IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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| SHERIF el-MASHAD, et al.<br><br>Petitioners,<br><br>v.<br><br>GEORGE W. BUSH, et al.,<br><br>Respondents. | ) | Civil Action No. 1:05-CV-270 (JR) |

**RESPONDENTS' MEMORANDUM IN OPPOSITION TO PETITIONERS' MOTION FOR PRELIMINARY INJUNCTION**

Respondents hereby respond to petitioners' motion for a preliminary injunction barring the return of petitioners, enemy combatants detained at Guantanamo Bay, to their country of nationality. Petitioners have not made the requisite showing to justify the extraordinary relief they seek, and judicial intervention in the processes by which enemy combatant detainees are repatriated or transferred would illegitimately encroach on the foreign relations and national security prerogatives of the Executive Branch.[1]

## 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

[1] Since the requested judicial intervention is wholly inappropriate, it would also be inappropriate for the Court to order respondents to provide the Court with advance notice before repatriating, releasing, or transferring any detainees; such advance notice would serve no purpose except in contemplation of future judicial intervention.

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 two Egyptian-citizen detainee petitioners here, Sherif el-Mashad and Adel Fattouh Aly Ahmed Algazzar, each of whom was captured near the Pakistan-Afghanistan border. 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 based on factors such as whether the detainee continues to pose a threat to the United States and its allies. Waxman Decl. ¶ 3; Prosper Decl. ¶ 2. Where continued detention is not warranted, a detainee may be transferred to the control of another government, in general the government of their 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.

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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.

¶ 5. As such, once transferred, a detainee is no longer subject to the control of the United States. Id.

**C. Petitioners' Motion and Allegations Regarding Possible Repatriation**

Petitioners filed this habeas corpus action on or about February 4, 2005, joining over 100 of their fellow detainees who have filed such petitions in this Court. In one crucial respect, however, the instant petition differs dramatically from many of the others pending: it asks for a preliminary injunction requiring the United States to keep petitioners confined at Guantanamo for the duration of this case, and, ultimately, that they not be returned to their native country but rather be "release[d] . . . so that they may travel freely to a third country of their own choosing." Petition ¶ 73.

With their petition, petitioners filed the instant motion for a preliminary injunction, attaching a number of press reports, editorials, and propaganda pieces. Only two of these exhibits address petitioners' circumstances. The first, a story published on August 13, 2004 on a website that advertises itself as "serving the caged prisoners at Guantanamo Bay," reflects comments from some detainee advocates urging the Egyptian government to more actively seek repatriation of petitioners and other Egyptian nationals detained at Guantanamo, while citing other sources saying the Egyptian government was already conducting talks aimed at such repatriation. Petrs' Ex. 1. The other is a BBC news story about three months later, entitled "Egypt wants Guantanamo releases," indicating that the Egyptian government was in fact attempting to secure the repatriation of its citizens through diplomatic channels. Petrs' Ex. 8.

Principally on the basis of these two press reports, petitioners somehow infer that they are in jeopardy of being "rendered" (which they define as being "secretly transferred . . . to other

countries" in order "to facilitate interrogation by subjecting detainees to torture"). Petrs' Mem. at 4-5. Plainly, there is no factual foundation for the idea that the United States is about to engage in what petitioners' motion characterizes as "rendition" of petitioners. See also Waxman Decl. ¶ 5 (when the Department of Defense transfers detainees, the Department of Defense does not ask or direct the receiving government to detain the individual on behalf of the United States, and detainees are no longer subject to the control of the United States once transferred). Petitioners have made, at most, a prima facie showing that they may be repatriated to their country of nationality. It is on that basis, consistent with the policies and practices of the United States as outlined in the declarations submitted herewith, that we will respond to petitioners' motion.[3]

**ARGUMENT**

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)).

[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 the possible repatriation of citizens of that foreign nation who are detained by the United States as enemy combatants.

Petitioners fail to meet their burden on all four prongs of the standard.

