IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AL-HAMANDY, *et al.*, Petitioners, v. BARACK OBAMA, *et al.*, Respondents.	Civil Action No. 05-2385 (ESH) (Jawad, ISN 900)

MEMORANDUM IN SUPPORT OF RESPONDENTS'
PROPOSED ORDER FOR RESOLUTION OF THIS ACTION

INTRODUCTION

In accordance with the Court's Order of July 28, 2009 (Dkt. No. 316), Respondents submit herewith a proposed form of order to resolve this case by providing for the prompt and orderly transfer of Petitioner in accordance with the Great Writ, reporting requirements enacted by Congress, and logistical realities. Specifically, under Respondents' proposed order the government would be allowed up to seven days' time to prepare the inter-agency report, required by the Supplemental Appropriations Act of 2009, informing Congress of any risks to national security of Petitioner's transfer, any measures taken to reduce that risk, and any agreements with the receiving country pertaining to its acceptance of Petitioner. Upon expiration of the 15-day notice period required by the Act, Respondents would then be obligated to promptly release Petitioner and transfer him to the receiving government.

Contrary to Petitioner's suggestion,[1] Respondents are not suggesting that the Court lacks authority to order his release and transfer, consistent with statutory requirements. Indeed, Respondents have already initiated logistical efforts to effect the transfer, and have moved Petitioner, in anticipation thereof, to Camp Iguana, the least restrictive facility for Guantanamo detainees. Nor in proposing this schedule are Respondents asserting authority to detain an individual to pursue a criminal investigation. As noted below, the existence of that pending investigation is relevant to demonstrating why the collateral relief Petitioner seeks is not appropriate here. But the timetable presented by the Government reflects the requirements of the Act, and practical considerations attendant to the transfer.

In his response to the government's Notice That Respondents Will No Longer Treat Petitioner as Detainable Under the AUMF and Request for Appropriately Tailored Relief (Dkt. No. 311) ("Notice and Request"), Petitioner contends that he is entitled to "immediate release" from detention, and that the Court should make no allowance for Respondents' duty to comply with the reporting requirements of the Supplemental Appropriations Act. Pet'r's Resp. at 2 (citation omitted). *Habeas corpus* is an equitable remedy, however, that allows the Court sufficient flexibility to provide for the timely release and transfer of Petitioner while still permitting Respondents to meet the requirements of the Act. As a practical matter, moreover, the preparations necessary for Petitioner's transoceanic flight on a military aircraft would make it infeasible, in any event, to transfer him to the receiving country on an "immediate" basis, as he requests.

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[1] Petitioner's Response to Respondents' Notice That Respondents Will No Longer Treat Petitioner as Detainable Under the AUMF and Request for Appropriately Tailored Relief (Dkt. No. 314) ("Pet'r's Resp.") at 2 n.1.

The additional relief that Petitioner seeks is simply unavailable in a *habeas* case, and is inappropriate in its own right. For example, the factual findings that Petitioner now seeks are unnecessary to effectuate his transfer, beyond the scope, therefore, of the writ, and without a proper basis given that the facts of this case have not been litigated, and should only be litigated, if necessary, in any prosecution that may ensue from the criminal investigation that the Attorney General has directed. Petitioner's various requests for judicial oversight of his interim living conditions also lie beyond the limits of available *habeas* relief, and are unnecessary given his transfer to Camp Iguana. And Petitioner's efforts to impose judicial supervision over the details of Respondents' preparations for his transfer and its execution would inappropriately involve the judiciary in matters of foreign relations and military operations.

Accordingly, for the reasons stated herein, the Court should bring this case to its resolution by entry of an order in the form submitted herewith. Petitioner's request for relief, apart from a prompt release and transfer 15 days following Respondents' compliance with the terms of the Supplemental Appropriations Act, should be denied.

DISCUSSION

I. THE COURT IN ITS DISCRETION SHOULD ORDER THE PROMPT RELEASE OF PETITIONER FIFTEEN DAYS AFTER RESPONDENTS HAVE COMPLIED WITH THEIR STATUTORY REPORTING OBLIGATIONS.

