IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

**OPPOSITION TO PETITIONER'S MOTION FOR PRELIMINARY INJUNCTION ORDERING HIS REMOVAL FROM PUNITIVE CONDITIONS OF CONFINEMENT**

Petitioner's Motion for Preliminary Injunction Ordering His Removal from Punitive Conditions of Confinement does little more than simply reurge the same arguments he asserted in a prior preliminary injunction motion, which the Court denied. Petitioner's current rehashed motion suffers from the same defect of insufficient evidence of irreparable harm that prompted the Court to deny his prior motion. Despite the addition of affidavits from petitioner and his counsel, the motion fails to provide a sufficiently competent and compelling factual basis for petitioner's assertion that the conditions of his confinement warrant the Court's intrusion into the decisions of military authorities regarding the appropriate level of security in which to detain petitioner. In particular, no crisis of irreparable harm exists either with respect to petitioner's access to emergency medical assistance or recreational reading materials. Petitioner's repeated request to be transferred from his purported "solitary confinement" to the least onerous conditions of confinement available at the United States Naval Base at Guantanamo Bay, Cuba, should also be denied because issues underlying the legal moorings for petitioner's challenge to

the manner in which he is confined are the subject of the appeal before the D.C. Circuit in related cases involving other detainees, and the Court has stayed this case in light of those appeals. Further, petitioner's challenge to his conditions of confinement is not likely to succeed on the merits in light of the well-established legal authority requiring courts to accord substantial deference to the judgment of Executive authorities pertaining to the operation of detention facilities and the substantial case law upholding even the imposition of actual solitary confinement, which is not at issue here. For these reasons, petitioner's motion fails to satisfy the requirements for a preliminary injunction and should be denied.

**BACKGROUND**

Petitioner, a citizen of Pakistan currently detained as an enemy combatant at Guantanamo, initiated this action by filing a Petition for Writ of Habeas Corpus on November 17, 2004. Respondents filed a motion to dismiss the petition and a factual return explaining the basis for petitioner's detention as an enemy combatant on January 18, 2005. See Resp. to Am. Pet. for Habeas Corpus and Mot. to Dismiss or for J. as a Matter of Law and Supp. Mem. (dkt. no. 22) (Jan. 18, 2005); Resp'ts' Factual Return to Pet. for Writ of Habeas Corpus by Pet'r Saifullah Paracha and Notice of Submission of Factual Return Under Seal (dkt. no. 21) (Jan. 18, 2005). Petitioner was found to be affiliated with the al Qaeda terrorist organization after a Combatant Status Review Tribunal reviewed evidence (1) that petitioner was involved in an al Qaeda plan to smuggle explosives into the United States; (2) that petitioner held and managed large amounts of al Qaeda money given to him by known al Qaeda operatives; and (3) that petitioner recommended to an al Qaeda operative that nuclear weapons be used against U.S.

troops and suggested where such weapons might be obtained.[1] See Resp'ts' Factual Return.[2]

On January 19, 2005, Judge Richard Leon of this Court granted respondents' motion to dismiss in two other Guantanamo detainee cases. See Khalid v. Bush, Boumediene v. Bush, Case Nos. 04-cv-1142 (RJL), 04-cv-1166 (RJL), 355 F. Supp. 2d 311 (D.D.C. 2005). Judge Leon 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, Judge Leon concluded that aliens held at Guantanamo, that is, outside the sovereign territory of the United States, are not possessed of constitutional rights. Furthermore, Judge Leon 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 petitioners' detention." Id. at 329. According to Judge Leon, 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. Judge Leon also noted that petitioners' challenges to the conditions of their confinement did not support the issuance of a writ of habeas corpus because such claims, even if true, would not render the custody itself unlawful. Id. at 324-25. Judge Leon explained that separation of powers principles prevent the judiciary from scrutinizing the conditions of the aliens' detention because such matters are the

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[1] Additionally, petitioner's son, Uzair Paracha, is being tried on charges of providing material support to a foreign terrorist organization, among other offenses. See United States v. Paracha, 03-cr-1197 (S.D.N.Y.).

[2] The Court is referred to the classified version of Respondents' Factual Return, on file with the Court, for further detail regarding the evidence supporting petitioner's enemy combatant classification.

province of the Executive and Legislative branches. Id. at 328. Petitioners in Khalid and Boumediene then appealed.

On January 31, 2005, Judge Joyce Hens Green denied in part and granted in part respondents' motion to dismiss or for judgment as a matter of law in eleven other pending Guantanamo habeas cases. See In re Guantanamo Detainee Cases, 355 F. Supp. 2d 443 (D.D.C. 2005). In contrast to Judge Leon'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 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 concluded 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 Third 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.[3] 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.

