IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ISA ALI ABDULLA ALMURBATI, *et al.*,	)	
Petitioners,	)	
v.	)	Civil Action No. 04-1227 (RBW)
GEORGE W. BUSH, *et al.*,	)	
Respondents.	)	

RESPONDENTS' OPPOSITION TO PETITIONER'S MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

Respondents hereby oppose petitioner Jumah Al Dossari's motion for temporary restraining order and preliminary injunction ("motion for preliminary injunction") which seeks extraordinary court intervention and governance over numerous conditions of petitioner's confinement at the United States Naval Base at Guantanamo Bay, Cuba ("Guantanamo"). Petitioner's motion stems from his recent suicide attempt and rests on the faulty premise that petitioner is detained under stringent conditions of solitary confinement that purportedly cause him to be suicidal. See Motion for Preliminary Injunction at 2-4. Contrary to petitioner's allegations, petitioner is not held in isolation and has adequate opportunities for human interaction, exercise, and intellectual stimulation. In addition, petitioner's physical and mental health is carefully supervised and maintained by the Guantanamo medical staff. Petitioner, accordingly, fails to demonstrate that he will experience irreparable harm without an injunction. Petitioner also fails to establish a substantial likelihood of success on his claim of inhumane confinement conditions in light of the significant legal authority standing for the proposition that courts should accord substantial deference to the judgment of Executive authorities pertaining to

the operation of detention facilities and the medical care provided to detainees. Furthermore, many of the items on petitioner's laundry list of requests for relief, which includes permitting phone calls with his family and attorneys, viewing family DVD messages, providing periodic medical reports, and access to medical records, would impose undue burdens on the government and injure its interest and the public's interest in the efficient and appropriate operation of the military's detention facilities and the detention hospital at Guantanamo. Accordingly, petitioner fails to satisfy each of the requirements for preliminary injunctive relief, and his motion should be denied.

ARGUMENT

I. PRELIMINARY INJUNCTION STANDARD

It is well-established that a request for preliminary injunctive relief "is an extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion." Mazurek v. Armstrong, 520 U.S. 968, 972 (1997); Cobell v. Norton, 391 F.3d 251, 258 (D.C. Cir. 2004). To prevail in a request for a preliminary injunction, a movant "must 'demonstrate 1) a substantial likelihood of success on the merits, 2) that [he] would suffer irreparable injury if the injunction is not granted, 3) that an injunction would not substantially injure other interested parties, and 4) that the public interest would be furthered by the injunction.'" See Katz v. Georgetown Univ., 246 F.3d 685, 687-88 (D.C. Cir. 2001) (quoting CityFed Financial Corp. v. Office of Thrift Supervision, 58 F.3d 738, 746 (D.C. Cir. 1995)).

The irreparable harm that must be shown to justify a preliminary injunction "must be both certain and great; it must be actual and not theoretical." Wisconsin Gas Co. v. FERC, 758 F.2d 669, 674 (D.C. Cir. 1985). "Injunctive relief will not be granted against something merely

feared as liable to occur at some indefinite time; the party seeking injunctive relief must show that the injury complained of is of such imminence that there is a clear and present need for equitable relief to prevent irreparable harm." Id. (citations and internal quotation marks omitted; emphasis in original). Injunctions are not intended "to prevent injuries neither extant nor presently threatened, but only merely feared." Comm. in Solidarity v. Sessions, 929 F.2d 742, 745-46 (D.C. Cir. 1991); see also Milk Indus. Found v. Glickman, 949 F. Supp. 2d 882, 897 (movant must show that the threatened injury is not merely "remote and speculative").

II. PETITIONER FAILS TO ESTABLISH THAT HE FACES IMMINENT IRREPARABLE INJURY.

Petitioner has failed to carry his burden of establishing imminent irreparable injury. Petitioner's motion for preliminary injunction is based on the faulty premise that petitioner is detained under unlawfully restrictive conditions of confinement. However, petitioner's factual allegations regarding his conditions of confinement are without merit. As the Declaration of Colonel Michael I. Bumgarner[1] makes clear, petitioner has regular and meaningful opportunities for human interaction, exercise, personal hygiene, sleep, communication with family members and intellectual stimulation. See Declaration of Colonel Michael I. Bumgarner, attached as Exhibit 1.

Moreover, petitioner erroneously contends that Guantanamo medical personnel have not been sufficiently attentive to his medical needs and do not provide appropriate care to treat his

[1] Col. Bumgarner currently serves as the Commander of the Joint Detention Group for the Joint Task Force - Guantanamo Bay, Cuba. He is responsible for all aspects of detention operations for Joint Task Force - Guantanamo Bay, Cuba. See Bumgarner Decl. ¶ 2.

physical and mental health conditions. The Declaration of Dr. John S. Edmondson[2] directly refutes petitioner's claims. See Declaration of Dr. John S. Edmondson, attached as Exhibit 2. Petitioner has been provided extensive high-quality medical care, including individualized examination, treatment and counseling by qualified mental health professionals who have regularly worked with petitioner over the past two and a half years in order to treat his ongoing mental health conditions. Id.

As explained more fully below, the Declarations of Colonel Bumgarner and Dr. Edmondson collectively establish that petitioner is not suffering irreparable harm based upon either the conditions of his confinement or Guantanamo's provision of medical care.

A. Petitioner's Conditions of Confinement Are Not Inappropriate.

As threshold matter, every detainee at Guantanamo is housed in an area that provides adequate shelter, ventilation, access to potable drinking water, a toilet, and a sleeping area. See Bumgarner Decl. ¶ 3. Detainees also receive three nutritionally sound meals prepared in compliance with their specific religious, cultural, and, where applicable, medical dietary requirements. Id. Further, detainees in each detention area within Guantanamo receive regular opportunities for recreation and regular opportunities to maintain adequate personal hygiene. Id.

For the past six months, the petitioner in this case has been detained primarily in an area

[2] Dr. Edmondson is the Commander, US Navy Hospital, Guantanamo Bay, Cuba and also serves as the Task Force Surgeon for Joint Task Force - Guantanamo Bay, Cuba. He is directly responsible for the medical care provided to personnel living at Guantanamo Bay and oversees the operation of the detention hospital that provides medical care to the detainees held at Guantanamo. See Edmondson Decl. ¶ 1.

of Guantanamo known as Camp 5, which is a state-of-the-art, maximum security facility.[3] Id. at ¶ 4. Camp 5 is modeled on an existing state prison facility in Indiana that meets American Corrections Association ("ACA") standards. Id. at ¶ 5. The individual cell block wings of Camp 5 contain standard-sized detention cells based upon ACA standards. Id.

Petitioner's motion for preliminary injunction essentially argues that the conditions of confinement in Camp 5 are unlawfully restrictive in five respects: lack of communication with others at Guantanamo, lack of exercise and personal hygiene opportunities, insufficient opportunities for sleep, lack of communication with persons outside Guantanamo, and lack of intellectual stimulation. See Motion for Preliminary Injunction at 21-28. As explained below, however, petitioner's allegations lack a sufficient factual basis to support his claim of irreparable injury.

