ECF filing allowed by the CSO.

IN THE UNITED STATES DISTRICT COURT FOR THE

DISTRICT OF COLUMBIA

SAIFULLAH PARACHA,

Petitioner,

v. Case No. 04cv02022-PLF

ORAL ARGUMENT IS REQUESTED

Hon. GEORGE W. BUSH,

et al.,

Respondents.

REPLY IN SUPPORT OF
PETITIONER'S MOTION FOR PRELIMINARY INJUNCTION
ORDERING HIS REMOVAL FROM ISOLATION
AND PROHIBITING HIS RENDITION

Petitioner moved (on April 5, 2005, docket number 50) for a preliminary injunction with two provisions:

> *First*, that he be released from solitary confinement, because his habeas corpus has been stayed, possibly for several months, to await the D.C. Circuit's resolution of some other cases; and,
>
> *Second*, that he not be moved from Guantanamo without notice to this Court, unless he is to be released.

On April 22, 2005, (docket number 53) respondents filed an opposition to both aspects of petitioner's motion. The present filing is petitioner's reply, so the motion is now ripe for decision.

I. SOLITARY CONFINEMENT.

The government's opposition, while praising the medical facilities at Guantanamo, admits one of the key reasons such medical facilities are needed: Prisoners are held in isolation cells. "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." Respondents' opposition, page 11. The Orwellian term "individual cell" cannot transform an instrument of torture into a luxury resort accommodation, and cannot obscure the fact that petitioner is deprived of all human contact except controlled contact with the guard force. Respondents do not describe the outdoor exercise yard, and presumably access to it does not include access to other human beings. Such treatment will cause a breakdown of the prisoner's physical and psychological functioning. Footnote 20 of respondents' filing admits that this abuse is in the service of "intelligence gathering" -- and we know from the experience of American captives during the Korean War that that means the extracting of false confessions and information the product of suggestion and fantasy.

Petitioner has been subject to this abuse for nearly two years now. If he is to endure executive confinement for several more months awaiting rulings from the D.C. Circuit, his conditions should not violate minimal standards of humanity. The relevant legal precedents are canvassed in petitioner's motion. They lay upon this Court a duty to

inquire into petitioner's treatment and to preserve his health and sanity. The Court must at the very least order petitioner released from solitary confinement, and, since petitioner is not allowed to communicate with counsel, should also require reports directly from petitioner and his captors.

II. TRANSFER, RENDITION, ETC.

The government's opposition relies heavily on the line of cases going back to ***Ker v. Illinois***, 119 U.S. 436 (1886), saying that a criminal defendant cannot raise a bar to his conviction from any irregularities in how he was brought before the court. This doctrine has always rested on the rationale explained in ***Frisbie v. Collins***, 342 U.S. 519 (1952):

> [D]ue process of law is satisfied when one present in court is convicted of crime after having been fairly apprized of the charges against him and after a fair trial in accordance with constitutional procedural safeguards. There is nothing in the Constitution that requires a court to permit a guilty person rightfully convicted to escape justice because he was brought to trial against his will.
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> ***Frisbie v. Collins***, 342 U.S. 519, 522 (1952)

The government's attempt to extend this doctrine to this situation, where the executive is claiming a right to detain the kidnapped prisoner indefinitely, possibly for the rest of his life, without ***any*** judicial due process, much less a criminal trial, demonstrates the depth and audacity of the Constitutional revolution the Court is being asked to endorse.

On extradition, the situation more similar to rendition, at least with respect to the direction of the prisoner's travel, the government provides many citations on the supposed "rule of non-inquiry," the idea that the judicial branch should enforce a properly presented executive branch petition for extradition without any inquiry into the quality of justice the prisoner is likely to encounter in the receiving state. This rule has been

roundly criticized -- see footnote 3 of "Federal Courts, the Constitution, and the Rule of Non-Inquiry in International Extradition Proceedings," Jacques Semmelman, 76 *Cornell Law Review* 1198 (1991), quoting an impressive array of authorities who think it should be limited or abolished. It has never been unequivocally accepted, and there is authority saying that the United Nations Convention Against Torture, 14 UNTS 85, and the Foreign Affairs Reform and Restructuring Act of 1998, P.L. 105-277, sec. 2242, 112 Stat. 2681, codified as a note to 8 U.S.C 1231, carve out an exception to the rule. That is the way the Ninth Circuit left the issue in the case discussed in footnote 15 of the government's filing, *Cornejo-Barreto v. Seifert*, No. 02-56605. The final opinion in that case, on November 19, 2004 (*en banc*, pages 16321-22 of the slip opinions on the Ninth Circuit's web site), declared the case moot and vacated the August 16, 2004, panel opinion reported at 379 F.3d 1075, which said the Secretary of State's decision to allow extradition "is within the Rule of Non-Inquiry, and therefore not subject to judicial review." But the final opinion also said, "We deny the government's request to vacate other published opinions in this case." (*En banc*, pages 16321-22 of the slip opinions on the Ninth Circuit's web site.) That left in place the dicta in the earlier appeal which said, "Examining federal legislation implementing the Torture Convention, we conclude that the Administrative Procedure Act ("APA") allows an individual facing extradition who is making a torture claim to petition, under habeas corpus, for review of the Secretary of State's decision to surrender him." 218 F.3d 1004 (9th Cir., July 11, 2000). Contrary to the government's footnote 15, it is unlikely that the rule of non-inquiry will bar Paracha from judicial review, if and when it should be proposed to rendition him to a state with a record of torture.

