IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

SHAFIIQ (a.k.a. SUFYIAN BARHOUMI) (ISN 694),	)	
Petitioner,	)	
v.	)	Civil Action 05-CV-1506 (RMC)
BARACK OBAMA, et al.,	)	
Respondents.	)	

RESPONDENTS' RESPONSE TO ORDER TO SHOW CAUSE AND IN OPPOSITION TO PETITIONER'S EMERGENCY MOTION FOR ORDER EFFECTING RELEASE

Petitioner's Emergency Motion for Order Effecting Release, ECF No. 279 ("Mot."), should be denied. Petitioner, who is detained by the Department of Defense ("DoD") at Guantanamo Bay, Cuba, pursuant to the Authorization for Use of Military Force, Pub. Law 107-40, 115 Stat.224 (2001) ("AUMF"), as informed by the laws of war, was previously determined by this Court, in a decision affirmed by the Court of Appeals, to be legally detained under the AUMF as "part of" an al-Qaida associated force. *See Barhoumi v. Obama*, 609 F.3d 416, 418, 432 (D.C. Cir. 2010). In August 2016, a Periodic Review Board review mandated by executive order resulted in a determination that the continued law of war detention of Petitioner was "no longer necessary to protect against a continuing significant threat to the security of the United States." The Board recommended that Petitioner be repatriated to Algeria because "the risk the detainee presents can be adequately mitigated," conditioned on appropriate security assurances to be negotiated by the U.S. Government and approved by relevant Government agencies. Contrary to the understanding of Petitioner's counsel reflected in his Motion that Petitioner's transfer has

"been delayed due to bureaucratic obstacles unrelated to Petitioner[], the underlying facts of . . . [his] case[], or any serious substantive concerns about the ability of . . . [his] home countr[y] to receive and monitor" him, Mot. at 1-2, on January 12, 2017, the Secretary of Defense determined that Petitioner should not be repatriated at this time based on a variety of substantive factors relevant to Petitioner's circumstances, including factors not related to Petitioner himself.

Accordingly, no appropriate factual or legal basis exists for the emergency relief requested by Petitioner intended to effect a court-sanctioned release. Petitioner remains lawfully detained under the AUMF, which permits the detention of individuals who were part of, or substantially supported, al-Qaida, Taliban, or associated forces, for the duration of active hostilities. And the determination by the Periodic Review Board that he is eligible for transfer does not give Petitioner standing to challenge his continued detention, nor does it render his detention unlawful or otherwise entitle Petitioner to an order effecting release. Accordingly, Petitioner's Motion should be denied.

BACKGROUND

Petitioner is currently detained by DoD at the United States Naval Base at Guantanamo Bay, Cuba. The Court previously denied his petition for writ of habeas corpus, concluding that he was part of an al-Qaida associated force and, therefore, was lawfully detained under the Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) ("AUMF"). *See Barhoumi*, 609 F.3d at 418; Order, Sept. 3, 2009 (ECF No. 219). The Court's denial of the writ was affirmed on appeal. 609 F.3d at 432. Petitioner subsequently filed a motion for relief from judgment, which the Court denied. Order, Jun. 5, 2013 (ECF No. 266); Opinion, Jun. 5, 2013 (ECF No. 267).

As provided by Executive Order 13,567, 76 Fed. Reg. 13,277 (Mar. 7, 2011), and consistent with the National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, 125 Stat. 1298, 1562 (2011) ("2012 NDAA"), Petitioner received a hearing before a Periodic Review Board ("PRB") to determine, based on certain information provided by DoD and other relevant Government agencies and any relevant information submitted by or on behalf of the detainee, whether continued custody of the detainee was necessary to protect against a continuing significant threat to the security of the United States. *See* Exec. Order 13,567, §§ 2, 3(a), 3(d), 9(d); 2012 NDAA § 1023(b)(1). On August 9, 2016, the PRB determined that continued law of war detention of Petitioner was "no longer necessary to protect against a continuing significant threat to the security of the United States," thereby designating the detainee as eligible for transfer. *See* Unclassified Summary of Final Determination, *available at* http://www.prs.mil/Portals/60/Documents/ISN694/160809_U_ISN694_FINAL_DETERMINATION_PUBLIC.pdf (last accessed on Jan. 17, 2017) (copy attached as Exhibit A). In its determination, the PRB stated that it "recognize[d] that the detainee presents some level of threat in light of his past activities, skills, and associations; however, the Board found that . . . the risk the detainee presents can be adequately mitigated." *Id.* The PRB recommended "repatriation of the detainee to Algeria . . . with security [sic] appropriate security assurances as negotiated by the Special Envoys [for Guantanamo Detention Closure at DoD and for Guantanamo Closure at the Department of State] and agreed to by relevant USG departments and agencies." *Id.*

The Executive Order regarding the PRB states plainly that the review process "does not address the legality of any detainee's law of war detention." Exec. Order 13,567, § 8; *see also id.* § 9 ("If, at any time during the periodic review process . . . material information calls into question the legality of detention, the matter will be referred immediately to the Secretary of

Defense and the Attorney General for appropriate action."); 2012 NDAA § 1023(b)(1) ("purpose of the periodic review process is not to determine the legality of any detainee's law of war detention"). Rather, the review is undertaken "to make discretionary determinations" regarding detainees. 2012 NDAA § 1023(b)(1) ("purpose of the periodic review process is . . . to make discretionary determinations whether or not a detainee represents a continuing threat to the security of the United States"); *see also* Exec. Order 13,567, § 1(b) (stating that "[t]his order is intended solely to establish, as a discretionary matter, a process to review on a periodic basis the executive branch's continued, discretionary exercise of existing detention authority in individual cases"). Furthermore, the Executive Order provides,

> This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

Id. § 10(c).

