IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE:	
GUANTANAMO BAY DETAINEE LITIGATION	Misc. No. 08-CV-442 (TFH) Civil Action No. 08-CV-1360 (RBW)

RESPONDENTS' OPPOSITION TO PETITIONERS' EMERGENCY MOTION FOR IMMEDIATE DISCLOSURE OF PETITIONER'S MEDICAL RECORDS AND FOR RELATED RELIEF

On the basis of the argument below and the annexed declaration of Andrew Warden, Respondents hereby oppose the emergency motion of petitioner Husayn in which the petitioner asks this Court to exercise its "inherent power to ensure the welfare of the parties" (Mot. at 7) and order the immediate release of petitioner's medical records, guards and staff reports, logs and other notes related to petitioner's seizures since his arrival at the Guantanamo Bay Naval Base in September 2006. Petitioner also requests that his counsel be granted access to interview petitioner's treating physician and be permitted to show petitioner's medical records to an independent physician. In effect, petitioner is asking that this Court intrude into the provision of medical care at Guantanamo and supervise the condition of petitioner's confinement.

For the reasons discussed below, despite petitioner's attempt to invoke the "inherent supervisory power of the Court," this Court lacks jurisdiction to consider the petitioners' motion, which in effect is a challenge to petitioner's conditions of confinement and is an aspect of petitioner's detention that the Military Commissions Act of 2006 specifically withdrew from the Court's purview. As another judge in this Court recently held, *see In re Guantanamo Bay Litigation*, Misc. No. 08-0442 (1:05cv1509, dkt. no. 151) (J. Urbina), this is so even in light of

the Supreme Court's decision in *Boumediene v. Bush*, No. 06-1195 (June 12, 2008). Moreover, even if the Court had jurisdiction, the petitioner has failed to meet the standard for obtaining the extraordinary and drastic remedy of a preliminary injunction. His conditions-of-confinement claim is not cognizable in habeas and, in any event, he has not demonstrated that he will suffer irreparable harm because as demonstrated in the attached declaration of Captain Ronald L. Sollock, M.D., Ph.D. – which was submitted in connection with the habeas case of another Guantanamo Bay detainee, Majid Khan's – Guantanamo detainees are provided comprehensive medical and mental health care comparable to that provided to active duty military members. Petitioner is no exception, and his current medical condition is discussed in the attached declaration of Andrew Warden. This Court's micro-management of the provision of medical care at Guantanamo, on the other hand, would impose significant burdens upon the government and other detainees, and would harm the public interest. This Court should thus deny the petitioner's motion. Finally, because respondents were notified of the noon deadline for this response less than three hours before the deadline, respondents respectfully request that either the present motion simply be denied, or that they be permitted to submit supplemental briefing as warranted.

ARGUMENT

I. THIS COURT HAS NO JURISDICTION TO CONSIDER PETITIONER'S MOTION

This Court lacks jurisdiction to consider the petitioner's requested relief because, even after the Supreme Court's *Boumediene* decision, 28 U.S.C. § 2241(e)(2) prevents this Court from considering challenges to any aspect of a detainee's detention apart from the core habeas function of inquiring into the lawfulness of that detention. Through the Military Commissions

Act of 2006 (MCA), Pub. L. No. 109-366, § 7(a), 120 Stat . 2600 (codified at 28 U.S.C. § 2241(e)), Congress expressly withdrew from this Court's jurisdiction two distinct and enumerated types of actions that could be brought by individuals detained by the United States as enemy combatants:

> (e)(1) No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.
>
> (2) . . . no court, justice, or judge shall have jurisdiction to hear or consider any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

28 U.S.C. § 2241(e).

In *Boumediene*, the Supreme Court held that detainees at Guantanamo Bay have a constitutional right to habeas corpus, protected by the Suspension Clause, and that "§ 7 of the Military Commissions Act of 2006 (MCA), 28 U.S.C.A. § 2241(e) (Supp. 2007), operates as an unconstitutional suspension of the writ." *Boumediene*, Slip Op. at 2. The Court's holding that section 7 of the MCA is unconstitutional, however, is limited in two important respects. First, *Boumediene* holds that the first part of section 7 of the MCA, 28 U.S.C. § 2241(e)(1) (eliminating federal court jurisdiction over habeas corpus actions), is unconstitutional only insofar as it denies aliens detained at Guantanamo their constitutional right to habeas. *See, e.g.*, *id.* at 54 ("The habeas court must have sufficient authority to conduct a meaningful review of both the cause for detention and the Executive's power *to detain*.") (emphasis added).