1. Petitioner Has Frequent Opportunities For Communication With Others At Guantanamo

Contrary to petitioner's allegations, petitioner is not being held in solitary confinement. In fact, there are no detention areas at Guantanamo, including Camp 5, where detainees are housed in solitary confinement. See Bumgarner Decl. ¶ 3. Although petitioner resides in his own individual cell that has solid walls, he has the ability to communicate with other detainees on his cell block in addition to daily interactions with guards, medical staff, library personnel and mail delivery personnel who make daily rounds on the cell block. Id. at ¶ 4. Even when petitioner's cell is fully secured with the feed tray slot closed, his cell, like others in Camp 5, allows communication between adjacent cells, and opposing cells on the block. Id. at ¶ 6.

[3] Petitioner is current hospitalized due to recent medical incidents. See Edmondson Decl. ¶ 10.

Indeed, with a raised voice petitioner can communicate effectively with a detainee on the opposite end of the block. Id. Contrary to petitioner's claims, this type of open and free communication between detainees is not discouraged. Id. In fact, for the duration of the five separate thirty-minute prayer call periods during each day, the feed tray slots in the Camp 5 cells are opened to facilitate this type of communication between detainees to accomplish coordinated prayer. Id. Notably, petitioner often leads other detainees on his cell block during the daily prayer periods.[4] Id.

In addition to regular communications with other detainees and Guantanamo personnel on the cell block, petitioner has been visited by and/or met with representatives of the International Committee of the Red Cross ("ICRC") on various occasions. Id. ¶ 11. Petitioner has met with the Guantanamo Chaplain. Id. ¶ 4. Petitioner also has had significant interactions with both medical and mental health professionals. Id.; see Edmondson Decl. ¶¶ 6, 9. Furthermore, petitioner has established a cordial relationship with members of his interrogation team. See Bumgarner Decl. ¶ 10. During the past two years, petitioner, who speaks English, has had at least 29 interview sessions, which allow petitioner to interact with one or more interrogators in various ways, including eating western food such as hamburgers and pizza, watching movies, playing checkers or engaging in other informal interactions. Id.

[4] Prior to his arrival in Camp 5, and during the course of the past two years, petitioner has been detained at several different detention locations at Guantanamo, including Camp 1, Camp Echo and the detention hospital facilities. All of these locations have multiple opportunities for daily interaction with other detainees and Guantanamo personnel. Within Camp 1, the walls of the cells are metal mesh and detainees can communicate with all the detainees on the entire block. At the detention hospital, detainees also have interaction with medical staff and/or other detainees. Petitioner has availed himself of opportunities for interaction with other detainees in each of the locations in which he has lived. He has never resided on any block as the only detainee. See Bumgarner Decl. ¶ 4.

2. Petitioner Is Provided Meaningful Exercise And Personal Hygiene Opportunities

Petitioner also inaccurately alleges that he is not provided with sufficient opportunities for exercise and personal hygiene, claiming that he is only permitted to leave his cell for one hour or less of exercise per week and one shower every five or six days. See Motion for Preliminary Injunction at 14. These allegations are without merit. As the sworn declaration of Colonel Bumgarner explains, each day detainees are offered one two-hour exercise period followed by a 15-minute personal hygiene period where they may shower, shave and clip their nails.[5] See Bumgarner Decl. ¶ 7. Due to ongoing improvements and the installation of a larger recreation yard at Camp 5, allotted exercise periods have increased over the past six months from a minimum of three one-hour periods per week, to its present state of seven two-hour periods per week. Id. Petitioner, however, frequently does not avail himself of these opportunities. Since May 2005, petitioner has been offered recreation time on 97 separate occasions, but he refused to participate on 72 of those occasions. Id. Further undermining petitioner's claims of isolation, on those occasions when petitioner agreed to participate in the exercise periods, he shared his time with a minimum of two and a maximum of eleven other detainees. Id.

3. Petitioner Is Provided Appropriate Conditions to Sleep.

Contrary to petitioner's allegations, the cells in Camp 5 provide adequate sleeping conditions for the detainees. As explained above, detainees are provided with a sleeping area in their cells. The cells also are temperature-regulated by a central cooling system to between 72 and 74 degrees Fahrenheit. See Bumgarner Decl. ¶ 5. Thus, there is no merit to petitioner's

[5] Detainees are offered a shower period every day even if they refuse recreation time. The two are not linked. See Bumgarner Decl. ¶ 7.

claim that Guantanamo authorities keep the cells at a very cold temperature intentionally. See Motion for Preliminary Injunction at 14. Furthermore, since early May 2005, the lighting within each cell in Camp 5 is dimmed from 10 p.m. until 5:00 a.m. to enable detainees to sleep during these hours. See Bumgarner Decl. ¶ 5. Detainees in Camp 5 also are offered the opportunity to control lighting within their cells during other periods of the day by asking the guards to dim the lights.[6] Id.

4. Petitioner Has Opportunities To Communicate With Others Outside Guantanamo.

Petitioner's complaints regarding a lack of access to family communications do not rise to the level of irreparable harm and, in any event, are without merit. Petitioner has never been prevented from communicating via letters and ICRC mail with his family. Id. ¶ 8. Indeed, Guantanamo's records reflect that, since his arrival at Guantanamo, petitioner has received 51 pieces of mail, and he has written 168 pieces of mail. Id. Most of the mail is attributed to family members. Id. In addition, Guantanamo officials permit habeas counsel to deliver written family mail to Guantanamo staff for delivery to petitioners through normal channels, which include security review, consistent with the terms of the Court's November 8, 2004 Amended Protective Order governing counsel access. See Amended Protective Order and Procedures for Counsel Access to Detainees at the United States Naval Base in Guantanamo Bay, Cuba, 344 F. Supp. 2d 174 (D.D.C. 2004). Furthermore, pursuant to the Amended Protective Order, petitioner is permitted to engage in unlimited privileged legal mail communications with his attorneys, in

[6] Although Guantanamo previously illuminated the cells in Camp 5 at all times as an institutional security measure, that is, permitting guards to see inside the cells during security checks or emergencies, the cells are now dimmed for seven hours per day and detainees may request further dimming during other periods of the day by asking the guards on the cell block.

addition to in-person visits with his attorneys at Guantanamo.[7] See id. Finally, as mentioned above, petitioner has been visited by ICRC representatives on various occasions at Guantanamo. See Bumgarner Decl. ¶ 11.

5. Petitioner Has Access To Reading Material And Opportunities For Intellectual Stimulation.

Petitioner's complaints regarding insufficient reading material also are without merit. As petitioner admits, he is provided with the Koran, attorney-client letters, and family letters. See Motion for Preliminary Injunction at 15. Additionally, subject to advance review, Guantanamo authorities have permitted petitioner's counsel to provide petitioner with various non-legal reading materials, most recently an English-language soccer magazine. See id. at 3 n.2. Furthermore, as the Declaration of Colonel Bumgarner explains, over the past six month period, petitioner made many requests for intellectually engaging items such as board games, novels and library visits, most of which were granted.[8] See Bumgarner Decl. ¶ 7. Petitioner also has had the opportunity to view feature films, including most recently "Troy" and "Gladiator." Id. ¶ 10.

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In summary, petitioner faces no threat of irreparable harm due to his conditions of confinement. As reflected in Colonel Bumgarner's declaration, petitioner has not been isolated. He has been provided sufficient opportunities for exercise, personal hygiene, and intellectual stimulation. Petitioner also has regular opportunities for personal interaction with other detainees as well as Guantanamo personnel and ICRC representatives. Further, he has the ability

[7] Since October 2004, counsel for petitioner have visited Guantanamo on five separate occasions to conduct interviews with him.