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[3] Judge Green 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), cert. granted, 74 U.S.L.W. 3108 (U.S. Nov. 7, 2005) (No. 05-184). 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, 415 F.3d at 40.

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 . . . .

In re Guantanamo Detainee Cases, Order Den. Mot. for Recons. of Order Granting Stay Pending Appeal (Feb. 7, 2005).

On February 9, 2005, pursuant to Judge Green's certification, respondents filed a petition 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. Oral argument on the merits of the appeal, along with appeals by petitioners in Khalid and Boumediene was heard by the D.C. Circuit on September 8, 2005.

On March 23, 2005, the Court in the present case, consistent with rulings in other Guantanamo detainee cases, granted respondents' motion to stay and stayed this case pending resolution of all appeals of In re Guantanamo Detainee Cases and Khalid. See Order (dkt. no. 49) (Mar. 23, 2005). The Court noted that motions for emergency relief would be exempted from the stay. Id. Shortly thereafter, on April 5, 2005, petitioner filed a motion for preliminary

injunction, which was the precursor to his current motion. See Pet'r's Mot. for Prelim. Inj. Ordering His Removal from Isolation & Prohibiting His Rendition (dkt. no. 50) (Apr. 5, 2005). In that motion, petitioner complained about the conditions of his detainment and specifically asserted that he was improperly being held in solitary confinement. Id. at 6-7.[4] As relief, petitioner requested, among other things, a preliminary injunction transferring him to the least onerous conditions of confinement reasonably available at Guantanamo and a report directly from petitioner on his conditions of confinement. Id. at 17.

On June 16, 2005, the Court denied without prejudice petitioner's request for a preliminary injunction ordering his removal from solitary confinement. See Mem. Op. & Order (dkt. no. 58) (June 16, 2005) at 4. The Court determined that the "absence of any specific firsthand information from petitioner about the conditions of his confinement" prevented petitioner from demonstrating sufficiently that he would suffer irreparable harm without an injunction. Id. at 2-3. The Court decided that it would not issue the requested injunctive relief "[w]ithout less ambiguous or more reliable information about the conditions of petitioner's detention." Id. at 3.

On August 12, 2005, petitioner appealed the Court's denial of his motion for a preliminary injunction ordering his removal from isolation. See Notice of Appeal (dkt. no. 65). Petitioner's appeal was consolidated with other appeals in his case, and the D.C. Circuit agreed to hear oral argument on December 8, 2005. See Paracha v. Bush et al., Order Consolidating Appeals, No. 05-5211 (D.C. Cir., Aug. 4, 2005). Despite his pending appeals, on October 7,

[4] In that motion, petitioner also requested that the Court protect its jurisdiction by preventing respondents from removing petitioner from the Guantanamo detention facility and sought 30 days' advance notice of any transfer of petitioner. Id. at 1, 13-15.

2005, petitioner filed his current motion for preliminary injunction in which he renews his previous request to be removed from his purported "solitary confinement" and transferred to the "least onerous conditions of confinement reasonably available" at the Guantanamo detention facility. See Pet'r's Mot. For Prelim. Inj. (dkt. no. 69) (Oct. 7, 2005). Petitioner also seeks an injunction providing him with immediate access to emergency medical assistance and recreational reading material. Petitioner's renewed motion is of the same ilk as his previous motion, which the Court denied.

## ARGUMENT

### I. JUDICIAL INTERFERENCE WITH CONDITIONS OF PETITIONER'S CONFINEMENT IS UNWARRANTED.

#### A. The Court Should Refuse to Address Petitioner's Renewed Request for Injunctive Relief Because His Interlocutory Appeals Are Still Pending.

As an initial matter, the Court should not consider yet another challenge to petitioner's conditions of confinement while petitioner's appeal of the Court's denial of his original motion, which made the same arguments and sought the same relief, is pending before the D.C. Circuit. The D.C. Circuit's decision will directly affect petitioner's present motion, and the Court should avoid wasting the resources of the Court and the parties by deciding the instant motion now.

#### B. The Court Should Decline to Address Petitioner's Complaint About the Nature of His Confinement While the Asserted Legal Bases for His Claims Could be Resolved by His Appeals to the D.C. Circuit and the Case is Stayed.

Similarly, as explained in respondents' opposition to petitioner's prior motion, the Court should not entertain the legal challenges to the conditions of petitioner's confinement presented in the instant motion when the underlying legal bases for such claims are also before the D.C.

