ORAL ARGUMENT SCHEDULED FOR SEPTEMBER 25, 2008
Nos. 05-5487, 05-5488, 05-5489, and 05-5490

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

JAMAL KIYEMBA, Next Friend, et al.,
Appellees/Cross-Appellants,
v.
GEORGE W. BUSH, President of the United States, et al.,
Appellants/Cross-Appellees.

EDHAM MAMET, Detainee, et al.,
Appellees/Cross-Appellants,
v.
GEORGE W. BUSH, President of the United States, et al.,
Appellants/Cross- Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SUPPLEMENTAL BRIEF FOR APPELLEES/CROSS-APPELLANTS

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TABLE OF AUTHORITIES*

* Authorities upon which we chiefly rely are marked with asterisks.

GLOSSARY

App.	Appendix
CAT	The Convention Against Torture And Other Cruel, Inhuman Or Degrading Treatment Or Punishment, dated Dec. 10, 1984, 1465 U.N.T.S. 85
DTA	Detainee Treatment Act of 2005, Pub. L. No. 109-148, §§ 1001-1006, 119 Stat. 2680 (2005)
FARRA	Foreign Affairs Reform And Restructuring Act of 1998, Pub. L. No. 105, § 2242, 112 Stat. 2681-822 (1998)
Gov't Mot. to Enter J. From *Parhat*	Gov't's Mot. To Enter J. From *Parhat v. Gates* In These Actions, With Modification, And To Remove Cases From Oral Argument Calendar, dated Aug. 18, 2008, filed in *Abdusemet v. Gates*, No. 07-1509 (D.C. Cir.), *Jalaldin v. Gates*, No. 07-1510 (D.C. Cir.), *Ali v. Gates*, No. 07-1511 (D.C. Cir.), and *Osman v. Gates*, No. 07-1512 (D.C. Cir.)
Gov't Opp. to Parhat's Release Into the U.S	Resp't's Combined Opp. To Parhat's Mot. For Immediate Release Into The United States And To Parhat's Mot. For J. On His Habeas Petition, dated Aug. 5, 2008, filed in *In re: Guantanamo Bay Detainee Litigation*, Misc. No. 08-CV-442 (D.D.C) (TFH)
Gov't TRO Mem.	Resp'ts' Mem. In Opp. To Pet'r's Mots. For Temporary Restraining Order And Prelim. Inj. Barring Transfer Or Release Or Requiring Advance Notice Of Transfer Or Release, dated Nov. 3, 2005, filed in *Zakirjan v. Bush*, No. 05-CV-2053 (HHK)
Joint Status Report	Joint Status Report, dated Aug. 18, 2008, filed in *In re: Guantanamo Bay Detainee Litigation*, Misc. No. 08-CV-442 (D.D.C.) (TFH)
MCA	Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (2006)

Mot. to Govern	Resp'ts' Mot. To Govern Further Proceedings, dated July 1, 2008
Mot. to Govern Reply	Resp'ts' Reply In Supp. Of Motion Govern Further Proceedings And Response To Request For Summ. Affirmance, dated July 24, 2008
Pet'r Br	Pet'rs' Brief for Appellees/Cross Appellants, dated July 10, 2006
Resp't Br	Resp'ts' Br. for Appellants, dated June 16, 2006
SA	Supplemental Appendix
Supp. Add.	Supplemental Addendum

INTRODUCTION AND SUMMARY

These appeals have been held in abeyance for almost two years. During that time, the Supreme Court held in *Boumediene v. Bush*, __ U.S. __, 128 S. Ct. 2229 (2008), that the Constitution guarantees Petitioners' right to bring their habeas claims. *Id.* at 2247-59. Additionally, this Court held that one of the Petitioners in these appeals, Huzaifa Parhat – who is identically situated in all material respects to each of the other Petitioners – was unlawfully designated as an enemy combatant. *See Parhat v. Gates*, __ F.3d __, 2008 U.S. App. LEXIS 13721, at *56-*57 (D.C. Cir. June 20, 2008).[1] Now, more than ever, there is little doubt that Petitioners, nine ethnic Uighurs held at Guantánamo for more than six years, are entitled to relief based on their habeas petitions.

The issue now before the Court is *not* the ultimate relief to which Petitioners may be entitled, but the more limited question of whether the district court may require the Government to provide 30-days' notice before transferring Petitioners to a foreign country of the Executive's own choosing (the "Notice Orders"). The Notice Orders do not prevent any transfer actually contemplated by the Government. If the Government proposes the transfer of Petitioners to a safe country, they will not object. Indeed, three of the original Petitioners in these appeals (all of whom the Government conceded were *not* enemy combatants) have already been transferred from Guantánamo – all three were provided with advance notice of the proposed transfers, and none objected. There is no need at this time to address the merits of a hypothetical transfer, which the remaining Petitioners may or may not oppose. Nor, as a matter of law, would it be appropriate to do so; unless and until Respondents disclose the specific circumstances of the

[1] Huzaifa Parhat is identified as Hudaifa Doe in the Petitioners' opening brief. Pet'r Br. at 6.

proposed transfer (including the country to which Petitioners are to be transferred), the district court will remain unable to address any claims opposing it.

For these reasons alone, the Notice Orders are appropriate under *Boumediene* and the All Writs Act. The district court narrowly tailored the Notice Orders for the sole purpose of protecting its jurisdiction to consider the merits of Petitioners' habeas claims, including whether any proposed transfer is engineered to deny Petitioners the very relief that the Supreme Court has held they are entitled to pursue, *see Boumediene*, 128 S. Ct. at 2273 ("[i]f a detainee can present reasonably available evidence demonstrating there is no basis for his continued detention, he must have the opportunity to present this evidence to a habeas corpus court"), and which this Court has indicated they are entitled to receive. *See Parhat*, 2008 U.S. App. LEXIS 13721, at *48. Because the district court indisputably has habeas jurisdiction, it has the authority under the All Writs Act to protect that jurisdiction. *See Belbacha v. Bush*, 520 F.3d 452, 456 (D.C. Cir. 2008) (Ginsburg, J., joined by Griffith, J.) (holding that even before *Boumediene*, district court had authority under All Writs Act to enjoin transfer to preserve jurisdiction over a petitioner's habeas claims); *see also id.* at 460 (Randolph J., dissenting) (dissenting on other grounds while agreeing that the court should enter "a stay under the All Writs Act, 28 U.S.C. § 1651, preventing Belbacha's transfer to Algeria pending [*Boumediene*]"). The Court need not reach any other issues presented by Respondents.

Nevertheless, the Notice Orders are also appropriate under Fed. R. Civ. P. 65. Under *Parhat*, Petitioners are likely to succeed on their claims for unlawful detention because they are not enemy combatants. Likewise, because the Respondents have conceded that it is more likely than not that Petitioners – all of whom are ethnic Uighurs, a group traditionally oppressed by the Chinese government – would be tortured if they were transferred to China (their country of citizenship), Petitioners would be entitled to an injunction against any proposed

transfer to that country. With respect to transfer anywhere else, Petitioners, at a minimum, are entitled to advance notice so that they may determine whether they would face a similar risk of physical harm and, if so, to seek a ruling on the merits of any objection to that proposed transfer. The Government claims the power to decide that question unilaterally, but the Government lacks the power to defeat the district court's jurisdiction over the habeas remedy by sending Petitioners beyond the control of the court. The Government also fails to demonstrate how it has been harmed by having to provide notice in the past, or how it could possibly be injured by providing the same notice in the future, merely to preserve the district court's jurisdiction long enough for it to consider any potential claims concerning a proposed transfer.

Petitioners seek only the opportunity to obtain judicial review of their habeas claims. It is this basic right, and only this right, that the Notice Orders preserve.

ARGUMENT

POINT I

THE DISTRICT COURT HAS JURISDICTION OVER PETITIONERS' HABEAS CASES

A. *Boumediene* Demonstrates That Habeas Jurisdiction Provides The Court The Power To Order Release, Which Necessarily Includes The Lesser Power To Require Advance Notice Of Removal

It is undisputed that the district court has jurisdiction over Petitioners' habeas cases. *See* Mot. to Govern at 3 (conceding that "the Supreme Court's *Boumediene* decision . . . holds that the [MCA] is not a bar to subject matter jurisdiction in these habeas corpus cases"). As *Boumediene* acknowledges, the district court's habeas jurisdiction must perforce include the power to remedy Petitioners' meritorious claims here. *See also Parhat*, 2008 U.S. App. LEXIS 13721, at *47-*48.

In rejecting the jurisdiction-stripping provisions under § 2241(e)(1), the Supreme

Court stated that release is "a constitutionally required remedy" for habeas claims. *Boumediene*, 128 S. Ct. at 2271. Requiring the Government to provide advance notice of an intended transfer of a Guantánamo petitioner is an incident of the district court's power to order a petitioner's release. Indeed, in the setting of Guantánamo, the Government has argued that "release" and "transfer" are synonymous because a "transfer for release would consist of, in the first instance, a transfer to the control of the government of the destination country." Gov't TRO Mem. at 8 n.8 (Supp. Add. A37).[2] Because the power to order release subsumes the power to control the terms of the release, the district court necessarily has jurisdiction to require the Government to provide advance notice of any intended removal of Petitioners from Guantánamo. *See Boumediene*, 128 S. Ct. at 2266 ("the habeas court must have the power to order the conditional release of an individual unlawfully detained – though release need not be the exclusive remedy and is not the appropriate one in every case in which the writ is granted"); 28 U.S.C. § 2243 (habeas actions may be resolved "as law and justice require").[3]

Moreover, it is self-evident that the "release" of an innocent man consequent to the grant of habeas relief may not be engineered to threaten him with harm. Nor may "release" simply be a transfer of Petitioners from one unlawful detention to another. Accordingly, the

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[2] Accordingly, outright "release" by the Government must, in its own parlance, mean release within the United States, as opposed to "transfer" to the custody of a foreign government.

[3] *Accord Peyton v. Rowe*, 391 U.S. 54, 66 (1968) ("the [habeas] statute does not deny the federal courts power to fashion appropriate relief other than immediate release"); *Carafas v. LaVallee*, 391 U.S. 234, 239 (1968) ("[T]he statute does not limit the relief that may be granted to discharge of the applicant from physical custody. Its mandate is broad with respect to the relief that may be granted."); *see also Schlup v. Delo*, 513 U.S. 298, 319 (1995) (Habeas "is, at its core, an equitable remedy."); *Jones v. Cunningham*, 371 U.S. 236, 243 (1963) (Habeas is not "a static, narrow, formalistic remedy; its scope has grown to achieve its grand purpose."). *Compare* Sept. 11, 2006 Oral Arg. Tr. at 19:15-17 (Supp. Add. A73) (Government arguing here: "So, we are releasing them. We're giving them basically . . . what they could get at the end of the case") *with Boumediene*, 128 S. Ct. at 2266 ("release need not be the exclusive remedy and is not the appropriate one in every case in which the writ is granted").

district court's habeas jurisdiction necessarily extends to ensuring that any proposed "release" of Petitioners is in fact that, and not in actuality a transfer that would result in foreseeable harm to Petitioners or their continued unlawful detention in a location beyond the jurisdiction of the district court, whether at the hands of a foreign government or at the hands of, in coordination with, or at the behest of the United States.

Here, at the very least, the district court has jurisdiction to ensure that the Government complies with the order of this Court in *Parhat* that Petitioners must be released or transferred to a safe country, and that it does so in a manner consistent with the Constitution, laws and treaties of the United States, 28 U.S.C. § 2241(c)(3), as well as international law, *Hamdan v. Rumsfeld*, 548 U.S. 557, 630-31 (2006) (holding that the United States is bound by Common Article 3 of the Geneva Convention). Indeed, as a result of *Parhat*, the Government is required to promptly "release" or "transfer" to a safe country five of the nine Petitioners in these appeals – the very relief they seek by their habeas petitions.[4] Petitioners assert further that any proposed transfer that would unlawfully subject them to risk of physical harm or continued unlawful detention would be patently illegal and clearly within the purview of the district court to prevent. Petitioners' claims relating to unlawful transfer are thus equivalent to demands for immediate release from detention: if the Government is unable to coordinate the safe and legal "transfer" of Petitioners, then it must promptly "release" them. Petitioners' claims relating to

[4] On August 18, 2008, the Government conceded in actions filed under the DTA that the rationale of this Court's decision in *Parhat* applies equally to four of the other *Kiyemba* Petitioners and stated that it would likewise treat them "as if they are no longer enemy combatants." Gov't Mot. to Enter J. From *Parhat* at 3-4 (Supp. Add. A4-A5), filed in *Abdusumet v. Gates*, No. 07-1509 (D.C. Cir.), *Jalaldin v. Gates*, No. 07-1510 (D.C. Cir.), *Ali v. Gates*, No. 07-1511 (D.C. Cir.), *Osman v. Gates*, No. 07-1512 (D.C. Cir.). Petitioners in *Abdusemet*, *Jalaldin*, *Ali*, and *Osman* are identified as Abdusamad Doe, Jalaal Doe, Khalid Doe, and Saabir Doe, respectively, in these appeals. Pet'r Br. at 6.

transfer thus strike at the very heart of the type of habeas relief indisputably protected by *Boumediene*.

The Supreme Court's ruling in *Munaf v. Geren*, __ U.S. __, 128 S. Ct. 2207 (2008) – issued the same day as *Boumediene* – demonstrates further that there is jurisdiction over claims relating to the proposed transfer of a habeas petitioner. In *Munaf*, the Supreme Court was confronted with two issues:

> *First*, do United States courts have jurisdiction over habeas corpus petitions filed on behalf of American citizens challenging their detention in Iraq by the MNF-I [Multinational Force-Iraq]? *Second*, if such jurisdiction exists, may district courts exercise that jurisdiction to enjoin the MNF-I from transferring such individuals to Iraqi custody or allowing them to be tried before Iraqi courts?

Id. at 2213. The Supreme Court concluded that U.S. courts *do* have habeas jurisdiction to address claims relating to the petitioners' proposed transfer to Iraq, but held that "[u]nder circumstances such as those presented here, however, habeas corpus provides petitioners with no relief." *Id.*[5] *Munaf* therefore confirms that the district court has habeas jurisdiction to address Petitioners' claims opposing the unlawful transfer of a prisoner to the custody of a foreign government. Here, unlike in *Munaf*, the actual facts surrounding Petitioners' potential transfers are not known. The Notice Orders merely preserve the district court's habeas jurisdiction – which *Boumediene* and *Munaf* recognize is present – and provide Petitioners with a brief window of time within which to assert their habeas claims prior to being unilaterally transferred by the Government beyond the reach of the writ.

[5] As set forth below, here there are none of the same circumstances upon which the Court in *Munaf* relied in support of its conclusion that habeas relief was not available on the merits for the *Munaf* petitioners. *See infra* Point.III.B.2.

B. The Government's Apparent Reading Of *Boumediene* Is Beside The Point

Respondents argue that *Boumediene* struck down only § 2241(e)(1) and therefore that the district court is barred from requiring the Government to provide advance notice of removal, which it argues is an action covered by § 2241(e)(2). *See* Mot. to Govern Reply at 5. But this argument misses the point of *Boumediene*. Section 2241(e)(1) purported to strip the courts of "'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.'" *Boumediene*, 128 S. Ct. at 2242. Congress intended more than merely to strip the courts' jurisdiction to *consider* a Guantánamo prisoner's habeas petition "challeng[ing] the legality of [his] detention." Mot. to Govern Reply at 4. Section 2241(e)(1) also attempted to strip the courts of any habeas *remedy* for an unlawful detention. In striking down § 2241(e)(1), the Supreme Court held that a habeas court "must have" jurisdiction and the power to remedy such claims. *See Boumediene*, 128 S. Ct. at 2266-67.

Rasul held that this Court has jurisdiction in Petitioners' cases under the habeas corpus statute, 28 U.S.C. § 2241, *et. seq*. *See Rasul v. Bush*, 542 U.S. 466, 564 (2004). Congress attempted to amend the statute in § 7 of the MCA, codified as § 2241(e), Supp. Add. A74-A76, which purported to strip the courts of jurisdiction over habeas petitions filed by foreign nationals detained as enemy combatants. *Boumediene* expressly held that § 7 of the MCA was unconstitutional. 128 S. Ct. at 2274. Accordingly, as a result of *Boumediene*, the repeal of habeas jurisdiction under § 2241(e) is simply void, and the habeas corpus statute is as applicable as it was before the passage of MCA § 7. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) ("[A]n act of the legislature, repugnant to the constitution, is void."). The Court must therefore "disregard" the unconstitutional provision, *see Plaut v. Spendthrift*

Farm, Inc., 514 U.S. 211, 231 (1995), and proceed under the pre-existing statutory authority. *See United States v. Klein*, 80 U.S. (13 Wall.) 128 (1872) (same); Henry M. Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 Harv. L. Rev. 1362, 1387 (1952) ("If the court finds that what is being done is invalid, its duty is simply to declare the jurisdictional limitation invalid also, and then proceed under the general grant of jurisdiction."). *See also Boumediene v. Bush*, 476 F.3d 981, 1011 (D.C. Cir. 2007) (Rogers, J., dissenting) (stating that the habeas repeal was unconstitutional, and that the proper outcome was to hold that "on remand the district courts shall follow the return and traverse procedures of 28 U.S.C. § 2241, et seq."). Petitioners are therefore in precisely the same position they were in prior to enactment of § 7 of the MCA, and are in the same position as any other federal habeas petitioner invoking 28 U.S.C. § 2241, entitled to bring claims based on violations "of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2241(c)(3).

Whether the notice requirement is at the "core" of a habeas remedy or ancillary to "core" habeas is irrelevant. Mot. to Govern Reply at 4.[6] The Government would like to read Section 2241(e) as distinguishing "core" habeas (treated in § 2241(e)(1)) and "ancillary" habeas (treated in § 2241(e)(2)). But Sections 2241(e)(1) and (e)(2) do not divide the world by habeas "issues" or habeas "aspects." At most, they distinguish between two types of *actions*. Section 2241(e)(1) treats habeas actions; Section 2241(e)(2) treats "other action[s] against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions

[6] The Government's position that this Court should read into *Boumediene* a critical distinction between "core" and "non-core" habeas claims is perplexing. The term "core" appears in that decision only *once*, and only then when citing *Schlup*, 513 U.S. at 319, for the proposition that habeas "is, at its core, an equitable remedy." There is not a single statement in *Boumediene* to support the Government's apparent position that claims relating to the transfer of a habeas petitioner are not "core" habeas claims or, for that matter, why it would make any difference as a matter of law if they were not.

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."[7] Thus, whether *Boumediene* invalidated § 2241(e)(2) is a red herring. The notice requirement by the district court is an incident of the court's remedial power in a habeas action, which Congress attempted to restrict under § 2241(e)(1), invalidated by *Boumediene*.[8]

POINT II

THE NOTICE ORDERS ARE APPROPRIATE UNDER THE ALL WRITS ACT

As this Court recently affirmed in *Belbacha*, the All Writs Act provides a federal court with the authority "to issue an 'auxiliary' writ 'in aid' of a 'jurisdiction already existing.'" *Belbacha*, 520 F.3d at 458 (internal citation omitted). Under *Boumediene*, subject matter jurisdiction indisputably exists here. Thus, the district court had authority under the All Writs

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[7] Unlike habeas actions addressed by 2241(e)(1), the "other action[s]" treated by 2241(e)(2) are not limited to actions "filed by or on behalf of" a Guantánamo prisoner, and those against whom the actions may be brought are not limited to the prisoner's custodian but extend to "the United States or its agents." The "other action[s]" treated by 2241(e)(2) thus might include non-habeas claims such as *Bivens* actions against government officials for money damages.

