IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HISHAM SLITI, et al. Petitioners, v. GEORGE W. BUSH, et al., Respondents.	Civil Action No. 05-429 (RJL)

RESPONDENTS' MEMORANDUM IN OPPOSITION TO PETITIONER SAMI AL LAITHI'S MOTION FOR A PRELIMINARY INJUNCTION REGARDING THE PRODUCTION OF MEDICAL RECORDS AND MEDICAL TREATMENT

Despite the fact that the Court has stayed this case, petitioner Sami Al Laithi has filed a Motion For A Preliminary Injunction Requiring That Respondents Provide His Counsel With A Complete Copy Of His Own Medical Records And Cease Their Practice Of Intentional Medical Malpractice Against Him (dkt. no. 13) (Aug. 15, 2005) ("Motion for Preliminary Injunction"). In his Motion for Preliminary Injunction, petitioner seeks an order requiring the production of "a complete set of his medical records" and prohibiting respondents from allegedly "continuing to subject him to gross and intentional medical malpractice" while detained at the United States Naval Base at Guantanamo Bay, Cuba ("Guantanamo"). Motion for Preliminary Injunction at 1. Petitioner's motion should be denied in its entirety because petitioner has failed to provide a sufficient factual or legal basis to justify departure from the stay in this case for purposes of the requested relief. Discovery of petitioner's medical records is not warranted while the stay is in place and issues underlying the purported legal bases for petitioner's challenge to his medical treatment and his general conditions of confinement are being reviewed on appeal by the D.C.

Circuit in related cases involving other detainees. Further, the asserted factual basis for petitioner's complaints about the nature of his medical and other treatment at Guantanamo is insufficient to justify the Court's intrusion into the decisions of military authorities regarding the appropriate manner in which to treat and detain petitioner. Accordingly, petitioner's Motion for Preliminary Injunction is inappropriate, unsound, and should be denied.[1]

BACKGROUND

Petitioner is an Egyptian national who is currently detained at Guantanamo. He is one of several petitioners who initiated the above-captioned case by jointly filing a petition for writ of habeas corpus on March 2, 2005. Prior to the filing of their petition, this Court, on January 19, 2005, issued a Memorandum Opinion and Order granting respondents' motion to dismiss in two other Guantanamo detainee cases. See Khalid v. Bush, Boumediene v. Bush, Nos. 04-CV-1142 (RJL), 04-CV-1166 (RJL), 355 F. Supp. 2d 311 (D.D.C. 2005). This Court held 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. In reaching this decision, the Court concluded that aliens held at Guantanamo, that is, outside the sovereign territory of the United States, are not possessed of any constitutional rights. Furthermore, this Court determined that "the Court's role in reviewing the military's decision to capture and detain a non-resident alien is, and must be, highly circumscribed," and that the Court would "not probe into the factual basis for the

[1] The arguments presented herein also support a denial of petitioners' Motion For Preliminary Injunction under the traditional four-factor analysis requiring an assessment of (1) the movant's likelihood of success on the merits; (2) the possibility of irreparable harm to the movant without interim relief; (3) the harm to others should the injunction be granted; and (4) the public interest. See, e.g., Mova Pharm. Corp. v. Shalala, 140 F.3d 1060, 1066 (D.C. Cir. 1998). Petitioner, however, fails to explicitly address these factors in his Motion for Preliminary Injunction, but an extensive factor-by-factor analysis is not necessary to deny the motion.

petitioners' detention." Id. at 329. According to the Court, the Constitution allocates exercise of war powers "among Congress and the Executive, not the Judiciary," and such separation of powers concerns necessarily limit any role of the Court in reviewing challenges of non-resident aliens to their detention in the midst of ongoing armed conflict. Id. This Court 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. The Court explained that separation of powers principles prevent the judiciary from scrutinizing the conditions of the aliens' detention because such matters are the province of the Executive and Legislative branches. Id. at 328.

