

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

OMAR DEGHAYES, et al., )  
 )  
 *Petitioners/Plaintiffs,* )  
 )  
 v. )  
 )  
 GEORGE W. BUSH, et al., )  
 )  
 *Respondents/Defendants.* )

Civ. No. 04-cv-02215 (RMC)

MOTION FOR A PRELIMINARY INJUNCTION  
CONCERNING CONDITIONS OF CONFINEMENT

Petitioners<sup>1</sup> seek a preliminary injunction against Respondents concerning the conditions of his confinement in Guantanamo Bay.<sup>2</sup>

As the Court reads this motion, prisoners at Guantanamo are already three weeks into a hunger strike. The reason: the constant debasement and deception of the prisoners by their custodians, and the lack of any prospect for the prisoners to receive a fair trial. This is the second major hunger strike since early July. Last time, various prisoners came close to death before the military agreed to make obviously necessary changes. Almost immediately, the military reneged, and it will be twice as difficult to resolve the issues this time.

Counsel for petitioners has repeatedly attempted to discuss this matter with officials in charge of Guantanamo Bay. However, these officials simply refused to meet with counsel to discuss the problems faced by his clients. The military will not negotiate issues of basic decency in good faith, the prisoners must seek injunctive relief from the Court.

#### **I. THE FACTS CONCERNING THE UNTENABLE CONDITIONS OF PETITIONERS' CONFINEMENT**

Petitioners urgently bring this motion to resolve the illegal, uncivilized and inhumane conditions of his confinement in Guantanamo Bay.

There is good reason why the people being held in Guantanamo Bay have become desperate. Most of the 500 men have been held for more than three years. Just four have been charged with some kind of an offense in a military commission, although none even among these four has actually had a commission – a tribunal which has, itself, been described as unfair and

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<sup>1</sup> Counsel is filing a similar motion in the case of every prisoner he is representing as all face similar degradation and imminent danger to their lives. This is being done independently in each case, since the clients cannot afford the time that might be consumed certifying this as a class action, and there no longer exists the option of going to a designated judge (formerly Judge Green) to resolve all of the issues at one go. Obviously, such a system was more efficient, and Petitioners respectfully suggest that such a system should be invoked once again.

<sup>2</sup> Footnotes to sources are included for the convenience the classification assessment of this document rather than for any other reason. The obstacles placed in the way of counsel securing verified information about each element of the pleading below from the client are legion, but counsel verifies by his signature that each factual allegation is true and accurate to the best of the information counsel has received from the clients in Guantanamo and other legitimate sources of information.

rigged by the military prosecutors involved,<sup>3</sup> and “kangaroo courts” by respected international jurists.<sup>4</sup>

The rest of the 500 men have been offered only the military’s other kangaroo tribunal, the Combatant Status Review Tribunal (CSRT). At a CSRT tribunal, there is no opportunity to see much of the evidence against you, there is no lawyer is allowed to represent you, and the ‘judges’ are all hand-picked members of the U.S. military. See In re Guantanamo Bay Cases, 355 F. Supp. 2d 443, 468 (D.D.C. 2005). The definition of “enemy combatant” is inherently vague, and the burden is on the prisoner to prove his own ‘innocence’. Id. And whether the tribunal finds you are an enemy combatant or not,<sup>5</sup> you can be held indefinitely.<sup>6</sup> For the Guantanamo prisoner, then, there is no hope whatsoever of actually challenging his detention, let alone going home.

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<sup>3</sup> See Neil Lewis, *Two Prosecutors Faulted Trials for Detainees*, N.Y. TIMES (August 1, 2005) (“Maj. Robert Preston, also of the Air Force, said in a March 11, 2004, message to another senior officer in the prosecutor’s office that he could not in good conscience write a legal motion saying the proceedings would be “full and fair” when he knew they would not.”); ABC News Online, *Leaked emails say Guantanamo trials rigged* (August 1, 2005) (“I lie awake worrying about this every night,” [Military Prosecutor Major Robert Preston] wrote. “I find it almost impossible to focus on my part of mission. After all, writing a motion saying that the process will be full and fair when you don’t really believe it is kind of hard, particularly when you want to call yourself an officer and lawyer.”), available at <http://www.abc.net.au/news/newsitems/200508/s1426797.htm>.