[8] Respondents get no help from the Court's reservation that "[i]n view of our holding we need not discuss the reach of the writ with respect to claims of unlawful conditions of treatment or confinement." Mot. to Govern Reply at 4 (quoting *Boumediene*, 128 S. Ct. at 2274). As the Court explained: "[t]he structure of the two paragraphs [§§ 2241(e)(1) and (e)(2)] implies that habeas actions [referenced in § 2241(e)(1)] are a type of action [referenced in § 2241(e)(2)] 'relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained . . . as an enemy combatant.'" *Boumediene*, 128 S. Ct. at 2243 (quoting § 2241(e)(2)). At most, the Court's recognition that it need not address the reach of the writ with respect to actions relating to "treatment" or "conditions of confinement" confirms by implication that the writ *does* reach each of the three categories of actions identified by § 2241(e)(2) other than those relating to treatment or conditions of confinement – i.e., actions "relating to any aspect of the detention, *transfer*, . . . [or] trial . . . 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." 28 U.S.C. § 2241(e)(2) (emphasis added).

Act to issue the Notice Orders in aid of that jurisdiction to address Petitioners' habeas claims. *See Klay v. United Healthgroup, Inc.*, 376 F.3d 1092, 1102 (11th Cir. 2004).[9]

A. An All Writs Act Injunction Was Necessary To Preserve The District Court's Subject Matter Jurisdiction Under *Boumediene*

Respondents concede that *Boumediene* "holds that the [MCA] is not a bar to subject matter jurisdiction in these habeas corpus cases." Mot. to Govern at 3. Respondents have also said that they intend to transfer Petitioners to a foreign country, and they have argued that doing so would divest the district court of jurisdiction over all claims asserted in the habeas petitions. Resp't Br. at 45, 49; *see also Qassim v. Bush*, 466 F.3d 1073, 1075-77 (D.C. Cir. 2006). These are precisely the type of circumstances in which courts "*should* take such action as will defeat attempts to wrongfully deprive parties entitled to sue in the Federal courts for the protection of their rights in those tribunals." *Abu Ali v. Ashcroft*, 350 F. Supp. 2d 28, 54 (D.D.C. 2004) (emphasis added) (quoting *Ala. Great S. Ry. Co. v. Thompson*, 200 U.S. 206, 218 (1906)); *see also SEC v. Vision Commc'ns, Inc.*, 74 F.3d 287, 291 (D.C. Cir. 1996) (All Writs Act provides district court with power "to protect its jurisdiction").[10]

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[9] *See also* 2 Randy Hertz & James S. Liebman, *Federal Habeas Corpus Practice and Procedure* § 36.3 (5th ed. 2005) ("[T]he federal courts have inherent authority to preserve or modify a prisoner's custody status during all phases of a habeas corpus proceeding. . . . That authority extends, at least, to issuance by the district court – at any time after it concludes that it has personal and subject matter jurisdiction – of an order forbidding transfer to another facility if (1) transfer would threaten the court's jurisdiction or venue or adversely affect the efficiency, fairness, or remedial capacity of the proceedings, and (2) there is no 'need therefor.'")

[10] *See* App. 47 (*Kiyemba* district court issuing Notice Order based on its "concern that the government may remove the petitioners from GTMO in the near future, thereby divesting (either as a matter of law or *de facto*) the court of jurisdiction.") (emphasis added); App. 62 (*Mamet* district court citing *Kiyemba* and *Deghayes v. Bush*, Civ. No. 04-2215 (RMC) (D.D.C. June 15, 2005) (issuing identical 30-day notice order under All Writs Act).

The gravamen of an All Writs Act injunction (as opposed to a Rule 65 injunction) is *not* whether the Petitioner is likely to succeed on his cause of action.[11] Rather, an All Writs Act injunction is appropriate where "'*jurisdiction* [is] already existing,'" *Belbacha*, 520 F.3d at 458 (emphasis added) (citation omitted), and "the integrity of [that jurisdiction] is being threatened by some action or behavior." *Klay*, 376 F.3d at 1100 (citations omitted); *see also id.* at 1101 ("The requirements for a traditional injunction do not apply to injunctions under the All Writs Act because the historical scope of a court's traditional power to protect its jurisdiction, codified by the Act, is grounded in entirely separate concerns."). Because there is jurisdiction over Petitioners' habeas claims, the Notice Orders are proper under the All Writs Act to protect against the threat that Petitioners' transfer to a foreign country would divest the district court of such jurisdiction.

Belbacha is directly on point. There, the district court had declined to enjoin the transfer of Belbacha to Algeria citing this Court's ruling in *Boumediene* that the MCA had validly stripped habeas jurisdiction. This Court reversed the district court, holding that there was authority to issue an All Writs Act injunction enjoining transfer:

> We conclude that Belbacha's petition for a writ of habeas corpus is colorable. Belbacha does not challenge only his transfer to a country that might torture him; he contests also the basis for his detention as an "enemy combatant." Should the Supreme Court hold in *Boumediene* that a detainee at Guantanamo Bay may petition for a writ of habeas corpus to challenge his detention, and should the district court conclude that Belbacha's detention is unlawful, then the Executive might be without authority to transfer him to Algeria.

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[11] Petitioners have in any event demonstrated likelihood of success on the merits of their habeas claims, both for immediate release and that such release be to a safe and appropriate country. *See Parhat*, 2008 U.S. App. LEXIS 13721, at *56-*57 (enemy combatant designation improper); *Belbacha*, 520 F.3d at 456 (finding that habeas petition seeking release and challenging transfer to country that might torture him was "colorable" and therefore that All Writs Act injunction appropriate); *see also infra* Point.III.B.

Belbacha, 520 F.3d at 456. The panel's decision that the district court could enjoin Belbacha's transfer under the All Writs Act even prior to the Supreme Court's decision in *Boumediene* – when the law of this Circuit was that there was *not* jurisdiction over Belbacha's habeas claims – means *a fortiori* the district court has the authority to order advance notice of such a transfer now that the Supreme Court established that there is subject matter jurisdiction.

The Government also argued in *Belbacha* that there was no authority to issue an All Writs Act injunction because the petitioner's claims for relief were barred as a matter of law. This Court squarely rejected that argument:

> We need not and do not address the Government's argument that . . . § 7(a) of the MCA constitutionally bars Belbacha's underlying claims for relief; the district court has the authority to grant Belbacha preliminary relief because the Suspension Clause colorably protects those claims . . . . Belbacha's transfer would make it impossible for the district court to entertain his claim to relief that the Constitution might guarantee.

Id. at 456, 458-59. *Belbacha* thus remanded for the district court to address the petitioner's claims on the merits. *See id.* at 459 ("Here the probability of Belbacha's prevailing on the merits of his habeas petition is far from clear but, in light of the seriousness of the harm he claims to face, namely, torture at the hands of a foreign state and of a terrorist organization, we cannot as the Government urged at oral argument say Belbacha's motion for a preliminary injunction fails as a matter of law."). Likewise here, whether or not Petitioners have demonstrated a likelihood of success on the merits – which in fact they have, *see infra* Point.III.B.2 – an All Writs Act injunction, in the modest form of a notice order, is necessary in order to ensure that the Government does not unilaterally divest the district court of its jurisdiction to address

Petitioners' habeas claims.[12] Once the circumstances of an actual transfer are known, it will be for the district court to address the merits of Petitioners' opposition to that transfer, if any.

B. *Munaf* Is Irrelevant To Whether An All Writs Act Injunction Is Appropriate Here

The Government's reliance upon *Munaf* is misplaced. *See* Mot. to Govern Reply at 8-9 (arguing that *Munaf* "discredited" *Belbacha*). *Munaf* was not an All Writs Act case, and thus in no way "discredited" this Court's holding in *Belbacha* that a district court may issue an injunction under that statute (as opposed to Rule 65) when a party's threatened actions would destroy jurisdiction before adjudication on the merits. *See Belbacha*, 520 F.3d at 456 (recognizing that Supreme Court granted certiorari in *Munaf* on a different question).

Indeed, the Court in *Munaf* had no occasion to address the All Writs Act because it concluded that the factual record surrounding transfer was fully developed. *See Munaf*, 128 S. Ct. at 2219-20 (deciding that merits resolution was ripe). Because the petitioners' claims were ripe for review on substantive grounds, the Supreme Court could and did proceed directly to the merits determination, and there was no need to preserve jurisdiction pending the outcome. *See id.* at 2220. Here, however, where many of the circumstances surrounding Petitioners' potential transfers are yet to be determined, it is impossible at this stage to proceed to the merits of Petitioners' claims, and under the All Writs Act the district court may – indeed "should," *Abu Ali*, 350 F. Supp. 2d at 54 – preserve its jurisdiction to consider the claims once the relevant facts

[12] Judge Randolph's dissent in *Belbacha* agreed that an All Writs Act injunction was proper. *See Belbacha*, 520 F.3d at 460. He took issue only with the availability of a Rule 65 injunction while the D.C. Circuit's decision in *Boumediene* was still on appeal. *Id.*; s*ee also Belbacha v. Bush*, No. 07-5258, 2007 U.S. App. LEXIS 30191 (D.C. Cir. Dec. 31, 2007) (court enjoining *sua sponte* respondents from transferring petitioner pending appeal on the merits); *Belbacha v. Bush*, No. 07-5258, 2007 U.S. App. LEXIS 18264 (D.C. Cir. July 30, 2007) (enjoining transfer while considering petitioner's motion to stay pending appeal in order "to give the court sufficient opportunity to consider the merits."), *stay denied*, 2007 U.S. App. LEXIS 18710 (D.C. Cir. Aug. 2, 2007).

are before it. *See Klay*, 376 F.3d at 1102 ("[A] court may enjoin almost any conduct 'which, left unchecked, would have . . . the practical effect of diminishing the court's power to bring the litigation to a natural conclusion.'") (internal citation omitted); *see also Lindstrom v. Graber*, 203 F.3d 470, 474-76 (7th Cir. 2000) (All Writs Act permits court to stay extradition pending appeal of habeas petition); *Michael v. INS*, 48 F.3d 657, 663-64 (2d Cir. 1995) (All Writs Act permits federal Court of Appeals to stay a deportation order pending review of its legality).[13]

POINT III

THE NOTICE ORDERS ARE ALSO APPROPRIATE UNDER FED. R. CIV. P. 65

The existence of the district court's jurisdiction and authority to preserve it under the All Writs Act are dispositive. However, the Notice Orders are also appropriate under the traditional four-factor test under Fed. R. Civ. P. 65. *See* Pet'r Br. at 34-42.

A. Petitioners Face Potential Irreparable Injury

The Notice Orders protect the Court's habeas jurisdiction, and therefore Petitioners' ability to obtain meaningful judicial review of whether they are unlawfully detained and the legality of any proposed transfer before the Government unilaterally eliminates that jurisdiction. *See* Pet'r Br. at 36-37. It is particularly important that the district court be permitted to address any claims concerning a proposed transfer of Petitioners given the undisputed likelihood that they would be unlawfully detained and/or subjected to physical harm or torture in the event they were transferred to China (or to any other country that would not resist China's demand for their return). *See* Gov't Opp. to Parhat's Release Into the U.S. at 6 (Supp. Add. A13) (Government conceding that transfer of Petitioner Parhat to China would not

[13] Here, preservation of jurisdiction is particularly critical given that a transfer of Petitioners to China would divest the district court of jurisdiction over claims on which even Respondents essentially concede Petitioners would succeed. *See infra* Point.III.B.

be "consistent with its policy against returning an individual when it is more likely than not he will be tortured"); Pet'r Br. at 35-36; Point.III.B.2, *infra*.

Respondents' suggestion that *Munaf* "undermines petitioners' claims of irreparable injury," Mot. to Govern Reply at 7, is incorrect. Although the Court held in *Munaf* that a "difficult question as to jurisdiction is, of course, no reason to grant a preliminary injunction," 128 S. Ct. at 2219, Petitioners here do not argue that the Notice Orders are proper because there are "difficult questions as to jurisdiction." The district court's jurisdiction over Petitioners' habeas claims – which the Notice Orders are designed to protect – is manifest. *See Boumediene*, 128 S. Ct. at 2275 ("the petitioners before us are entitled to seek the writ").

B. Petitioners Are Likely To Succeed On The Merits

1. *Boumediene* And *Parhat* Establish That Petitioners Are Likely To Succeed On The Merits Of Their Claims That They Are Unlawfully Detained

Boumediene establishes that "habeas corpus jurisdiction applies . . . in these cases." *Boumediene*, 128 S. Ct. at 2275. In addition, this Court held in *Parhat* that the designation of Petitioner Huzaifa Parhat as an enemy combatant was improper, *Parhat*, 2008 U.S. App. LEXIS 13721, at *56-*57, and therefore "direct[ed] the government to release or transfer the petitioner, or to expeditiously hold a new CSRT consistent with [the Court's] opinion," *id.* at *57. All of the other Petitioners are Uighurs who are in all material respects identically situated to Parhat and have been held on the basis of the same allegations that the Court ruled in *Parhat* were insufficient as a matter of law. Joint Status Report at 5 (Supp. Add. A57). Indeed, only three days before the filing of this brief, the Government conceded that, after more than six years of imprisonment, four more of the Petitioners should be deemed to be non-enemy combatants. *See supra* p. 5 n.4. Petitioners can therefore establish – at a minimum – a likelihood of success on the merits of their habeas claims for unlawful detention.

2. Petitioners Are Likely To Succeed On The Merits Of Obtaining An Order Enjoining Any Proposed Transfer To China

The Government acknowledges that, "consistent with its policy against returning an individual when it is more likely than not he will be tortured, [the Government] will not return [Parhat] involuntarily to [China]." Gov't Opp. to Parhat's Release Into the U.S. at 6 (Supp. Add. A13). The Government thus concedes that any transfer of Parhat – or any of the other Petitioners, who are identically situated to Parhat – to China would "more likely than not" result in torture. Any purported reversal by the Government of this position should be reviewed by the courts with extreme caution, particularly in light of the increasing pressure to transfer or release Petitioners given the indisputable reality that they have been imprisoned for more than six years without any legal basis.

As the Supreme Court has repeatedly admonished in the context of the Guantánamo cases, simply invoking the Executive's foreign affairs and war powers does not provide the Respondents with a "blank check" to preclude review by the Judicial Branch. *See Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004) (plurality opinion) ("[U]nless Congress acts to suspend it, the Great Writ of habeas corpus allows the Judicial Branch to play a necessary role in maintaining th[e] delicate balance of governance, serving as an important judicial check on the Executive's discretion in the realm of detentions."); *see id.* at 525 (habeas corpus is a "critical check" on the executive); *Hamdan*, 548 U.S. at 636 (Breyer, J., concurring) ("The Court's conclusion ultimately rests upon a single ground: Congress has not issued the Executive a 'blank check.'"); *Rasul*, 542 U.S. at 485 ("[F]ederal courts have jurisdiction to determine the legality of the Executive's potentially indefinite detention of individuals who claim to be wholly innocent of wrongdoing.").

Contrary to the Government's assertion, *Munaf* did not overrule this principle and provide it with the absolute and unreviewable discretion to transfer Petitioners anywhere it chooses. *First*, the petitioners in *Munaf* were held in custody by U.S. forces for the sole purpose of transfer into a foreign government's criminal justice system. *Munaf*, 128 S. Ct. at 2214-15. The Court, noting that the injunctions "would interfere with Iraq's sovereign right to 'punish offenses against its laws committed within its borders,'" *id.* at 2220 (citation omitted), held that it could not "shelter . . . fugitives from the criminal justice system of the sovereign with authority to prosecute them," *id.* at 2228.[14] The unique factual and legal circumstances of *Munaf* make the case distinguishable from those relevant to Petitioners, whose release would not implicate issues of foreign sovereignty, who have been charged or convicted of no crimes, who are not held in a war zone, and are held under the sole authority of the United States. Indeed, the Supreme Court has already ruled *twice* that habeas relief is available for detainees held at Guantánamo. *See Rasul*, 542 U.S. at 483-84; *Boumediene*, 128 S. Ct. at 2261-62 (in the context of Guantánamo "[t]here is no indication . . . that adjudicating a habeas corpus petition would cause friction with the host government. . . . Under the facts presented here . . . there are few practical barriers to the running of the writ. To the extent barriers arise, habeas corpus procedures likely can be modified to address them."). Whether Petitioners have a right to enjoin a proposed transfer,

[14] In addition, the Court in *Munaf* recognized that "petitioners do not dispute that they voluntarily traveled to Iraq, that they remain detained within the sovereign territory of Iraq today, or that they are alleged to have committed serious crimes in Iraq." 128 S. Ct. at 2221. The Court also noted that the Executive had represented that Iraqi prison and detention facilities "'generally met internationally accepted standards.'" *Id.* at 2226 (citation omitted). It was under these factual circumstances, and the long-entrenched precedent that the U.S. may turn over its citizens to foreign authorities for prosecution of crimes committed in that country, that the Court declined to pass further judgment on the Iraqi justice system and held that the petitioners had failed to state a claim in their habeas petitions. *Id.*; *see also id.* at 2228 (Souter, J., concurring, joined by Ginsburg, Breyer, JJ.) (noting the eight particular circumstances under which habeas corpus provided no relief).

under the facts then known, applying the traditional Rule 65 standards and the functional test provided by the Supreme Court in *Munaf*, is for the *district court* to decide in the first instance, not *Respondents*' in their unqualified discretion.[15]

Second, the Court in *Munaf* pointedly noted that petitioners had not raised claims for relief under FARRA as Petitioners do here. *Munaf*, 128 S. Ct. at 2226 n.6. Under FARRA – and Article 3 of CAT, which FARRA implements – the United States may not expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture. FARRA § 2442(a), 112 Stat. 2681-822; CAT, art. 3; *cf.* S. Exec. Rep. No. 101-30, Res. of Advice and Consent to Ratification, at II.(2) (1990) (U.S. ratification of CAT includes reservation that it "understands the phrase, 'where there are substantial grounds for believing that he would be in danger of being subjected to torture,' as used in article 3 of the Convention, to mean 'if it is more likely than not that he would be tortured.'"). Although *Munaf* notes *in dictum* that "claims under [FARRA] may be limited to certain immigration proceedings," *Munaf*, 128 S. Ct. at 2226 n.6 (citing Section 2242(d)), numerous circuit courts have concluded that Section 2242(d) cannot be read to strip district courts' of jurisdiction over habeas petitions alleging violations of FARRA in light of *St. Cyr's* holding that Congress must articulate "specific and unambiguous statutory directives to effect a repeal" of habeas jurisdiction. *See Ogbudimkpa v. Ashcroft*, 342 F.3d 207, 215-22 (3d Cir. 2003); *Cadet v. Bulger*, 377 F.3d 1173, 1182 (11th Cir. 2004); *Saint Fort v. Ashcroft*, 329 F.3d 191, 200-02 (1st Cir. 2003); *Wang v. Ashcroft*, 320 F.3d 130, 140-43 (2d Cir. 2003); *Singh v. Ashcroft*, 351 F.3d 435, 441-42 (9th Cir. 2003). *But see*

[15] *See Khouzam v. Hogan*, 529 F. Supp. 2d 543, 567-70 (M.D. Pa. 2008) (diplomatic assurances that petitioner would not be tortured upon deportation to Egypt did not preclude review by an impartial adjudicator).

