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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 WALKER BUSH, *ET AL.*,	)	
	)	
Respondents.	)	
	)	

MEMORANDUM OF LAW IN SUPPORT OF
MOTION FOR TEMPORARY RESTRAINING ORDER

Pursuant to Rule 65 of the Federal Rules of Civil Procedure, the All Writs Act, 28 U.S.C. § 1651, and the federal *habeas* statute, 28 U.S.C. § 2241, Petitioners[1] respectfully move for a temporary restraining order directing Respondents to permit counsel for Petitioners to meet with Petitioners at medical facilities at the U.S. Naval Base in Guantánamo Bay, Cuba ("Guantánamo") if Petitioners are required to be at such facilities due to their medical conditions during counsel's impending visit to Guantánamo.

There is reason to believe that certain Petitioners are participating in a hunger strike that is presently occurring at Guantánamo because certain Petitioners took part in a hunger strike undertaken by many Guantánamo detainees in June and July 2005, and informed counsel that they would participate in subsequent hunger strikes. Petitioners' counsel cannot confirm

[1] The Petitioners who filed the Amended Petition in this action were six detainees of Bahraini citizenship as well as the detainees' next friends. Subsequent references to "Petitioners" in this memorandum refer to the detainees only.

whether Petitioners are presently participating in the hunger strike that Respondents acknowledge is ongoing at Guantánamo because Respondents refuse to provide any relevant information regarding Petitioners. There are no alternate means available for securing such information.

There is also reason to believe that at least some Petitioners may be hospitalized during counsel's upcoming visit to Guantánamo as a result of participating in the ongoing hunger strike. Petitioners' counsel visited Guantánamo just after the conclusion of the June/July hunger strike. On the first day of this visit, military personnel at Guantánamo informed counsel that one Petitioner, Isa Almurbati, would not be brought to Camp Echo (where counsel visits are held) because he was hospitalized due to his participation in the hunger strike that had just concluded. Military personnel did not permit counsel to visit with Mr. Almurbati on that day. When the military released Mr. Almurbati from the hospital and brought him to Camp Echo to meet with counsel the following day, he was in poor physical condition. Other Petitioners informed counsel that they had participated in the June/July hunger strike and had been taken to the detainee hospital for medical treatment as well.

Petitioners' counsel is scheduled to visit Guantánamo beginning on October 13, 2005. As such, counsel asked Respondents whether Petitioners are participating in the hunger strike that is presently ongoing. Counsel also asked whether any Petitioners who may be participating in the hunger strike are hospitalized and, consequently, might not be able to visit with counsel at Camp Echo. Respondents refused to provide this information.

Respondents also refused, without explanation, the request by Petitioners' counsel to meet with Petitioners in medical facilities at Guantánamo if Petitioners' medical conditions

require that they be at such facilities during counsel's upcoming visit. To the extent that Respondents might claim that this refusal is predicated upon supposed security or logistical concerns, such claim should be treated with skepticism, particularly considering that Respondents have allowed and encouraged members of the media and congressional delegations to visit the detainee hospital. In light of the positions taken by Respondents, Petitioners have no choice but to seek the very limited relief requested herein to ensure that their access to counsel is not unreasonably impeded.

STATEMENT OF FACTS

Petitioners are six Bahraini nationals who are being detained as "enemy combatants" at Guantánamo. As detailed in their amended *habeas* petition filed on or about August 11, 2004, all deny being "enemy combatants" and contend that they are being detained in violation of the Constitution, treaties and laws of the United States.

I. The June/July 2005 Hunger Strike

Counsel for Petitioners visited Guantánamo to meet with Petitioners from July 29, 2005 through July 31, 2005. Declaration of Joshua Colangelo-Bryan ("Colangelo-Bryan Decl.") ¶ 2. On July 29, 2005, counsel were informed by U.S. military personnel at Camp Echo that Petitioner Isa Almurbati was hospitalized and would not be brought to Camp Echo that day. Colangelo-Bryan Decl. ¶ 3. Military personnel provided no additional information regarding Mr. Almurbati's condition and made no representations as to if or when Mr. Almurbati would be released from the hospital and brought to Camp Echo. Colangelo-Bryan Decl. ¶ 4. As such, counsel was prevented from meeting with Mr. Almurbati on July 29, 2005. Colangelo-Bryan Decl. ¶ 5.

