

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

SUHAIL ABDU ANAM, <i>et al.</i> ,)	
)	
)	
Petitioners,)	
)	
v.)	Civil Action No. 04-1194 (HHK)
)	
GEORGE W. BUSH,)	
President of the United States, <i>et al.</i> ,)	
)	
Respondents.)	
)	

**RESPONDENTS’ OPPOSITION TO PETITIONERS’ MOTION FOR TEMPORARY
RESTRAINING ORDER TO COMPEL GOVERNMENT TO APPROVE COUNSEL
VISIT TO GUANTANAMO BAY FROM OCTOBER 8-10, 2005**

Respondents hereby oppose petitioners’ motion for a temporary restraining order to compel respondents to approve petitioners’ counsel’s request for a visit to Guantanamo Bay from October 8-10, 2005. For the reasons explained in respondents’ opposition to petitioners’ motions to compel access to counsel and information related to medical treatment, filed in, inter alia, Abdah v. Bush, 04-CV-1254 (HHK) (dkt. no. 162) (attached to Petrs’ Mot., Exhibit F), and incorporated herein by reference, petitioners’ motion should be denied.

In similarity to various motions to compel immediate access by counsel to detainees in other Guantanamo habeas cases,¹ petitioners’ motion arises out of reports of hunger strikes by

¹ See Motion to Compel Information Related to Medical Treatment filed in Al-Oshan v. Bush, Case No. 05-520 (RMU), Al-Subaiy v. Bush, Case No. 05-1453 (RMU), Al-Hela v. Bush, Case No. 05-1048 (RMU), Hatim v. Bush, Case No. 05-1429 (RMU), and Bin Amir v. Bush, Case No. 05-1724 (RMU); Motion to Compel Access to Counsel and Information Related to Medical Treatment filed in Al Joudi v. Bush, Case No. 05-301 (GK), Al-Marri v. Bush, Case No.

some detainees at the United States Naval Base at Guantanamo Bay, Cuba and rests on the faulty and inadequately substantiated premise that the military authorities and medical staff at Guantanamo are not interested in and are not capable of protecting the health and welfare of detainees participating in a hunger strike, purportedly creating a “grave situation.” See Petr’s Mot. ¶ 6.

Contrary to petitioners’ allegations, Guantanamo has carefully established procedures in place for responding appropriately to hunger strikes that include protocols to intervene to take medically appropriate measures to preserve detainees’ lives and health. As noted in the sworn declaration of Major General Jay W. Hood, the Commander of Joint Task Force-Guantanamo (“JTF-GTMO”), security forces at Guantanamo monitor each detainee’s daily intake of food and water. Declaration of MG Jay W. Hood (“Hood Decl.”) ¶ 5 (attached as Exhibit 1). If medical personnel have reason to believe that the continuation of a hunger strike² might endanger the health of a detainee, the detainee is admitted to the hospital. Id. ¶ 6. The detainee is then encouraged to eat food and drink liquids and is counseled on the health risks associated with refusing to do so. Id. If a detainee continues to refuse to eat or drink and a medical officer determines that the detainee’s health or life might be seriously threatened if treatment is not

04-2035 (GK), Al-Adahi v. Bush, Case No. 05-280 (GK), and Al Razak v. Bush, Case No. 05-1601 (GK); Motion to Compel Access to Medical Information filed in Abdah v. Bush, Case No. 04-1254 (HHK).

² A detainee is deemed to have started a hunger strike after missing nine consecutive meals or after declining food and water for more than two days. Hood Decl. ¶ 5. A detainee is deemed to have ended a hunger strike after eating three consecutive meals. The number of detainees engaged in a hunger strike at any given moment thus fluctuates frequently. At the time of filing this response, there are approximately 30 detainees currently on hunger strikes at Guantanamo, including one petitioner in this case.

promptly administered, Major General Hood will authorize feeding by intravenous means or through a feeding tube. Id. ¶ 8. No detainee at Guantanamo has ever died, from a hunger strike or otherwise, since the detentions at issue in the Guantanamo cases began.