Circuit in the related appeals. Although not entirely clear from petitioner's memorandum in support of his motion, petitioner appears to rely on the Due Process Clause of the Fifth Amendment and the Third Geneva Convention in seeking injunctive relief.[5] However, he ignores the fact that appeals are presently pending in the D.C. Circuit that will address the scope of constitutional rights as applied to alien enemy combatants detained at Guantanamo Bay ("GTMO") and the fact that the D.C. Circuit in Hamdan has held that the Third Geneva Convention does not afford detainees judicially enforceable rights.[6] See supra note 3.

As noted above, the D.C. Circuit granted interlocutory appeal in In re Guantanamo Detainee Cases and will determine in that case and in the appeal of Khalid, on an expedited basis, whether and to what extent detainees at GTMO have any rights under the Fifth

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[5] As noted in respondents' prior response, petitioner makes various references to "due process" and cites cases such as Sandin v. Conner, 515 U.S. 472 (1995), and Hatch v. Dist. of Columbia, 184 F.3d 846 (D.C. Cir. 1999), which discuss due process concerns regarding the imposition of administrative or disciplinary segregation on prisoners. See Pet'r's P. & A. at 16-17. Petitioner also explicitly references the Third Geneva Convention. Id. at 12-13.

[6] As previously argued to the Court, to the extent petitioner contests the nature of his detention based on Army Regulation 190-8, such a challenge plainly lacks merit. Both Judge Leon's decision in Khalid and Judge Green's decision in In re Guantanamo Detainee Cases determined that AR 190-8 did not provide a viable basis on which GTMO detainees could obtain relief. See Khalid, 355 F. Supp. 2d at 326 (finding that AR 190-8 does not create a private right of action); In re Guantanamo Detainee Cases, 355 F. Supp. 2d at 480-81 (rejecting claim based on AR 190-8, citing arguments explaining that determinations of whether the Military has complied with AR 190-8 are better left to the Executive, not the Judiciary). And to the extent petitioner asserts that the manner in which he is confined violates the Eighth Amendment's prohibition against cruel and unusual punishment, such a claim also lacks any merit. In Khalid, Judge Leon determined that the non-resident aliens detained at GTMO 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 none of the petitioners, including petitioner in the instant case, have been convicted. See In re Guantanamo Detainee Cases, 355 F. Supp. 2d at 480-81.

Amendment. 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 would have to be relitigated or revisited once the D.C. Circuit provides guidance on the constitutional issues, and for the other reasons discussed infra, the Court should not consider petitioner's current challenge to the conditions of his confinement at GTMO until the appeals are resolved.

## II. PETITIONER HAS FAILED TO DEMONSTRATE THAT INJUNCTIVE RELIEF IS WARRANTED.

It is well-established that a request for preliminary injunctive relief "is an extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion." Mazurek v. Armstrong, 520 U.S. 968, 972 (1997) (emphasis in original); 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.'" 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)).

Irreparable harm to the moving party is "'[t]he basis of injunctive relief in federal courts.'" CityFed Fin. Corp., 58 F.3d at 747 (quoting Sampson v. Murray, 415 U.S. 61, 88 (1974)). The irreparable harm that must be shown to justify a preliminary injunction "must be both certain and great; it must be actual and not theoretical." Wisconsin Gas Co. v. FERC, 758 F.2d 669, 674 (D.C. Cir. 1985). "Injunctive relief will not be granted against something merely

feared as liable to occur at some indefinite time; the party seeking injunctive relief must show that the injury complained of is of such imminence that there is a clear and present need for equitable relief to prevent irreparable harm." Id. (citations and internal quotation marks omitted; emphasis in original). Injunctions are not intended "to prevent injuries neither extant nor presently threatened, but only merely feared." Comm. in Solidarity v. Sessions, 929 F.2d 742, 745-46 (D.C. Cir. 1991); see also Milk Indus. Found. v. Glickman, 949 F. Supp. 882, 897 (D.D.C. 1996). Petitioner's motion does not meet this extraordinary standard.

**A. The Factual Record Still Fails to Establish that Petitioner Will Suffer Irreparable Harm.**

Despite the addition of declarations from petitioner and his counsel, the factual record remains insufficient to warrant the Court's involvement in petitioner's conditions of confinement -- that is, petitioner has not made a sufficient showing of irreparable harm. Petitioner's assertion that he is being held in "solitary confinement" is an inaccurate characterization of the nature of his detention and fails to justify the Court's intervention into military determinations of the appropriate level of security necessary to detain particular individuals at GTMO. Contrary to petitioner's suggestions, the mission of military authorities operating the detention center is the safe, secure, and humane treatment of all detainees at GTMO, including petitioner.