<sup>4</sup> Lord Johan Steyn, *Guantanamo: The Legal Black Hole*, 27<sup>th</sup> F.A. Mann Lecture (25<sup>th</sup> November 2003) (Lord Steyn properly said that “the military commissions are not independent courts or tribunals. The term kangaroo court springs to mind. It derives from the jumps of the kangaroo, and conveys the idea of a pre-ordained arbitrary rush to judgement by an irregular tribunal which makes a mockery of justice.”). Similar opinions have been expressed by some of the Bush Administration’s closest allies. For example, as British Foreign Secretary Jack Straw has said, “in the Attorney General’s view the Military Commissions, as presently constituted, would not provide the type of process which we would afford British nationals.” *Foreign and Commonwealth Office, Statement by the Foreign Secretary on Return of British Detainees* (19<sup>th</sup> February, 2004).

<sup>5</sup> Respondents have recently taken the position with the Uigurs at Guantanamo Bay that even if they are found not to be enemy combatants at the CSRT they can still be held indefinitely while the government decides what to do with them. Associated Press, *Judge Asks Status of Gitmo Detainees* (August 25, 2005), available at <http://www.nytimes.com/aponline/national/AP-Guantanamo-Detainees.html>. With Sami Al Laithi, another person who was found not to be an enemy combatant several months ago at his CSRT, Respondents’ position has been even more depressing for the prisoners. Respondents have argued that the CSRT finding was not a finding of ‘innocence,’ asserted the government’s right to deport him to face persecution in Egypt, and denied the courts’ role in any aspect of his predicament. See *Respondents’ Memorandum in Opposition to Petitioner Sami Al Laithi’s Motion for a Preliminary Injunction*, filed July 22, 2005, in *Sliti et al. v. Bush*, CIV No. 05-429 (RJL).

<sup>6</sup> Administrative Review Boards determine whether someone who was found to be an enemy combatant no longer poses a threat, but that review only occurs once a year. In the notice given to counsel for each prisoner earlier this year, Respondents represented: “The ARBs are an annual review process to make an assessment of whether there is continued reason to believe that an enemy combatant poses a continuing threat to the United States or its allies . . . . Information on the ARB procedures can be obtained through the Department of Defense website at <http://www.defenselink.mil/releases/2004/nr20040915-1253.html>.”

The lack of any meaningful due process is itself a denial of the right to fair detention, and a source of intense frustration to the prisoners concerned. But the problem has been exacerbated exponentially because of the horrendous conditions under which the prisoners are being held. For example, prisoners “in Camp V are held in concrete isolation cells with 24-hour lighting and large, loud fans designed to prevent detainees talking with each other. ... [D]etainees [are] confined to these cells for up to 24 hours a day, only being allowed out to exercise once a week or every two weeks. When they are allowed out to exercise it is often in the middle of the night, so that detainees go for months without seeing the sun.”<sup>7</sup>

There have been endless violations of the prisoners’ religious rights. The Qur’an has been repeatedly desecrated by the military. Prisoners are isolated, cut off from family and friends – no visits whatsoever are allowed, no telephone calls, and even the mail system is manipulated as part of the interrogation process.

The prisoners have shown a surprising degree of patience in the face of this abuse. However, gradually, the prisoners have come to the end of their tether. It is this fact that makes the current petition so urgent.

#### **A. THE URGENCY OF THE PROBLEM**

The situation in Guantanamo Bay dire. There is a hunger strike going on there, and people are likely to die.<sup>8</sup> The history is briefly stated by Binyam Mohammed in his recently-unclassified statement:<sup>9</sup>

I am Binyam Mohammed. I am 27 years old. I was seized by the Americans on April 10, 2002, and I have been held by them since. They took me forcibly to Morocco where I endured 18 months of

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<sup>7</sup> Amnesty International, *Report of Hunger Strike at Guantanamo* (July 2005), available at <http://web.amnesty.org/pages/stoptorture-hungerstrike-eng>.