Relying on these policies, three Judges of this Court recently denied motions requesting judicial intervention into respondents' care of detainees participating in a hunger strike. First, on September 28, 2005, Judge Oberdorfer denied motions for preliminary injunctions concerning conditions of confinement and hunger strikes at Guantanamo that were filed by petitioners in El-Banna v. Bush, Case No. 04-1144 (RWR), Deghayes v. Bush, Case No. 04-2215 (RMC), Aziz v. Bush, Case No. 05-0492 (JR), Imran v. Bush, Case No. 05-0764 (CKK), and Al Habashi v. Bush, Case No. 05-0765 (EGS) ("Memorandum and Order") (attached as Exhibit 2).³ In denying the motions, Judge Oberdorfer relied on the declaration of Major General Hood to conclude that petitioners had not "carried their burden of proving an imminent threat by respondents to the health and life of the hunger-striking movants."

Second, on September 30, 2005, Judge Kollar-Kotelly denied a motion for temporary restraining order seeking "judicial oversight of the medical treatment of Petitioners" in Al Odah v. Bush, 02-CV-828 (CKK). See Memorandum Opinion (attached as Exhibit 3). In reaching this decision, Judge Kollar-Kotelly also relied on General Hood's declaration: "It is clear from Major General Hood's declaration that the Government has regular procedures for determining when detainees are on a hunger strike, when medical intervention is required, and what is the appropriate treatment in order to preserve the lives of detainees." Id. at 6; see also id. at 13

³ The motions were assigned to Judge Oberdorfer through orders in the relevant cases transferring the motions to Judge Oberdorfer for decision.

(Government provides medical care “to the detainees on hunger strikes . . . calibrated to preserve their life and health”).

Third, on October 3, 2005, Judge Bates issued an order in Hamliily v. Bush, 05-CV-763 (JDB), denying a “motion for a preliminary injunction” concerning conditions of confinement and hunger strikes “[f]or the reasons stated by Judge Oberdorfer in his decision.” See Order (attached as Exhibit 4).

As demonstrated in the sworn declaration of Major General Hood, and as recognized in the opinions by Judges Oberdorfer, Kollar-Kotelly, and Bates, the premise of petitioners’ motion – that the government is unwilling to act to preserve detainees’ lives and health and that a crisis situation is at hand – is inaccurate. Accordingly, counsel’s request for immediate access to petitioners is merely a prelude to a request for relief that would improperly second-guess the medical care provided by Guantanamo personnel. See Petrs’ Mot. at ¶ 11 (“It is imperative that Counsel be permitted to meet with Petitioners in order to consider whether their rights are being violated or whether any further legal action needs to be initiated on their behalf.”). As such, counsel’s request for an immediate visit to Guantanamo is not legally justified 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 medical care provided to detainees. Additionally, the relief requested by petitioners would be unduly burdensome in light of the number of cases in which similar relief is sought, as well as likely similar requests and emergency motions by counsel for many other of the well over 200 detainees at Guantanamo with pending habeas cases. In any event, the relief requested in petitioners’ motion is unnecessary in light of a previously planned visit by petitioners’ counsel

scheduled to occur from November 9-13, 2005, as well as the fact that the health of all detainees, including those on hunger strikes, is carefully managed by the Guantanamo staff.

For these reasons, petitioners' motion should be denied.

ARGUMENT

I. TEMPORARY RESTRAINING ORDER STANDARD

It is well-established that a request for a temporary restraining order “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 a request for a temporary restraining order, a movant “must ‘demonstrate 1) a substantial likelihood of success on the merits, 2) that [he] would suffer irreparable injury if the injunction is not granted, 3) that an injunction would not substantially injure other interested parties, and 4) that the public interest would be furthered by the injunction.’” See Katz v. Georgetown Univ., 246 F.3d 685, 687-88 (D.C. Cir. 2001) (quoting CityFed Financial Corp. v. Office of Thrift Supervision, 58 F.3d 738, 746 (D.C. Cir. 1995)); see also Vencor Nursing Ctrs. V. Shalala, 63 F. Supp. 2d 1, 7 n.5 (D.D.C. 1999) (“The same factors necessary to obtain a preliminary injunction apply when a TRO is sought.”). Petitioners' motion does not meet this extraordinary standard.

