UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SAMI AL LAITHI (HISHAM SLITI, et al.)	)	
	)	
Petitioner,	)	
	)	
v.	)	Civ. No. 05cv0429 (RJL)
	)	
GEORGE WALKER BUSH, et al.	)	
	)	
Respondents.	)	
	)	

REPLY MEMORANDUM IN SUPPORT OF
MOTION FOR A PRELIMINARY INJUNCTION
BARRING THE GOVERNMENT FROM RENDERING
SAMI AL LAITHI TO EGYPT TO FACE PERSECUTION

Petitioner Sami Al Laithi respectfully files the following *Reply* to Respondents' Memorandum in Opposition to his Preliminary Injunction ("*Resp. Memo*"):

WITHDRAWAL OF REQUEST THAT
PLEADINGS REMAIN UNDER SEAL

Counsel for Mr. Al Laithi returned from Guantanamo Bay on August 15, and is authorized to withdraw his request that any pleadings in his case be filed under seal. Respondents' approach to this case is deeply disturbing, and given Respondents' insistence that they should be allowed to discuss anything with the repressive Egyptian regime without the knowledge of this Court or anyone else, filing under seal is pointless. It is counsel's determination that Petitioner's plight cannot be hidden from public view, and that the democratic process demands that Respondents make their arguments on the public record. He opposes Respondents' filing their opposition under seal.

INTRODUCTION

As of May 10, 2005, the United States military notified Petitioner that he was found not to be an enemy combatant.[1] This decision was made in a tribunal hearing that was stacked against Petitioner.[2] He is, in other words, innocent of any offense against the United States.

Respondents' *Memorandum* in opposition is an extraordinary document. First, Respondents refuse to even acknowledge the fact that Mr. Al Laithi has been cleared by the Combatant Status Review Tribunal (CSRT). *Resp. Memo* at 11 n.11 ("Respondents neither confirm nor deny petitioner's claim that he has been found to no longer be an enemy combatant or that he has been cleared for transfer from Guantanamo.").

Why on earth not? What is the possible government interest in refusing to confirm to this Court what Mr. Al Laithi was told more than three months ago?[3]

Second, Respondents now say that the CSRT does not determine a prisoner's status as an Enemy Combatant:

> Further, even if petitioner were found to no longer be an enemy combatant, his characterization that such a finding is equivalent to a determination that he is "wholly innocent" is inappropriate. The military and national security interests served by detaining "enemy combatants" are completely distinct from the

---

[1] See *Statement of Sami Al Laithi*, July 3, 2005, submitted by secure fax with Pet'r's Mot. for Prelim. Inj. Undersigned counsel also received an unclassified return of Mr. Al Laithi's Combatant Status Review Tribunal from the Freedom of Information Act request made by the Associated Press. Petitioner hereby requests that the Court order the Government to produce the entire record of Petitioner's CSRT and the resulting Decision Report.

[2] Mr. Al Laithi was presumed to be an enemy combatant and the burden of proof was placed on him; he had no right to see material evidence against him; he had no counsel to argue for him. See In re Guantanamo Bay Cases, 355 F. Supp. 2d 443, 468 (D.D.C. 2005). In his case, he had no access to witnesses in his favor.

[3] It should be noted that Deputy Associate Attorney General J. Michael Wiggins testified before the Senate Judiciary Committee on June 15, 2005 that the results of all CSRT's have been made public:

> In October 2004, the Government moved to dismiss the then-pending Guantanamo Bay detainee habeas cases on two principal grounds. … In these cases, the Government also filed factual returns including the record of each CSRT proceeding. The Court, and counsel who had obtained appropriate security clearances, were given access to classified information in the factual returns; an unclassified version suitable for public release was filed on the public record.

See http://judiciary.senate.gov/testimony.cfm?id=1542&wit_id=4359. If this is the case, what is the governmental interest in refusing to tell this Court the result of the CSRT in Mr. Al Laithi's case?

> criminal justice interests served by confining "pretrial detainees." * * * Accordingly, the CSRT process is not a trial of innocence or guilt but rather a determination of *whether a detainee poses a threat to the national security interests of the United States.*

Resp. Memo at 11 n.11 (emphasis supplied; citations omitted).

This Court may well believe that it has misread this passage. Of course the CSRT was not designed to determine whether the prisoner remained a threat to the United States – that is the purpose of the ARB.[4] The purpose of the CSRT process was to determine whether Petitioner should be correctly designated an "enemy combatant" in the first place. This is what Respondents asserted this in the original fact sheets concerning the CSRT,[5] and it has been repeated in a series of statements by officials -- including Secretary of the Navy Gordon England[6] and Rear Admiral McGarrah[7] -- and it was most recently reiterated by Respondents'

---

[4] It was the ARB that was created to determine whether someone who was found to be an enemy combatant no longer posed a threat. In the notice given to counsel for each prisoner earlier this year, Respondents represented: "The ARBs are an annual review process to make an assessment of whether there is continued reason to believe that an enemy combatant poses a continuing threat to the United States or its allies . . . . Information on the ARB procedures can be obtained through the Department of Defense website at http://www.defenselink.mil/releases/2004/nr20040915-1253.html."

[5] Department of Defense definition of the CSRT, provided under the heading *Department of Defense fact sheet on the various detainee processes*, available at http://www.defenselink.mil/news/Jan2005/d20050131process.pdf ("*Combatant Status Review*. Definition/purpose: A formal review of all the information related to a detainee to determine whether each person meets the criteria to be designated as an enemy combatant.").

[6] *Special Defense Department Briefing on Status of Military Tribunals*, December 20, 2004, available at http://www.defenselink.mil/transcripts/2004/tr20041220-1841.html ("Again, for explanation/clarification, CSRTs, Combatant Status Review Tribunals, that is the determination if someone is or is not an enemy combatant. So it strictly is or is not an enemy combatant; that's the only determination made by those boards."); Statements of Secretary of the Navy Gordon England in a *Special Defense Department Briefing*, October 1, 2004, available at http://www.defenselink.mil/transcripts/2004/tr20041001-1344.html ("SEC. ENGLAND: Well, this is only to determine, again, if you're an enemy combatant. * * * This is a more formalized review, it's later, there's more data available, so I would expect that you'll get some people to be non-ECs, non-enemy combatants. But remember now, this is strictly an administrative review to determine if the people are indeed classified appropriately, still classified right, in terms of enemy combatants.")

[7] McGarrah was appointed by Secretary England as the Convening Authority for the CSRT process. See Defense Department Special Briefing on Administrative Review Boards for Detainees at Guantanamo Bay, Cuba given by Rear Admiral James McGarrah, July 8, 2005, available at http://www.defenselink.mil/transcripts/2005/tr20050708-3322.html ("Our CSRT process, which we finished in March, determined that these detainees were enemy combatants."); Testimony before Senate Judiciary Committee, June 15, 2005, available at: http://judiciary.senate.gov/testimony.cfm?id=1542&wit_id=4358 ("the Deputy Secretary of Defense established the Combatant Status Review Tribunal (CSRT) process to assess formally whether each detainee was properly detained as an enemy combatant and to permit each detainee the opportunity to contest the enemy combatant designation.").

counsel before the D.C. Circuit Court of Appeals.[8] Certainly, until the most recent *volte face*, Respondents have left the impression with the Courts that the CSRT's were meant to determine whether the prisoner was an 'enemy combatant'.[9]

Indeed, Secretary England represented earlier this year that once a prisoner is cleared by the CSRT of being an enemy combatant,

> They're free. We just move them to a different area on Guantanamo. … It's a better environment, I believe, it is a different area than they've been in, while waiting to be transferred. And we do that as quickly as we can.[10]

For Respondents to pretend that this is not true today is disingenuous, to say the least.