On January 31, 2005, Judge Green entered a Memorandum Opinion and Order in eleven of the pending Guantanamo habeas cases, denying in part and granting in part respondents' motion to dismiss or for judgment as a matter of law. See Memorandum Opinion Denying in Part and Granting in Part Respondents' Motion to Dismiss or for Judgment as a Matter of Law, No. 02-CV-0299, et al., In re Guantanamo Detainee Cases, 355 F. Supp. 2d 443 (D.D.C. 2005). In contrast to this Court's decision, Judge Green held 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. Id. at 463. Based on this decision, Judge Green concluded that the Combatant Status Review Tribunal ("CSRT") proceedings the military has used in assessing detainees' enemy combatant status do not satisfy procedural due process requirements. Id. at 465-78. Judge Green also adopted the reasoning of Judge Robertson in Hamdan v. Rumsfeld, 344 F. Supp. 2d 152, 165 (D.D.C. 2004), rev'd, 415 F.3d 33 (D.C. Cir. 2005), to conclude that Articles 4 and 5 of the Third Geneva Convention are

"self-executing" and can provide some petitioners – those held because of their relationship with the Taliban – with a judicially enforceable claim in a habeas action to a hearing consistent with Article 5 of the Geneva Convention to determine whether the detainee qualifies for "prisoner of war" protections, as defined by Article 4 of the Convention. Id. at 478-80.[2] Finally, Judge Green dismissed petitioners' remaining claims under the Sixth, Eighth, and Fourteenth Amendments, the Suspension Clause, other international treaties, and under Army Regulation 190-8, the Alien Tort Statute and the Administrative Procedure Act. Id. at 480-81.

On February 3, 2005, in response to a motion filed by respondents, Judge Green certified for interlocutory appeal her January 31, 2005 opinion and stayed proceedings in the eleven cases coordinated in In re Guantanamo Detainee Cases for all purposes pending the resolution of all appeals. Various petitioners in the eleven cases sought reconsideration of Judge Green's stay order, arguing that the Court should permit discovery and proceedings regarding complaints about detainee living conditions, similar to the charges asserted by petitioner in the present case, to go forward, but Judge Green denied the motion for reconsideration

> in light of the substantial resources that would be expended and the significant burdens that would be incurred should this litigation go forward, and . . . [in] recognition that a reversal of the Court's January 31, 2005 rulings would avoid the expenditure of such resources and incurrence of such burdens . . . .

See In re Guantanamo Detainee Cases, Order Denying Motion for Reconsideration of Order Granting Stay Pending Appeal (Feb. 7, 2005).

On February 9, 2005, pursuant to Judge Green's certification, respondents filed a petition

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[2] On July 15, 2005, the D.C. Circuit reversed the lower court's decision in Hamdan, and squarely held that "the 1949 Geneva Convention does not confer . . . a right to enforce its provisions in court." Hamdan v. Rumsfeld, 415 F.3d 33, 2005 WL 1653046, *6 (D.C. Cir. 2005).

for interlocutory appeal of the January 31, 2005 decision with the D.C. Circuit, see 28 U.S.C. § 1292(b), and requested that the appeal proceed on an expedited basis. Petitioners, in the coordinated cases, in responding to the petition for interlocutory appeal, filed their own cross-petition for interlocutory appeal. On March 10, 2005, the D.C. Circuit granted the petition and cross-petition for interlocutory appeal, and set an expedited briefing schedule that concluded on June 28, 2005.[3]

On April 7, 2005, this Court in the present case granted respondents' motion to stay and stayed this case pending resolution of all appeals of Judge Green's January 31, 2005 decision in In re Guantanamo Detainee Cases and of this Court's January 19, 2005 decision in Khalid v. Bush. See Order (dkt. no. 8) (Apr. 7, 2005).

On August 15, 2005, petitioner filed his current Motion For Preliminary Injunction (dkt. no. 13). In this motion, petitioner complains about the medical treatment he is receiving and his general conditions of confinement at Guantanamo. Petitioner alleges, among other things, that he broke two vertebrae while at Guantanamo, which has confined him to a wheelchair, and that the medical staff is incapable of providing him effective back surgery. See Motion for Preliminary Injunction at 4. Petitioner requests preliminary injunctive relief requiring the production of his medical records to his counsel, ordering that he be transferred from Camp V [4]

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[3] This appeal has been docketed with the Court of Appeals as case number 05-5064. Additionally, the D.C. Circuit set a briefing schedule for the appeal of this Court's decision dismissing all detainee claims in Khalid v. Bush, No. 04-CV-1142 (RJL) and Boumediene v. Bush, No. 04-CV-1166 (RJL), 355 F. Supp. 2d 311 (D.D.C. 2005), appeals docketed, Nos. 05-5062, 05-5063 (D.C. Cir. Mar. 2, 2005). Briefing concluded in these appeals on June 8, 2005. Consolidated oral argument in both cases is scheduled for September 8, 2005.