Petitioner contends that, as a result of Respondents' decision no longer to treat him as detainable under the Authorization for the Use of Military Force ("AUMF"), he is entitled to various forms of relief, including "immediate release" as a matter of law. As the Supreme Court has recognized, however, habeas corpus is "an adaptable remedy," *Boumediene v. Bush*, __ U.S. __, 128 S.Ct. 2229, 2267 (2008), that is "governed by equitable principles," *Munaf v. Geren*, __

U.S. __, 128 S.Ct. 2207, 2220 (2008), and with respect to which this Court has the authority "to formulate and issue appropriate orders for relief," *Boumediene,* 128 S.Ct. at 2275. An appropriate relief order in this case should be fashioned in light of Congress's recent enactment of requirements in the Supplemental Appropriations Act (the Act) and should take into account issues related to logistical and other arrangements with the receiving government. *Cf. Munaf,* 128 S.Ct. at 2220 ("the present cases involve habeas petitions that implicate sensitive foreign policy issues in the context of ongoing military operations").

Section 14103(e) of the Act prohibits the expenditure of any funds for the transfer of any individual detained at Guantanamo until 15 days after the President submits certain information to Congress, including "an assessment of any risk to the national security of the United States . . . posed by such . . . release and the actions taken to mitigate such risk" and "the terms of any agreement with another country for acceptance of such individual." Petitioner contends that the Act is not implicated here because his release can be effectuated without "cost[ing] the U.S. government a dime," if the Government permits a delegation from the receiving government "or from a neutral intermediary such as the International Committee of the Red Cross (ICRC) to fly to Guantanamo and pick him up." Pet'r's Resp. 4. Petitioner, however, misunderstands the nature of this funding condition. Its terms are not a mere technical obstacle to be creatively circumvented. Moreover, and contrary to Petitioner's contention, effecting his transfer from military custody at Naval Station, Guantanamo Bay, Cuba – like virtually all governmental actions – would necessarily involve the expenditure of appropriated funds, even if a third party were to transport Petitioner from Guantanamo.

Petitioner insists alternatively that even if the Court were to take § 14103(e) into account in fashioning a remedy here, the Court should direct Respondents to submit the required information to Congress within 24 hours' time. Pet'r's Resp. at 5 n.3, 8. That request should also be denied. Under circumstances such as those presented here, § 14103(e)(2) requires the President to provide the Congress with "an assessment of any risk to the national security of the United States or its citizens, including members of the Armed Services . . . that is posed" by repatriating the detainee, and "the actions taken to mitigate such risk." Paragraph (e)(3) requires the President to inform Congress of "[t]he terms of any agreement with [that] country for acceptance" of the detained individual. By Presidential Order issued on July 17, 2009, responsibility for compliance with these reporting requirements has been delegated to the Secretary of State, acting in consultation with the Secretary of Defense. *See* 74 Fed. Reg. 35765 (July 21, 2009).

The Departments of State and Defense have already begun preparation of the required assessment, and based on the particular circumstances of this case, the government believes that it can be completed within one week's time from the issuance of the Court's Order. That is a reasonable period given the nature of the reporting requirement, and the Court should allow Respondents the time needed to carry out their duties under the Act in a responsible manner. Compliance with these reporting responsibilities cannot be carried out in a meaningful way in only 24 hours' time, particularly since this is the first time such a report is to be submitted under the Act.

Moreover, the time frame imposed by the Act is consistent with the time needed to complete the practical steps necessary to arrange for Petitioner's departure from Guantanamo.

As Respondents have explained, in order to give effect to any order to transfer they will require a period of several weeks to resolve "issues related to logistical and other arrangements." Resps.' Notice and Request, at 2; *see id.* at 3-4. For example, to transfer Petitioner would require the assignment of an appropriate military aircraft, which would take approximately 12 days given current operational requirements. Once the aircraft is available, on-board security personnel are deployed for a five-day period of pre-flight preparation and training. Based on prior experience with similar transfers of detained individuals, these and other necessary preparations for Petitioner's transcontinental flight would require approximately 20 days, the time effectively contemplated by the Act.

