IN THE SUPREME COURT OF THE UNITED STATES

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No. 07A98

AHMED BELBACHA, ET AL., APPLICANTS

v.

GEORGE W. BUSH, ET AL.

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OPPOSITION TO EMERGENCY APPLICATION FOR STAY AND INJUNCTION[1]

The Solicitor General, on behalf of respondents George W. Bush et al., respectfully files this opposition to the emergency application for a stay and an injunction.

STATEMENT

Applicant Ahmed Belbacha (ISN 290) (applicant), an Algerian citizen, was designated an enemy combatant by a Combatant Status Review Tribunal (CSRT) and has been detained by the Department of Defense at the Guantanamo Bay Naval Base in Cuba (Guantanamo). See Second Decl. of Karen L. Hecker ¶¶ 2-3 (Opp. to Emergency Mot. to Stay Transfer, Exh. 1 (D.C. Cir. July 31, 2007) (filed under seal)).

In December 2005, applicant filed a petition for a writ of habeas corpus in the United States District Court for the District

[1] Although applicant Ahmed Belbacha styles his request as an "Emergency Application for Stay," he in fact seeks "an order enjoining [his] transfer to Algeria" pending further proceedings in this Court and the court of appeals. Emergency Application for Stay 23 (hereinafter Appl.); see id. at 1, 7.

of Columbia. On April 19, 2007, respondents moved the district court to dismiss applicant's case for lack of jurisdiction pursuant to Boumediene v. Bush and Al Odah v. United States, 476 F.3d 981, 986, 994 (D.C. Cir.), cert. granted, 127 S. Ct. 3067 and 127 S. Ct. 3078 (2007). Those decisions hold that Section 7 of the Military Commissions Act of 2006 (MCA), Pub. L. No. 109-366, 120 Stat. 2600, 2635-2636, eliminates federal court jurisdiction over pending petitions for habeas corpus filed by aliens detained as enemy combatants. See Boumediene, 476 F.3d at 986-994. Respondents' motion is still pending in district court.

Although he has been deemed an enemy combatant, applicant, through the Administrative Review Board process, has been determined to be eligible for transfer out of Guantanamo, subject to the process for making appropriate diplomatic arrangements for another country to receive him. See Detainee Status Notification (Feb. 22, 2007) (Opp. to Emergency Mot. to Stay Transfer, Exh. 3 (D.C. Cir. July 31, 2007) (filed under seal)). Applicant has sought to block any potential transfer to Algeria. He filed a motion in district court alleging that his counsel learned that the United States plans to transfer him from Guantanamo to his home country of Algeria in the immediate future and seeking a temporary restraining order barring that transfer. See Emergency Mot. for Order Enjoining Transfer 1 (D.D.C. July 26, 2007) (filed under seal). Due to diplomatic interests and security concerns,

respondents advised the district court that they were not in a position to comment on any potential repatriation of applicant to Algeria, see Declaration of Clint Williamson ¶ 4; Declaration of Joseph Benkert ¶¶ 6-7 (hereinafter Williamson Decl. and Benkert Decl.) (Opp. to Emergency Mot. to Stay Transfer, Exhs. 6 & 7 (D.C. Cir. July 31, 2007) (filed under seal)).[2]

The district court denied applicant's motion, concluding that it lacked jurisdiction to prevent his potential transfer from Guantanamo to Algeria. See Order Denying Emergency Mot. for Temporary Restraining Order 2 (D.D.C. July 27, 2007). "[O]n that question," the district court held, "the MCA is clear: the Court lacks jurisdiction over any and all non-habeas claims raised by aliens who are detained as enemy combatants." Ibid. The district court stated that the MCA required denial of applicant's motion for an injunction prohibiting transfer even though the court would lose jurisdiction over his underlying habeas petition when he is released from United States custody, finding that the D.C. Circuit had implicitly rejected applicant's argument when it denied "a similar motion to enjoin the transfer of a Guantanamo detainee based on lack of jurisdiction," id. at 2-3 (citing Zalita v. Bush, No. 07-5129 (D.C. Cir. Apr. 25, 2007), stay denied, No. 06A1005 (U.S. May 1, 2007)), and a "motion for an order requiring the

[2] Due to the same concerns, respondents still are not in a position to officially comment on whether or when applicant might be transferred from Guantanamo to Algeria. See pp. 18-19, supra.