[8] Detainees in neighboring cells have the ability to play board games by communicating with each other and directing where the pieces should be placed.

to communicate with his family and his lawyers. For these reasons, petitioner has not carried his burden of establishing imminent irreparable harm warranting extraordinary court intervention and governance of his conditions of confinement.

B. Petitioner Has Been Provided Appropriate Mental Health Care.

In addition to challenging the conditions of his confinement, petitioner also alleges that he faces irreparable harm because the mental health care at Guantanamo has been unlawfully inadequate. See Motion for Preliminary Injunction at 28-29. Petitioner faces no such harm. Contrary to petitioner's allegations, the Guantanamo medical staff provide appropriate medical and mental health services to all detainees through a thorough, coordinated team approach, based on individualized treatment plans that account for each patients's conditions and circumstances. See Edmondson Decl. ¶ 4.

Guantanamo provides extensive medical care facilities and resources for detainees. The detention hospital at Guantanamo provides an 18-bed facility with a hospital medical staff of seventy, including two medical doctors, a physician's assistant, nurses, corpsman, various technicians (laboratory, radiology, pharmacy, operating room, respiratory, physical therapy, information technology and biomedical repair), and administrative staff. Id. ¶ 3.[9] In addition, a 21-member Behavioral Health Service ("BHS") staff supports the hospital. The BHS staff includes a Board Certified Psychiatrist, a Ph.D. Psychologist, psychiatric nurses and psychiatric

[9] Medical treatment is available to detainees daily by means of a request, which the detainees can make at any time through a guard or to medical personnel who make rounds on the cellblocks every other day. In addition to following up on detainee requests, the medical staff will investigate any medical issues observed by guards or other staff. The availability of this medical care has led to thousands of out-patient contacts between detainees and medical staff, followed by in-patient treatment and care as needed. See Edmondson Decl. ¶ 5.

technicians. Id. ¶ 4. The BHS staff provides long term supportive care and short-term behavioral modification therapy as well as psychotropic medication therapy for acute management of self-injurious behaviors and intense mood swings associated with possible danger toward others. Id. They also manage major mental disorders and maladaptive behaviors associated with personality disorders. Id.

With respect to petitioner in this case, he has generally been in good physical health since his arrival at Guantanamo in February 2002, but he has exhibited various mental health issues that the BHS staff have diligently and continually undertaken to address through appropriate care and treatment.[10] Id. ¶ 6. Specifically, petitioner has undergone extensive in-person psychiatric care, and has been seen regularly by behavioral science professionals. Id. ¶ 7. Petitioner also has been proscribed various medications. Id. ¶ 8. However, petitioner has often been noncompliant in taking this medication, despite repeated humane encouragement and counseling from the BHS staff. Id.

Beyond medication, the BHS therapists have repeatedly reached out to petitioner and attempted to assist him by providing cognitive behavioral therapy. Id. ¶ 9. This type of therapy, however, requires patient cooperation and, unfortunately, petitioner has generally been unwilling to cooperate, or at times even participate in such care, undermining the effectiveness of such therapy. Id.

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[10] In light of potential privacy implications regarding petitioner's specific mental health diagnoses and treatment regimens, respondents have filed a redacted version of Dr. Edmonson's declaration on the public record. An unredacted version of Dr. Edmondson's declaration has been provided to the Court and petitioner's counsel. Respondents' counsel are in the process of consulting with petitioners' counsel to determine whether the redacted information should remain under seal.

Petitioner's mental health situation has varied over time and there have been ebbs and flows in his condition. Id. ¶ 10. For example, there have been periods of time when petitioner has not exhibited any symptoms of his various mental health ailments and has appeared to be functioning normally. Id. However, petitioner has unfortunately attempted to commit suicide multiple times between March 2003 and the present, with his last attempt occurring on November 14, 2005, when he attempted to reopen a laceration that had been treated following a previous suicide attempt on October 15, 2005. Id. The medical staff has responded on these occasions by renewing their efforts to treat and assist him, including on an in-patient basis. Id.

For example, petitioner was seen daily by behavioral science professionals, including on an in-patient basis, for an 8-month period during 2003 following an initial suicide attempt by petitioner. Id. ¶ 11. Also, for a 7-month period in 2004, petitioner was housed in the mental health ward of the detention hospital, where he was kept under 24-hour surveillance by both medical staff and security personnel, while he received treatment. Id. He was subsequently seen three times per week by BHS staff for an additional three months, at the end of which time he reported, and BHS staff agreed, that he no longer harbored self-harmful intentions. Id. Since that time petitioner was seen periodically by behavioral health staff, including almost weekly beginning in August of 2005, and regularly since his October 2005 suicide attempt. Id.

The BHS staff and other staff at Guantanamo have been and will continue to take appropriate, humane steps to prevent petitioner from being in a situation where he might cause harm to himself, while attempts to treat his conditions appropriately continue.[11] Id. ¶ 12. For

[11] Petitioner also recently, since the first week of November 2005, initiated a hunger strike, which he reports to be in protest that he was not included in a group of detainees that were released from Guantanamo to Bahrain recently. See Edmondson Decl. ¶ 12. Petitioner is being

example, when detainees at Guantanamo are determined to be at risk for suicide or other self-harmful behavior, they are placed on "self-harm precautions." Id. Petitioner has regularly been placed on such precautions. Id. These self-harm precautions include, for example, (a) regularly inquiring with petitioner about his mood and whether he is having suicidal thoughts, (b) keeping petitioner in regular or constant line-of-sight or video surveillance; (c) making appropriate adjustments to his cell environment to account for his propensity to harm himself, and (d) denying him items that he might be able to use to hurt himself or permitting him such items (e.g., a safety razor) only under close supervision (e.g., when shaving or grooming).

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As illustrated above, far from neglecting petitioner's mental health conditions, Guantanamo medical personnel are providing petitioner with appropriate and attentive medical and mental health care. Consequently, petitioner has not carried his burden of establishing an imminent threat of irreparable harm related to Guantanamo's provision of medical care.[12]

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monitored and treated on this issue also in accordance with the protocols described in the declarations of Major General Jay Hood, Commander of Joint Task Force-Guantanamo, and Dr. Edmondson, previously submitted in other Guantanamo detainee cases. See Exhibits 3-4; see also infra pp. 23-25 (discussing recent orders by Judges of this Court denying injunctive relief related to detainee hunger strikes).

[12] Petitioner's motion also raises allegations concerning past physical abuse and abusive interrogations. Respondents vigorously dispute the accuracy of these allegations. In any event, the allegations are not material to petitioner's requested injunctive relief – which is limited to conditions of confinement – because a series of historical allegations manifestly does not establish an entitlement to forward-looking injunctive relief. See City of Los Angeles v. Lyons, 461 U.S. 95, 105, 110 (1982); O.K. v. Bush, 377 F. Supp. 2d 102, 113-14 (D.D.C. 2005) (Bates, J.). Guantanamo personnel consider allegations of mistreatment to be serious matters. Credible claims have received high level attention and are being investigated so that corrective action can be taken where appropriate. See, e.g., Final Report, Investigation Into FBI Allegations of Detainee Abuse at Guantanamo Bay, Cuba Detention Facility, available at http://www.defenselink.mil/news/Jul2005/d20050714report.pdf.