[4] Camp V is a state-of-the-art prison facility that features some cells equipped with overhanging sinks and grab bars on the toilets for detainees with physical disabilities. See

to what he characterizes as a medically suitable facility, and requiring the provision of competent medical care for his medical complaints. Id. at 29.

ARGUMENT

I. The Court Should Not Address Petitioner's Complaints About His Medical Treatment and His Conditions of Confinement While the Case is Stayed and the Asserted Legal Bases for His Claims Could be Resolved or Determined by the Appeals to the D.C. Circuit.

As an initial matter, the Court should not entertain petitioner's challenges to his medical treatment and other conditions of his confinement at Guantanamo when the legal bases for any such claims at all are involved in the appeal to the D.C. Circuit. Petitioner relies on the Fourth, Fifth, Eighth, and Fourteenth Amendments to the United States Constitution, as well as various other statutes and international treaties, to support his Motion for Preliminary Injunction. See Motion for Preliminary Injunction at 1. He ignores, however, the fact that appeals are presently pending in the D.C. Circuit that will address the existence and scope of these rights as applied to aliens detained at Guantanamo.[5]

As noted above, in Khalid v. Bush and Boumediene v. Bush, Nos. 04-CV-1142 (RJL),

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Kathleen T. Rhem, "Detainees Living in Varied Conditions at Guantanamo," American Forces Information Service, February 16, 2005 (attached as Exhibit A).

[5] To the extent petitioner asserts that his medical treatment and the manner in which he is confined violates the Eighth Amendment's prohibition against cruel and unusual punishment, such a claim lacks any merit. As mentioned, in Khalid, this Court determined that the non-resident aliens detained at Guantanamo have no cognizable constitutional rights whatsoever, thus precluding any claim under the Eighth Amendment. Khalid, 355 F. Supp. 2d at 321. And Judge Green rejected petitioners' Eighth Amendment claims because the Eighth Amendment applies only after an individual is convicted of a crime, and Mr. Al Laithi has not been. See In re Guantanamo Detainee Cases, 355 F. Supp. 2d at 480-81. In any event, whether Guantanamo detainees have any rights under the Eighth Amendment is an issue currently on appeal before the D.C. Circuit.

04-CV-1166 (RJL), 355 F. Supp. 2d 311 (D.D.C. 2005), this Court held 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. In reaching this decision, the Court concluded that aliens held at Guantanamo "possess no cognizable constitutional rights" including rights under the Fifth, Sixth, and Eighth Amendments. Id. at 321. Thus, this Court concluded that petitioners "lack any viable theory under the United States Constitution to challenge the lawfulness of their continued detention at Guantanamo." Id. at 323. This Court also found that petitioners failed to identify any United States law or international treaty that could serve as a basis for the issuance of a writ of habeas corpus. Id. at 324-27.

Conversely, with respect to the issue of constitutional rights, Judge Green, in In re Guantanamo Detainee Cases, 355 F. Supp.2d 443 (D.D.C. 2005), found only 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. Id. at 463.[6] As mentioned, Judge Green also adopted the reasoning of Judge Robertson in Hamdan v. Rumsfeld, 344 F. Supp.2d 152, 165 (D.D.C. 2004), rev'd, 415 F.3d 33 (D.C. Cir. 2005), to conclude that Articles 4 and 5 of the Third Geneva Convention are "self-executing" and can provide some petitioners – only those held because of their relationship with the Taliban – with a judicially enforceable claim in a habeas action to a hearing consistent with Article 5 of the Third Geneva Convention to determine whether the detainee qualifies for "prisoner of war"

[6] Because Judge Green held that the Guantanamo detainees have a Fifth Amendment right merely to challenge the fact of their confinement, her decision does not directly authorize detainees to contest the conditions of their confinement.

protections, as defined by Article 4 of the Convention. Id. at 478-80.[7] Judge Green, however, dismissed the detainees' remaining claims under the Sixth, Eighth, and Fourteenth Amendments, the Suspension Clause, other international treaties, and under Army Regulation 190-8, the Alien Tort Statute and the Administrative Procedure Act. Id. at 480-81.

