IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

YOUNOUS CHEKKOURI (ISN 197),	)	
Petitioner,	)	
v.	)	Civil Action No. 05-329 (UNA)
BARACK OBAMA, President of the United States, *et al.*,	)	
Respondents.	)	

RESPONDENTS' OPPOSITION TO PETITIONER'S EMERGENCY MOTION FOR IMMEDIATE PRODUCTION OF PUBLIC VERSIONS OF CLASSIFIED DOCUMENTS

PRELIMINARY STATEMENT

Petitioner's Emergency Motion for the Immediate Production of Public Versions of Classified Documents ("Petitioner's Motion"), ECF No. 380, should be denied. Respondents have made reasonable efforts to create public versions of the numerous classified filings both in Petitioner's case and in other Guantanamo Bay habeas cases, consulting with Petitioner's counsel throughout the process and working to create such public versions in the order Petitioner's counsel requested. Petitioner now seeks not only to change his requested order of processing of multiple filings, but also to unreasonably expedite the review process, including for two documents totaling over two thousand pages, when such review should be as careful as possible to prevent the mistaken disclosure of classified information and when such expedition threatens to delay the completion of other competing priority tasks required to support ongoing Guantanamo habeas litigation and Office of Military Commission (OMC) and Periodic Review Board (PRB) proceedings. And Petitioner seeks expedited review and public release of his classified filings for purposes other than those related to his habeas corpus claim and without any

particularized demonstration of the specific relevance of the documents to any specific charges in Morocco against Petitioner. The nature and purpose of Petitioner's request for relief, including the unreasonable acceleration of that relief, puts Petitioner's request outside the proper scope of habeas relief in this case, which is now moot in light of Petitioner's transfer out of United States custody. Although Respondents have made reasonable efforts to create public versions of filings in Petitioner's case and will continue to do so in accordance with Petitioner's new order of priority, Petitioner's Motion, including the specific unreasonable and burdensome expedition of relief sought in the Motion, should be denied.

ARGUMENT

I. Respondents Have Made, and Continue to Make, Reasonable Efforts to Create Public Versions of the Filings in This Case in the Order Petitioner Requested.

Petitioner's Motion should also be denied because Petitioner requested relief goes beyond proper habeas relief in this case. Respondents do not dispute that the Protective Order governing this Guantanamo habeas litigation requires them to create public versions of the classified filings that are the subject to Petitioner's Motion, but that responsibility also extends to classified filings in scores of other Guantanamo habeas cases. *See* Protective Order, ECF No. 107, ¶ 47(a). Respondents have made reasonable efforts to create such versions, but this work has taken time given the huge volume of classified materials that must be reviewed in these habeas cases. Throughout this process, Respondents have consulted with Petitioner's counsel and given priority to the review of documents Petitioner deemed most important—a priority list that prioritized other documents over those Petitioner now demands. Respondents have now shifted their classification review to re-prioritize the documents Petitioner seeks in his Motion, but Respondents should be allowed the necessary time to complete their review. Forcing

Respondents to accelerate the review of these documents would unduly burden Respondents' declassification review resources, risk the inadvertent disclosure of classified information, prejudice other petitioners, and delay completion of competing priorities in other habeas cases and in OMC and PRB proceedings.

The Guantanamo habeas litigation has involved the filing of many hundreds of classified filings or documents, many of them hundreds of pages in length and involving numerous classified exhibits. The interagency process for preparing public versions of habeas case filings involves several federal agencies' classification review teams and is both time-consuming and resource intensive. Each page of these documents must be closely scrutinized by multiple agencies before a public version can be created. The teams also perform numerous tasks that must be accomplished concurrently along with the classification review of habeas case filings. Specifically, the same personnel are responsible for an extensive portfolio of work that requires them to review and process an enormous volume of material needed to support the ongoing Guantanamo habeas litigation as well as the prosecutions (both pending and those still contemplated but not yet filed) before military commissions administered by OMC, and the reviews and hearings now being conducted by the PRB. They must assist in reviewing and clearing evidence for the habeas litigation and commission proceedings and also assist in processing motions, briefs, opinions, orders, videos, and transcripts of proceedings, for public release in federal district courts. Additionally, certain of the agency teams handle the review and production of detainee-related material requested under the Freedom of Information Act ("FOIA") and are involved with several detainee-related FOIA suits in litigation before this and other federal district courts, as well as other matters. The priorities in these classification reviews are often subject to tight deadlines and at times conflict.