Furthermore, if a detainee is recommended for transfer by the PRB, the Secretary of Defense is responsible for any final decision to transfer a detainee and is "not . . . bound by any such [PRB] recommendation." *See* 2012 NDAA § 1023(b)(2). Upon receipt of such a recommendation, however, the Secretaries of State and Defense "shall be responsible for ensuring that vigorous efforts are undertaken to identify a "suitable transfer location" for the detainee "consistent with the national security and foreign policy interests of the United States," and consistent with humane treatment policies. Exec. Order 13, 567 § 4. Indeed, rigorous processes have been established to review carefully on a case-by-case basis all potential transfers of detainees eligible for transfer, to ensure that each transfer is in the national security interest of the United States, the threat posed by the detainee will be substantially mitigated, and the transfer is consistent with humane treatment policies. Prior to every transfer, various agency

principals—including the Attorney General, the Director of National Intelligence, the Chairman of the Joint Chiefs of Staff, and the Secretaries of Homeland Security and State—review the potential transfer to determine whether steps have been, or will be taken, to substantially mitigate the threat the detainee poses and to ensure that humane treatment standards have been met. Based on these inputs and his own judgment, the Secretary of Defense makes the final decision on whether to transfer the detainee.

Also relevant to a detainee's transfer, pursuant to § 1034(a) of the National Defense Authorization Act for Fiscal Year 2016, Pub. L. No. 114-92, 129 Stat. 726, 969 (2015) ("2016 NDAA"), the current use of appropriations to effect a suitable transfer of a detainee to another country is conditioned on the Secretary of Defense making a written certification to Congress 30 days in advance of the transfer that:

> (1) the transfer concerned is in the national security interests of the United States;
>
> (2) the government of the foreign country or the recognized leadership of the foreign entity to which the individual detained at Guantanamo concerned is to be transferred—
>
> > (A) is not a designated state sponsor of terrorism or a designated foreign terrorist organization;
> >
> > (B) maintains control over each detention facility in which the individual is to be detained if the individual is to be housed in a detention facility;
> >
> > (C) has taken or agreed to take appropriate steps to substantially mitigate any risk the individual could attempt to reengage in terrorist activity or otherwise threaten the United States or its allies or interests; and
> >
> > (D) has agreed to share with the United States any information that is related to the individual;
>
> (3) if the country to which the individual is to be transferred is a country to which the United States transferred an individual who was detained at United States Naval Station, Guantanamo Bay, Cuba, at any time after September 11,

> 2001, and such transferred individual subsequently engaged in any terrorist activity, the Secretary has—
>
> (A) considered such circumstances; and
>
> (B) determined that the actions to be taken as described in paragraph (2)(C) will substantially mitigate the risk of recidivism with regard to the individual to be transferred; and
>
> (4) includes an intelligence assessment, in classified or unclassified form, of the capacity, willingness, and past practices (if applicable) of the foreign country or foreign entity concerned in relation to the certification of the Secretary under this subsection.

Id. § 1034(b). An exception to this certification requirement exists with respect to transfers of "any individual detained at Guantanamo to effectuate an order affecting the disposition of the individual that is issued by a court or competent tribunal of the United States having lawful jurisdiction." *Id.* § 1034(a)(2).[1] In addition, § 308 of the Intelligence Authorization Act for Fiscal Year 2012, Pub. L. No. 112-87, 125 Stat. 1876, 1883 (2012), requires notice to Congress 30 days in advance of the transfer of a Guantanamo detainee that includes various details of the transfer, including "terms of any agreement with the [receiving] country . . . for the acceptance of such individual."

With regard to Petitioner, who was deemed eligible for transfer by the PRB with a recommendation for repatriation to Algeria, DoD represents that on January 12, 2017, the Secretary of Defense determined that Petitioner should not be repatriated at this time based on a variety of substantive concerns, shared by multiple agencies, relevant to Petitioner's circumstances, including factors not related to Petitioner himself.

[1] These provisions of the 2016 NDAA were not repealed or modified by the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000, enacted on December 23, 2016.

