IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SAIFULLAH PARACHA,	)
Petitioner,	)
v.	) Case No. 1:21-cv-2567-PLF
JOSEPH R. BIDEN, JR., *et al.*,	)
Respondents.	)

RESPONDENTS' RETURN TO PETITION FOR HABEAS CORPUS AND RESPONSE TO PETITION FOR OTHER RELIEF

On October 2, 2021, Saifullah Paracha filed a Petition for Habeas Corpus and Other Relief. ECF No. 1 ("Pet."). On October 7, 2021, the Court granted in part Petitioner's Motion for Prompt Answer, ECF No. 3, and ordered Respondents to file by October 25, 2021, a response showing cause why the writ of *habeas corpus* should not issue, and why the other relief sought by Petitioner should not be granted. ECF No. 4. Respondents hereby tender that response.

INTRODUCTION

This is Mr. Paracha's second petition for a writ of *habeas corpus. See Paracha v. Trump*, 453 F. Supp. 3d 168 (D.D.C. 2020) (Friedman, J.) ("*Paracha I*").[1] After a two-week long, classified evidentiary hearing in October 2019, at which counsel presented hundreds of exhibits and made extensive argument on five disputed issues of material fact, this Court denied Petitioner's first petition. *Id.* at 172. Petitioner has appealed that judgment to the D.C. Circuit, *see Paracha v. Biden*, No. 20-5039 (D.C. Cir.). The instant petition, "*Paracha II*," was filed while the *Paracha I* appeal was still pending, and shortly before counsel in *Paracha I* moved for a limited remand of

[1] This redacted, public version of the Court's opinion in *Paracha I* issued on March 27, 2020 (ECF No. 555). The unredacted, classified version of the opinion issued January 23, 2020, *see* ECF No. 549.

that appeal for this Court to consider certain claims that are raised in *Paracha II*.[2]

Mr. Paracha's new petition now seeks a writ of *habeas corpus* on two grounds: (1) that the 2001 Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 ("AUMF") no longer provides authority to detain Petitioner after August 31, 2021, when the President stated, "The war in Afghanistan is now over" (Count I); and (2) that said authority expired on May 13, 2021, the date of the final determination from the Periodic Review Board ("PRB") process that Petitioner was eligible for transfer out of United States custody (Count II).

Petitioner also seeks "other relief," namely: (1) that Respondents be ordered to facilitate Petitioner's transfer from Guantanamo Bay to Pakistan (Count III); (2) that the statutory restrictions in the FY2016 National Defense Authorization Act, Pub. L. No. 114-92, § 1034, 129 Stat. 726, 969-71—which prohibit the use of funds to transfer Guantanamo detainees to other countries absent certain national-security-related certifications by the Secretary of Defense at least 30 days prior to transfer—be deemed an unconstitutional bill of attainder (Count IV); (3) that Respondents release Petitioner within the United States, specifically to 333 Constitution Avenue NW, Washington, D.C., where this Court sits (Count V); and (4) that 49 U.S.C. § 44903(j)(2)(C)(v), which requires that all Guantanamo detainees be placed on a No Fly List except in limited circumstances, be deemed an unconstitutional bill of attainder and deprivation of due process (Count VI).

Petitioner's arguments are without merit. The President's August 31, 2021, statement did not herald the end of "active hostilities" against Al Qaeda or its associated forces. Nor does the PRB decision affect the legality of detention, as the Executive Order establishing the PRB process says clearly, and as the D.C. Circuit has squarely held. And as explained below, Petitioner's claims for "other relief" are all categorically barred, either by 28 U.S.C. § 2241(e)(2) as non-*habeas*

[2] The *Paracha II* petition did not note *Paracha I* as a related case, nor did the *Paracha I* remand motion mention the filing of the *Paracha II* petition.

claims, or by appropriations statutes that have long prohibited transferring Guantanamo detainees to the United States. These claims for "other relief" also fail, alternatively, for want of standing or on their merits.

But the Court need not delve into all of these questions yet. To conserve judicial resources and ensure fair litigation among the Parties, the Court should hold Counts I and II of the *Paracha II* petition in abeyance until the D.C. Circuit rules on Mr. Paracha's motion to remand *Paracha I* to this Court for consideration of the same claims. Should *Paracha I* be remanded, Respondents respectfully suggest that the Court order Mr. Paracha to consolidate all of his *habeas* arguments, in both of his petitions, into a single brief to which Respondents can respond. In the meantime, however, the Court can (and should) dismiss Mr. Paracha's claims for "other relief" in Counts III-VI, addressed below. If the Court would prefer further briefing on those claims, the Court should incorporate that into the consolidated briefing suggested above.