The D.C. Circuit granted interlocutory appeal in Judge Green's case and will determine in that case and in the appeal of this Court's decisions in Khalid and Boumediene, on an expedited basis, whether and to what extent detainees at Guantanamo have any rights under the United States Constitution, statutory law, or international treaties – the legal bases asserted by petitioner in his present motion. In light of the potential for the D.C. Circuit's ruling to moot or at least significantly impact the legal bases for the present motion, the likelihood that any decision by this Court regarding petitioner's right to challenge the nature of his confinement and medical treatment would have to be re-litigated or revisited once the Court of Appeals provides guidance on these legal issues, and for the other reasons discussed infra, the Court should not consider petitioner's current challenge to his medical treatment and other confinement conditions at Guantanamo until the appeals are resolved.[8] Discovery of petitioner's medical records would

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[7] As mentioned, the D.C. Circuit reversed Judge Robertson's decision in Hamdan, finding instead that the Third Geneva Convention is not privately enforceable in court. Hamdan v. Rumsfeld, 415 F.3d 33, 2005 WL 1653046, *6 (D.C. Cir. 2005).

[8] Other Guantanamo detainees have attempted unsuccessfully to raise similar challenges to their treatment and conditions of confinement. 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 his alleged abuse and noting that the Court was "not equipped or authorized to assume the broader roles of a congressional

also be inappropriate in light of the stay pending the appeals.[9] Accordingly, the Court should deny petitioner's Motion for Preliminary Injunction.

II. The Factual Record Does Not Warrant the Court's Involvement in the Medical Care or Other Treatment Provided to Petitioner.

Regardless of the pendency of the appeals involving the core legal bases for petitioner's motion, the record here does not warrant the Court's involvement in petitioner's medical

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oversight committee or a superintendent of the operations of a military base." O.K. v. Bush, 377 F. Supp. 2d 102, 2005 WL 1621343, *9-*11 (D.D.C. 2005). In Al Odah, et al. v. United States, Case No. 02-0828 (CKK), Judge Green, acting as coordinating judge, twice rejected petitioners' requests to assert claims objecting to their confinement conditions in light of the appeals pending in the D.C. Circuit and the fact that the case was stayed. See Al Odah, et al., 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"). The Al Odah petitioners' third attempt to litigate their conditions of confinement claims is currently pending. See Plaintiffs-Petitioners' Motion For a Preliminary Injunction and Provisional Motion to Modify Stay Pending Appeals, filed Mar. 11, 2005, in Al Odah, et al.. And in Paracha v. Bush, Case No. 04-2022 (PLF), the Court denied petitioner's motion for a preliminary injunction which, in part, challenged his conditions of confinement. See Memorandum Opinion and Order (dkt. no. 58) (June 16, 2005). The Court determined that petitioner had not set forth sufficient competent evidence of his alleged mistreatment to establish that he would suffer irreparable harm without an injunction. See id. at 3.

[9] Furthermore, petitioner has not obtained leave of court to seek discovery, as required in habeas cases. 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."); 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 (requiring leave of court for good cause shown before discovery may be conducted). Additionally, that petitioner's counsel purports to have requested petitioner's medical records under the Freedom of Information Act further demonstrates the inappropriateness of discovery at this stage of the proceedings. See Motion for Preliminary Injunction at 2 n.2. (Respondents, however, have no record of such a request ever having been made).

treatment or other conditions of his confinement; that is, Petitioner has not made a sufficient showing of irreparable harm. Even if petitioner were possessed of constitutional rights, the showing required of him would be demanding. See infra Section III. B. (indicating that petitioner likely would have to demonstrate, at a minimum, that military personnel were deliberately indifferent to his health or safety). Petitioner, however, relies on incompetent and unpersuasive evidence that, for the most part, does not pertain to his own medical treatment and, in any event, is refuted by sworn and compelling declarations from military authorities with firsthand knowledge of the medical care and other treatment provided to detainees at Guantanamo.