Third, Respondents refuse to let either Petitioner – an innocent man – or this Court have any input into where he should be forcibly sent:

> Nor do Respondents confirm or deny that, if petitioner has been cleared for transfer, he will be transferred to Egypt.

Resp. Memo at 11 n.11.

---

[8] See, e.g., *Brief of Respondents in Boumediene v. Bush*, 2005 WL 1387147 at 4-5 (D.C. Cir. filed May 25, 2005) ("Each Guantanamo Bay detainee has received a formal adjudicatory hearing before a Combatant Status Review Tribunal (CSRT). Those tribunals, established pursuant to written orders by the Deputy Secretary of Defense and the Secretary of the Navy, were created specifically 'to determine, in a fact-based proceeding, whether the individuals detained at the U.S. Naval Base Guantanamo Bay, Cuba, are properly classified as enemy combatants and to permit each detainee the opportunity to contest such designation.'").

[9] See Hamdan v. Rumsfeld, --- F.3d ---, 2005 WL 1653046,*4 (D.C. Cir. 2005) ("Hamdan received a formal hearing before a Combatant Status Review Tribunal. The Tribunal affirmed his status as an enemy combatant"); In re Guantanamo Detainee Cases, 355 F.Supp.2d 443, 450 (D.D.C. 2005) ("On July 7, 2004, nine days after the issuance of the *Rasul* decision, Deputy Secretary of Defense Paul Wolfowitz issued an Order creating a military tribunal called the Combatant Status Review Tribunal (hereinafter "CSRT") to review the status of each detainee at Guantanamo Bay as an 'enemy combatant.'"); Abdah v. Bush, Slip Opinion, 2005 WL 711814 *6 (D.D.C. 2005) ("Petitioners' current designation as enemy combatants is not a foregone conclusion; challenges to the accuracy and legitimacy of the government's determination that Petitioners have engaged in hostilities against the United States, or aided those who have, are the very core of Petitioners' underlying habeas claims. Respondents' assertion to the contrary, that "Petitioners' enemy combatant status was recently confirmed in Combatant Status Review Tribunals," Resp'ts' Opp'n at 2, ignores Judge Green's ruling that the CSRTs as so far implemented are constitutionally deficient."); O.K. v. Bush, 344 F.Supp.2d 44, 57 (D.D.C. 2004) ("Each of the Guantánamo detainees is being reviewed by a CSRT, a military tribunal convened to make a determination whether the detainee is properly designated as an enemy combatant.").

[10] Secretary England, *Defense Department Special Briefing on Combatant Status Review Tribunals* (March 29, 2005) (transcript available at http://www.defenselink.mil/transcripts/2005/tr20050329-2382.html).

Fourth, Respondents criticize Petitioner for filing an "unsworn" declaration about the threats that he received from the Egyptian government:

> Petitioner's unsworn story about an alleged encounter between petitioner and Egyptian officials does not even purport to speak to what may be the intentions or plans of the United States officials who would be in charge of deciding on any transfer or repatriation, and, even if credited, hardly establishes that he is at risk of the United States sending him to Egypt specifically to be tortured or treated inhumanely.

Resp. Memo at 12 n.14. Again, this Court may be excused for reacting with some incredulity. How can Respondent complain that Petitioner does not file "sworn" declarations when Respondents are holding him on an offshore enclave without access to notaries?[11]

Fifth, Respondents tell this Court that the evidence of Petitioner's horrendous abuse at the hands of U.S. forces is "gratuitous" and irrelevant:

> Petitioner's motion also includes various gratuitous allegations that he has been abused while in the custody of the U.S. military at Guantanamo Bay. * * * Nevertheless, these allegations are not material to the issue presently before the Court, i.e., whether petitioner is entitled to a preliminary injunction prohibiting the United States from relinquishing custody of petitioner and transferring him to Egypt without prior notice and a court hearing.

Resp. Memo at 11 n.12. Translated into plain English this means that if Respondents abused Petitioner for three and a half years before finding him innocent, this should have no bearing on Respondents' good faith, or whether they should be allowed to send him to Egypt for the Mubarak regime to finish the job.

[11] This is all depressingly reminiscent of Joseph Heller's famous book *Catch 22*. It should be noted, however, that counsel verifies in the original petition that the allegations are true and accurate. While on the subject of irrelevant evidence, it is worth mentioning the declarations filed by Respondents. The declaration of Matthew Waxman is dated June 2, 2005, many weeks before Mr. Al Laithi filed his pleading. Indeed, it seems to have nothing to do with the case. It is a form declaration that speaks exclusively of enemy combatants and how they may be detained for the duration of the conflict, or who may be returned to countries for continued detention. *Waxman Declaration* at ¶¶ 2-8. Pierre-Richard Prosper files a one-size-fits-all document that is five months old and also talks only about "enemy combatants." *Prosper Declaration* at ¶ 2.

Sixth, Respondents tell us that Petitioner's claim that he should be moved from Camp V -- where he is being held under conditions that compare unfavorably with any Death Row in the country – is a non-starter:

> For similar reasons, petitioner's request that he be immediately released from Camp V and housed somewhere else at Guantanamo that is "non-punitive" is not likely to succeed on the merits and should be denied. See Motion for Preliminary Injunction at 16. As an initial matter, detentions at Guantanamo are not done pursuant to the criminal justice system. *** And petitioner's particular conditions of confinement have not been imposed on him as a method of punishment.

Resp. Memo at 22 n.20 (citation omitted).

Why is Petitioner unlikely to succeed on this claim when Secretary England promised (above) that the very goal of the claim was what would happen to someone found innocent by a CSRT, and when, in the past several days, Respondents agreed that such a move was appropriate for other prisoners found innocent by the CSRT process. See *Surreply of Petitioners in Qassim v. Bush*, 05cv0497 (JR) at 11 (D.D.C. filed August 10, 2005) ("the Government now concedes that for unspecified reasons, persons who are not enemy combatants have been sent to Camp 1"). Why, if the horribly abusive conditions of Camp V have not been imposed as a method of punishment, they are being inflicted gratuitously on an innocent man in a wheelchair?

All in all, Respondents have exalted the 'independence' of the Executive Branch to such a height as to remind us all of the need for an independent judiciary. We now turn to some of the legal issues raised by Respondents.

