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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

SHAKER AAMER,	)	
	)	
<i>Petitioner/Plaintiff,</i>	)	
	)	
v.	)	Civ. No. 04-cv-2215 (RMC)
	)	
GEORGE W. BUSH, et al.,	)	
	)	
<i>Respondents/Defendants.</i>	)	
_____	)	

**REPLY IN SUPPORT OF MOTION TO LIFT STAY AND FOR PRELIMINARY  
INJUNCTION ENFORCING GENEVA CONVENTIONS**

Petitioner Shaker Aamer respectfully files this reply in support of his motion to ensure his humane treatment in Guantánamo Bay.

Mr. Aamer has been held in Camp Echo out of the general population for over a year. Respondents have admitted using physical force against Mr. Aamer repeatedly. They have admitted violating their own rules of keeping prisoners in isolation for only 30 days. They have admitted that they never turn off the lights in the shack in which Mr. Aamer lives.<sup>1</sup> Respondents do not deny that Mr. Aamer’s sleep has been disturbed every 15 minutes.<sup>2</sup>

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<sup>1</sup> Respondents say this is not a problem because while they leave the lights on constantly in the “passageway outside the cell,” they dim the lights in his cell. See Declaration of Colonel Dennis at ¶ 9c. This statement is belied by the physical reality of the shack in which Mr. Aamer lives. The whole shack consists of a single room with two cells in it. The word “passageway” implies a hall outside a cell. There is no “passageway” in this shack, merely the other half of the room. The cell has bars only, no door to block the light. If you dim a light in one of the cells, by Respondents’ admission the lights in the room still remain at full force. It’s like turning off a bedside lamp in a room while leaving overhead florescent lights on and claiming you’ve made it dark.

<sup>2</sup> They excuse this as an attempt to let in fresh air. See Declaration of Colonel Dennis at ¶ 9d.

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Respondents have failed to provide justification for this treatment, except for a conclusory statement that placement in solitary was based on “appropriate detention considerations.” Mr. Aamer is not being treated humanely. The Court must intervene.

**ARGUMENT**

There can be little doubt that Mr. Aamer is being punished. Mr. Aamer led negotiations to settle a major hunger strike during the summer of 2005. When the agreement reached fell apart, Mr. Aamer was shipped off to Camp Echo. Except for a brief interlude last fall, he has been there ever since. He is a warehoused human being. Mr. Aamer has never been charged with a crime, never been given a trial. He is a prisoner of an unjust system that has deprived him of his liberty and punished him for attempting to make the lives of his fellow prisoners tolerable through negotiation – not violence. For that, he has been cut off from his fellow prisoners, beaten, subjected to temperature extremes and ceaseless lighting. This must stop. An alternative must be explored.

**I. There Are No Barriers to the Court Reaching the Merits of this Motion**

1. The Detainee Treatment Act Is Not a Barrier to Reaching the Merits of this Motion

Predictably, the government has responded to this motion by trotting out the exclusive review provisions of Detainee Treatment Act Section 1005(e)(2) once again. This issue has been conclusively settled by *Hamdan* and by the authorities referenced in our initial motion. Counsel will not reiterate those arguments here.

2. Passage of the Military Commissions Act Is Not a Barrier to Reaching the Merits of this Motion

Congressional passage of the Military Commissions Act, S.3930, does not change this calculus.<sup>3</sup> First of all, the MCA is not yet law, having not been signed by the President (he is

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<sup>3</sup> Section 7 of the Military Commissions Act states that “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

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expected to sign it October 17, 2006), and therefore is no bar to affording the urgently needed relief we seek here. Second, if the MCA is signed into law, it will be patently unconstitutional under the Suspension Clause and, therefore, is no law at all. This law is an unlawful suspension of the Great Writ. *See* Article I, Section 9, Cl. 2 (“The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.”). It must not stand. *See Marbury v. Madison*, 5 U.S. 137 (1803) (“All laws which are repugnant to the Constitution are null and void”).<sup>4</sup>

3. Habeas Corpus Is the Proper Vehicle for This Inquiry

Contrary to respondents’ contention, habeas corpus proceedings may be used to challenge conditions of confinement. *See, e.g., Preiser v. Rodriguez*, [411 U.S. 475, 498-99, 93 S.Ct. 1827](#) (1975) (stating habeas may be available to challenge conditions of prison life; “[w]hen a prisoner is put under additional and unconstitutional restraints during his lawful custody, it is arguable that habeas corpus will lie to remove the restraints making the custody illegal”); U.S. Attorneys Manual, Federal Habeas Corpus, 9-37.000, available at [http://www.usdoj.gov/usao/eousa/foia\\_reading\\_room/usam/title9/37mcrm.htm](http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/37mcrm.htm) (“complaints about conditions of confinement are properly raised in habeas corpus petitions”). Counsel notes that Mr. Aamer’s custody is illegal, making it even more important that he have a forum to litigate his conditions of confinement.