Also, the creation of public versions of past filings involves more than merely redacting information marked, or based on information marked, as classified; rather, in order to maximize the information disclosed on the public record, the review involves determinations of whether any classified information in those filings can be declassified through a robust, multi-tiered classification review process. Such declassification review is both a resource-intensive and a time-consuming process, with a significant number of documents in the Guantanamo cases yet to be fully reviewed as a result of the many burdensome and competing priorities within the agencies' classification review teams' areas of responsibility.

In light of the significant resources required for classification and declassification reviews, and to ensure that past habeas filings are reviewed as soon as practicable, and in an order most useful to petitioners in the litigation, Respondents have focused the Government's scare classification resources on Petitioners' most-desired filings through a prioritized review process. Respondents consulted with petitioners' counsel in the Guantanamo cases to identify filings of particular interest, whether petitioners' filings or those of Respondents, and have prioritized the declassification review of these filings accordingly. Respondents have also implemented protocols designed to avoid unfairly expediting review of some petitioners' prioritized filings to the delay of other petitioners' prioritized filings. In general, for the last several years, Respondents have undertaken review of the first filing prioritized by each petitioner in each case, followed by review of the second filing prioritized by each petitioner in each case, *etc.* The habeas prioritized review process was designed as a fair and equitable approach to prioritizing the review and public release of the habeas case filings that petitioners desire most. The agencies' classification review teams have been diligently processing these prioritized case filings consistent with the many other obligations placed on their resources and

personnel. Most of the filings identified as priorities by petitioners in the habeas prioritized review process are major cases filings, such as a traverses, amended traverses and motions for judgment on the record, which, due to their scope and nature, are particularly difficult and time-consuming for agencies to process.

As part of the prioritized review process, Petitioner originally submitted a priority list of thirteen filings for which he sought such processing, Pet'r's Mot., Ex. A, later adding two additional filings to the list. *See* Status Report, ECF No. 375 (Nov. 28, 2014). The prioritized classification review process for Petitioner's first priority item, Petitioner's Reply to Respondents' Supplemental Brief Addressing New Allegations of Abuse, Coercion, and Mistreatment, ECF No. 332, was completed, and a public version was filed on the public docket on July 14, 2014. *See* Notice of Filing, ECF No. 372.[1] Although Petitioner complains about the time it took to create a public version of this classified document, it bears noting that this filing was itself 140 pages in length, with citations to numerous classified documents, *see id*., and that Respondents were, of course, also processing documents in many other cases during this time period.

Respondents then focused on processing the next three items on Petitioner's priority list: Petitioner's Motion to Strike, ECF No. 330; Petitioner's Traverse, ECF No. 279; and Petitioner's Motion for Judgment, ECF No. 293. By late November 2014, significant progress in Respondents' review of these three filings was complete. *See* Status Report, ECF No. 375 (Nov. 28, 2014); Resp't's Ex. A (E-mail Exchange Between Counsel) at 7. Soon thereafter, however,

[1] Respondents have also created a public version of their Factual Return, although, pursuant to Court order, this public version has not yet been filed on the public record. *See* Order, ECF No. 374 (Oct. 6, 2014); *infra* note 3.