Mironescu v. Costner, 480 F.3d 664, 673-77 (4th Cir. 2007). Absent the Notice Orders, Petitioners would suffer the irreparable harm of being denied the opportunity to assert this claim in opposition to any transfer that might result in torture.

In addition to FARRA, Petitioners have also asserted several other legal grounds upon which the Government could be enjoined from effecting their unlawful transfer, including the Fifth Amendment,[16] the Third and Fourth Geneva Conventions,[17] the Administrative Procedure Act, the 1954 Convention Relating to the Status of Refugees and international human rights law. *See* Pet'r Br. at 41; SA 270-81, 301-14. There simply is no basis for the Government's position that it has the power to unilaterally deny the district court an opportunity to address the merits of each of Petitioners' claims by transferring them, without prior notice, beyond the jurisdiction of that court – particularly in light of the Government's stated position that Petitioners would have no recourse *even in "a case where we know that the detainee would be subject to torture if returned to another country.*" Sept. 11, 2006 Oral Arg. Tr. at 6-7 (Supp. Add. A71-A72) (emphasis added). That is not the law. *Cf. Munaf*, 128 S. Ct. at 2226 ("Petitioners here allege only the possibility of mistreatment in a prison facility; this is not a

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[16] Substantive due process protections flowing from the Due Process Clause of the Fifth Amendment prohibit government conduct that shocks the conscience, a standard that transfer to torture easily satisfies. *See, e.g., Rochin v. California*, 342 U.S. 165, 172 (1952). The Supreme Court in *Boumediene* adopts the "impracticable and anomalous" test flowing from the *Insular Cases* in general, and from *Reid v. Covert*, 354 U.S. 1 (1957), in particular, in determining whether a constitutional provision has extraterritorial effect. *Boumediene*, 128 S. Ct. at 2255 (quoting *Reid*, 354 U.S. at 74). That evaluation turns on "objective factors and practical concerns, not formalism." *Boumediene*, 128 S. Ct. at 2258. Extending Fifth Amendment Due Process protections to Petitioners, thereby protecting them from transfers that would result in torture would not be "impracticable or anomalous." *See Downes v. Bidwell*, 182 U.S. 244, 277, 283 (1901) (even in "territory over which Congress has jurisdiction which is not a part of the 'United States'" aliens "are entitled under the principles of the Constitution to be protected in life, liberty and property"). Here, the Supreme Court has affirmed that "[i]n every practical sense Guantanamo is not abroad; it is within the constant jurisdiction of the United States." *Boumediene*, 128 S. Ct. at 2261; *see also Rasul*, 542 U.S. at 480.

[17] *See* Pet'r Br. at 40 n.30 (Common Article 3).

more extreme case in which the Executive has determined that a detainee is likely to be tortured but decides to transfer him anyway."); *see also id.* at 2228 (Souter, J., joined by Ginsburg, Breyer, JJ., concurring) (noting same caveat would extend "to a case in which the probability of torture is well documented, *even if the Executive fails to acknowledge it*") (emphasis added).

3. The Notice Orders Are Necessary To Provide The District Court With An Opportunity To Address Any Concerns Relating To Any Transfer Of Petitioners To A Third Country

To the extent Petitioners have not alleged with "certainty and specificity" their fear of being transferred to a country other than China, Mot. to Govern Reply at 7-8, it is for the simple reason that Respondents have refused to disclose any of the circumstances surrounding any such proposed transfer. To the extent there are unknown factors – such as the identity of the destination country – this counsels *for*, not against, granting the Notice Orders. *See Avramidis v. Arco Petroleum Prods. Co.*, 798 F.2d 12, 15 n.8 (1st Cir. 1986); Pet'r Br. at 37-38.

Respondents claim that they need not disclose to the district court or Petitioners any information about a proposed transfer – including the identity of the destination country – before a transfer is effected, and thus may unilaterally prevent the district court from even addressing any claim by Petitioners that the transfer would violate the protections of FARRA or substantive due process, among other laws. However, permitting unilateral transfer would contravene the procedural protections of the Due Process Clause, which at base require notice and a hearing before rights are affected. *See Nat'l Council of Resistance of Iran v. Dep't of State*, 251 F.3d 192, 205 (D.C. Cir. 2001) ("[T]he fundamental norm of due process clause jurisprudence requires that before the government can constitutionally deprive a person of the protected liberty or property interest, it must afford him *notice and a hearing*.") (emphasis added) (citing *Mathews v. Eldridge*, 424 U.S. 319 (1976)). The Notice Orders are narrowly tailored to address this concern.

C. Respondents Are Not Harmed By The Notice Orders

There is no merit to Respondents' assertion that "the mere inquiry into the United States' dialogue with foreign nations and into the terms of a release or transfer, and any assurances that may have been obtained, would cause grave harm." Resp't Br. 51. The transfer of three of the original Petitioners in these appeals illuminates that Respondents simply exaggerate the practical impact of the Notice Orders.[18] Respondents have not asserted that they suffered any harm in providing advance notice of those transfers.

Petitioners' counsel consented to those transfers because they did not raise concerns of prolonged unlawful detention, mistreatment or torture. To the extent that any intended transfer of the remaining Petitioners were to raise any such concerns, Respondents' generalized separation-of-powers arguments do not weigh against appropriate judicial review. *See Boumediene*, 128 S. Ct. at 2246 ("The Framers' inherent distrust of governmental power was the driving force behind the constitutional plan that allocated powers among three independent branches. This design serves not only to make Government accountable but also to secure individual liberty.").[19]

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[18] The Government transferred former Petitioner Saddiq Turkestani to the Kingdom of Saudi Arabia on June 15, 2006. Pet'r Br. 10. Following oral argument in this appeal, Petitioners Zakirjan and Ala Abdel Maqsud Muhammad Salim were transferred to Albania. *See* Notice Of Transfer And Motion To Dismiss Case As Moot As To Certain Petitioners at 3 n.1, dated Nov. 22, 2006.

[19] Notwithstanding Respondents' insistence that judicial review would "chill" Executive prerogative, *Boumediene* observed that the exercise of habeas jurisdiction "does not undermine the Executive's powers as Commander in Chief. On the contrary, the exercise of those powers is vindicated, not eroded, when confirmed by the Judicial Branch." 128 S. Ct. at 2277. And providing a forum for habeas claims is fundamental to the role of the Judiciary in the balance of governance, "even if, in the end, [claimants] do not obtain the relief they seek." *Id.*

D. The Notice Orders Serve The Public Interest

The public has a strong interest in ensuring that Petitioners receive due process and a meaningful opportunity to challenge the legality of a proposed transfer. Pet'r Br. at 42. Respondents' position that the courts should uncritically accept their generalized predictions that Petitioners will not be harmed upon transfer, and that any interference in that decision frustrates the Government's ability to conduct foreign policy, improperly conflates the public interest with their own position. *Id.* Indeed, as Justice Kennedy warned, because "the writ of habeas corpus is itself an indispensable mechanism for monitoring the separation of powers. . . . the scope of this provision must not be subject to manipulation by those whose power it is designed to restrain." *Boumediene*, 128 S. Ct. at 2259. Allowing Respondents to eliminate habeas jurisdiction over Petitioners' claims by transferring them to a foreign country without notice – and thus without the opportunity to bring a legal challenge to the transfer itself – is precisely the type of manipulation by the Executive that does not comport with the separation of powers. *Id.* at 2277 ("Security subsists, too, in fidelity to freedom's first principles. Chief among these are freedom from arbitrary and unlawful restraint and the personal liberty that is secured by adherence to the separation of powers. It is from these principles that the judicial authority to consider petitions for habeas corpus relief derives.").

CONCLUSION

For the foregoing reasons, the *Mamet* and *Kiyemba* Petitioners respectfully request that this Court affirm the Notice Orders.

Dated: August 21, 2008

Respectfully submitted,

By: _____
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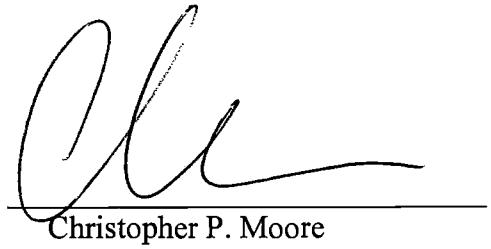
CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(a)(7)(C) and D.C. CIRCUIT RULE 32(a)

I hereby certify that that the foregoing brief contains 7,827 words (which does not exceed the applicable 8,000 word limit), according to the word processing system used to prepare this brief.



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CERTIFICATE OF SERVICE

I, Erika J. Davis, assistant managing attorney at the Washington, D.C. office of Cleary Gottlieb Steen & Hamilton LLP, hereby certify that:

On August 21, 2008, an original plus sixteen copies of the Supplemental Brief for Appellee/Cross-Appellants have been delivered by hand to the party listed below:

U.S. Department of Justice
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Ms. DaSilva, Ms. Campbell or Ms. Hogarty will serve two copies of the Supplemental Brief for Appellee/Cross-Appellants on Respondents' counsel and will file the documents listed above with the United States Court of Appeals for the D.C. Circuit.

Dated: August 21, 2008

Erika J. Davis

SUPPLEMENTAL ADDENDUM

[ORAL ARGUMENT SCHEDULED SEPTEMBER 8, 2008]

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ABDUSEMET, Petitioner, v. ROBERT M. GATES, et al., Respondents.	No. 07-1509
JALAL JALALDIN, Petitioner, v. ROBERT M. GATES, et al., Respondents.	No. 07-1510
KHALID ALI, Petitioner, v. ROBERT M. GATES, et al., Respondents.	No. 07-1511
SABIR OSMAN, Petitioner, v. ROBERT M. GATES, et al., Respondents.	No. 07-1512

GOVERNMENT'S MOTION TO ENTER JUDGMENT FROM *PARHAT v. GATES* IN THESE ACTIONS, WITH MODIFICATION, AND TO REMOVE CASES FROM ORAL ARGUMENT CALENDAR

For the reasons set forth below, the Government respectfully requests that this Court enter the judgment from *Parhat v. Gates* in each of these actions, with the clarifications requested in the Government's petition for rehearing in that case, and that this Court remove these cases (now set for argument on September 8, 2008) from its oral argument calendar.

1. In its June 20 order, in *Parhat v. Gates*, No. 06-1397, this Court vacated the determination of a Combatant Status Review Tribunal (CSRT) regarding petitioner Huzaifa Parhat's status as an enemy combatant. The Court concluded that the CSRT had failed to make appropriate findings regarding the reliability of the documents it cited and that the Court could not determine whether the documents were, on their face, sufficiently reliable to support the CSRT's enemy combatant determination. "Having concluded that the evidence before the CSRT was insufficient to sustain its determination that Parhat is an enemy combatant," the Court remanded the matter, stating that the government should "expeditiously convene a new CSRT to consider evidence submitted in a manner consistent with this opinion." Slip op. 33. The Court further stated that, as an alternative to conducting a CSRT proceeding, the government could "release" Parhat. *Ibid.*

On August 4, 2008, the Government filed a petition for rehearing in *Parhat*. That petition stated, given that Parhat had already been approved for release, "the government has determined that it would serve no useful purpose to engage in further litigation over his status," and that it "will concentrate its limited litigation resources on the many other pending habeas cases." Petition for Rehearing at 1-2. Consequently, the Government has determined that it will house Parhat as if he is no longer an enemy combatant, while it uses its "best efforts to place him in a foreign country." *Ibid.* The filing explained that in the past, all those treated as no longer enemy combatants were released, once a foreign country where they could be transferred was identified. It further explained that while awaiting release, those held as "no longer enemy combatants" were held in a "special, separate camp facility, at which detainees have significantly more privileges" -- including a communal living arrangement, access to all areas of the camp (including a recreation yard, their own bunk house, and an activity room), access to entertainment (including a television set equipped with a VCR and DVD, a stereo system, and equipment for soccer, volleyball, and table tennis), air conditioning in all living areas (which they control), special food items, and expanded access to shower facilities and library materials. *Id.* at 2 n.1.[1]

[1] The process of moving Parhat to this new housing is ongoing and we expect the new housing will be ready this week. In our rehearing petition, we explained that,

The rehearing petition filed in *Parhat* requested that this Court modify its opinion to clarify that it did not purport to resolve the scope of a district court's authority to order Parhat's release into the United States. That question remains unresolved in this Circuit, having been briefed, but not decided, in *Qassim v. Bush*, 466 F.3d 1073 (D.C. Cir. 2006) (dismissing appeal as moot after petitioners were released into another country). Moreover, the petition noted, the question of whether a court can order release into the United States has been raised in and is more appropriately addressed by the district court as part of Parhat's habeas case.

2. The Government concedes that the rationale (noting the lack of findings by the tribunals regarding the reliability of evidence, and concluding that it could not determine that the material was on its face reliable) supporting this Court's ruling in *Parhat* applies equally to these appeals. Therefore, the Government requests that this Court enter the same order as it did in *Parhat*, subject to the clarifications requested in the Government's petition for rehearing in that case (described above).[2]

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absent any behavior jeopardizing operational security, Parhat would remain in such special housing until he is placed in another country. In the meantime, Parhat committed a disciplinary infraction (assaulting another Uigher detainee) and is temporarily being held in Camp 6, based on security concerns. When he is moved to the special housing, that has been used for those designated as no longer enemy combatants, Parhat will be given a clear warning that the new housing arrangements are contingent upon his adhering the base security and disciplinary rules.

[2] As in *Parhat*, the order entered should include a further opportunity to designate and support the designation of protected information.

As noted in that petition, the question of whether a court has the authority to order alien detainees released into the United States is a significant question of first impression in this Circuit, and it should be addressed in the first instance by the district court in habeas corpus proceedings.[3] Consequently, the Government further requests that this Court remove the arguments (scheduled for September 8, 2008) from its oral argument calendar.

3. In light of its determination not to expend its limited resources to continue litigating the enemy combatant status of these detainees, the Government will now treat these petitioners, like Parhat, as if they are no longer enemy combatants. Thus, they will soon be housed in the aforementioned facility together with Parhat, while the Government uses its best efforts to place them in a foreign country. Like Parhat, petitioners here, absent any behavior jeopardizing operational security, will remain in such special housing until they are placed in another country.

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[3] By urging that the issue be decided in the first instance by the district court, the Government does not in any way suggest that its position on this question has changed or that any intervening court decision compels a different conclusion than that reached by the district court when it first decided the question in *Qassim*.

CONCLUSION

In light of the foregoing, the Government respectfully requests that this Court enter the judgment from *Parhat v. Gates* in each of these actions, with the clarifications requested in the Government's petition for rehearing in that case, and that this Court remove these cases from its oral argument calendar.

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CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of August, 2008, I served the foregoing "Government's Motion to Enter Judgment from *Parhat v. Gates* in These Actions, with Modification, and to Remove Cases from Oral Argument Calendar," by causing an original and four copies to be served on the Court via hand delivery and one copy to be sent to the following counsel via e-mail and first-class U.S. mail:

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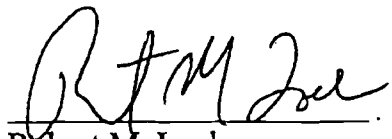

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE:	**Misc. No. 08-442 (TFH)**
GUANTANAMO BAY	**Civil Action No. 05-1509 (RMU)**
DETAINEE LITIGATION	

RESPONDENT'S COMBINED OPPOSITION TO PARHAT'S MOTION FOR IMMEDIATE RELEASE INTO THE UNITED STATES AND TO PARHAT'S MOTION FOR JUDGMENT ON HIS HABEAS PETITION

INTRODUCTION AND SUMMARY

Respondent, the Secretary of Defense, respectfully opposes petitioner Huzaifa Parhat's requests for judgment on the merits and to be released or paroled immediately into the United States.

In a decision issued June 20, 2008, the D.C. Circuit vacated the determination of a Combatant Status Review Tribunal ("CSRT") regarding petitioner Huzaifa Parhat's status as an enemy combatant. *Parhat v. Gates*, __ F.3d __, 2008 WL 2576977 (D.C. Cir. 2008), *rhg. pet. pending* (filed August 4, 2008). In exercising its jurisdiction under the Detainee Treatment Act of 2005 ("DTA"), Pub. L. No. 109-148, 119 Stat. 2680 (2005), the Court concluded that the CSRT had failed to make appropriate findings regarding the reliability of the documents it relied upon and that the Court could not determine whether the documents were, on their face, sufficiently reliable to support the CSRT's enemy combatant determination. *Parhat*, 2008 WL 2576977 at *11-*14. "Having concluded that the evidence before the CSRT was insufficient to sustain its determination that Parhat is an enemy combatant," the Court remanded the matter for further proceedings. *Id.* at

*14. Now, based on that decision, Parhat seeks immediate judgment in his habeas case and release (and instant parole) *into the United States*, where he intends to settle in the Washington, D.C. area, and suggests that he should also be entitled to a work authorization. Petitioner thus demands the most extraordinary remedy imaginable—the privileges of immigration into the United States—when he is not in the United States and has no right to enter the United States. This Court simply has no authority to order his admission or parole into the United States in contravention of the immigration laws.

It is undisputed that petitioner traveled to Afghanistan to receive military training from a camp affiliated with enemies of this country. The D.C. Circuit's conclusions about the Government's evidence related solely to the question of whether the Government had established sufficient affiliation with the enemies of the United States, and not whether petitioner was an armed militant. Indeed, in *Parhat*, the D.C. Circuit did not purport to resolve petitioner's status conclusively or to require his release into the United States, and Parhat errs in arguing to the contrary. Although the D.C. Circuit expressly permitted the Government to convene a new CSRT to re-adjudicate Parhat's status, the Government, having previously concluded that Parhat should be cleared for release, believes that it would serve no useful purpose to engage in further litigation over his status. Accordingly, DoD plans to house Parhat as if he were no longer an enemy combatant. Petitioner would, after transfer to such special housing, remain there until he is placed in another country, absent behavior posing a security threat. The Government thus will concentrate its scarce litigation resources on the hundreds of other pending habeas cases.

Parhat's assertion that he should be released or paroled into the United States, and assertion that the D.C. Circuit endorsed such authority in its ruling, is without basis. The court of appeals did

not assume it had any authority to order release under the DTA. To the contrary, the court specifically declined to address the availability of release as a remedy under the DTA, stating that "*we need not resolve today*" that issue. *Parhat*, 2008 WL 2576977 at *14. (emphasis added). Even more significantly, the court of appeals did not suggest that *any* court could order a detainee held at Guantanamo Bay, Cuba to be released into the United States. That question was squarely addressed in *Qassim v. Bush*, 407 F.Supp.2d 198 (D.D.C. 2005), *appeal dismissed as moot*, 466 F.3d 1073 (D.C. Cir. 2006), in which Judge Robertson held that a court cannot order such relief in the exercise of its habeas jurisdiction. *Id.* at 202-03. The court of appeals in *Parhat* did not discuss the issue presented in *Qassim* or purport to overrule its analysis.