In short, any relief this Court grants should allow Respondents to comply with the dictates of the Act concurrent with their preparations to effectuate Petitioner's transfer. Respondents recognize Petitioner's interest in a prompt release from custody. Nevertheless, the equitable nature of habeas relief neither requires nor counsels that this Court contravene Congress's express intent.[2] Accordingly, Respondents submit that the Court should enter an order, in the form submitted herewith, allowing Respondents up to seven (7) days to submit the required report to Congress, and providing that once the 15-day period prescribed by the statute has expired, they shall promptly effectuate Petitioner's release from detention at Guantanamo.

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[2] Petitioner suggests that the 15-day report-and-wait provision of the Supplemental Appropriations Act may constitute an unconstitutional suspension of the Writ as applied to transfers that are the product of a court's granting of a habeas petition. (Pet. Resp. 4.) This Court need not reach that question in light of its discretion to fashion a remedy that comports both with the ordinary operation of Writ (including the discretion ordinarily afforded the federal court to fashion a remedy), and with the Supplemental Appropriations Act. *Cf. Ashwander v. Tennessee Valley Authority,* 297 U.S. 288, 348 (1936) (Brandeis, J., concurring).

II. THE COLLATERAL RELIEF REQUESTED BY PETITIONER IS NOT AUTHORIZED UNDER THE COURT'S POWER OF *HABEAS CORPUS.*

Petitioner also demands a panoply of ancillary relief that has nothing to with whether he is released from detention. Pet'r's Resp. at 6-8. Generally speaking, Petitioner requests that the Court make a number of findings and declarations unnecessary to the resolution of the case; oversee the preparations for Petitioner's transfer to the receiving government and its execution; and in the meantime regulate the conditions of Petitioner's treatment pending his release. These various requests for relief should be denied.

As a general matter, Petitioner can invoke the Court's power of *habeas corpus* – even here, where the writ is no longer contested – only to remedy the fact, duration, or location of confinement. As the Supreme Court observed in *Boumediene*, "[t]he Framers . . . understood the writ of *habeas corpus* as a vital instrument to secure . . . freedom." 128 S. Ct. at 2244. Similarly, in *Munaf*, decided the same day as *Boumediene*, the Supreme Court reiterated that "[h]abeas is at its core a remedy for unlawful executive detention," and "[t]he typical remedy is, of course, release." 128 S. Ct. at 2211. Petitioner cannot rely on the writ as a basis for demanding declaratory and injunctive relief that is entirely unrelated or at best unnecessary to his release from detention at Guantanamo Bay. Closer scrutiny of Petitioner's individual requests for relief reveals still further reasons why they should be denied.

A. Petitioners' Request for Declaratory Relief Is Improper and Should Be Rejected.

In his first and second requests for relief, Petitioner seeks a declaration that he "has been unlawfully detained and mistreated by the United States since December 17, 2002," and that "Respondents have failed to meet their burden of establishing that Petitioner committed any acts

which would authorize the United States to lawfully detain him, including the alleged acts of throwing a hand grenade and providing substantial support to terrorist groups." Pet'r's Resp. at 6-7. Now that Respondents have determined, however, that they will no longer treat Petitioner as detainable under the AUMF, this Court should simply order release as described in the Government's proposed order – factual findings of the kind requested by Petitioner are neither necessary nor appropriate. To the extent the intended purpose of these proposed findings is to insulate Petitioner from any moral stigma owing to his detention at Guantanamo Bay, that sort of alleged reputational injury has never been considered redressable in *habeas*, even in the context of criminal convictions. *See, e.g., Spencer v. Kenna*, 523 U.S. 1, 16 n.8 (1998); *Jackson v. California Dep't of Mental Health*, 399 F.3d 1069, 1075 (9th Cir. 2005).

Even if at this stage of the proceedings the Court still retained the authority to make the factual findings that Petitioner has requested, it should nevertheless refrain from doing so. The newly available evidence of Petitioner's involvement with the grenade attack on two U.S. servicemen has not been submitted to the Court for purposes of supporting Petitioner's detention, and no contested evidentiary hearing or briefing has been held on the factual questions Petitioner asks this Court to resolve. Moreover, in light of the Attorney General's decision to pursue the criminal investigation of Petitioner, the Court should refrain as a matter of comity from making any findings that touch on the subject matter of that investigation. *See Munaf*, 128 S. Ct. at 2220 ("'prudential concerns,' such as comity and the orderly administration of criminal justice, may 'require a federal court to forgo the exercise of its *habeas corpus* power'") (citations omitted).