**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). In this regard, it is not sufficient for petitioners to show that they are likely to succeed on their claim that their detention is unlawful, that their classification as enemy combatants was in error, or as they put it, that "[p]etitioners have presented substantial claims that challenge conduct of the United States Government in violation of even the most basic international norms, as well as the United States laws governing habeas corpus." Petrs' Mem. at 10. In this case, where the relief petitioners are seeking on the merits is not release from United States custody and repatriation, but a prohibition against repatriation and, instead, judicially ordered resettlement in a third country of their own choosing, see Petition ¶ 73, Prayer for Relief ¶ 13, petitioners must show that they are likely to succeed in obtaining that relief. Stated differently, petitioners must show a legal entitlement to dictate the destination country to which they will be transferred – or at least to prevent repatriation to their country of nationality – if and when there is a determination (judicial, military, or diplomatic) that they shall no longer be detained by the United States.

Petitioners manifestly fail to show a likelihood of success on the merits. As explained below, first, they fail to articulate any valid legal basis on which the extraordinary judicial intervention they seek could be premised. Second, the separation of powers does not allow for judicial scrutiny of the commitments, assurances, and understandings between a foreign government and our Executive Branch with respect to the treatment of individuals being returned to the control of that foreign government. Third, petitioners' end game – to have the Court order

the United States to release them to a third country of their own choosing – is so wholly devoid of merit that it makes no sense to decree extraordinary interlocutory relief to preserve the Court's ability to order such obviously unavailable relief in the future.

1. No Valid Legal Basis Exists for the Injunctive Relief Petitioners Seek

Petitioners purport to anchor their request for relief in claims based on various treaties and statutes, but most of these claims have already been held non-viable by other Judges of this Court in the related Guantanamo detainee cases, and none of the claims sustains their request.

Treaties. Petitioners cite several treaties that they contend would be violated by "the rendering of Petitioners to Egypt or other countries for torture and interrogation": the International Covenant on Civil and Political Rights ("ICCPR"), the Convention Against Torture ("CAT"), and the Third and Fourth Geneva Conventions. Petrs' Mem. at 11. Of course, the short answer to this contention is that what is at stake is not "the rendering of Petitioners to Egypt or other countries for torture and interrogation," but rather the possibility of eventual repatriation of petitioners to their country of nationality, if and only if the government of that country first provides the United States Government with appropriate assurances that they will be treated humanely and not tortured there. None of the cited treaties prohibits repatriation in those circumstances.

Moreover, the cited treaties are not judicially enforceable.[4] The United States ratified the ICCPR subject to an express declaration "that the provisions of Articles 1 through 27 of the

[4] It is vitally important not to conflate the status of treaties as the law of the land where applicable with the issue of whether they are judicially enforceable. The issue of judicial enforceability merely addresses which branch of Government is charged with making final determinations in the execution of the treaty concerned.

Covenant are not self-executing." Resolution of Ratification, 102d Cong., 138 Cong. Rec. S4781, S4784 (Apr. 2, 1992). Accordingly, the courts, including the Supreme Court and both Judges of this District who recently ruled on motions to dismiss in related Guantanamo detainee habeas cases, have unanimously held that the ICCPR does not create rights enforceable in federal court. 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) (Leon, J.), on appeal (D.C. Cir.; filed Feb. 22, 2005); In re Guantanamo Detainee Cases, — F. Supp. 2d —, 2005 WL 195356, *33 (D.D.C. Jan. 31, 2005) (Green, J.), petition for appeal filed, No. 05-8003 (D.C. Cir.); Iguarta de la Rosa v. United States, 32 F.3d 8, 10 n.1 (1st Cir. 1994) (ICCPR articles 1-27 are not self-executing "and could not therefore give rise to privately enforceable rights under United States law"); Hawkins v. Comparet-Cassani, 33 F. Supp. 2d 1244, 1257 (C.D. Cal. 1999) (ICCPR is not self-executing), other orders rev'd, 251 F.3d 1230 (9th Cir. 2001); White v. Paulsen, 997 F. Supp. 1380, 1386-87 (W.D. Wash. 1998) (stating that no court has ever found the ICCPR to be self-executing); Matter of Extradition of Cheung, 968 F. Supp. 791, 802-03 & n.17 (D. Conn. 1997) (ICCPR is not self-executing).[5]

It is equally clear that, as Judge Leon held, joining many other courts, the CAT similarly does not create judicially enforceable rights. Khalid, 2005 WL 100924, at *10. The United States Senate conditioned its advice and consent to the CAT upon a Resolution of Ratification