I. PETITIONER SHOULD NOT BE PERMITTED TO MAINTAIN TWO SIMULTANEOUS *HABEAS* ACTIONS, MUCH LESS LITIGATE THE SAME CLAIMS SIMULTANEOUSLY IN TWO DIFFERENT CASES.

In Petitioner's pending appeal, he recently filed a Motion for Limited Remand and Continuance of the Stay of His Appeal, *Paracha v. Biden*, No. 20-5039 (D.C. Cir. Oct. 4, 2021), Doc. No. 1916668. That motion seeks remand to this Court to address two issues that, according to Petitioner, affect the legality of his detention: (1) the withdrawal of American troops from Afghanistan and the President's accompanying statement that "the United States ended 20 years of war in Afghanistan"; and (2) the PRB's "clear[ance of Mr. Paracha] for release." *Id.* at 2. These issues overlap precisely with the two bases for *habeas* relief that Petitioner now advances in *Paracha II*.[3]

[3] The Government took no position on the motion for limited remand, but rather deferred to the Court of Appeals regarding the most efficient use of its and this Court's resources. *Paracha v. Biden*, No. 20-5039 (D.C. Cir. Oct. 14, 2021), Doc. No. 1918140.

Making the same arguments in two simultaneous, but distinct, petitions would be an abuse of the writ. *See* Order, *In Re: Guantanamo Bay Detainee Litigation*, No. 1:08-cv-1085-TFH (D.D.C. Oct. 3, 2018) ("[Petitoner] cannot proceed with duplicate habeas petitions before this Court"), ECF No. 41; *cf. Banister v. Davis*, 140 S. Ct. 1698, 1707 (2020) (affirming that "abuse-of-writ principles" demand the dismissal of successive petitions except in "rare cases") (collecting cases); *Boumediene v. Bush*, 553 U.S. 723, 774 (2008) (noting that "certain gatekeeping provisions" in the Antiterrorism and Effective Death Penalty Act of 1996, which "restrict a prisoner's ability to bring new and repetitive claims in 'second or successive' habeas corpus actions," had been upheld in a prior case because "for the most part, [they] codified the longstanding abuse-of-the-writ doctrine") (citing *Felker v. Turpin*, 518 U.S. 651, 662-64 (1996)). And it would not only unnecessarily consume the Court's resources in multiple proceedings, it would unfairly give Petitioner multiple opportunities to address the same issues through multiple briefs by different counsel, to which Respondents would have to respond.

In the course of communicating with counsel in *Paracha II*, shortly after filing of the Petition, counsel asserted that the new petition was supported by the court's reasoning in *Uthman v. Trump*, 486 F.Supp.3d 350 (D.D.C. 2020) (Lamberth, J.), *appeal on other grounds pending*, *Uthman v. Biden*, No. 20-5319 (D.C. Cir. Oct. 28, 2020). But that case merely concluded that filing essentially a new *habeas* petition asserting new claims was not improper where the detainee-petitioner's first *habeas* petition had been finally resolved years prior. *See id.* at 352-55. Mr. Paracha's counsel, by contrast, filed *Paracha II* while *Paracha I* was still pending, and both petitions now seek to address the same core issues. The Court should not permit such an approach.

Instead, this Court should hold in abeyance Counts I and II in *Paracha II* until the D.C. Circuit resolves Petitioner's pending motion for limited remand. Should the D.C. Circuit grant the limited remand, the Court should consolidate *Paracha I* and *Paracha II* and set down one,

consolidated briefing schedule for the Parties to address the issues presented. Should the Court decline to hold Counts I and II in abeyance, or should the D.C. Circuit deny Petitioner's motion for limited remand, Respondents respectfully suggest that the Court then order fulsome briefing on these issues.

In the meantime, and in response to the Court's Order, ECF No. 4, Respondents respond to the *Paracha II* petition as follows.