United States to provide 30 day[s'] notice before transferring the detainee from Guantanamo," ibid. (citing Hamlily v. Gates, No. 07-1127 (D.C. Cir. Jul. 16, 2007)).

Applicant appealed the district court's ruling and moved for an injunction pending appeal before the court of appeals. The court of appeals denied applicant's motion for an injunction pending appeal, on the ground that the court lacked jurisdiction to entertain the motion, and ordered that applicant's appeal be heard on an expedited basis. See Order (D.C. Cir. Aug. 2, 2007).

On August 3, 2007, applicant filed the instant emergency application for a stay and injunction. He seeks "an order enjoining [his] transfer to Algeria" pending resolution of his appeal and a petition for certiorari before judgment in this case. Appl. 23.

ARGUMENT

As a general matter, when an applicant seeks a stay of a court of appeals' judgment, the applicant has the substantial burden of demonstrating (1) "a reasonable probability that certiorari will be granted," (2) "a significant possibility that the judgment below will be reversed," and (3) "a likelihood of irreparable harm (assuming the correctness of the applicant's position) if the judgment is not stayed." Barnes v. E-Systems, Inc. Group Hosp. Med. & Surgical Ins. Plan, 501 U.S. 1301, 1302 (1991) (Scalia, J., in chambers).

Although applicant has labeled his filing in this Court as an "Emergency Application for Stay," the requested relief makes clear that applicant seeks not a stay, but an injunction pending appeal that prohibits the United States from transferring him to Algeria. See, e.g., Appl. 1 (asking for order "restraining the Government of the United States from transferring Mr. Belbacha from Guantanamo Bay to Algeria"); id. at 2 (applicant "seeks to enjoin the United States from delivering him to Algeria"); id. at 6 (requesting an "order restraining * * * transfer[]"); id. at 7 (seeking an "order temporarily enjoining the United States"); id. at 23 ("the Court should issue an order enjoining Mr. Belbacha's transfer"); see also Emergency Mot. for Order Enjoining Transfer 1 (D.D.C. July 26, 2007) (filed under seal).

Where, as here, an applicant seeks an injunction, the applicant faces an even greater burden than if he had sought a stay. "Unlike a stay, which temporarily suspends judicial alteration of the status quo, an injunction grants judicial intervention that has been withheld by the lower courts." Turner Broad. Sys., Inc. v. FCC, 507 U.S. 1301, 1302 (1993) (Rehnquist, C.J., in chambers) (internal quotation marks omitted). For that reason, it is "clear that such power should be used sparingly and only in the most critical and exigent circumstances." Fishman v. Schaffer, 429 U.S. 1325, 1326 (1976) (Marshall, J., in chambers) (internal quotation marks omitted).

An injunction is appropriate only (1) if it is "necessary or appropriate in aid of [the Court's] jurisdictio[n]," and (2) "where the legal rights at issue are indisputably clear." Ohio Citizens for Responsible Energy, Inc. v. NRC, 479 U.S. 1312, 1313-1314 (1986) (Scalia, J., in chambers) (internal quotation marks omitted). This Court should be even more reluctant to grant an injunction pending appeal where, as here, the central issue on appeal is whether there is subject matter jurisdiction over the case and where the courts below held that jurisdiction is lacking. Entry of an injunction requires the exercise of jurisdiction and Article III power, neither of which exists here. And, of course, applicant seeks an injunction pending appeal that essentially duplicates the final relief he seeks, and no court has considered the propriety of such an injunction, which would implicate serious separation of powers concerns. This Court should be reluctant to address that matter in the first instance and in an emergency posture.

In Zalita v. Bush, No. 06A1005, the Court denied a similar emergency request filed on behalf of a Guantanamo detainee for an injunction barring his transfer from Guantanamo to his home country of Libya. See Order (U.S. May 1, 2007). The applicant in this case raises essentially the same arguments as Zalita in seeking an extraordinary injunction barring his potential transfer. Because applicant, like Zalita, has not satisfied the stringent standards

for obtaining an injunction or even for obtaining a stay, his application should be denied as well.

I. APPLICANT HAS NOT SATISFIED THE HEIGHTENED STANDARD FOR AN INJUNCTION

Applicant cannot satisfy the demanding standard for an injunction. Under the MCA, "no court, justice, or judge" has "jurisdiction to hear or consider" applicant's request for an injunction to block a potential transfer. MCA § 7(a). Further, even if there were jurisdiction, applicant has no judicially enforceable rights to support the extraordinary relief he seeks. Finally, separation of powers principles insulate the core Executive functions at issue here from judicial intervention.