As we detail below, Judge Robertson was correct in *Qassim*, in concluding that a habeas court does not have authority to order a detainee at Guantanamo brought to the United States. An order requiring the Government to bring a non-resident alien petitioner to the United States not only would conflict with the specific provisions of the Immigration and Nationality Act, but also would be contrary to over a century of Supreme Court jurisprudence recognizing that the admission of aliens is a quintessential sovereign function reserved exclusively to the political branches of Government. Notably, although the Supreme Court held in *Boumediene* that release is generally the appropriate habeas relief, the Court also made clear that release is "not the appropriate one in every case in which the writ is granted." *Boumediene v. Bush*, 128 S.Ct. 2229, 2266 (2008). And in *Munaf v. Geren*, 128 S.Ct. 2207 (2008), decided the same day as *Boumediene*, the Court unanimously held (in a case involving an American citizen detained abroad) that "a habeas court is 'not bound in every case' to issue the writ," *id.* at 2220, and that, in the exercise of its equitable discretion, even a habeas court must be "'reluctant to intrude upon the authority of the Executive in military and national

security affairs.'" *Id.* at 2218. Here, an order of release can entitle petitioner only to the right to go to a country willing to accept him; it cannot force his admission into any unwilling country, including the United States.

ARGUMENT

I. THIS COURT NEED NOT ADDRESS THE CLAIMS REGARDING PARHAT'S ENEMY COMBATANT STATUS BECAUSE THE GOVERNMENT IS PROVIDING PARHAT WITH ALL THE RELIEF THAT COULD PROPERLY BE ORDERED BY THIS COURT.

The D.C. Circuit, exercising jurisdiction under the DTA, concluded that the CSRT had failed to make appropriate findings regarding the reliability of the documents in Parhat's case. *See Parhat*, 2008 WL 2576977 at *11-*14. The Court further found that it could not determine whether the documents were, on their face, sufficiently reliable to support the CSRT's enemy combatant determination. *Ibid.* "Having concluded that the evidence before the CSRT was insufficient to sustain its determination that Parhat is an enemy combatant," the Court remanded the matter for further proceedings. *Id.* at *14. That order did not, however, purport to resolve Parhat's status conclusively and did not address his current claim that he is entitled to release into the United States.

Under the *Parhat* ruling, the Government could seek to hold a new CSRT for Parhat, while simultaneously responding to Parhat's habeas petition in this Court. At the same time, pursuant to Judge Hogan's order in the consolidated cases, the Government is being required to produce at least 50 factual returns per month in other detainee cases, *see* Scheduling Order, *In re Guantanamo Bay Litig.*, Misc. No. 08-442 (D.D.C. July 11, 2008), and must also this month produce an additional 14 factual returns in cases pending before Judge Leon and Judge Sullivan. In light of these circumstances, and DoD's prior, independent assessment that Parhat should be cleared for release,

it would serve no purpose to engage in further litigation over Parhat's status. The Government will, instead, focus its limited resources on the cases of the other detainees.

The Government will thus treat Parhat as if he were no longer an enemy combatant, a determination with several important consequences. To date, 38 Guantanamo detainees have been determined by CSRTs to no longer be enemy combatants. *All* of those detainees were thereafter released to other countries. Parhat cannot be returned to his home country and objects to his repatriation there. However, the Government will use its best efforts to release Parhat to another country, as it has in the cases of past detainees no longer held as enemy combatants.

In the interim, DoD plans to house Parhat as one who is no longer an enemy combatant. In the past, the Department of Defense has housed individuals determined to no longer be enemy combatants at a special, separate camp facility. In general, such individuals are provided the greatest possible degree of freedom consistent with the security needs of an operating United States military base. For example, such individuals have had a communal living arrangement, with access to all areas of the camp, including a recreation yard, their own bunk house, and an activity room. They have had access to a television set equipped with a VCR and DVD, a stereo system, and recreational items such as soccer, volleyball, and table tennis. And they have had air conditioning in all living areas (which they control), special food items, and expanded access to shower facilities and library materials. Once transferred to such special housing, petitioner would remain there until he can be transferred to another country willing to accept him, absent any misconduct or other behavior jeopardizing operational security.

As explained more fully below, this course of action will provide Parhat with all the relief that could properly be ordered by this Court in the exercise of its habeas jurisdiction, absent the

Government finding a country that will accept him. Typically, upon release, detainees should be returned to their native countries. But petitioner vigorously opposes being sent to his native country, and the United States, consistent with its policy against returning an individual when it is more likely than not he will be tortured, will not return him involuntarily to that country. Thus, he is held by the military, pending the outcome of extensive diplomatic efforts to transfer him to an appropriate country. In the meantime, however, it is not unlawful to continue to detain petitioner until he can be properly resettled. As detailed below, it is common practice to continue to detain individuals captured in wartime when they object to repatriation to their native country, as is the case here, pending relocation to an appropriate country. The diplomatic efforts to place Parhat are on-going, but Parhat nonetheless claims an immediate entitlement to enter, live, and work in the United States. Petitioner, however, sought and was given weapons training at a military training camp supplied by the Taliban, and obviously has no immigration status or other right permitting him to enter the United States. Thus, as set forth below, petitioner's demand for a court order permitting him to enter the United States is improper.

II. THIS COURT LACKS AUTHORITY TO ORDER PETITIONER'S RELEASE INTO THE UNITED STATES.

A. The D.C. Circuit's Opinion Does Not Cast Doubt On What *Qassim* Correctly Held: Habeas Courts May Not Order Detainees In Guantanamo Bay, Cuba Released Into the United States.

Parhat argues that the D.C. Circuit's ruling granted this Court the authority to order his release into the United States. The court of appeal's opinion, however, does no such thing.

1. Parhat stresses the court of appeals' statement that "we direct the government to release Parhat, to transfer him, or to expeditiously convene a new CSRT to consider evidence

submitted in a manner consistent with this opinion." *Parhat*, 2008 WL 2576977 at *15. That Court, however, expressly found it unnecessary to resolve the issue of its own authority to order release under the DTA. Instead, "[h]aving concluded that the evidence before the CSRT was insufficient to sustain its determination that Parhat is an enemy combatant," the court remanded the matter to allow the Government to conduct a new CSRT hearing, consistent with the Government's contention that a remand, as opposed to a release order, is generally the appropriate remedy under the DTA. *Id.* at *11-*14. The court of appeals further noted that "the DTA does not expressly grant the court release authority," but stated that "there is a strong argument (which the Supreme Court left unresolved in *Boumediene* * * *, *and which we need not resolve today*) that it is implicit in our authority to determine whether the government has sustained its burden of proving that a detainee is an enemy combatant." *Id.* at *14 (emphasis added). Thus, the court of appeals plainly did not resolve the question of whether it may order release pursuant to the DTA, much less the question whether an order of release, if otherwise permissible, could extend to release *into the United States* of a detainee held abroad.[1]

To be sure, the D.C. Circuit made clear that Parhat could seek release in this court under its habeas jurisdiction. *See Parhat*, 2008 WL 2576977 at *15 ("in that proceeding there is no question but that the court will have the power to order him released"). Again, however, in so doing it did not address the different question of whether a habeas court could order Parhat's release into the United States (or to any other country unwilling to accept him). That issue was,

[1] On August 4, 2008, the Government petitioned the panel in *Parhat* to clarify that its opinion does not entitle detainees such as Parhat to be released into the United States. Whether or not that petition is granted, however, the D.C. Circuit's ruling is best read as not resolving this distinct and significant question.

instead, fully addressed by the district court in *Qassim*, where the court correctly held that it had no authority in the exercise of its habeas jurisdiction to order the release into the United States of a Guantanamo detainee who had been found to no longer be an enemy combatant. *See Qassim*, 407 F.Supp.2d at 202-03. That order was appealed to the D.C. Circuit and was the subject of full briefing. The appeal was, however, rendered moot when those detainees were released to another country. *See Qassim v. Bush*, 466 F.3d 1073 (D.C. Cir. 2006).

Thus, the D.C. Circuit has never spoken to the issue of the scope of relief that can be afforded to a detainee who cannot return to his home country. Plainly, the court of appeals did not, *sub silentio*, reach or resolve that surpassingly important issue in the context of its DTA ruling.

2. In *Qassim*, Judge Robertson correctly held that a district court, in the exercise of its habeas jurisdiction, had no authority to order that an alien held at Guantanamo be brought into the United States.

As the court in *Qassim* explained, "a strong and consistent current runs through [the cases] that respects and defers to the special province of the political branches, particularly the Executive, with regard to the admission or removal of aliens * * *. These petitioners are Chinese nationals who received military training in Afghanistan under the Taliban and al Qaida. China is keenly interested in their return. An order requiring their release into the United States * * * would have national security and diplomatic implications beyond the competence or the authority of this Court." *Qassim*, 407 F. Supp. 2d at 202-03. So too here.

The Supreme Court' s ruling in *Boumediene* is entirely consistent with that decision. In *Boumediene*, the Court held only that the Suspension Clause preserves habeas jurisdiction for the

Guantanamo detainees to challenge their detention and that the DTA is not an adequate substitute for habeas. *Boumediene*, 128 S.Ct. at 2239. In so doing, the Court expressly declined to address the question of what substantive or procedural law would govern habeas practice in this context. *Id.* at 2239-2241. Moreover, in addressing habeas remedies, the Court made clear that "the habeas court must have the power to order the conditional release of an individual unlawfully detained—*though release need not be the exclusive remedy and is not the appropriate one in every case in which the writ is granted.*" 128 S. Ct. at 2266 (emphasis added). In this case, the Court may not properly order petitioner "released" from U.S. custody, because there is nowhere for him to presently be released.

The error of Parhat's argument is made plain by *Munaf v. Green*, 128 S. Ct. 2207 (2008), decided by a unanimous Court the same day as *Boumediene*. In *Munaf*, two habeas petitioners sought to be "released" from U.S. custody within Iraq, in a way that would prevent Iraqi authorities from detecting and re-detaining them. *Id.* at 2220. Thus, "the last thing petitioners want[ed] [wa]s simple release." *Id.* at 2221. The same is true here. A "simple release" of petitioner would be either to return him to his native country or to release him to the local Cuban government. Neither option is available. Instead, as in *Munaf*, petitioner seeks not just release, but "a court order requiring the United States to shelter" him. *Id.* As Judge Robertson concluded in *Qassim*, habeas does not empower a Court to order an inadmissible alien, captured in an active war zone and detained abroad, to be admitted or paroled into the United States simply because he is no longer treated as an enemy combatant, and because there is no country willing to take him.

B. Parhat's Detention Pending Repatriation Is Lawful.

The circumstance of petitioner's capture and detention warrant review. Parhat traveled to

Afghanistan to receive weapons training, over the course of several months, near Tora Bora, at a military camp supported by the Taliban and run by the East Turkistan Islamic Movement (ETIM). *Parhat*, 2008 WL 2576977 at *9-*10, *12. It is also undisputed that ETIM is engaged in violent resistance to Chinese rule over portions of western China, and that Parhat traveled to its camp to join that resistance. When Northern Alliance Forces approached the camp, Parhat and others fled to the nearby Tora Bora caves, where they were subsequently captured. *See, e.g., Parhat*, 2008 WL 2576977 at *9. Under the circumstances, it is hardly surprising that Parhat and his confederates were initially captured as suspected enemy combatants against United States and allied forces. And as *Boumediene* itself makes clear, "it likely would be both an impractical and unprecedented extension of judicial power to assume that habeas corpus would be available at the moment the prisoner is taken into custody." 128 S.Ct. at 2275. Nor is the legitimacy of Parhat's initial capture undermined by the D.C. Circuit's conclusion, rendered with the benefit of hindsight, that the extent of ETIM's affiliation with al Qaida, and the extent to which ETIM was in fact fighting alongside al Qaida, may be unclear. *See Parhat*, 2008 WL 2576977 at *3.

Now that the exigency supporting Parhat's wartime detention has abated, the question is whether the Department of Defense has the authority to wind up Parhat's detention in an orderly fashion. It clearly does, for reasons rooted in history and logic.

The United States armed forces have detained prisoners of war following the end of major conflicts when the prisoner objects to repatriation in his native country.[2] For example, at

[2] Even in the absence of such objections by the prisoner, there can often be substantial delays in effecting repatriation following the cessation of hostilities. *See, e.g.*,Howard S. Levie (ed,), DOCUMENTS ON PRISONERS OF WAR, 796 note (Naval War College Press, 1979) (noting that it took nearly two years after hostilities ceased between Pakistan and India in 1971, to repatriate prisoners of war).

the end of the Korean War, approximately 100,000 Chinese and North Korean prisoners of war refused to return to their native countries, citing fears of execution, imprisonment, or mistreatment in their countries if returned. *See* Charmatz and Wit, *Repatriation of Prisoners of War and the 1949 Geneva Convention*, 62 Yale L.J. 391, 392 (Feb 1953); Delessert, RELEASE AND REPATRIATION OF PRISONERS OF WAR AT THE END OF ACTIVE HOSTILITIES: A STUDY OF ARTICLE 118, PARAGRAPH 1, OF THE THIRD GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR, 157-165 (Schulthess 1977). The United Nations Command continued to hold those 100,000 prisoners for more than one and one-half years while it considered whether and how best to resettle them. *See* Delessert, RELEASE AND REPATRIATION at 163-164.

After World War II, Allied Forces spent several years at the end of hostilities dealing with such issues with respect to prisoners of war they detained during the war, including issues regarding thousands of prisoners who did not wish to return to their native countries. *See id.* at 145-156 & n.53 (citing, *inter alia*, the fact that as late as 1948 England held 24,000 German prisoners who did not wish to repatriate); Charmatz and Wit, *Repatriation or Prisoners of War*, 62 Yale L.J. at 401 nn.46 & 48, 404 n.70; Delessert, REPATRIATION OF PRISONERS OF WAR TO THE SOVIET UNION DURING WORLD WAR II: A QUESTION OF HUMAN RIGHTS, IN WORLD IN TRANSITION: CHALLENGES TO HUMAN RIGHTS, DEVELOPMENT AND WORLD ORDER, 80 (Henry H. Han ed., 1979). Similarly, thousands of Iraqis were held in continued detention by the United States and its allies after the end of combat in the prior Gulf War because they refused to be repatriated in their native country. *See* FINAL REPORT TO CONGRESS ON THE CONDUCT OF THE PERSIAN GULF WAR, APPENDIX O, at 708 (April 1992) (http://www.ndu.edu/library/epubs/

cpgw.pdf) (discussing the more than 13,000 Iraqi POWs who refused repatriation and remained in custody despite the end of hostilities).

Parhat points to the situation of some 45,000 Italian prisoners of war during World War II who were detained in the United States, but agreed to join the American war effort after Italy surrendered. That example does not advance his arguments. To begin with, those detainees had been held by the Executive Branch within the United States, so the question of a judicially compelled transfer to the United States obviously was not presented. Moreover, those Italian detainees were nonetheless still housed in camps; indeed, those prisoners that did not agree to turn against their country and join the war effort were (according to the article Parhat cites) "kept in highly isolated camps in places like Texas, Arizona, Wyoming, and Hawaii." Camilla Calamandrei, *Italian POWs Held in America During WWII, available at* www.prisonersinparadise.com/history.html.

More important, no court ever questioned that it was solely for the political branches—not the courts—to decide whether, and to what extent, those Italian POWs were to be given "increased freedom of movement," within the United States. Parhat Mot. for Parole at 6, 8. They were to be repatriated. The power to wind down or how quickly the wartime detention of suspected enemy combatants, like the related power to capture such suspected combatants in the first place, is by "'universal agreement and practice,'" an "'important incident of war'" authorized by the AUMF. *See Hamdi*, 124 S. Ct. at 2640; *see also, id.* at 2647 ("Without doubt, our Constitution recognizes that core strategic matters of warmaking belong in the hands of those who are best positioned and most politically accountable for making them."). Because the D.C. Circuit held only weeks ago that Parhat's CSRT could not support his continued detention as an

enemy combatant, and because DoD decided only days ago to forego its option of attempting to conducting a new CSRT, this case does not present the question whether a habeas court may ever—at some future time—review the sufficiency of efforts to achieve repatriation of such individuals.

C. Parhat Is Equally Mistaken In Urging That The Court Can Order His Parole Or Admission Into The United States.

It is equally clear that the Court cannot properly order Parhat's parole or admission into the United States. In *Munaf*, the Supreme Court refused to grant the habeas petitioners there the remedy of release, because in that case, "release of *any* kind would interfere with the sovereign authority of Iraq." 128 S. Ct. at 2223 (emphasis in original) (quoting *Wilson v. Girard*, 354 U.S. 524, 529 (1957)). And it is axiomatic that a fundamental incident of sovereignty is the power to control lawful entry into a country, for "every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe." *Ekiu v. United States*, 142 U.S. 651, 659 (1891); *see also Fong Yue Ting v. United States*, 149 U.S. 698, 713 (1893); *Lem Moon Sing v. United States*, 158 U.S. 538, 546-47 (1895). A habeas court is thus powerless to order the release (or parole) of an individual into the United States if doing so would be inconsistent with the exercise of that sovereign power.

1. Releasing or paroling Parhat into the United States would conflict fundamentally with the United States' sovereign power to control lawful entry into this country. As Parhat does not dispute, he is an inadmissible alien detained abroad with no legal right under the immigration laws to be present in the United States. And Parhat's motions do not (and properly cannot) seek

a change in his immigration status. Parhat Mot. for Parole at 3. Although, as Parhat notes, (Mot. for Parole at 3 n.1; Mot. for Judgment at 19 n.14) the Secretary of Homeland Security has discretion to parole him into the United States if he deems appropriate, the Secretary has not done so. Hence, both Congress and the Executive have denied Parhat the privilege of being present in this country, and the Court may not order his admission or parole in contravention of the immigration laws. Indeed, having associated himself with ETIM, and having received weapons training in a Taliban sponsored ETIM camp, Parhat is *specifically inadmissible* due to his connections with terrorist organizations. *See generally* 8 U.S.C. § 1182(a)(3)(B); *see id.* at 1182(a)(3)(B)(i)(VIII) (inadmissible aliens include anyone who "has received military-type training (as defined in section 2339D(c)(1) of Title 18) from or on behalf of any organization that, at the time the training was received, was a terrorist organization (as defined in clause (vi))"); *see also* Consolidated List of the U.N. Security Council's Al-Qaida and Taliban Sanctions Committee (updated Jan. 16, 2008), *available at* http://www.un.org/sc/committees/1267/consolist.shtml (concluding "ETIM" is a terrorist organization affiliated with al Qaida).

Congress has also decided that the Secretary of Homeland Security's refusal to parole an alien into this country is a matter solely within his discretion, and is not judicially reviewable. *See* 8 U.S.C. § 1252(a)(2)(B)(ii). The power to exclude such aliens, after all, "is inherent in the executive power to control the foreign affairs of the nation," and "it is not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of the Government to exclude a given alien." *Knauff v. Shaughnessy*, 338 U.S. 537, 542-43 (1950). And as Judge Robertson has explained, "'the conditions of entry for every alien * * *

have been recognized as matters wholly outside the power of [courts] to control.'" *Qassim v. Bush*, 407 F. Supp. 2d 198, 203 (D.D.C. 2005) (quoting *Fiallo v. Bell*, 430 U.S. 787, 796 (1977)). No basis for a contrary rule exists here. The Government has concluded that it will treat Parhat as if he were no longer an enemy combatant and will seek his release into a third country. It by no means follows that the Government is powerless to avoid his release into the United States. Indeed, admission to the United States would pose serious concerns. As noted above, Parhat received weapons training at a military camp run by ETIM in Taliban-controlled territory, and in the wake of September 11, 2001, was captured fleeing that camp by the United States military during the war in Afghanistan. It is entirely appropriate for the Government to refuse Parhat admission into this country under those circumstances. *See, e.g.*, 8 U.S.C. § 1182(a)(3)(B). This Court has no power to revisit the Government's refusal to admit or parole Parhat by ordering such relief in this habeas proceeding.