II. PETITIONER REMAINS LAWFULLY DETAINED.

This Court determined in *Paracha I* that Petitioner is legally detained under the authority of the AUMF based upon the extensive record submitted in that case, comprising classified and unclassified evidence. Respondents will not repeat in full the legal and factual bases on which this Court has already found Petitioner detainable. *See Paracha I*, 453 F. Supp. 3d 168. In summary, the Court found that Petitioner provided substantial support to the Taliban, *id.* at 229-30, and to Al Qaeda, *id.* at 230-36. As to Al Qaeda, the Court found that Petitioner provided four kinds of support: financial assistance; assistance spreading Al Qaeda's message; assistance to Majid Khan, an Al Qaeda operative who planned to reenter the United States; and other assistance to Khalid Sheikh Mohammad. *Id.* at 235. As explained below, this determination of legality is not undermined by the withdrawal of military personnel from Afghanistan or by the PRB determination that Petitioner is eligible for transfer from Guantanamo.

A. The Legality of Petitioner's Detention is Not Undermined by the President's August 31, 2021 Statement.

Seizing on a single statement by the President on August 31, 2021, Petitioner argues in Count I of his Petition "that all military operations under the Authorization for Use of Military Force and [*sic*] ceased." Pet. ¶ 10. Petitioner thus appears essentially to argue that the United States is no longer involved in "hostilities" under the AUMF. *See* FY2012 NDAA, Pub. L. No. 112-81, § 1021(c)(1), 125 Stat. 1298, 1562 (individuals who are part of or substantial supporters of Al

Qaeda or associated forces may be detained "until the end of hostilities authorized by" the AUMF).

That argument has been recently addressed and successfully rebutted by Respondents in another *habeas* case. *See* Supp. Opp'n to Mot. for Immediate Release, *Gul v. Biden*, No. 1:16-cv-1462-APM (D.D.C. Oct. 1, 2021), ECF No. 134; Order on Motion, *Gul v. Biden*, No. 1:16-cv-1462-APM (D.D.C. Oct. 19, 2021) (the Government's authority to detain under the 2001 AUMF is not dependent on the existence of hostilities in Afghanistan; hostilities against Al Qaeda and associated forces under the AUMF are ongoing).[4] As explained in Respondents' memorandum in *Gul*, supported by classified declarations since publicly filed in redacted form, *see* Notice of Filing of Redacted Public Version of Classified Submission, *Gul v. Biden*, No. 1:16-cv-1462-APM (D.D.C. Oct. 14, 2021), ECF No. 137, the United States remains in active hostilities against Al Qaeda and its associated forces, including in Afghanistan. Accordingly, detention authority under the AUMF continues. Respondents incorporate by reference those arguments presented in *Gul*, and will expound them at the Court's direction once *Paracha I* and *Paracha II* are reconciled and consolidated for briefing.[5]

B. The Legality of Petitioner's Detention is Not Undermined by the Periodic Review Board Determination.

On May 13, 2021, a final determination of the PRB concluded that Petitioner's "continued law of war detention is no longer necessary to protect against a continuing significant threat to the

[4] "A court may take judicial notice of public records from other proceedings." *Jones v. Holt*, 893 F. Supp. 2d 185, 194 (D.D.C. 2012) (citing *Covad Comms. Co. v. Bell Atlantic Corp.,* 407 F.3d 1220, 1222 (D.C. Cir. 2005). The same end-of-hostilities issue is also pending in two other Guantanamo *habeas* cases, *Husayn v. Austin*, No. 08-cv-1360-EGS (D.D.C.), and *Qassim v. Biden*, No. 04-cv-1194-TFH (D.D.C.).

The October 19, 2021, order in *Gul* is pending declassification review. As soon as a public version is available, Respondents will append it to a supplemental notice in this case for the Court's benefit.

[5] Another factor warranting consolidated briefing on the end-of-hostilities issue is that addressing the issue has involved classified submissions by Respondents and, thus, a protective order governing the use of classified information. Such a protective order has been entered in *Paracha I* (ECF No. 185) but not in *Paracha II*.

security of the United States." *See* 5/13/2021 PRB Determination, https://www.prs.mil/Portals/60/Documents/ISN1094/SubsequentReview3/210513_CUI_ISN1094_SH3_FINAL_DETERMINATION_U_PR.pdf. The PRB process was constituted by Executive Order 13,567, which made clear that the process "does *not* address the legality of any detainee's law of war detention." 76 Fed. Reg. 13,277, 13,280 (Mar. 10, 2011) (emphasis added). The D.C. Circuit likewise has confirmed 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) (citing *Awad v. Obama,* 608 F.3d 1, 11 (D.C. Cir. 2010) ("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")). Thus, contrary to Petitioner's argument, the PRB determination does not "terminat[e] all authority to hold Petitioner thereafter." Pet. ¶ 16.[6] Executive Order 13,567 and D.C. Circuit precedent squarely reject such an argument.