<sup>8</sup> Guantanamo inmates on hunger strike – Friday 22<sup>nd</sup> July 2005 1.44 Makka time 22:44 GMT, <http://english.aljazeera.net/NR/exeres/1AFAF53F-2A54-43B5-A049-9B673AF6D241.htm> (“The hunger strike is a “peaceful, nonviolent strike until demands are met” and calls for “starvation until death.””).

<sup>9</sup> *Statement of Binyam Mohammed (August 11, 2005)*, provided to counsel as unclassified on August 23, 2005. This statement has been cleared as “Unclassified”.

torture from July 21, 2002, to January 21, 2004. I was then taken by the Americans to Afghanistan and, on September 19, 2004, to Guantanamo Bay.

All this time the conditions of my confinement have been a nightmare. Along with other U.S. prisoners, I have been routinely humiliated and abused and constantly lied to.

We were very, very patient here in Guantanamo. But finally enough was enough, and in late June we organized a strike across the prison. People refused food and water, some for over 20 days, and became so weak they were hospitalized. They refused an I.V. drip and the doctor told them that he could not force them to take sustenance even if they were in a coma. He had the people in the hospital confirm twice, before witnesses, that they refused resuscitation if it came to that.

The administration eventually agreed, if we stopped the hunger strike, to negotiate on good faith. I had not eaten for just four days but I had been very weak and fallen down.

The administration promised that if we gave them ten days, they would bring the prison into compliance with the Geneva Conventions. They said this had been approved by Donald Rumsfeld himself in Washington, D.C.

As a result of these promises, we agreed to end the strike on July 28<sup>th</sup>, 2005.

It is now August 11<sup>th</sup>, 2005. They have betrayed our trust (again). Hisham from Tunisia was savagely beaten in his interrogation, and they publically (sic) desecrated the Qur'an (again). Saad from Kuwait was ERF'd for refusing to go (again) to interrogation because the female interrogator had sexually humiliated him (again) for 5 ½ hours. Omar the kid from Canada was ERF'd (again) for refusing to go to another illegal interrogation.

Therefore the strike must begin again. Some have already begun – 150 have begun in Camps I, II & III. 60 people in Camp V begin today.

I will begin tomorrow – Friday, August 12<sup>th</sup>, 2005. I do not plan to stop until I either die or we are respected. People will definitely die.

\* \* \*

We ask only for justice: treat us, as promised, under the rules of the Geneva Conventions for Civilian Prisoners while we are held, and either try us fairly for a valid criminal charge or set us free.

Guantanamo presents a unique problem in the Western world, because of the military's insistence on secrecy even where such secrecy is patently unnecessary. How can the security of the nation be threatened by information about the physical well-being of our prisoners? Yet, as the prisoners starve to death hundreds of miles to the south of this Court, no public monitoring of their status is permitted.

### **1. THE PREDICTABLE AND FATAL COURSE OF A HUNGER STRIKE PROVIDES CAUSE OF URGENT CONCERN**

Despite the lack of reliable information, we can predict the prisoners' plight by the known course of a hunger strike. Once a human being ceases to take in food, there are predictable limits for a normal, healthy adult (estimating approximately 24 pounds of fat on his body).<sup>10</sup> After a week, the hunger striker experiences dramatic weight loss.<sup>11</sup> Physiologists agree that no human being can survive losing 40 percent of his body mass,<sup>12</sup> which will generally happen within 40 to 60 days.

In the first few days of starvation the body uses stores of glycogen which is stored in the liver and muscles. This provides energy for the body to function. During these days, the person will experience substantial weight loss combined with salt excretion. After about two weeks, the stores of glycogen in the body are exhausted and the body turns to muscles and vital organs for energy.<sup>13</sup> Over the next several days, the liver and intestines atrophy, followed by the heart and kidneys. The pulse slows and blood pressure falls. Patients complain of fatigue,

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<sup>10</sup> See Brendan I. Koerner, *How Long Can You Go Without Food? Hunger strikes 101* (June 10, 2004), available at <http://slate.msn.com/id/2102228>.

<sup>11</sup> See Mary A Kenny, et. al., *Legal And Ethical Implications Of Medically Enforced Feeding Of Detained Asylum Seekers On Hunger Strike*, MJA 2004; 180 (5): 237-240, available at [http://www.mja.com.au/public/issues/180\\_05\\_010304/ken10552\\_fm.html](http://www.mja.com.au/public/issues/180_05_010304/ken10552_fm.html).