**II. Mr. Aamer is Being Held in Conditions of Confinement that Violate His Rights**

The test for determining the constitutionality of treatment of pretrial detainees alleged to deprive them of liberty without due process of law is “whether those conditions amount to punishment of the detainee.” *Bell v. Wolfish*, 441 U.S. 520, 535, 99 S.Ct. 1861 (1979) (courts

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United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.”

<sup>4</sup> This Court should not wait for guidance on the MCA from other courts. Mr. Aamer has been in isolation for over a year. His case has been stayed for over 18 months. His health is at grave risk. Mr. Aamer needs to be removed from solitary now, not when those other cases might be resolved.

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may infer intent to punish if restriction or condition is sufficiently onerous and is not reasonably related to a legitimate governmental goal; *id.* at 538). *See also* Uniform Code of Military Justice, Article 13 (prohibiting imposition of punishment or penalty upon an accused prior to trial). Mr. Aamer has not been charged, let alone convicted of any crime. The conditions under which Mr. Aamer is imprisoned amount to punishment. They are illegal and must be stopped.

While the Court has to show some deference to decisions by prison wardens, it is not permissible for Respondents to justify administrative segregation for a year based on the conclusory statement that Mr. Aamer might influence other prisoners.<sup>5</sup> Respondents offer no explanation whatsoever as to what type of influence they fear. Nor is there any indication that lesser steps were considered, let alone taken. For instance, Mr. Aamer could be housed with those prisoners Respondents agree he would not influence. Respondents may not cut someone off from fellow prisoners and then just say: trust us, we based the decision on “appropriate detention considerations.” Respondents must tell the Court what those considerations were. Respondents have not done so. As a result, there is no evidence that Mr. Aamer’s isolation is related to a legitimate government purpose. The isolation must be stopped. *See, e.g., U.S. v. King*, 61 M.J. 225, 228-229 (U.S. Armed Forces 2005) (holding placement of prisoner “in a segregated environment with all the attributes of severe restraint and discipline, *without an individualized demonstration of cause in the record*, was so excessive as to be punishment”) (emphasis added).

Let there be no doubt that Mr. Aamer is being held in solitary. Solitary confinement is isolation from fellow prisoners, alone in a cell nearly all day and with very little chance for social interaction or stimulation. “Regular contact” with prison guards does not mean a

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<sup>5</sup> Respondents state Mr. Aamer “was placed in Camp Echo based solely on appropriate detention considerations, including his potential influence upon various elements of the detainee population residing in other detention areas. Detention in Camp Echo is not punitive.” Declaration of Colonel Dennis at ¶ 8.

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prisoner is not in solitary. To repeat, solitary confinement means restriction from being with *fellow prisoners*. Mr. Aamer has been kept out of the general population for over a year.

1. This Is an Extraordinary Case That Requires Judicial Intervention

Counsel have not asked for a blanket lift of the stay or an injunction in *all* cases; counsel is compelled to bring this motion because the extraordinary amount of time Mr Aamer has spent in solitary, combined with the abuse he has suffered, threaten severely his health. *See* Letter from James MacKeith, Attachment A to Declaration of Clive Stafford Smith. (“In my opinion Mr Aamer’s mental and also perhaps his physical health is likely to be at risk, especially in the short term and perhaps in the longer term. This concern can only be satisfactorily resolved if a thorough medical examination and report on Mr Aamer is completed soon. The physician would need to enjoy the confidence of Mr Aamer and his lawyers.”). We believe those circumstances tip the balance of equities in Mr Aamer’s favor.<sup>6</sup>

2. Respondents Have Failed to Rebut the Facts Presented by Mr. Aamer

Mr. Aamer is being held in punitive conditions. His conditions cannot be construed as anything else. The government was all too happy to exploit Mr. Aamer’s respected status to their own ends during last year’s hunger strike. When the agreement broke down, Mr. Aamer was thrown into Camp Echo. Keeping him in isolation, assaulting him, and subjecting him to 24 hour lighting are punitive.

Mr. Aamer’s factual allegations establish “imminent irreparable injury” sufficient to justify granting the injunction, and have as strong an evidentiary basis as the environment of Guantánamo will permit.