[5] The general reference in the habeas corpus statute, 28 U.S.C. § 2241(c)(3), permitting a litigant to contest his detention as violative of, inter alia, "treaties of the United States," does not render judicially enforceable a treaty that is not otherwise so. See, e.g., Bannerman v. Snyder, 325 F.3d 722, 724 (6th Cir. 2003); Wesson v. U.S. Penitentiary Beaumont, 305 F.3d 343, 348 (5th Cir. 2002); United States v. Warden, FMC Rochester, 286 F.3d 1059, 1063 (8th Cir. 2002).

declaring "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); S. Exec. Rep. 101-30, at 31. The Senate Report regarding the CAT, to which the Resolution of Ratification was appended, included the Executive's analysis that the term "competent authorities" in Article 3 of the CAT "appropriately refers in the United States to the competent administrative authorities who make the determination whether to extradite, expel, or return. . . . Because the Convention is not self-executing, the determinations of these authorities will not be subject to judicial review in domestic courts." S. Exec. Rep. 101-30, at 17-18 (emphasis added).[6] See also 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.[7]

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[6] Petitioners do not raise any claims under the Foreign Affairs Reform and Restructuring Act of 1998 ("FARR Act"), Pub. L. No. 105-277, § 2242, 112 Stat. 2681 (codified at 8 U.S.C. § 1231 note), nor could they. That statute expressly provides that "nothing in this section shall be construed as providing any court jurisdiction to consider or review claims raised under the Convention or this section, or any other determination made with respect to the application of the policy set forth in subsection (a) [prohibiting the return of persons when there are substantial grounds for believing they will be tortured], except as part of the review of a final order of removal pursuant to section 242 of the Immigration and Nationality Act (8 U.S.C. § 1252)." See FARR Act § 2242(d); Soliman v. United State ex rel. INS, 296 F.3d 1237, 1241 n.1 (11th Cir. 2002) (noting lack of jurisdiction over FARR Act claims in the absence of a petition to review a final order of removal, and denial of emergency stay on that basis). Plainly, this case does not involve a final order of removal under the Immigration and Nationality Act.

[7] Moreover, even if the CAT were judicially enforceable, petitioners have not come forward with any facts that show a violation or imminent violation of the CAT. Petitioners have come forward with some evidence (i.e., press reports) suggesting there is a possibility they will be repatriated to Egypt. As discussed above, in accordance with United States policy, no detainee will be repatriated or transferred to any country where the United States believes it is more likely than not that he will be tortured, based where appropriate on suitable assurances from the receiving country that the detainee will be treated humanely. 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

With respect to the Third and Fourth Geneva Conventions, petitioners fail to identify any provision thereof that gives them a judicially enforceable right to block their repatriation, even assuming arguendo that (1) the (hypothesized) provision conferred judicially enforceable rights; and (2) the instant petitioners qualified for "prisoner of war" status.[8] Indeed, the Third Geneva Convention generally contemplates repatriation of prisoners of war upon the cessation of active hostilities. See Hamdi v. Rumsfeld, 124 S. Ct. 2633, 2641 (2004) (plurality opinion).

Alien Tort Statute. Petitioners also purport to base their request for relief in the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350. Petrs' Mem. at 11. Three Judges of this Court, in addition to at least one Judge of the Court of Appeals, have agreed that ATS claims in related Guantanamo detainee cases are barred as a matter of law. See In re Guantanamo Detainee Cases, 2005 WL 195356, at *33 ("The Court also agrees with the reasoning of Judge Kollar-Kotelly in

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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"); see also Waxman Decl. ¶ 6; Prosper Decl. ¶ 4.