ARGUMENT

Petitioner seeks two alternative forms of relief. First, he seeks an order, to be issued under the 2016 NDAA or the Court's equitable habeas powers, providing that the certification and advance notice provisions of the 2016 NDAA somehow should not apply with respect to Petitioner. Second, Petitioner alternatively asks the Court to grant him a writ of habeas corpus because, Petitioner argues, his detention is no longer authorized under the AUMF where "administrative obstacles impede efforts to implement a transfer that," he alleges, "all parties urgently seek to conclude," Mot. at 4, and because detention in such circumstances would be "arbitrary" and "indefinite" and violate the Due Process Clause, *id* at 14. As noted *supra* at 6, there is no appropriate factual basis for Petitioner's assertion, and, as explained below, there is no appropriate legal basis for Petitioner's requests for relief: Petitioner's designation as eligible for transfer by a PRB does not entitle Petitioner to challenge his detention; neither the NDAA nor the Court's equitable habeas powers permit the type of order Petitioner requests; and Petitioner's detention is not arbitrary, improperly indefinite, or otherwise legally improper.[2]

I. Petitioner Lacks Standing To Seek An Order Effecting Release.

As an initial matter, to the extent Petitioner's requests for relief are grounded in his PRB determination and related recommendation that he be repatriated—with appropriate security assurances to be negotiated by the Government and agreed to by relevant U.S. agencies—

[2] As a preliminary matter Respondents object to the form of Petitioner's filing because he has not stated an appropriate legal basis for his request that the Court reconsider his finally adjudicated habeas petition. Here Petitioner asserts new claims never raised in his original habeas petition; such claims should be considered via a new petition. *See Al-Adahi v. Obama,* 187 F. Supp. 3d 74, 75 n.1 (D.D.C. 2014) (stating that "there are serious objections" to a detainee filing a motion for release in a fully adjudicated habeas case based on a new legal theory but declining to address that procedural issue because the merits of the matter clearly warranted denial of the motion).

Petitioner lacks standing to pursue such claims.[3] The legal authority for Petitioner's detention is settled, and under Circuit precedent, whether a detainee is eligible for transfer does not undermine or affect the legality of his detention. Indeed, under applicable law and precedent, Petitioner, who has been determined by this Court to be "part of" an al-Qaida associated force, may be lawfully detained "for the duration of the relevant conflict." *Hamdi v. Rumsfeld*, 542 U.S. 507, 521 (2004); *see also Boumediene v. Bush*, 553 U.S. 723, 733 (2008) (noting that *Hamdi* recognized that the government has the authority to detain "individuals who fought against the United States in Afghanistan 'for the duration of the particular conflict in which they were captured'"); *Aamer v. Obama*, 742 F.3d 1023, 1041 (D.C. Cir. 2014) (" [T]his court has repeatedly held that under the[AUMF] individuals may be detained at Guantanamo so long as they are determined to have been part of A1 Qaeda, the Taliban, or associated forces, and so long as hostilities are ongoing."); *Ali v. Obama*, 736 F.3d 542, 544 (D.C. Cir. 2013) ("Detention under the AUMF may last for the duration of hostilities."); *Al-Bihani v. Obama*, 590 F.3d 866, 875 (D.C. Cir. 2010) (concluding that "[i]n the absence of a determination by the political branches

[3] "Article III . . . gives the federal courts jurisdiction over only 'cases and controversies,' and the doctrine of standing serves to identify those disputes which are appropriately resolved through the judicial process." *Whitmore v. Arkansas*, 495 U.S. 149, 154-55 (1990). To demonstrate Article III standing, a plaintiff must satisfy three prerequisites. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). First, a plaintiff must demonstrate that he has suffered an "injury in fact"—"an invasion of a legally protected interest" that is both "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." *Id*. (quotations omitted). An "injury in fact [is] an actual or imminent invasion of a legally protected, concrete, and particularized interest." *Ctr. for Law & Educ. v. Dep't of Educ.*, 396 F.3d 1152, 1157 (D.C. Cir. 2005). Second, that injury must be "fairly traceable to the challenged action of the defendant." *Lujan*, 504 U.S. at 560 (quotations omitted). Finally, it must be "likely, as opposed to merely speculative," that the injury will be redressed by a favorable decision. *Id.* at 561 (quotations omitted). Further, "a plaintiff must demonstrate" that these requirements are satisfied "for each claim he seeks to press" and "for each form of relief sought." *Daimler Chrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006) (internal quotations omitted).

that hostilities in Afghanistan have ceased, Al-Bihani's continued detention is justified").[4] Congress, also, "affirm[ed]" in the 2012 NDAA that the authority the AUMF granted the President in 2001 includes detention of persons who were "part of or substantially supported al-Qaeda, the Taliban, or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act or has directly supported such hostilities in aid of such enemy forces." 2012 NDAA § 1021(a), (b)(2); *see also id*. § 1021(c) (detention may continue "until the end of the hostilities authorized by the Authorization for Use of Military Force"). Established Court of Appeals precedent also makes clear that "the United States's authority to detain an enemy combatant is not dependent on whether an individual would pose a threat to the United States or its allies if released but rather upon the continuation of hostilities." *Awad v. Obama*, 608 F.3d 1, 11 (D.C. Cir. 2010). "Whether a detainee would pose a threat to U.S. interests if released is not an issue in habeas corpus proceedings in federal courts concerning aliens detained under the authority conferred by the AUMF." *Id.* Relatedly, that a detainee is formally eligible for transfer does not undermine the legality of detention or warrant an order of release. The Court of Appeals has plainly stated that "whether a detainee has been cleared for release is irrelevant to whether a petitioner may be detained lawfully." *Almerfedi v. Obama*, 654 F.3d 1, 4, n.3 (D.C. Cir. 2011) (involving detainee approved for transfer by Guantanamo Review Task Force, *see infra* note 5).