Petitioner's specific allegations of his own purported medical mistreatment consist of his assertions that he had an object shoved up his rectum, that a guard at the hospital slammed him on the ground and stomped on his back, resulting in two broken vertebrae and confining him to a wheelchair, that he has not received necessary back surgery or physical therapy, and that he has untreated infections. See Motion for Preliminary Injunction at 3-4. The only support offered by petitioner to substantiate these particular claims, however, consists of his own unsworn statements listing some of these allegations, see Appendix B and Appendix C to Motion for Preliminary Injunction,[10] and one paragraph from his counsel's memorandum purporting to contain the unsworn statements of another Guantanamo petitioner, see Appendix D to Motion for Preliminary Injunction at 6. Respondents vehemently dispute these conclusory statements,

[10] Petitioner's earlier version of his Motion for Preliminary Injunction that was initially submitted to the CSOs included Appendices B and C. Petitioner has not, however, included Appendices B and C in his version of his Motion for Preliminary Injunction that was filed with the Court.

which generally lack specificity in details, dates, and times, and, in any event, do not warrant lifting the stay to provide the injunctive relief requested by petitioner.

Petitioner also includes a medical complaint to the Medical Board of California submitted by counsel for four other detainees asserting that Dr. John S. Edmondson, the Commander of the U.S. Navy Hospital at Guantanamo, and the medical staff under his supervision have engaged in unprofessional conduct and violated medical ethics in their treatment of these four detainees. See Appendix A to Motion for Preliminary Injunction.[11] The charges made in this complaint, however, are unsworn and conclusory statements that fail to provide sufficient details of the alleged incidents they describe. And even if these allegations were true, they pertain only to the four detainees making the complaint; they do not substantiate any of Petitioner Al Laithi's particular complaints regarding his own medical care. Similarly, counsel's memo containing his notes from an interview with another detainee consists of unsworn statements that, save for one paragraph, have nothing to do with Petitioner Al Laithi's own allegations. See Appendix D to Motion for Preliminary Injunction. Moreover, petitioner's list of other detainees allegedly subjected to mistreatment at Guantanamo also fails to be supported by competent and compelling evidence. See Motion for Preliminary Injunction at 6-26. The only sources offered in support of these myriad allegations are unidentified "memos" presumably drafted by petitioner's counsel. See id. at notes 6, 8-18. These complaints are also entirely distinct from petitioner's particular assertions of medical mistreatment and do not

[11] As with Appendices B and C, Petitioner's earlier version of his Motion for Preliminary Injunction that was submitted to the CSOs also included Appendix A. Petitioner has not, however, included Appendix A in his version of his Motion for Preliminary Injunction that was filed with the Court.

amount to sufficiently compelling evidence on which to afford petitioner the injunctive relief he seeks. In sum, the factual support for petitioner's allegations of medical mistreatment amounts to mere storytelling based on incompetent evidence that, for the most part, does not pertain to petitioner himself.[12]

Other competent sources of information, however, belie many of the assertions in petitioner's motion. Contrary to petitioner's allegations, detainees at Guantanamo receive extensive, high-level medical care, as noted in the sworn declaration of Dr. John S. Edmondson, the Commander of the U.S. Navy Hospital at Guantanamo. See Declaration of Dr. John S. Edmondson ("Edmondson Decl.," attached hereto as Exhibit B; originally submitted in O.K. v. Bush, 04-cv-01136).[13] The Guantanamo detention center hospital is an 18-bed facility with a medical staff of seventy consisting of highly trained doctors, nurses, technicians, and administrative personnel. Id. ¶ 3. Detainees receive a comprehensive physical exam on their arrival and can request medical assistance at any time by telling a guard or by informing medical personnel who make rounds to the cellblocks every other day. Id. ¶ 5. From just January, 2004 to November, 2004, the hospital staff conducted over 17,000 outpatient visits and has treated the detainees for a wide variety of medical conditions including hepatitis, diabetes, and tuberculosis.

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[12] Respondents deny these various allegations but, given the absence of details and the fact that many of the allegations do not pertain to petitioner in this case, responses to each individual allegation here are unwarranted. Respondents, however, reserve the right to respond to such allegations with greater specificity should the Court deem it necessary.

[13] The Edmondson Declaration is the version filed on the public record in O.K. v. Bush, which has health information specific to petitioner O.K. redacted. See O.K. v. Bush, Respondents' Motion to Designate as "Protected Information" Certain Information in Memorandum of Points and Authorities in Opposition to Petitioner's Application for Preliminary Injunction and Two Declarations in Support Thereof (dkt. no. 116) (Apr. 13, 2005).