It is ironic that the government conclusively rejects Mr. Aamer’s factual allegations of abuse as baseless, yet has assiduously tried in this litigation—and in every Guantánamo

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<sup>6</sup> Granting this motion will not open the floodgates for similar motions. To counsel’s knowledge, there is only one prisoner kept in the same general area of Camp Echo where Mr. Aamer is imprisoned. He is the only other prisoner facing such conditions, and he has been there less than half the time of Mr. Aamer. While he almost certainly also has grounded for relief, this is an extraordinary case.

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case—to prevent petitioner from putting those claims to the test in a fair forum. By contrast, petitioner has asked for two simple things, two things anyone being held in prison by a government would want: 1) removal from the conditions that pose an imminent threat to his health, and 2) the chance to prove his innocence and the substance of his other claims before a court of law.

Counsel has taken every step available to establish that Mr Aamer’s conditions warrant an injunction. The restrictions at Guantánamo make it impossible to do anything more. Counsel has requested an independent examination of Mr. Aamer. *See* Letter to Rear Admiral Harry Harris, Clive Stafford Smith Declaration, Attachment A (“It is Dr. McKeith’s opinion that an independent mental health evaluation is mandatory, if Mr. Aamer continues to be held in solitary confinement. ... I should stress that I am not asking you to have a military mental health professional see him. He is, naturally enough, not willing to take part in a medical examination that is not privileged, and where a doctor is in the unenviable position of having to inform on a patient to the military.”). Respondents never responded to Counsel’s request. Instead, contrary to counsel (and Mr. Aamer’s) express statement, respondents sent in a camp psychologist. Respondents state when the psychologist went in, no symptoms of mental disorder were observed. *See* Declaration of Dr. Sollock at ¶13. Missing from the declaration is any statement of whether or not an examination actually took place. Presumably not, considering Mr. Aamer’s express wish for an independent evaluation.<sup>7</sup>

Even without an independent evaluation, far from “mere allegations” and “misinformation”, Mr. Aamer has presented all the facts necessary for the Court to rule in his favor.

Respondents have admitted the use of force. Colonel Dennis Declaration at ¶¶ 10, 11.

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<sup>7</sup> Should the court find the factual statements of Mr. Aamer lacking at all, it should order such an independent evaluation to ensure the court has a neutral opinion of the situation. Counsel is confident it will back Mr. Aamer’s statements.

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Respondents have admitted that guards can alter the temperature (failing to deny that this does not take place) and open the door frequently to Mr. Aamer's shack, invading his sleep. See Opposition at 12, n 6 ("petitioner is able to request changes to the temperature in his cell; the insinuation that petitioner is subjected to temperature extremes due to guard misconduct is disputed"); Declaration of Colonel Dennis at ¶ 9d (stating door is opened "to allow for fresh air and is closed at his request."). Colonel Dennis's closely-worded statement regarding sleep disruption does not dispute Mr. Aamer's claims. One can easily picture the door being opened constantly at night, as Mr. Aamer described, and Mr. Aamer asking the guards to close it. Mr. Aamer is still awoken, his sleep is still disturbed.

Respondents admit Mr. Aamer is currently in contact only with military personnel. While Mr. Aamer has indeed refused recreation when offered to him,<sup>8</sup> he informed counsel that it is for a simple reason. Camp rules prohibit isolation for longer than 30 days. Mr. Aamer believes that once every 30 days, prison officials will allow him to spend recreation time with another prisoner, then throw him back in isolation for 30 more days. He sees recreation offers as a mere ruse to keep him in isolation further, not a genuine offer of outdoor time.

Camp Echo consists of a series of shacks, each containing two 6 x 8 foot adjoined cells and a roughly 6 x 16 foot area for interrogations or attorney-client meetings. Only bars separate these two segments of the hut.<sup>9</sup> At counsel's last visit, Mr. Aamer was placed in the shack at one end of Echo, and the only other prisoner in that portion of the camp was placed in the shack at the opposite end. Mr. Aamer believes, not unreasonably, that the military can be expected to state that permitting him to stand outside in a cage in the general vicinity of

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<sup>8</sup> Counsel notes that Respondents claim that Mr. Aamer is offered recreation daily and has refused recreation 51 times since mid-May 2006. Colonel Dennis Declaration ¶ 5. It has been five months since mid-May, or approximately 150 days. Recreation is hardly being offered every day.

<sup>9</sup> Petitioner respectfully requests that the Court keep this in mind when adjudging the adequacy of the purported dimming of lights in Mr. Aamer's cell, while leaving the lights blazing in the attached interrogation area. Again, there is no "passageway" outside the cell.