Indeed, another member of this Court has considered, and rejected, contrary arguments in cases involving issues similar to those raised in Petitioner's Motion. First, in *Ahjam v. Obama*, 37 F. Supp. 3d 273 (D.D.C. 2014) (Lamberth, J.), a Guantanamo detainee designated by a

[4] *See also Razak v. Obama*, 174 F. Supp. 3d 300, 305 (D.D.C. 2016) (rejecting habeas claim that active hostilities in Afghanistan ended), *vacated as moot due to transfer of petitioner*.

government task force as eligible for transfer challenged as unconstitutional provisions of prior versions of the NDAA requiring advance certification or notice to Congress of transfers of Guantanamo detainees to foreign countries.[5] The Court held, however, that the petitioner lacked standing to challenge the lawfulness of those statutory provisions. The Court explained that the petitioner could not establish an injury-in-fact or judicially cognizable interest in transfer, noting that "barring a successful habeas petition, the Constitution confers no 'right to be free' upon enemy belligerents detained at Guantanamo." *Ahjam*, 37 F. Supp. 3d at 278. Thus, the petitioner "ha[d] no right to a transfer in the first instance [because] it is entirely within the discretion of the Executive … [and] it is not the place of the judiciary to police the discretion of the President." *Ahjam*, 37 F. Supp. 3d at 280 (citing by analogy *Connecticut Board of Pardons v. Dumschat*, 452 U.S. 458 (1981) (no legally protected interest in claim for a discretionary grant of parole)).

[5] The petitioner in *Ahjam* was deemed eligible for transfer through the implementation of Executive Order No. 13,492, 74 Fed. Reg. 4897 (Jan. 22, 2009), which established the Guantanamo Review Task Force ("Task Force"), with a mission to "review [] the status of each individual . . . [then] detained at Guantanamo" and determine "whether it is possible to transfer or release the individuals consistent with the national security and foreign policy interests of the United States and, if so, whether and how the Secretary of Defense may effect their transfer or release." 74 Fed. Reg. at 4899. Further, as explained in the Final Report of the Task Force, *see* Guantanamo Review Task Force, Final Report, at i (2010), *available at* https://www.justice.gov/sites/default/files/ag/legacy/2010/06/02/guantanamo-review-final-report.pdf (last accessed Jan. 17, 2017) ("Task Force Final Report"), "if a detainee was approved for transfer to a foreign country as a result of the review, the Department of State and Department of Defense worked together to make appropriate arrangements to effect the transfer in a manner consistent with the national security and foreign policy interests of the United States." *Id.* at 5. Thus, "a decision to approve a detainee for transfer does not reflect a decision that the detainee poses no threat or no risk of recidivism," but rather, a judgment that the "threat posed by the detainee can be sufficiently mitigated through feasible and appropriate security measures in the receiving country." *Id.* at 17. The Task Force also "emphasize[d] that a decision to approve a detainee for transfer does not equate to a judgment that the government lacked legal authority to hold the detainee." *Id.* The Executive Order creating the Task Force also provided that neither the Executive Order nor the actions of those carrying it out would "create any right or benefit, substantive or procedural, enforceable at law or in equity by any party." 74 Fed. Reg. at 4899-4900.

And then, in *al Wirghi v. Obama,* 54 F. Supp. 3d 44 (D.D.C. 2014) (Lamberth, J.), a Guantanamo detainee argued that his eligibility for transfer entitled him to an order of release because, as a result of that approval, (1) his detention violated due process because it was arbitrary and indefinite, and (2) his detention was not authorized by the AUMF because the Government had acknowledged that he no longer posed a threat to the United States. The Court rejected those arguments, concluding that the petitioner lacked standing for the same reasons provided in *Ahjam*, *see al Wirghi*, 54 F. Supp. 3d at 47; that the petitioner's detention was not "unconstitutionally indefinite" given that petitioner could be properly detained for the duration of the relevant conflict, *id.* (citing *Hamdi*, 542 U.S. at 521; *Ali*, 736 F.3d at 544); and that his detention was not arbitrary because a decision to designate a detainee for transfer is not a concession that the detainee is not legally detainable nor does it "reflect a decision that the detainee poses no threat or no risk of recidivism," but instead represents a judgment that "any threat posed by the detainee can be sufficiently mitigated through feasible and appropriate security measures in the receiving country," *id.* (quoting Task Force Report at 17).[6]