III. PETITIONER'S CHALLENGE TO HIS CONDITIONS OF CONFINEMENT IS NOT LIKELY TO SUCCEED ON THE MERITS BECAUSE THERE IS NO ADEQUATE LEGAL BASIS FOR THE RELIEF REQUESTED.

In addition to lacking a justifiable factual basis (as demonstrated in the sworn declarations of Dr. Edmondson and Col. Bumgarner), petitioner's motion lacks an adequate legal basis for the requested relief. As a threshold matter, petitioner asserts that he has enforceable rights under the Fifth Amendment to the Constitution that enable him to challenge his conditions of confinement. See Motion for Preliminary Injunction at 19. In support of this proposition, petitioner cites to Judge Green's decision in In re Guantanamo Detainee Cases, 355 F. Supp. 2d 443, 464 (D.D.C. 2005), which found that "the detainees at Guantanamo Bay have the fundamental right to due process of law under the Fifth Amendment" to challenge the legality of their detention through petitions for writs of habeas corpus. Judge Green's opinion, however, did not address whether alien enemy combatants have a constitutional basis to challenge their conditions of confinement or authorize such claims. Judge Green's analysis of the constitutional issues was limited solely to whether Guantanamo detainees are "entitled to due process under the Fifth Amendment" to challenge "the government's determinations that they are 'enemy combatants.'" See In re Guantanamo, 355 F. Supp.2d at 465. The Court's focus on the legality of the detention – as opposed to the legality of the conditions of confinement – is reflected throughout the opinion. See id. at 464 ("In sum, there can be no question that the Fifth Amendment right asserted by the Guantanamo detainees in this litigation – the right not to be deprived of liberty without due process of law – is one of the most fundamental rights recognized by the U.S. Constitution."); id. at 476 ("[T]he detainee is entitled to fully litigate the factual basis for his detention in these habeas proceedings and to have a fair opportunity to prove

that he is being detained on improper grounds."); id. at 477 (stating that a detainee must be provided with a "fair opportunity to challenge . . . the legality of his detention as an 'enemy combatant'"). Put simply, Judge Green only addressed the scope of petitioners' Fifth Amendment rights to challenge the lawfulness of the procedures used to confirm their enemy combatant status; she did not make any findings or conclusions with respect to the scope of any Fifth Amendment right to challenge the conditions of their confinement.[13]

Furthermore, petitioner ignores Judge Leon's decision in Khalid v. Bush, 355 F. Supp. 2d 311 (D.D.C. 2005), which found that aliens held at Guantanamo, that is, outside the sovereign territory of the United States, are not possessed of any constitutional rights, id. at 320-21, and concluded that "no viable legal theory exists" by which the Court "could issue a writ of habeas corpus" in favor of the Guantanamo detainees, id. at 314. Judge Leon also noted that petitioners' challenges to the conditions of their confinement did not support the issuance of a writ of habeas corpus because such claims, even if true, would not render the custody itself unlawful. Id. at 324-25. Judge Leon explained that separation of powers principles prevent the judiciary from

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[13] The distinction between legal challenges to the fact or duration of custody and legal challenges to the conditions of confinement is well-established. See Preiser v. Rodriguez, 411 U.S. 475, 498 (1973). This distinction is based in part on the different legal bases underlying these types of challenges. On the one hand, challenges to the procedures used to determine the lawfulness of custody invoke the procedural due process component of the Fifth Amendment, which requires the government to follow appropriate procedures when its agents or officials decide to deprive a person of liberty. See Daniels v. Williams, 474 U.S. 327, 331 (1986). On the other hand, challenges to conditions of confinement rely on the substantive due process component of the Fifth Amendment, which forbids "certain government actions regardless of the fairness of the procedures used to implement them." See id. Judge Green's opinion addressed only the Guanatanamo detainees' procedural due process rights to challenge the procedures used to confirm their status as enemy combatants. See In re Guantanamo, 355 F. Supp.2d at 465-78 (discussing whether CSRTs comport with procedural due process). Judge Green gave no consideration to whether the detainees have any rights under substantive due process to challenge their conditions of confinement.

scrutinizing the conditions of the aliens' detention because such matters are the province of the Executive and Legislative branches. Id. at 328.

Petitioner also overlooks the fact that both Judge Green's decision and Judge Leon's decision are on appeal to the D.C. Circuit and are under consideration on a consolidated basis. Accordingly, the D.C. Circuit will decide whether and to what extent detainees at Guantanamo have any rights under the United States Constitution. As a result, Judge Green's finding that Guantanamo detainees have some due process rights under the Fifth Amendment may be undermined by the decision of the D.C. Circuit, and, in any event, fails, by itself, to establish that petitioner's conditions of confinement claims are likely to succeed.[14]

Even assuming that petitioner is entitled to constitutional protections under the Fifth Amendment or otherwise (which respondents contest), he still fails to demonstrate that his challenge to his conditions of confinement is likely to succeed. As an initial matter, because no court has ever determined that detainees of the military can even bring conditions of confinement claims, especially in a habeas context,[15] no court has definitively determined what legal standard should be applied to evaluate such claims brought by detainees in the custody of the military.

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[14] Indeed, in light of the pending D.C. Circuit appeals, Judge Green, acting as coordinating judge, stayed this case and the other coordinated cases, and twice rejected petitioners' requests to assert claims objecting to their confinement conditions. See In re Guantanamo Detainee Cases, Order Granting in Part and Denying in Part Respondents' Motion for Certification of Jan. 31, 2005 Orders and for Stay (Feb. 3, 2005); Order Denying Motion for Reconsideration of Order Granting Stay Pending Appeal (Feb. 7, 2005) (refusing to allow claims regarding conditions of confinement to proceed "in light of the substantial resources that would be expended and the significant burdens that would be incurred should this litigation go forward").

[15] See infra note 21 (arguing that conditions of confinement claims are not cognizable in habeas proceedings).

See O.K. v. Bush, 377 F. Supp. 2d 102, 112 n.10 (D.D.C. 2005) ("No federal court has ever examined the nature of the substantive due process rights of a prisoner in a military interrogation or prisoner of war context."). The Supreme Court has explained that constitutional challenges to conditions of confinement brought by convicted criminals are analyzed under the Eighth Amendment's "deliberate indifference" standard, which requires a prisoner to establish that prison officials "were knowingly and unreasonably disregarding an objectively intolerable risk of harm to the prisoners' health or safety."[16] Farmer v. Brennan, 511 U.S. 825, 834-35, 846 (1994); see also Ingram v. Wright, 430 U.S. 651, 664 (1977) (holding that the Eighth Amendment applies only to "those convicted of crimes"). In contrast, the constitutional standard of care owed to "pretrial detainees" in the criminal justice context – defined by the Supreme Court as "those persons who have been charged with a crime but who have not yet been tried on that charge" – is governed by the Due Process Clause of the Fifth Amendment. Bell v. Wolfish, 441 U.S. 520, 523, 536 (1979). "[W]here it is alleged that a pretrial detainee has been deprived of liberty without due process, the dispositive inquiry is whether the challenged condition, practice, or policy constitutes punishment, for under the Due Process Clause, a detainee must not

[16] This standard is applicable both to claims alleging inadequate medical care as well as challenges to general conditions of confinement, such as inadequate food, clothing, and cell temperature. See Wilson v. Seiter, 501 U.S. 294, 303 (1991) ("Whether one characterizes the treatment received by the prisoner as inhumane conditions of confinement, failure to attend to his medical needs, or a combination of both, it is appropriate to apply the 'deliberate indifference' standard articulated in Estelle [v. Gamble, 429 U.S. 97 (1976)]"). The two-prong deliberate indifference test requires the moving party to establish first that "the deprivation alleged must be, objectively, sufficiently serious, . . . a prison official's act or omission must result in the denial of the minimal civilized measure of life's necessities"; second, a prison official must have a "sufficiently culpable state of mind" – "one of deliberate indifference to inmate health or safety." Farmer, 511 U.S. at 834 (internal quotations omitted).

be punished prior to an adjudication of guilt in accordance with due process of law."[17] Block v. Rutherford, 468 U.S. 576, 583 (1984) (internal quotations omitted); see also Brogsdale v. Barry, 926 F.2d 1184, 1188 n.4 (D.C. Cir. 1991).