Petitioner's contention that he is being held in solitary confinement or administrative segregation remains problematical. Although the affidavits submitted in support of the instant motion provide a general description about the conditions of petitioner's detention, the factual support offered is insufficient to conclude that petitioner is being detained in absolute isolation or that petitioner's physical or mental condition requires immediate Court intervention. Petitioner is not "segregated" from the general population of detainees as in a typical solitary

confinement situation. Rather, he is housed with other detainees, albeit in an individual cell, in a maximum security facility.[7] Petitioner is not, as he asserts, "isolated from human contact." To the contrary, he is able to communicate with detainees in nearby cells, he has regular contact with guards posted near his cell, and he has access to an outdoor exercise yard for approximately one hour each day. See Pet'r's Aff. ¶¶ 5-6, at pp. 5-6, Oct. 24, 2005. In fact, petitioner admits that recently his exercise privileges were upgraded. Id. at ¶ 5, at p. 5. Like all other detainees, petitioner is treated humanely and receives adequate shelter, food, water, and medical care at all times. Hadjis Decl. ¶¶ 2-3 Apr. 13, 2005 (attached as Ex. B) (originally submitted in O.K. v. Bush, 344 F. Supp. 2d 44)). Petitioner is also afforded the necessities to maintain personal hygiene, including time for showers. Id. at ¶ 3.

In addition, petitioner has made no showing that the Military is either incapable or unwilling to provide him with emergency medical care. Petitioner has access to medical care 24-hours a day and such care can include treatment in the detention center hospital or the Naval Base Hospital, as appropriate. See id.; see also Edmondson Decl. ¶¶ 3, 6, Apr. 11, 2005 (attached as Ex. C) (originally submitted in O.K. v. Bush, 344 F. Supp. 2d 44).[8] By his own admission,

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[7] Detainees at GTMO are divided into four levels based on their compliance with camp rules, with Level 1 being the most compliant and Level 4 being the most non-compliant. See Kathleen T. Rhem, "Detainees Living in Varied Conditions at Guantanamo," American Forces Information Service, February 16, 2005 (attached as Ex. A). The detainees are housed in three different types of camps with varying levels of security. Id. The maximum security facility houses Level 4 detainees and detainees with high intelligence value. Id.

[8] Dr. Edmondson's 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, 344 F. Supp. 2d 44, Resp't Mot. to Designate as "Protected Information" Certain Information in Mem. of P. & A. in Opp'n to Pet'r Application for Prelim. Inj. & Two Decl. in Supp. Thereof (dkt. no. 116) (Apr. 13, 2005).

petitioner has made his medical needs known, and he has been seen and treated. See Pet'r's Aff. ¶ 5, at 1; see also Edmondson Decl. ¶ 5 ("The detainee can request medical care at any time by making a request to a guard or to medical personnel who make rounds on the cellblocks every other day."). And while petitioner complains that on occasion the guards did not immediately respond to his complaints of chest pain, he admits that he ultimately obtained appropriate medical care for his condition.[9] See Pet'r's Aff. ¶ 5, at 1.

Petitioner's discussion of the psychological impact of solitary confinement is also misleading and inapplicable in this case. There is simply no evidence in the record that petitioner is suffering from psychological affliction. In any event, the detention center hospital is 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. Edmondson Decl. ¶ 4.

The Court denied petitioner's previous motion for preliminary injunction because it lacked "specific firsthand information" about the conditions of confinement. See Mem. Op. & Order (dkt. no. 58) (June 16, 2005) at 2. Similarly, the Court should deny the instant motion because petitioner fails to describe such onerous conditions of confinement warranting injunctive relief. In his renewed motion, petitioner complains about his circumstances, but does not point to conditions so egregious as to warrant immediate and extraordinary court intervention. Regardless of the label used to describe the terms of petitioner's confinement, petitioner has again failed to make a showing of irreparable harm or to offer sufficient evidence that his

[9] Despite his insinuation to the contrary, petitioner is not so isolated in his cell as to go unnoticed. Not only can petitioner call for help and be heard by the guards and fellow detainees, he can also wave at the monitored camera located in his cell to get the attention of the guards.