Second, the Court's holding has no effect on the second provision of section 7 of the

MCA, 28 U.S.C.A. § 2241(e)(2), eliminating federal court jurisdiction over "any other action . . . relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement" of an alien detained as an enemy combatant. Indeed, the Court expressly noted that it was not deciding whether the Guantanamo detainees have a constitutional right to bring conditions-of-confinement claims. *See id.* at 64 ("[W]e need not discuss the reach of the writ with respect to claims of unlawful conditions of treatment or confinement."). Thus, the second provision of section 7 of the MCA, barring claims challenging conditions of confinement, remains in effect.

But even if the Supreme Court entirely invalidated section 7 of the MCA, reverting to statutory or common habeas law as it existed prior to the MCA, the petitioners' challenges to conditions of confinement would not be cognizable in habeas because the function of the Great Writ is to secure a petitioner's release from unlawful custody. Remedies short of release, such as challenges to the conditions under which a detainee is held, are therefore not available in habeas.

A. Pursuant to 28 U.S.C. § 2241(e)(2), This Court Lacks Jurisdiction to Hear or Consider the Petitioner's Request Which Amounts to A Challenge to His Condition of Confinement

At base, the *Boumediene* Court held that section 7 of the MCA, 28 U.S.C. § 2241(e)(1), violates the Suspension Clause as to detainees at Guantanamo Bay because it eliminates federal jurisdiction over habeas actions without providing an adequate substitute. *Boumediene,* Slip Op. at 1–2. But the Court did not invalidate section 7 of the MCA *in toto*. Indeed, the Court expressly declined to reach the constitutionality of § 2241(e)(2): "we need not discuss the reach of the writ with respect to claims of unlawful conditions of treatment and confinement." *Id.* at 64. In fact, the Court's rationale for invalidating § 2241(e)(1) as applied to aliens detained at Guantanamo Bay has no application to § 2241(e)(2). Section 2241(e)(2) does not impair the

Guantanamo detainees' ability to pursue a writ of habeas corpus, but simply limits *other* types of actions that may be brought by Guantanamo detainees. The Court explicitly distinguished between habeas actions governed by § 2241(e)(1), and *other, non-habeas* actions governed by § 2241(e)(2), by recognizing that "[t]he structure of the two paragraphs [i.e. (e)(1) and (e)(2)] implies that habeas actions are a type of action 'relating to an aspect of the detention, transfer, treatment, trial, or conditions of confinement'" *See id.* at 7.

Moreover, the Court's opinion discusses the detainees' constitutional right to bring only core *habeas* actions—challenging the lawfulness of detention—as opposed to the broader class of "any other action . . . relating to any aspect of the detention." *See, e.g., id.* at 42 ("Petitioners, therefore, are entitled to the privilege of habeas corpus *to challenge the legality of their detention*.") (emphasis added). Therefore, because § 2241(e)(2) does not address any constitutional habeas right held by the Guantanamo detainees, the Suspension Clause provides no basis for invalidating that provision. Accordingly, the Court's holding applies only to § 2241(e)(1), and not to all of section 7.

The fact that the constitutionality of § 2241(e)(2) was never challenged in *Boumediene* further supports the argument that the Court's holding does not invalidate that provision. *See Belbacha* v. *Bush*, 520 F.3d 452, 455 (D.C. Cir. 2008) ("In [the court of appeals' decision in] *Boumediene* we held that § 7(a)(1) [28 U.S.C. § 2241(e)(1)] of the MCA does not violate the Suspension Clause of the Constitution"). It would be odd to interpret the Court's decision in *Boumediene* as not only having reached the constitutionality of § 2241(e)(2), *sua sponte* and for the first time on appeal, but also to have determined that the provision is unconstitutional, without any explanation as to why.

That is particularly true given that the Court's discussion of what is constitutionally required in habeas proceedings nowhere suggests that Guantanamo detainees have a right to challenge their conditions of confinement. To the contrary, the Court's discussion is phrased in terms that limit a detainee's habeas action to challenging his status or custody. *See, e.g.*, *Boumediene*, Slip Op. at 50 ("We do consider it uncontroversial, however, that the privilege of habeas corpus entitles the prisoner to a meaningful opportunity to demonstrate that he is being held pursuant to 'the erroneous application or interpretation' of relevant law."); *id.* at 54 ("The habeas court must have sufficient authority to conduct a meaningful review of both the cause for detention and the Executive's power to detain."); *id.* at 61 (detainee must have opportunity to present "reasonably available evidence demonstrating there is no basis for his continued detention"). None of the language suggests that petitioners' constitutional habeas rights include a right to challenge the particular conditions of their treatment or confinement.[1] Thus, the Court's holding that the Suspension Clause requires invalidation of section 7 of the MCA as applied to aliens detained at Guantanamo should be read to apply only to the first part of section 7, 28 U.S.C.A. § 2241(e)(1); because the second part of that section, 28 U.S.C.A. § 2241(e)(2), does not implicate the Guantanamo detainees' right to challenge their detention and seek release, but only "other action[s]" related to "aspects" of their detention, it cannot be understood to raise any Suspension Clause concerns.