Likewise here, Petitioner can demonstrate no legally protected interest in the Executive's discretionary authority to transfer detainees to a foreign country. Petitioner has not prevailed on the merits of his habeas petition—quite the opposite—and, therefore, he has no procedural or substantive right to a transfer to another country. The determination and related recommendation of the PRB, like the transfer designations at issue in *Ahjam* and *al Wirghi*, does not provide Petitioner any legally cognizable right to a transfer; as explained above, the PRB determination

[6] The petitioner in *al-Wirghi* had been deemed eligible for transfer by the Guantanamo Review Task Force and a prior DoD administrative process. 54 F. Supp. 3d at 45-46; *supra* note 5.

is a decision reflecting an exercise of discretion that a detainee otherwise lawfully detained may be transferred upon the diplomatic negotiation of appropriate security assurances commensurate with the particular circumstances. The PRB's decision did not create any judicially enforceable rights and, therefore, does not provide Petitioner with a legally protected interest. Indeed, the Executive Order establishing the PRB process is clear: "This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person."[7] Exec. Order 13,567, § 10(c). Thus, Petitioner has no standing to challenge his detention on the basis of the PRB's determination and recommendation, and the PRB decision does not afford Petitioner a legal basis to seek any order of the Court effecting his release.

II. Petitioner Is Not Entitled To An Order Under The 2016 NDAA Or The Court's Equitable Habeas Authority "Affecting" His "Disposition."

Petitioner, disclaiming any intent to challenge the "basis for . . . [his] initial capture and detention" or to seek an order for transfer to a country of his choosing, Mot. at 7, asks the Court to enter an Order "affecting the disposition" of Petitioner, without granting the writ—that is, an order basically saying that the order is one that falls within the exception under 2016 NDAA § 1034(a)(2). Petitioner contends that such an order will relieve his proposed transfer from the transfer certification requirements of the NDAA, permitting, he suggests, his immediate

[7] Courts of this Circuit have interpreted similar language in executive orders as not creating any judicially enforceable rights. *See Meyer v. Bush*, 981 F.2d 1288, 1297 n.8 (D.C. Cir. 1993) (holding that executive order establishing President Reagan's Task Force on Regulatory Relief did not create any private rights of action subject to judicial review); *Alliance for Natural Health U.S. v. Sebelius*, 775 F. Supp. 2d 114 (D.D.C. 2011) (holding that plaintiffs may not sue for alleged violations of executive order containing express language that order does not create enforceable rights); *Shekoyan v. Sibley Int'l Corp.*, 217 F. Supp. 2d 59, 68 (D.D.C. 2002) (individual could not enforce employment discrimination provision of executive order absent "a provision that provides for a private cause of action").

repatriation, prior to the next Administration. *See* Mot. at 8, 14 n.10, Proposed Order #1. Petitioner argues that such an order is authorized by the court-order exception in § 1034(a)(2), as well under the Court's equitable habeas powers. Petitioner's arguments should be rejected.

As an initial matter, Petitioner's argument overlooks the requirement in § 308 of the Intelligence Authorization Act for Fiscal Year 2012, Pub. L. No. 112-87, 125 Stat. 1876, 1883 (2012) ("IAA"), that requires the President to provide 30-days' advance notice to Congress of the transfer of a Guantanamo detainee. That statute's advance notice requirement is in addition to the certification requirements of the 2016 NDAA, and the IAA contains no court-order exception like § 1034(a)(2) of the 2016 NDAA. Accordingly, the order Petitioner seeks under § 1034(a)(2) would not accomplish Petitioner's purpose of obtaining an immediate transfer.

In any event, the exception contained in § 1034(a)(2) of the 2016 NDAA does not create any new authority for a court to issue an order to effect the release of a Guantanamo detainee. Instead, as applied to the habeas context, the statute contemplates that, where a court has granted a writ of habeas corpus in an appropriate case, transfer of the detainee may proceed based on the writ and without the certifications otherwise required by the statute.

As explained *supra*, § 1034(a) of the 2016 NDAA imposes various conditions on the use of appropriations for the transfer of Guantanamo detainees to foreign countries, including that the Secretary of Defense must submit to Congress a written certification addressing specific factors prior to a transfer. The exception Petitioner cites states that these certification requirements "shall not apply to any action taken by the Secretary to transfer any individual detained at Guantanamo to effectuate an order affecting the disposition of the individual that is issued by a court or competent tribunal of the United States having lawful jurisdiction . . . ."

But there is nothing in the language of § 1034(a)(2) that confers new jurisdiction or

substantive authority upon the Court to issue an order requiring the release of a detainee beyond the habeas authority and jurisdiction that the Court already has. Indeed, the exception in § 1034(a)(2) refers instead to orders issued by courts "having lawful jurisdiction," indicating that any such order be grounded in the court's otherwise lawful jurisdiction. Thus, § 1034(a)(2) clearly contemplates orders in which a court requires a detainee's release or transfer based upon legal authority outside of § 1034(a)(2) that permits the court to order such release or transfer, that is, relevant to this case, any appropriate exercise of habeas authority to grant a detainee the writ.