The PRB determination does not affect the legality of Petitioner's detention, and therefore supplies no basis on which to grant Petitioner a *habeas* writ.

III. PETITIONER'S REQUESTS FOR "OTHER RELIEF" ARE BARRED BY STATUTE AND, IN ANY EVENT, ARE WITHOUT MERIT.

Petitioner styles his pleading as a "Petition for Habeas Corpus and Other Relief." Pet. 1.[7] But by definition, any claim to "Other Relief" brought by a detainee such as Petitioner is barred

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[6] Nor is the PRB determination "binding on this honorable Court." *Id.* To the contrary, the Executive Order was not "intended to affect the jurisdiction of Federal courts to determine the legality of [petitioners'] detention." *Id.* at 13,277.

[7] Petitioner elsewhere describes his pleading as "a petition for the writ of habeas corpus; an action in the nature of mandamus to compel officers and employees of the United States, or agencies thereof, to perform duties owed petitioner; a civil action to review policies, regulations, or ruling of executive agencies; a civil action arising under the Constitution, laws, or treaties of the United States; and an action under all constitutional, statutory, and other grounds that may give this Court authority to review Mr. Paracha's confinement, treatment, and right to communicate with others." Pet. ¶ 4.

by 28 U.S.C. § 2241(e), which provides that:

> (1) No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.
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> (2) Except as provided [in Section 1005(e) of the Detainee Treatment Act of 2005], no court, justice, or judge shall have jurisdiction to hear or consider any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

While the Supreme Court in *Boumediene* held Section 2241(e)(1) unconstitutional as applied to Guantanamo detainees like Petitioner, 553 U.S. at 732, Section 2241(e)(2) still divests courts of jurisdiction over any actions that are not "proper claim[s] for habeas relief." *Kiyemba v. Obama*, 561 F.3d 509, 513 (D.C. Cir. 2009) ("*Kiyemba II*"); *see also Aamer v. Obama*, 742 F.3d 1023, 1030 (D.C. Cir. 2014) ("[I]f petitioners' claims do not sound in habeas, their challenges constitute an action other than habeas corpus barred by section 2241(e)(2).") (cleaned up).

None of Counts III, IV, or VI sound in *habeas*, and all of them seek relief beyond the writ. Count III seeks to expedite a certification process entrusted by Congress to the Executive. Counts IV and VI ask this Court to find two federal statutes unconstitutional and to prohibit their application to Petitioner. The Court should deny categorically these claims to "other relief," Pet. 1, 10-11 (prayer for relief), under 28 U.S.C. § 2241(e)(2).

While Count V uses wording familiar to *habeas*, insofar as it seeks an order to "have the body" produced by court order, Pet. ¶ 24, Petitioner asks that he be brought to a specific location within the United States, *id.*; *id.* at 11 (Prayer for Relief) ¶ 3. Therefore, even if Count V surmounts the bar in § 2241(e)(2), it runs head-long into repeated congressional prohibitions on releasing Guantanamo detainees into the United States.

Even if the Court could entertain any of these claims, moreover, none of them has merit. As explained below, whether because they are barred by statute or fail on the merits, Counts III-VI should be dismissed.

A. Petitioner Cannot Expedite His Release through the PRB Process, or Interfere with International Negotiations, through this *Habeas* Action.

In Count III, Petitioner alleges that "Respondents are obliged to facilitate Petitioner's departure from Guantanamo Bay and his return to Pakistan." Pet. ¶¶ 17-20. He grounds that obligation in Section 4(c)(2) of Executive Order 13,492, 74 Fed. Reg. 4897 (Jan. 22, 2009). Pet ¶ 17. But that executive order, and the provision cited by Petitioner, pertain to transfer under a review process undertaken in 2009-2010, commonly referred to as the Guantanamo Review Task Force review. *See generally* Final Report, Guantanamo Review Task Force (Jan. 22, 2010), https://www.justice.gov/sites/default/files/ag/legacy/2010/06/02/guantanamo-review-final-report.pdf.