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.[10]

**B. The Court Should Deny Petitioner's Requested Relief Because He Fails to Demonstrate a Likelihood of Success and the Requested Relief Would Impose Significant Harms on the Military and the Public Interest.**

Petitioner's renewed request for a preliminary injunction regarding his conditions of confinement also should be denied because petitioner again cannot demonstrate a likelihood of success 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 detention of enemy combatants.[11]

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[10] Petitioner seeks permission to obtain recreational reading materials that were sent to him by his relatives. Since the filing of the instant motion, petitioner has been given certain books from the outside. Processing of the books was delayed in part because they were sent by counsel to the GTMO base chaplain instead of through normal mail channels as specified in the Protective Order. Additionally, certain books will not be released to petitioner, including those publications that can be used to incite detainees, develop codes, or enhance English language skills which in turn could allow detainees to obtain and exploit information from the guards. In any event, petitioner fails to articulate that he would suffer harm, let alone irreparable harm, sufficient to warrant an injunction. See also Resp'ts' Opp. to Pet'r's Mot. to Be Allowed a Bible & Other Books (being filed Nov. 15, 2005).

[11] As a threshold matter, it is questionable whether a habeas action is even an appropriate vehicle for challenging conditions of confinement, rather than the fact of detention or its duration. Neither the Supreme Court nor the D.C. Circuit have squarely resolved the issue. 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); Miller v. Overholser, 206 F.2d 415, 419-20 (D.C. Cir. 1953) (stating that habeas action "is not the correct remedy" for challenging "discipline or treatment," although it may be used to challenge the legality of the place of confinement). Courts in other jurisdictions that have 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

**1. The Authority Cited by Petitioner Does Not Support Departure From the Stay and Imposition of a Preliminary Injunction.**

As discussed in the Government's initial opposition, petitioner attempts to graft the Supreme Court's analysis in Sandin, which indicates that due process is required when prison authorities impose "atypical and significant hardship on [an] inmate in relation to the ordinary incidents of prison life," onto the circumstances surrounding his own confinement at GTMO.[12]

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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. U.S. Parole Comm., 115 F.3d 809, 811-12 (10th Cir. 1997); Badea v. Cox, 931 F.2d 573, 574 (9th Cir. 1991).

[12] As before, petitioner's reliance on the doctrine of "jus cogens" and customary international law is also unavailing. See Pet'r's P. & A. at 12. Jus cogens is "[a] mandatory or peremptory norm of general international law accepted and recognized by the international community as a norm from which no derogation is permitted." Black's Law Dictionary (8th ed. 2004). Customary international law results from a general, consistent, and widely accepted practice of states, followed out of a sense of legal obligation and not merely because the practice may be politically desirable, morally required, or just a good idea. See Comm. of U.S. Citizens Living in Nicaragua v. Reagan, 859 F.2d 929, 940 (D.C. Cir. 1988); Buell v. Mitchell, 274 F.3d 337, 372-73 (6th Cir. 2001). The existence of customary international law does not authorize the free-wheeling exercise of judicial power over and against domestic legal norms or government action, however. In the United States, "[i]t has long been established that customary international law is part of the law of the United States to the limited extent that 'where there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations.'" United States v. Yousef, 327 F.3d 56, 92 (2d Cir. 2003) (quoting The Paquete Habana, 175 U.S. 677, 700 (1900)) (emphasis in original). The President's legitimate exercise of his powers under the Constitution and Congress' Authorization for Use of Military Force ("AUMF"), Pub. L. No. 107-40, 115 Stat. 224 (2001), which consented to the President's use of "all necessary and appropriate force against those nations, organizations, or persons" involved in the September 11, 2001 terrorist attacks, constitute "controlling executive or legislative acts" that permit the detention of enemy combatants in maximum security facilities and negate any need to resort to customary international law. See Hamdi v. Rumsfeld, 124 S. Ct. 2633, 2640 (2004) (plurality opinion) (indicating that detention of enemy combatants is "so fundamental and accepted an incident of war as to be an exercise of . . . 'necessary and appropriate force'"). Moreover, petitioner cites no clear evidence of a mandatory or peremptory international norm, or even a consistent and widespread norm, that prevents placement of non-prisoner-of-war enemy combatants in maximum security confinement during a worldwide war against terrorist organizations. Accordingly, petitioner's "jus cogens" and customary international law argument provides no basis for his requested relief.