II. PETITIONERS WILL NOT BE IRREPARABLY INJURED.

Despite petitioners' attempts to portray a crisis situation warranting an immediate, Court-ordered visit to Guantanamo by counsel, petitioners' motion is factually unwarranted and should be denied. No crisis of irreparable harm exists either with respect to detainees' health or counsel's access to their clients. As explained above, and as recognized by Judges Oberdorfer,

Kollar-Kotelly, and Bates, Guantanamo personnel have policies and practices in place for responding appropriately to hunger strikes such that no detainee's life or health will be endangered.

With respect to counsel's requests for immediate in-person access to petitioners, court intervention is unnecessary in this case. Counsel for the petitioners are currently scheduled to visit their clients at Guantanamo from November 9-13, 2005, having previously submitted a visit request on September 22, 2005 in accordance with the Amended Protective Order governing counsel access to detainees at Guantanamo.⁴ See In re Guantanamo Detainee Cases, 344 F. Supp. 2d 174, 186 (D.D.C. 2004) (publishing November 8, 2004 protective order, which indicates that counsel visits generally require twenty days advance notice). Requiring a more immediate visit is unwarranted because the health and welfare of the detainees, including those on hunger strikes, are sufficiently maintained by the Guantanamo staff, as discussed previously and clearly established in General Hood's declaration. Consequently, petitioners have not demonstrated that they will suffer irreparable harm, and their motion should be denied.

III. THE REQUESTED RELIEF WOULD IMPOSE UNDUE BURDENS ON THE GOVERNMENT AND INJURE ITS INTERESTS.

In addition to being unnecessary, requiring immediate in-person access by counsel would impose a significant burden on the staff at Guantanamo. Arranging for attorneys to meet with their detainee clients at Guantanamo is a significant and time-consuming undertaking, which thus far in the Guantanamo litigation has taken place without significant judicial oversight. The

⁴ Petitioners' counsel have visited Guantanamo on five prior occasions: January 9-14, 2005; February 27-March 4, 2005; April 17-21, 2005; June 6-10, 2005; and August 29-September 2, 2005.

relief requested in petitioners' motion has the potential to create a cumulative effect across the more than 150 Guantanamo habeas cases with petitioners' counsel filing requests for emergency relief to schedule immediate visits to Guantanamo, and the Court acting on a routine basis as the final scheduling arbiter.⁵

In order to facilitate counsel visits, counsel must be lodged on the base, and petitioners must be moved from the detention areas to meeting facilities capable of supporting privileged communications in a separate but physically limited area of Guantanamo known as "Camp Echo." Each movement of each detainee to and from Camp Echo requires a number of logistical and security measures, including orders from military supervisors to move the detainee, arrangements for vehicular transport, and arrangements for multiple guards and support personnel for the movement of the detainee, his personal belongings, and for the delivery of meals. These arrangements must be orchestrated with other operational functions and duties at Guantanamo, including, but not limited to, daily meals, multiple daily prayer calls, exercise opportunities, and, where appropriate, military commission proceedings and witness interviews. Thus, while done frequently – indeed, virtually daily in recent weeks – counsel visits can be accommodated for only a few attorneys at any given time and therefore typically require several weeks advance notice for scheduling. Arranging immediate counsel visits, with little or no prior notice, even on a case-by-case basis, typically would be difficult to accomplish and accommodate, and permitting such a practice when the Guantanamo litigation involves well over a hundred different cases involving more than a hundred different attorneys and over two

⁵ Indeed, as noted above, petitioners in many other Guantanamo cases have filed motions for similar relief. See supra note 1.

hundred different detainees would be a recipe for chaos.⁶ Indeed, counsel's requests for an immediate visit in the present case cannot be viewed in isolation, as any order granting such relief would likely cause counsel for many detainees in the other cases to demand immediate access to their clients as well, resulting in an undue burden on respondents that would be imprudent and unwarranted, particularly in the face of declarations demonstrating that competent staff at Guantanamo Bay have procedures in place which they apply to care for the health and lives of the detainees.⁷ As demonstrated, the relief requested by petitioners is unnecessary and, at the same time, would have a potentially cumulative effect that would substantially injure the interests of respondents. The relief, therefore, should be denied.