Although the Court's opinion refers generally to section 7, without identifying a particular subsection of 28 U.S.C.A. § 2241(e), *see, e.g.*, *Boumediene*, Slip Op. at 64 ("MCA § 7

[1] Indeed, for reasons discussed more fully in Part I.B., this would be a particularly expansive reading of *Boumediene*, considering that the Supreme Court has never held that conditions-of-confinement claims are cognizable in habeas actions.

thus effects an unconstitutional suspension of the writ."); *id.* at 66 ("The only law we identify as unconstitutional is MCA §7, 28 U.S.C.A. § 2241(e) (Supp. 2007)"), that is an insufficient basis for construing the Court's opinion to invalidate all of section 7 of the MCA, including § 2241(e)(2), particularly since, as discussed above, the Court's rationale for invalidating § 2241(e)(1) has no application to § 2241(e)(2). In fact, at one point in its opinion, the Court seems to acknowledge that its reference generally to section 7 is simply short-hand for referring to § 2241(e)(1). *See id.* at 47 (stating that § 7 is the source of the relevant "jurisdiction-stripping language," but citing specifically to subsection § 2241(e)(1)).

Thus, while the Court held that § 2241(e)(1) is unconstitutional as applied to Guantanamo detainees, its opinion should not be read to have determined *sub silentio* the constitutionality of 28 U.S.C.A. § 2241(e)(2). If the Court had intended to hold § 2241(e)(2) unconstitutional, the only rationale that might have supported that conclusion would have been if the Court had determined that conditions of confinement claims are encompassed in the detainees' constitutional right to habeas, so that elimination of jurisdiction over those claims jeopardized their constitutional habeas right. But, as noted above, the Court expressly stated that it was *not* deciding that issue. *See id.* at 64.

The continued viability of § 2241(e)(2) after *Boumediene* is further apparent in light of the Court's duty to save as much of the statute as is constitutional. *See Tilton* v. *Richardson*, 403 U.S. 672, 684 (1971) ("'The unconstitutionality of a part of an act does not necessarily defeat . . . the validity of its remaining provisions. Unless it is evident that the Legislature would not have enacted those provisions which are within its power . . . the invalid part may be dropped if what is left is fully operative as a law.'") (quoting *Champlin Ref. Co. v. Corp. Comm'n*, 286 U.S. 210,

234 (1934)). Indeed, because § 2241(e)(2) is severable, there is no obstacle to continuing to apply that provision, despite the *Boumediene*'s holding that § 2241(e)(1) cannot withdraw the privilege of the writ of habeas corpus to the detainees at Guantanamo. *See Ayotte v. Planned Parenthood*, 546 U.S. 320, 330 (2006) ("After finding an application or portion of a statute unconstitutional, we must next ask: Would the legislature have preferred what is left of its statute to no statute at all?").

The text and history of section 7 of the MCA demonstrate that Congress surely intended § 2241(e)(2) to survive, even if the elimination of habeas jurisdiction in § 2241(e)(1) could not. In enacting the MCA, Congress clearly sought to eliminate jurisdiction over conditions-of-confinement claims, precisely to prevent the Executive Branch from having to divert significant resources during the duration of an armed conflict to respond to those claims. *See, e.g.*, 152 Cong Rec. S10403 (daily ed. Sept. 28, 2006) (Sen. Cornyn) ("[O]nce . . . section 7 is effective, Congress will finally accomplish what it sought to do through the [DTA] last year. It will finally get the lawyers out of Guantanamo Bay. It will substitute the blizzard of litigation instigated by *Rasul v. Bush* with a narrow DC Circuit-only review of the [CSRT] hearings."); 152 *id.* at S10367 (Sen. Graham) (citing one petitioner's motion for preliminary injunction regarding conditions of confinement as an examples of a claim that should be barred); *see also* 151 *id.* at 12656–57 (daily ed. Nov. 10, 2005) (Sen. Graham) (noting that DTA was intended to limit detainees' right to "challenge their status"); 151 *id.* at S12659–60 (Sen. Kyl) (stating that DTA would grant detainees "substantial rights to contest their status but not the right to clog up Federal courts" with medical malpractice claims and complaints about food).

Thus, § 2241(e)(2) is presumed severable, *News America Pub., Inc.* v. *F.C.C.*, 844 F.2d

800, 802 (D.C. Cir. 1988), and should remain in force, despite the Court's holding that § 2241(e)(1) is unconstitutional as applied to aliens detained at Guantanamo Bay. *Alaska Airlines, Inc.* v. *Brock*, 480 U.S. 678, 685 (1987) ("[T]he unconstitutional provision must be severed unless the statute created in its absence is legislation that Congress would not have enacted"). Pursuant to that statute, this Court has no jurisdiction to hear or consider the petitioners' challenges to aspects of their confinement short of the lawfulness of their detention.