I. MR. AL LAITHI MEETS ALL THE CRITERIA FOR A PRELIMINARY INJUNCTION AS HE WOULD MORE LIKELY THAN NOT BE TORTURED SHOULD HE BE SENT TO EGYPT

In considering Petitioner's request for a preliminary injunction,[12] the Court must consider four factors: (1) whether the plaintiff has a substantial likelihood of success on the merits; (2) whether the plaintiff would suffer irreparable injury were an injunction not granted; (3) whether an injunction would substantially injure other interested parties; and (4) whether the grant of an injunction would further the public interest. See Al-Fayed v. CIA, 254 F.3d 300, 303 (D.C. Cir. 2001). "These factors interrelate on a sliding scale and must be balanced against each other." Serono Labs., Inc. v. Shalala, 158 F.3d 1313, 1318 (D.C. Cir. 1998). "If the arguments for one factor are particularly strong, an injunction may issue even if the arguments in other areas are rather weak." CityFed Fin. Corp. v. Office of Thrift Supervision, 58 F.3d 738, 746 (D.C. Cir. 1995). "An order maintaining the status quo is appropriate when a serious legal question is presented, when little if any harm will befall other interested persons or the public and when denial of the order would inflict irreparable injury on the movant. There is substantial equity, and need for judicial protection, whether or not movant has shown a mathematical probability of success." Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841, 844 (D.C. Cir. 1977).

A. Without an injunction giving him notice before his rendition and an opportunity to oppose it, Mr. Al Laithi will be sent to Egypt where he will be irreparably harmed through torture and possibly death.

1. Torture is endemic in Egypt.

The conditions in Egypt are horrendous for opponents of the current government like Mr. Al Laithi. Torture is widespread and has been for years. See, e.g., Khouzam v. Ashcroft, 361

[12] Respondents question whether Mr. Al Laithi wants 30-days' notice of his rendition to Egypt, or to bar it. *Resp. Memo* at 1 n.2. Petitioner makes clear that he seeks an injunction both (a) requiring 30 days' notice prior to Petitioner's forcible transfer anywhere, and (b) barring Respondents from ever forcing him to go to Egypt. However, the notice requirement is more urgent and less intrusive, since such an order would allow the Court to work out the complex issues involving access to the client, so that he can have an appropriate input in the decision where he should be sent.

F.3d 161, 163 (2nd Cir. 2004) ("we are firmly persuaded that the provisions of [U.N. Convention Against Torture] have been shamefully trampled by Egyptian police").[13]

The Department of State, the agency charged with arranging the next destination of Mr. Al Laithi, has steadily condemned of Egypt human rights record; surely they must listen to their own conclusions and find another location for him. See DEP'T ST. 2004 COUNTRY REPORT ON EGYPTIAN HUMAN RIGHTS PRACTICES, February 28, 2005 ("The security forces continued to mistreat and torture prisoners, arbitrarily arrest and detain persons, hold detainees in prolonged pretrial detention, and occasionally engage in mass arrests."); DEP'T ST. 2003 COUNTRY REPORT ON EGYPTIAN HUMAN RIGHTS PRACTICES, February 25, 2004 ("The November, [sic] 2002 session of the U.N. Committee Against Torture noted a systematic pattern of torture by the security forces. … Torture was used to extract information, coerce the victims to end their oppositionist activities, and to deter others from similar activities. … Principal methods of torture reportedly employed by the police and the SSIS included victims being: stripped and blindfolded; suspended from a ceiling or doorframe with feet just touching the floor; beaten with fists, whips, metal rods, or other objects; subjected to electrical shocks; and doused with cold water."); DEP'T ST. 2002 COUNTRY REPORT ON EGYPTIAN HUMAN RIGHTS PRACTICES, March 31, 2003 ("[T]here were numerous, credible reports that security forces tortured and mistreated detainees. … Reports of torture and mistreatment at police stations remained frequent.").[14]

---

[13] See also U.N. COMMITTEE AGAINST TORTURE, *Fourth Periodic Report on Egypt*, U.N. Doc. CAT/C/XXIX/Misc.4, Sec. D(5)(b), (c) (November 20, 2002) (raising concerns over "consistent reports received concerning the persistence of the phenomenon of torture and ill-treatment of detainees by law enforcement officials, and the absence of measures ensuring effective protection and prompt and impartial investigations. Many of these reports relate to numerous cases of deaths in custody; … [and] widespread evidence of torture and ill-treatment in administrative premises under the control of the State Security Investigation Department, the infliction of which is reported to be facilitated by the lack of any mandatory inspection by an independent body of such premises");

[14] This is not a case, as the Government tries to argue in its opposition brief, where problems noted in a country report are limited to a certain facility or branch of government or do not apply to the situation at hand. See *Resp. Memo* at 7 n.8. Rather, the torture outlined by the State Department's reports occurs at all levels of Egypt's security apparatus, throughout the country, and is directed toward democracy advocates like Mr. Al Laithi. See, e.g., Human

Respondents would have us ignore these country reports even though they are compiled by the same governmental organization (the State Department) that is now apparently trying to ship Mr. Al Laithi back to Egypt:

> 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 will be tortured by a receiving foreign government.

Resp. Memo at 7 n.8. Yet in his declaration, Mr. Prosper concedes that the annual government human rights reports are "important in evaluating foreign government assurances because and any individual persecution and torture claims, because they are knowledgeable about such matters as human rights, prison conditions, and prisoners' access to counsel. . . ." *Prosper Declaration* at ¶ 7. This is because "[t]he Human Rights reports are the official State Department reports to Congress on human rights conditions in the individual countries for a given year and are mandated by law. . . ." Id. at ¶ 7 n.1.

Rather, as the courts have repeatedly noted, the "[c]ountry reports … are the most appropriate and perhaps the best resource for information on political situations in foreign nations." Chen v. Gonzales, --- F.3d ----, 2005 WL 1806121, *5 (2nd Cir. 2005). See also Negeya v. Gonzales, --- F.3d ---, 2005 WL 1761333 (1st Cir. 2005) ("Generally, State Department reports are a highly probative source of evidence in cases that turn on the objective reasonableness of an asserted fear of future persecution.").[15] It ill-behooves Respondents to run

---

Rights Watch, Egypt's Torture Epidemic, February 2004 <http://hrw.org/english/docs/2004/02/25/egypt7658.htm> ("Police and state security agencies continue to use torture in order to suppress political dissent. In the past decade, suspected Islamist militants have borne the brunt of these acts. Recently, increasing numbers of secular and leftist dissidents have also been tortured by police and security officials.").

[15] In addition to the State Department reports, there are plenty of other indicators that Egypt's addiction to torture continues unabated in 2005. See, e.g., Human Rights Watch, Egypt: Calls for Reform Met with Brutality, (May 26, 2005) <http://hrw.org/english/docs/2005/05/26/egypt11036.htm> (reporting how Egyptian plainclothes security agents beat opposition demonstrators while police stood by and at times encouraged mobs of government supporters to beat and sexually assault protestors); Amnesty International, Egypt: Amnesty International's Human Rights Concerns 2005 <http://www.amnestyusa.org/countries/egypt/document.do?id=ar&yr=2005>.

away from the clear import of these reports now, and this is yet another indicator of the need for impartial judicial intervention.

2. Egypt has a history of reneging on assurances to treat detainees humanely.

Any assurances Egypt might offer that it will protect human rights are useless.[16] Respondents argue that the United States is not sending Petitioner to Egypt specifically for torture, saying that Petitioner:

> does not even purport to speak to what may be the intentions or plans of the United States officials who would be in charge of deciding on any transfer or repatriation, and . . . hardly establishes that he is at risk of the United States sending him to Egypt specifically to be tortured or treated inhumanely.