On July 29, 2005, counsel met with Petitioner Jum'ah Al Dossari. Mr. Al Dossari reported that a hunger strike had taken place between June 20, 2005 and July 27, 2005 at Guantánamo. According to Mr. Al Dossari, the hunger strike had been undertaken by the detainees to protest their indefinite detention without fair hearings, as well as to protest the conditions of their confinement, including interference with religious practices, inadequate medical care, substandard food and general abuse (Colangelo-Bryan Decl. ¶ 6); such abuse has been well documented by U.S. military and law enforcement personnel working at Guantánamo.

Mr. Al Dossari participated in the hunger strike that had concluded on July 27, 2005, and had been hospitalized and fed intravenously as a result; counsel observed numerous markings on Mr. Al Dossari's arm between the forearm and bicep that Mr. Al Dossari explained had been caused by needles that were inserted to administer intravenous feedings. Mr. Al Dossari reported that his blood pressure had become dangerously low during the hunger strike. Colangelo-Bryan Decl. ¶ 8.

Mr. Al Dossari informed counsel that the detainees had halted the hunger strike based upon promises by military officials to address detainee grievances. Mr. Al Dossari reported that if the military did not fulfill its promises, the detainees would initiate a subsequent hunger strike of far more severe proportions. Colangelo-Bryan Decl. ¶ 7. Mr. Al Dossari pledged that he would participate in any hunger strike initiated following the end of the June/July hunger strike. Colangelo-Bryan Decl. ¶ 9.

Also on July 29, 2005, Petitioners' counsel met with Petitioner Adel Kamel Abdulla Hajee. Mr. Hajee reported that he too had participated in the June/July hunger strike, and that

during this hunger strike, he had been taken to the detainee hospital for medical care. Colangelo-Bryan Decl. ¶ 10.

On July 30, 2005, military personnel brought Mr. Almurbati from the hospital to an interview cell in Camp Echo. Mr. Almurbati was gaunt and his eyes were sunken. He lay on the cement slab that serves as a sleeping area in Camp Echo cells. Mr. Almurbati did not move from this slab. He spoke only a few words. Colangelo-Bryan Decl. ¶ 12.

II. The Current Hunger Strike

U.S. military personnel have acknowledged that a large number of detainees at Guantánamo are participating presently in a hunger strike. According to military personnel, a number of detainees have been hospitalized due to their participation in the hunger strike, and have been forcibly fed. *See* Mike Mount, *Hunger Strike at Guantánamo Grows,* Sept. 13, 2005, http:// www.cnn.com (attached as Exhibit A to the Colangelo-Bryan Decl.) (news account containing statements from military officials); *see also* Declaration of Major General Jay W. Hood (attached as Exhibit C to the Colangelo-Bryan Decl.) (describing practice of hospitalizing detainees who are on hunger strike).

III. Petitioners' Counsel's Upcoming Visit and Requests for Information and Access

Petitioners' counsel is scheduled to visit Guantánamo beginning on October 13, 2005. Colangelo-Bryan Decl. ¶ 16. In light of the fact that certain Petitioners were hospitalized during the June/July hunger strike, and that a hunger strike in which certain Petitioners pledged to participate is ongoing at Guantánamo, Petitioners' counsel requested information from Respondents regarding Petitioners. Specifically, Petitioners' counsel inquired whether any Petitioner is participating in the current hunger strike, and whether any Petitioner who is engaged

in the hunger strike has received medical treatment, including while being hospitalized. Colangelo-Bryan Decl. ¶ 14. Respondents refused to provide any information in response to these requests. Colangelo-Bryan Decl. ¶ 15.