Id. ¶¶ 5, 7. The staff has also provided prosthetic limbs to some detainees and has removed cancerous tumors from several of them. Kathleen T. Rhem, "Guantanamo Detainees Receiving 'First Rate' Medical Care," American Forces Information Service, February 18, 2005 (attached as Exhibit C). The detention center hospital is also supported by a twenty-one member Behavioral Health Service (BHS) staff, including a board-certified psychiatrist and a Ph.D. psychologist, to address any psychological issues presented by the detainees.[14] Edmondson Decl. ¶ 4. In sum, detainees, such as petitioner, receive high quality medical care that is comparable to the care provided to active duty members of the armed forces. Id. ¶ 8; see also O.K. v. Bush, 344 F. Supp. 2d 44, 62 (D.D.C. 2004) (finding that Dr. Edmondson's declaration describes "in substantial detail a high level of medical care" provided at the Guantanamo detention center medical facility and noting that newspaper reports corroborate that description).

Additionally, compelling evidence indicates that the Military's mission is to treat all Guantanamo detainees, including petitioner, humanely. See Declaration of John A. Hadjis ("Hadjis Decl.") ¶ 2 (attached as Exhibit D) (originally submitted in O.K. v. Bush, Case No. 04-1136 (JDB)).[15] To that end, all detainees receive adequate shelter, food, water, and medical care at all times. Id. ¶ 3. Moreover, mistreatment of detainees is not permitted, and the Military

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[14] Petitioner's allegation that the Guantanamo medical staff abuses the detainees psychologically as part of the interrogation process, see Motion for Preliminary Injunction at 15, is completely unfounded and inaccurate. Contrary to petitioner's assertion, the BHS staff is entirely distinct and separate from the Behavioral Science Consultation Teams (BSCT) that petitioner alleges are involved in the interrogation process. Moreover, medical care is not affected by a detainee's degree of cooperation in interrogations, and medical records of detainees are not available to interrogators. Edmondson Decl. ¶ 10.

[15] Colonel Hadjis was the Chief of Staff of the Joint Task Force-Guantanamo Bay, Guantanamo Bay, Cuba and oversaw the Joint Detention Operations Group at Guantanamo at the time he executed his declaration. Hadjis Decl. ¶ 1.

employs standard operating procedures and training programs to ensure that detainees are not abused and that any violations of those procedures are investigated. Id. ¶ 2.

Courts have found the foregoing declarations to be more reliable and persuasive than various unsworn statements from detainees and other assorted press articles and, as a result, have denied similar requests for injunctive relief regarding medical care and other treatment of detainees at Guantanamo. In particular, in O.K. v. Bush, 344 F. Supp. 2d 44, 60-63 (D.D.C. 2004), Judge Bates rejected a detainee's similar request for an order requiring an independent medical examination and production of his medical records finding that petitioner had not offered sufficient competent evidence of medical neglect, especially in light of the sworn declaration of Dr. Edmondson detailing the extensive medical care afforded to detainees at Guantanamo. See also Paracha v. Bush, Case No. 04-2022 (PLF), Memorandum Opinion and Order at 3 (dkt. no. 58) (June 16, 2005) (denying petitioner's motion for preliminary injunction challenging, in part, his conditions of confinement, due to lack of competent evidence of his alleged mistreatment).

As demonstrated, petitioner has failed to make a sufficient showing of irreparable harm or to offer any competent and compelling evidence that his physical or mental condition warrants departure from the stay in this case or compels the granting of his request for the extraordinary relief of a preliminary injunction. 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) (emphasis in original). Petitioner has failed to make an appropriate showing here.

III. The Court Should Not Grant Petitioner's Requested Relief When He Cannot Demonstrate a Likelihood of Success and the Requested Relief Would Impose Significant Harms on the Military and the Public Interest.

Petitioner's request for a preliminary injunction regarding his medical care and other general conditions of confinement also should be denied because petitioner cannot demonstrate a likelihood of success on such claims generally and because the requested relief would impose significant harms on the government and the public interest by improperly interfering with the judgment of the Military regarding the confinement of wartime detainees.

A. Whether Wartime Detainees of the Military Can Assert Claims Challenging Their Medical Treatment and Other Conditions of Confinement and What Standard Would Govern Such Claims, if Permitted, are Unsettled Questions.