Sandin, 515 U.S. at 484. This argument continues to be wholly without merit. In Sandin, the Supreme Court determined that convicted criminals are entitled to due process protections when being punished for disciplinary reasons, but only if the nature of the punishment constitutes an "atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." Id. at 484. This standard is frequently employed to evaluate challenges to the imposition of solitary confinement or disciplinary segregation by incarcerated prisoners. The standard, however, does not apply in petitioner's case because he is not a convicted criminal and the particular conditions of his confinement have not been imposed on him as a method of "punishment" for disciplinary reasons. To the contrary, petitioner is an alien enemy combatant who is being detained, not in solitary confinement, but in a maximum security facility at GTMO in order to prevent him from assisting in the enemy's battle against the United States. See Hamdi, 124 S. Ct. at 2640 (detention of enemy combatants is not punishment nor penal in nature, but is to "prevent captured individuals from returning to the field of battle and taking up arms once again."). Accordingly, Sandin has no application here and cannot provide a basis for granting a preliminary injunction.[13]

Even if the standard articulated in Sandin were somehow applicable to petitioner, the nature of his confinement is not a per se constitutional violation. Petitioner portrays all incidents of solitary confinement or disciplinary segregation as per se constitutional violations, but courts frequently uphold the imposition of such confinement conditions. In Sandin itself, the Supreme Court determined that placement of an inmate for 30 days in an single-person cell in a Special

[13] As a result, petitioner's discussion of a suggested baseline comparison to use to determine if his confinement conditions are "atypical" under Sandin, including his references to the confinement conditions of World War II prisoners of war, is irrelevant.

Holding Unit used for disciplinary segregation did not constitute an atypical and significant hardship on the inmate that would trigger due process protections. Sandin, 515 U.S. at 475-76 n.2, 486. Other courts have also found no constitutional problems with inmates subjected to various forms of disciplinary segregation. See, e.g., Novak v. Beto, 453 F.2d 661, 665 (5th Cir. 1971) (concluding that solitary confinement in a lightless cell, with limited bedding and minimal food did not constitute cruel and unusual punishment where the inmate was not deprived of the basic elements of hygiene and noting the "long line of cases . . . holding that solitary confinement per se is not 'cruel and unusual.'") (emphasis in original); Bonner v. Parke, 918 F. Supp. 1264, 1270 (N.D. Ind. 1996) (finding that placement of prison inmate in disciplinary segregation for term of three years did not impose atypical and significant hardship on inmate, as would create liberty interest protected by due process clause on part of inmate in remaining in general prison population); Smith v. Dist. of Columbia, No. 95-57, 1996 WL 61775, at * 2 (D.D.C. Jan. 26, 1996) (holding that no liberty interest was created by placement of inmate into segregation for three months).

In particular, courts have found that placements of inmates in maximum security prisons, similar to the facility in which petitioner is detained, do not implicate due process rights of the Fifth or Fourteenth Amendments nor do they violate the Eighth Amendment's prohibition against cruel and unusual punishment. See, e.g., Meachum v. Fano, 427 U.S. 215, 225 (1976) (holding that the Constitution itself does not give rise to a liberty interest in avoiding transfer to more adverse conditions of confinement); Donaldson v. Ducote, No. 03-31122, 2004 WL 2320073, at * 2 (5th Cir. Oct. 12, 2004) (holding that transfer of prisoner to confinement in a maximum security cellblock was not an atypical significant hardship that would trigger due

process protections); Hill v. Pugh, No. 02-1561, 2003 WL 22100960, at * 4-* 5 (10th Cir. Sep. 11, 2003) (finding that federal prisoner's placement in a maximum security prison where he was isolated in his cell for twenty-three hours a day and suffered from sensory deprivation did not implicate due process rights under the Fifth Amendment or constitute cruel and unusual punishment under the Eighth Amendment where prisoner's minimal physical requirements for food, shelter, clothing, and warmth were satisfied)[14]; Campbell v. Dist. of Columbia, 874 F. Supp. 403, 407 (D.D.C. 1994) (holding that prisoner's confinement for 10 months in a maximum security cellblock where he was restricted to his cell for twenty-three hours a day did not violate the Fifth or Eighth Amendments).[15] Even under the standard proposed by petitioner, he has failed to demonstrate that his conditions of confinement warrant judicial relief and, especially, preliminary injunctive relief. Thus, as explained above and in respondents' earlier submission to the Court, petitioner's reference to the due process discussion in Sandin is inapplicable and unavailing in the present case in which petitioner is making a general conditions of confinement complaint.

Petitioner also cannot demonstrate a likelihood of success based on other potential sources of law. Neither Judge Leon nor Judge Green in either of their opinions authorized conditions of confinement claims or decided what legal standard should govern them. The

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[14] Consistent with the rules of the Fifth and Tenth Circuit Courts of Appeals, the unpublished opinions in Donaldson and Hill are cited for their persuasive value. See 5th Cir. R. 47.5.4; 10th Cir. R. 36.3 (B).

[15] The Supreme Court's decision in Wilkinson v. Austin, 125 S. Ct. 2384, 2393 (2005), is not to the contrary. In that case, the Court determined only that a liberty interest in avoiding particular conditions of confinement may arise from state policies or regulations, subject to the limitations set forth in Sandin.