Petitioners' counsel have no reasonable alternate means of ascertaining whether Petitioners are participating in the hunger strike or, if any Petitioner is so participating, whether such Petitioner has been hospitalized. While the Revised Procedures for Counsel Access to Detainees at the U.S. Naval Base in Guantánamo Bay, Cuba (the "Access Procedures") (entered as *In re Guantánamo Detainee Cases,* 344 F. Supp. 2d 174 (D.D.C. 2004)), allow for written correspondence between counsel and detainees, it is not feasible to communicate with Petitioners via the mail. Not only can it take *months* for letters to be delivered in the normal course, but personnel at Guantánamo do not even follow proper procedures with respect to detainee mail, causing additional delays and raising questions as to whether all correspondence is actually delivered at all. Indeed, Petitioners' counsel was recently informed by the Court Security Officer in this case that letters from Petitioners to counsel (as well as from many other detainees to their counsel) had been mistakenly mailed by personnel at Guantánamo to an office in the Department of Homeland Security, rather than to the Court Security Officer. Certain of these letters were held in the Department of Homeland Security for nearly *three months* before Petitioners' counsel were even notified of the letters' existence. Colangelo-Bryan Decl. ¶ 20. Further, pursuant to the Access Procedures, telephonic access to detainees by counsel is not normally approved. Access Procedures VIII (A).

In light of the fact that Petitioners' counsel were not permitted to meet with one Petitioner who was hospitalized during counsel's last visit to Guantánamo, and the fact that

Respondents refuse to provide any information regarding whether Petitioners are presently hospitalized, counsel for Petitioners requested permission to meet with Petitioners, if necessary, in medical facilities where Petitioners might be receiving treatment during counsel's upcoming visit. Respondents, without explanation, denied this request. Colangelo-Bryan Decl. ¶ 17. Strikingly, Respondents have allowed members of the media and congressional delegations to visit the detainee hospital. Colangelo-Bryan Decl. ¶ 18.

ARGUMENT

The Court may issue preliminary injunctive relief, including a temporary restraining order, pursuant to Rule 65 of the Federal Rules of Civil Procedure to ensure that Petitioners have proper access to counsel and, resultantly, the Court. In considering a request for preliminary injunctive relief, the Court weighs four factors: (1) whether Petitioners would suffer irreparable injury if an injunction were not granted; (2) whether Petitioners have a substantial likelihood of success on the merits; (3) whether an injunction would substantially injure other interested parties; and (4) whether the grant of an injunction would further the public interest. *See Al-Fayed v. CIA,* 254 F.3d 300, 303 (D.C. Cir. 2001). "These factors interrelate on a sliding scale and must be balanced against each other." *Serono Labs, Inc. v. Shalala,* 158 F.3d 1313, 1318 (D.C. Cir. 1998). "If the arguments for one factor are particularly strong, an injunction may issue even if the arguments in other areas are rather weak." *CityFed Fin. Corp. v. Office of Thrift Supervision,* 58 F.3d 738, 747 (D.C. Cir. 1995).

When the balance of hardships tips decidedly toward the movant, ""it will ordinarily be enough that the [movant] has raised questions going to the merits so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation and thus for more deliberative

investigation.'" *Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc.,* 559 F.2d 841, 844 (D.C. Cir. 1977) (quoting *Hamilton Watch Co. v. Benrus Watch Co.,* 206 F.2d 738, 740 (2d Cir. 1953)).

I. Petitioners Make the Requisite Showing

There is a substantial likelihood of success on the merits and Petitioners will suffer irreparable injury if injunctive relief is denied.

A. Petitioners Have a Right to Counsel and Right to Access the Courts That May Not Be Unreasonably Restricted

Petitioners have a right to counsel. *Al-Odah v. United States,* 346 F. Supp. 2d 1, 5 (D.D.C. 2004). Incident to the right to counsel, naturally, is Petitioners' right to have access to their counsel. *In re Guantánamo,* 344 F. Supp. 2d 174 (Access Procedures establishing mechanisms by which counsel may visit detainees).