<sup>12</sup> See Koerner, *supra*.

<sup>13</sup> *Id.*

headache, faintness and dizziness. By about the 40th day, the striker becomes seriously ill and is bedridden.<sup>14</sup>

The body is generally able to survive for up to 40-60 days without food.<sup>15</sup> Although this is an estimate, there are tragic examples in history that provide some empirical evidence. In the Irish hunger strikes in 1981 – precipitated by the British internment of Irish suspects without trial, similar to Guantanamo Bay – ten people died. They began to expire after 46 days without food, and the longest lived survived 73 days.<sup>16</sup>

These predictions involve a gradual decline based on the lack of solid food, but assume the continued consumption of water. Refusing water radically changes the equation. It is unlikely that a human being will be able to last more than a week without water.<sup>17</sup>

Meanwhile, among the survivors, there are psychological implications that are inevitable when a hunger strike takes place. A study on anorexia nervosa and depression<sup>18</sup> indicates that 77% of individuals who lose significant body weight through means of starvation are clinically depressed at the time of admission to hospital. Hunger strikers also demonstrated features similar to those of the post-traumatic stress syndrome.

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<sup>14</sup> See *Kenny, supra*. While these stages may be ‘predictable,’ their consequences for each individual may not be. For example, the process described causes ketone bodies to be produced. Ketone bodies are toxic byproducts which are excreted through the urine. Some varieties of ketone bodies called acetones can be expelled through the lungs. Ketone bodies can be oxidized by the brain to create the energy that it needs. However, if the number of ketone bodies is too abundant in the blood stream, a lethal condition can arise which poisons the individual. See *Koerner, supra*.

<sup>15</sup> See *Koerner, supra*; *Kenny, supra*.

<sup>16</sup> See *1981 Irish Hunger Strike*, available at <http://www.answers.com/topic/1981-irish-hunger-strike>.

<sup>17</sup> Jill Irvin, Ohio State University, *Nutrition in Perspective* (Patricia Kreutler, 1980), <http://www.madsci.org/posts/archives/sep99/937540022.Gb.r.html> (“[a] person will die within 3-5 days without water.”). The weight and size of the person is irrelevant in this matter. The human body is “made up of about 70 percent water. (That is about 15 gallons for an adult.) The body uses water in maintaining its temperature, breathing, digesting food, and lubricating moving joints.” See Juyani, *Water*, available at <http://www.endtimesreport.com/waterarticle.html>. A person must consume “2.5 litres of water from all sources (i.e. water, food) per day to maintain health.” [http://www.epa.gov/safewater/kids/water\\_trivia\\_facts.html](http://www.epa.gov/safewater/kids/water_trivia_facts.html); see also <http://www.ynhh.org/online/nutrition/advisor/water.html>; [http://www.nsf.org/consumer/drinking\\_water/ww\\_funfacts.asp?program=WaterTre](http://www.nsf.org/consumer/drinking_water/ww_funfacts.asp?program=WaterTre); <http://ct.water.usgs.gov/EDUCATION/trivia.htm>.

<sup>18</sup> See Herpertz-Dahlmann B, Remschmidt H, *Anorexia nervosa and depression. On the relation of body weight and depressive symptoms*, Klinik und Poliklinik für Kinder- und Jugendpsychiatrie, Philipps-Universität Marburg, [http://www.ncbi.nlm.nih.gov/entrez/query.fcgi?cmd=Retrieve&db=pubmed&dopt=Abstract&list\\_uids=2797333&q\\_ery\\_hl=2](http://www.ncbi.nlm.nih.gov/entrez/query.fcgi?cmd=Retrieve&db=pubmed&dopt=Abstract&list_uids=2797333&q_ery_hl=2).

This is the process that we know is now taking place in Guantanamo Bay.

