**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

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| **SAIFULLAH PARACHA,** | ) | |
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| **Petitioner,** | ) | |
| | ) | |
| **v.** | ) | **Civil Action No. 04-CV-2022 (PLF)** |
| | ) | |
| **GEORGE W. BUSH,** | ) | |
| **President of the United States,** | ) | |
| ***et al.*,** | ) | |
| | ) | |
| **Respondents.** | ) | |
| | ) | |

**RESPONDENTS' OPPOSITION TO PETITIONER'S MOTION FOR PRELIMINARY INJUNCTION UNDER RELIGIOUS FREEDOM RESTORATION ACT**

Despite the fact that the Court has stayed this case, petitioner has filed a Motion for Preliminary Injunction Under Religious Freedom Restoration Act[1] ("Motion") (dkt. no. 115), in which he requests that the Court order the military to assign a military, Islamic chaplain for the detainees at Guantanamo Bay, Cuba, or as an alternative, that civilian, Islamic chaplains be allowed access to Guantanamo and the detainees there. Petitioner also "renews" his requests to have a copy of the Bible in English and all other published books sent to him or for him by his relatives or by counsel. This motion is yet another in a continuing series of motions by petitioner that disregard the stay this Court has entered in this case and the reasons supporting that stay.[2]

[1] Petitioner has chosen to file the following separate documents as one docket entry: Petitioner's Motion for Preliminary Injunction Under Religious Freedom Restoration Act, Points and Authorities in Support of Petitioner's Motion for Preliminary Injunction Under Religious Freedom Restoration Act, Certificate of Conferring, (Proposed) Order. See dkt. no. 115.

[2] See Order, No. 04-CV-2022 (PLF) (Mar. 23, 2005) (dkt. no. 49); Petitioner's Motion for Preliminary Injunction Ordering His Removal From Isolation and Prohibiting His Rendition,

(continued...)

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. Petitioner's Motion is inappropriate at this time because of the pendency of the D.C. Circuit's review of related cases involving other detainees and of the consolidated interlocutory appeals in this very case, the former of which may determine how cases such as petitioner's should proceed, if at all, with the latter potentially determining or affecting his entitlement to the relief he seeks. Further, petitioner cannot avail himself of the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000bb, and even if petitioner could, he has not shown that the practice of his religion has been "substantially burdened" or that he faces irreparable injury. Additionally, this Court has no authority to interfere with, and it should defer to the military's judgments, regarding whether and when petitioner, who is held as an enemy combatant, should receive books and other reading materials. Accordingly, petitioner's Motion is inappropriate, unsound, and should be denied.

[2](...continued)
No. 04-CV-2022 (PLF) (Apr. 5, 2005) (dkt. no. 50); Petitioner's Motion to Allow and to Accelerate Discovery, No. 04-CV-2022 (PLF) (Oct. 6, 2005) (dkt. no. 68); Petitioner's Motion for Preliminary Injunction Ordering His Removal From Punitive Conditions of Confinement, No. 04-CV-2022 (PLF) (Oct. 7, 2005) (dkt. no. 69); Petitioner's Motion to Be Allowed a Bible and Other Books, No. 04-CV-2022 (PLF) (Nov. 11, 2005) (dkt. no. 72); Petitioner's Motion for Order to Show Cause Why Pending Motions Should Not Be Promptly Resolved, No. 04-CV-2022 (PLF) (Nov. 11, 2005) (dkt. no. 75); Petitioner's Motion to Vacate the Stay and to Grant Petitioner's Motion for Summary Judgment, No. 04-CV-2022 (PLF) (July 7, 2006) (dkt. no. 90).

## ARGUMENT

### I. THE COURT SHOULD DENY PETITIONER'S MOTION BECAUSE THE DETAINEE TREATMENT ACT OF 2005 GRANTED THE D.C. CIRCUIT EXCLUSIVE JURISDICTION OVER THIS ACTION

Petitioner's motion should be denied, as a threshold matter, because the Detainee Treatment Act of 2005, Pub. L. No. 109-148, tit. X, 119 Stat. 2680 ("the Act"), vests exclusive jurisdiction over this action in the D.C. Circuit. The Act, among other things, amends 28 U.S.C. § 2241 to eliminate court jurisdiction to consider habeas petitions and other claims by aliens held as enemy combatants at Guantanamo Bay, id., § 1005(e)(1), and creates an exclusive review mechanism in the D.C. Circuit to address the validity of the detention of such aliens and final decisions of any military commissions, id., § 1005(e)(1), (e)(2), (e)(3). Section 1005(e)(2) of the Act states that the D.C. Circuit "shall have exclusive jurisdiction to determine the validity of any final decision of a Combatant Status Review Tribunal that an alien is properly detained as an enemy combatant," and it further specifies the scope and intensiveness of that review. While the Supreme Court in Hamdan v. Rumsfeld, 548 U.S. —, 126 S. Ct. 2749, 2762-69 (U.S. June 29, 2006), held that § 1005(e)(1) of the Detainee Treatment Act did not apply to habeas petitions pending prior to the enactment of the Act, it recognized that the exclusive review provisions of the Act did expressly apply to cases pending prior to enactment. Although the petitioner in Hamdan escaped the Act because his challenge did not involve a final decision of a military commission within the exclusive jurisdiction of the Court of Appeals under § 1005(e)(3), the Court reserved the question of the effect of the exclusive review provisions of the Act on other cases, stating that "[t]here may be habeas cases that were pending in the lower courts at the time the DTA was enacted that do qualify as challenges to 'final decision[s]' within the meaning of