A. Applicant cannot establish that an injunction is "necessary or appropriate" to aid the Court's jurisdiction because the MCA expressly bars the Court from considering applicant's challenge to a potential transfer. The MCA provides that "[n]o court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination." MCA § 7(a). The MCA further states that "no court, justice, or judge shall have jurisdiction to hear or consider any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement

of an alien who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination." Ibid. (emphasis added).[3]

This application stems from an appeal of the district court's denial of applicant's motion to enjoin a potential transfer of him from Guantanamo to Algeria and the D.C. Circuit's order stating that it lacked jurisdiction to grant injunctive relief pending that appeal. In seeking injunctive relief, applicant directly challenges an "aspect of the * * * transfer * * * of an alien who is * * * detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant." MCA § 7(a). Thus, the district and circuit courts properly held that they lacked jurisdiction to grant the relief sought, and this Court likewise lacks jurisdiction to grant the relief sought.

Applicant suggests (Appl. 9-11) that it is likely that this Court would determine that it has jurisdiction to grant applicant's requested relief in light of this Court's decision to grant review

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[3] A detainee may file a petition for review in the D.C. Circuit under the Detainee Treatment Act of 2005, Pub. L. No. 109-148, tit. X, §§ 1001-1006, 119 Stat. 2680, 2739-2744 (DTA), challenging the determination of a CSRT that he is an enemy combatant. See MCA § 7(a). Applicant has not filed such a challenge. In any event, neither the DTA nor traditional habeas would support this extraordinary effort to enjoin a release from custody.

in Boumediene v. Bush, No. 06-1195, 127 S. Ct. 3078 (2007). Applicant notes that both of the lower courts concluded that they lacked jurisdiction to enter an injunction barring a potential transfer of applicant to Algeria in reliance on the court of appeals' decision in Boumediene, and now that this Court has granted review in Boumediene, the question whether there is jurisdiction to enjoin a potential transfer in cases like applicant's is "squarely before the Supreme Court." Appl. 9.

But the fact that this Court has granted certiorari in Boumediene does not entitle applicant to the extraordinary relief he seeks. Contrary to applicant's contention (Appl. 9), "the matter at issue here" is not the same as in Boumediene. Indeed, the questions pending before this Court in Boumediene involve whether Section 7(a) of the MCA removes federal court jurisdiction over habeas petitions filed by aliens detained as enemy combatants at Guantanamo Bay, whether those aliens have rights under the Suspension Clause, and if so, whether the MCA violates the Suspension Clause. See Pet. at i, Boumediene v. Bush (No. 06-1195). This application is not based on a habeas petition governed by the first part of Section 7(a) of the MCA; rather, it is a challenge to an "aspect of the * * * transfer * * * of an alien" governed by the second part of MCA § 7(a) (emphasis added). Importantly, the Boumediene case does not involve a challenge to

the second part of Section 7(a) of the MCA or the issue of whether courts may legitimately block a potential transfer.

Thus, even if this Court were to reverse the court of appeals' decision in Boumediene that Section 7 of the MCA removes federal jurisdiction over pending petitions for habeas corpus, 476 F.3d at 986, 994, the MCA would nevertheless preclude this Court from granting an order enjoining a potential transfer of applicant from Guantanamo. Even if the MCA's removal of federal court jurisdiction over habeas petitions were rendered unenforceable, there would be no effect on the independent provision of the MCA which expressly bars any claims regarding, inter alia, "transfer." MCA § 7(a). Thus, this Court's review of the questions in Boumediene has no bearing on whether this Court has jurisdiction to grant the extraordinary relief requested by applicant.