Nor does § 1034(a)(2) contemplate the novel type of order Petitioner seeks that allegedly would permit a transfer without explicitly requiring it (but instead merely intoning the phrase, "affecting the disposition" of a detainee). To the contrary, the section excepts from certification "action[s]" taken by the Secretary "to transfer" a detainee "to *effectuate* a[] [court] order affecting the disposition of the individual" (emphasis added). A court order that merely states, as Petitioner requests, that Petitioner falls within the provisions of § 1034(a)(2) and that the order "affects the Petitioner's disposition," Proposed Order #1, would be circular and nonsensical. It would not require action by the Secretary as there would be nothing for the Secretary to "implement."[8]

[8] Indeed, even if the Court were to enter Petitioner's requested order, it is merely speculative whether such an order purporting to relieve Petitioner's case from the 2016 NDAA's certification requirement would accomplish anything, given the Secretary's recent decision not approving Petitioner's repatriation. Petitioner's requested relief, therefore, is not only not legally authorized as explained above, it is outside the Court's jurisdiction both on standing and habeas jurisdiction grounds. *See Lujan*, 504 U.S. at 561 (quotations omitted) (standing requires that it be "likely, as opposed to merely speculative," that an injury will be redressed by a favorable decision); *cf. US Ecology, Inc. v. U.S. Dep't of Interior*, 231 F.3d 20, 24 (D.C. Cir. 2000) ("Courts have been loath to find standing when redress depends largely on policy decisions yet to be made by government officials."). *See also Salahi v. Obama*, No. 05-CV-0569 (RCL), 2015 WL 9216557, at *1-*3 (D.D.C. Dec. 17, 2015) (concluding in Guantanamo habeas case that claims with only a probabilistic impact on the duration of custody do not properly lie within the

Furthermore, reading § 1034(a)(2) as conferring some new authority on the Court to issue orders to effect detainee releases that are not otherwise grounded in outside legal authority also would conflict with the Executive's legitimate authority under the AUMF, as informed by the laws of war, to detain enemy forces for the duration of the relevant conflict and regardless of a discretionary approval for transfer—authority confirmed by extensive Court of Appeals precedent. *See supra* at 8-9. Accordingly, there is no basis for Petitioner's claim that § 1034(a)(2) must be read to permit Petitioner the relief he seeks in order "to avoid serious constitutional problems" that Petitioner does not explain in any meaningful way. *See* Mot. at 10. Petitioner seems to assume that his release is otherwise required by law, but, as explained *supra*, it is not; to the contrary, Petitioner's continued detention is legally authorized. Absent an appropriate grant of the writ in this case, § 1034(a)(2) of the 2016 NDAA does not support the relief Petitioner seeks.

Petitioner additionally contends that the Court's equitable, common-law habeas authority and 28 U.S.C. § 2243 authorize the Court to ignore the Government's legal authority to detain Petitioner pursuant to the AUMF, and instead issue an order "affecting" his "disposition" in order to "dispose of th[is] matter as law and justice require" and to "correct a miscarriage of justice." *See* Mot. at 11, 14. Of course, as explained *supra*, the "law" supports Respondents' authority to continue to detain Petitioner. And Petitioner does not cite any governing legal principle that would justify the Court taking action solely to deprive an incoming Administration of the opportunity to consider a particular transfer. Thus, Petitioner's reliance on 28 U.S.C. §2243's

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Court's habeas jurisdiction); 28 U.S.C. § 2241(e)(2) (withdrawing jurisdiction over non-habeas claims of Guantanamo detainees).

language that, "The Court shall summarily hear and determine the facts, and dispose of the matter as law and justice require" is unavailing. The law applicable to habeas petitions such as Petitioner's is set out in the AUMF and case law of the Court of Appeals governing these cases, and Petitioner is, and may continue to be, lawfully detained under those standards.

Furthermore, none of the cases Petitioner cites for the proposition that the Court's habeas authority should be guided by equitable principles supports an order attempting to effect a release independent of a determination on the merits of the case. The Supreme Court's "miscarriage of justice" jurisprudence cited by Petitioner, *see* Mot. at 12, does not support the extraordinary relief that he seeks here. As explained by the Supreme Court, the "fundamental miscarriage of justice exception[][to procedural bars to relief] is grounded in the equitable discretion of habeas courts to see that federal constitutional errors do not result in the incarceration of innocent persons." *McQuiggin v. Perkins*, __ U.S. __, 133 S. Ct. 1924, 1931 (2013); *see also Schlup v. Delo*, 513 U.S. 298, 321-27 (1995) (limiting this doctrine to "rare" and "extraordinary" cases where a petitioner establishes his actual innocence). Even assuming this doctrine applies in the wartime detention context of this case, Petitioner has not established "his innocence" or any error in the final decision in this case that Petitioner was part of an al-Qaida associated force (indeed, Petitioner does not here challenge the basis of his initial detention, *see* Mot. at 7).

Accordingly, §1034(a)(2) of the 2016 NDAA and the Court's equitable habeas powers do not provide authority for the relief Petitioner seeks under §1034(a)(2).