subsection (e)(2) or (e)(3). We express no view about whether the DTA would require transfer of such an action to the District of Columbia Circuit." 126 S. Ct. at 2769 n.14.

The above-captioned case is such a case, i.e., challenging petitioner's designation as an enemy combatant through the Combatant Status Review Tribunal ("CSRT"). See Motion at 4-5 (denying that petitioner is an enemy combatant); see also Respondents' Opposition to Petitioner's Motion to Vacate the Stay and to Grant Petitioner's Motion for Summary Judgment, No. 04-CV-2022 (PLF) (July 25, 2006) (dkt. no. 96) at 4 (explaining the numerous ways petitioner's case is a CSRT challenge). Given the Act's investment of exclusive review in the Court of Appeals, the District Court lacks jurisdiction over this case, for it is well-settled that an exclusive-review scheme, where applicable, precludes the exercise of jurisdiction under more general grants of jurisdiction, including habeas corpus. Cf., e.g., 5 U.S.C. § 703 ("form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for . . . writs of . . . habeas corpus"); Thunder Basin Coal Co. v. Reich, 510 U.S. 200, 207-09 (1994) ("exclusive" jurisdiction under federal Mine Act precludes assertion of district court jurisdiction); FCC v. ITT World Communications, Inc., 466 U.S. 463, 468 (1984) (Hobbs Act) ("The appropriate procedure for obtaining judicial review of the agency's disposition of these issues was appeal to the Court of Appeals as provided by statute."); Laing v. Ashcroft, 370 F.3d 994, 999-1000 (9th Cir. 2004) ("§ 2241 is ordinarily reserved for instances in which no other judicial remedy is available"); Lopez v. Heinauer, 332 F.3d 507, 511 (8th Cir. 2003) ("Because judicial review was available . . . the district court was not authorized to hear this § 2241 habeas petition."). See also Telecommunications Research

and Action Center v. FCC, 750 F.2d 70, 77 (D.C. Cir. 1984) ("even where Congress has not expressly stated that statutory jurisdiction is 'exclusive' . . . a statute which vests jurisdiction in a particular court cuts off original jurisdiction in other courts in all cases covered by that statute") (footnote omitted); id. at 75, 78-79 (request for relief in district court that might affect Court of Appeals' future, exclusive jurisdiction is subject to the exclusive review of the Court of Appeals).

Granting the relief petitioner requests would require an assertion of jurisdiction and authority in this case inconsistent with the Act's investment of exclusive jurisdiction in the Court of Appeals, and respondents' argument in this regard is in no way immaterial or premature. See Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 94 (1998) ("Without jurisdiction [a] court cannot proceed at all in any cause."); see also Ex parte McCardle, 74 U.S. (7 Wall.) 506, 514 (1869) ("Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause.").

Thus, the Supreme Court's decision in Hamdan has not resolved the issue of whether this Court may exercise jurisdiction in this case in light of the Act.[3] The effect of the Act was addressed in supplemental briefing in the Guantanamo detainee appeals pending before the D.C. Circuit (Boumediene v. Bush, No. 05-5062, and Al Odah v. United States, No. 05-5064), and additional supplemental briefing on the effect of the Hamdan decision on this issue was

[3] Moreover, Congress recently passed the Military Commissions Act of 2006, which, among other things, amends 28 U.S.C. § 2241 to eliminate district court jurisdiction to consider habeas and other claims by aliens detained by the United States as enemy combatants. See Military Commissions Act of 2006, S. 3930, 109th Cong. § 7 (2006). The legislation, which awaits signature by the President, expressly applies the amendment "to all cases, without exception, pending on or after the date of the enactment of this Act," which would include the above-captioned case and thereby divest this Court of jurisdiction over this action.

completed on August 15, 2006. Accordingly, petitioner's motion for preliminary injunction should be denied.