Petitioner, however, was determined to be eligible for transfer under the PRB process established by Executive Order 13,567. Although Section 4 of that executive order makes the Secretaries of State and Defense responsible for "ensuring that vigorous efforts are undertaken to identify a suitable transfer location for any . . . detainee [determined eligible for transfer], outside of the United States, consistent with the national security and foreign policy interests of the United States," 76 Fed. Reg. at 13,279, the executive order does not create a private right of action. Thus, Petitioner cannot ground a claim for relief in that executive order.

As a general matter, executive orders are viewed as management tools for implementing the President's policies, and not as legally binding documents that may be enforced against the Executive Branch. *See In re Surface Mining Regulation Litig.*, 627 F.2d 1346, 1357 (D.C. Cir. 1980); *see also, e.g.*, *Chen Zhou Chai v. Carroll*, 48 F.3d 1331, 1338-39 (4th Cir. 1995); *Facchiano Constr. Co. v. U.S. Dep't of Labor*, 987 F.2d 206, 210 (3d Cir. 1993); *Indep. Meat Packers Ass'n*

v. Butz, 526 F.2d 228, 236 (8th Cir. 1975). Here, the plain language of Executive Order 13,567 (not referenced in the Petition) shows an intent *not* to create the private right on which Petitioner depends: "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." 76 Fed. Reg. at 13,280.

The Court of Appeals has regularly found that such language is dispositive and forecloses a private right of action.[8] Applying that precedent, another court in this district found that a Guantanamo detainee's asserted "right to be free" could not "be grounded in" Executive Order 13,492, because "its terms" expressly stated that it did not "create any right or benefit." *Ahjam v. Obama*, 37 F. Supp. 3d 273, 280 (D.D.C. 2014) (rejecting challenge to FY2014 NDAA's prerequisites to transfer of Guantanamo detainees).[9]

While Petitioner accordingly cannot claim *any* right grounded in Executive Order 13,567, the right he claims would be particularly problematic if countenanced by this Court. Petitioner asks

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[8] *See Helicopter Ass'n Int'l, Inc. v. FAA*, 722 F.3d 430, 439 (D.C. Cir. 2013) (Executive Order 12,866, requiring the FAA to conduct cost-benefit analyses, contained similar language and therefore did not confer private rights that could be sued upon); *Communities Against Runway Expansion, Inc. v. FAA*, 355 F.3d 678, 688-89 (D.C. Cir. 2004) (Executive Order 12,898, requiring an environmental-justice analysis, "expressly stat[ing] that [it did] not create a private right to judicial review" could not form the basis for the suit); *Air Transp. Ass'n of Am. v. FAA*, 169 F.3d 1, 8-9 (D.C. Cir. 1999) (finding that similar language in Executive Order 12,893, requiring cost-benefit analysis for infrastructure projects, "is not subject to judicial review"); *Meyer v. Bush*, 981 F.2d 1288, 1296 n.8 (D.C. Cir. 1993) ("An Executive Order devoted solely to the internal management of the executive branch—and one which does not create any private rights—is not, for instance, subject to judicial review.").

[9] Other judges on this Court have made similar findings in other contexts based on express language in Executive Orders disclaiming any private right of action. *See, e.g.*, *Fla. Bankers Ass'n v. U.S. Dep't of Treasury*, 19 F. Supp. 3d 111, 118 n.1 (D.D.C. 2014); *Defenders of Wildlife v. Jackson*, 791 F. Supp. 2d 96, 120-21 (D.D.C. 2011); *Alliance for Natural Health v. Sebelius*, 775 F. Supp. 2d 114, 135 n.10 (D.D.C. 2011); *Natural Res. Def. Council v. U.S. Dep't of State*, 658 F. Supp. 2d 105, 108 (D.D.C. 2009).

this Court to order the Secretary of Defense to give notice to Congress under Section 1034 of the FY2016 NDAA, § 1034, 129 Stat. at 969-971. Pet. ¶ 19. That statute prohibits the use of funds by the Department of Defense to transfer a Guantanamo detainee to another country unless the Secretary of Defense certifies to appropriate committees of Congress, not less than 30 days prior to the transfer, that:

> (1) the transfer concerned is in the national security interests of the United States;
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> (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;
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> (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—
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> > (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
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> (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.

FY2016 NDAA, § 1034(a)-(b), 129 Stat. at 969-70.[10] Notably, when deciding whether to make this certification, the Secretary is "not . . . bound by any [PRB] recommendation." FY2012 NDAA, § 1023(b)(2), 125 Stat. at 1564.