[8] The Geneva Conventions do not confer judicially enforceable rights, 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), and the President has determined, in any event, that al Qaeda and Taliban detainees are categorically not entitled to "prisoner of war" status thereunder. Respondents acknowledge that this Court has held in another Guantanamo detainee case, and Judge Green has agreed (albeit only with respect to Taliban detainees), certain provisions of the Third Geneva Convention confer rights that are judicially enforceable in a habeas case, and that enemy combatants taken into custody during hostilities in Afghanistan must be presumed to have "prisoner of war" protections unless and until determined otherwise by an individualized tribunal. Hamdan v. Rumsfeld, 344 F. Supp. 2d 152, 163-65 (D.D.C. Nov. 8, 2004), on appeal, No. 04-5393 (D.C. Cir.); see also In re Guantanamo Detainee Cases, 2005 WL 195356, at *31-*33. While respondents respectfully disagree with these conclusions, there is no need to revisit them here. Neither this Court's rulings in Hamdan, nor Judge Green's in In re Guantanamo Detainee Cases, are apposite to the instant motion because, as discussed above, petitioners have not identified any provision of the Geneva Conventions that entitles them to the either the preliminary or permanent injunctive relief they seek.

her original Rasul decision and with Judge Randolph's concurrence in the Al Odah appeal that the doctrine of sovereign immunity bars claims based on the Alien Tort Claims Act and that the general waiver of sovereign immunity contained in the Administrative Procedure Act is inapplicable because of the "military authority" exception in 5 U.S.C. § 701(b)(1)(G). Al Odah, 321 F.3d at 1149-50 (Randolph, J. concurring); Rasul, 215 F.Supp.2d at 64 n. 11."); Khalid, 2005 WL 100924, at *9 n.19.[9] Petitioners have not even acknowledged this case law adverse to their position, let alone articulated why this Court should diverge from it.[10] Plainly, a claim or statute as to which the Government's sovereign immunity has not been waived does not augur a likelihood of success, and cannot serve as a basis for preliminarily enjoining the Government.

All Writs Act. Having failed to identify any valid treaty or statutory basis for the relief they seek, and relief also being barred for the reasons set forth in Sections A.2 and A.3, infra, plaintiffs 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 8-9. After all, the All Writs Act does not give rise to an independent substantive claim; it merely enables courts "to issue such

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[9] For more thorough exposition of why ATS claims are non-viable in this and other Guantanamo detainee cases, see respondents' Response to Petitions for Writ of Habeas Corpus and Motion to Dismiss or for Judgment as a Matter of Law, filed Oct. 4, 2004, in In re Guantanamo Detainee Cases, at 54-66; respondents' Reply Memorandum in Support of Motion to Dismiss or for Judgment as a Matter of Law, filed Nov. 16, 2004, in In re Guantanamo Detainee Cases, at 21-26; and Supplemental Memorandum of Law in Support of Respondents' Motion to Dismiss or for Judgment as a Matter of Law Pursuant to Court's Dec. 2, 2004 Order, filed Dec. 13, 2004, in Khalid, Civil Action No. 1:04-cv-1142 (RJL), and Boumediene, Civil Action No. 1:04-cv-1166(RJL), at 22-27.

[10] Even if petitioners could mount an ATS claim in the face of the Government's sovereign immunity, there is nothing tortious about repatriating detainees upon a determination that the detainees are not likely to be tortured in their country of nationality, based, where appropriate, on receipt of suitable assurances to that effect, which is the only circumstance in which such a repatriation would occur.

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 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. And, while Rasul v. Bush, 124 S. Ct. 2686 (2004), holds that federal district courts have jurisdiction to consider challenges to the lawfulness of ongoing detention at Guantanamo, it is odd that petitioners would invoke the All Writs Act to demand that the very objective of a habeas petition – release from United States custody – be indefinitely postponed.[11]

2. The Separation of Powers Does Not Allow for Judicial Scrutiny in this Area

Even if some valid claim or other legal basis existed for the injunctive relief sought, the separation of powers would prevent the Court from exercising its discretion to undertake inquiry and grant such relief in this case. "[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,

[11] Curiously, petitioners' reliance on the All Writs Act is self-contradictory: even as they urge that an injunction ordering indefinite future confinement by the United States is necessary "'to protect [the Court's] jurisdiction,'" Petrs' Mem. at 9, they disavow the necessary predicate of this jurisdictional rationale. See Petrs' Mem. at 9 n.2 ("Petitioners also do not concede that such a transfer would necessarily deprive this Court of jurisdiction." (emphasis in original)).

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))).[12] 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 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

[12] 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.

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).[13]

Although this case does not involve an extradition, the same principles control.[14] The considerations that underlie the Rule of Non-Inquiry are not 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

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[13] 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).