## II. THE COURT SHOULD DENY PETITIONER'S MOTION BECAUSE THE COURT HAS STAYED THIS CASE

Petitioner's motion also 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. See Order, No. 04-CV-2022 (PLF) (Mar. 23, 2005) (dkt. no. 49) at 2. The Court stayed this case pending "resolution of all appeals" in In re Guantanamo Detainee Cases, Civil No. 02-CV-0299, et al., 355 F. Supp. 2d 443 (D.D.C. 2005), and Khalid et al. v. Bush, Civil No. 04-CV-1142, 355 F. Supp. 2d 311 (D.D.C. 2005). Id. Since these appeals have not been resolved, the stay, including with respect to the RFRA claim petitioner puts forth in his current motion, is still in effect. Indeed, this Court recently denied petitioner's motion to vacate the stay and reiterated that the case shall remain stayed pending resolution of the above-mentioned D.C. Circuit appeals. See Minute Order (Aug. 4, 2006), No. 04-CV-2022 (PLF). Petitioner's counsel makes no showing of any change in circumstances since this Court entered either its March 23, 2005 Order or August 4, 2006 Minute Order that would in any way warrant a lifting of the stay, even if such action was appropriate in light of the pending appellate proceedings.[4] Thus, petitioner's Motion is procedurally improper and should be denied given the pendency of the stay.

Further, granting petitioner's Motion in the face of the stay would potentially have far-reaching consequences because such an order doubtless would trigger a cascade effect in other

[4] While the Order does not "bar the filing and disposition of any motion for emergency relief," see Order at 2 (dkt. no. 49), petitioner's Motion clearly is not such a motion.

Guantanamo detainee cases. Presently, there are more than 200 habeas cases pending on behalf of well over 300 detainees at Guantanamo; the majority of those cases and petitioners were not subject to the decisions of Judges Leon and Green in Khalid and In re Guantanamo. A decision to grant petitioner's Motion pending the resolution of the appeals could precipitate a chain reaction – the scores of petitioners in other pending and future Guantanamo detainee habeas cases, seeking parity of treatment, would request the Court to require the military to supply chaplains and provide specific books and other outside materials to detainees in those cases, which could result in the lifting or modifying of stays that have already been entered and the imposition of an enormous logistical and security burden on respondents. This scenario is exactly what Judge Green aimed to avoid when she denied petitioners' motion to reconsider her order granting a stay pending appeal "in light of the substantial resources that would be expended and the significant burdens that would be incurred should this litigation go forward." See Order Denying Motion for Reconsideration of Order Granting Stay Pending Appeal in In re Guantanamo Detainee Cases (Feb. 7, 2005) (Green, J.).

## III. THE COURT SHOULD DENY PETITIONER'S MOTION GIVEN THAT THE PENDING D.C. CIRCUIT APPEALS WILL DETERMINE WHETHER AND HOW, IF AT ALL, GUANTANAMO DETAINEE CASES SHOULD PROCEED, OR WILL POTENTIALLY IMPACT PETITIONER'S REQUEST FOR RELIEF

The Court should also deny petitioner's Motion given that the legal bases for petitioner's whole habeas petition could be affected by the D.C. Circuit's decisions in the In re Guantanamo and Khalid appeals. The D.C. Circuit may decide that Guantanamo detainees, such as petitioner, have no legal bases for their habeas petitions. Such a decision would effectively nullify petitioner's ability to bring a RFRA claim and a motion to be allowed other books, which, as petitioner acknowledges, are essentially conditions of confinement claims, pending any further

appeal. See Motion at 5 ("this motion addresses only one discrete aspect of his conditions of confinement").

In light of the potential for the D.C. Circuit's ruling to moot or at least significantly impact the legal bases for and future proceedings on petitioner's habeas petition, which would affect petitioner's ability to bring his current request for relief, it is likely that any decision of this Court regarding petitioner's Motion would have to be relitigated or revisited once the Court of Appeals provides its guidance. Thus, to avoid any needless expenditure of any further judicial, litigation, and government resources pending the appeals, and for the reasons discussed infra, the Court should deny petitioner's Motion.

The consolidated interlocutory appeals and petitioner's recent interlocutory appeal which are pending before the D.C. Circuit in this case, and the D.C. Circuit's decision on those appeals, likewise may affect the proper disposition of petitioner's Motion. Again, petitioner inexplicably makes no mention of his own pending appeals. In the consolidated appeals, the D.C. Circuit will consider three issues: (1) whether this Court abused its discretion in staying petitioner's habeas action pending the D.C. Circuit's expedited resolution of Khalid and In re Guantanamo Detainee Cases; (2) whether this Court abused its discretion in applying in this case the protective order that governs all the other detainee cases; and (3) whether the district court properly declined to grant preliminary injunctive relief releasing petitioner from solitary confinement where petitioner failed to make a showing that he was, in fact, being held in solitary confinement. Petitioner also recently initiated an interlocutory appeal of this Court's August 4, 2006 Minute Order denying petitioner's motion to vacate the stay and to grant petitioner's motion for summary judgment. In light of the potential that petitioner's Motion would have to be relitigated

or revisited once the Court of Appeals provides guidance on the stay, preliminary injunctive relief, and summary judgment issues, the Court should deny petitioner's Motion.

Thus, for all of these reasons relating to the stay and the pending appeals before the D.C. Circuit, the Court should deny petitioner's Motion.