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the lone other prisoner, who would be caged separately, somehow places Mr. Aamer's year-long isolation outside the ambit of rules that only permit a prisoner's separation for 30 days.

**III. Mr. Aamer is Being Held in Conditions of Confinement that Violate the Defense Department's Own Rules**

1. Respondents' Actions Violate Guantánamo Rules

Respondents have failed to rebut the fact that under Guantánamo camp rules, Mr. Aamer can only be held in isolation for up to 30 days. He has been held for over one year.

2. Respondents' Actions Violate the Army Field Manual

Mr. Aamer's confinement runs afoul of the Department of Defense's rules for treatment of detainees contained in Army Field Manual ("AFM") 2-22.3, which was released on Sept. 6, 2006 and superseded formerly applicable sections of the AFM.<sup>10</sup>

Those rules contemplate only one permissible sort of isolation, which is available only in limited circumstances (aside from health quarantines).<sup>11</sup> "Separation," as the field manual calls it—notably, defined as removal from the general population of *prisoners*, not *guards*<sup>12</sup>—is a "restricted interrogation technique" aimed at breaking a prisoner designated an "unlawful enemy combatant." The rules require official approval for solitary confinement used for this purpose for over 30 days. *See* Army Field Manual Appendix M, FM 22-22.3.

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<sup>10</sup> *See* Press Release, available at <http://www.defenselink.mil/news/NewsArticle.aspx?ID=720>.

The new Field Army Manual in general – and its isolation procedures in particular, invoke the "laws of war", which include the Geneva Conventions. *See* FM 2-22.3 at vi (citing Geneva Conventions, including Common Article III, as applicable law); Appendix M ("Restricted Interrogation Technique – Separation), Army FM 2-22.3, M-2 (referring to Common Article III); M-4 (asserting use of separation as an exceptional interrogation technique "is consistent with the minimum humane standards of treatment required by US law, the law of war; and does not constitute cruel, inhuman, or degrading treatment of punishment as defined in the [DTA] and addressed in GPW Common Article III,"); M-6 (specifying that "the use of separation...shall be conducted humanely in accordance with applicable law and policy...[including] US law; the law of war; relevant international law; relevant directives including DOD Directive 3115.09, "DOD Intelligence Interrogations, Detainee Debriefings, and Tactical Questioning"; DOD Directive 2310.1E, "The Department of Defense Detainee Program" [and other rules]). *See also* Detainee Program Directive 4.1 ("all detainees shall be treated humanely and in accordance with U.S. law, the law of war, and applicable U.S. policy"), 4.2 (stating Common Article 3 applies to all detainees irrespective of status).

<sup>11</sup> As the field manual notes, this concept is distinct from a process of "segregation," which seemingly only applies to sorting *groups* of prisoners for health and safety purposes, rather than isolating one man from the general population. *See* AFM 2-22.3 6-9 (describing segregation as organization of prisoners into various classes to prevent, e.g., counterintelligence measures).

<sup>12</sup> *See* Appendix M-2 "separation involves removing the detainee from other detainees and their environment."

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The AFM specifically states that separation is intended only for the purposes of preventing a prisoner “from learning counter-resistance techniques or gathering new information to support a cover story” or “decreasing the detainee’s resistance to interrogation,” AFM Appendix M-1. Yet, Colonel Dennis has not given any reason for Mr Aamer’s isolation other than his “potential influence” on other detainees. Given the fact that the manual cautions commanders that “separation poses a higher risk to the detainee than do standard techniques, and so require strenuous oversight to avoid misapplication and potential abuse,” Mr Aamer’s situation clearly runs afoul of both the letter and the spirit of these principles. *See* AFM Appendix M-10. Respondents have offered no evidence whatsoever that approval has been sought to keep Mr. Aamer separated from the general prison population for well more than 30 days.

Mr Aamer was removed to isolation after negotiations broke down regarding the hunger strike. This strongly suggests that Mr. Aamer has been placed in isolation for a year not for interrogation purposes—in which case his lengthy isolation would still violate the Army regulations—but as punishment.

3. Respondents’ Actions Violate Military Court Rulings

Respondents’ actions go against military court rulings. *See, e.g., U.S. v. Suzuki*, 14 M.J. 491, 492 (CMA 1983) (holding prisoner was subjected to illegal pre-trial confinement and terming treatment “egregious” when prisoner was kept in administrative segregation for 7 days in a cell 6 feet by 8 feet cell containing only a bed resting on a piece of plywood, an open toilet, a sink, and a single light, clothed only in his underwear).