B. The Right to Seek a Writ of Habeas Corpus Recognized in *Boumediene* Does Not Encompass a Right to Challenges Conditions of Confinement.

Because § 2241(e)(2) survives the Court's decision in *Boumediene*, that provision removes federal court jurisdiction over any actions relating to conditions of treatment and confinement, including the placement of a detainee within a certain camp at Guantanamo, except insofar as such actions may be constitutionally protected under *Boumediene*'s interpretation of the Suspension Clause. In other words, under § 2241(e)(2), detainees at Guantanamo are prohibited from challenging the conditions of their confinement unless their constitutional right to habeas corpus encompasses such claims.

However, the MCA's elimination of jurisdiction over conditions-of-confinement claims raises no Suspension Clause violation because such claims are not even cognizable in a habeas proceeding. Rather, a habeas action has historically been understood as a vehicle for challenging only the fact of detention or its duration, and not conditions of confinement. That is, the Great Writ is only concerned with relief that, if granted, will result in the petitioner's *release* from confinement, not with the conditions of detention or the internal management of the detention facility.

The Supreme Court thus far has been unwilling to water down the writ from its core

purpose in the way the petitioners seek. *See Bell* v. *Wolfish*, 441 U.S. 520, 526 n.6 (1979) ("[W]e leave to 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 the confinement itself."); *see also Wilkinson v. Dotson*, 125 S. Ct. 1242, 1250 (2005) (Scalia, J., concurring) (noting that conditions-of-confinement claims in habeas would "utterly sever the writ from its common-law roots"); *Brown v. Plaut*, 131 F.3d 163, 168–69 (D.C. Cir. 1997) (indicating that requiring the use of habeas corpus for conditions claims would extend the writ beyond its core).

The Supreme Court's reservation of the question, however, has not prevented courts in other jurisdictions from squarely addressing it. Indeed, such courts have held that conditions of confinement claims that do not seek accelerated release from custody are not within the scope of the writ. *See Glaus* v. *Anderson*, 408 F.3d 382, 387–88 (7th Cir. 2005) (noting the Supreme Court has "never found" a challenge to prison conditions that "qualified" as a habeas corpus claim); *Pischke* v. *Litscher*, 178 F.3d 497, 499 (7th Cir. 1999) (stating that habeas action is proper "only if the prisoner is seeking to 'get out' of custody in a meaningful sense"); *Rael* v. *Williams*, 223 F.3d 1153, 1154 (10th Cir. 2000) ("[F]ederal claims challenging the conditions of . . . confinement generally do not arise under § 2241."); *Badea* v. *Cox*, 931 F.2d 573, 574 (9th Cir. 1991) ("Habeas corpus proceedings are the proper mechanism for a prisoner to challenge the 'legality or duration' of confinement," but not to "challeng[e] 'conditions of . . . confinement.'") (citation omitted); *Doe* v. *Pennsylvania Bd. of Probation & Parole*, 513 F.3d 95, 100 n.3 (3d Cir. 2008) (noting that habeas is limited to "[a]ttacks on the fact or duration of the confinement" and does not include "[c]hallenges to conditions of confinement"); *Hutcherson* v. *Riley*, 468 F.3d

750, 754 (11th Cir. 2006) (same). Indeed, in *Miller* v. *Overholser*, 206 F.2d 415 (D.C. Cir. 1953), the D.C. Circuit recognized that a habeas action "is not the correct remedy" for challenging "discipline or treatment," *id.* at 419-20.[2]

Thus, even prior to the MCA, a detainee could not have challenged his conditions of confinement under statutory habeas jurisdiction. And if statutory habeas jurisdiction prior to the MCA did not encompass challenges to conditions of confinement, *a fortiori* the writ as it existed at common-law in 1789 would not have permitted such claims. *See Rasul*, 542 U.S. at 474 (stating that the "habeas statute clearly has expanded habeas corpus 'beyond the limits that obtained during the 17th and 18th centuries'"). Although the Supreme Court in *Boumediene* noted that the Court has not "foreclose[d] the possibility that the protections of the Suspension Clause have expanded along with post-1789 developments," *Boumediene*, Slip Op. at 15, there is nothing in the Court's opinion to suggest that the detainees' constitutional habeas rights extend beyond the common-law writ as it existed in 1789, or require them to be able to challenge their conditions of confinement. In fact, the *Boumediene* Court expressly declined to address whether the constitutional writ of habeas corpus encompasses claims regarding unlawful conditions of confinement. *See id.* at 64. Thus, the Suspension Clause should be read, at most, to protect the