## IV. PETITIONER IS NOT ENTITLED TO A PRELIMINARY INJUNCTION REGARDING HIS CONDITIONS OF DETENTION

Even if the Court were to reach the merits of petitioner's current motion, it should also be denied because petitioner fails to satisfy the standards for obtaining preliminary injunctive relief. 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." See Mazurek v. Armstrong, 520 U.S. 968, 972 (1997); Chaplaincy of Full Gospel Churches v. England, 454 F.3d 290, 297 (D.C. Cir. 2006); 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 Fin. 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).

### A. PETITIONER'S MOTION IS NOT LIKELY TO SUCCEED ON THE MERITS BECAUSE THERE IS NO ADEQUATE LEGAL BASIS FOR THE RELIEF REQUESTED

Petitioner's motion lacks an adequate legal basis for the requested intervention into petitioner's detention conditions. "'Likelihood of success is the main bearing wall of the four-factor framework'" applicable to motions for preliminary relief. Katz v. Georgetown Univ., 246 F.3d 685, 687-88 (D.C. Cir. 2001) (quoting Ross-Simons of Warwick, Inc. v. Baccarat, Inc., 102 F.3d 12, 16 (1st Cir. 1996)). Here, petitioner's reliance on RFRA to establish that he is likely to succeed in the instant matter cannot bear much weight.[5]

#### 1. PETITIONER CANNOT AVAIL HIMSELF OF RFRA

This Court does not have jurisdiction to consider the RFRA claim and arguments raised in petitioner's Motion. As explained supra, the Court generally lacks jurisdiction over this case because the Detainee Treatment Act of 2005 vests exclusive jurisdiction over this action in the

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[5] Petitioner also lacks a likelihood of success because it is not clear petitioner may even bring a conditions of confinement claim in a habeas case. Neither the Supreme Court nor the D.C. Circuit have 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).

Court of Appeals. Further, RFRA by no means authorizes the extraordinary action attempted by petitioner here. There is no basis for concluding that Congress intended RFRA to be applicable outside the United States or to subject the military to claims under RFRA by enemy combatants detained by the Executive Branch as part of an ongoing war effort, such as petitioner.

It is a "longstanding principle of American law" that congressional legislation is presumed not to have extraterritorial application unless such intent is clearly manifested. EEOC v. Arabian American Oil Co., 499 U.S. 244, 248 (1991). Here, while the D.C. Circuit has found RFRA applicable to the federal government, Henderson v. Kennedy, 265 F.3d 1072, 1073 (D.C. Cir. 2001), neither the Supreme Court nor the D.C. Circuit has ruled on whether RFRA is operative outside the United States. See Cutter v. Wilkinson, 125 S. Ct. 2113, 2118 n.2 (2005) ("This Court . . . has not had occasion to rule on the matter" of whether RFRA is operative as to "federal territories and possessions."). Nothing in RFRA, however, evidences an intent, much less a clear intent, that the statute applies to Guantanamo Bay.

While the Ninth Circuit found that RFRA applies to Guam, a federal instrumentality, Guam v. Guerrero, 290 F.3d 1210, 1221-22 (2002), that case is inapposite. RFRA in "its original form" expressly applied to Guam but not to Guantanamo Bay. See id. at 1221. Moreover, the Ninth Circuit found that RFRA applied to Guam because it was a federal territory, and Guantanamo Bay is not a federal territory. Although the Supreme Court in Rasul v. Bush, 542 U.S. 466, 481 (2004), held that jurisdiction for the purposes of the habeas corpus statute extended to Guantanamo Bay, the Court did not find that Guantanamo is itself a federal territory. Also, while the Court specifically discussed the historical reach of the writ of habeas corpus to "so-called 'exempt jurisdictions,' where ordinary writs do not run, and all other dominions under

the sovereign's control," id. at 482 (citation omitted), RFRA does not have a similarly long, historical jurisdictional reach.

Additionally, extending RFRA to aliens detained at Guantanamo would be inconsistent with the purposes of the statute. Congress enacted RFRA in response to the Supreme Court's decision in Employment Division, Dep't of Human Resources v. Smith, 494 U.S. 872 (1990). In that case, the Court held that the Free Exercise Clause did not require Oregon to exempt from its criminal drug laws the sacramental ingestion of peyote by members of the Native American Church. Id. at 877-82. Such generally applicable laws, the Court concluded, may be applied to religious exercises regardless of whether the government demonstrates a compelling interest for its rule. Id. at 884-89. Congress indicated that the "purposes" of RFRA are: "(1) to restore the compelling interest test in Sherbert v. Verner, 374 U.S. 398 (1963) and Wisconsin v. Yoder, 406 U.S. 205 (1972), and to guarantee its application in all cases where free exercise of religion is substantially burdened; and (2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government." 42 U.S.C. § 2000bb(b). Indeed, the statute's legislative history indicates that Congress expected courts to look to cases predating Smith in construing and applying RFRA. See H.R. Rep. No. 103-88, 103d Cong., 1st Sess. 6-7 (1993); S. Rep. No. 103-111, 103d Cong., 1st Sess. 9, reprinted in 1993 U.S.C.C.A.N. 1892, 1898; see also S. Rep. No. 103-111, at 9, 1993 U.S.C.C.A.N. at 1898 ("the compelling interest test generally should not be construed more stringently or more leniently than it was prior to Smith.").