Clearly, then, this certification is far from the "ministerial act" that Petitioner claims it is. Pet. ¶ 20. Congress requires the Secretary of Defense to exercise, first and foremost, his judgment to determine that transfer is in the national-security interests of the United States. FY2016 NDAA, § 1034(b)(1), 129 Stat. at 969-70. In addition, the Secretary must make certain certifications about the transferee country, including certain actions the country has taken or agreed to take, which requires the Secretary to *obtain* those assurances from the receiving country before the certification to Congress. *Id.* § 1034(b)(2). If the transferee country has received transfers from Guantanamo before, the Secretary also must determine whether any prior transferred detainees were recidivists, and if so, must exercise yet *more* judgment regarding the impact on national security. *Id.* § 1034(b)(3). Finally, the Secretary must provide to Congress an intelligence assessment related to the transferee country and the required certifications. *Id.* § 1034(b)(4).

Petitioner's bid to have this Court inject itself into the Section 1034 process presents serious problems. First, and respectfully, the courts are ill-equipped to opine on the subjects required to be certified under Section 1034; these have long been understood as the province of the Executive Branch. *See Kiyemba v. Obama*, 605 F.3d 1046, 1048 (D.C. Cir. 2010) (per curiam) ("*Kiyemba III*") ("[I]t is for the political branches, not the courts, to determine whether a foreign country is appropriate for resettlement.") (citing *Kiyemba II*, 561 F.3d at 514-16).

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[10] Although Petitioner cites the FY2016 NDAA, these requirements have been carried forward in subsequent NDAAs, most recently FY2021 NDAA, Pub. L. No. 116-283, § 1042, 134 Stat. 3388, 3846.

Nor could the Court calculate a timeframe by which the United States should negotiate with a foreign country (which inherently involves diplomatic and foreign-affairs judgment vested in the Executive) or conclude such negotiations (which inherently involves assent from the foreign government with respect to all aspects of the transfer, over which neither the U.S. government nor the Court has control). *Cf. id.* The Petitioner cites a letter purportedly from the Prime Minister of Pakistan to the Secretary of State, and acknowledges that the "practicalities of [Petitioner's] return to Pakistan" would need to be negotiated between the two governments. Pet. ¶ 18. To expedite by court order those processes, or the "intelligence assessment" required by Section 1034(b)(4), would offend the separation of powers by exercising or second-guessing judgments that Congress vested in the Executive.

To be sure, the Court has a central role to play with respect to detainees at Guantanamo Bay who seek *habeas* relief: to determine the legality of their detention. But the Court has already fulfilled that role and, upon an exhaustive review of voluminous evidence and myriad arguments, denied Mr. Paracha's original petition. *Paracha I*, 453 F. Supp. 3d 168. Petitioner's invitation for the Court to go further, and insert itself into the transfer process, should be rejected.[11]

B. This Court Cannot Order Petitioner Released into the United States.

In Count V, and in contravention of the statutory process enumerated above, Petitioner takes it upon *himself* to certify that Pakistan "is ready, willing, and able to accept him as a returning citizen." Pet. ¶ 22. For good and obvious reasons, Congress has vested that decision in the Executive Branch, and not in the detainees themselves. FY2016 NDAA, § 1034(b), 129 Stat. at

[11] Respondents can assure the Court that the Secretaries of State and Defense, in accordance with Section 4 of Executive Order 13,567, will continue "ensuring that vigorous efforts are undertaken to identify a suitable transfer location for any such detainee, outside of the United States, consistent with the national security and foreign policy interests of the United States and the [*nonrefoulment*] commitment set forth in section 2242(a) of the Foreign Affairs Reform and Restructuring Act of 1998 (Public Law 105–277)." 76 Fed. Reg. at 13,279.

969-70.

Even if Pakistan were *not* ready to receive him, Petitioner argues, he is a Lawful Permanent Resident with an "unrevoked green card," and can therefore be ordered released into the United States—specifically, to 333 Constitution Ave NW, Washington, D.C., where this Court sits. Pet. ¶¶ 22, 24; *id.* at 11 (Prayer for Relief) ¶ 3. As an initial matter, this Court addressed the "green card" issue in *Paracha I* and concluded that Petitioner had "abandoned his resident alien status over 20 years ago." *See* Transcript, *Paracha I*, ECF No. 335 at 17; *see also Paracha I*, ECF No. 41 at 3-5; *Paracha I*, ECF No. 23 at 2-3 & Ex. 2 (Respondents' briefs and evidentiary submission regarding Petitioner's abandonment of his resident-alien status). Petitioner provides no basis for the Court to question or revisit this question.