Neither this Court in Khalid nor Judge Green in In re Guantanamo Detainee Cases directly addressed conditions of confinement claims asserted by detainees or decided what legal standard should govern them. In fact, because no court has ever determined that detainees of the Military can even bring conditions of confinement claims, no court has determined what legal standard should be applied to evaluate such claims brought by detainees in the custody of the Military. 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

[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

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 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).

Neither of these two standards, however, clearly applies to the Guantanamo detainees and, in any event, would not provide petitioner with a likelihood of success on his claim. Petitioner has not been convicted of any crime, thus he cannot rely on the Eighth Amendment as

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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).

[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).

a basis for his conditions of confinement claim. See In re Guantanamo Detainee Cases, 355 F. Supp. 2d at 465-78 (dismissing Eighth Amendment claims). Similarly, Petitioner is not a "pretrial detainee," as defined by the Supreme Court, because he has not been charged with a crime, nor is he 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). 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.[18] 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 (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."). The uncertainty of the law in this area is illustrated by the fact that one Judge of this Court who has addressed the issue of a condition of confinement claim by a Guantanamo detainee reserved the question whether "the 'deliberate indifference' doctrine is the correct standard for any constitutional claims that petitioners might raise in this case." O.K. v. Bush, 344 F. Supp.2d 44, 60-63 & n.23 (D.D.C. 2004) (Bates, J.) ("Without concluding that the 'deliberate indifference' doctrine applies" to challenges regarding inadequate medical care, "the Court will draw on this well-developed body of law to guide its analysis"). As explained below,

[18] Even in the cases of detainees who have been found to no longer be enemy combatants, their continued detention is not for any criminal justice purpose, but rather is an incident of war that is conducted on an interim basis as part of the military's necessary authority to wind up their detention in an orderly fashion while arrangements can be made for the proper resettlement or repatriation of such detainees.

petitioner cannot demonstrate a likelihood of success even under that standard in this context.

B. Petitioner's Motion Does Not Justify Displacement of the Judgment of the Military Authorities at Guantanamo Regarding His Medical Care and the General Manner in which He is Detained.

Petitioner is asking the Court to second-guess the decisions of the Military regarding his medical treatment and the general manner in which he is detained. Even in the penal context, however, prison administrators are entitled to great deference regarding the ways in which they manage prisons and the means used to care for and detain prisoners. The Supreme Court has stated 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 has admonished lower courts to avoid becoming "enmeshed in the minutiae of prison operations." Bell v. Wolfish, 441 U.S. 520, 548, 562 (1979). 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 into the treatment of inmates in the traditional penal prison setting. See Neitzke v. Williams, 490 U.S. 319, 321 (1989). Accordingly, the Supreme Court has directed that prison administrators "should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security." Wolfish, 441 U.S. at 547; see also 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."). These same principles counsel the Court to decline petitioner's request

to entangle itself in unspecified ways[19] in the particulars of his medical treatment and the manner in which he is confined at the Guantanamo detention center. Indeed, in light of the fact that petitioner is challenging the practices of a military detention center during a time of war, separation of powers principles may require satisfaction of an even more stringent standard before judicial intervention is warranted than in the penal context. 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"); id. at 2640 (noting that capture and detention of suspected combatants is an "important incident of war"); Ludecke v. Watkins, 335 U.S. 160, 170 (1948) (finding that determination of state of war and status of individual as enemy alien are "matters of political judgment for which judges have neither technical competence nor official responsibility"); cf. Hirota v. MacArthur, 338 U.S. 197, 215 (1949) (Douglas, J., concurring) (stating that "the capture and control of those who were responsible for the Pearl Harbor incident was a political question on which the President as Commander-in-Chief, and as spokesman for the nation in foreign affairs, had the final say."); 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).[20] Petitioner, however, has not satisfied even the

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[19] Petitioner's motion requests only that "he receive[] competent medical care" and that he be moved "to a medically suitable facility." Motion For Preliminary Injunction at 29.

[20] This Court also recognized that even if a detainee is the subject of mistreatment, the authority to remedy such mistreatment "should remain with the military and the military judicial process." Khalid, 355 F. Supp. 2d at 324 n.18.

"deliberate indifference" standard that would apply in the penal context. The record demonstrates that petitioner is detained in a manner in which he receives adequate food, shelter, water, hygiene opportunities, and medical care. See supra Section II. Accordingly, petitioner's request for a preliminary injunction should be denied.

CONCLUSION

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

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Respectfully submitted,

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