Further, at the time Congress enacted RFRA, it had long been established that non-citizens outside U.S. territorial jurisdiction who lacked a substantial connection to the United States are not entitled to First Amendment protection. See, e.g., United States ex rel. Turner v.

Williams, 194 U.S. 279, 292 (1904). The Constitution generally affords protection only to aliens "when they have come within the territory of the United States and developed substantial connections with this country." United States v. Verdugo-Urquidez, 494 U.S. 259, 265 (1990). Applying these principles, the Eleventh Circuit held that aliens at Guantanamo Bay Naval Base may not assert First Amendment rights. Cuban-American Bar Ass'n v. Christopher, 43 F.3d 1412, 1425-27 (11th Cir. 1995). Congress, seeking merely to restore pre-existing First Amendment rights, could not possibly have contemplated that RFRA would be extended to aliens without a substantial connection to the United States. To conclude otherwise would be to find that Congress intended a fundamental change in the way religious exercise cases would be litigated and decided.

Furthermore, there is no reason for believing that Congress intended to subject the military to claims under RFRA by an alien enemy combatant such as petitioner detained by the Executive Branch as part of an ongoing war effort. Military operations during time of war have traditionally been left to the discretion of the Executive. See Hamdi v. Rumsfeld, 542 U.S. 507, 531 (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"). Courts do not presume that Congress wishes to curtail the discretion of the Executive Branch with respect to military functions, unless Congress does so in clear and unequivocal terms. See Dep't of Navy v. Egan, 484 U.S. 518, 530 (1988) ("unless Congress specifically has provided otherwise, courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs"). Thus, as the Supreme Court has put it, the presumption in favor of judicial review "runs aground when it

encounters concerns of national security . . . committed by law to the appropriate agency of the Executive Branch." Egan, 484 U.S. at 527; Saavedra Bruno v. Albright, 197 F.3d 1153, 1162 (D.C. Cir. 1999) (same).

In passing RFRA, Congress evinced no intent – let alone a specific and clear intent – to encroach on the traditional powers of the Commander in Chief and the armed forces to conduct war, especially a power so sensitive as that to determine the rights and duties towards detained enemies. See Ex parte Quirin, 317 U.S. 1, 27-28 (1942). In the absence of such an expression of intent, this Court should not extend RFRA's judicial review provision to an alien enemy being detained by the military at Guantanamo and should deny the Motion on that basis.

Having thus failed to allege any valid basis for availing himself of a RFRA claim, petitioner's Motion should be denied.[6]

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[6] Petitioner relies on Judge Urbina's decision in Rasul et al. v. Rumsfeld et al., 433 F. Supp. 2d 58 (D.D.C. 2006), which denied the government's motion to dismiss a RFRA claim brought by former detainees against federal officials sued in their individual capacities. See Motion at 11. For the reasons explained above, the Court should not follow Rasul, especially in this preliminary injunction context. See also Threadgill v. Armstrong World Indus., Inc. 928 F.2d 1366, 1371 (3rd Cir. 1991) ("The doctrine of *stare decisis* does not compel one district judge to follow the decision of another.") (internal citations and quotations omitted); see also United States v. Article of Drugs Consisting of 203 Paper Bags, 818 F.2d 569, 572 (7th Cir. 1987) (indicating that single district court decision has little precedential effect and is not binding on other district judges in the same district). Additionally, Rasul should also not be followed because the decision's reliance upon the text of RFRA for what the district court characterized as RFRA's "broad reach," without due consideration of the purpose of the statute, overlooks important points. See 433 F. Supp. 2d at 70. For example, the fact that RFRA defines "government" to include United States "possessions" does not compel the conclusion that non-citizens held outside the United States are "persons" protected by the statute. Congress enacted RFRA to restore pre-existing free exercise rights under the Constitution as they existed prior to the Supreme Court's decision in Employment Division, Dep't of Human Resources v. Smith, 494 U.S. 872 (1990). Yet, both before and after Smith, aliens who lacked substantial connection to the United States (including those detained at Guantanamo) had no free exercise rights under the Constitution. See, e.g., Cuban American Bar Ass'n., 43 F.3d at 1425-27. Moreover, the D.C.

(continued...)