Resp. Memo at 12 n.14. Here, Respondents state the wrong standard: It does not matter what the intentions of the U.S. may be – the question is what the probable consequence of sending Petitioner to Egypt will be.

Egypt's track record does not bode well. The U.N. Committee on Torture recently ruled that Sweden had violated the ban on torture by sending a terrorism suspect to Egypt, where despite assurances from the Mubarak government that the suspect would be treated fairly, he was in fact tortured.[17] Perhaps most tellingly, the Committee found that "[t]he procurement of

---

[16] It is worth noting that the United States' close ally Britain has found Egypt's assurances regarding torture to be meaningless. See Hani El Sayed Sabaei Youssef v. Home Office, [2004] EWHC 1884 (QB), ¶ 78 ("[T]here was strong evidence that the Egyptian Security Forces systematically tortured political detainees, despite the fact that Egypt had signed the UN Convention Against Torture in 1987. The Home Office accordingly knew that the evidence strongly suggested that elements in the Egyptian Security Forces were a law unto themselves. … It ought therefore to have been readily apparent that even if a single non-torture assurances was actually given, there were going to be very serious difficulties in persuading an English court that such an assurance was sufficient.").

[17] See U.N. COMMITTEE AGAINST TORTURE, *Communication No. 233/2003: Sweden.24/05/2005*, U.N. Doc. CAT/C/34/d/233/2003, ¶ 2.6 <http://www.unhchr.ch/tbs/doc.nsf/0/4dec90a558d30573c1257020005225b9?Opendocument> (May 24, 2005) (stating Egyptian state security officials told prisoner while giving him electric shocks that "the guarantees provided by the Egyptian Government concerning him were useless;" Committee found that "it was known, or should have been known, to the State party's authorities at the time of the complainant's removal that Egypt resorted to consistent and widespread use of torture against detainees, and that the risk of such treatment was particularly high in the case of detainees held for political and security reasons. … [T]he natural conclusion [was] that the complainant was at a real risk of torture in Egypt." Id. at ¶13.4.).

diplomatic assurances, which, moreover, provided no mechanism for their enforcement, did not suffice to protect against this manifest risk."[18]

Of even greater concern, in this particular case of torture, is the fact that the United States was found to have been complicit. Swedish authorities turned the prisoner over to United States special agents and flown on an American plane to Egypt. At the airport, CIA "agents stripped the clothes from the men's bodies, inserted suppositories of an unknown nature, placed diapers upon them and dressed them in black overalls. Their hands and feet were chained to a specially-designed harness, they were blindfolded and hooded as they were brought to the plane."[19]

Respondents' prior actions do not leave one with much faith that the issue should be resolved by Respondents and the Egyptians in a huddle, without input from anyone else. In order to get assurances, we are told, the government must approach Egypt "with discretion." *Prosper Declaration* at ¶ 9. If Egypt's assurances were made public, why would Egypt "likely be reluctant in future to communicate frankly with the United States concerning such issues?" *Prosper Declaration* at ¶ 10. Presumably – true or false – the Egyptians will put their governmental hands on their hearts and promise to do no harm to Mr. Al Laithi. How could revelation of this be embarrassing, unless the Egyptians know that their 'assurances' are identical to their false promises last time a prisoner returned to find the electric shock machine waiting for him?

It is clear that the only thing that will allow any faith in the process is for there to be guarantees that Mr. Al Laithi will not be treated in the same manner as other victims of U.S.-Egyptian bilateral outsourcing of U.S. torture 'needs'.[20]

---

[18] Id. at ¶ 13.4.
[19] Id. at ¶ 10.2.
[20] To the extent that the information should really be kept confidential, there is no reason why counsel cannot review it under the same classification rules as currently apply to most of the other evidence.

To date, Respondents have presented "declarations that attempt to mitigate these concerns, [but] they neither refute Petitioner's claims nor render them frivolous." Al-Marri v. Bush, 2005 WL 774843, *4 (April 4, 2005). Respondents have provided absolutely no indication as to the assurances, if any, that the Egyptians have offered, whether and how Respondents would monitor follow-through on those assurances, or whether there would be any consequences for Egypt's failure to comply. Instead, they stress that detainees are "transferred entirely to the custody and control of the other government, and once transferred, [are] no longer in the custody and control of the United States." *Waxman Declaration* at ¶ 5.

3. Due to his status as a proponent of democracy, and adequate assurances being impossible, Mr. Al Laithi faces an immediate threat of being tortured by Egyptian authorities.

Mr. Al Laithi is an outspoken opponent of the Egyptian government. See *Statement of Sami Al Laithi*, ¶¶ 4, 6, 8, 15. He left Egypt in 1986. Id. at ¶¶ 3, 6. He was pursued by Egyptian agents to Pakistan because of his pro-democracy views, and he was threatened, forcing him to flee to Afghanistan. Id. at ¶¶ 8-13. He has been visited twice in Guantanamo Bay by Egyptian delegations and been threatened by them with torture. Id. at ¶¶ 16-20. The most recent delegation informed him that he would be tried in Egypt in a military court for political crimes, namely speaking out in opposition to corruption of the current government. Id. at ¶¶ 17-18. If the United States sends him to Egypt regardless of the "natural conclusion" that torture will be the sure outcome, it will be in violation of the Convention Against Torture and simply morality, namely the higher law of doing justice towards an innocent man.[21] And in turn, Mr. Al Laithi will be irreparably harmed.

[21] Respondents also open themselves to criminal liability under 18 U.S.C. § 2340A(c) (2000) ("[a] person who conspires to commit [torture] … shall be subject to [fines or imprisonment of up to 20 years, or both, and if the tortured person is killed, imprisonment for any term of years or for life]"). Respondents surely do not want to have to serve prison time for complicity in the torture of an innocent man.

Further, the threat is immediate. Mr. Al Laithi was declared innocent in May 2005. Secretary of the Navy Gordon England stated during a Special Briefing on Combatant Status Review Tribunals in March 2005 that once a prisoner is cleared by the Combatant Status Review Tribunal: "Arrangements are made to send them home. … And we do that as quickly as we can."[22] Therefore, any day Mr. Al Laithi could be transferred to Egypt to be tortured. The Court must stop this from happening without at least 30 days' notice to counsel.

B. Mr. Al Laithi would likely win this action on the merits.

1. The United States' government's decision as to where to send Mr. Al Laithi is justiciable.

The Bush Administration's War on Terror continues and as it does, litigation proceeds regarding other detainees at Guantanamo Bay.[23] But whatever the ultimate outcome of those court cases, Mr. Al Laithi is not in the same position as most other Guantanamo prisoners. It is time for Mr. Al Laithi to be treated in the manner befitting his status: a man the United States military has determined has been wrongfully imprisoned for over three years.[24]

a. Under the Convention Against Torture, the Court must examine the Secretary of State's decision to send Mr. Al Laithi to Egypt where he will more likely than not be tortured.

---

[22] Secretary England, Defense Department Special Briefing on Combatant Status Review Tribunals (March 29, 2005) (transcript available at http://www.defenselink.mil/transcripts/2005/tr20050329-2382.html). See also *Waxman Declaration* at ¶ 3 (stating Respondents have no interest in maintaining custody any longer than necessary).