IV. PETITIONERS ARE NOT LIKELY TO SUCCEED BECAUSE THERE IS NO ADEQUATE LEGAL BASIS FOR THE RELIEF PETITIONERS REQUEST.

In addition to lacking a justifiable factual basis (as demonstrated by the sworn declaration of Major General Hood), petitioners' motion lacks an adequate legal basis for their requested

⁶ In support of their motion, petitioners' counsel refer to a recent visit arranged for counsel in Al Odah v. United States, Case No. 02-828 (CKK). See Petrs' Mot. at ¶ 12. The Al Odah counsel visit, however, was scheduled only slightly inside the normal twenty-day advance notice period for counsel visits and was able to be fully accommodated only because the Abdah counsel group had recently canceled its previously arranged visit for that same time period.

⁷ Petitioners' counsel also request that the Court order the Government to permit them to conduct visit meetings in the Guantanamo detention hospital to the extent their clients are being treated there. See Petrs' Mot. at ¶ 13. Because counsel's request for immediate access to petitioners should be denied, the Court need not decide petitioners' challenge to Guantanamo's policy prohibiting the conduct of habeas counsel meetings in the detention hospital, a policy that is based upon the significant burdens that would result from such meetings, including interference with administration of medical care and other base operations. In any event, as petitioners' counsel concede in their motion, see id., they have been permitted to meet with their clients in Camp Echo – the area of Guantanamo reserved for counsel meetings – during their prior visits, as have other habeas counsel in recent visits; the need for a hunger striking detainee to remain hospitalized in a fashion that would prevent a meeting with counsel has not arisen. Thus, petitioners' challenge to the hospital policy is premature and unnecessary.

relief. The Amended Protective Order provides that “reasonable efforts will be made to accommodate counsel’s request regarding the scheduling of a meeting [at Guantanamo].” See Revised Procedures For Counsel Access to Detainees At the U.S. Naval Base in Guantanamo Bay, Cuba, ¶ III.D.1. Throughout the thirteen months of habeas counsel visits, Guantanamo personnel have worked to schedule visits for nearly 100 different counsel teams in an orderly fashion with an eye toward balancing the burdens placed on Guantanamo personnel who support counsel visits, on the one hand, and equitable treatment of petitioners’ counsel in all the Guantanamo habeas cases, on the other. In this case, petitioners’ counsel submitted their request less than nine days in advance of their visit date, which increases the already heavy burden on Guantanamo personnel to make appropriate visit arrangements. See id. ¶ III.D.4 (“Requests for visits inside of 20 days will not normally be granted”); Petrs’ Mot., Exhibit F. Furthermore, respondents have already approved a visit for petitioners’ counsel from November 9-13, 2005, and the asserted basis for the emergency request in this case – that Guantanamo is not capable of protecting the health and welfare of detainees participating in a hunger strike – is without merit. Given the need to schedule and arrange habeas counsel visits in an orderly fashion, petitioners’ emergency motion to compel approval of a visit in a few days’ time is not a reasonable request and, as explained above, may lead to a flood of similar motions, thus rendering the orderly process of scheduling visits unmanageable. Based on these facts, respondents have not acted unreasonably in refusing to schedule a visit on such short notice.

In any event, petitioners’ counsel’s request for immediate access to the petitioners is not otherwise meritorious as a legal matter because counsel’s request indicates that petitioners ultimately seek improper judicial intervention and oversight of the medical care provided by

Guantanamo to hunger-striking detainees. Indeed, petitioners' request for such access can serve no other purpose than to facilitate second-guessing of the judgment of the military's medical professionals. See Petr's Mot. at ¶ 11.