**2. EVEN IF THE COURT HAD JURISDICTION OVER PETITIONER'S RFRA CLAIM, PETITIONER HAS NOT ESTABLISHED THAT RESPONDENTS HAVE "SUBSTANTIALLY BURDENED" THE PRACTICE OF HIS RELIGION**

Even if this Court were to conclude that RFRA applies to petitioner, it should still dismiss that claim because, at a minimum, petitioner has failed to allege facts that could establish that the government "substantially burdened" the practice of his religion. As this Court has previously held, individuals asserting RFRA claims "have the initial burden of establishing that the government has substantially interfered with their exercise of religion."[7] Branch Ministries, Inc. v. Rossotti, 40 F. Supp. 2d 15, 24 (D.D.C. 1999) (Friedman, J.) (citing Weir v. Nix, 114 F.3d 817, 820 (8th Cir. 1997)), aff'd, 211 F.3d 137 (D.C. Cir. 2000); see 42 U.S.C. § 2000bb-1.

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[6](...continued)
Circuit has held that the Fifth Amendment, despite using the word "person," does not apply to aliens abroad. See Jifry v. FAA, 370 F.3d 1174, 1182 (D.C. Cir.2004) ("non-resident aliens who have insufficient contacts with the United States are not entitled to Fifth Amendment protections"); Peoples Mojahedin Org. v. United States, 182 F.3d 17, 22 (D.C. Cir. 1999).

Further, the Rasul decision is currently on appeal. See Rasul v. Rumsfeld, No. 06-5222 (D.C. Cir.). (The D.C. Circuit consolidated this appeal with another appeal in the case on August 31, 2006, but has not yet established a briefing schedule. See Rasul v. Rumsfeld, Nos. 06-5209 & 06-5222 (D.C. Cir.)).

[7] Petitioner also states that under the Supreme Court's decision in Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal et al., 126 S. Ct. 1211 (2006), "[o]nce the plaintiff has shown" a substantial burden on the practice of religion, a "preliminary injunction must issue unless the government comes forth with a preponderance of evidence in defense of its measures." Motion at 6. However, since petitioner cannot show that he is "substantially burdened," it is not necessary for respondents to demonstrate that any alleged burden is based on a compelling government interest and that it is the least restrictive means of furthering that interest. See 42 U.S.C. § 2000bb. Furthermore, in light of the propriety of a continued stay and respondents other arguments, the compelling interest and least restrictive means issues should not be reached. If the Court deems it necessary, however, to reach the issues, respondents request the right to address the issues more fully in the future.

A "substantial burden exists where the government 'put[s] substantial pressure on an adherent to modify his behavior and to violate his beliefs. . . .'" Rossotti, 40 F. Supp. 2d at 25 (quoting Thomas v. Review Bd. of Indiana Employment Security Div., 450 U.S. 707, 718 (1981)), "or where the government forces an individual to 'choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion.'" Id. (quoting Sherbert v. Verner, 374 U.S. 398, 404 (1963)). The challenged rule must burden "a central tenet or important practice of the litigant's religion." Levitan v. Ashcroft, 281 F.3d 1313, 1320 (D.C. Cir. 2002). The "law is clear . . . that governmental programs that 'may make it more difficult to practice certain religions but which have no tendency to coerce individuals into acting contrary to their religious beliefs' do not infringe on free exercise rights protected by the First Amendment (and therefore RFRA)." Newdow v. Bush, 355 F. Supp. 2d 265, 290 (D.D.C. 2005) (quoting Lyng v. Northwest Indian Cemetary Protective Ass'n, 485 U.S. 439, 450-51 (1988)).

Under these standards, petitioner's RFRA claim fails. Petitioner's allegation at most suggests that his religious practice has been inconvenienced. Petitioner makes broad assertions that he has been denied access "to the consolations of religion," and confined "without access to the practice of his religion." Motion at 5, 7. More specifically, petitioner states that he has been denied access to a Muslim chaplain and a copy of the Bible in English. Motion (Proposed Order) at 15-16.

Contrary to petitioner's suggestions, however, the military authorities operating the Guantanamo detention center go to great lengths to respect the religious practices and beliefs of the enemy combatants detained there, including petitioner. The military authorities have

established a sweeping program that ranges from educating servicemembers about Muslim beliefs and sensitivities to incorporating those religious practices into nearly every aspect of camp life.

Detainees, including petitioner, are given numerous avenues of access to the practice of their religion. These include providing detainees with Korans and signaling of the Muslim "call to prayer" five times a day, and permitting, to the extent feasible, uninterrupted periods for such prayer towards the Muslim holy city of Mecca, in the direction designated by arrows painted in each detainee cell and all common areas. The military also facilitates detainees adherence to Muslim dietary practices by providing meal menu items permitted under Muslim law. See Kathleen T. Rhem, Task Force Tends to Detainees' Dietary Needs During Ramadan at 1, Armed Forces Information Service (attached as Exhibit A) (available at http://www.defenselink.mil/news/Oct2005/20051021_3126.html). Further, the military also acknowledges Islamic holy periods, such as Ramadan, modifying meal schedules to meet the strict fasting requirements and even offering detainees meals at appropriate times. Id.