[2] In *Miller*, the D.C. Circuit allowed the petitioner to challenge the legality of the *place* of confinement because that challenge was more akin to challenging the fact of confinement than the conditions of confinement. *See* 26 F.3d at 418 ("this habeas corpus proceeding . . . tests only the legality of his present confinement"); *id.* at 419 ("legal validity of confinement in a certain place is a different problem" than "discipline or treatment in a place of legal confinement"); *see also Blair-Bey* v. *Quick*, 151 F.3d 1036, 1041–42 (D.C. Cir. 1998) (acknowledging possibility that habeas "might be available to challenge prison conditions in at least some situations," but that "pure prison-conditions cases" are "easy to identify" as outside the scope of habeas corpus); *Brown* v. *Plaut*, 131 F.3d 163, 1689–69 (D.C. Cir. 1997) (use of habeas corpus to challenge conditions of confinement would extend "beyond the 'core' of the writ"). The same consideration is not present here, where the petitioner is in effect challenging the treatment he received.

common-law writ as it existed in 1789. In any event, however, even if the writ protected by the Suspension Clause has expanded along with the habeas statute, the habeas statute has not been interpreted to allow challenges to conditions of confinement, as explained above.[3] Accordingly, the MCA's elimination of jurisdiction over conditions-of-confinement claims brought by Guantanamo detainees does not implicate the Suspension Clause.

Indeed, the Court's decision in *Munaf v. Geren*, No. 06-1666 (June 12, 2008)—decided the same day as *Boumediene*—further supports this understanding of the writ's scope. In *Munaf*, the Court emphasized that "[h]abeas is at its core a remedy for unlawful detention. . . . The typical remedy is, of course, release." *Munaf*, Slip Op. at 16 (citing *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004) (plurality opinion)); *see also Preiser v. Rodriguez*, 411 U.S. 475, 484 (1973), *cited in Munaf*, Slip Op. at 16 ("[T]he traditional function of the writ is to secure release from illegal custody."). Accordingly, the Court refused to extend the relief that a habeas court could grant to the *Munaf* petitioners' collateral challenge to their transfer to Iraqi custody. *Munaf*, Slip Op. at 28 ("Habeas corpus does not require the United States to shelter such fugitives from the criminal justice system of the sovereign with authority to prosecute them."). As with the collateral claims at issue in *Munaf*, the petitioners' pleas for relief here fall well outside the core of a habeas corpus proceeding, and request a form of relief that may not be granted in habeas.

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[3] And even if the habeas statute were to permit conditions-of-confinement claims, the Guantanamo detainees have no rights under the habeas statute. *See* MCA, § 7, 28 U.S.C. § 2241(e)(1); *Boumediene*, Slip Op. at 1 (Souter, J., concurring) ("Subsequent legislation eliminated the statutory habeas jurisdiction over these claims, so that now there must be constitutionally based jurisdiction or none at all."). There is no authority for the proposition that *constitutional* habeas corpus encompasses challenges to the conditions of confinement.

II. EVEN IF THIS COURT HAD JURISDICTION TO ENTERTAIN THE PETITIONER'S MOTION, THE MOTION SHOULD BE DENIED BECAUSE THE PETITIONERS HAS NOT MET THE BURDEN OF SHOWING A NEED FOR THE INJUNCTIVE RELIEF THEY SEEK.

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

A. The Petitioners Have Not Established that They Face Any Imminent, Irreparable Injury.

The petitioner has not shown he will suffer irreparable harm by a denial of this emergency motion. 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).

Petitioner alleges that he currently suffers from frequent seizures and attributes those seizures in part to his treatment by the military. He also discusses the differing diagnoses by several military doctors at Guantanamo, and complains about the ineffectiveness of those doctors' treatment of his condition. There is, however, no evidence that the petitioner risks irreparable harm from an inadequate provision of medical care, nor is there any such harm. As demonstrated in the attached declaration of Andrew Warden, petitioner's current medical condition warrants no relief of the sort sought by petitioner. Moreover, the attached declaration of Captain Ronald L. Sollock, M.D., Ph.D. demonstrates that Guantanamo detainees are provided comprehensive and attentive medical care, the quality of which is comparable to that provided to active duty military members.