## **2. AN EARLIER HUNGER STRIKE TOOK PLACE IN LATE JUNE AND IN JULY, PROVIDING THIS COURT WITH SOME IDEA OF WHAT IS HAPPENING NOW**

In late June and most of July 2005, a hunger strike took place in Camp V.<sup>19</sup> A similar action took place in Camps I, II, III and IV.<sup>20</sup> The July hunger strike was a rolling one:

They began on June 21, 2005, by rejecting one meal each day for a week. On June 28, they began to reject two meals. On July 2, 2005, they began rejecting all food. \* \* \* A majority of Camp V are taking part in the hunger strike. Some are not able to because they have medical conditions.<sup>21</sup>

More details of this action follow below, as they become relevant.

## **3. THE PROBLEMS INHERENT IN THE CLOSED PRISON OF GUANTANAMO BAY CAST DOUBT ON ALL THE INFORMATION RELEASED BY THE U.S. MILITARY**

Sad to say, the military simply cannot be trusted to provide the Court and the public with accurate and reliable information about the prisoners' health and welfare. The earlier hunger strike provides a good illustration of this. When a tree falls in the forest, nobody knows unless they are there to see or hear it. The same principle applies to Guantanamo Bay: when a prisoner suffers there, we only know if lawyers are allowed to see him, as otherwise it is highly unlikely that the military will provide a forthright report of what happened.

As one of the prisoners reports, the Military "showed indifference to the very fact of our deaths. 'Do you think the world will ever learn of your hunger strike? We will never let them know.' They said. 'We care nothing if one of you dies.'"<sup>22</sup>

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<sup>19</sup> Most of the details concerning Camp V come from an unclassified memo concerning discussions with Omar Deghayes (dated July 19, 2005) ("*Deghayes Memo*"). This memo has previously been filed in the public record in the case of Sami Al Laithi.

<sup>20</sup> Most of the details concerning Camps I-IV come from an unclassified memo concerning discussions with Usama Abu Kabir ("*Abu Kabir Memo*").

<sup>21</sup> *Deghayes Memo at 1.*

<sup>22</sup> *Shaker Aamer Statement* (August 11, 2005) (Note that the Shaker Aamer statement was submitted for classification review by counsel on August 14, 2005, and has been classified FOUO-Protected. This classification determination is indefensible, since all the facts in the memo concern the abuse of the Guantanamo prisoners.

The disregard for the true facts is apparent from the military's public statements during the July hunger strike. As of July 21, 2004, the Pentagon denied that a hunger strike was even taking place.<sup>23</sup> The Pentagon was then forced to admit it was happening,<sup>24</sup> but suggested that the prisoners had only refused meals for about three days,<sup>25</sup> when in truth it had been going on for three weeks. The U.S military then said that "52 prisoners are taking part in a hunger strike,"<sup>26</sup> when independent sources – now confirmed – suggested that it was three or four times that number.<sup>27</sup>

During the last hunger strike it was said that "[d]etainees are being monitored by medical professionals and their vital signs are being checked daily."<sup>28</sup> This much is true, but it is deceptive. Monitoring will not save the lives of the prisoners. The critical issue is whether the prisoners are going to be allowed to die from lack of food and water. "A military spokesman was unable to say whether any of the treatment was being administered by force."<sup>29</sup> The military may feel 'unable' to say this, but the truth is that last time the prisoners were not forcibly fed,

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However, counsel has attempted to pare down the facts cited in this pleading even more to head off any notion that the evidence should be censored.)

<sup>23</sup> See, e.g., Associated Press, *Afghans tell of hunger strike at Guantanamo* (July 22, 2004), *TAIPEI TIMES* ("Pentagon said it was unaware of a hunger strike"), available at <http://www.taipetimes.com/News/world/archives/2005/07/22/2003264520>.

<sup>24</sup> Pravda, *Guantanamo prisoners engaged in hunger strike* (July 31, 2005) ("Pentagon had to admit a hunger strike in Guantanamo prison but declined to name the reason of it."), available at <http://newsfromrussia.com/usa/2005/07/21/60646.html>.

<sup>25</sup> ITV NEWS, *Guantanamo: prisoners on hunger strike* (July 22 2005) ("The Joint Task Force in charge of the facility said so far the men had refused nine meals over three days and are being monitored by medical professions."), available at [http://www.itv.com/news/world\\_1782911.html](http://www.itv.com/news/world_1782911.html). See also ABC News Online, *Guantanamo detainees give demands to end hunger strike* (July 23, 2005), available at <http://www.abc.net.au/news/newsitems/200507/s1420814.htm>.