[23] See In re Guantanamo Bay Cases, 355 F. Supp. 2d 443, 468 (D.D.C. 2005) (finding Guantanamo prisoners have constitutional rights and are covered by the Geneva Convention); Khalid v. Bush, 355 F. Supp. 2d. 311, 319 (D.D.C. 2005) (finding Guantanamo prisoners have no constitutional rights and no rights under international treaties). Both cases are now before the D.C. Circuit Court.

[24] Respondents erroneously claim that Mr. Al Laithi failed to offer in his Motion for Preliminary Injunction any theory under which the Court could stop his rendition to Egypt. They state the only oblique mention of grounds for relief is from Mr. Al Laithi's statement where he avers his need for an asylum state. *Resp. Memo* at 15. Apparently, Respondents chose to completely ignore Mr. Al Laithi's Memorandum in Support of his Motion for Preliminary Injunction, which raises as grounds for relief the Protocol Relating to the Status of Refugees, Jan. 31, 1967, 606 U.N.T.S. 267, id. at 2; the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 39 U.N. GAOR Supp. (No. 51), U.N. Doc. A/39/51 (1984), id. at 13, and its implementing legislation, the Foreign Affairs Reform and Restructuring Act, Pub. L. No. 105-277, 112 Stat. 2681, Oct. 21, 1998, id. at 20.

CAT's Article 3 provides that "[n]o State party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture."[25] The implementing legislation for CAT "confers standing to sue for … aliens that can demonstrate it is 'more likely than not' that he or she would be tortured if removed to a particular country." Khalid, 355 F. Supp. 2d at 327 n.21 (citing Foreign Affairs Reform and Restructuring Act of 1998 (FARRA), § 2242(b), Pub. L. No. 105-277 (codified as Note to 8 U.S.C. § 1231)).[26] Under the regulations issued pursuant to FARRA, if an alien can show that it is more likely than not that he will be tortured if removed to a particular country, the government must grant him protection. See 8 C.F.R. § 208.16(c)(4) ("If the immigration judge determines that the alien is more likely than not to be tortured in the country of removal, the alien is entitled to protection under the Convention Against Torture. Protection under the Convention Against Torture will be granted either in the form of withholding of removal or in the form of deferral of removal."); see also Cornejo-Barreto, 218 F.3d 1014 ("The FARR Act imposes a clear and nondiscretionary duty: the agencies responsible for carrying out expulsion, extradition, and other involuntary returns, must ensure that those subject to their actions may not be returned if they are likely to face torture.").

Under the federal statute, CAT claims are to be considered only as part of a "final order of deportation." 8 U.S.C. § 1252; see also Ogbudimkpa v. Ashcroft, 342 F.3d 207, 212 (3rd Cir. 2003) (holding that court can review habeas petition of alien challenging final deportation order under CAT). Even if the transfer order Mr. Al Laithi is facing is not called a final order of

[25] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 3, cl. (1), 39 U.N. GAOR Supp. (No. 51), U.N. Doc. A/39/51 (1984). The United States became a signatory in 1994. See U.N. Doc. 571 Leg./SER. E/13.IV.9 (1995).

[26] "While the CAT uses the phrase 'substantial grounds for believing' rather than 'more likely than not,' the Senate voted to ratify the CAT with the understanding that the more likely than not standard would be used …." Khouzam v. Ashcroft, 361 F.3d 161, 168 (2nd Cir. 2004) (citing Cong. Rec. 36, 198 (1990)).

deportation, the reality is the same and he should be heard regarding his torture claims. It would hardly be equitable to deny an innocent man the right to advocate to be free of torture simply because he is in military custody, rather that of immigration authorities. Mr. Al Laithi is only in military custody because he was mistakenly seized. He did not select his captors. He did not ask the U.S. military to haul him half way around the world to Guantanamo Bay. It must be remembered that the CAT has been drawn up first and foremost to protect individuals, and not to serve State interests. The Court should grant Mr. Al Laithi's motion and ensure he receives at least 30 days notice of transfer to Egypt.

b. Under extradition law, the Court must bar the United States from sending Mr. Al Laithi to Egypt where he will more likely than not be tortured.

If Egypt were officially seeking Mr. Al Laithi's extradition, the United States would refuse to extradite him to be tried for espousing democracy. See *Convention between the United States and the Ottoman Empire Relating to Extradition*, August 22, 1875, U.S.-Egypt, art. III, 19 Stat. 572, TS 270 ("[t]he provisions of this treaty shall not apply to any crime or offence of a political character"). If the United States insisted on going forward with the extradition, despite the torture claims, "the Administrative Procedure Act … allows an individual facing extradition who is making a torture claim to petition, under habeas corpus, for review of the Secretary of State's decision to surrender him." Cornejo-Barreto v. Seifert, 218 F.3d 1004, 1007 (9th Cir. 2000) ("Congress did not limit judicial review of the Secretary's decisions under long-standing APA procedures. * * * Such a claim, brought in a petition for habeas corpus, becomes ripe as soon as the Secretary of State determines that the fugitive is to be surrendered to the requesting government." Id. at 1016-1017.);[27] cf. Khalid, 355 F. Supp. 2d at 326 n.19 ("the petitions [of

[27] The 9th Circuit originally invalidated this decision in Cornejo-Barreto v. Siefert, 379 F.3d 1075 (9th Cir. 2004). However, the 2004 opinion was later vacated on rehearing as moot. See Cornejo-Barreto v. Siefert, 389 F.3d 1307

Guantanamo prisoners challenging their detention and conditions of confinement] do contain … claims that would provide a private right of action, (e.g. … the Administrative Procedure Act) …").[28]

1. The Rule of Non-Inquiry does not apply to this action.

The government argues that the Rule of Non-Inquiry bars the Court from delving into the torturous practices of the Egyptian government. It does not. "The rule does not bar review of the Secretary [of State's] actions … since Congress' legislation implementing the Torture Convention … clearly supersedes the doctrine, which developed as a matter of federal common law." Cornejo-Barreto, 218 F.3d at 1009. See also Flynn v. Shultz, 748 F.2d 1186, 1191 (7th Cir. 1984) (stating an "area concerning foreign affairs that has been uniformly found appropriate for judicial review is the protection of individual or constitutional rights from government action;" "it is clear that respect for the political branches affects but does not preclude, decision on the merits") (citation omitted); DKT Memorial Fund, Inc. v. Agency for Int'l Dev., 810 F.2d 1236, 1238 (D.C. Cir. 1987) ("whereas attacks on foreign policymaking are non-justiciable, claims alleging non-compliance with the law are justiciable, even though the limited review that the court undertakes may have an effect on foreign affairs"). DKT Memorial held that the Court had jurisdiction to examine U.S. A.I.D.'s decision under a Presidential delegation of power not to fund an agency's family planning work in China, because the inquiry "concerned not the

---

(9th Cir. 2004). In vacating the 2004 opinion, the 9th Circuit explicitly refused the government's request to vacate the 2000 Cornejo-Barreto decision. Id. ("We vacate the panel opinion filed August 16, 2004 and published at 379 F.3d 1075 (9th Cir.2004) as moot. We deny the government's request to vacate other published opinions in this case."). Therefore, the 2000 Cornejo-Barreto opinion remains good law.