**IV. The Geneva Conventions Are Judicially Enforceable**

Mr. Aamer can go to court to enforce his rights under the Geneva Conventions. Article II, cl. 2, provides that “the judicial Power” extends to all cases “arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made,

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under their Authority.” Moreover, under Article VI of the Constitution, treaties that are valid and have entered into force are “the Supreme Law of the Land.” The Founders crafted a mechanism for resolving treaty violations: the Supremacy Clause, which vests that enforcement authority in the judges of the individual states and the United States. *See* Amicus Brief of Louis Henkin et al. in support of Salim Hamdan, at 2, 5-6, available at <http://www.hamdanvrumsfeld.com/HamdanvRumsfeldAmicusBriefofLawProfessorsLouisHenkinetal.pdf> (“Although they considered other measures for securing compliance with treaties, in the end the Founders adopted a mechanism that relied on judicial enforcement.... The very point of the Supremacy Clause was to establish that, *as a matter of U.S. domestic law*, treaties were to be enforceable in the courts by individuals whose rights they governed.”)

Alexander Hamilton elaborated on this principle in Federalist No. 22: “Laws are a dead letter without courts to expound and define their true meaning and operation. The treaties of the United States, to have any force at all, must be considered as part of the law of the land. Their true import, as far as respects individuals, must, like all other laws, be ascertained by judicial determinations.” *The Federalist Papers*, at 150 (Clinton Rossiter ed., 1961) (cited in Amicus Brief of Retired Generals and Admirals in support of Salim Hamdan, at 9, available at <http://www.hamdanvrumsfeld.com/GeneralsandAdmirals.pdf>).

The Supreme Court has given life to this principle on numerous occasions, from Chief Justice Marshall’s statement in *Owings v. Norwood’s Lessee* that “all persons who have real claims under a treaty should have their causes decided by the national tribunals,” 9 U.S. 344 (1809) to *Jones v. Meehan*, 175 U.S. 1 (1899) (granting Chippewa Chief fee simple title under a federal treaty with the tribe, despite contrary interpretation by both the Executive and Congress) to *Perkins v. Elg*, 307 U.S. 325 (1939) (overruling State Department’s interpretation of citizenship treaty) to *Japan Whaling Ass’n v. Am. Cetacean Soc’y*, 478 U.S.

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221, 230 (1986) (“the courts have the authority to construe treaties and executive agreements”).

Aside from the general question of judicial power to enforce treaties, the Geneva Conventions have been treated by this country as self-executing for years. In discussions to the ratification of the second Geneva Conventions, the Senate Foreign Relations Committee noted the four Conventions were almost entirely self-executing, noting that “from information furnished to the committee it appears that very little in the way of new legislative enactments will be required to give effect to the provisions contained in the four conventions.” *Geneva Conventions for the Protection of War Victims: Report of the Senate Comm. On Foreign Relations*, S. Rep. No. 9, 84<sup>th</sup> Cong, 1<sup>st</sup> Sess. 30 (1955) (cited in Am. Brief of Generals et al. at 12).

Mr. Aamer has rights under the Geneva Conventions and they are judicially enforceable.<sup>13</sup>

### **CONCLUSION**

Respondents claim Camp Echo confinement is not punishment. Counsel respectfully requests that the Court for a moment put itself in Mr. Aamer’s shoes. Mr. Aamer has been held for over four years without charge or trial. He has been assaulted, harassed and deprived of decent conditions. He has led hunger strikes, but only to challenge abuses at the prison and the failure to provide the men with a chance for a fair trial. To counsel’s knowledge, he has never been disciplined for harming anyone. Instead, he has been ripped from his family. He cannot visit with or speak with his wife or children. He has never seen his youngest son, now four. If this is not punishment – without charge or trial, no less, what is? This is unconstitutional, it is unwise and it must be stopped.

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<sup>13</sup> Mr. Aamer’s rights under the Due Process Clause of the 5<sup>th</sup> Amendment have also been violated. Respondents responded to this argument is its opposition. *See, e.g.*, Opposition at 20-21. Court here should enforce those rights.

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Accordingly, and for the foregoing reasons, this court should lift the stay in petitioner's case and order any relief necessary to end the violation of Mr. Aamer's rights.

Respectfully submitted,

Date: October 11, 2006

\_\_\_\_\_/s\_\_\_\_\_  
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**CERTIFICATE OF SERVICE**

I hereby certify that I have provided the Court Security Office with copies of this pleading for service upon Respondents once the contents have been reviewed for classification purposes.

Done this 11<sup>th</sup> day of October, 2006.

\_\_\_\_\_/s\_\_\_\_\_  
Zachary Philip Katznelson