Specifically, medical care for detainees in Guantanamo is provided by the Joint Medical Group ("JMG") of Guantanamo, which includes a Detention Hospital and a Behavioral Health Unit. *See* Declaration of Capt. Ronald L. Sollock, M.D., Ph.D. ("Sollock Decl.") ¶¶ 6-7, attached. The Detention Hospital provides a 20-bed facility with a hospital medical staff of approximately 100, including five medical doctors, a physician's assistant, nurses, corpsmen, various technicians (laboratory, radiology, pharmacy, operating room, respiratory, physical therapy), and administrative staff. *See id.* ¶ 6. The Behavioral Health Unit maintains a 21-member staff, including a Board Certified Psychiatrist, a Ph.D. Psychologist, psychiatric nurses

and psychiatric technicians. *See id.* ¶ 7. The Behavioral Health Unit staff conducts mental health assessments, provides crisis intervention, develops individualized treatment plans, and formulates behavior modification plans for management of acute and high risk behaviors that pose a threat to self or others. Long-term supportive care and psychotropic medication therapy is also provided to treat symptoms of major psychiatric disorders. *Id.*

All incoming detainees are given complete physical examinations, and any medical issues identified in initial physical examinations, or subsequently, are followed by the medical staff. *Id.* ¶ 4. A detainee can request medical care not only by notifying guards, but also by directly notifying medical personnel who make rounds every day. *Id.* In addition to following up on detainee requests, the medical staff investigates any medical issues observed by guards or other staff. *Id.*

The availability of medical care at Guantanamo has led to thousands of outpatient contacts between detainees and medical staff, followed by inpatient treatment and care as needed. *See id.* ¶¶ 4, 9-10. Detainees have been treated for a variety of medical conditions, including hepatitis, heart ailments, hypertension, combat wounds, diabetes, tuberculosis, appendicitis, inguinal hernia, leishmaniasis, malaria, and malnutrition, and have been provided prescription eyeglasses and prosthetic limbs. *Id.* ¶ 9. The medical staff at Guantanamo has performed more than 300 surgical procedures on detainees since January 2002, ranging from common procedures, such as appendectomies, to more complex intervention, such as coronary artery stent placement. *Id.* ¶ 10. When necessary, detainees are transferred to the Naval Base Hospital at Guantanamo to receive types of care not available at the Detention Hospital, and medical specialists are flown in from outside Guantanamo in appropriate cases. *Id.* ¶ 8.

The provision of health care for Guantanamo detainees is robust and comprehensive, and there is simply no basis for suggesting that petitioner will suffer irreparable harm if his emergency motion is denied.

B. The Petitioners Have Little Chance of Success on the Merits because Their Constitutional Right to Seek a Writ of Habeas Corpus Does Not Encompass a Right to Challenge their Conditions of Confinement.

The petitioner ask this Court significantly to intrude upon, and micro-manage the operations of, the Guantanamo Bay detention facility by ordering the production of medical records, guard, staff reports, logs and other notes relating to his episodes of seizure, and by ordering that petitioner's military treating physicians be interviewed by counsel. As already discussed above, the core habeas right recognized in *Boumediene* does not include, and has never included, the right to challenge the conditions under which a detainee is confined, whether it be the provision medical care or otherwise. Thus, petitioner is unlikely to succeed on the merit of what must be characterized as a condition of confinement claim.

At the threshold, it is worth noting that, because no court has ever determined that detainees of the military can even bring conditions-of-confinement claims, especially in a habeas context, *see supra* Part I.B., no court has definitively determined what legal standard should be applied to evaluate such claims brought by detainees in the custody of the military. *See O.K. v. Bush*, 377 F. Supp. 2d 102, 112 n.10 (D.D.C. 2005) ("No federal court has ever examined the nature of the substantive due process rights of a prisoner in a military interrogation or prisoner of war context."). This remains true even after *Boumediene*. *See Boumediene*, Slip Op. at 64.

Accordingly, even in the context of constitutional challenges to conditions of confinement brought by those vested with constitutional rights, courts have applied at least three

different standards to determine when an alleged violation justifies court intervention into the management of a detention facility. For example, when such challenges have been brought by criminals serving a term of imprisonment after conviction, courts have analyzed them under the Eighth Amendment's "deliberate indifference" standard. This standard 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." *Farmer v. Brennan*, 511 U.S. 825, 834–35, 846 (1994). In contrast, the constitutional standard of care owed to "pretrial detainees" in the criminal justice context—"those persons who have been charged with a crime but who have not yet been tried on that charge," *Wolfish*, 441 U.S. at 523—is governed by the Due Process Clause of the Fifth Amendment, *id.* at 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 . . . ."[4] *Block v. Rutherford*, 468 U.S. 576, 583 (1984) (internal quotations omitted); *see also Brogsdale v. Barry*, 926 F.2d 1184, 1188 n.4 (D.C. Cir. 1991). For unadmitted or excludable aliens detained by the United States, some courts have applied a separate and higher standard, reviewing the detainee's submission to determine whether it challenges actions amounting to "gross physical abuse." *See Adras v. Nelson*, 917 F.2d 1552, 1559 (11th Cir. 1990); *Lynch v. Cannatella*, 810 F.2d 1363, 1374 (5th Cir. 1987); *see also Arar v. Ashcroft et al.*, No. 06-4216, Slip Op. at 43–45 (2d Cir. June 30,

[4] The Supreme Court has stated, in partial explanation of the relationship between these standards, 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). Accordingly, as noted by a Judge of this Court, some courts have applied the "deliberate indifference" standard in both settings. *See O.K. v. Bush*, 344 F. Supp. 2d at 61 n.23 (citing *Hill v. Nicodemus*, 979 F.2d 987, 991–92 (4th Cir. 1992)).