Moreover, the fact that applicant is endeavoring here to block a potential transfer out of United States custody clearly distinguishes his claims from those raised in Boumediene and from traditional habeas claims more generally. Unlike the petitioners in Boumediene, applicant is in no sense seeking habeas relief and no Suspension Clause issues are implicated by his prayer for injunctive relief. Habeas has traditionally afforded a mechanism for challenging one's detention, not for challenging one's transfer or release out of custody. See, e.g., Wilkinson v. Dotson, 544 U.S. 74, 79 (2005) (explaining that the "core" relief afforded by

the writ of habeas corpus is "immediate release or a shorter period of detention" (internal quotation marks omitted)); id. at 86 (Scalia, J., concurring) ("It is one thing to say that permissible habeas relief * * * includes ordering a quantum change in the level of custody, such as release from incarceration to parole. It is quite another to say that the habeas statute authorizes federal courts to order relief that neither terminates custody, accelerates the future date of release from custody, nor reduces the level of custody." (internal quotation marks and citation omitted)); see also Bell v. Wolfish, 441 U.S. 520, 526 n.6 (1979); Preiser v. Rodriguez, 411 U.S. 475, 499-500 (1973); Cochran v. Buss, 381 F.3d 637, 639 (7th Cir. 2004). Thus, even if applicant -- an alien held abroad -- had a constitutional right to habeas corpus, that right would not entitle him to the extraordinary relief he seeks here.[4]

Applicant invokes (Appl. 1, 7-8) the All Writs Act, 28 U.S.C. 1651(a), and the Court's "inherent power" as bases for this Court to assert jurisdiction and issue injunctive relief barring a potential transfer. Applicant's reliance on the All Writs Act and the Court's inherent power are misplaced, because Section 7(a) of the MCA expressly withdraws all forms of jurisdiction relating to

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[4] Applicant's contention (Appl. 11) that courts could issue the requested injunctive relief in the context of a habeas action, based on Federal Rule of Appellate Procedure 23(a), lacks merit. That provision provides no basis for enjoining a potential transfer of a habeas petitioner outside of United States custody. See Qassim v. Bush, 466 F.3d 1073, 1078 (D.C. Cir. 2006).

the transfer of a detainee from Guantanamo. The broad, unambiguous language of the MCA plainly covers any jurisdiction that could possibly be afforded under Section 1651(a) and limits the Court's exercise of its inherent power. Although the All Writs Act provides that federal courts "may issue all writs necessary or appropriate in aid of their respective jurisdictions," 28 U.S.C. 1651(a), the Act "confines [that] authority to the issuance of process 'in aid of' the issuing court's jurisdiction" and "does not enlarge that jurisdiction." In re Tennant, 359 F.3d 523, 527 (D.C. Cir. 2004) (quoting Clinton v. Goldsmith, 526 U.S. 529, 534-535 (1999)). Accordingly, the All Writs Act does not authorize injunctive relief concerning transfers. See Zalita v. Bush, No. 07-5129 (D.C. Cir. Apr. 25, 2007) (order rejecting applicant's reliance on the All Writs Act and dismissing challenge to his transfer for lack of jurisdiction), stay denied, No. 06A1005 (U.S. May 1, 2007); cf. Khadr v. Gates, No. 07-1156 (D.C. Cir. May 30, 2007) (order rejecting applicant's reliance on the All Writs Act as providing jurisdiction to stay military commission proceedings, given the MCA's repeal of federal jurisdiction over military commission proceedings).

Further, this Court's jurisdiction to review the court of appeals' decision in a DTA case (challenging a detainee's enemy combatant status) ceases upon the detainee's release or transfer out of United States custody. See DTA § 1005(e)(2)(B) (limiting

claims under the DTA to those brought by aliens who are still detained at Guantanamo); DTA § 1005(e)(2)(D) (jurisdiction under (e)(2) ceases when an alien is released from Department of Defense custody); see also MCA § 7(a) (no jurisdiction, except as provided in Section 1005(e)(2) and (3) of the DTA, over any action against the United States brought by "alien who is or was detained" as an enemy combatant). Congress clearly contemplated that detainees could be transferred out of United States custody during the pendency of their cases and that the cases should then terminate. Invocation of the All Writs Act (or some other source of jurisdiction) to consider applicant's request for injunctive relief here would frustrate the intent of Congress.

Because the MCA expressly removed jurisdiction over applicant's legal challenge to a potential transfer, it would not be appropriate for this Court to issue an injunction in aid of its jurisdiction, especially when the courts below correctly recognized the absence of jurisdiction over applicant's claim.

B. Even assuming that this Court had jurisdiction to issue the relief applicant seeks, he has failed to establish that the legal rights he asserts are "indisputably clear." In fact, applicant has asserted no judicially enforceable rights that support the relief that he seeks.