To the extent that such conditions of confinement claims are even cognizable in habeas proceedings,⁸ there is no compelling legal basis for judicial supervision of petitioners' medical care. As a threshold matter (and assuming detainees have constitutional rights, a matter currently before the Court of Appeals),⁹ courts have routinely denied constitutional challenges to the involuntary feeding of hunger-striking prisoners. See, e.g., Grand Jury Subpoena John Doe v. United States, 150 F.3d 170, 172 (2d Cir. 1998) ("we, like the majority of courts that have considered the question, hold that [an involuntary feeding] order does not violate a hunger-striking prisoner's constitutional rights"); Martinez v. Turner, 977 F.2d 421, 423 (8th Cir. 1992) ("Martinez's claim that he was force-fed also fails to state a constitutional claim."); In

⁸ The Supreme Court and the D.C. Circuit have never squarely resolved whether challenges to conditions of confinement may be brought under habeas proceedings. See Bell v. Wolfish, 441 U.S. 520, 526 n.6 (1979) ("Thus, we leave for another day the question of the propriety of using a writ of habeas corpus to obtain review of the conditions of confinement, as distinct from the fact or length of confinement itself."); Brown v. Plaut, 131 F.3d 163, 168-69 (D.C. Cir. 1997) (acknowledging that habeas corpus might conceivably be used to challenge prison conditions, but indicating that requiring use of habeas corpus in such cases would extend the writ beyond its core). Courts in other jurisdictions that have squarely addressed the issue, however, have affirmatively held that conditions of confinement claims that do not seek accelerated release from custody are not within the scope of the writ of habeas corpus. See, e.g., Cochran v. Buss, 381 F.3d 637, 639 (7th Cir. 2004); Carson v. Johnson, 112 F.3d 818, 820-21 (5th Cir. 1997); McIntosh v. United States Parole Commission, 115 F.3d 809, 811-12 (10th Cir. 1997); Badea v. Cox, 931 F.2d 573, 574 (9th Cir. 1991).

⁹ The assumption that detainees have constitutional rights, which respondents contest, pertains to the entire ensuing discussion regarding the legal standards that apply to those rights. As demonstrated infra, even assuming the existence of such rights, petitioners are not entitled to the relief requested.

re Soliman, 134 F. Supp. 2d 1238, 1255 (N.D. Ala. 2001) (“Federal courts generally have approved of force-feeding hunger striking inmates, regardless of whether the person was a convicted prisoner, a pre-trial detainee, or a person held pursuant to a civil contempt order”), vacated as moot, 196 F.3d 1237 (11th Cir. 2002). None of these cases even suggests that courts have a role in supervising the government’s medical treatment of hunger-striking detainees. And, as a general matter, the Supreme Court has explained that the operation of even domestic “correctional facilities is peculiarly the province of the Legislative and Executive Branches of our Government, not the Judicial,” and has admonished lower courts to avoid becoming “enmeshed in the minutiae of prison operations.” Bell v. Wolfish, 441 U.S. 520, 548, 562 (1979); see also Inmates of Occoquan v. Barry, 844 F.2d 828, 841 (D.C. Cir. 1988) (“courts are not to be in the business of running prisons”); O.K. v. Bush, 377 F. Supp. 2d 102, 114 (D.D.C. 2005) (“But in assessing the need for extraordinary preliminary injunctive relief, the Court must examine whether such relief is warranted here because of a real, imminent threat of harm to petitioner in the future. 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”). This is especially the case in the area of medical care. See, e.g., Exhibit 4 (Mem. Op. of Judge Kollar-Kotelly in Al Odah) at 11; Inmates of Allegheny County Jail v. Pierce, 612 F.2d 754, 762 (3d Cir. 1979) (stating that federal courts will “disallow any attempt to second-guess the propriety of a particular course of treatment” chosen by prison doctors); Martinez v. Mancusi, 443 F.2d 921, 924 (2d Cir. 1971) (“Obviously, courts cannot go around second-guessing doctors.”). These concerns are certainly heightened in the unique and unprecedented context of these cases – involving the military detention of alien enemy combatants overseas during a time

of war.