Further, Petitioner's argument for release into the United States also has been expressly foreclosed by Congress. *See Kiyemba III*, 605 F.3d at 1048 (collecting the numerous statutes under which "Congress has prohibited the expenditure of any funds to bring any Guantanamo detainee into the United States"). That prohibition continues today, *see* FY2021 NDAA, Pub. L. No. 116-283, § 1041, 134 Stat. 3388, 3846 (extending until December 31, 2021, the "prohibition on use of funds for transfer or release of individuals detained at United States Naval Station, Guantanamo Bay, Cuba, to the United States").

Apart from the statutory prohibitions, the Court of Appeals has held that *habeas* petitioners "have no right to be released into the United States" cognizable in federal court, because it is "the exclusive power of the political branches to decide which aliens may, and which aliens may not, enter the United States, and on what terms." *Kiyemba III*, 605 F.3d at 1048 (reinstating in relevant part the Court's prior opinion, *Kiyemba v. Obama*, 555 F.3d 1022, 1025 (D.C. Cir. 2009) ("*Kiyemba I*"), *vacated on other grounds*, 559 U.S. 131 (2010)). Accordingly, challenging the statutory restrictions above would be futile, because none of them suspends or restricts any right

that a *habeas* petitioner would otherwise have. *Id*.

In summary, Petitioner's plea to be released into the United States is foreclosed by congressional command and binding precedent.

C. Section 1034 of the FY2016 NDAA Is Not an Unconstitutional Bill of Attainder.

In Count IV, Petitioner claims that Section 1034 of the FY2016 NDAA, requiring advance notice and certifications with respect to transfers of detainees to other countries, "is void and unenforceable as a bill of attainder." Pet. ¶ 21.

This Court has already addressed this claim and dismissed it for want of standing. *Paracha I*, 194 F. Supp. 3d 7, 9-11 (D.D.C. 2016) *affirmed on other grounds*, 697 F. App'x 703 (2017) (per curiam). In that matter, Petitioner challenged, as bills of attainder, various statutory provisions regarding potential transfers of Guantanamo detainees, including provisions contained in Section 1034 of the FY2016 NDAA. *See id.*; *Paracha I*, ECF No. 421 (Respondents' brief opposing challenge to Section 1034 provisions). The Court determined, however, that even though Petitioner argued that the provisions "plac[ed] obstacles to his transfer to the United States or other foreign countries[,] . . . because no court has issued a writ of habeas corpus [in Petitioner's favor], petitioner has no 'legally protected interest' in being transferred or released and therefore cannot establish an injury in fact, as required by the first element of the test for standing."[12] 194 F. Supp. 3d at 10; *see also Ahjam v. Obama*, 37 F. Supp. 3d 273, 278-80 (D.D.C. 2014) (concluding that Guantanamo detainee approved for transfer did not have legally protected interest in transfer

[12] The Court explained that the "irreducible constitutional minimum of standing contains three elements. First, the claimant must have suffered an 'injury in fact'—that is, an invasion of a legally protected interest which is 'concrete and particularized' and 'actual or imminent.' Second, there must be a causal connection between the claimant's injury and the subject of his complaint such that the injury is 'fairly traceable to the challenged action of the defendant.' Third, it must be 'likely' that the injury will be 'redressed by a favorable decision.'" 194 F. Supp. 3d at 9 (internal citations omitted) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)).

sufficient to confer standing to challenge statutory transfer certification requirements). No intervening change in fact or law warrants that the Court revisit that analysis. To the contrary, since Mr. Paracha's petition for *habeas corpus* has since been denied, he is even *less* likely to have a legally protected interest in being transferred.

The Court also ruled, alternatively, that the bill-of-attainder claim was barred by 28 U.S.C. § 2241(e)(2), a point on which the Court of Appeals affirmed. *Paracha I*, 194 F. Supp. 3d at 11, *affirmed*, 697 F. App'x 703 (2017) (per curiam). Again, there has been no material change since that opinion was issued, and there is no reason to revisit its reasoning. For the reasons stated above, § 2241(e)(2) should categorically bar *all* claims to "other relief" by Petitioner, including his bill-of-attainder claims.