Moreover, military personnel follow procedures designed to show respect for the detainees Islamic practices. Military personnel strive to ensure detainees are not interrupted during the 20 minutes following the prayer call, even if they are not involved in religious activities. Further, strict measures in place throughout the facility ensure appropriate treatment of the Koran, the Muslim holy book.

In short, while petitioner claims to have been inconvenienced by the absence of a chaplain and Bible, petitioner has not demonstrated that such denial "was in any way connected to" petitioner's "refusal to violate [his] religious beliefs or abandon a precept of [his] religion."

Rossotti, 40 F. Supp. 2d at 25. Thus, petitioner's showing falls well short of the "substantial burden" required by RFRA and petitioner's Motion should be denied.

### B. PETITIONER FAILS TO ESTABLISH THAT HE FACES IMMINENT IRREPARABLE INJURY

Petitioner has also failed to carry his burden of establishing imminent irreparable injury, and his motion may be denied on that ground alone. See CityFed Financial Corp., 58 F.3d at 747 (failure to make showing of irreparable injury sufficient to deny preliminary injunction); Chaplaincy, 454 F.3d at 297 (same); Wisconsin Gas Co., 758 F.2d at 674 (same).

Petitioner's motion for preliminary injunction complains primarily that petitioner has been confined "without access to the practice of his religion." Motion at 7. As noted supra, however, detainees are provided significant opportunities to practice their religion. In any event, aside from the RFRA claim addressed supra, petitioner appears to ground his irreparable harm claim in the First Amendment's Free Exercise Clause. Petitioner, however, cannot avail himself of an irreparable harm claim grounded in the First Amendment.

Petitioner's irreparable harm argument assumes that Guantanamo detainees, all of whom are aliens, possess constitutional rights, specifically rights under the First Amendment. However, as mentioned supra, the Eleventh Circuit has held that aliens at Guantanamo Bay Naval Base may not assert First Amendment rights. Cuban-American Bar Ass'n v. Christopher, 43 F.3d 1412, 1425-27 (11th Cir. 1995). Moreover, no decision of the Court in a Guantanamo Bay detainee habeas case, including the decisions of Judges Green and Leon in the Guantanamo detainee habeas cases currently pending before the Court of Appeals, has held that Guantanamo detainees are possessed of constitutional rights with respect to conditions of confinement claims. Indeed, Judge Leon in Khalid v. Bush, Boumediene v. Bush, 355 F. Supp. 2d 311 (D.D.C. 2005),

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

In addition, Judge Green in In re Guantanamo Detainee Cases, 355 F. Supp. 2d 443, 464 (D.D.C. 2005), while concluding 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, did not address whether alien enemy combatants have a constitutional basis to challenge their conditions of confinement, nor did her decision 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 other constitutional provision with regard to challenges to conditions of confinement.

### C. THE RELIEF REQUESTED WOULD IMPOSE UNDUE BURDENS ON THE GOVERNMENT AND INJURE ITS INTERESTS AS WELL AS THE PUBLIC INTEREST

Petitioner's request for injunctive relief also should be denied because it would impose inappropriate burdens on the Guantanamo authorities and interfere with the appropriate operation of the detention facility. "The usual role of a preliminary injunction is to preserve the status quo pending the outcome of litigation." Cobell v. Kempthorne, 455 F.3d 301, 314 (D.C. Cir. 2006) (citation and quotation marks omitted). Petitioner's requested relief, however, seeks to interfere in significant ways with the military's competent judgment and the expertise of Guantanamo authorities respecting the detention of petitioner. Petitioner asks the Court to order the assignment of military chaplain personnel to Guantanamo for detainees, or to require the military to open the camp to "frequent and regular" visits by civilian imams with detainees. See Proposed Order. Petitioner further appears to contemplate making demands regarding religious services and communal prayers. See Motion at 2, 9. Thus, petitioner seeks not the status quo, but revision of it.

The public, however, has a strong interest in assuring that the military detention operations provided at Guantanamo are not interrupted, overly burdened, and second-guessed by the demands of detainees pertaining to the particulars of detention. See, e.g., Hamdi, 542 U.S. at 531 (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"); 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). The prospect of the Court being entangled, through an improper injunction, in the minutiae of the Guantanamo detention operations at petitioner's behest indicates that such relief would impose undue burdens on the government and be contrary to the public interest. Furthermore, petitioner's request for relief cannot be viewed in isolation or confined to just the petitioner at issue in the present motion, because any order granting the form of relief petitioner seeks would likely prompt counsel for many detainees in other cases to demand similar remedies. Accordingly, providing petitioner with the relief he requests would be an inappropriate burden for the military authorities at Guantanamo and contrary to the public interest.[8]

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[8] To the extent that petitioner's Motion "renews" his previous motion for access to "other books" that counsel has sent and brought to Guantanamo, the instant Motion should also be denied. Petitioner's Motion to be Allowed a Bible and Other Books, No. 04-CV-2022 (PLF) (dkt. no. 72). As respondents explained at greater length in their opposition to petitioner's motion for a Bible and other books, the Court lacks authority to interfere with and it should defer to the military's determinations on which books petitioner receives and when he receives them. See No. 04-CV-2022 (PLF) (dkt. no. 79). Therefore, the Court should deny petitioner's Motion. Id. 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

(continued...)