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, 511 U.S. at 834-35, 846; see also Ingram v. Wright, 430 U.S. 651, 664 (1977) (holding that the Eighth Amendment applies only to "those convicted of crimes"). In contrast, the constitutional standard of care owed to "pretrial detainees" in the criminal justice context – defined by the Supreme Court as "those persons who have been charged with a crime but who have not yet been tried on that charge" – is governed by the Due Process Clause of the Fifth Amendment. Wolfish, 441 U.S. at 523, 536. "[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

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[16] This standard is applicable both to claims alleging inadequate medical care as well as challenges to general conditions of confinement, such as inadequate food, clothing, and cell temperature. See Wilson v. Seiter, 501 U.S. 294, 303 (1991) ("Whether one characterizes the treatment received by the prisoner as inhumane conditions of confinement, failure to attend to his medical needs, or a combination of both, it is appropriate to apply the 'deliberate indifference' standard articulated in Estelle [v. Gamble, 429 U.S. 97 (1976)]"). The two-prong deliberate indifference test requires the moving party to establish first that "the deprivation alleged must be, objectively, sufficiently serious, . . . a prison official's act or omission must result in the denial of the minimal civilized measure of life's necessities"; second, a prison official must have a "sufficiently culpable state of mind" – "one of deliberate indifference to inmate health or safety." Farmer v. Brennan, 511 U.S. 825, 834 (1994) (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

Brogsdale v. Barry, 926 F.2d 1184, 1188 n.4 (D.C. Cir. 1991).

Neither of these two standards, however, clearly applies to the GTMO detainees and, in any event, would not provide petitioner with a likelihood of success on his claim. As discussed, petitioner has not been convicted of any crime, thus he cannot rely on the Eighth Amendment as a basis for his conditions of confinement claim. See In re Guantanamo, 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. See Hamdi, 124 S. Ct. at 2640 (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 petitioner as an "enemy combatant." 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 ("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.").[18] The

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something less than the Eighth Amendment's 'deliberate indifference' test may be applicable in claims by [pretrial] detainees asserting violations of their due process right to medical care while in custody"), the Court has explained that "the due process rights of a pretrial detainee are at least as great as the Eighth Amendment protections available to a convicted prisoner." County of Sacramento v. Lewis, 523 U.S. 833, 849-50 (1998).

[18] Detention of enemy combatants is equally important to the gathering of vital intelligence concerning the capabilities, internal operations, and intentions of the enemy. See Howard S. Levie, Prisoners of War in Int'l Armed Conflict, 59 Int'l Law Studies 5, 108-09 (U.S. Naval War College 1977) (explaining that interrogation of enemy detainees is an "important technique in modern warfare"). Such intelligence-gathering is especially critical in the current, unconventional conflict.

uncertainty of the law in this area is illustrated by the fact that the only Judge of this Court who has touched on the issue of a condition of confinement claim by a GTMO 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 at 60-63 & n.23 ("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, petitioner cannot demonstrate a likelihood of success even under that standard in this context.

**2. Petitioner's Renewed Motion Does Not Justify Displacement of the Judgment of the Military Authorities Regarding the Manner In He Is Detained.**

In seeking an injunction concerning his confinement, petitioner again is asking the Court to second-guess the decisions of the Military regarding the manner in which he is detained and the appropriate level of security to be applied to him. Assuming, arguendo, that conditions of confinement claims are cognizable in habeas proceedings, even in the penal context, prison administrators are entitled to great deference regarding the ways in which they manage prisons and the means used to detain prisoners. The Supreme Court has stated that the operation of 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." Wolfish, 441 U.S. at 548, 562. The 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." Id. 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."). 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).[19]

These same principles counsel that the Court should decline petitioner's request to entangle itself in the particulars of the manner in which he is confined at the GTMO detention center. Moreover, petitioner has not satisfied even the "deliberate indifference" standard that would apply in the penal context. There is no evidence that the Military has been deliberately indifferent to petitioner's health or well-being. To the contrary, as explained above, the record demonstrates that petitioner is housed with other detainees, but in a single cell, and is detained in a manner in which he receives adequate food, shelter, water, hygiene opportunities, medical care, and exercise. See supra Section II. A. The record also indicates that petitioner underwent a