Even if Petitioner had standing to pursue this claim, and it were not barred by 28 U.S.C. § 2241(e)(2), the claim would fail on the merits. As noted above, the D.C. Circuit in *Kiyemba III* reaffirmed that none of the statutes barring the Government from releasing Guantanamo detainees into the United States was a bill of attainder. 605 F.3d at 1048 ("The statutory restrictions, which apply to all Guantanamo detainees, are not legislative punishments; they deprive petitioners of no right they already possessed.") (citing *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 475 (1977)). Following that logic, another Judge in this District held that statutory requirements of the sort assailed by Petitioner—that determinations be made before a detainee is transferred to another country—were not unconstitutional bills of attainder. *Ahjam v. Obama*, 37 F. Supp. 3d 273, 280-81 (D.D.C. 2014).[13] If it reaches the question, this Court should follow suit and deny Petitioner's claim on its merits.

[13] The court in *Ahjam* was considering a predecessor to Section 1034 of the FY2016 NDAA, set forth above. 37 F. Supp. 3d at 276 (addressing FY2014 NDAA, Pub. L. No. 113-66, § 1035, 127 Stat. 672). The provisions are indistinguishable for present purposes, however, and the logic in *Ahjam* would apply equally to Section 1034 of the FY2016 NDAA.

D. Petitioner's No-Fly-List Claim Is Barred and Should be Denied.

In Count VI, Petitioner challenges 49 U.S.C. § 44903(j)(2)(C)(v), which requires the Administrator of the Transportation Safety Administration to "include on the No Fly List any individual who was a detainee held at the Naval Station, Guantanamo Bay, Cuba, unless the President certifies in writing to Congress that the detainee poses no threat to the United States, its citizens, or its allies." Petitioner argues that this provision is "invalid as a bill of attainder and a deprivation without due process of the right to travel." Pet. ¶ 26. Once again, Petitioner brings a claim that does not "sound in habeas," *Aamer*, 742 F.3d at 1030, that is therefore barred by 28 U.S.C. § 2241(e)(2), and that should be dismissed on that basis alone.

The thrust of Petitioner's claim is that his addition to the No Fly List "will prevent his resumption of ordinary business and personal activities *after his release*," which "*will continue* to be a great harm and detriment to him." Pet. ¶ 28 (emphasis added). Petitioner's singular focus on post-release harms is understandable, since his presence on the No Fly List cannot harm him while he remains detained at Guantanamo Bay. But as another court in this district has held, once a *habeas* petitioner is released, the *habeas* claim becomes moot absent proof of a "concrete and continuing injury" aside from the prior detention, "some 'collateral consequence' of the [detention]" that is "likely to be redressed by a favorable judicial decision." *In re Petitioners Seeking Habeas Corpus Relief in Relation to Prior Detentions at Guantanamo Bay*, 700 F. Supp. 2d 119, 126 (D.D.C. 2010), *aff'd sub nom. Chaman v. Obama*, No. 10-5130, 2012 WL 3797596 (D.C. Cir. Aug. 10, 2012). Further, a challenge to § 44903(j)(2)(C)(v) cannot save a *habeas* claim from mootness because presence on the No Fly List does not "result from a determination or conviction that a federal court can remedy." *In re Petitioners*, 700 F. Supp. 2d at 134-35. Petitioner's presence on the No Fly List arises from his detention at Guantanamo, but not from whether that detention is lawful—the issue that a *habeas* court can decide (and has decided unfavorably to Petitioner here). That is, "the legality of [Petitioner's] detention at Guantanamo is

not relevant to the injury" arising from being placed on the No Fly List. *Id*. Nor would granting the writ of *habeas* corpus remove Petitioner from the No Fly List. *Id*.

Petitioner's challenge to § 44903(j)(2)(C)(v), thus, is not a proper *habeas* claim and is not redressable through the instant petition. The claim is barred by 28 U.S.C. § 2241(e)(2).

CONCLUSION

For the foregoing reasons, Respondents respectfully suggest that the Court hold in abeyance the two *habeas* claims in this petition (Counts I and II) until the D.C. Circuit has resolved Petitioner's motion for a limited remand on those same claims in *Paracha I*. In the meantime, the Court should dismiss Petitioner's claims for "other relief" (Counts III-VI).

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Respectfully submitted,

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