2008) (noting the difference between the "gross physical abuse" and *Wolfish* standards, but not resolving which standard applies because the complainant failed to plead a cause of action under either standard).[5]

Regardless of which standard actually applies to these petitioners, one principle animates all three approaches: courts accord substantial deference to the judgment of prison administrators and generally refrain from interfering in the day-to-day operations of detention facilities. *See, e.g.*, *Wolfish*, 441 U.S. at 548, 562 (explaining that the operation of even domestic "correctional facilities is peculiarly the province of the Legislative and Executive Branches of our Government, not the Judicial," and cautioning lower courts to avoid becoming "enmeshed in the minutiae of prison operations"). This deference is, naturally, at its height when the court is asked to second-guess decisions made by facility personnel that concern institutional security. *See Thornburgh v. Abbott*, 490 U.S. 401, 408 (1989) ("Acknowledging the expertise of these officials and that the judiciary is 'ill equipped' to deal with the difficult and delicate problems of prison management, this Court has afforded considerable deference to the determinations of prison administrators who, in the interest of security, regulate the relations between prisoners and the outside world."); *Inmates of Occoquan v. Barry*, 844 F.2d 828, 841 (D.C. Cir. 1988) (noting that "courts are not to be in the business of running prisons" and that "questions of prison administration are to be left to the discretion of prison administrators").

Those same principles which counsel against judicial interference in the penal context should apply with even greater force in this unique context, where the detainee is challenging the

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[5] Notably, none of the cases establishing the three different standards for evaluating a conditions-of-confinement claim described above arose in the context presented here, of a *habeas corpus* action.

provision of medical care at a military detention center during a time of war. *See Dep't of Navy v. Egan*, 484 U.S. 518, 530 (1988) ("[C]ourts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs.") (citing cases); *see also Almurbati v. Bush*, 366 F. Supp. 2d 72, 81 (D.D.C. 2005) ("[I]t 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."). Keeping these principles in mind, it is clear that the appropriate standard for this Court to apply—if reaching this point is even necessary—is the "gross physical abuse" standard.

This result follows, in part, as a matter of status. Guantanamo detainees are aliens who have not been admitted to the United States. Moreover, they have not been convicted of any crime, and thus cannot rely on the Eighth Amendment-based "deliberate indifference" standard in challenging their conditions of confinement. *See, e.g.*, *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 465–78 (D.D.C. 2005) (dismissing Eighth Amendment claims). But the petitioner also is not a "pretrial detainee," at least not as defined by the Supreme Court, because they have not been charged with a crime, nor are they being detained as part of the civilian criminal justice system. *Cf. Hamdi*, 124 S. Ct. at 2640 (plurality opinion) (detention of enemy combatants and unlawful enemy combatants is not punishment or penal in nature). Moreover, the criminal justice interests served by confining "pretrial detainees" are completely distinct from the military and national security interests served by detaining individuals, such as the petitioners, in conjunction with ongoing hostilities. *Compare Wolfish*, 441 U.S. at 536-37 (criminal justice interest served by pretrial detention is to ensure detainees' presence at trial), *with Hamdi*, 124 S. Ct. at 2640 (plurality opinion) ("The capture and detention of lawful

combatants and the capture, detention, and trial of unlawful combatants is to prevent captured individuals from returning to the field of battle and taking up arms once again.").[6]

Rather, the Guantanamo alien detainees are held outside the continental United States in military, administrative, detention, at a time of war and under circumstances in which this Court owes the highest degree of deference to executive decisions affecting the mechanics of detention. In this way, the petitioners are most akin to the unadmitted aliens at issue in *Adras v. Nelson*, 917 F.2d 1552 (11th Cir. 1990) and *Lynch v. Cannatella*, 810 F.2d 1363 (5th Cir. 1987). The inquiry this Court should thus make, if it reaches the merits, is whether the petitioner has alleged such "gross physical abuse" that the Court's direct intervention in the administration of medical care at Guantanamo is warranted.[7] The petitioner has made no such showing, and as discussed