No different result is warranted simply because Respondents have determined that they will no longer treat Petitioner as detainable under the AUMF. Contrary to Petitioner's suggestion, that decision cannot be viewed as a concession that Respondents lack any evidence on which he might be called to stand trial. *See* Pet'r's Resp. at 3. As Respondents explained in their Notice and Response, at 2:

> [T]the standard for detention under the AUMF is different than the elements that must be proved in a criminal prosecution, and thus a decision not to contest the writ does not resolve [the question] whether the current eyewitness testimony and other evidence, or additional evidence that may be developed, would support a criminal prosecution stemming from the attack on U.S. service members.

The Court should enter no findings – especially where the facts have not been litigated – now that this question is the subject of a criminal investigation.

B. Petitioner's Requests for Judicial Supervision of His Interim Living Conditions and the Preparations of His Release Should Also Be Denied.

Petitioner's remaining requests for relief are likewise unavailable or inappropriate as relief in an action for *habeas corpus.*

A number of Petitioner's requests essentially seek to regulate the conditions of his custody pending his release. *See* Pet'r's Resp. at 7 (requesting that Respondents be directed "to cease all interrogation of Petitioner," to "treat him humanely," and to "offer [him] a full range of social, educational, recreational and mental health services"). As a threshold matter, however, Petitioner has now been transferred to Camp Iguana, rendering such relief unnecessary. As Guantanamo's pre-release and transfer facility, Camp Iguana constitutes the least restrictive

facility for detainees,[3] providing them with relative freedom of movement and opportunities for not only education, but also social interaction, physical exercise and recreational activities.

> Camp Iguana is a communal camp with wooden, hut-like living structures, which provide freedom to move about from different buildings designated for housing, prayer, library, laundry facilities, shower/bathroom, outdoor recreation, and lounge areas. Detainees also have free access to satellite television, books, newspapers, magazines, handheld games, puzzles, and art supplies. Detainees have unfettered access outside their living facilities within the confines of the camp.

Walsh Report at 18. Interrogations are not conducted in the ordinary course at Camp Iguana, and Respondents have no intention of interrogating Petitioner prior to his departure from Guantanamo. Because Camp Iguana is designed for individuals whom the government no longer considers detainable under the AUMF, it already provides Petitioner with all that he could reasonably ask for in his short time remaining at Guantanamo "to assist in preparing him for reintegration into society." Pet'r's Resp. at 7.

Even if that were not the case, however, *habeas* can be used only to challenge the fact, duration, or location of confinement, *see Boumediene*, 128 S. Ct. at 2244; *Munaf,* 128 S. Ct. at 2211, and the majority of Circuits to consider the issue have recognized that claims addressing *conditions* of confinement are outside the scope of the writ.[4] Although the Supreme Court and the D.C. Circuit have not categorically ruled out the possibility that some sort of conditions

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[3] *See* Review of Department Compliance with President's Executive Order on Detainee Conditions of Confinement, Feb. 23, 2009 ("Walsh Report") at 12 (at www.defenselink.mil/pubs/pdfs/REVIEW_OF_DEPARTMENT_ COMPLIANCE_WITH_PRESIDENT'S_ EXECUTIVE _ORDER_ON_DETAINEE_CONDITIONS_OF_CONFINEMENTa.pdf).

[4] *See, e.g., Doe v. Pennsylvania Bd. of Probation and Parole*, 513 F.3d 95, 100 n.3 (3d Cir. 2008); *Hutcherson v. Riley*, 468 F.3d 750, 754 (11th Cir. 2006); *Badea v. Cox*, 931 F.2d 573, 574 (9th Cir. 1991).

claims might be brought under *habeas*,[5] courts typically do not entertain conditions claims through habeas, and the waning days of this litigation do not present a suitable occasion for making an exception. Now that Respondents have committed to Petitioner's timely release from Guantanamo, Petitioner has secured all that this Court could award him by granting the writ. Therefore, the Court should decline his invitation to supervise the conditions of his custody at Camp Iguana.