Petitioner requested that his priority list be reordered to accelerate processing of the 2010 Amendments to the Factual Return filed by Respondents, ECF No. 294, which had previously been fourteenth on the priority list. *See* Resp'ts' Ex. A at 1 (Petitioner's counsel, writing on December 22, 2014: "If you could re-order the factual return to the top of the list, that would be great.")[2]; Status Report, ECF No. 375 (Nov. 28, 2014); Status Report, ECF No. 377 (May 8, 2015). Thus, since that time, Respondents' review efforts in this case have focused on the 2010 Amendments to the Factual Return, a document several hundred pages in length.[3]

Petitioner now requests that Respondents again shift the priority of their review. Respondents have no objection to doing so, but they cannot possibly do so at the pace that Petitioner requests. Petitioner's Motion indicates that he is no longer concerned about the 2010 Amendments to the Factual Return, and thus, Respondents have suspended their review of that document to focus on completing their review of the three documents previously at the top of Petitioner's priority list and that he is now most anxious to have in a public version: Petitioner's Motion to Strike, ECF No. 330; Petitioner's Traverse, ECF No. 279; and Petitioner's Motion for Judgment, ECF No. 293. *See* Pet'r's Mot. at 8.

Respondents have now completed their review of the Motion to Strike, a public version of which was produced to Petitioner's counsel on September 25, 2015. Unfortunately, given their length—the Traverse, in particular, is over two thousand pages and includes more than

[2] Petitioner's Exhibit B and Respondent's Exhibit A include the same e-mail communications between Petitioner's counsel and Respondent's counsel, but Respondent's Exhibit A also includes subsequent e-mail exchanges not part of Petitioner's Exhibit B.

[3] The Court also ordered, at Petitioner's urging, that Respondents file a public version of the original factual return in the case "within 7 days after, but not before, public versions of the 2010 amended factual return and petitioner's traverse, post-hearing brief, and motion for judgment on the record are filed on the public return." Order, ECF No. 375 (Oct. 6, 2014); Pet'r's Response to Resp'ts' Mot. to Designate Protected Info, ECF No. 363 (June 14, 2013), at 4, 6.

three hundred exhibits—completing review of the Traverse and Motion for Judgment will take additional time, despite the work previously done in 2014. Even if Respondents prioritize their review of these documents over the filings of other petitioners and in other proceedings, they are unlikely to finish public versions before November 13, 2015, given the complexity and volume of these filings. Forcing Respondents to attempt to prepare public versions of these documents more quickly than this would pose a significant risk of the inadvertent disclosure of classified information, in addition to forcing Respondents to delay the review of filings of other petitioners and other work as well.[4]

Respondents have made reasonable efforts to create public versions of filings in Petitioner's case, and focused those review efforts on documents identified by Petitioner. That Petitioner now desires different documents does not change the reasonableness of Respondents' efforts or its need to provide the support necessary to keep active habeas cases and pending military commissions and PRB proceedings moving forward.

II. Petitioner's Request the Expedited Creation of Public Versions of Classified Documents Goes Beyond Proper Habeas Relief in This Case.

Respondents have relinquished custody of Petitioner and transferred him to the control of the Government of Morocco. *See* Notice of Transfer, ECF No. 379 (Sept. 17, 2015). Thus, this case is moot under binding Court of Appeals precedent, and Petitioner cannot properly seek further relief under this Court's habeas jurisdiction.

Article III courts are limited "to deciding 'actual, ongoing controversies.'" *Clarke v.*

[4] And with respect to the additional seven filings Petitioner seeks, review of these materials has not yet been undertaken and will require additional time to review; Respondents should be allowed the time necessary to complete the review of these materials.