Regardless of whether either of these two standards directly applies to the Guantanamo detainees,[18] courts have employed the constitutionally-based "deliberate indifference" standard as a guide to evaluate claims of deficient medical care and challenges to conditions of confinement asserted by Guantanamo detainees, despite the fact that it is presently unclear whether the detainees at Guantanamo even have constitutional rights. See O.K. v. Bush, 344 F. Supp. 2d 44, 60-63 & n.23 (D.D.C. 2004) (Bates, J.) ("Without concluding that the 'deliberate

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[17] Although the Supreme Court has never resolved the precise relationship between these two tests, see City of Canton v. Harris, 489 U.S. 378, 389 n.8 (1989) (reserving "whether something less than the Eighth Amendment's 'deliberate indifference' test may be applicable in claims by [pretrial] detainees asserting violations of their due process right to medical care while in custody"), the Court has explained that "the due process rights of a pretrial detainee are at least as great as the Eighth Amendment protections available to a convicted prisoner." County of Sacramento v. Lewis, 523 U.S. 833, 849-50 (1998).

[18] Guantanamo detainees, such as petitioner, have not been convicted of any crime, and thus cannot rely on the Eighth Amendment as a basis for their conditions of confinement claims, see In re Guantanamo Detainee Cases, 355 F. Supp. 2d 443, 465-78 (D.D.C. 2005) (dismissing Eighth Amendment claims), and they also are not "pretrial detainees," as defined by the Supreme Court, because they have not been charged with a crime, nor are they being detained as part of the criminal justice system. Cf. Hamdi v. Rumsfeld, 124 S. Ct. 2633, 2640 (2004) (plurality opinion) (detention of enemy combatants is not punishment or penal in nature); Padilla v. Hanft, 2005 WL 2175946 at *6 (4th Cir. Sept. 9, 2005) (distinguishing criminal detention from military detention of enemy combatants). Furthermore, the criminal justice interests served by confining "pretrial detainees" are completely distinct from the military and national security interests served by detaining individuals, such as petitioner, in conjunction with ongoing hostilities. Compare Wolfish, 441 U.S. at 536-37 (criminal justice interest served by pretrial detention is to ensure detainees' presence at trial), with Hamdi, 124 S. Ct. at 2640 (2004) (plurality opinion) ("The capture and detention of lawful combatants and the capture, detention, and trial of unlawful combatants is to prevent captured individuals from returning to the field of battle and taking up arms once again.").

indifference' doctrine applies" to challenges regarding inadequate medical care, "the Court will draw on this well-developed body of law to guide its analysis"); Al Odah v. United States, No. 02-CV-828 (CKK), Memorandum Opinion at 11-12 (dkt. no. 254; Sept. 30, 2005) (attached as Exhibit 5). Under that standard, only upon a showing that prison conditions or care sink to the level of "deliberate indifference" to an inmate's health or well-being is a court justified in intervening in the treatment of inmates in the traditional penal prison setting. See Neitzke v. Williams, 490 U.S. 319, 321 (1989); Chandler v. District of Columbia Dept. of Corrections, 145 F.3d 1355, 1360 (D.C. Cir. 1998) ("To prevail in a case alleging unconstitutional conditions of confinement, a prisoner must show that the government official 'knew of and disregarded an excessive risk to inmate health or safety").[19]

In light of this demanding standard, courts accord substantial deference to the judgment of prison administrators and generally refrain from interfering in the day-to-day operations of correctional facilities, including the provision of medical care. See, e.g., Bell v. Wolfish, 441 U.S. 520, 548, 562 (1979) (explaining that the operation of even domestic "correctional facilities is peculiarly the province of the Legislative and Executive Branches of our Government, not the Judicial," and cautioning lower courts to avoid becoming "enmeshed in the minutiae of prison

[19] Separation of powers principles, however, may require satisfaction of an even more stringent standard here before judicial intervention is warranted, in light of the fact that petitioner is challenging the practices of a military detention center during a time of war. See, e.g., Hamdi v. Rumsfeld, 124 S. Ct. 2633, 2647 (2004) (plurality opinion) (stating that "[w]ithout doubt, our Constitution recognizes that core strategic matters of warmaking belong in the hands of those who are best positioned and most politically accountable for making them"); Almurbati v. Bush, 366 F. Supp. 2d 72, 81 (D.D.C. 2005) (indicating that "it is a fundamental principle under our Constitution that deference to the Executive Branch must be afforded in matters concerning the military and national security matters."); Khalid v. Bush, 355 F. Supp. 2d 311, 328 (D.D.C. 2005) (explaining that management of wartime detainees' confinement conditions is the province of the Executive and Legislative branches, thus precluding judicial scrutiny of such conditions).

operations."); Thornburgh v. Abbott, 490 U.S. 401, 408 (1989) ("Acknowledging the expertise of these officials and that the judiciary is 'ill equipped' to deal with the difficult and delicate problems of prison management, this Court has afforded considerable deference to the determinations of prison administrators who, in the interest of security, regulate the relations between prisoners and the outside world."); Inmates of Occoquan v. Barry, 844 F.2d 828, 841 (D.C. Cir. 1988) (noting that "courts are not to be in the business of running prisons" and that "questions of prison administration are to be left to the discretion of prison administrators); Inmates of Allegheny County Jail v. Pierce, 612 F.2d 754, 762 (3d Cir. 1979) (stating that federal courts will "disallow any attempt to second-guess the propriety of a particular course of treatment" chosen by prison doctors).

Petitioner's numerous requests for relief, however, clearly indicate that petitioner is asking the Court to micro-manage the manner in which he is detained. Petitioner seeks the Court's involvement in, for example, the provision of telephone calls between himself and his attorneys and family members, the reading materials available to petitioner, the lighting in his cell, the amount of exercise time he is permitted, and the provision of an independent psychological exam. Petitioner's motion thus requests the type of judicial intervention and oversight of the operations and medical care provided at Guantanamo that is highly discouraged under the law and particularly unwarranted in this case.

As demonstrated previously, the facts do not support a finding that the Guantanamo staff has been deliberately indifferent to the health or well-being of petitioner. To the contrary, the record demonstrates that petitioner is not held under strict conditions of solitary confinement. Petitioner has the ability to interact and communicate with other individuals, including his family

members by mail; he is provided regular opportunities to exercise and maintain personal hygiene; the lighting in his cell is dimmed during night hours; and he is provided with sufficient reading materials and intellectual stimulation. See Bumgarner Decl. ¶¶ 4-12.[20] Additionally, as explained in Dr. Edmondson's declaration, petitioner receives extensive medical care and supervision, including psychiatric treatment and counseling. See Edmondson Decl. ¶¶ 3-13. Accordingly, the requisite showing of deliberate indifference is absent, and petitioner's objections to his conditions of confinement cannot succeed. His motion, therefore, should be denied.