2. Parhat does not suggest that the Court could order his parole if doing so would be contrary to the immigration laws. He urges, however, that the immigration laws authorize his immediate release or parole into the United States, relying in particular on *Clark v. Martinez*, 543 U.S.C. 371 (2005), and *Zadvydas v. Davis*, 533 U.S. 678 (2001). Parhat Mot. for Judgment at 19-21; Parhat Mot. for Parole at 3-5. That reliance is misplaced.

Clark and *Zadvydas* construed 8 U.S.C. § 1231(a)(6), which authorizes the Government to detain aliens *who are already within the United States* who have been ordered removed from the United States but detained beyond the 90-day removal period. *Clark* and *Zadvydas*, more specifically, interpreted § 1231(a)(6) to authorize the Government to detain aliens pursuant to that provision only for the period of time reasonably necessary to effect their removal, and

adopted a presumptive six-month limit for such detention, even when the alien in question is inadmissible under the immigration laws, and thus has no legal right to remain in the United States. 533 U.S. at 699-70; 543 U.S. at 378.

Parhat is, of course, an inadmissible alien, but he is not in the United States. Indeed, in the Immigration and Nationality Act, Congress defined the "United States" to include only "the continental United States, Alaska, Hawaii, Puerto Rico, Guam, and the Virgin Islands of the United States." 8 U.S.C. §1101(a)(38). And the Detainee Treatment Act makes clear that the geographic scope of the "United States" is that defined in the immigration laws and "in particular, does not include the United States Naval Station, Guantanamo Bay, Cuba." DTA §1005(g). In any event, petitioner is wrong that *Clark* and *Zadvydas* carve out a presumptive six-month detention period for any and all inadmissible aliens, no matter the reason for, or source of authority for, their detention. Rather, *Clark* and *Zadvydas* created that presumption for aliens in the United States who have been ordered removed, and detained beyond the 90-day removal period pursuant to 8 U.S.C. § 1231(a)(6). Parhat does not fit that description. He is not being detained under that statute or any other immigration provision. Nor is he the subject of a removal order. Indeed, subjecting him to such an order would be a legal impossibility, since he is not in the United States.

Even in *Zadvydas*, the Court specifically stated that it was not announcing a rule that would necessarily apply to cases involving "terrorism or other special circumstances where * * * [there would be a need for] heightened deference to the judgments of the political branches with respect to matters of national security." 533 U.S. at 695. In *Clark*, the Court expanded upon that statement, explaining that the Court's interpretation of Section 1231(a)(6) would not affect the

ability of the Government to detain aliens under other authority. 543 U.S. at 379 n.4. The Government may, for example, convict inadmissible aliens that violate federal criminal statutes and incarcerate them free of the presumptive six month limit that *Clark* and *Zadvydas* read into § 1231(a)(6). Similarly, as *Clark* itself recognized, Congress has authorized the extra-criminal detention of aliens in other statutes. 543 U.S. at 386 & n.8; *see also id.* at 387 (O'Connor, J., concurring). And in this case, as explained, Parhat was apprehended while fleeing a Taliban-sponsored training camp during military operations in Tora Bora in late 2001, and is now being held solely pending repatriation to a country willing to accept him. The fact that repatriation may take longer than six months does not require petitioner's release or parole into the United States. *See, e.g., Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 216 (1953). *Clark* and *Zadvydas* do not address, let alone restrict, the Government's power to detain aliens abroad in military custody pursuant to that power.

The Seventh Circuit recognized the limited reach of *Clark* and *Zadvydas* in *Bolante v. Keisler*, 506 F.3d 618 (7th Cir. 2007). In that case, an alien who had applied for asylum in the United States asked the Seventh Circuit to release him on bail pending its review of the order to remove him from the country. *Id.* at 619. The court, per Judge Posner, rejected that request because the alien was being detained pursuant to 8 U.S.C. § 1225(b)(1)(B)(ii), a provision that permits the Government to detain aliens while their applications for asylum are pending. *Id.* at 621. The Executive "can and often does release the alien on parole" while his asylum application is pending, the court explained, "but his decision to do so is not judicially reviewable." *Id.* "To allow a court to admit such an alien to bail while he is challenging a removal order would be inconsistent with these provisions." *Id.*

Bolante also advanced an "independent basis" for holding that the alien in that case had no right to release or parole into the United States—a basis that applies with equal force to Parhat. "[I]n *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953)," the court explained, "the Supreme Court held that a lawfully admitted alien who had left the country had been detained by the immigration authorities at Ellis Island when he tried to return had no right to be released" into the United States. *Id.* "In *Zadvydas v. Davis*, 533 U.S. at 692-93 * * * the Court distinguished *Mezei* on the ground that since he had been excluded (in the current parlance of immigration law, since he had not been lawfully admitted when he returned to this country from his sojourn abroad), 'his presence on Ellis Island did not count as entry into the United States.'" *Id.* (quoting *Zadvydas*, 533 U.S. at 693). "'Hence he was "treated," for constitutional purposes, "as if stopped at the border."'" *Id.* (quoting *Zadvydas*, 533 U.S. at 693 (in turn quoting *Mezei*, 345 U.S. at 213)). "Our petitioner is in the same position * * * [J]ust like Mezei * * * he was not lawfully admitted to the United States, and so had no right to be released." *Id.* (citation omitted). The court's logic applies with even greater force to Parhat, who is not within the United States, but held on a military base in a foreign country. Parhat is also an inadmissible alien being detained for reasons that were not at issue in, or otherwise affected by, *Zadvydas* or *Clark*. He therefore has no right to be released or paroled into the United States. Since a district court may not review and override a denial of admission, it follows *a fortiori* that a court may not arrogate the political branches' authority by ordering admission in the first instance.[3]

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[3] Parhat also relies upon what he describes as the Fourth Geneva Convention of 1949, which he contends "contemplates" that he "may be released from confinement while pursuing (and presumably while the Government pursues) a final asylum solution." Parhat Mot. for Judgment at 22. But in support of that assertion, Parhat quotes not the Fourth Geneva Convention, but rather the

3. Parhat also contends that he can be released into the United States because "in law" he is already "present" in the United States. Parhat Mot. for Judgment at 17-19. In regard to his rights under immigration law, that is plainly incorrect. Under the plain terms of the Immigration and Nationality Act, Guantanamo is *not* within the definition of the United States. *See* 8 U.S.C. § 1101(a)(14); DTA, §1005(g). Being in United States custody and being in the United States are two different things. To read the habeas statute to permit the court to bring an inadmissible and unparoled detainee housed outside the United States into this country would squarely conflict with the immigration laws and violate the constitutional separation of powers.

In short, Parhat has no right to be released into a country where he was no right to be admitted. In *Mezei*, the Supreme Court squarely rejected the proposition that an alien's physical presence in the United States conferred on him the right to enter the United States lawfully. Mezei was detained at Ellis Island, but the Court ruled that "harborage at Ellis Island is not an entry into the United States." *Mezei*, 345 U.S. at 213. "He is an entering alien just the same, and may be excluded if unqualified for admission under existing immigration laws." *Id.* Similarly, in *Chin Yow v. United States*, 208 U.S. 8 (1908), the Court rejected the proposition that permitting an alien to participate in his habeas proceedings in the territory of the United States

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Red Cross Commentary to the Convention, *id.*, which the United States never ratified or adopted as law. Moreover, Parhat's attempt to judicially enforce the Convention (or its commentary) is foreclosed by the Military Commissions Act, which provides that "[n]o person may invoke the Geneva Conventions or any protocols thereto in any habeas corpus or other civil action... as a source of rights in any court of the United States or its states." MCA § 5(a). Even assuming Parhat may claim its protections, the actual Fourth Geneva Convention (and indeed the passage from the Red Cross Commentary that Parhat quotes) expressly contemplates that the United States has the right to refuse "permission to reside in its territory to a released internee." *Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, Aug. 12, 1949, art. 135, 6 U.S.T. 3516, 3608.

granted him the legal right to be there. "[T]he petitioner," the Court explained, "gains no additional right of entrance by being allowed to pass the frontier in custody for the determination of his case." *Id.* at 12-13. Even if Parhat were physically brought to the United States, he would still be an inadmissible alien who has no general legal right to be here, and the Court therefore could not order his release into the country.

Parhat's suggestion that "without remedy in this habeas case, there will be no check on executive lawlessness" is entirely meritless. Pet. Mot'n for Judgment at 21. Habeas provides a severe check on the Executive's power of detention in this context, because it would require the release of a person no longer held as an enemy combatant to a country willing to receive him. As Parhat concedes, his is an unusual case where he vociferously opposes being returned to his native country and United States policy prohibits it. In the meantime, while other efforts are underway to find Parhat a new home, the Executive must house and treat petitioner as if he were no longer an enemy combatant. That is a substantial change. But, "[t]o order * * * petitioner[] released, however, would require cutting through more than 'barriers of form and procedural mazes.' The obstacles are constitutional and involve the separation of powers doctrine." *Qassim*, 407 F. Supp. 2d at 202. The Court may not order petitioner released into the United States in contravention of the immigration laws and the political branches' prerogatives. *See, e.g., Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 216 (1953) ("Whatever our individual estimate of [the policy decision not to release Mezei] and the fears on which it rests, respondent's right to enter the United States depends on congressional will, and courts cannot substitute their judgment for the legislative mandate."); *Fong Yue Ting v. United States*, 149 U.S. 698, 713 (1893) ("The power to exclude or to expel aliens, being a power affecting international

relations, is vested in the political departments of the government."). Rather, "[t]he conditions of entry for *every* alien * * * have been recognized as matters * * * wholly outside the power of [the courts] to control." *Fiallo v. Bell*, 430 U.S. 787, 796 (1977) (emphasis added).[4]

4. Finally, Parhat cites various cases for the proposition that this Court has "inherent" authority to grant him "bail" and thus release him into the United States pending the adjudication of his habeas petition. Parhat Mot. for Parole at 2-4. Whatever the merits of this "inherent authority" doctrine generally as it applies to courts of limited jurisdiction,[5] it has no application where, as here, the petitioner seeking "bail" is an inadmissible (and unparoled) alien with no legal right be present in the United States. Parhat relies, for example, on *Baker v. Sard*, 420 F.2d 1342 (D.C. Cir. 1969) (*per curium*), which appeared to involve a citizen, and did not address the question whether the exercise of that "inherent" authority is appropriate where doing so would (as it would here) conflict with the immigration laws. Similarly, *Mapp v. Reno*, 241 F.3d 221 (2d Cir. 2001), involved a lawful permanent resident. As *Zadvydas* made clear, the distinction between lawful permanent residents and inadmissible aliens is crucial, for the latter have no legal right to be present in the United States. 533 U.S. at 693-94. Again, Parhat does not purport to seek (and cannot seek) an order changing his immigration status. That defeats any claim he has to parole.

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[4]Although the Court must deny petitioner's motions, it may retain jurisdiction over the habeas case and could entertain further applications from petitioner if he can allege that the United States is denying him an opportunity to go to an available country, or otherwise unduly delaying his release.

[5] "Federal courts are courts of limited jurisdiction; they possess only that power authorized by Constitution and statute, which is not to be expanded by judicial decree." *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 377 (1994).

CONCLUSION

Parhat's motion for judgment on his habeas petition seeking release into the United States and his motion for immediate release or parole pending final judgment, should both be denied.

Dated: August 5, 2008

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ZAKIRJAN, Petitioner, v. GEORGE W. BUSH, et al., Respondents.	Civil Action No. 05-2053 (HHK)

RESPONDENTS' MEMORANDUM IN OPPOSITION TO PETITIONER'S MOTIONS FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION BARRING TRANSFER OR RELEASE OR REQUIRING ADVANCE NOTICE OF TRANSFER OR RELEASE

Respondents hereby respond to petitioner's motions for a temporary restraining order and preliminary injunction barring his transfer or release from Guantanamo or requiring respondents to provide the Court and petitioner's counsel with advance notice of any transfer or release from Guantanamo (dkt. nos. 5, 8). Petitioner's motions should be denied for the reasons set forth herein.[1] Moreover, petitioner's filing of a second, follow-up motion, seeking a temporary

[1] This Court has previously granted similar motions brought by Guantanamo detainees detained as enemy combatants on the basis that Fed. R. App. P. 23(a) requires advance notice of any transfer. See, e.g., Abdah v. Bush, Civ. A. No. 04-1254(HHK), 2005 WL 711814, *5 (D.D.C. Mar. 29, 2005), notice of appeal filed, D.C. Cir. No. 05-5224, (May 31, 2005). Other Judges of this District ruling on similar motions after this Court's decision in Abdah, however, have reached divergent results, with a number of Judges denying relief in whole or in part. Compare, e.g., Kurnaz v. Bush, Civ. A. No. 04-1135 (ESH), 2005 WL 839542 (D.D.C. Apr. 12, 2005) (granting preliminary injunction only as to transfers other than for release), with Al-Oshan v. Bush, Civ. A. No. 05-520 (RMU) (D.D.C. Mar. 31, 2005) (ordering advance notice as part of stay), with Deghayes v. Bush, Civ. A. No. 04-2215 (RMC) (D.D.C. June 15, 2005) (denying preliminary injunction but requiring notice to the Court of any decision to transfer a particular individual to a particular country), with Almurbati v. Bush, 366 F. Supp. 2d 72 (D.D.C. 2005) (denying preliminary injunction); Al-Anazi v. Bush, 370 F. Supp. 2d 188 (D.D.C. 2005) (same); Mammar v. Bush, Civ. A. No. 05-573 (RJL), slip op. (D.D.C. May 2, 2005) (same); Attash v. Bush, Civ. A. No. 05-1592 (RCL), slip op. (D.D.C. Sept. 1, 2005) (same).

restraining order on the basis of feigned emergency, was entirely unnecessary because, as petitioner concedes in that motion, respondents' counsel had advised petitioners' counsel that there was no reason this matter could not be briefed and dealt with on a normal preliminary injunction schedule.

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 Armed Forces to seek out and subdue the al Qaeda terrorist network and the Taliban regime and others that had supported it. In the course of those hostilities, the United States has captured or taken custody of a number of foreign nationals as enemy combatants, some of whom are being held at the Guantanamo Bay Naval Base ("Guantanamo") in Cuba.

B. Combatant Status Review Tribunals

Beginning in the summer of 2004, the Department of Defense convened Combatant Status Review Tribunals ("CSRTs") to review the enemy combatant status of each detainee at Guantanamo. During the CSRT proceedings, the detainees were provided with notice of the factual basis for their classification as enemy combatants, they were allowed to present evidence on their own behalf, and the tribunal members then made an independent determination as to whether the detainees should continue to be designated as enemy combatants.[2] If an individual in

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[2] See generally July 7, 2004 Order Establishing Combatant Status Review Tribunal, available online at <<http://www.defenselink.mil/news/Jul2004/d20040707review.pdf>>; July (continued...)

the custody of the Department of Defense at Guantanamo is determined to be no longer classified as an enemy combatant, the government releases that individual as soon as practicable.

Petitioner alleges, and respondents hereby confirm, that he was determined in his CSRT to be no longer classified as an enemy combatant. Thus, respondents are actively engaged in efforts to determine an appropriate destination country so that the necessary arrangements can be made with that country to enable petitioner to be released pursuant to the procedures described below.

C. Transfers of Guantanamo Detainees for Release

Because the detainees at Guantanamo are foreign nationals, a release involves transferring the detainee to another country, including most typically his home country. See Declaration of Deputy Assistant Secretary of Defense for Detainee Affairs Matthew C. Waxman dated June 2, 2005 ("Waxman Decl.") ¶ 3.[3] In any transfer, a key concern is whether the foreign government

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[2](...continued)
29, 2004 Memorandum re: Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants Detained at Guantanamo Naval Base, Cuba, available online at <<http://www.defenselink.mil/news/Jul2004/d20040730comb.pdf>>.

[3] The June 2, 2005 Waxman Declaration submitted herewith replaced and superseded two prior declarations by Deputy Assistant Secretary Waxman submitted in connection with similar motions in other Guantanamo detainee cases, including Abdah. See Waxman Decl. ¶ 1. While the declaration is written broadly to address all transfer scenarios involving individuals detained by the Department of Defense at Guantanamo (including transfers of individuals confirmed to be enemy combatants), the policies and practices described therein for addressing concerns about possible treatment of an individual after transfer or repatriation are equally applicable to transfers for release of individuals determined to no longer be enemy combatants. In addition, information in the declaration concerning the number of individuals transferred is subject to updating. As of November 2, 2005, 247 detainees have been transferred by the Defense Department from Guantanamo, of which 179 were transferred for release. See Department of Defense Press Release, "Detainee Transfer Announced," Oct. 1, 2005, available at <<http://www.defenselink.mil/news/detainees.html>>.

will treat the detainee humanely and in a manner consistent with its international obligations. Declaration of Ambassador Pierre-Richard Prosper dated March 8, 2005 ("Prosper Decl.") ¶ 2;[4] Waxman 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. Prosper Decl. ¶ 4; Waxman Decl. ¶ 6. If a transfer is deemed appropriate, a process is undertaken, typically involving the Department of State, in which appropriate assurances regarding the detainee's treatment are sought from the country to whom the transfer of the detainee is proposed. Waxman Decl. ¶ 6; Prosper Decl. ¶ 5. 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 relevant foreign government. Waxman Decl. ¶ 6; Prosper Decl. ¶ 6. Such discussions include an effort to obtain 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. Among other things, 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

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[4] The Prosper Declaration submitted herewith was originally submitted in Abdah. Ambassador Prosper left office on or about October 11, 2005, but the policies and practices set forth in his March 8 declaration remain in effect and are applicable to the instant case. Again, while the declaration is written broadly to address all transfer scenarios involving transfers of individuals detained by the Department of Defense at Guantanamo (including transfers of individuals confirmed to be enemy combatants), the policies and practices described therein for addressing concerns about possible treatment of an individual after transfer or repatriation are equally applicable to transfers for release of individuals determined to no longer be enemy combatants. The information in the declaration concerning the number of individuals transferred is subject to updating. See supra n.3.

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 may take 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. Prosper Decl. ¶¶ 6-8; Waxman Decl. ¶ 7. The Department of State develops its recommendations through a process involving the Bureau of Democracy, Human Rights, and Labor (which drafts the Department of State's annual Country Reports on Human Rights Practices) and the relevant Department of State regional bureau, country desk, or U.S. Embassy. Prosper Decl. ¶ 7.[5] When evaluating the adequacy of assurances, Department of State 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

[5] It is important to note that the Country Reports on Human Rights Practices are relevant but not necessarily dispositive in assessing whether it is more likely than not that a particular individual faces a likelihood that he will be tortured by a receiving foreign government. For example, the Country Reports may describe problems that are confined to a particular facility or component of a government, may reflect certain types of fact patterns that are not applicable to the situation at hand, or may raise concerns that can be appropriately addressed through assurances from the receiving government and, in appropriate cases, monitoring mechanisms. Thus, the fact that a Country Report on Human Rights Practices discusses issues with respect to a country does not per se make that country forever off-limits as a potential repatriation or transfer destination.

assurances to the United States.[6] Prosper Decl. ¶ 8. In an appropriate case, the Department of State 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 mistreatment concerns. Waxman Decl. ¶ 7; Prosper Decl. ¶ 8.