United States, 915 F.2d 699, 700-01 (D.C. Cir. 1990) (en banc) (quoting *Honig v. Doe*, 484 U.S. 305, 317 (1988)); *accord Preiser v. Newkirk*, 422 U.S. 395, 401 (1975) (a federal court has no "power to render advisory opinions [or] . . . 'decide questions that cannot affect the rights of litigants in the case before them.'"). This requirement applies at "all stages of review, not merely at the time the complaint is filed." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 67 (1997) (internal quotation marks omitted). As the Court of Appeals has held, "for a court to exercise habeas jurisdiction over a petitioner no longer in custody, the petitioner must demonstrate that he was in custody at the time he filed the petition *and* that his subsequent release has not rendered the petition moot, *i.e.*, that he continues to present a case or controversy under Article III, § 2 of the Constitution." *Qassim v. Bush*, 466 F.3d 1073, 1078 (D.C. Cir. 2006) (quoting *Zalawadia v. Ashcroft*, 371 F.3d 292, 297 (5th Cir. 2004) (emphasis in original)). Thus, in order to avoid dismissal on mootness grounds, Petitioner bears the burden of showing that despite his transfer to the custody of a foreign government, he continues to suffer "some concrete and continuing injury . . . some collateral consequences," assuming the doctrine applies to former Guantanamo detainees, of the type amenable to judicial redress. *Quin*n, 466 F.3d at 1076 (quoting *Spencer v. Kemna*, 523 U.S. 1, 7 (1998)); *see also Idema v. Rice*, 478 F. Supp. 2d 47, 51 (D.D.C. 2007) ("The [habeas] petitioner bears the burden of establishing collateral consequences."). Petitioner can make no such showing here.

Petitioner seeks to continue this action—and use it as the basis for further relief—because of Morocco's current detention and potential prosecution of him. *See generally* Pet'r Mot. But such injuries are not redressable in a habeas action challenging the lawfulness of his prior detention. Indeed, in *Gul v. Obama*, 652 F.3d 12 (D.C. Cir. 2011), the Court of Appeals rejected the contention by two former Guantanamo Bay detainees who had been transferred out

of United States custody that "their petitions are not moot because they continue to be burdened by the collateral consequences of their prior detention and continuing designation." *Id.* at 14; *see also id.* at 16 (explaining the collateral consequences petitioners allege include "the government[] of Afghanistan . . . [has] imposed travel restrictions upon [one of] them . . . [and] their reputations have been damaged."). While reserving the question whether the collateral consequences doctrine[5] applied to former Guantanamo Bay detainees, the Court of Appeals held that, even if the doctrine applied, it could "not save from mootness the petitions filed in these cases." *Id.* In so holding, the Court of Appeals rejected the petitioners' various arguments against mootness, which are equally applicable to Petitioner here.[6]

The Court of Appeals first rejected the contention that former Guantanamo Bay detainees were entitled to a presumption of collateral consequences, explaining that "[a] former detainee, like an individual challenging his parole, must instead make an actual showing his prior detention or continued designation burdens him with 'concrete injuries.'" *Id.* at 17 (quoting *Spencer*, 523 U.S. at 14). The Court of Appeals then held that all of the claimed injuries that the petitioners in *Gul* alleged were insufficient or not redressable in a habeas proceeding. *Id.* at 18. For example, with respect to petitioners' allegations that they were

[5] The collateral consequences doctrine arose in the context of statutory habeas review of domestic criminal convictions and provides that release from custody generally moots a habeas petition unless a petitioner continues to suffer "some concrete and continuing injury other than the now-ended incarceration." *See Spencer v. Kemna*, 523 U.S. 1, 7 (1998) (interpreting the "in custody" requirement of 28 U.S.C. § 2254).

[6] In so doing, the Court of Appeals affirmed certain cases arising out of Judge Hogan's dismissal of over one hundred habeas petitions of former Guantanamo Bay detainees, holding that petitioners had suffered no redressable injury under Article III. *Gul*, 652 F.3d at 14-15; *see In re Petitioners Seeking Habeas Corpus Relief in Relation to Prior Detentions at Guantanamo Bay*, 700 F. Supp. 2d 119 (D.D.C. 2010).