As the Court made plain in *Al-Odah*, "the Government is not entitled to unilaterally impose procedures that abrogate the attorney-client relationship." *Al-Odah,* 346 F. Supp. 2d at 5. The Court further held that Respondents may not vitiate Petitioners' right to counsel by imposing restrictions on counsel's access that "inappropriately burden" the attorney-client relationship, *id.* at 9, and that the Court has authority "to craft the procedures necessary" to enforce Petitioners' right to counsel so Petitioners may "present the facts surrounding their confinement to the Court." *Id.* at 7.

The petitioners also have a right to access the courts. *Rasul v. Bush,* 124 S. Ct. 2686, 2696, 542 U.S. 466 (2004). The right to counsel and the right of access to the courts are interconnected because the assistance of counsel "can be a means of accessing the courts." *See Benjamin v. Fraser*, 264 F.3d 175, 186 (2d Cir. 2001) (finding that pretrial detainees need access

to the courts and counsel); *see also Bourdon v. Loughren*, 386 F.3d 88, 93 (2d Cir. 2004) (confirming that "the appointment of counsel can be a valid means of satisfying a prisoner's right of access to the courts"). Unreasonable interference with the right to consult counsel before trial "may be more damaging than denial of counsel during the trial itself." *Benjamin*, 264 F.3d at 185; *see also Johnson-El v. Schoemehl,* 878 F.2d 1043, 1051 (8th Cir. 1989) (stating that the ultimate fairness of pretrial detainees' trial can be compromised if detainees' right to effective communication with attorneys is "inadequately respected during pre-trial confinement").

B. Respondents' Blanket Refusal to Permit Access to Hospitalized Petitioners Unreasonably Restricts Petitioners' Right to Counsel and Right of Access to the Courts

Here, Respondents' unilaterally created restrictions on counsel visits may well prevent some (or all) Petitioners from meeting with their counsel during counsel's upcoming visit. There is a very real risk that certain Petitioners will be hospitalized during counsel's upcoming visit as a result of participating in the ongoing hunger strike. As set forth above, several Petitioners were in very poor physical condition during the June/July hunger strike, and were hospitalized as a result.[2] Thus, there is every reason to believe that these Petitioners, and perhaps others, are participating in the current hunger strike, and may be hospitalized presently or in the near term.[3]

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[2] The government concedes that unnamed detainees have been hospitalized during the current hunger strike.

[3] As set forth above, while Petitioners' counsel cannot confirm that any Petitioner is hospitalized, this is due solely to Respondents' refusal to provide any information regarding Petitioners; thus, to the extent Respondents argue that counsel's concerns are "speculative," any such "speculation" is occasioned solely by Respondents. Further, if counsel were to wait to request the relief sought herein until they (continued...)

As set forth above, counsel was not permitted to meet with Petitioner Isa Almurbati when he was hospitalized during counsel's last visit to Guantánamo. It is Respondents' position that if a Petitioner is hospitalized during counsel's upcoming visit, the Petitioner will not be permitted to meet with his counsel, including if the Petitioner is hospitalized during the duration of counsel's visit.

Respondents' refusal to allow counsel to meet with Petitioners in medical facilities, if necessary, creates an inappropriate and unreasonable burden on the relationship between counsel and Petitioners. For the reasons discussed above, counsel visits are the only viable means by which counsel and Petitioners can communicate. However, as a practical matter, these visits can only be arranged sparingly. Authorities at Guantánamo exercise authority to refuse visit requests for putative logistical and operational reasons. Traveling to Guantánamo is a substantial undertaking that requires coordination among counsel and interpreters, as well as securing seats on commercial flights that have very limited capacity. Respondents' policy of not permitting visits at the detainee hospital thus may well have the effect of denying Petitioners access to their counsel for a lengthy – and indefinite – period of time.[4] Such a result is counter to the substance and spirit of the Court's rulings in these cases. *Al-Odah,* 346 F. Supp. 2d 1; *In re Guantánamo,* 344 F. Supp. 2d 174; *see also Procunier v. Martiniez*, 416 U.S. 396, 419, 94 S. Ct. 1800, 1814 (1974) ("[r]egulations and practices that unjustifiably obstruct the availability of professional

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arrive in Guantánamo and can confirm if Petitioners are hospitalized, counsel's visit would be rendered ineffective for all practical purposes with respect to any hospitalized Petitioners.