Applicant's invocation of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment and Punishment (CAT),

the United Nations Convention Relating to the Status of Refugees (Refugee Convention), the International Covenant on Civil and Political Rights (ICCPR), and Common Article 3 of the Geneva Convention (Common Article 3), is unavailing. First, applicant ignores Congress's explicit mandate in the MCA that courts not consider actions, like his, challenging transfers from United States custody at Guantanamo. See MCA § 7(a). Whatever relief those provisions might have afforded him before the MCA, applicant cannot continue to rely on them post-MCA to justify the Court's exercise of jurisdiction. Moreover, neither the CAT, the Refugee Convention, nor the ICCPR gives rise to rights individually enforceable in court. See, e.g., Castellano-Chacon v. INS, 341 F.3d 533, 544 (6th Cir. 2003); Foreign Affairs Reform and Restructuring Act of 1988 (FARR Act), Pub. L. 105-277, § 2242(d), codified at 8 U.S.C. 1231 note ("[N]othing in this section shall be construed as providing any court jurisdiction to consider or review claims raised under the Convention or this section * * * except as part of the review of a final order of removal pursuant to [8 U.S.C. 1252]."); see also Al-Anazi v. Bush, 370 F. Supp. 2d 188, 194 (D.D.C. 2005) (rejecting the argument that the FARR Act, which implemented CAT in certain immigration-specific contexts, could serve as a legal basis for prohibiting or limiting transfer of wartime detainees to other countries); 8 U.S.C. 1252(a)(4).

Congress specified that the CAT would not be self-executing or privately enforceable. See 136 Cong. Rec. S36,198 (Oct. 27, 1990); Wang v. Ashcroft, 320 F.3d 130, 140 (2d Cir. 2003). In enacting the FARR Act, Congress was careful to limit jurisdiction over Article 3 CAT claims to "the review of a final order of removal." FARR Act § 2242(d). And Section 5(a) of the MCA, which provides that "[n]o person may invoke the Geneva Conventions or any protocols thereto in any habeas corpus or other civil action or proceeding to which the United States, or a current or former officer * * * is a party as a source of rights" in any civil court proceeding, precludes applicant's reliance on Common Article 3 as providing a basis for court relief in this matter. Thus, even assuming jurisdiction existed, applicant has asserted no privately enforceable rights that would support a grant of the extraordinary relief he seeks.

Because applicant cannot demonstrate an "indisputably clear" right to relief, the application should be denied.

C. Separation of powers principles also bar the relief sought. The Executive's efforts to arrange for transfers of wartime detainees and to ensure that another country provides adequate assurances regarding their treatment of transferees is a quintessential function of foreign affairs within the sole province of the Executive. The process is "delicate, complex, and involve[s] large elements of prophecy. [It] should be undertaken

only by those directly responsible to the people." Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 111 (1948).

The extraordinary relief sought here would directly intrude upon foreign affairs and the government's ability to resettle wartime detainees. Such repatriations and transfers are typically the result of sensitive negotiations among Executive Branch officials with senior officials of foreign governments. See Williamson Decl. ¶¶ 5-6, 9-10; Benkert Decl. ¶¶ 5, 8. Such matters are not properly subject to judicial assessment and evaluation. See Schneider v. Kissinger, 412 F.3d 190, 197 (D.C. Cir. 2005) ("pass[ing] judgment on the policy-based decision of the executive" in foreign policy "is not the stuff of adjudication"). Further, there can be no doubt that the relief sought would interfere with the ability of the Executive Branch to speak with one voice in its dealings with foreign nations. See Crosby v. National Foreign Trade Council, 530 U.S. 363, 381 (2000) (expressing disapproval of acts that "compromise the very capacity of the President to speak for the nation with one voice in dealing with other governments").

As explained in detail in the sworn declarations of Clint Williamson, the Ambassador-at-Large for War Crimes, and Joseph Benkert, the Principal Deputy Assistant Secretary of Defense for Global Security Affairs, the United States has developed an elaborate, inter-agency process to govern the transfer of an enemy

combatant from Guantanamo to another country, typically the enemy combatant's home country. See generally Williamson Decl.; Benkert Decl.