[14] To the extent that petitioners may argue that they may not be repatriated 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 "[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").

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 conditions in a foreign country 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).

3. Because Petitioners' Ultimate Request is Clearly Futile, There is No Basis for Granting Extraordinary Interlocutory Relief Merely to Preserve that Request

Just as the separation of powers bars judicial second-guessing of the Executive Branch's assessment of a detainee's likely treatment upon repatriation to his country of citizenship (or transfer to any other government, for that matter), so too this Court manifestly lacks power to order that the United States transfer a detainee to an as yet unspecified third country of the detainee's own choosing. In such a situation, the third country would be a necessary and indispensable party, over which this Court absolutely lacks jurisdiction. Sovereign nations have borders, and no foreign nation could be compelled by this Court to grant entry to a released enemy combatant detainee for resettlement purposes. See Greater Tampa Chamber of Commerce v. Goldschmidt, 627 F.2d 258 (D.C. Cir. 1980) (holding that there is no redressable case or controversy under Article III in matter where effective relief depends on independent actions or cooperation of a foreign government not party to the case). Such an order would be impossible even if petitioners were to prevail on their various other claims. Yet such an order is exactly

what petitioners request, ultimately, by their petition. See Petition ¶ 73 ("Petitioners and Next Friends want Respondents to release Petitioners so that they may travel freely to a third country of their own choosing.").

"The purpose of a preliminary injunction is merely to preserve the status quo, pending the final decision on the merits, where necessary to enable a court to grant effective permanent relief." City of Philadelphia v. Klutznick, 503 F. Supp. 659, 661 n.3 (E.D. Pa. 1980) (citing 11 C. Wright & A. Miller, Federal Practice & Procedure, § 2947, at 423 (1973)). Here, that permanent relief would be judicially ordered resettlement in a third country of petitioners' choosing. See Petrs' Mem. at 3, 9 (asking "only that the status quo be maintained while this lawsuit is pending" so that they will not be "precluded from pursuing these claims"). Because, as discussed above, that ultimate relief requested is so unmistakably beyond the power of the Court, an injunction to preserve petitioners' ability to pursue such relief simply facilitates what is, in effect, the pursuit of a mirage. Petitioners' utter lack of likelihood of success on their ultimate claim in this case is thus reason enough, standing alone, to deny the preliminary injunction currently requested.

Thus, petitioners have not demonstrated a likelihood of success on the merits. The treaty and statute provisions they raise do not create a valid basis either for an injunction against repatriation or for a later decree directing the United States to resettle them in a third country of their choosing. 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. And particularly given that the relief ultimately requested by petitioners is obviously non-redressable by any court, there is no warrant for temporary injunctive relief to preserve the ability to seek that relief.

### B. Petitioners Have Not Demonstrated They Will Suffer Irreparable Injury Absent a Court Order Mandating Their Continued Detention at Guantanamo

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).

Petitioners speculate that, absent an injunction keeping them detained at Guantanamo, they will suffer "torture and possible death at the hands of a foreign government." Petrs' Mem. at 10. This speculation is baseless. What will actually occur, absent an injunction, is that the United States will comply with its policy reflecting the principles of the Convention Against Torture: petitioners will not be repatriated if the Executive Branch finds that it is more likely than not that they will be tortured if returned. The United States Government would seek appropriate assurances from their country of nationality and would evaluate whether they are 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 by this Court would simply interfere with these policies running their course. The only "irreparable injury" that is cognizable for purposes of the injunction analysis is the possibility of

being returned to their country of nationality, which, by definition in that scenario, would have necessarily committed to the satisfaction of the United States Government that it will treat petitioners humanely.

### 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.[15]

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 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

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[15] Perhaps because their claims rest so manifestly on the private interests of two individuals, petitioners address the public interest factor only in cursory fashion. They assert conclusorily that "there is a clear public interest in preventing the United States Government from rendering individuals to foreign countries for detention and torture." Petrs' Mem. at 10. However, this assertion gratuitously and self-servingly mischaracterizes the issue: as discussed above, (1) no so-called "rendition" for "detention and torture" is at issue here; and (2) if any repatriation occurred, it 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.