Petitioner's attempt to avoid the demanding "deliberate indifference" standard by alternatively asserting that courts have inherent authority under the habeas statute, the common

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[20] In any event, courts have frequently found no constitutional problems even with various forms of disciplinary segregation and isolation. See, e.g., Hill v. Pugh, 2003 WL 22100960 at ** 4-** 5 (10th Cir. 2003) (finding that federal prisoner's placement in a maximum security prison where he was isolated in his cell for twenty-three hours a day and suffered from sensory deprivation did not implicate due process rights under the Fifth Amendment or constitute cruel and unusual punishment under the Eighth Amendment where prisoner's minimal physical requirements for food, shelter, clothing, and warmth were satisfied) (consistent with the rules of the Tenth Circuit Court of Appeals, the unpublished opinion in Hill is cited for its persuasive value. See 10th Cir. R. 36.3 (B)); Novak v. Beto, 453 F.2d 661, 665 (5th Cir. 1971) (concluding that solitary confinement in a lightless cell, with limited bedding and minimal food did not constitute cruel and unusual punishment where the inmate was not deprived of the basic elements of hygiene and noting the "long line of cases . . . holding that solitary confinement *per se* is not 'cruel and unusual.'") (emphasis in original); Campbell v. District of Columbia, 874 F. Supp. 403, 407 (D.D.C. 1994) (holding that prisoner's confinement for ten months in a maximum security cellblock where he was restricted to his cell for twenty-three hours a day did not violate the Fifth or Eighth Amendments); Chavarria v. Stacks, 102 Fed. Appx. 433 437 (5th Cir. 2004) ("Because the policy of 24-hour illumination does not violate the Eighth Amendment, [prisoner's] complaint about the policy is based upon an indisputably meritless legal theory.") (unpublished; cited for persuasive value per 5th Cir. R. 47.5.4). The Supreme Court's decision in Wilkinson v. Austin, 125 S. Ct. 2384, 2393 (2005), is not to the contrary. In that case, the Court determined only that a liberty interest in avoiding particular conditions of confinement may arise from state policies or regulations.

law, and the All Writs Act to take whatever action necessary to protect the lives and health of all habeas petitioners in order to preserve their ability to appear in court and pursue their habeas petitions, is misguided and unavailing. See Motion for Preliminary Injunction at 20-21. Petitioner's theory would involve standardless and unbounded court oversight of detention conditions all in the name of preserving habeas petitioners' access to the courts, which is not and cannot be the appropriate legal standard. While respondents contend that conditions of confinement claims are not even properly cognizable in habeas,[21] that aside, any court oversight of conditions of confinement must be tethered to an appropriate legal standard, and, as argued above, the case law, even in the context of domestic incarceration of those possessed of constitutional rights, requires that prison conditions or care sink to the level of "deliberate indifference" to an inmate's health or well-being before a court may act to intervene in the treatment of inmates. See Neitzke v. Williams, 490 U.S. 319, 321 (1989). One other Judge of this Court recently rejected this alternative theory of amorphous court authority over the confinement conditions of a habeas petitioner. See Al Odah v. United States, Case No. 02-CV-

[21] Contrary to petitioners' assertions, whether conditions of confinement claims are even cognizable in habeas proceedings is subject to dispute. The Supreme Court and the D.C. Circuit have never squarely resolved whether challenges to conditions of confinement may be brought under habeas proceedings. See Bell v. Wolfish, 441 U.S. 520, 526 n.6 (1979) ("Thus, we leave for another day the question of the propriety of using a writ of habeas corpus to obtain review of the conditions of confinement, as distinct from the fact or length of confinement itself."); Brown v. Plaut, 131 F.3d 163, 168-69 (D.C. Cir. 1997) (acknowledging that habeas corpus might conceivably be used to challenge prison conditions, but indicating that requiring use of habeas corpus in such cases would extend the writ beyond its core). Courts in other jurisdictions that have squarely addressed the issue, however, have affirmatively held that conditions of confinement claims that do not seek accelerated release from custody are not within the scope of the writ of habeas corpus. See, e.g., Cochran v. Buss, 381 F.3d 637, 639 (7th Cir. 2004); Carson v. Johnson, 112 F.3d 818, 820-21 (5th Cir.1997); McIntosh v. United States Parole Commission, 115 F.3d 809, 811-12 (10th Cir. 1997); Badea v. Cox, 931 F.2d 573, 574 (9th Cir. 1991).

828 (CKK), Memorandum Opinion at 9-11 (dkt. no. 274) (Nov. 8, 2005) (attached as Exhibit 6) (rejecting argument that Court had authority to modify conditions of confinement under the habeas statute, the common law, and the All Writs Act, and finding the petitioner failed to satisfy the deliberate indifference standard). Accordingly, even if habeas courts have the authority to consider challenges to a detainee's confinement conditions, petitioner is not likely to succeed on the merits of his challenge to his conditions of confinement because he cannot demonstrate that the Guantanamo staff has been deliberately indifferent to his health or well-being.

Furthermore, numerous other Judges of this Court have rejected similar challenges by other Guantanamo detainees to their conditions of confinement, suggesting petitioner's claim is also not likely to succeed. In O.K. v. Bush, 344 F. Supp. 2d 44, 60-63 (D.D.C. 2004), Judge Bates rejected a detainee's request for an order requiring an independent medical examination and production of medical records finding that petitioner had not alleged a substantive violation of a legal right and had not offered sufficient competent evidence of medical neglect. Subsequently, in the same case, Judge Bates denied the detainee's request for a preliminary injunction against the alleged torture and other mistreatment of the detainee concluding that the detainee failed to make a sufficient showing of ongoing alleged abuse and noting that the Court was "not equipped or authorized to assume the broader roles of a congressional oversight committee or a superintendent of the operations of a military base." O.K. v. Bush, 377 F. Supp. 2d 102, 114 (D.D.C. 2005).

Several other Judges recently have denied preliminary injunction motions stemming from detainee hunger strikes which challenged various aspects of their confinement conditions. On September 28, 2005, Judge Oberdorfer denied motions for preliminary injunctions that were

filed by petitioners in a number of cases.[22] See El Banna v. Bush, --- F. Supp. 2d ---, 2005 WL 2375073 (D.D.C. 2005). In denying the motions, which contained a number of extraordinary allegations,[23] Judge Oberdorfer concluded that petitioners had not "carried their burden of proving an imminent threat by respondents to the health and life of the hunger-striking movants." Id. at *2. Two other Judges adopted the reasoning of Judge Oberdorfer in denying identical motions for preliminary injunctions. Hamlily v. Bush, Case No. 05-CV-763 (JDB), Order (Oct. 3, 2005) at 1 (attached as Exhibit 7) (denying an identical "motion for a preliminary injunction" concerning conditions of confinement and hunger strikes "[f]or the reasons stated by Judge Oberdorfer in his decision."); Sliti v. Bush, Case No. 05-CV-429 (RJL), Order (Oct. 27, 2005) at 2 (attached as Exhibit 8) (denying nearly identical motions "[f]or the reasons set forth in Judge Oberdorfer's decision . . . .").