[19] 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, 124 S. Ct. at 2647 (stating that "[w]ithout doubt, our Constitution recognizes that core strategic matters of warmaking belong in the hands of those who are best positioned and most politically accountable for making them"); Almurbati v. Bush, 366 F. Supp. 2d 72, 81 (D.D.C. 2005) (indicating that "it is a fundamental principle under our Constitution that deference to the Executive Branch must be afforded in matters concerning the military and national security matters."); Khalid, 355 F. Supp. 2d at 328 (explaining that management of wartime detainees' confinement conditions is the province of the Executive and Legislative branches, thus precluding judicial scrutiny of such conditions).

comprehensive medical examination upon his arrival at GTMO, that he is consistently observed and treated by medical personnel and guards, and that he has access to on-site emergency medical care 24-hours a day. Furthermore, petitioner has the ability to alert his guards of a medical emergency by banging on his cell door, calling for help, or waving to the camera in his cell. Clearly, petitioner has ready access to health care at a level that is anything but "deliberately indifferent."

Indeed, other Judges of this Court have rejected similar challenges by other Guantanamo detainees to their conditions of confinement, suggesting petitioner's claim is also not likely to succeed. In O.K. v. Bush, 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. See O.K. v. Bush, 344 F. Supp. 2d at 60-63. 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 oversight committee or a superintendent of the operations of a military base." O.K. v. Bush, 377 F. Supp. 2d 102, 114 (D.D.C. 2005).

Recently, several Judges have denied preliminary injunction motions stemming from detainee hunger strikes which challenged various aspects of their confinement conditions. On September 28, 2005, Judge Oberdorfer denied motions for preliminary injunctions that were filed by petitioners in El-Banna v. Bush, No. 04-1144 (RWR), Deghayes v. Bush, No. 04-2215

(RMC), Aziz v. Bush, No. 05-0492 (JR), Imran v. Bush, No. 05-0764 (CKK), and Al Habashi v. Bush, No. 05-0765.[20] See El Banna v. Bush, --- F. Supp. 2d ----, 2005 WL 2375073 (D.D.C. Sep. 28, 2005). In denying the motions, which contained a number of extraordinary allegations,[21] Judge Oberdorfer concluded that petitioners had not "carried their burden of proving an imminent threat by respondents to the health and life of the hunger-striking movants." Id. at *2. Two other Judges adopted the reasoning of Judge Oberdorfer in denying identical motions for preliminary injunctions. Hamlily v. Bush, No. 05-CV-763 (JDB), Order (Oct. 3, 2005), at 1 (denying an identical "motion for a preliminary injunction" concerning conditions of confinement and hunger strikes "[f]or the reasons stated by Judge Oberdorfer in his decision."); Sliti v. Bush, No. 05-CV-429 (RJL), Order (Oct. 27, 2005), at 2 (denying nearly identical motions "[f]or the reasons set forth in Judge Oberdorfer's decision . . . .").

Additional Judges of this Court have denied other preliminary injunction motions that sought some of the same forms of relief that petitioner seeks in this case. On October 5, 2005, Judge Urbina denied a motion to compel immediate visits to Guantanamo, telephonic access to detainees, medical updates, and discovery of medical records in five different cases. See, e.g., Al-Oshan v. Bush, No. 05-CV-520 (RMU), Mem. Order. On that same day, Judge Kennedy denied a similar motion for temporary restraining order finding court intervention into the Guantanamo staff's response to hunger strikes to be inappropriate. Anam v. Bush, No. 04-CV-

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[20] The motions were assigned to Judge Oberdorfer through orders in the relevant cases transferring the motions to Judge Oberdorfer for decision.

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

1194 (HHK), Mem. and Order at 3. And on three different occasions, Judge Kotelly has denied motions seeking court intervention into the treatment and confinement conditions of hunger-striking detainees. Al Odah v. Bush, No. 02-CV-828 (CKK), Mem. Op. (Sept. 30, 2005) (denying temporary restraining order seeking judicial oversight of medical treatment of detainees, including periodic reports on medical conditions, access to detainee medical records, and telephone calls with detainees' family and counsel); Mem. Op. (Nov. 8, 2005) (denying motion for preliminary injunction requesting same relief as prior temporary restraining order and finding that petitioners' failed to satisfy deliberate indifference test); Order (Nov. 10, 2005) (denying request for immediate medical evacuation of hunger-striking detainee, detailing extensive medical care provided to detainee, and concluding that petitioner's medical treatment at Guantanamo has not been marked by deliberate indifference). These recent decisions confirm that petitioner enjoys no substantial likelihood of success on his analogous challenge to his conditions of confinement and that court intervention would impose significant harms on the military and public interest. Accordingly, petitioner's motion should be denied.

## CONCLUSION

For the foregoing reasons, petitioner's Motion for Preliminary Injunction should be denied in its entirety.

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