ARGUMENT

I. LEGAL STANDARD FOR PRELIMINARY INJUNCTION/ TEMPORARY RESTRAINING ORDER

It is well-established that 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

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[6] Diplomatic sensitivities surround the Department of State's communications with foreign governments concerning assurances relating to torture, and the United States' 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. The United States Government 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 our ability to conduct foreign relations. Prosper Decl. ¶ 9. Disclosure of communications with a foreign government relating to particular mistreatment or torture concerns outside appropriate Executive Branch channels may cause that government and potentially other governments to be reluctant to communicate frankly with the United States concerning such issues in the future. 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.

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)).

In particular, 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 Co. 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).[7]

The same factors that apply to a motion for preliminary injunction also govern the issuance of temporary restraining orders. Vencor Nursing Ctrs. v. Shalala, 63 F. Supp. 2d 1, 7 n.5 (D.D.C. 1999).

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[7] Some Judges of this Court have entered the functional equivalent of preliminary injunctive relief as a component of a stay of proceedings pending related appeals. However, as Judge Bates concluded, "if the petitioners cannot meet the prerequisites of a motion for preliminary injunction . . . it is unlikely that they should receive that same relief through the backdoor of a stay." Al-Anazi, 370 F. Supp. 2d at 199 n.11 (citing Laborers' Intern. Union of North Am. v. Nat'l Post Office Mail Handlers, 1988 WL 142384, at *1 (D.D.C. Dec. 23, 1988)). Thus, in whatever form of order the inherently-injunctive-in-nature relief petitioner seeks might be embodied, petitioner should be required to satisfy the preliminary injunction standard in order to justify that relief.

II. PETITIONERS FAIL TO SHOW IRREPARABLE INJURY

A. The Mooting of a Habeas Claim that Naturally Flows From Relinquishment of United States Custody Does Not Constitute Irreparable Injury Justifying a Preliminary Injunction

This Court has previously found irreparable harm in the prospect that a repatriation or transfer of Guantanamo detainees out of United States custody would "effectively extinguish those detainees' habeas claims by fiat." Abdah, 2005 WL 711814, at *4. Respondents respectfully ask the Court to revisit this finding (a) in light of the subsequent analysis by other Judges confronted with the same issue, and (b) in particular because this petitioner has been determined to no longer be classified as an enemy combatant, meaning that the only type of transfer would be a transfer for release, as described in the accompanying declarations.[8] The ultimate relief sought by petitioner in this habeas case is obviously release from custody. Any right to challenge the legality of one's detention through a habeas proceeding cannot reasonably extend so far as to require that detention be continued, after the Executive determines that the military rationales for enemy combatant detention no longer warrant such custody, for no reason other than to be able to test the legitimacy of detention the Executive no longer is interested in

[8] To be clear, a transfer for release would consist of, in the first instance, a transfer to the control of the government of the destination country. See Waxman Decl. ¶ 3 ("a detainee may be transferred to the control of another government for release"). This is necessary because sovereign nations have borders and any transfer must be coordinated with the foreign government concerned. The United States is not in a position to transport individuals to foreign countries and introduce them into civil society there without the involvement of the government concerned. Even though the foreign government is not (and could not be) constrained from engaging in its own law enforcement efforts, such a transfer is, of course, with the understanding that from the perspective of the United States, release would be appropriate. Petitioner's rhetoric that respondents are "contemplating removal of Petitioner from Guantanamo to foreign territories for torture or indefinite imprisonment without due process of law" (Petr's PI Mot. at 1) is thus nonsensical and incoherent.

maintaining.[9] "The ultimate objective of a habeas petition is release from custody." Almurbati, 366 F. Supp. 2d at 78. As Judge Walton found, "once the respondents release the petitioners from United States custody . . . they will have obtained the result requested and at that point there will be no further need for this Court to maintain jurisdiction." Id. at 80; see also Al-Anazi, 370 F. Supp. 2d at 198 ("Every habeas petition, including this one, is ultimately about obtaining release from detention, and where, as here, the United States will relinquish custody of the detainee to the home government there is nothing more the Court could provide to petitioners." (citation omitted)).

B. Speculation that the United States Will Defy its Own Policy by Transferring Detainees to Countries in Circumstances Where it is Believed They Will be Tortured Does Not Warrant a Preliminary Injunction

Nor can petitioner carry his burden to show irreparable injury that is "certain and great . . . actual and not theoretical," Wisconsin Gas Co. v. FERC, 758 F.2d 669, 674 (D.C. Cir. 1985), by rife speculation that, contrary to the policies and processes attested to in the sworn declarations of high-level Executive Branch officials, the United States has designs to send petitioner – who has been determined to no longer be classified as an enemy combatant – to a foreign country in

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[9] Transfers of Guantanamo detainees are not undertaken in order to thwart the jurisdiction of the Court. Waxman Decl. ¶ 3. Indeed, such transfers have been occurring since October 2002, long before the June 28, 2004 Rasul Supreme Court decision and the proliferation of detainee habeas petitions that it spawned in this Court. Waxman Decl. ¶ 4. As Judge Bates noted, 131 transfers (i.e., more than half of the transfers to date) had occurred three months or longer before Rasul was decided, "thus casting doubt on petitioners' suggestion that DOD is undertaking a policy of transfer in order to thwart the jurisdiction of the courts." Al-Anazi, 370 F. Supp. 2d at 196 n.7 (citing Dep't of Defense, Transfer of Afghani and Pakistani Detainees Complete (Mar. 15, 2004), available at http://www.defenselink.mil/releases/2004/nr20040315-0462.htm); see also supra note 3 (citing documents showing that administrative review process for considering transfers and repatriations predates Rasul and the filing of this and most other detainee habeas petitions).

circumstances where he will be tortured. Those declarations, after all, make clear that it is the policy of the United States not to repatriate or transfer any detainee to a country when the United States believes, based on a number of factors and considerations, it is more likely than not that the individual will be tortured there. Prosper Decl. ¶ 4; Waxman Decl. ¶ 6. This policy is implemented through a process that contains several levels of precautions and safeguards. To conclude that an injunction is nevertheless necessary would require the Court to assume, without any evidence, that the United States' policy and practice is somehow a sham or pretext. There is no valid basis for such an assumption.

Rather, as Judge Walton has found, respondents' sworn declarations "directly refute the petitioners' allegations of their potential torture, mistreatment and indefinite detention to which the United States will in some way be complicit." Almurbati, 366 F. Supp. 2d at 78. Moreover, Judge Bates found that the assortment of magazine and newspaper stories relied upon by many detainee-petitioners in these cases – including petitioner here – failed to form a factual predicate justifying an injunction, noting that, among other problems with relying on such materials, "[p]etitioners [in that case] concede that none of these incidents involve the transfer of detainees out of Guantanamo." Al-Anazi, 370 F. Supp. 2d at 190-91; see also id. at 196. Thus, petitioner has failed to meet his burden of showing that either the prospect of release from United States custody or unfounded speculation about possible torture in a foreign country constitute irreparable harm that must be remedied by a preliminary injunction.

III. PETITIONER CANNOT SHOW A LIKELIHOOD OF SUCCESS IN OBTAINING A COURT ORDER PREVENTING A TRANSFER IN ACCORDANCE WITH THE POLICIES EXPRESSED IN RESPONDENTS' DECLARATIONS

Petitioner fares no better on the second prong of the preliminary injunction analysis, which requires him to show that he is likely to succeed, following notice, in preventing a transfer from Guantanamo. To be clear, whatever the merits of the issues currently before the D.C. Circuit in the ongoing appeals in Khalid v. Bush, 355 F. Supp. 2d 311 (D.D.C. 2005), appeals docketed, Nos. 05-5062, 05-5063 (D.C. Cir. Mar. 2, 2005), and In re Guantanamo Detainee Cases, 355 F. Supp. 2d 443 (D.D.C. 2005), appeal on petition for interlocutory appeal, No. 05-5064 et al. (D.C. Cir.), and of petitioner's claim that he is being unlawfully detained, it is not the likelihood of success on those issues or claims that matters for purposes of the instant motion for preliminary injunction. Rather, the likelihood of success analysis must focus on the legal basis for petitioner to obtain an order preventing termination of detention by the United States in the manner described in the declarations submitted herewith. As this Court previously held, "if there are no circumstances under which Petitioners could obtain a court order preventing a contemplated transfer, a preliminary injunction should not be granted." Abdah, 2005 WL 711814, at *4 (emphasis in original). Accord Al-Anazi, 370 F. Supp. 2d at 194 ("[T]he presence of a sound basis to challenge the legality of one's detention does not at all imply that there exists a sound basis to challenge the legality of one's transfer. Put differently, the 'merits,' if you will, to be assessed for purposes of the present claim for preliminary injunctive relief, is petitioners' challenge to their transfer from Guantanamo, not to their detention at Guantanamo (emphasis in original)).

A. No Valid Legal Basis Exists for a Judicial Order Enjoining Transfer or Repatriation of an Individual Being Released Upon a Determination That He is No Longer an Enemy Combatant

Petitioner relies solely on Fed. R. App. P. 23(a) as a putative legal basis for the order barring a transfer that he claims he would be likely to succeed in obtaining. This reliance is misplaced for two reasons. First, Fed. R. App. P. 23(a) does not even apply to this case in its present procedural posture, because, unlike in Abdah, there is no decision in this case that is on appeal, as required by the plain language of the Rule. See Fed. R. App. P. 23(a) (applying "[p]ending review of a decision in a habeas corpus proceeding" and only to "the prisoner" in whose proceeding that decision was made); see also Fed. R. App. P. 1(a)(1) ("These rules govern procedure in the United States courts of appeals."); Order dated May 3, 2005, in Battayav v. Bush, Civ. A. No. 05-714 (RBW) (D.D.C.), at 1 n.1 (rejecting Fed. R. App. P. 23(a) argument in case that, like this one, did not have a pending appeal); see also Al-Anazi, 370 F. Supp. 2d at 199 n.11 ("The Court notes that petitioners did not even attempt to argue in their papers that Federal Rule of Appellate Procedure 23 requires a stay of a transfer decision, because petitioners' habeas petition is not presently on appeal.").[10]

Second, even if Federal Rule of Appellate Procedure 23(a) could somehow be deemed to find application here notwithstanding the absence of any decision in this case that is on appeal, that Rule does not apply to a situation in which the United States relinquishes custody of an individual altogether. Respondents appreciate that this Court previously held that Fed. R. App.

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[10] The fact that now pending before the D.C. Circuit are habeas cases brought by other Guantanamo detainees does not somehow convert this case into one that is somehow deemed constructively on appeal or otherwise governed by the Federal Rules of Appellate Procedure.

P. 23(a) barred transfer of confirmed enemy combatant detainees whose habeas cases had decisions pending on appeal. See Abdah, 2005 WL 711814, at *5. This case, however, in addition to not having a pending appeal, involves an individual who has been determined to no longer be classified as an enemy combatant, of whom any transfer would be a transfer for release, as described in the attached declarations. In any event, respondents respectfully urge the Court to reconsider its prior interpretation of Rule 23(a), particularly in light of Judge Bates' conclusion in another Guantanamo detainee case that "[n]othing in the Rule indicates a desire to extend it to situations where the United States (or a state) is transferring an individual out of federal or state custody entirely." O.K. v. Bush, 377 F. Supp. 2d 102, 116 (D.D.C. 2005). Rule 23(a) is designed to ensure that, in situations where a prisoner is transferred from one custodian subject to federal habeas jurisdiction to another custodian subject to federal habeas jurisdiction, but remains in the custody of the United States (or relevant state thereof), the court is able to appropriately substitute the successor custodian as the respondent. See Fed. R. App. P. 23(a) ("the court, justice, or judge rendering the decision under review may authorize the transfer and substitute the successor custodian as a party"); Wood v. United States, 873 F. Supp. 56, 57 (W.D. Mich. 1995) (declining to adopt expansive construction of Rule 23(a) where "the purposes of Rule 23(a) would not be furthered," which purposes are "reflected in the provisions of the rule for substituting the successor custodian as a party"). Critically, nothing in Rule 23(a), nor any other provision of law, operates to restrict the United States from relinquishing custody of an individual, which, after all, is the ultimate object of a habeas corpus case. See O.K., 377 F. Supp. 2d at 116-17; cf. Brady v. United States Parole Comm'n, 600 F.2d 234, 236 (9th Cir. 1979) (Rule "does not touch upon release" by government).

In light of its focus on "substitut[ing] the successor custodian as a party," Fed. R. App. Proc. 23(a), the Rule should not be read to cover situations that involve not a transfer from one United States custodian to another United States custodian, but rather a relinquishment of United States custody altogether in connection with a transfer or repatriation to a foreign nation for release. In that situation, there is no "successor custodian" subject to federal habeas jurisdiction who could be substituted as a party.[11] See O.K., 377 F. Supp. 2d at 116 (noting that petitioners' interpretation of the word "another" to include a foreign government "immediately runs into difficulty in the next sentence of the Rule"). Moreover, upon relinquishment of United States custody, the relief available in habeas would have been received and the habeas case therefore would be moot, making substitution of a successor custodian unnecessary.

Indeed, until this Court's prior decision in Abdah, 2005 WL 711814, our research has not uncovered any case where Federal Rule of Appellate Procedure 23(a) has been held to apply to the transfer of a detainee to a foreign country for release and concomitant relinquishment of custody by the United States, even assuming arguendo that petitioner could be considered a "prisoner" within the meaning of the Rule. Rather, Rule 23(a) cases have involved transfers from one United States (or state) custodian to another United States (or state) custodian where the prisoner remained in the custody of the United States (or state authorities). See, e.g., Goodman v. Keohane, 663 F.2d 1044, 1047 (11th Cir. 1981) (involving transfer from federal correctional facility in Miami, Florida to a federal penitentiary in Terre Haute, Indiana); see also Brady, 600

[11] This is so regardless of whether the foreign nation to which the former Guantanamo detainee is repatriated or transferred may itself detain the individual as a function of its own law enforcement, criminal justice, or other interests, as would be its prerogative. Neither respondents, nor this Court, are in a position to confer upon ex-detainees some kind of worldwide immunity from law enforcement by other sovereign governments.

F.2d at 236 (Rule 23 "was promulgated to alleviate jurisdictional problems sometimes created by geographical limits on habeas corpus jurisdiction"). As Judge Bates held, in light of the "well-settled canon of statutory interpretation providing that a court should not construe a statute to interfere with the province of the Executive over military affairs in the absence of a clear manifestation of Congressional intent to do so," these cases involving detainees captured in the course of ongoing military hostilities do not present an appropriate occasion for indulging a creative interpretation that "would transform a technical and procedural rule that addresses the identity of the parties in a habeas proceeding into a sweeping prohibition on the transfer and release of military detainees while a case is on appeal." O.K., 377 F. Supp. 2d at 117 (citing Dep't of Navy v. Egan, 484 U.S. 518, 527 (1988)).

The Court should also be mindful of the practical implications of extending its Fed. R. App. P. 23(e) analysis in Abdah to the situation of detainees who are slated for release based on determinations that they are no longer classified as enemy combatants and in whose cases there has been no decision awaiting appellate review. As discussed above, for diplomatic and logistical reasons, any release of a foreign national detained at Guantanamo but determined no longer be classified as an enemy combatant necessarily involves, in the first instance, a transfer to the control of the government of the destination country. See supra note 8. If Fed. R. App. P. 23(e) were construed to cover such situations, it would thus effectively impose a requirement of affirmative court approval for the release of detainees whom the Combatant Status Review Tribunals have already determined shall no longer be classified as enemy combatants. Whatever may be the appropriate application of Fed. R. App. 23(a) to confirmed enemy combatants as in Abdah, there is no warrant for reading "a technical and procedural" (O.K., 377 F. Supp. 2d at

117) rule of appellate procedure to dictate such an extraordinary result in a case that is not even on appeal.

B. Separation-of-Powers Principles Militate Heavily Against Petitioner's Likelihood of Success

Further, even if some valid claim or other legal basis existed for judicial involvement in the transfer or repatriation of individuals formerly detained by the Military as enemy combatants, or for an advance notice requirement to support and facilitate such involvement, the separation of powers would bar such relief. "[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, 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 petitioner's claim to a right to contest repatriation or removal from Guantanamo, it would insert itself into the most sensitive of diplomatic matters. Judicial review of a transfer or repatriation decision could involve scrutiny

[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.

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 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)); see Al-Anazi, 370 F. Supp. 2d at 194 (holding that this "well-established line of cases in the extradition context" "counsel[s] even further against judicial interference"). 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 wholly 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); Hoxha v. Levi, 371 F. Supp. 2d 651, 659-61 (E.D. Pa. 2005) (holding that allegations that individual would be tortured after extradition to Albania were solely for the Secretary of State to weigh, and not an appropriate subject for judicial inquiry), on appeal, No. 05-3149 (3d Cir.). See generally Jacques Semmelman, Federal Courts, the Constitution, and the Rule of Non-Inquiry in International Extradition Proceedings, 76 Cornell L. Rev. 1198 (1991).

The force of these principles is not diminished by the fact that petitioner seeks judicial review of any kind of release from Guantanamo, rather than merely trying to block an extradition. The considerations that underlie the Rule of Non-Inquiry are not endemic to the specific context of extradition, but instead rest on the constitutional separation of powers.[13] See

[13] Some petitioners in Guantanamo detainee habeas cases have argued that the Rule of Non-Inquiry is narrowly limited to extradition cases, citing In re Extradition of Howard, 996 F.2d 1320, 1329 (1st Cir. 1993). However, the applicable language from Howard was characterized as dicta by the First Circuit in a subsequent decision. Kin-Hong, 110 F.3d at 111 n.12. In that later (continued...)

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 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, petitioner cannot turn to the courts to second-guess any Executive judgments about matters such as custodial conditions or the adequacy of legal procedures in a foreign country, nor the credibility and adequacy of a foreign government's assurances. Cf.

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[13](...continued)
case, while pretermitting the question "[w]hether the doctrine is constitutionally mandated" as "immaterial here," the First Circuit cited an analogy to the act-of-state doctrine and described the doctrine using language imbued with constitutional significance. See id. at 110-11 ("The rule of non-inquiry, like extradition procedures generally, is shaped by concerns about institutional competence and by notions of separation of powers. It is not that questions about what awaits the relator in the requesting country are irrelevant to extradition; it is that there is another branch of government, which has both final say and greater discretion in these proceedings, to whom these questions are more properly addressed.") (citation omitted).

Moreover, to the extent that petitioner may contend that the only possible way to move him out of Guantanamo would be pursuant to an extradition treaty or statute, such a contention would lead to the absurd result that he could not be released unless some other country sought him for purposes of initiating a law enforcement proceeding against him. In any event, that 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").

People's Mojahedin, 182 F.3d at 23 (expressing reluctance of courts to interfere in 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'" (quoting Chicago & Southern, 333 U.S. at 111)).

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Thus, there is no basis in law for an injunction requiring advance notice of an upcoming transfer or repatriation in order to enable petitioner to seek a judicial order blocking it. Neither the Court's habeas corpus jurisdiction nor any other legal authority supports the notion of ordering custody that the United States wishes to relinquish to nevertheless be artificially and indeterminately prolonged purely to preserve a live case for the Court. And, apart from the absence of affirmative legal authority, separation of powers considerations and foreign relations sensitivities preclude a judicial inquiry in which this Court would substitute its judgment regarding the appropriateness of transfer or repatriation for that of the appropriate Executive Branch officials.

