advance notice of his transfer from GTMO or an injunction prohibiting his transfer outright should be denied.

CONCLUSION

For the foregoing reasons, Petitioner's Motion for Preliminary Injunction should be denied in its entirety.

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Respectfully submitted,

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