subject to travel restrictions or other restraints on their liberty in the countries to which they were transferred, the Court of Appeals explained that "the harm does not meet the case-or-controversy requirement because it is caused not by a party before the court but by a stranger to the case, and is therefore beyond the power of the court to redress."[7] *Id*. In regards to the petitioners' contention that stigma as a result of their detention at Guantanamo Bay was a sufficient collateral consequence to allow them to maintain their habeas action after their transfer from United States custody, the Court of Appeals held that "'when injury to reputation is alleged as a secondary effect of an otherwise moot action, we [require] some tangible concrete effect . . . susceptible to judicial correction' before we assert jurisdiction," *id.* at 20-21 (quoting *McBryde v. Comm. to Rev. Circuit Council Conduct*, 264 F.3d 52, 57 (2001)), and that "the label 'enemy combatant' brings with it neither a 'concrete effect' nor a 'civil disability' susceptible to judicial correction," *id.* Having broadly determined that each category of alleged collateral consequences did not prevent mootness, the Court of Appeals then rejected the remainder of petitioners' claims of error, holding, *inter alia*, that the burden of proof was properly borne by habeas petitioners once they had been released from Guantanamo Bay. *Id.* at 21. The Court of Appeals also rejected the *Gul* petitioners' argument that equitable considerations warranted continuing their habeas cases because they did not have a full opportunity to obtain a decision on the merits of their cases and attempt to establish that their

[7] In so finding, the Court of Appeals credited Respondents' declarations submitted in *Gul* that explained that petitioners are "transferred entirely to the custody and control of the [receiving] government," and thus any such restrictions are "traceable to the act of a foreign sovereign," not the United States. *Id.* at 18 (referencing the declarations of Sandra L. Hodgkinson, Dep'y Asst. Sec'y of Defense for Detainee Affairs (July 9, 2008), and of Lt. Col. David F. Koonce, Director, Detainee Capabilities Directorate for the Combined Security Transition Command–Afghanistan (Oct. 31, 2008)).

detention was unlawful. *See id.* at 21-22 ("'[M]ootness, however it may have come about, simply deprives us of our power to act'. . . . Equity is not a substitute for meeting the requirements of Article III.") (quoting *Spencer*, 523 U.S. at 18).

Petitioner's habeas case is moot under *Gul*. As explained above, Article III jurisdiction is contingent upon an actual ongoing controversy between litigants. *See Preiser*, 422 U.S. at 401. As the Court of Appeals noted in *Gul*, the scores of habeas petitioners who have been released from Guantanamo Bay present "the same basic issue," 652 F.3d at 21, of whether the habeas petitions of released Guantanamo Bay detainees are moot. That issue was resolved in *Gul*: Guantanamo Bay detainees released from United States custody are beyond the control of the United States government, and any injuries that they claim they suffer at the hands of others are either not traceable to the United States or are not redressable in a habeas action challenging the lawfulness of their prior detention by the United States.

Although Respondents nonetheless will create public versions of the requested documents pursuant to the Protective Order, the fact that creation of the public versions has yet to be completed does not save this case from mootness under *Gul*. Indeed, at least one judge of this Court specifically ruled that a transferred petitioner's claims were moot despite the petitioner's complaints about Respondents' creation of public versions of classified filings. Resp'ts' Ex. B, Order, *Hamlily v. Obama*, 05-cv-0763, ECF No. 346 (D.D.C. Mar. 1, 2011) (Bates, J.); *see also* Resp'ts' Ex. C, Order, *Faraj v. Obama*, 05-cv-1490, ECF No. 325 (D.D.C. Apr. 2, 2015) (Friedman, J.) (denying petitioner's request for an extension of time to respond to Court's order to show cause why the case should not be dismissed as moot until Respondents had created public versions of certain documents).