[28] The APA's exception of the military in times of war does not apply here. See 5 U.S.C.A. § 701(b) (1) (G) (exempting from the APA "military authority exercised in the field in time of war or in occupied territory"). As Secretary England stated, it is the job of the Secretary of State, not the Department of Defense, to arrange the fate of prisoners found not to be enemy combatants. See Secretary England, Defense Department Special Briefing on Combatant Status Review Tribunals (March 29, 2005) (transcript available at http://www.defenselink.mil/transcripts/2005/tr20050329-2382.html) ("State is coordinating the return of the 38 non-enemy combatants to their home countries;" "Arrangements are made to send them home. … State has to do it."). See also Prosper Declaration at ¶ 5 ("The Department of State generally has responsibility to communicate on these matters as between the U.S. and foreign governments").

executive's making of a policy decision and implementing that decision, but rather a challenge to the constitutionality of the manner in which an agency sought to implement an earlier policy pronouncement by the President." Schneider v. Kissinger, 412 F.3d 190, 198 (D.C. Cir. 2005). That is the situation here. The President issued a directive regarding the detention of enemy combatants. Mr. Al Laithi does not challenge that policy decision or the President's actual detention of enemy combatants. Rather, he challenges the manner in which the Department of State and other respondents seek to implement the President's 2001 policy *for enemy combatants* vis-à-vis someone found not to be one.[29]

c. Under immigration law, the Court must examine the Secretary of State's decision to send Mr. Al Laithi to Egypt where he will more likely than not be tortured.

"Under U.S. immigration law, the United States can not deport an individual if 'it is more likely than not that the alien would be subject to persecution.'" Auguste v. Ridge, 395 F.3d 123, 131 n.5 (3rd Cir. 2005) (quoting INS v. Stevic, 467 U.S. 407, 424, 104 S.Ct. 2489 (1984)).[30] Indeed, "some judicial intervention in deportation cases is unquestionably required by the Constitution." INS v. St. Cyr, 533 U.S. 289, 300, 121 S. Ct. 2271 (2001). The First, Second and Third Circuits have all held that habeas review is available for CAT claims in the deportation context, the First Circuit so holding even for a petitioner convicted of a serious crime. Mr. Al Laithi of course has not been convicted of anything. See Saint Fort v. Ashcroft, 329 F.3d 191, 200 (1st Cir. 2003) (holding "federal courts possess § 2241 habeas jurisdiction over claims that

[29] While courts must act delicately when the executive's foreign policy powers are implicated, habeas corpus can be called upon to check the executive. As the Supreme Court recently stated in the Guantanamo context: "unless Congress acts to suspend it, the Great Writ of habeas corpus allows the Judicial Branch to play a role in maintaining this delicate balance of governance, serving as an important judicial check on the Executive's discretion in the realm of detentions." Hamdi v. Rumsfeld, 542 U.S. 507, 124 S.Ct. 2633, 2650 ("Whatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake." Id.).

[30] U.S. immigration law also provides that asylum may be granted to an alien who is unwilling to return to his home country "because of persecution or a well-founded fear of persecution." INS v. Cardoza-Fonseca, 480 U.S. 421, 424, 107 S.Ct. 1207 (1987).

arise under the implementing legislation and regulations of the CAT, and that are asserted by aliens who are statutorily ineligible for judicial review of their final orders of removal because they have been convicted of aggravated felonies"); Wang v. Ashcroft, 320 F.3d 130, 141 n.17 (2nd Cir. 2003) (stating "[o]nce Congress created rights under CAT by enacting FARRA, § 2241 necessarily became a proper avenue of relief for individuals in custody in violation of FARRA and its implementing regulations"); Ogbudimkpa v. Ashcroft, 342 F.3d 207, 222 (3rd Cir. 2003) (finding "[d]istrict courts have jurisdiction to consider claims alleging violations of CAT raised in *habeas corpus* petitions").[31]

"'At its historical core,' the writ of habeas corpus was designed to provide a means for 'reviewing the legality of Executive detention' and hence it is in this context that the writ's protections are at their strongest." Ogbudimkpa, 342 F.3d at 214 n.17 (quoting St. Cyr, 533 U.S. at 301).

2. Mr. Al Laithi can show that it is more likely than not that he will be tortured if Respondents send him to Egypt.

The United States has an obligation under CAT not to send Mr. Al Laithi to a country where he can demonstrate that it is more likely than not that he will be tortured. As the evidence clearly shows, Egypt is just such a country, Mr. Al Laithi is just the type of target Egypt tortures, and Egypt is just where the United States plans to send him[32] In fact, every single prisoner transferred from Guantanamo has been sent to his home country. Almurbati v. Bush, 366 F. Supp.2d 72, 77 (D.D.C. April 14, 2005) (finding because all prisoners had been sent to their home country, the destination petitioners sought, the threat of petitioners being sent somewhere

[31] Courts have also found the All Writs Act, 28 U.S.C. § 1651(a), permits a stay of extradition and of a deportation order pending resolution of torture claims. See Lindstrom v. Graber, 203 F.3d 470, 474-476 (7th Cir. 2000) (stay of extradition order); Michael v. I.N.S., 48 F.3d 657, 664 (2d Cir. 1995) (stay of deportation order pending review of its legality).

[32] Of course, Mr. Al Laithi must be given a proper opportunity to present his case if this Court has any doubt. He must be allowed to appear in court himself and testify to the reasons why he fears persecution in Egypt.

else was quite remote and therefore petitioners faced no irreparable harm; id. at 78).[33] For Mr. Al Laithi, that country is Egypt, which will more likely than not torture him upon arrival.

C. An injunction will in no way "substantially injure" Respondents.

There is not even a minimal burden on the government in granting 30 days' notice. "[A]t most, it would require the Government to file a few pieces of paper. Such a minimal consequence does not outweigh the imminent threats of … potential torture." Al-Marri, 2005 WL 774843, at *6; see also Al-Joudi v. Bush, 2005 WL 774847, at *6 (D.D.C. April 4, 2005) (granting 30 days' notice as petitioners "are faced with an imminent threat of serious harm, which far outweighs any conceivable burden that the Government might face"); Abdah v. Bush, 2005 WL 711814, *5 (stating "court does not have any indication that notifying Petitioner's counsel 30 days ahead of planned transfers of their clients will intrude upon executive authority;" "It is misleading … to frame the relevant interest here as the government's ability to detain enemy combatants to prevent them from returning to the fight and continuing to wage war against the United States. … Petitioners' current designation as enemy combatants is not a foregone conclusion … ." Id. (citation omitted)).[34]

---

[33] The Almurbati court stated:

> With respect to the petitioners' speculation that they may be transferred to countries other than their home country of Bahrain, the D[epartment] o[f] D[efense] represents that of the over [200] transfers, both for release and for continued detention that have occurred over the years so far, *those have all been repatriations back to the home country.*

Almurbati, 366 F. Supp. 2d at 77 (emphasis added, citation omitted). As of July 22, there had been 242 transfers of detainees from Guantanamo Bay. See *Resp. Memo* at 4 n.7.