The government's other citations are flimsy support for the rule. For instance, the vessel master in *Coumou v. U.S.*, 107 F.3d 290, modified 114 F.3d 64 (5th Cir., 1997), who suffered long-term damage to his health from six months in a Haitian jail, was arrested by the Haitian authorities on a Haitian dock because drugs were found hidden in the cargo he was unloading. United States involvement consisted only in the presence of a U.S. Coast Guard ship which could possibly have tried to take the master into U.S. custody but made no effort to do so. This is not an extradition or rendition case. Even so, the courts upheld the master's suit for damages in negligence because the Coast Guard failed to tell the Haitian authorities exonerating facts that might have spared him much of his ordeal. Far from supporting an iron-clad universal rule of non-inquiry, this case shows that American authorities act at their peril when they look the other way as people fall into the clutches of penal systems which fail to maintain basic humanitarian standards. Cf. the suggestion in *Ker v. Illinois*, 119 U.S. 436, 444 (1886) that Ker might have had a civil action against the individual who had arrested him in Peru in violation of Peruvian law.

The United States has literally dozens of extradition treaties. They are listed in the note following the extradition statute, 18 U.S.C. Ann. 3181. There is one with Pakistan, December 22, 1931, 47 Stat. 2122, one with Thailand, December 30, 1922, 43 Stat. 1749, but none so far with the other of the three countries where respondents have held petitioner captive, Afghanistan. The State Department has differing reports on the status of human rights for various nations, and applications for political asylum are treated differently in light of what the State Department knows about persecution and protection in each relevant area. Should the government want to remove petitioner to

some other country, there will be many issues to be investigated and researched. We cannot know what they may be until such a removal is proposed, with a specific destination and specific terms. But at this point the government is asking this Court to leave the executive branch free to ship petitioner off, without notice, to anyplace on earth, with no independent inquiry into the circumstances. All petitioner is asking is for a chance to challenge such a rendition, should it be proposed, and should a specific destination be named.

On the factual level, the government's own filings show that this is a clear and present danger and argue strongly for granting petitioner's motion. Exhibit B to the filing in the consolidated cases, is the March 8, 2005, declaration of Mr. Matthew C. Waxman, which says, paragraph 4., that 65 detainees have been transferred for "detention, investigation and prosecution, as appropriate." It goes on to list the receiving countries, and Pakistan leads, with 29 prisoners. Paragraph 2. of the declaration of Mr. Pierre-Richard Prosper, March 8, 2005, has the same figures. These statements amount to candid admissions that petitioner Paracha is in danger of transfer for "detention, investigation and prosecution" to Pakistan, if not someplace worse.

The government is correct in pointing out one ambiguity in petitioner's motion. He asks at some places for a flat prohibition against his removal from Guantanamo and at other places for thirty days' notice of any proposed removal. Petitioner would prefer the flat prohibition. A preliminary injunction can always be modified by the Court, and if need be can be modified in much less that thirty days, so such an injunction would not be inflexible in actual effect. The only consequence of including a thirty-day notice clause would be to give the parties and the Court a deadline, and that could prove inconvenient.

This Court in *Al-Wazan*, 05cv0329-PLF, April 1, 2005, entered the thirty-day-notice requirement, citing other Guantanamo cases to the same effect. That, coupled with release from solitary confinement and any other ameliorations needed to bring the conditions of his imprisonment up to normal prisoner of war level, is clearly called for. Nothing less will protect this Court's jurisdiction, and nothing less will protect petitioner from a repetition of the sinister, totalitarian-style, unmonitored removals he has already suffered at least twice in respondents' hands.

Should the government propose repatriating petitioner to Pakistan, he might well agree. To the extent that the government has no desire to hold the Guantanamo prisoners any longer than necessary, this case may well end with all parties in agreement. But at this point we have no way of knowing which of these contingencies may eventuate. The injunction against removing petitioner, except to release him, should be entered, without prejudice to further discussion if and when a removal is proposed.

Respectfully submitted, April 29, 2005

____/s/_____
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