[4] There is no indication that the current hunger strike in which numerous Guantánamo detainees are participating will end. The hospitalization of detainees to forcibly administer intravenous hydration and/or nourishment may therefore last indefinitely.

representation or other aspects of the right of access to the courts are invalid."), *overruled on other grounds by Thornburgh v. Abbott*, 490 U.S. 401, 109 S. Ct. 1874 (1989).

While research reveals no case addressing the highly unusual factual scenario relevant to this application, there can be no dispute that the Court is empowered "to craft the procedures necessary" to permit Petitioners to exercise their right to counsel. *Al-Odah,* 346 F. Supp. 2d at 7. Indeed, courts regularly "requir[e] additional measures to assure meaningful access" by *habeas* petitioners "to present their own cases." *Bounds v. Smith,* 430 U.S. 817, 824, 97 S. Ct. 1491, 1496 (1977).

The restrictions that Respondents will unilaterally impose upon any Petitioner who is hospitalized will have the effect of denying said Petitioners access to counsel and the courts during this very critical period. Such restrictions are impermissible.

II. There Is No Substantial Injury to Respondents

In denying Petitioners' counsel's request for access, Respondents simply stated that "GTMO does not permit interviews with detainees in the detainee hospital." Colangelo-Bryan Decl. ¶ 17. Respondents offered no explanation for this policy, either as a general matter or with respect to its particular application to Petitioners.

To oppose this motion, Respondents will undoubtedly argue that operational and security concerns do not allow for counsel visits to the detainee hospital. Any such argument would be disingenuous in this context and the Court should not simply defer to vaguely articulated claims regarding operations and security. Indeed, Respondents have organized publicity tours for members of the media (and congressional delegations) that include visits to the detainee hospital. Colangelo-Bryan Decl. ¶ 18. If operational and security concerns do not preclude visits to the

detainee hospital by multiple reporters for public-relations purposes, they ought not preclude a visit by an attorney (who holds a United States security clearance) for the purpose of seeing an ill client.

To the extent that there are logistical issues that would arise from having an attorney/client meeting at the detainee hospital, such issues could be addressed (although Respondents have not demonstrated any willingness to do so). Petitioners' counsel understand that a visit to the detainee hospital might be brief in nature due to the physical condition and medical needs of a Petitioner, and that such a visit might have to be scheduled at the optimal time for the medical facility in question. Counsel also understands that only a single attorney might be permitted to make the visit.[5] Finally, given that counsel are permitted to have day-long visits alone with Petitioners at Camp Echo, it is difficult to imagine that any security-related concerns could not be addressed so as to allow for a brief visit with a Petitioner who is so incapacitated that he requires hospitalization.

For each of these reasons, granting Petitioners' request would not substantially injure – or even cause more than a minimal burden for – Respondents.

III. Granting the Relief Sought Satisfies a Strong Public Interest

There is a significant public interest in ensuring that unreasonable government restrictions are not imposed on those who attempt to vindicate *habeas* claims. That is especially true in this context where Petitioners' ability to investigate relevant factual circumstances is

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[5] Relevant to any logistical concerns, it appears that only one other attorney will be at Guantánamo conducting counsel visits during the first two days of Petitioners' counsel's three-day visit. Colangelo-Bryan Decl. ¶ 19.

"nonexistent"; where Petitioners are faced with "the complexities of a foreign legal system"; where Petitioners "face an obvious language barrier"; where Petitioners have "no access to a law library"; and where Petitioners "lack a working knowledge of the American legal system." *See Al-Odah,* 346 F. Supp. 2d at 8.

CONCLUSION

For all of the foregoing reasons, Petitioners' application should be granted.

Dated: October 3, 2005

Respectfully submitted,

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