For all of these reasons, petitioner's Motion should be denied.

## CONCLUSION

For the foregoing reasons, petitioner's motion for preliminary injunction should be denied.

[8](...continued)
prison operations." Bell v. Wolfish, 441 U.S. 520, 548, 562 (1979). Here, of course, petitioner is challenging the practices of a military detention center during a time of war, and separation of powers principles counsel even greater deference to and non-interference with military authorities. Additionally, petitioner's Motion in this regard is particularly mooted by two of the books at issue, Julius Caesar and Hamlet, being cleared for release to petitioner.

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Respectfully submitted,

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# EXHIBIT A

AMERICAN FORCES INFORMATION SERVICE
NEWS ARTICLES

## Task Force Tends to Detainees' Dietary Needs During Ramadan

By Kathleen T. Rhem
American Forces Press Service

WASHINGTON, Oct. 21, 2005 – Members of Joint Task Force Guantanamo are ensuring detainees get special consideration for religious requirements of observing Ramadan, the Muslim holy month, which began Oct. 4 and runs to Nov. 3 this year.

Most observant Muslims fast from sunup to sundown during Ramadan, and food-service officials at the U.S. military detention center at Guantanamo Bay, Cuba, are providing pre-dawn and midnight meals to help the detainees observe their customs during this holy period, the joint task force's food-service officer explained.

Breakfast, which might normally be served around 7 a.m., is now served at 4 a.m. "because obviously we want to make sure that they have plenty of time to eat before sunup," Navy Lt. Jonathan Sym said in a telephone interview from the island naval base.

He said a religious adviser also provides input as to what's appropriate to serve during Ramadan.

Detainees who choose not to fast still receive meals on the regular schedule. But, Sym said, most Guantanamo detainees are fasting during Ramadan, though many have chosen not to fast.

*Contracted food service workers prepare rice that will be fed to detainees at the U.S. detention facility in Guantanamo Bay, Cuba. Photo courtesy of Joint Task Force Guantanamo*
(Click photo for screen-resolution image);high-resolution image available.

The extra early and late meals, generally consisting of dates, fruit and bread, mean the food service staff works nearly around the clock during Ramadan, Sym said. Contractors provide food service to detainees and servicemembers at Guantanamo Bay.

"Everyone in the JTF took some great pains to make sure their observation of Ramadan was done as best as we possibly could," he said.

Sym explained that officials at the detention facility strive to cater to the religious and social preferences of the detainees throughout the year, not just during Ramadan. Detainees are served only Halal meats, from animals that were ritually slaughtered according to Islamic practice, and are not served pork. Muslims are forbidden from eating pork or products made from any part of pigs. For instance, gelatin and lard often are derived from rendered pig bones or skin.

Officials also try to provide foods familiar to Middle Easterners, but that many Westerners don't eat regularly, such as lamb and dates.

"During Ramadan, we still obviously will cater to that level of quality," Sym said.

A menu review board meets quarterly to discuss dietary issues affecting the detainees and plan menus. The commander and logistics officer of the Joint Detention Operations Group, the Joint Task Fore Guantanamo food service officer, a nutritionist, a preventive medicine specialist, and the contract galley manager make up the menu review board. Menus generally rotate and repeat on a two-week cycle, Sym said.

Even at the detention center, special occasions deserve special meals. Sym said officials began several weeks ago to plan a suitable meal for the detainees to celebrate "Eid al-Fitr," the celebration of breaking the fast at the end of Ramadan. Eid al-Fitr is one of Islam's most important celebrations.

Sym said he's never heard anyone question whether it's appropriate to cater to detainees' religious preferences during their holy time. It's just the right thing to do, he said.

"I think all the things that we do here is exactly the way that I know we would like our counterparts to treat Americans if we were in that situation," Sym said. "I don't even think it was a matter of choice whether we're going to do what we can; I think it just came naturally.

"I'm not a policy maker in the military; I'm just a junior officer," he added. "But ... I think we set a standard for ourselves and for the way we will treat other people, and we won't go below that."

**Related Sites:**
Detainee Affairs
Joint Task Force Guantanamo
U.S. Naval Station Guantanamo Bay, Cuba

*Contracted food service workers prepare meals for detainees at the U.S. detention facility in Guantanamo Bay, Cuba. Photo courtesy of Joint Task Force Guantanamo*
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*A salad that will be served to a detainee at the U.S. detention facility at Guantanamo Bay, Cuba. Photo courtesy of Joint Task Force Guantanamo*
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*Members of the Navy Provisional Guard Force at Guantanamo Bay, Cub, pass food to a detainee in a cell through a slot. Photo courtesy of Joint Task Force Guantanamo*
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