Petitioner's professed desire to use the documents he seeks to clear his name in the eyes of Moroccan authorities does not change this analysis. If anything, that Petitioner seeks expedited declassification review for purposes of using the materials in any Moroccan proceedings puts Petitioner's request for expedition outside the Court's proper habeas jurisdiction as no habeas equity is implicated. Indeed, as noted above, in *Gul* the D.C. Circuit specifically rejected the argument that restrictions imposed on former Guantanamo Bay detainees by foreign sovereigns gave U.S. district courts continued jurisdiction over their cases. *Gul*, 652 F.3d at 18-19. Petitioner presents no new arguments or evidence that would support a different outcome in this case. Petitioner's request for expedited relief for purposes related to circumstances in Morocco does not justify and exercise of the Court's powers for such purposes. Put simply, Petitioner's request for the accelerated processing of these documents does not fall within the "fundamental procedural protections of habeas corpus" to which he is entitled under *Boumediene v. Bush*, 553 U.S. 723, 798 (2008), and the Court should reject this attempt to exploit its habeas jurisdiction to obtain relief that is unrelated to detention at Guantanamo Bay.

Respondents are continuing to create public versions of the filings requested by Petitioner, and are now doing so in accordance with Petitioner's new order of priority, but the Court should not grant the expedited and burdensome relief Petitioner requests, which is not for habeas purposes and, separately, will increase the risk of inadvertent public disclosure of classified information, in addition to forcing Respondents to delay the review of filings of other petitioners and other work as well.

III. Plaintiff's Need for the Accelerated Creation of Public Versions of Classified Documents Has Not Been Adequately Demonstrated.

Aside from the points explained above, as a practical matter Petitioner has not made any particular demonstration of the need for the specific documents he requests. It is not clear which, if any, of the voluminous filings Petitioner now demands, or any particular exhibit within them, would actually be relevant to any such Moroccan proceedings, were they to occur. Petitioner's habeas filings, after all, were designed to respond to the Government's evidence in this case; if a Moroccan prosecution were to rely on different evidence, the usefulness of public versions of the habeas filings Petitioner seeks would be questionable. For example, a large portion of Petitioner's filings attack the reliability of certain witnesses whose accounts Respondents used to support Petitioner's detention. *See, e.g.*, Notice of Filing (Public Version of Pet'r's Resp. to Resp't's Supp. Br. Regarding Abuse), ECF No. 372 (arguing statements on which Respondents relied were the product of abuse). If a Moroccan prosecution were not to rely on those witnesses, the filings attacking their reliability would do nothing to aid Petitioner's defense.

Finally, the classified filings Petitioner demands are also necessarily duplicative: similar arguments and citations to the same evidence reoccur throughout Petitioner's filings. Thus, even if Petitioner's arguments to this Court were entirely relevant to hypothetical proceedings against him in Morocco, he would not actually need public versions of every filing he now demands to make those arguments. Public versions of certain key filings would suffice. As noted, Respondents have already provided Petitioner with public versions of the two allegedly exculpatory documents on which he placed the highest priority: Petitioner's Reply to Respondents' Supplemental Brief Addressing New Allegations of Abuse, Coercion, and Mistreatment; and Petitioner's Motion to Strike. These documents already contain some of

Petitioner's core arguments. And once Respondents finish creating public versions of Petitioner's Traverse and Motion for Judgment on the Record by November 13, 2015, Petitioner will have access to public versions of the vast majority of arguments and evidence he relied on in this case. Although Respondents will produce public versions of the remaining filings in due course pursuant to the Protective Order, it is unclear what Petitioner's particular need for them would be, even if he were to be prosecuted by Morocco.

CONCLUSION

For the foregoing reasons, Petitioner's Motion should be denied. Respondents will continue to produce public versions of Petitioner's filings pursuant to the Protective Order, but Petitioner's request for expedited relief is not proper, and he has no demonstrated need to seek the accelerated production of such public versions.[8]

Date: September 30, 2015

Respectfully submitted,

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[8] Petitioner also requests an emergency status conference be scheduled. For the reasons already discussed, a status conference is unnecessary, and thus this request should be denied. Should the Court decide to order oral argument or a status conference, undersigned counsel will be traveling to another jurisdiction for a hearing October 1 and 2 and will be unavailable on those dates.

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