[34] Respondents claim in vague terms that an injunction will unduly interfere with the Executive's foreign relations powers, perhaps making foreign governments less likely to offer assurances if they will be reviewed by the courts. But there is no evidence that giving Petitioner notice of his impending transfer would in any way hinder the Executive's ability to negotiate with foreign governments or limit the assurances the government could extract. Those negotiations can go forward, and indeed the government's hand would be strengthened, as a foreign nation would know their assurances would have to meet objective criteria. Regardless of the ultimate disposition of this question, "speculation about future requests [for investigation into action by the Executive] is no justification for denying the narrow relief requested at this point," namely 30 days' notice before any transfer. See Al-Joudi, 2005 WL 774847, at *5 n.12. The injunction should be granted.

There is no exigency in Mr. Al Laithi's transfer for Respondents. They have held him for over three years. One more month is hardly a burden sufficient to overcome the torture imminently awaiting Mr. Al Laithi.[35]

D. The public interest will be furthered by an injunction.

The public has a profound interest in ensuring that Respondents live up to their obligations under United States law and the Convention Against Torture. See G & V Lounge, Inc. v. Mich. Liquor Control Comm'n, 23 F.3d 1071, 1079 (6th Cir. 1994) ("[i]t is always in the public interest to protect the violation of a party's constitutional rights"); Gannett Co., Inc. v. DePasquale, 443 U.S. 368, 383, 99 S.Ct. 2898 (1979) ("The public … has a definite and concrete interest in seeing that justice is swiftly and fairly administered"); Abdah, 2005 WL 711814, at *6 ("the public has a strong interest in ensuring that its laws do not subject individuals to indefinite detention without due process"). Nor is there any merit to Respondents' argument that the public interest requires the Executive be free from interference to detain enemy combatants for the duration of hostilities. *Resp. Memo* at 24. Mr. Al Laithi is not an enemy combatant. See Al-Marri v. Bush, 2005 WL 774843 *6 (D.D.C. April 4, 2005) ("It is obvious beyond words that there is a strong public interest in the zealous pursuit of those who wish to commit acts of terrorism against the United States and its citizens. However, the narrow relief sought in this case will not compromise that effort in any way.").

The Government cites to Al-Anazi v. Bush, F. Supp. 2d 188, 199 (D.D.C. 2005) for the proposition that "there is a strong public interest against the judicially needlessly intruding upon the foreign policy and war powers of the Executive on a deficient factual record." But the facts in this case are quite different from those in Al-Anazi, and therefore the Al-Anazi court's

[35] The fact that Mr. Al Laithi would prefer to remain for 30 days more in Guantanamo, a situation about which he stated, "I would prefer to be buried alive than continue to receive the treatment I receive," rather than go to Egypt, lends great support to the validity of his fears. See *Statement of Mr. Al-Laithi* at ¶ 2.

conclusion bears little relevance. Most importantly, the detainees in Al-Anazi had all been found to be enemy combatants. Mr. Al Laithi was found not to be one. He should be treated like any other alien – not an accused terrorist – facing return to a country that will more likely than not torture him. To prove harm, the detainees in Al-Anazi relied solely on newspaper articles about the rendition practices of the United States, but did not offer any reason why they particularly were in danger. As discussed above, Egypt has a persistent pattern of torturing political prisoners, Mr. Al Laithi is wanted by Egypt for political crimes and he has actually been threatened by Egyptian officials. There is specific proof that it is more likely than not that if he is transferred to Egypt, he will be tortured. This is no "deficient factual record." Finally, Mr. Al Laithi has identified a number of legal bases on which the Court could grant ultimate relief from torture. But without the opportunity to actually fight the government in court, Mr. Al Laithi has no chance of winning that relief.

II. THE COURT SHOULD FOLLOW THE MAJORITY OF ITS SISTER DISTRICT COURTS AND GRANT PETITIONER'S MOTION AT LEAST WITH RESPECT TO THE ISSUE OF NOTICE

Of the eleven decisions in this District regarding motions for preliminary injunction requesting 30 days' notice before transfer from Guantanamo, in seven the court has granted the motion.[36] Notably, these cases have been resolved in favor of the petitioners, even though there

[36] See Al-Joudi v. Bush, 2005 WL 774847 (granting motion as "Court fails to see any injury whatsoever that the Government would suffer from granting the requested preliminary injunction"); Abdah, 2005 WL 711814 (finding that while "the injunction Petitioners seek might restrict or delay Respondents with respect to one aspect of managing Petitioners' detention, such a consequence does not outweigh the imminent threat facing Petitioners with respect to the *entirety* of their claims before the court") (italics in original); Al-Marri v. Bush, 2005 WL 774843 (stating "it is clear … that, at a minimum, Petitioner has raised 'fair grounds for litigation'" and therefore granting relief); Kurnaz v. Bush, 2005 WL 839542, *3 (D.D.C. April 12, 2005) (ordering respondents to provide counsel with 30 days' notice of transfer, including proposed destination and conditions of transfer); Ahmed v. Bush, 2005 WL 1606912, *2 (D.D.C. July 8, 2005) (ordering respondents to provide court and counsel thirty days' advance written notice of any transfer or removal from Guantanamo); Mokit v. Bush, --- F. Supp.2d ---, 2005 WL 1404938, *1 (D.D.C. June 16, 2005) (ordering respondents not to remove from Guantanamo without 30 days' advance notice to court and counsel); Paracha v. Bush, --- F. Supp.2d ---, 2005 WL 1406002 (D.D.C. June 16, 2005) (ordering that respondents may not remove petitioner from Guantanamo without 30 days' notice to court and counsel, but denying injunction to remove petitioner from isolation; counsel refused to meet with petitioner under conditions required by

was no showing that they were innocent – as is Mr. Al Laithi. The critical factor in all the cases in which the preliminary injunction was denied is the failure of petitioners to offer real proof that they personally would actually be transferred to a country that would torture them.[37] Mr. Al Laithi has shown that he faces a definite, imminent, all too personal risk of torture in Egypt. He should be granted relief.

"[E]ven in times of emergency – indeed, particularly in such times – it is the obligation of the Judicial Branch to ensure the preservation of our constitutional values and to prevent the Executive from running roughshod over the rights of citizens and aliens alike." Gherebi v. Bush, 374 F.3d 727, 730 (9th Cir. 2004). Therefore, an injunction should be granted forcing the United States to inform Mr. Al Laithi and counsel of his destination at least 30 days before his removal, so they may challenge any final decision to render him to Egypt.[38]

A military tribunal found that Mr. Al Laithi is not an enemy combatant. He is a civilian being imprisoned for no reason at all. The public interest requires that innocent people be treated fairly, not delivered to torturers. To return him to Egypt would violate the Convention Against Torture and United States law. At minimum, Mr. Al Laithi has presented "a serious legal question." Washington

---

military and protective order issued by court and as a result, had failed to gather or provide anything but ambiguous, unreliable information regarding conditions of detention).