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[6] Although the principle does not apply to the petitioner, some detainees who are charged with crimes under the MCA and are subject to trial by military commission may argue that they are "pretrial detainees." This argument is unavailing. First, *Boumediene* recognized only the right of a detainee to challenge the lawfulness of his detention, not other procedural rights. Second, the question whether an enemy combatant has committed a crime—that is, determining the "unlawful" part of "unlawful enemy combatant"—is separate from the issue that *Boumediene* allows this Court to consider: whether the detainee is an enemy combatant in the first place. It is to this latter question that the substantive review standard attaches. Third, relatedly, even apart from the unresolved question whether the Guantanamo detainees have due process or other constitutional rights, the purpose for detaining an unlawful enemy combatant for trial is not to ensure his appearance at trial or punish him for a crime. Rather, the purpose remains to incapacitate the combatant and prevent him from again taking up arms. *See Hamdi*, 124 S. Ct. at 2640 (plurality opinion) ("The capture and detention of . . . unlawful combatants is to prevent captured individuals from returning to the field of battle and taking up arms once again.").

[7] The petitioner may assert that they need not satisfy the demanding "gross physical abuse" or "deliberate indifference" standards because he has argued that this Court has inherent authority to protect the lives and health of all habeas petitioners. This argument falters on the facts because there is no showing that petitioner's life or health is at risk. Moreover, such a theory would involve standardless and unbounded court oversight of detention conditions all in the name of preserving habeas petitioners' access to the courts, which is not and cannot be the appropriate legal standard. Any court oversight of conditions of confinement (even if cognizable

above, Dr. Sollock's sworn declaration demonstrates otherwise. Indeed, this same result would obtain even if the Court were to find that a different standard, such as that of "deliberate indifference," applies to these detainees. *See, e.g.*, *O.K. v. Bush*, 344 F. Supp. 2d 44, 60–63 & n.23 (D.D.C. 2004) ("Without concluding that the 'deliberate indifference' doctrine is the correct standard for any constitutional claims the petitioners may raise . . . the Court will draw on this well-developed body of law to guide its analysis . . . ."). Under that standard, only upon a showing that prison conditions or care sink to the level of "deliberate indifference" to an inmate's health or well-being is a court justified in intervening in the treatment of inmates in the traditional penal prison setting. *See Neitzke v. Williams*, 490 U.S. 319, 321 (1989); *Chandler v. District of Columbia Dept. of Corrections*, 145 F.3d 1355, 1360 (D.C. Cir. 1998) ("To prevail in a case alleging unconstitutional conditions of confinement, a prisoner must show that the government official 'knew of and disregarded an excessive risk to inmate health or safety.'"). Accordingly, even if habeas courts have the authority to consider challenges to a detainee's confinement conditions, the petitioner is not likely to succeed on the merits of his emergency motion because he cannot demonstrate that the Guantanamo staff has been deliberately indifferent to his health or well-being.

C. The Relief Petitioner Requests Would Impose Substantial and Undue Burdens on the Government and Injure its Interests

At its base, the petitioner's request for relief invites this Court to micro-manage the

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in habeas, which respondents dispute) must be tethered to an appropriate legal standard, and the case law, even in the context of domestic incarceration of those possessed of full constitutional rights, requires that prison conditions or care sink to the level of "deliberate indifference" to an inmate's health or well-being before a court may intervene in the management of a detention facility. *See Neitzke v. Williams*, 490 U.S. 319, 321 (1989). The standard for unadmitted aliens detained in administrative custody is even more demanding.

administration of medical care at Guantanamo. The motion asks for the type of judicial intervention and oversight of the operations at Guantanamo that is highly discouraged under the law and particularly unwarranted in the unique context presented in this case. Indeed, as discussed below, their motion asks this Court to question the considered judgment of those charged with maintaining the health, welfare and safety of these and other detainees. But this Court is "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). It should therefore reject the petitioner's invitation. As discussed above, courts are reluctant to intervene in the management of detention facilities and to second-guess the security judgments made by trained personnel. *See Thornburgh v. Abbott*, 490 U.S. 401, 408 (1989); *Bell v. Wolfish*, 441 U.S. 520, 548, 562 (1979). Deference to the considered judgment of Guantanamo staff is particularly appropriate under the unique circumstances here, involving enemy combatants detained by the military in a time of war.

D. The Public Interest Would Not be Served by Granting the Emergency Motion.

Finally, the public has a strong interest in assuring that the military operations at Guantanamo are not interrupted, overly burdened, and second-guessed by the unnecessary demands of individual detainees regarding the particulars of his confinement conditions. As demonstrated above, the Guantanamo medical staff has provided, and will continue to provide excellent, comprehensive medical care to ensure the health and well-being of detainees there. By the same token, to require that staff to take the time to address petitioner's request for records would divert resources from the medical care to detainees and result in a burden on the Guantanamo Bay medical staff. Accordingly, to avoid the unnecessary burdens imposed by

petitioner's motion, the public interest would best be served if the Court denied the motion.

CONCLUSION

For the reasons stated above, respondents respectfully request that the petitioner's emergency motion be denied.

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