Beyond this, because no court has ever determined that detainees of the military can even bring conditions of confinement claims, no court has determined what legal standard should be applied to evaluate such claims brought by detainees in the custody of the military. Cf. 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.”). The Supreme Court has explained that constitutional challenges to conditions of confinement brought by convicted criminals are analyzed under the Eighth Amendment’s “deliberate indifference” standard, which requires a prisoner to establish that prison officials “were knowingly and unreasonably disregarding an objectively intolerable risk of harm to the prisoners’ health or safety.”¹⁰ Farmer v. Brennan, 511 U.S. 825, 834-35, 846 (1994); 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. Bell v. Wolfish, 441 U.S. 520, 523, 536

¹⁰ 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, 511 U.S. at 834 (internal quotations omitted).

(1979). “[W]here it is alleged that a pretrial detainee has been deprived of liberty without due process, the dispositive inquiry is whether the challenged condition, practice, or policy constitutes punishment, for under the Due Process Clause, a detainee must not be punished prior to an adjudication of guilt in accordance with due process of law.”¹¹ Block v. Rutherford, 468 U.S. 576, 583 (1984) (internal quotations omitted); see also Brogdsdale v. Barry, 926 F.2d 1184, 1188 n.4 (D.C. Cir. 1991).

Regardless of whether either of these two standards directly applies to the Guantanamo detainees,¹² prison administrators are entitled to great deference regarding the ways in which

¹¹ Although the Supreme Court has never resolved the precise relationship between these two tests, see City of Canton v. Harris, 489 U.S. 378, 389 n.8 (1989) (reserving “whether something less than the Eighth Amendment’s ‘deliberate indifference’ test may be applicable in claims by [pretrial] detainees asserting violations of their due process right to medical care while in custody”), the Court has explained that “the due process rights of a pretrial detainee are at least as great as the Eighth Amendment protections available to a convicted prisoner.” County of Sacramento v. Lewis, 523 U.S. 833, 849-50 (1998).

¹² Petitioners have not been convicted of any crime, and thus cannot rely on the Eighth Amendment as a basis for their conditions of confinement claims, see In re Guantanamo Detainee Cases, 355 F. Supp. 2d 443, 465-78 (D.D.C. 2005) (dismissing Eighth Amendment claims), and they also are not “pretrial detainees,” as defined by the Supreme Court, because they have not been charged with a crime, nor are they being detained as part of the criminal justice system. Cf. Hamdi v. Rumsfeld, 124 S. Ct. 2633, 2640 (2004) (plurality opinion) (detention of enemy combatants is not punishment or penal in nature); Padilla v. Hanft, 2005 WL 2175946 at *6 (4th Cir. Sept. 9, 2005) (distinguishing criminal detention from military detention of enemy combatants). Furthermore, the criminal justice interests served by confining “pretrial detainees” are completely distinct from the military and national security interests served by detaining individuals, such as 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 (2004) (plurality opinion) (“The capture and detention of lawful combatants and the capture, detention, and trial of unlawful combatants is to prevent captured individuals from returning to the field of battle and taking up arms once again.”). The uncertainty of the law in this area is illustrated by the fact that one Judge of this Court who has addressed the issue of a condition of confinement claim by a Guantanamo detainee reserved the question whether “the ‘deliberate indifference’ doctrine is the correct standard for any constitutional claims that petitioners might raise in this case.” O.K. v.

they manage prisons and the means used to care for and detain prisoners. One court has employed the deliberate indifference standard as a guide for its evaluation of a Guantanamo detainee's claim of deficient medical care. O.K. v. Bush, 344 F. Supp. 2d 44, 60-63 & n.23 (D.D.C. 2004) (Bates, J.) ("Without concluding that the 'deliberate indifference' doctrine applies" to challenges regarding inadequate medical care, "the Court will draw on this well-developed body of law to guide its analysis"). 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'"). And, as noted above, "second-guessing" medical care decisions is not permissible. See, e.g., Pierce, 612 F.2d at 762. These same principles counsel the Court to decline petitioners' request to begin to entangle itself in unspecified ways into the particulars of their medical care and the military's response to hunger strikes by ordering counsel's immediate access to petitioners. Indeed, in light of the fact that petitioners are 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.¹³

Bush, 344 F. Supp. 2d 44, 60-63 & n.23 (D.D.C. 2004) (Bates, J.).