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 case involving two detainees, but in the context of the precedent it will inevitably set for the over 30 cases pending in this District involving over 100 Guantanamo detainees.[16] 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 – in contravention of the separation of powers and against the public interest – to an advisory role

[16] The above figures do not include a recently filed petition in which an organization purports to bring habeas claims on behalf of "John Does 1-- 570" detained at Guantanamo. See Doe v. Rumsfeld, Civil Action No. 1:05-CV-313 (CKK).

with respect to the transfer and repatriation of detainees in the war on terrorism.[17]

**D. Petitioners' Request for Discovery Should Be Denied**

Discovery is disfavored in habeas corpus cases and not allowed except by leave of court for good cause shown. See Harris v. Nelson, 294 U.S. 286, 296-97 (1969) (discovery is "ill-suited to the special problems and character of [habeas] proceedings" and tends to "be exceedingly burdensome and vexatious" in such cases). In the rare case where it is appropriate, a habeas petitioner seeking discovery is required to attach the proposed discovery requests for which leave is sought, see Rule 6(b) of the Rules Governing Section 2254 Cases in the United States District Court (applicable in the Court's discretion to non-§ 2254 cases via Rule 1(b)), a practice also normally followed with respect to requests for preliminary injunction discovery, see Merrill Lynch, Pierce, Fenner & Smith, Inc. v. O'Connor, 194 F.R.D. 618, 624 (N.D. Ill. 2000) ("where a plaintiff seeks expedited discovery to prepare for a preliminary injunction hearing, it makes sense to examine the discovery request, as we have done . . . .").[18] However, rather than comply with this practice, petitioners instead seek essentially a blank check to engage in unspecified discovery regarding, inter alia, "the United States' knowledge of and acquiescence in Egyptian torture practices." Petrs' Mem. 12. Their request must be denied.

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[17] Even without the instant motion having been decided, counsel for petitioners in one of the other Guantanamo detainee cases have informed us that they intend shortly to move for a preliminary injunction prohibiting movement of any of their clients out of Guantanamo.

[18] Petitioners cite no support for their proposed standard that disputing any of the facts alleged in a preliminary injunction motion triggers discovery on those facts, Petrs' Mem. at 12 (asking for discovery "to the extent that the Respondents challenge any of the facts"), and to our knowledge there is none. A preliminary injunction motion is not like a Rule 12(b)(6) motion where the plaintiffs' allegations are taken at face value. To the contrary, the movant for a preliminary injunction bears the burden of persuasion, and relies on his bare allegations at his peril. Cobell v. Norton, 391 F.3d 251, 258 (D.C. Cir. 2004).

Because, as discussed above, there is no viable legal basis upon which the Court could grant an injunction directing the Executive to continue detaining an enemy combatant and indefinitely prohibiting the repatriation of that individual, no amount of factual discovery can salvage petitioners' flawed motion. Indeed, discovery both underscores and would aggravate the serious separation of powers problems posed by petitioners' motion. While petitioners' failure to attach a copy of their proposed requests reduces us to speculation about what they might be, it seems unavoidable that they would intrude on matters such as diplomacy with foreign sovereign nations that, as discussed above, are non-justiciable.[19] For the same reasons that judicial oversight of such matters would run afoul of separation of powers principles, see supra Section A.2, so too would discovery. Thus, petitioners' request to engage in unfettered and unspecified discovery in search of after-acquired support for an already-filed motion that is intrinsically flawed should be denied.

**CONCLUSION**

For the foregoing reasons, respondents respectfully request that petitioners' motion for a preliminary injunction be denied.

Dated: February 25, 2005

Respectfully submitted,

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[19] In addition to these matters being non-justiciable, documents and information reflecting the United States' confidential communications with foreign sovereign nations and sensitive foreign policy determinations are likely to be privileged. See Ellsberg v. Mitchell, 709 F.2d 51, 57 (D.C. Cir. 1983) (referring to absolute privilege against disclosure of information that would result in "disruption of diplomatic relations with foreign governments."), cert. denied, 465 U.S. 1038 (1984). Contrary to petitioners' suggestion, see Petrs' Mem. at 12 n.5, a security clearance would not entitle petitioners' counsel to access to such documents and information.

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