III. Petitioner's Detention Does Not Violate the AUMF or Due Process Clause.

Petitioner alternatively requests that the Court issue, on an emergency basis, a writ of habeas corpus because, he asserts, his detention is not authorized by the AUMF in light of his

eligibility for transfer, Mot. at 14-15, and because detention in such circumstances "no longer serves its ostensible purpose," and would be "arbitrary" and "unlawful" and violate the Due Process Clause, *id* at 18-25. The Court should reject Petitioner's arguments.

As explained *supra*, the Government's detention authority under the AUMF with respect to Petitioner is established by the governing statutes and Supreme Court and Court of Appeals precedent, and that authority continues for the duration of the conflict against al-Qaida, the Taliban, and associated forces, which Petitioner does not dispute remains ongoing.[9]

Further, that detention authority is not undermined because Petitioner continues to be detained, even into a new Administration, after receiving a discretionary designation as eligible for transfer. To the contrary, such a designation was considered by the Court of Appeals to be "irrelevant" to any evaluation of the legality of detention under the AUMF. *See Almerfedi*, 654 F.3d at 4 n.3. Indeed, the designation for transfer by the PRB means only that Petitioner may be transferred under certain conditions, that is, the negotiation of appropriate security and humane treatment assurances, subject ultimately to the approval of the Secretary of Defense. *See supra* at 3-5. Such a designation for transfer does not establish that there is no basis or reason to continue a detainee's detention (that is, to prevent his return to the battlefield, *see Hamdi*, 542 U.S. at 518-19, 521) pending fulfillment of those conditions. *See also* Exhibit A (PRB recognizing Petitioner "presents some level of threat" although the risk can be "adequately

[9] *See also* Letter from the President -- Supplemental 6-month War Powers Letter, at 3, issued on December 5, 2016, available at https://www.whitehouse.gov/the-press-office/2016/12/05/letter-president-supplemental-6-month-war-powers-letter (last accessed January 17, 2017) ("U.S. forces remain in Afghanistan for the purposes of, among other things, training, advising, and assisting Afghan forces; conducting and supporting counterterrorism operations against the remnants of core al-Qa'ida and against ISIL; and taking appropriate measures against those who directly threaten U.S. and coalition forces in Afghanistan or provide direct support to al-Qa'ida."); *id.* ("The United States remains in an armed conflict, including against the Taliban, and active hostilities remain ongoing.").

mitigated"); *cf. al-Wirghi*, 54 F. Supp. 3d at 47 (designation as eligible for transfer does not mean that Government concedes that it no longer needs to detain a petitioner).

Nor is there any legitimate basis for Petitioner to assert that the Government's detention authority has "unravel[ed]," Mot. at 15. To the contrary, "the 2001 AUMF does not have a time limit, and the Constitution allows detention of enemy combatants for the duration of hostilities," and it is not the Court's proper role "to devise a novel detention standard that varies with the length of detention." *Ali*, 736 F.3d at 552. And Petitioner offers no clear authority for his request that the Court ignore or reject this and other binding Court of Appeals decisions regarding the scope of the Government's detention authority in these Guantanamo cases. *See United States v. Torres*, 115 F.3d 1033, 1036 (D.C. Cir. 1997) ("District judges . . . are obligated to follow controlling circuit precedent until either . . . [the Court of Appeals], sitting en banc, or the Supreme Court, overrule it.").

Finally, under the binding law of this Circuit, this Court should reject Petitioner's argument that the Supreme Court's extension of Suspension Clause protections to detainees at Guantanamo Bay leads to the conclusion that Guantanamo detainees may also avail themselves of Due Process protections through habeas corpus and that Petitioner is entitled to a habeas writ because his continued detention violates Due Process. *See* Mot. at 19-25. The Court of Appeals has held that detainees such as Petitioner at Guantanamo cannot avail themselves of constitutional due process rights. In any event, for all the reasons explained above, Petitioner's continued detention under the AUMF, despite his designation as eligible for transfer, is neither arbitrary, indefinite, nor contrary to due process.

The Court of Appeals has held that "the due process clause does not apply to aliens" detained at Guantanamo Bay who have no "property or presence in the sovereign territory of the