IV. AN INJUNCTION REQUIRING ADVANCE NOTICE WOULD TRAMPLE ON THE SEPARATION OF POWERS

It is undisputed that the sole reason petitioner seeks advance notice is to enable him to seek an order blocking a transfer or repatriation decision that the Executive would already have made after consultation and coordination with the foreign government in question. See Petr's PI Mot. at 9 (stating that purpose of advance notice is so that petitioner is "provided with a meaningful opportunity to contest his transfer" in federal court); Petr's TRO Mot. at 2 ("contest[ing] the legality of such a transfer" is "precisely the relief sought by the pending

Preliminary Injunction motion"). Such an advance notice requirement foreshadows judicial review and intervention that would be accompanied by the attendant harms discussed in the declarations of Deputy Assistant Secretary Waxman and then Ambassador Prosper submitted herewith. See Waxman Decl. ¶ 8; Prosper Decl. ¶¶ 10, 12. Even if such judicial review did not ultimately result in an injunction against transfer, the mere inquiry into the United States' dialogue with foreign nations and into the terms of a transfer and any assurances that may have been obtained would cause grave harm. See supra Section III.B (describing interests of international comity that underlie the Rule of Non-Inquiry); Waxman Decl. ¶ 8; Prosper Decl. ¶¶ 10, 12. Moreover, the very prospect of judicial review, as exemplified by an advance notice requirement, causes separation-of-powers harm by undermining the ability of the Executive Branch to speak with one voice in its dealings with foreign nations. See Crosby v. Nat'l 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"). An advance notice requirement, after all, would make the results of diplomatic dialogue between the Executive Branch and a foreign government regarding repatriations or transfers inherently contingent because the effective acquiescence of another Branch (i.e., the Judiciary) would be required for a transfer or repatriation to go forward, and such a requirement would also inject delays into future transfers. These harms weigh heavily against entry of a preliminary injunction.

V. AN INJUNCTION WOULD DISSERVE THE PUBLIC INTEREST

The public interest favors allowing the Executive Branch, which is constitutionally vested with the authority both to conduct military functions and to engage in foreign relations, to act without undue intrusion within its constitutional sphere of responsibility. Petitioner may invoke truisms such as that the public interest disfavors torture, but that aspect of the public interest is already well served by the existing policies and processes governing transfers and repatriations of Guantanamo detainees, as described in the accompanying declarations.[14] As Judge Bates held:

> [T]here is a strong public interest against the judiciary needlessly intruding upon the foreign policy and war powers of the Executive on a deficient factual record. Where the conduct of the Executive conforms to law, there is simply no benefit – and quite a bit of detriment – to the public interest from the Court nonetheless assuming for itself the role of a guardian ad litem for the disposition of these detainees. See People's Mojahedin Org., 182 F.3d at 23 ("[I]t is beyond the judicial function for a court to review foreign policy decisions of the Executive Branch.").

Al-Anazi, 370 F. Supp. 2d at 199. Here, as well, the public interest disfavors an injunction.

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[14] While this Court held in Abdah that "this factor tilts in Petitioners' favor, because the public has a strong interest in ensuring that its laws do not subject individuals to indefinite detention without due process," 2005 WL 711814, at *6 (emphasis added), here, the government intends to release petitioner as soon as the appropriate destination country can be determined and necessary arrangements made with that country. And, to the extent petitioner subsequently, if ever, becomes subject to law enforcement or detention in a country to which he is transferred, that would be a function of that country's laws, not the laws of the United States or its public. Moreover, the proposition that "[i]t is always in the public interest to prevent the violation of a party's constitutional rights," G&V Lounge, Inc. v. Mich. Liquor Control Comm'n, 23 F.3d 1071, 1079 (6th Cir. 1994), begs the question what violations of constitutional rights (assuming arguendo that enemy aliens detained at Guantanamo possess rights under the United States Constitution, but see Khalid v. Bush, 355 F. Supp. 2d 311, 320-23 (D.D.C. 2005)) are present or imminent here and stand to be prevented by an injunction. As discussed above, respondents' policy and practices governing transfer and repatriation of Guantanamo detainees plainly do not violate any rights petitioner may have, constitutional or otherwise. The public interest surely does not support assuming without any foundation that Executive Branch officials are wont to engage in constitutional violations unless supervised by the courts.

CONCLUSION

For the reasons stated above, respondents respectfully request that petitioner's motions for a temporary restraining order and for a preliminary injunction be denied.

Dated: November 3, 2005

Respectfully submitted,

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Attorneys for Respondents

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE:	)	
	)	Misc. No. 08-CV-442 (TFH)
GUANTANAMO BAY	)	
DETAINEE LITIGATION	)	Civil Action Nos. 05-1509 (RMU)
	)	05-1602 (RMU)
	)	05-1704 (RMU)
	)	05-2370 (RMU)
	)	05-2398 (RMU)
	)	08-1310 (RMU)

JOINT STATUS REPORT

Pursuant to the Court's August 12, 2008 Order, undersigned counsel for petitioners and respondents in the above-captioned cases jointly state as follows:

1. *Petitioner's Name, ISN, and Status*

Attached hereto as Exhibit 1 is a chart listing the agreed-upon name of each petitioner, petitioner's ISN number, the name of each petitioner as listed in petitioner's habeas petition, the date of petitioner's capture, and the date petitioner was approved for transfer either for release or for possible detention, investigation, and/or prosecution as the receiving government deems appropriate under its own laws.

2. *Status Of Next-Friend Authorizations*

a. Petitioners' Position

The chart attached herewith as Exhibit 2 sets forth the name of each Petitioner's Next Friend and the date of his Next Friend Authorization. As each Petition was filed pursuant to a valid Next Friend Authorization, we have not addressed the ability of the Court to proceed with these cases without such authorization. Respondents have not advised whether they intend to contest the validity of Petitioners' Next Friend Authorizations. To the extent Respondents raise a challenge to

these authorizations now or in the future, Petitioners reserve the right to respond accordingly in subsequent briefing.

b. Respondents' Position

The habeas corpus petitions in these cases were filed in 2005 by putative "next friends" on behalf of the seventeen Uighur petitioners currently seeking relief. With the exception of petitioner Edham Mamet (ISN 102), whose brother is serving as his next-friend, the other sixteen petitions are brought by two former Guantanamo Bay detainees purporting to act as a "next friend." Because the petitioners seeking relief have not filed direct authorizations with this Court, it is unknown whether they consent to this matter proceeding. Accordingly, petitioners' counsel should be required to file a direct authorization from each of the petitioners.

To that end, on July 29, 2008, Judge Hogan issued an order requiring petitioners' counsel in most of the Guantanamo Bay habeas cases to file signed authorizations from the petitioners within sixty days (or ninety days for petitions filed on or after May 19, 2008). *See In re Guantanamo Bay Detainee Litigation*, July 29, 2008 Order (Misc. No. 08-442) at 2 (dkt. no. 210). In the alternative, Judge Hogan ordered petitioners' counsel to file a declaration stating that petitioners directly authorized counsel to pursue the action and to explain why counsel was unable to secure a signed authorization. *Id.* Judge Hogan's July 29 Order was entered in all of the above-captioned cases except *Razakah v. Bush*, 05-CV-2370.[1] To ensure consistency among the consolidated Uighur cases and to assure the Court that the petitioners on whose behalf relief

[1] Although the claims of petitioners Abdul Ghappar Abdul Rahman (ISN 281) and Adel Noori (ISN 584) have now been given a new civil action number (08-1310) in accordance with the Court's order of July 9, 2008 (08-MC-0442, dkt. no. 44), petitioners Rahman and Noori were still petitioners in Civil Action No. 05-2386 at the time Judge Hogan issued the July 29, 2008 Order. Consequently, the terms of that order apply to petitioners Rahman and Noori.

is being sought in fact desire legal representation, this Court should extend the portion of Judge Hogan's July Order requiring the filing of a direct authorization to the petitioners in *Razakah*.[2]

In the event any of the petitioners do not file the required direct authorizations or declarations by September 29, 2008, proceedings in those cases should cease and the cases should be dismissed for lack of proper next friend standing. *See Whitmore v. Arkansas*, 495 U.S. 149 (1990).

3. *Respondents' Efforts To Resettle Petitioners*

Submitted separately herewith as Exhibit 3 is the classified declaration of former Ambassador Pierre-Richard Prosper, Ambassador At Large For War Crimes Issues, filed in August 2005 in *Qassim v. Bush*, 05-CV-497 (JR). The declaration describes the Department of State's efforts to pursue resettlement options for the Uighur petitioners as of August 2005. The full submission cannot be filed on the public record because it contains classified information. The full submission will be filed with the Court under seal through the Court Security Office, pursuant to the protective orders entered in the above-captioned cases. Respondents will also provide a copy of the submission in its entirety to petitioners' counsel at the secure work facility for habeas counsel. A redacted copy of the declaration is attached hereto for filing on the public record.

Respondents have also undertaken to provide a supplemental declaration from the current

[2] *Razakah v. Bush*, 05-CV-2370, was excluded from Judge Hogan's July 29 Order because the case was originally assigned to Judge Sullivan, who has retained the Guantanamo Bay cases originally assigned to him, but has since reassigned *Razakah* to this Court's docket. For this reason, the petitioners in *Razakah* were not included in the parties' July 21, 2008 Joint Status Report to Judge Hogan. *See* 08-MC-0442, dkt. no. 170. The status of the two petitioners in the *Razakah* case is noted in the chart attached hereto as Exhibit 1.

Ambassador At Large For War Crimes Issues, Clint Williamson, that updates the information provided in the 2005 Prosper Declaration. Since the Court issued its August 12, 2008 Order, however, Ambassador Williamson has been traveling outside of Washington, D.C. and, therefore, has not been in a position to handle classified national security information or otherwise provide a declaration containing classified information. Ambassador Williamson returns to the Department of State tomorrow (August 19, 2008) and respondents will respectfully request that the Court accept the filing of Ambassador Williamson's classified declaration at that time.

4. *Further Proceedings And Submission Of Factual Returns*

a.1. Petitioners' Response to the Court's Request for Information Concerning the Necessity of Factual Returns[3]

Respondents should produce Petitioners' factual returns - and the Court should schedule prompt *habeas corpus* hearings - unless and until Respondents concede that Petitioners are not enemy combatants and release them from Guantánamo. Petitioners filed *habeas corpus* petitions to challenge a deprivation of their liberty and their "enemy combatant" status. Each day they remain in Guantánamo, they suffer the harm these actions were filed to remedy. The harm of indefinite detention is so grievous that even an adjudicated criminal alien who has never entered the United States must be released into the United States when faced with the prospect of indefinite detention. *See Clark v. Martinez*, 543 U.S. 371, 386 (2005); *cf.* Braden v. 30th Jud.

[3] Following the Court's August 12, 2008 Order, Petitioners' counsel contacted Respondents' counsel in an effort to determine whether the parties could reach an agreement on this issue and present a joint response to the Court. Respondents' counsel advised that they did not believe such an agreement was possible and therefore suggested that Petitioners and Respondents each present their respective views to the Court in separate filings.

Ct. of Ky., 410 U.S. 484, 490 (1973) (noting interest of society and prisoner in preserving habeas as a swift and imperative remedy to indefinite confinement); *Yong v. INS*, 208 F.3d 1116, 1120 (9th Cir. 2000) (rejecting indefinite stay in habeas case). Indeed, the need for production of factual returns and prompt judicial review is never greater than where, as here, Petitioners have long been cleared for release but afforded no judicial review on the merits of their detention. *Cf. Jones v. Shell*, 572 F.2d 1278, 1280 (8th Cir. 1978) (habeas is reduced to sham if trial courts do not act promptly).[4]

Petitioners believe the merits of their petitions for *habeas corpus* have already been resolved by the D.C. Circuit's decision in *Parhat v. Gates*, No. 06-1397, --- F.3d ---, 2008 WL 2576977 (D.C. Cir. June 20, 2008), *rhg. pet. pending* (filed Aug. 4, 2008) (*See a.2 infra*). In response to the D.C. Circuit's decision, Respondents have indicated they will treat Petitioner Huzaifa Parhat (ISN 320) "as if he were no longer an enemy combatant." Resp'ts' Combined Opp'n To Parhat's Mot. For Immediate Release Into the U.S. and Mot. For J. On His Habeas Pet. at 1-2, *Kiyemba v. Bush*, No. 05-cv-1509 (RMU) (D.D.C. Aug. 5, 2008) ("Resp'ts' Opp. To Parhat Release Mot."). On August 18, 2008, Respondents' counsel further advised that the government will afford the same treatment to Petitioners Khalid Ali (ISN 280), Sabir Osman (ISN 282), Abdul Semet (ISN 295) and Jalal Jalaldin (ISN 285). However, as of this filing

[4] Even if Petitioners are released from Guantánamo, the Court must adjudicate their status as "enemy combatants" through habeas hearings because such a designation exposes them to collateral consequences including the stigma of being falsely labeled as terrorists, which jeopardizes their future employability, freedom to travel and freedom from persecution and torture. Indeed, unless and until Respondents concede that Petitioners are not enemy combatants - as opposed to simply treating or considering them as such - the collateral consequences doctrine entitles them to have their claims heard through habeas. *See Qassim v. Bush*, 466 F.3d 1073 (D.C. Cir. 2006) (collateral consequences, if established, could have provided grounds for released Uighur prisoners to pursue habeas relief).

Respondents have refused to advise Petitioners' counsel whether they will concede the application of the Parhat decision to the remaining twelve Uighur Petitioners.

If Respondents contest the merits of the cases of these twelve Petitioners, then they "are entitled to a prompt *habeas corpus* hearing," *Boumediene v. Bush*, 128 S. Ct. 2229, 2275 (2008), and Petitioners will need factual returns in advance of those hearings to respond to the allegations against them. Even if Respondents do not intend to contest the merits of any of these cases, however, factual returns are still necessary to resolve the all important question of remedy. As the Court is aware, Petitioner Parhat has filed a motion for judgment on his habeas petition ordering his release into the continental United States and a motion for immediate release on parole into the continental United States pending final judgment on his *habeas* petition. Respondents have opposed Parhat's motions, and while they concede that the merits of his habeas action have been resolved in Parhat's favor, they continue to assert that the "circumstances of [Parhat's] capture and detention" justify denying him the relief he seeks. Resp'ts' Opp. To Parhat Release Mot. at 9. Petitioners anticipate that Respondents will make similar arguments in response to any subsequent motions for such relief by the remaining sixteen Uighur Petitioners. If Respondents assert that the factual circumstances of Petitioners' capture and detention justify denying them release or parole into the United States, then Petitioners are entitled to factual returns to their *habeas* petitions and prompt *habeas* hearings so that they may meaningfully respond to these allegations.

Five Petitioners - Edham Mamet (ISN 102), Abdur Razakah (ISN 219), Ahmad Tourson (ISN 201), Anwar Hassan (ISN 250) and Dawut Abdurehim (ISN 289) - have already received a factual return consisting of the classified and unclassified records of their Combatant Status

Review Tribunal ("CSRT") proceedings pursuant to court orders in their *habeas* actions. Eight Petitioners - Abdul Nasser (ISN 278), Abdul Semet (ISN 295), Hammad Memet (ISN 328), Huzaifa Parhat (ISN 320), Jalal Jalaldin (ISN 285), Khalid Ali (ISN 280), Sabir Osman (ISN 282) and Abdul Ghappar Abdul Rahman (ISN 281) have received these same records pursuant to court orders that the government produce the record on review in their parallel actions filed under the Detainee Treatment Act of 2005, Pub. L. No. 109-148, §§ 1001-06 ("DTA"). Petitioners Bahtiyar Mahnut (ISN 277) and Arkin Mahmud (ISN 103) have received only the unclassified portions of their CSRT records in their *habeas* actions. Petitioner Abdul Sabour (ISN 275) has received only the unclassified portion of his CSRT record in his DTA action. Petitioner Adel Noori (ISN 584) has not received any portion of his CSRT record, although the "unclassified summary" of evidence presented to his CSRT is publicly available as a result of a court order enforcing compliance with a Freedom of Information Act request by the Associated Press. The government has been under court order since 2007 to produce classified and unclassified CSRT records for Petitioners Abdul Sabour, Bahtiyar Mahnut, Arkin Mahmud and Adel Noori in their DTA actions. Therefore, there is no justification to further delay production of these documents.

Additionally, should Respondents wish to supplement the factual return of any Petitioner with allegations beyond those asserted by the CSRT - allegations which the government maintains have justified Petitioners' detention for the past six years - they should be required to file motions to amend and attach to their motion the proposed amended factual return, and the Court should allow amendment only where Respondents establish cause, consistent with Judge Hogan's order dated July 11, 2008 (Dkt. No. 53 in Misc. No. 08-442).

a.2. Petitioners' Recommendation as to How the Court Should Proceed

Petitioners recommend that the Court enter an order: (1) requiring Respondents to state by August 28, 2008 whether they concede that Petitioners are not enemy combatants; (2).requiring Respondents to state simultaneously whether they otherwise concede that the merits of Petitioners' *habeas* claims are resolved by *Parhat*; (3) promptly adjudicating Petitioner Parhat's pending motions for release and parole into the United States; and (4) if Respondents do not concede that Petitioners are not enemy combatants and/or if Parhat's motions are denied, requiring production of factual returns by September 4, 2008 and scheduling prompt *habeas* hearings.

Petitioners believe that the D.C. Circuit's decision in *Parhat* is dispositive of the merits of each Petitioner's *habeas* claim. In *Parhat*, the court ruled that the December 2004 CSRT determination that Parhat is an enemy combatant was invalid. 2008 WL 2576977, at *1. Accordingly, it directed the government to release Parhat, to transfer him or "to expeditiously convene a new CSRT to consider evidence submitted in a manner consistent with [the court's] opinion." *Id.* at *15. Although the D.C. Circuit afforded Respondents the opportunity to offer additional evidence before a new CSRT in order to establish that Parhat is an enemy combatant, the government has declined to do so, instead conceding that "it would serve no useful purpose to engage in further litigation over [Parhat's] status." Petition for Rehearing at 1, *Parhat v. Gates*, No. 06-1397 (D.C. Cir. Aug. 4, 2008).[1] The government has also represented that "it will

[1] Although the government has filed a petition for rehearing in *Parhat*, it does not seek reconsideration of the merits of Parhat's prior designation as an enemy combatant. Rather, the government has asked only the DC Circuit to "clarify that it did not purport to resolve the scope of a district court's [sic] to order Parhat's release into the United States." *Id.* at 3.

treat Parhat as if he were no longer an enemy combatant," a course of action that it believes "should resolve the merits of Parhat's habeas claim." *Id.* at 1-2.

The remaining sixteen Uighur Petitioners are in all material respects identically situated to Parhat. Although they have been approved to leave Guántanamo by the U.S. Department of Defense, each was designated an enemy combatant and has been held in extrajudicial detention since 2002 on the basis of the same core allegations that the D.C. Circuit found wanting against Parhat himself. Parhat's CSRT determined that he was an enemy combatant on the theory that he was "affiliated" with a Uighur independence group known as the East Turkistan Islamic Movement ("ETIM"), that ETIM was "associated" with al Qaeda and the Taliban, and that ETIM is engaged in hostilities against the United States and its coalition partners. *Id.* at *3. But the court in *Parhat* found that the government's evidence linking ETIM to al Qaeda and the Taliban and its evidence of ETIM's alleged hostile actions against the United States and its coalition partners was inadequate. *Parhat*, 2008 WL 2576977, at *1. Therefore, the court held that the government's "bare assertions cannot sustain the determination that Parhat is an enemy combatant." *Id.* at *24.