[37] In four cases, the court has rejected the motion for preliminary injunction, but all those cases are distinguishable, particularly by the fact that every single petitioner had been found to be an enemy combatant, not an innocent man like Mr. Al Laithi. See Al-Anazi v. Bush, 370 F. Supp.2d 188, 190-191 (D.D.C. April 21, 2005) (denying enemy combatants' motion requesting 30 days' notice, as motion was based entirely on newspaper articles, leaving court with a "deficient factual record;" id. at 199); O.K. v. Bush, --- F. Supp.2d ---, 2005 WL 1621343 (D.D.C. July 12, 2005) (denying enemy combatant's motion for preliminary injunction seeking end to torture, interrogation and 30 days' notice before transfer; petitioner failed to "cite any evidence that the interrogators have taken steps to carry out their threat to transfer the petitioner [to a country where he would be sexually assaulted], or that a transfer of petitioner is otherwise imminent"); Almurbati v. Bush, 366 F. Supp.2d 72 (D.D.C. April 14, 2005) (denying 30 days' notice as threats made to petitioners to send them to nation where they would be raped were not made by officials who will play a role in transfer decision and newspaper articles presented as evidence of harm were "speculation, innuendo and second hand media reports"); Mammar v. Bush, Civ. A. No. 05-573 (RJL), slip op. (D.D.C. May 2, 2005). Mammar v. Bush is cited in Respondent's Opposition, but is not available on either Westlaw or the District Court's website.

[38] If the decision is made to send him to a safe third country, in all likelihood, no further litigation will be necessary.

Metro. Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841, 844 (D.C. Cir. 1977). The preliminary injunction should be granted.

III. RESPONDENTS CANNOT TREAT PETITIONER DIFFERENTLY FROM OTHERS, AND MUST BE HELD TO THEIR PUBLIC PROMISE THAT INNOCENT PRISONERS BE MOVED IMMEDIATELY FROM CAMP V AND PUT IN NON- PUNITIVE CONDITIONS

According to the Department of Defense, Camp V is reserved for "high-value intelligence assets."[39] The conditions inside Camp V are brutal: "modeled on harsh 'supermaximum' security prisons on the US mainland, detainees in Camp V are held in concrete isolation cells with 24-hour lighting and large, loud fans designed to prevent detainees talking with each other. … [D]etainees [are] confined to these cells for up to 24 hours a day, only being allowed out to exercise once a week or every two weeks. When they are allowed out to exercise it is often in the middle of the night, so that detainees go for months without seeing the sun."[40] This is where Mr. Al Laithi, an innocent man, is being housed.

With respect to his conditions, Respondents argue that "Petitioner has made no showing of deliberate indifference in this case." *Resp. Memo* at 22 n.20. As a primary matter, this is not the issue. As noted above, Secretary of the Navy Gordon England has represented to the public that once a prisoner is cleared by the Combatant Status Review Tribunal: "They're free. We just move them to a different area on Guantanamo. … It's a better environment, I believe, it is a different area than they've been in, while waiting to be transferred. And we do that as quickly as we can."[41] At least, that's what he's told the press the military does. Mr. Al Laithi would beg to differ. Other prisoners found not to be enemy combatants are perhaps being moved to a separate

[39] Amnesty International, Report of Hunger Strike at Guantanamo (July 2005) <http://web.amnesty.org/pages/stoptorture-hungerstrike-eng>.
[40] Id.
[41] Secretary England, Defense Department Special Briefing on Combatant Status Review Tribunals (March 29, 2005) (transcript available at http://www.defenselink.mil/transcripts/2005/tr20050329-2382.html).

area of Guantanamo Bay. But, Mr. Al Laithi has received disparate treatment; since his CSRT decision roughly three months ago, he has remained in Camp V.

But even if we were dealing with general prison conditions law, a deprivation violates the Constitution if "it imposes an 'atypical and significant hardship' on an inmate in relation to the most restrictive confinement conditions that prison officials, exercising their administrative authority to ensure institutional safety and good order, routinely impose on inmates serving similar sentences." Hatch v. District of Columbia, 184 F.3d 846, 856 (D.C. Cir. 1999) (quoting Sandin v. Conner, 515 U.S. 472, 484, 115 S.Ct. 2293 (1995)). Designed for the "worst of the worst," Camp V is definitely an atypical and significant hardship for Mr. Al Laithi.[43]

But abusing an innocent man and leaving him in a wheelchair in solitary isolation is not a matter of 'deliberate indifference' – it is an intentional, shocking violation of basic human rights.

CONCLUSION

The sole reason that government has provided for imprisoning Mr. Al Laithi has been that he was a threat to the security of the United States. That is clearly not the case; per the May 2005 Combatant Status Review Tribunal, Mr. Al Laithi was never an enemy combatant. He has been detained for over three years in brutal conditions, cut off from the outside world, including family and friends. Even if "Congress has granted the President the authority to detain enemy combatants for the duration of the current conflict," Khalid v. Bush, 355 F. Supp. 2d. 311, 319

[42] No longer can national security interests arguably predominate regarding Mr. Al Laithi's treatment. As an innocent man, Mr. Al Laithi indeed has constitutional due process rights. See Gherebi, 374 F.3d at 733 ("if jurisdiction does lie, [Guantanamo Bay] detainees are not wholly without rights to challenge in habeas their … conditions of … detention.").

[43] No longer can national security interests arguably predominate regarding Mr. Al Laithi's treatment. As an innocent man, Mr. Al Laithi indeed has constitutional due process rights. See Gherebi, 374 F.3d at 733 ("if jurisdiction does lie, [Guantanamo Bay] detainees are not wholly without rights to challenge in habeas their … conditions of … detention.").

(D.D.C. 2005), Mr. Al Laithi is not an enemy combatant.[44] There is no lawful basis for his continued detention. Mr. Al Laithi must be released forthwith and sent to a safe country.

For the reasons stated above, Mr. Al Laithi respectfully asks that the Court hold an evidentiary hearing, with adequate notice, and enter the attached order.

Dated: September 6, 2005

Respectfully submitted,

_____/s/_____

James W. Beane Jr.
U.S. District Court for the
District of Columbia Bar No. 444920
2715 M Street, N.W.
Suite 200
Washington, D.C. 20007
(202) 333-5905 (tel)
(202) 333-5906 (fax)
e-mail: beane.law@verizon.net

Clive A. Stafford Smith
Admitted *pro hac vice*
636 Baronne Street
New Orleans, La. 70113
(504) 558 9867
e-mail: clivess@mac.com

Counsel for Mr. Al Laithi

[44] The Detention Order issued by President Bush on November 13, 2001 authorized the Secretary of Defense to detain anyone the President has "reason to believe: (i) is or was a member of the organization known as al Qaeda; (ii) has engaged in, aided or abetted, or conspired to commit, acts of international terrorism, or acts in preparation therefor, that have caused, threatened to cause, or have as their aim to cause, injury to or adverse effects on the United States, its citizens, national security, foreign policy, or economy; or (iii) has knowingly harbored one or more individuals described in subparagraphs (i) or (ii)[.]" Khalid, 355 F. Supp. 2d. at 315. The military tribunal found that there is no reason to believe that Mr. Al Laithi meets any of the criteria.

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of this pleading, this day, by e-mail, upon Andrew Warden, counsel for Respondents.

Done this 6th day of September, 2005.

_____/s/_____
James W. Beane