Petitioner's requests should also be denied because they concern matters that should be left to the discretion of the Executive Branch. "[I]t is a fundamental principle under our Constitution that deference to the Executive Branch must be afforded in matters concerning the military and national security matters." *Almurbati v. Bush*, 366 F. Supp. 2d 72, 81 (D.D.C. 2005); *see Dep't of Navy v. Egan*, 484 U.S. 518, 530 (1988) ("[C]ourts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs.") (citations omitted). Equally so, courts must accord substantial deference to the judgment of detention facility administrators and generally refrain from interfering in the day-to-day operations even of civilian detention facilities, not to mention a military facility during a time of hostilities. *See, e.g., Bell v. Wolfish*, 441 U.S. at 548, 562 (explaining that the operation of even domestic "correctional facilities is peculiarly the province of the Legislative and Executive Branches of our Government, not the Judicial," and cautioning lower courts to avoid becoming

[5] *Compare Bell v. Wolfish*, 441 U.S. 520, 526 n.6 (1979) (treating as open the question of whether conditions claims are cognizable on *habeas*); *Blair-Bey v. Quick*, 151 F.3d 1036, 1041-42 (D.C. Cir. 1998) (acknowledging that while habeas "might be available to challenge prison conditions in at least some situations," "pure prison-conditions cases" are "easy to identify" as outside the scope of *habeas corpus*); *Brown v. Plaut*, 131 F.3d 163, 168-69 (D.C. Cir. 1997) (holding that challenges to conditions of confinement would extend "beyond the 'core' of the writ" but acknowledging that "[h]abeas corpus might conceivably be available to bring challenges to . . . prison conditions").

"enmeshed in the minutiae of prison operations"); *see also Thornburgh v. Abbott*, 490 U.S. 401, 407-08 (1989) ("the judiciary is 'ill equipped' to deal with the difficult and delicate problems of prison management"); *Inmates of Occoquan v. Barry*, 844 F.2d 828, 841 (D.C. Cir. 1988) ("courts are not to be in the business of running prisons"; "questions of prison administration are to be left to the discretion of prison administrators").

Finally, Petitioner's various requests for judicial superintendence of Respondents' efforts to effectuate his transfer must also be denied. In particular, Petitioner seeks relief requiring Respondents to release him to the custody of "any authorized representative of [a receiving government] or a neutral intermediary" such as the Red Cross; to "take all necessary measures to facilitate [his] immediate transfer" to a receiving government, or the Red Cross, including "providing clearances to personnel and aircraft overflight and landing permissions over and on" U.S.-controlled territory; and to permit one or more of Petitioner's counsel to accompany him during his transfer to the receiving country. Pet'r's Resp. at 7. But where the proper execution of a detainee's transfer from U.S. military custody to a foreign country is concerned, courts are "require[d] [] to proceed 'with the circumspection appropriate when [] [c]ourt[s] [are] adjudicating issues inevitably entangled in the conduct of our international relations." *Munaf*, 128 S. Ct. at 2218.

For the same reasons, the Court should deny Petitioner's request for an order directing the United States to provide clearances for foreign nationals to fly over and into the Guantanamo Bay Naval Station to facilitate his transfer. As the D.C. Circuit recently reiterated, "[p]olicies pertaining to the entry of aliens . . . are peculiarly concerned with the political conduct of government," and are 'not within the province of any court, unless expressly authorized by law.'"

Kiyemba v. Obama, 555 F.3d 1022, 1026 (D.C. Cir. 2009) (citations omitted). Likewise, Petitioner's request for an order that could restrict the use of appropriate and lawful security measures during his transfer would be inconsistent with the "due regard" courts should show for the "'inordinately difficult undertaking" of administering modern detention facilities. *Thornburgh*, 490 U.S. at 407 (quoting *Turner v. Safley*, 482 U.S. 78, 85 (1987)).

CONCLUSION

For the foregoing reasons, the Court should adopt Respondents' proposed form of order, providing for the prompt release and transfer of Petitioner 15 days following Respondents' compliance with the reporting requirements of the Supplemental Appropriations Act. Petitioner's requests for relief should be denied.

Dated: July 29, 2009

Respectfully Submitted

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