United States." *Kiyemba v. Obama*, 555 F.3d 1022, 1026 (D.C. Cir. 2009) (*Kiyemba I*), *vacated and remanded*, 559 U.S. 131 (2010) (per curiam), *reinstated*, 605 F.3d 1046 (D.C. Cir. 2010). Petitioner's suggestion that this holding has been recognized as narrowly limited and has not been relied upon by subsequent decisions in this Circuit, *see* Mot at 23-24, is not correct. That some opinions found no Due Process violation "even assuming" that the Due Process Clause could apply to Guantanamo Bay does not establish that the Clause must apply there. Rather, any such statements merely reflect that the petitioners in those cases had not set out a Due Process violation at all. Moreover, contrary to Petitioner's suggestion, the Court of Appeals has noted—post-*Kiyemba I*—that the Due Process Clause does not extend to alien detainees at Guantanamo Bay. *See al Madhwani v. Obama*, 642 F.3d 1071, 1077 (D.C. Cir. 2011) (citing *Kiyemba I*'s due process holding and stating that the Court did "not accept" the "premise[]" that the petitioner "had a constitutional right to due process"); *see also al Bahlul v. United States*, 767 F.3d 1, 33 (D.C. Cir. 2014) (Henderson, J, concurring) (noting that "it remains the law of this circuit that, after *Boumediene*, aliens detained at Guantanamo may not invoke the protections of the Due Process Clause of the Fifth Amendment"); *Rabbani v. Obama*, 76 F. Supp. 3d 21, 25-26 (D.D.C. 2014) (Lamberth, J.) ("[E]xisting Circuit precedent forecloses any remedy for an alleged Fifth Amendment due process violation.").

Petitioner's attempt to circumvent this binding precedent by invoking the functional analysis relied on in *Boumediene* is unavailing. Indeed, the Court of Appeals has expressly rejected that argument. In *Rasul v. Myers*, the Court of Appeals determined that "the Court in *Boumediene* disclaimed any intention to disturb existing law governing the extraterritorial reach of any constitutional provisions, other than the Suspension Clause." 563 F.3d 527, 529 (D.C. Cir. 2009).

Even considering Due Process principles, however, any doubt as to the constitutional validity of Petitioner's continued detention is resolved by *Hamdi*. There, in a case of a United States citizen detained within the United States and, so, to whom the Due Process Clause clearly applied, the Supreme Court upheld his detention under the AUMF. In doing so, the Court specifically weighed Hamdi's substantial due process interest to be free from detention, but found that interest counter-balanced by "the weighty and sensitive governmental interests in ensuring that those who in fact fought with the enemy during a war do not return to battle against the United States." 542 U.S. at 531. And the Court also implicitly approved the upper bound that the future cessation of hostilities placed on that detention, noting that "[i]f the record establishes the United States troops are still involved in active combat in Afghanistan, those detentions are part of the exercise of 'necessary and appropriate force,' and therefore are authorized by the AUMF." *Id* at 521.

Accordingly, there is no basis to conclude that Petitioner's detention is not authorized by the AUMF or that Petitioner has a Due Process right to an order granting the habeas writ.

IV. The Court Should Immediately Vacate The Portion of Its January 13, 2016 Order To Show Cause Requiring Respondents To Begin Making Preparations In The Event Petitioner's Emergency Motion Is Granted.

The Court's January 13, 2017 Order to Show Cause not only established a deadline for Respondent's response to Petitioner's Motion, it also "further order[ed] that Respondents should begin to make preparations in the event Petitioner's Emergency Motion is granted as matter of equity." The Court should immediately set aside that latter portion of its Order.

Whatever impression of the facts the understanding of Petitioner's counsel reflected in Petitioner's Motion may have conveyed, leading to the Order, the actual circumstances are that the Secretary of Defense has not approved Petitioner's transfer at this time. Further, for all the

reasons explained above, there is no legal basis upon which to grant Petitioner any of the relief he seeks, and thus, no basis to require Respondents to "make preparations" for such relief.

Additionally, the "make preparations" clause of the Order fails to meet the legal requirements for an injunctive order requiring action by a party. Under FED. R. CIV. P. 65(d), such an order must state the reasons why it issued; state its terms specifically; and "describe in reasonable detail--and not by referring to the complaint or other document--the act or acts restrained or required." The Court's Order, at a minimum, does not describe what is required of Respondents in reasonable detail, especially in light of the fact that Petitioner's repatriation was not approved. It is wholly unclear what preparations would be properly undertaken when repatriation has been rejected for the time being. *See Schmidt v. Lessard*, 414 U.S. 473, 476 (1974) ("[T]he specificity provisions of Rule 65(d) are no mere technical requirements. The Rule was designed to prevent uncertainty and confusion on the part of those faced with injunctive orders, and to avoid the possible founding of a contempt citation on a decree too vague to be understood.") (citation omitted); *see also United States v. Apex Oil Co.*, 579 F.3d 734, 739 (7th Cir. 2009) (Rule 65(d) requirements apply to mandatory injunction as well as negative injunction).

For these reasons, the Court should immediately set aside, including during the pendency of the Court's decision on Petitioner's Motion, the portion of the Order to Show Cause requiring Respondents to "begin to make preparations in the event Petitioner's Emergency Motion is granted."

CONCLUSION

For the reasons stated above, the Court should deny Petitioner's Emergency Motion for Order Effecting Release and immediately set aside the "make preparations" clause of the January 13, 2017 Order to Show Cause.[10]

January 17, 2017

Respectfully submitted,

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[10] Should the Court, however, grant Petitioner's Motion and issue the writ or enter an order requiring Petitioner's transfer, Respondents request that the Court stay any such order, for a minimum of 24 to 48 hours, so that Respondents may consider whether to seek appellate review of the order and pursue such review if appropriate, including seeking any needed further stay of the order pending such review.