For every transfer, a key concern is whether the foreign government will treat the detainee humanely and in a manner consistent with its international obligations. Williamson Decl. ¶ 4; Benkert Decl. ¶¶ 6-7. 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. Ibid. If a transfer is deemed appropriate, a process is undertaken, typically involving the State Department, in which appropriate assurances regarding the detainee's treatment are sought from the country to which the transfer of the detainee is proposed. Benkert Decl. ¶ 6; Williamson Decl. ¶ 5-6. Those assurances include, where appropriate, assurances of humane treatment and treatment in accordance with the international obligations of the foreign government accepting transfer. Ibid. Among other things, the State Department considers whether the nation in question is a party to relevant treaties such as the CAT, and the State Department ensures that assurances are tailored accordingly if the nation concerned is not a party, or other circumstances warrant. Ibid.

The determination whether it is more likely than not that an individual would be tortured by a receiving foreign government, including, where applicable, evaluation of foreign government assurances, is made by senior Executive officials. The process 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; and any concerns regarding torture that may arise. Williamson Decl. ¶¶ 6-8; Benkert Decl. ¶¶ 6-7. Recommendations by the State Department are developed through a process involving the Bureau of Democracy, Human Rights, and Labor (which drafts the State Department's annual Country Reports on Human Rights Practices) and the relevant State Department regional bureau, country desk, or United States Embassy. Williamson Decl. ¶ 7. When evaluating the adequacy of 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. Williamson Decl. ¶ 8. In an appropriate case, the State Department may consider various monitoring mechanisms for verifying that assurances are being honored. Ibid.

If the assurances obtained from the receiving government are not sufficient when balanced against treatment concerns, the United States would not transfer a detainee to the control of that government. Benkert Decl. ¶ 7; Williamson Decl. ¶ 8. Indeed, the Department of Defense has decided in the past not to transfer detainees to their country of origin because of mistreatment concerns. Ibid.

Transfers of detainees are extremely sensitive matters, and the particulars of the discussions between the Executive Branch and foreign countries in any specific case -- including this one -- are closely held within appropriate Executive Branch channels. The United States' ability to seek and obtain meaningful assurances from a foreign government depends on its ability to treat its dealings with the foreign government with discretion. Williamson Decl. ¶ 9; Benkert Decl. ¶ 8. The United States typically 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, this country's ability to conduct foreign relations. Williamson Decl. ¶ 9.

"[I]n 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.'" Holmes v. Laird, 459 F.2d 1211, 1215 (D.C. Cir. 1972) (quoting Romero v. International Terminal Operating Co., 358 U.S. 354, 383 (1959)); see Hamdi v. Rumsfeld, 542 U.S. 507, 531 (2004) ("Without 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.").

Entertaining applicant's claim to a right to contest potential repatriation or removal from Guantanamo would require the Court to insert itself into sensitive diplomatic matters. It would involve scrutiny or second-guessing of United States officials' judgments and assessments on the likelihood of torture in a foreign country, including judgments regarding the state of diplomatic relations with a foreign government, the reliability of information concerning and representations from a foreign government, the adequacy of assurances provided and a foreign government's capability to fulfill them. Williamson Decl. ¶¶ 6-8; Benkert Decl. ¶¶ 5-8. And requiring the United States "to disclose outside appropriate Executive branch channels its communications with a foreign government relating to particular mistreatment or torture concerns, that government, as well as other governments, would likely be reluctant in the future to communicate frankly with the United States concerning such issues." Williamson Decl. ¶ 10 Moreover, "review in a public forum of the Department's dealings

with a particular foreign government regarding transfer matters would seriously undermine our ability to investigate allegations of mistreatment or torture that come to our attention and to reach acceptable accommodations with other governments to address those important concerns." Ibid.; see, e.g., Chicago & Southern Air Lines, Inc., 333 U.S. at 111 ("It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret. Nor can courts sit in camera in order to be taken into executive confidences. * * * [E]ven if courts could require full disclosure, the very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative.").

Accordingly, separation of powers principles provide an important reason why this Court should not assert jurisdiction to grant applicant the extraordinary relief he requests.