Additional Judges of this Court have denied other preliminary injunction motions that sought some of the same forms of relief that petitioner seeks in this case. On October 5, 2005, Judge Urbina denied a motion to compel immediate visits to Guantanamo, telephonic access to detainees, medical updates, and discovery of medical records in five different cases. See, e.g., Al-Oshan v. Bush, Case No. 05-CV-520 (RMU), Memorandum Order (attached as Exhibit 9). On that same day, Judge Kennedy denied a similar motion for temporary restraining order

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[22] El-Banna v. Bush, Case No. 04-1144 (RWR), Deghayes v. Bush, Case No. 04-2215 (RMC), Aziz v. Bush, Case No. 05-492 (JR), Imran v. Bush, Case No. 05-764 (CKK), and Al Habashi v. Bush, Case No. 05-765. The motions were assigned to Judge Oberdorfer through orders in the relevant cases transferring the motions to Judge Oberdorfer for decision.

[23] The motions alleged, inter alia, that scorpions were present in detainees' food, that a mini-refrigerator was thrown at a detainee, that guard personnel engaged in various forms of violent mistreatment, and that medical personnel withheld treatment. See, e.g., El-Banna v. Bush, Case No. 04-1144 (RWR) (dkt. no. 153).

finding court intervention into the Guantanamo staff's response to hunger strikes to be inappropriate. Anam v. Bush, Case No. 04-CV-1194 (HHK), Memorandum and Order at 3 (attached as Exhibit 10). And on three different occasions, Judge Kollar-Kotelly has denied motions seeking court intervention into the treatment and confinement conditions of hunger-striking detainees. Al Odah v. Bush, Case No. 02-CV-828 (CKK), Memorandum Opinion (Sept. 30, 2005) (attached as Exhibit 5) (denying temporary restraining order seeking judicial oversight of medical treatment of detainees, including periodic reports on medical conditions, access to detainee medical records, and telephone calls with detainees' family and counsel); Memorandum Opinion (Nov. 8, 2005) (attached as Exhibit 10) (denying motion for preliminary injunction requesting same relief as prior temporary restraining order and finding that petitioners' failed to satisfy deliberate indifference test); Order (Nov. 10, 2005) (attached as Exhibit 11) (denying request for immediate medical evacuation of hunger-striking detainee, detailing extensive medical care provided to detainee, and concluding that petitioner's medical treatment at Guantanamo has not been marked by deliberate indifference). These recent decisions indicate that petitioner's similar challenge to his conditions of confinement is not likely to succeed; thus, his motion should be denied.

IV. THE RELIEF REQUESTED WOULD IMPOSE UNDUE BURDENS ON THE GOVERNMENT AND INJURE ITS INTERESTS.

Petitioner's lengthy list of requests for relief would impose substantial burdens on the Guantanamo staff and interfere with the appropriate operation of the detention facilities and the detention hospital. At the outset, as discussed supra, petitioner's requests are not grounded in a sufficient showing of irreparable harm or in the proper application of legal authority. Further, petitioner's requests for relief cannot be viewed in isolation or confined to just the petitioner at

issue in the present motion, because any order granting such forms of relief would likely prompt counsel for many detainees in other cases to demand the same remedies. Accordingly, providing petitioner with telephone access, family DVDs, additional reading materials, independent psychological exams, continuous medical updates and medical records to counsel, and the other relief requested would be a significant burden for both the military authorities and medical staff at Guantanamo.

Counsel's request for bi-weekly telephone calls between petitioner and counsel and petitioner and his family members would particularly impose substantial and unnecessary burdens on Guantanamo operations. With respect to family calls, petitioner's family members do not have security clearances, and such calls, therefore, would have to be monitored, with the burdens attendant thereto and the risk that such steps would not be entirely effective as a security measure. In addition, the logistics of arranging telephone conversations between the detainees and their counsel or family members are complicated and time-consuming. A detainee must be moved from his detention area in order to make a telephone call, and each movement of a detainee requires a number of logistical and security measures, including orders from military supervisors to move the detainee, arrangements for vehicular transport, and arrangements for multiple guards and support personnel for the movement of the detainee. Moreover, a detainee would have to be moved to a location not typically used for holding detainees even temporarily (e.g., an office in an administration building) where a secure classified information international telephone line would be available. The appropriate security procedures required to complete such a movement of a detainee and ensure force protection to Guantanamo personnel far exceed the typical movement of detainees required to accommodate counsel visits. As mentioned, such

burdens would be multiplied many times over in light of the numerous other detainees who would request similar telephone privileges. These incredibly burdensome requirements form an important part of the Protective Order's Revised Procedures for Counsel Access, stating the over-arching premise that "[r]equests for telephonic access to the detainee by counsel or other persons will not normally be approved." Id. Accordingly, petitioner's request for bi-weekly telephone access to counsel and family members is unduly burdensome and should be denied.

Family involvement with detainees, however, may be accommodated at Guantanamo in the form of written communications and direct mail. Despite these avenues of written communication, petitioner's counsel complain that their request to allow petitioner to view a DVD containing personal greetings from his family members was denied. See Motion for Preliminary Injunction at 23. There are sound reasons, however, for distinguishing between written forms of communication and video or other electronic media, including the burdens associated with reviewing, redacting, and showing video and audio submissions to detainees. In contrast to reading and reviewing written correspondence, the burdens associated with review of video messages include understanding and verifying the translation of the audio messages, which may be of varying quality and involve foreign-language speakers of different dialects. Additionally, unlike written communications, military personnel would be required to review the video's images to determine if there are any persons or images that are not permitted to be shared with petitioners. This task can be extremely complicated in cases of group videos consisting of multiple, purported family members who may be unknown to military sources, where codes and signs could be easily masked. Further, in the event objectionable content is found on video messages, images and audio cannot simply be redacted with a black marker.

Instead, personnel at Guantanamo would have to isolate the offending image or audio message, and redact it using specialized video editing software and computers. For these reasons, enabling even one petitioner to view a DVD from outsiders – let alone setting a precedent for countless other cases – would be an extremely onerous task for the Guantanamo staff. Cf. Abdah v. Bush, Case No. 05-CV-1254 (HHK), Order (June 15, 2005, dkt. no. 157) (denying petitioners' emergency motion for order allowing counsel to show petitioners video messages from their families) (attached hereto as Exhibit 12). As a result, respondents have indicated that any family communications should be through written means.[24]

Petitioner's additional request for access to his medical records relating to any suicide attempts and to his psychiatric condition, see Motion for Preliminary Injunction at 30, is an improper attempt to take discovery that would also be unduly burdensome and, in any event, is unnecessary. A petitioner in a habeas case is not entitled to discovery as a matter of right, but rather must first demonstrate good cause to conduct discovery and obtain court permission. See, e.g., Rich v. Calderon, 187 F.3d 1064, 1068 (9th Cir. 1999) (explaining that "[a] habeas petitioner does not enjoy the presumptive entitlement to discovery of a traditional civil litigant," and that "discovery is available only in the discretion of the court and for good cause shown.");

[24] While some detainees have been permitted to view DVDs from family members, those DVDs contained only family messages introducing counsel to the detainees, as limited in the Protective Order. See id. at 188 (indicating that with respect to non-legal materials, only "communications introducing counsel to the detainee" are permitted to be brought by counsel into meetings with detainees, and that the Commander, JTF-GTMO, "shall not unreasonably withhold approval for counsel to bring into a meeting with a detainee letters, tapes, or other communications introducing counsel to the detainee, if the government has first reviewed the communication and determined that sharing the communication with the detainee would not threaten the security of the United States"). Clearance of DVDs in such cases takes approximately three weeks in order to account for factors and issues discussed above in the text.