For the same reason, these assertions cannot support the determination that *any* Uighur Petitioner is an enemy combatant. All of the Uighur Petitioners are alleged to be affiliated with ETIM. *See Thabid v. Bush*, No. 05-CV-2398 (ESH) (D.D.C.) (dkt no. 27, Ex. A at 29) (Unclassified Department of Defense Report, Oct. 30, 2004).[2] Indeed, Respondents have long

[2] The Unclassified Department of Defense Report, prepared by Respondents in advance of the Uighurs' CSRT proceedings, purports to detail the age of each of the twenty-two Uighurs then detained at Guantánamo, when they left China, the dates of their most recent interrogations and whether they exhibited any disciplinary problems in the previous year. While these details obviously differ as to each prisoner, the Report also sets forth the substantive allegations against them – allegations which are *identical* as to all of the Uighurs, including Parhat

acknowledged that all of the Uighur prisoners in Guantánamo are identically situated "notwithstanding a specific act" attributable to some subset of the group. An email from one of Respondents' agents, released pursuant to court order in *Thabid v. Bush*, No. 05-cv-2398 (ESH) (D.D.C.), and written at the time of Petitioner Anwar Hassan's CSRT proceeding, indicates that (i) Respondent ordered a new CSRT proceeding for Anwar Hassan after he had initially been found *not* to be an enemy combatant; (ii) Respondent did so in order to further "exploit" the Uighurs in Guantánamo; and (iii) Respondent had no legitimate basis to distinguish those Uighurs deemed to be enemy combatants from those deemed not to be enemy combatants. The email stated:

> Two points to consider in determining [Anwar Hassan's] status:
>
> - 16 of 22 Uighers have been classified as [enemy combatants ("EC")] and the same criteria applied (Per SPECIAL Uigher Chart) to them as well. Inconsistencies will not cast a favorable light on the CSRT process or the work done by [the Office for the Administrative Review of the Detention of Enemy Combatants ("OARDEC")]. This does not justify making a change in and of itself, but is a filter by which to look at the overall Uigher transaction since *they are all considered the same notwithstanding a specific act.*
>
> - By properly classifying them as EC, then there is an opportunity to (1) further exploit them here in GTMO and (2) when they are transferred to a third country, it will be controlled transfer in status. The consensus is that all Uighers will be transferred to a third country as soon as the plan is worked out.

In re Petitioner Ali, No. 06-1194, Petition for Original Writ of Habeas Corpus (S. Ct. filed Feb. 13, 2007) at 8 (emphasis added).

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and five Uighurs who were later classified as non-enemy combatants and released. The Report alleges that each of the Uighurs "has been suspected as being a probable member of [ETIM]. He is suspected of having received training in an ETIM training camp in Afghanistan." *Id.*

Respondents have now conceded "that the rationale . . . supporting [the D.C. Circuit's] ruling in *Parhat* applies equally" to four additional Uighurs – Petitioners Khalid Ali (ISN 280), Sabir Osman (ISN 282), Abdul Semet (ISN 295) and Jalal Jalaldin (ISN 285) – "noting the lack of findings by the [CSRTs] regarding the reliability of evidence, and concluding that [the court] could not determine that the material was on its face reliable." Gov't's Mot. To Enter J. From *Parhat v. Gates* In These Actions, With Modification, And To Remove Cases From Oral Argument Calendar at 2, *Abdusemet v. Gates*, No. 07-1509, No. 07-1510, No. 07-1511, No. 07-1512 (D.C. Cir. Filed Aug. 18, 2008). Respondents have also indicated that they will now "treat these [additional four Uighur] petitioners, like Parhat, as if they were no longer enemy combatants." *Id.* at 4. The only factor distinguishing these four from the remaining twelve Uighur Petitioners is that each has a motion for judgment as a matter of law pending before the D.C. Circuit in their parallel actions filed under the DTA. *See Ali v. Gates*, No. 07-1511 (D.C. Cir. Filed June 12, 2008); *Osman v. Gates*, No. 07-1512 (D.C. Cir. Filed June 12, 2008); *Abdusemet v. Gates*, No. 07-1509 (D.C. Cir. Filed June 12, 2008); and *Jalaldin v. Gates*, No. 07-1510 (D.C. Cir. June 12, 2008).

Although *Parhat* was decided nearly two months ago, as of this filing the government has refused to share its position as to whether the decision has equal application to the remaining twelve Uighur Petitioners. But in that time the government has offered no indication that it regards any Uighur currently detained in Guantánamo as materially distinguishable from Parhat, or that it intends to offer additional evidence against them to support their continued detention. Respondents' refusal to state their position on this issue has thus far prevented the parties from determining the remaining contested issues in this litigation. Therefore, as an initial matter, the Court should order Respondents to identify by August 28 every Uighur Petitioner who Respondents will reclassify as

a noncombatant on the basis of the *Parhat* decision. To the extent Respondents will not concede the *Parhat* decision's application to any Uighur Petitioner, the Court should order Respondents to produce their factual returns by September 4 and schedule "prompt" *habeas* hearings. *See Boumediene*, 128 S. Ct. at 2275. The factual returns should, among other things, state the allegations against Petitioners other than their alleged affiliation with ETIM that purportedly justify their continued designation as enemy combatants. Petitioners reserve the right to propose an appropriate procedural framework for their *habeas* hearings after Respondents have specified the nature of the allegations against them.

On the other hand, if Respondents are prepared to concede that the merits of Petitioners' *habeas* claims are resolved then the only remaining issue for this Court to decide is the appropriate remedy. Parhat's motion for release into the United States and his motion for immediate parole into the United States are now fully briefed, and we would urge the Court to consider those motions on an expedited basis. Each of the remaining sixteen Petitioners anticipate that they will promptly move this Court for similar relief, either by fully adopting the arguments set forth in Parhat's moving papers or by filing their own briefs in support of such relief.

a.3. Petitioners' Position On Remaining Issues

The Department of Defense has announced that it currently is in the process of modifying the maximum security facility known as Camp VI, to provide more "intellectual stimulation" for the prisoners. *See, e.g.,* Carol J. Williams, *Los Angeles Times*, August 2, 2008. It is Petitioners' position that under the circumstances, it is imperative that Respondents promptly advise the Court and Petitioners' counsel concerning these plans, including a timetable for when they will be completed.

As recently as August 2, 2008, Rear Admiral Dave Thomas, Commander of the military prison at Guantánamo showed reporters renovations that were underway to allow some of the men in Camp VI to eat, visit and exercise together. Because at least six of the 17 Uighur prisoners are still confined in Camp VI under conditions of near-isolation – and because these conditions have resulted in a marked deterioration in their mental health – it vitally important for Petitioners to know whether and when the conditions in Camp VI will be modified. While we understand that this Court has ruled that Petitioners did not demonstrate in their recently filed motion for a preliminary injunction and temporary restraining order that the Court has jurisdiction to order their transfer from Camp VI, we respectfully request that the Court inquire as to Respondents' progress on the Camp VI renovations and plans for improving conditions. Petitioners' counsel also respectfully request that the Court order Respondents to identify the Camp in which each Uighur Petitioner is currently housed and to notify Petitioners' counsel within 48 hours following their future transfer to any other Camp within Guantánamo.

Finally, Petitioners respectfully request that the Court enter an order clarifying that Judge Hogan's order dated July 10, 2008 (Dkt. No. 52 in Misc. No. 08-442), applies to Petitioners Abdul Ghappar Abdul Rahman and Adel Noori. The July 10 order – which requires that Respondents provide the Court and Petitioners with 30-days' advance notice of any intended removal of Petitioners from Guantánamo – was previously entered as to them when they were petitioners in *Mohammon v. Bush*, No. 05-cv-2386 (RBW) before the Court assigned them a new civil action number, although there is no indication in the court's docket that the order applies to them.

b. Respondents' Position On Further Proceedings And Submission Of Factual Returns

In light of the Court of Appeals' decision in *Parhat v. Gates*, __F.3d__, 2008 WL 2576977 (D.C. Cir. 2008), *rhg. pet. pending* (filed August 4, 2008), respondents are in the process of completing a comprehensive review of the status of the seventeen Uighur petitioners in the above-captioned cases. As explained in respondents' opposition to petitioner Parhat's motion for immediate release into the United States (05-1509; dkt no. 147), respondents have determined that it would serve no useful purpose to engage in further litigation over petitioner Parhat's enemy combatant status. Consequently, respondents plan to house Parhat as if he were no longer an enemy combatant while efforts continue to resettle him in a foreign country. Parhat would, after transfer to such special housing, remain there until he is resettled to another country, provided he complies with camp rules, regulations, and procedures.[3]

Respondents have also determined that it would serve no useful purpose to engage in further litigation over the enemy combatant status of petitioners Abdul Semet (ISN 295), Jalal Jalaldin (ISN 285), Khalid Ali (ISN 280), and Sabir Osman (ISN 282). Provided they comply with camp rules, regulations, and procedures, these petitioners, like Parhat, will be housed in a special living facility while efforts continue to resettle them in a foreign country.

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[3] The process of moving Parhat to this new housing is ongoing and respondents expect the new housing will be ready this week. This special camp facility provides significantly more living privileges, including a communal living arrangement, access to all areas of the camp (including a recreation yard, bunk house, and an activity room), access to entertainment (including a television set equipped with a VCR and DVD, a stereo system, and equipment for soccer, table football (foosball), and table tennis), air conditioning in all living areas (which they control), special food items, and expanded access to shower facilities and library materials. In the meantime, Parhat committed a disciplinary infraction (assaulting another Uighur detainee) and is temporarily being held in Camp 6, based on security concerns. When he is moved to the special housing, Parhat will be given a clear warning that the new housing arrangements are contingent upon his adhering the base security and disciplinary rules.

In light of respondents' decision with respect to these five petitioners, further litigation over petitioners' status is unnecessary and respondents will not file factual returns for these petitioners. Therefore, remedy is the only outstanding issue. Respondents have opposed petitioner Parhat's motion for release into the United States and will oppose motions for similar relief by the other four similarly situated petitioners. As discussed in respondents' classified submission, the Department of State has been working diligently to find an appropriate country for resettlement of petitioners and respondents will provide petitioners with special living privileges pending the successful outcome of the resettlement process.

With respect to the remaining twelve petitioners in the above-captioned cases, respondents are continuing to evaluate their status in light of the *Parhat* decision. Respondents will undertake to provide the Court with a supplemental status report on or before September 30, 2008, in which respondents will report whether further litigation concerning petitioners' status will be necessary. Proceeding in this fashion will allow respondents potentially to narrow the number of petitioners to only those for whom status disputes remain to be litigated, as to whom the production of factual returns and litigation on the merits will be appropriate. Further, this process will avoid unnecessary litigation concerning the production of factual returns in the interim and enable respondents to concentrate their limited litigation resources on the many other pending habeas cases with active status disputes.

Dated: August 18, 2008

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

JAMAL KIYEMBA, Next Friend, et al.,

Appellees/Cross-Appellants,

v.

GEORGE W. BUSH, President of the United States, et al.,

Appellants/Cross-Appellees.

No. 05-5487

Monday, September 11, 2006

Washington, D.C.

The above-entitled matter came on for oral argument pursuant to notice.

BEFORE:

CHIEF JUDGE GINSBURG AND CIRCUIT JUDGES GRIFFITH AND KAVANAUGH

APPEARANCES:

ON BEHALF OF THE APPELLANTS:

ROBERT M. LOEB, ESQ.

ON BEHALF OF THE APPELLEES:

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powers harm that's going on by these orders.

Ambassador Prosper explains that there has to be sensitive diplomatic exchanges in regard to the transfer of a detainee to another country; getting them to agree to accept the individual; and where assurances are necessary regarding how they are treated, those are very sensitive negotiations. And here, the District Court orders make all such negotiations contingent upon District Court review.

THE COURT: Well, let -- one second.

THE COURT: Go ahead.

THE COURT: Let's imagine a case where we know that the detainee would be subject to torture if returned to another country, we know that that's the case. Would that detainee under your theory have no recourse to the Courts to prevent that transfer, or to require the notification of the Court of that transfer?

MR. LOEB: Well, the short answer is yes. The longer answer is first, we have a U.S. policy by sworn declarations we've submitted from the Assistant Secretary of Defense, and from Ambassador Prosper --

THE COURT: I'm sorry, the answer is yes, the detainee --

MR. LOEB: There's no --

THE COURT: -- would have no legal recourse?

MR. LOEB: No legal recourse, which is from

several --

THE COURT: I understand what you're saying, it's the policy of the U.S. Government not to do that. But I'm --

MR. LOEB: Also we have the fact that what -- in the judging on a preliminary injunction we looked at likelihood of success. They even have trouble identifying what the possible claim might be where at the end of the day, at the end of their case a judge will decide which country they should go to, and how they should be treated in that country.

THE COURT: Let me ask you one question, Counsel, do you agree that Congress has the authority to enact rules governing the transfer of detainees to other countries?

MR. LOEB: I don't have any problem with that, Your Honor. I would --

THE COURT: So, in other words, this --

MR. LOEB: In some level they might infringe upon the Commander-in-Chief authority. But --

THE COURT: Well, that's my --

MR. LOEB: -- the notion of rules --

THE COURT: -- that's my, that's my --

MR. LOEB: -- in general --

THE COURT: That's my question. In *Hamdan*, the Court found that the President's exercise of his authority was constrained by what Congress had done, it was in conflict with what Congress had done. Here, we have a situation that's

of how they're going to be treated in another country, and the proceedings they'll be subject to is a matter of within the basically political question doctrine, not subject to further court review. So, if a U.S. serviceman with full due process rights doesn't have further rights to further proceedings, I don't think there's greater rights here.

And here the declarations also, when taking account of the declarations, the declarations that we're not sending someone to a country where they're going to be subjected to torture, where it's more likely they'll be subjected to torture; and it also says we're only sending them to countries where they're now going to be released from U.S. custody; we're not sending them to other countries for them to hold them on our behalf.

So, we are releasing them. We're giving them basically, the, you know, their full -- what they could get at the end of the case. At the end of the case they want an order of release and transfer. We're going to release them and transfer them from U.S. custody. And instead they want to now micro-manage where we send them, and have a court review how they'll be treated. Well, *Holmes v. Laird* --

THE COURT: Well, their theory, just as stated, is that they are going to be tortured in the third country, in the other country. So, I think it's not fair to say micro-managing without pointing out that their claim, and it's just

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with the meaning given the term 'severe mental pain or suffering' (as defined in section 2340(2) of this title), except that—

"(i) the term 'serious' shall replace the term 'severe' where it appears; and

"(ii) as to conduct occurring after the date of the enactment of the Military Commissions Act of 2006, the term 'serious and non-transitory mental harm (which need not be prolonged)' shall replace the term 'prolonged mental harm' where it appears.

"(3) INAPPLICABILITY OF CERTAIN PROVISIONS WITH RESPECT TO COLLATERAL DAMAGE OR INCIDENT OF LAWFUL ATTACK.—The intent specified for the conduct stated in subparagraphs (D), (E), and (F) or paragraph (1) precludes the applicability of those subparagraphs to an offense under subsection (a) by reasons of subsection (c)(3) with respect to—

"(A) collateral damage; or

"(B) death, damage, or injury incident to a lawful attack.

"(4) INAPPLICABILITY OF TAKING HOSTAGES TO PRISONER EXCHANGE.—Paragraph (1)(I) does not apply to an offense under subsection (a) by reason of subsection (c)(3) in the case of a prisoner exchange during wartime.

"(5) DEFINITION OF GRAVE BREACHES.—The definitions in this subsection are intended only to define the grave breaches of common Article 3 and not the full scope of United States obligations under that Article.".

(2) RETROACTIVE APPLICABILITY.—The amendments made by this subsection, except as specified in subsection (d)(2)(E) of section 2441 of title 18, United States Code, shall take effect as of November 26, 1997, as if enacted immediately after the amendments made by section 583 of Public Law 105–118 (as amended by section 4002(e)(7) of Public Law 107–273).

(c) ADDITIONAL PROHIBITION ON CRUEL, INHUMAN, OR DEGRADING TREATMENT OR PUNISHMENT.— 42 USC 2000dd–0.

(1) IN GENERAL.—No individual in the custody or under the physical control of the United States Government, regardless of nationality or physical location, shall be subject to cruel, inhuman, or degrading treatment or punishment.

(2) CRUEL, INHUMAN, OR DEGRADING TREATMENT OR PUNISHMENT DEFINED.—In this subsection, the term "cruel, inhuman, or degrading treatment or punishment" means cruel, unusual, and inhumane treatment or punishment prohibited by the Fifth, Eighth, and Fourteenth Amendments to the Constitution of the United States, as defined in the United States Reservations, Declarations and Understandings to the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment done at New York, December 10, 1984.

(3) COMPLIANCE.—The President shall take action to ensure compliance with this subsection, including through the establishment of administrative rules and procedures. President. Rules. Procedures.

SEC. 7. HABEAS CORPUS MATTERS.

(a) IN GENERAL.—Section 2241 of title 28, United States Code, is amended by striking both the subsection (e) added by section

1005(e)(1) of Public Law 109–148 (119 Stat. 2742) and the subsection (e) added by added by section 1405(e)(1) of Public Law 109–163 (119 Stat. 3477) and inserting the following new subsection (e):

"(e)(1) No 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.

"(2) Except as provided in paragraphs (2) and (3) of section 1005(e) of the Detainee Treatment Act of 2005 (10 U.S.C. 801 note), 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.".

28 USC 2441 note.

(b) EFFECTIVE DATE.—The amendment made by subsection (a) shall take effect on the date of the enactment of this Act, and shall apply to all cases, without exception, pending on or after the date of the enactment of this Act which relate to any aspect of the detention, transfer, treatment, trial, or conditions of detention of an alien detained by the United States since September 11, 2001.

SEC. 8. REVISIONS TO DETAINEE TREATMENT ACT OF 2005 RELATING TO PROTECTION OF CERTAIN UNITED STATES GOVERNMENT PERSONNEL.

(a) COUNSEL AND INVESTIGATIONS.—Section 1004(b) of the Detainee Treatment Act of 2005 (42 U.S.C. 2000dd–1(b)) is amended—

(1) by striking "may provide" and inserting "shall provide";

(2) by inserting "or investigation" after "criminal prosecution"; and

(3) by inserting "whether before United States courts or agencies, foreign courts or agencies, or international courts or agencies," after "described in that subsection".

Applicability. 42 USC 2000dd–1 note.

(b) PROTECTION OF PERSONNEL.—Section 1004 of the Detainee Treatment Act of 2005 (42 U.S.C. 2000dd–1) shall apply with respect to any criminal prosecution that—

(1) relates to the detention and interrogation of aliens described in such section;

(2) is grounded in section 2441(c)(3) of title 18, United States Code; and

(3) relates to actions occurring between September 11, 2001, and December 30, 2005.

SEC. 9. REVIEW OF JUDGMENTS OF MILITARY COMMISSIONS.

Section 1005(e)(3) of the Detainee Treatment Act of 2005 (title X of Public Law 109–148; 119 Stat. 2740; 10 U.S.C. 801 note) is amended—

(1) in subparagraph (A), by striking "pursuant to Military Commission Order No. 1. dated August 31, 2005 (or any successor military order)" and inserting "by a military commission under chapter 47A of title 10, United States Code";

(2) by striking subparagraph (B) and inserting the following new subparagraph (B):