¹³ See, e.g., Hamdi, 124 S. Ct. at 2647 (plurality opinion) (stating that "[w]ithout doubt, our Constitution recognizes that core strategic matters of war-making belong in the hands of those who are best positioned and most politically accountable for making them"); id. at 2640 (noting

In any event, petitioners cannot satisfy even the “deliberate indifference” standard that would apply in the penal context. The record demonstrates that any detainee engaged in a hunger strike receives sufficient monitoring and medical attention, and the Guantanamo medical staff has intervened and will continue to take medically appropriate measures to preserve the lives and health of detainees as needed. As noted, the declaration of Major General Hood explains that Guantanamo personnel have policies and practices in place for responding appropriately to hunger strikes, which include protocols for the close monitoring of each detainee’s daily intake of food and water, counseling regarding the risks associated with participating in a hunger strike, hospitalization when a detainee’s health is impaired, and administration of involuntary feedings when necessary to maintain a detainee’s life and health. Hood Decl. ¶¶ 5, 6, 8. These policies and care have already been applied with respect to detainees who have participated in a hunger strike, and will continue to be applied to any detainees who might choose to engage in a hunger strike in the future. Accordingly, there is no factual or legal basis for Court supervision of petitioners’ medical care, or for counsel’s immediate access to petitioners for these purposes.

that capture and detention of suspected combatants is an “important incident of war”); Ludecke v. Watkins, 335 U.S. 160, 170 (1948) (finding that determination of state of war and status of individual as enemy alien are “matters of political judgment for which judges have neither technical competence nor official responsibility”); cf. Hirota v. MacArthur, 338 U.S. 197, 215 (1949) (Douglas, J., concurring) (stating that “the capture and control of those who were responsible for the Pearl Harbor incident was a political question on which the President as Commander-in-Chief, and as spokesman for the nation in foreign affairs, had the final say.”); Khalid v. Bush, 355 F. Supp. 2d 311, 328 (D.D.C. 2005) (explaining that management of wartime detainees’ confinement conditions is the province of the Executive and Legislative branches, thus precluding judicial scrutiny of such conditions).

V. DENYING PETITIONERS' MOTION WOULD BEST SERVE THE PUBLIC INTEREST.

The public has a strong interest in assuring that the military operations and medical care provided at Guantanamo are not interrupted, overly burdened, and second-guessed by the unnecessary demands of various petitioners' counsel for immediate access to the detainees. Petitioners' counsel argue that they have an interest in ensuring that petitioners have access to counsel to support their motion. See Petrs' Mot. at ¶ 11. As demonstrated above, however, petitioners do, in fact, have adequate access to their counsel, especially in light of their impending counsel visit next month. Thus, the public's purported interest in petitioners' access to counsel is already being well-served without court intervention. Accordingly, to avoid the unnecessary burdens imposed by petitioners' motion, the public interest would best be served if the Court denied petitioners' motion.

CONCLUSION

For the reasons stated above, respondents respectfully request that petitioners' motion be denied in all respects.

Dated: October 4, 2005

Respectfully submitted,

PETER D. KEISLER
Assistant Attorney General

KENNETH L. WAINSTEIN
United States Attorney

DOUGLAS N. LETTER
Terrorism Litigation Counsel

/s/ Andrew I. Warden
JOSEPH H. HUNT (D.C. Bar No. 431134)

VINCENT M. GARVEY (D.C. Bar No. 127191)
TERRY M. HENRY
JAMES J. SCHWARTZ
PREEYA M. NORONHA
ROBERT J. KATERBERG
ANDREW I. WARDEN (IN Bar No. 23840-49)
NICHOLAS J. PATTERSON
EDWARD H. WHITE
United States Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Ave., N.W.
Washington, DC 20530
Tel: (202) 514-4107
Fax: (202) 616-8470

Attorneys for Respondents