II. APPLICANT HAS NOT SATISFIED THE STRINGENT STANDARD FOR A STAY

Even if the Court were to evaluate applicant's request under the still stringent standard governing the issuance of a stay pending consideration of a petition for a writ of certiorari, the request still falls short of meeting the threshold for such extraordinary relief. Applicant has not demonstrated a reasonable probability that certiorari will be granted, a significant

possibility that he would prevail on the merits before this Court, or irreparable harm. That is particularly true because applicant must show not that he is likely to satisfy the standards for certiorari, but the even more stringent standards for certiorari before judgment. To secure the relief sought, applicant must ask this Court (1) to assert jurisdiction over an action seeking non-habeas relief where Congress has expressly removed jurisdiction; (2) to disregard, or second guess, the Department of State's thorough review process for ensuring that a potential transfer will comply with United States policy and practice and its international obligations; and (3) to prohibit the Department of Defense from transferring an enemy combatant from a military base in reliance upon such a Department of State assessment.

A. Because the MCA's removal of jurisdiction is clear and the Suspension Clause does not apply to the non-habeas relief applicant seeks (even assuming that it could otherwise apply to habeas actions brought by aliens detained at Guantanamo), he cannot establish a reasonable probability that certiorari before judgment would be granted or a significant possibility that he would prevail on the merits. Applicant relies (Appl. 9-11) on this Court's decision to grant review in Boumediene to demonstrate that certiorari would be granted in his case. But, as explained supra, the petitioners in Boumediene sought review on the validity of the first part of Section 7(a) of the MCA, which concerns "an

application for a writ of habeas corpus," and applicant asserts jurisdiction under the second part of Section 7(a) of a non-habeas claim. Even if the Court were to hold in Boumediene that there is jurisdiction over the petitioners' habeas claims, that would not require courts to find jurisdiction over non-habeas claims like applicant's, particularly because the Suspension Clause does not apply to such non-habeas claims and the DTA makes clear that Congress intended to limit jurisdiction over claims for relief to detainees who were still detained at Guantanamo. See pp. 8-13, supra. Of course, the Court's decision to grant certiorari after judgment in Boumediene does not suggest a similar action would be appropriate before judgment here. See Br. in Opp. 12-13, Hamdan v. Gates (No. 07-15).

Apart from the dispositive jurisdictional obstacles, as explained above, applicant has no judicially enforceable rights to support the extraordinary relief he seeks. See pp. 13-15, supra. And even assuming applicant could overcome those problems, this Court should be hesitant to inject itself into sensitive diplomatic processes and block a potential transfer of applicant in accordance with long-standing Executive Branch policy. See, e.g., Department of the Navy v. Egan, 484 U.S. 518, 529 (1988) ("[F]oreign policy [is] the province and responsibility of the Executive."); Chicago & Southern Air Lines, Inc., 333 U.S. at 111 ("[T]he very nature of executive decisions as to foreign policy is political, not

judicial."); United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319-321 (1932); see also pp. 15-21, supra.

B. The other equitable factors also counsel against granting the extraordinary relief applicant seeks. Applicant asserts without support that the United States intends to repatriate him notwithstanding a belief that he will likely be tortured. The policy and practice of the United States, described above and supported by sworn declarations, is not to transfer detainees when it believes it is more likely than not they will be tortured. And there is no basis to assume that the government will not follow established practice. Cf. USPS v. Gregory, 534 U.S. 1, 10 (2001) ("[A] presumption of regularity attaches to the actions of Government agencies."); Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402, 415 (1971) (explaining that agencies are "entitled to a presumption of regularity"). Accordingly, applicant has failed to demonstrate irreparable harm that is either actual or certain, as required to justify the extraordinary relief he seeks.

At the same time, granting the requested relief would harm the Executive and the public interest. Because the transfer of a detainee from Guantanamo requires the cooperation of another sovereign country, an injunction barring transfer would undermine the United States' ability to interact effectively with foreign governments and obtain cooperation of other nations in the war on terrorism and to conduct foreign affairs more generally. See

Benkert Decl. ¶ 8; Williamson Decl. ¶¶ 8-12; see also Crosby, 530 U.S. at 381 (noting the importance of "the capacity of the President to speak for the nation with one voice in dealing with other governments").[5] The public interest thus does not favor the relief applicant seeks.

CONCLUSION

The emergency application for a stay and an injunction barring a potential transfer should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General
Counsel of Record

AUGUST 2007

[5] Applicant's contention (Appl. 18) that there is no harm caused by an injunction because the United States can continue to detain applicant while his appeal is pending lacks merit. As the United States has explained, it is in no one's interest to detain enemy combatants longer than is necessary. See Williamson Decl. ¶ 2. And an enemy combatant's professed desire to stay put in Guantanamo provides no basis for a Court to block his transfer out of United States custody.