Al Odah v. United States, 329 F. Supp. 2d 106, 107-08 (D.D.C. 2004) (finding that Guantanamo detainee habeas petitioners must first seek leave of court before conducting discovery and denying leave to conduct discovery); cf. Rule 6(a) of the Rules Governing Section 2254 Cases[25] (requiring leave of court for good cause shown before discovery may be conducted). Petitioner has not requested leave of court to take discovery, and the Court should not permit him to evade this requirement simply by filing a motion for preliminary injunction. Discovery should be particularly disfavored in the present case, where petitioner is challenging the military's conduct of a war overseas and such discovery would interfere with military operations. See Hamdi v. Rumsfeld, 124 S. Ct. 2633, 2652 (2004) (plurality opinion) (adjuring lower courts generally to "proceed with the caution that is necessary" and to take only "prudent and incremental" steps when faced with novel issues pertaining to petitions for writs of habeas corpus from detainees involved in the current war on terror).

Furthermore, access to petitioner's medical records is not necessary, and petitioner cannot demonstrate good cause for their production, because as Dr. Edmondson has indicated, the Guantanamo medical staff, including trained psychiatrists and psychologists, carefully monitors the mental and physical health of petitioner and has provided attentive and thorough care to petitioner. See Edmondson Decl. ¶¶ 6-13. Clearly, the only purpose for counsel's request for petitioner's medical records is to set the stage to invite the Court to second-guess the medical treatment provided by the Guantanamo medical staff, which, as explained previously, is improper. Accordingly, there is no need for petitioner's counsel to access petitioner's medical

[25] The Rules Governing Section 2254 Cases can apply to other habeas corpus petitions, including habeas petitions, such as the present one, brought under 28 U.S.C. § 2241. See Rule 1(b) of the Rules Governing Section 2254 Cases.

records, and the request should be denied.[26]

Petitioner's requests for English/Arabic textbooks and children's books also should be denied because no legal basis exists for such a request. As discussed previously, petitioner is provided with appropriate reading materials and other opportunities for intellectual engagement. Thus, there is now showing to warrant injunctive relief compelling respondents to provide these materials to petitioner. In any event, materials, such as these, that are intended to teach or improve the English language skills of detainees could result in a security threat to the personnel at Guantanamo and to the United States should they be regularly distributed into the detainee population at Guantanamo, thereby improving detainees' ability to collect and use information against staff or the United States. Although respondents are aware that many of the detainees speak and understand English to varying degrees, nonetheless it is appropriate to limit the detainees' ability to collect information that may be used to harm United States military personnel.

Petitioner's request for a court order requiring the provision of unidentified religious texts and novels should also be denied. Petitioner has access to reading materials. Further, as acknowledged by petitioner, the military already has established an effective system for screening non-legal materials, including books, sent to detainees at Guantanamo. See In re Guantanamo Detainee Cases, 344 F. Supp. 2d 174, 186 (D.D.C. 2004). This system balances making such materials available to detainees while also addressing security concerns that certain

[26] In addition, as mentioned, the burden of producing medical records should not be assessed merely within the confines of the petitioner in the present case, because many other detainees are likely to request such records if the Court orders such relief here, thus multiplying the onus on the Guantanamo staff considerably.

books or materials could be used to, among other things, incite detainees, develop codes, or, as mentioned, develop English language skills that could allow detainees to obtain and exploit information at Guantanamo. As petitioner concedes, under this system, the military has approved many types of non-legal reading materials to be delivered to detainees. See Motion for Preliminary Injunction at 25. Accordingly, in the unique and unprecedented context of this case – involving the military detention of alien enemy combatants overseas during a time of war in the interests of national security – the military's judgment regarding the types of prohibited contraband at Guantanamo is entitled to considerable deference, and the Court should not intervene in these determinations. See Thornburgh v. Abbott, 490 U.S. 401, 404 (1989) (upholding Bureau of Prisons regulation that authorized prison warden to reject incoming publications on the grounds that the publications are "detrimental to the security, good order, or discipline of the institution"); Robinson v. Palmer, 619 F. Supp. 344, 347-48 (D.D.C. 1985), aff'd in relevant part, 841 F.2d 1151 (D.C. Cir. 1988) (explaining that the Court should defer to the reasonable judgment of prison officials as to the details of prison contraband policy because of the security objectives behind the contraband policy and the dangers posed by the introduction of contraband).[27]

Petitioner's additional requests for relief are all unnecessary and do not warrant court intervention. As explained above, petitioner is provided an opportunity to exercise for two hours per day, making that request for relief moot. See Bumgarner Decl. ¶ 7. Similarly, the lighting in petitioner's cell is, in fact, dimmed from the hours of 10:00 p.m. to 5:00 a.m., obviating any need

[27] In addition, any order requiring the provision of such materials to petitioner would undoubtedly cause many other detainees to request similar treatment, increasing the military's burden of reviewing such materials dramatically.

for relief. See Bumgarner Decl. ¶ 5. Further, petitioner's request for a court-ordered hour of interaction with his fellow detainees daily is also unwarranted. As noted in Col. Bumgarner's declaration, petitioner currently is able to communicate with other detainees from his cell, in addition to his frequent interactions with medical staff, guards, and interrogators. Id. ¶¶ 4, 6. Finally, ordering respondents to permit an "independent" medical professional to travel to Guantanamo to examine petitioner is unnecessary and would present security concerns. As Dr. Edmondson explains, petitioner has and continues to receive thorough and attentive mental care. See Edmondson Decl. ¶¶ 6-13. The only purpose of an independent examination would be to second-guess that care, which is not appropriate. See supra pp. 19-20. Further, accommodating a visit from an independent medical professional would first require that person to obtain a security clearance and would necessitate the same logistics that are associated with planning counsel visits, which are complicated and burdensome enough on their own without opening up a new dimension of visits by other types of professionals.

Finally, counsel's request to visit petitioner at Guantanamo is moot given that counsel was permitted to meet with petitioner during their recent visit to Guantanamo this past weekend. Counsel are also free to schedule additional visits to Guantanamo.

V. DENYING PETITIONER'S MOTION WOULD BEST SERVE THE PUBLIC INTEREST.

The public has a strong interest in assuring that the military operations and medical care provided at Guantanamo are not interrupted, overly burdened, and second-guessed by the unnecessary demands of petitioner pertaining to the particulars of his confinement conditions. Petitioner points to the public's interest in ensuring that petitioner's life and health is preserved. See Motion for Preliminary Injunction at 33. As demonstrated above, however, the Guantanamo

staff has taken and will continue to take appropriate and careful measures to preserve the life and health of petitioner, including providing mental health care to him. Accordingly, to avoid the unnecessary burdens imposed by petitioner's motion, the public interest would best be served if the Court denied the motion.

CONCLUSION

For the reasons stated above, respondents respectfully request that petitioner's motion for preliminary injunction be denied in all respects.

Dated: November 16, 2005

Respectfully submitted,

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