<sup>26</sup> CBC News, *Hunger strike confirmed at Guantanamo Bay* (July 22, 2005), available at <http://www.cbc.ca/story/world/national/2005/07/22/Guantanamo-Bay-protest-050722.html>; Al Jazeera, *Guantanamo inmates on hunger strike* (July 22, 2005), available at <http://english.aljazeera.net/NR/exeres/1AF53F-2A54-43B5-A049-9B673AF6D241.htm>; Fox News, *Pentagon: Gitmo Prisoners on Hunger Strike* (July 21, 2005), available at <http://www.foxnews.com/story/0,2933,163237,00.html>.

<sup>27</sup> ITV News, *Guantanamo: prisoners on hunger strike* (July 22, 2005) ("Two Afghan detainees released this week said some 180 terror suspects had been on hunger strike for around two weeks."), available at [http://www.itv.com/news/world\\_1782911.html](http://www.itv.com/news/world_1782911.html). It was later confirmed that the number of prisoners who joined the strike reached 250, *Shaker Aamer statement* (August 11, 2005), or half of all the prisoners being held in Guantanamo.

<sup>28</sup> BBC News, *Guantanamo detainees refuse food Fifty-two detainees at the US prison camp at Guantanamo Bay in Cuba are staging a hunger strike in protest at their detention and treatment* (July 22, 2005), available at <http://news.bbc.co.uk/go/pr/fr/-/2/hi/americas/4704871.stm>.

<sup>29</sup> Id.

and it seems likely that they cannot be forced to take food if they refuse. Thus, their lives are likely to be in jeopardy at any time.

#### **4. THE BELLICOSE AND MANIPULATIVE MILITARY RESPONSE TO THE JULY HUNGER STRIKE ILLUSTRATES HOW DIFFICULT IT WILL BE TO AVERT FATALITIES THIS TIME**

Beyond the military's focus on secrecy, there are other institutional reasons why the military is unlikely to be able to avert fatalities with the August hunger strike. The military is highly unlikely to take an honest approach to negotiations, in part because they are politically reticent to 'negotiate' with people they publicly brand as 'terrorists,' and in part because the last three years have seen the military engage in a consistent pattern of deception with respect to virtually every aspect of the prisoners' affairs. On the other side of the equation, it is highly unlikely that the prisoners will give the military the benefit of the doubt again when it comes to questions of the military's good faith. The prisoners have been deceived on so many levels, and believe that the military reneged on an agreement yet again after the July strike, that it is going to prove extremely difficult to persuade the prisoners that any promises made by the military are in good faith. This creates an unenviable impasse: if the two parties cannot reach agreement, the predictable outcome will be the deaths of the starving prisoners.

We can draw depressing lessons from the military's response to the first hunger strike, which was initially bellicose. They refused to make any concessions, and forcibly ERF'd the prisoners who refused food.<sup>30</sup> However, it gradually became evident that the military could not prevail by force alone. The first major embarrassment for the military during the first strike was a visit by some VIP's who were shown Camp 4 on July 19, 2005. The prisoners in Whiskey

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<sup>30</sup> See *Memo on Conditions in Guantanamo Bay at 1* (August 13, 2005). This memo was submitted for classification review and was classified as 'FOUO Protected,' apparently because it involved the ongoing investigation of the abuse of Hisham Sliti. Counsel has endeavored to remove from this pleading anything that could possibly cause concern to the military censors, but it must be noted that such a classification is patently inappropriate. Undersigned counsel is Mr. Sliti's lawyer, and the idea that evidence that he has been abused can be covered up is unsupportable.

Block shouted their grievances at the visitors, telling them that their tour was a farce, and that they should talk to the prisoners in Camp V. The military cracked down on the prisoners in Whiskey Block, and moved half of them to harsher conditions. This did not cause the anticipated result, as the other half of the prisoners insisted on the same punishment, and this attitude of solidarity gradually spread to other camps.<sup>31</sup>

The July hunger strike grew to the extent that the medics could not keep up, and elected to stop their regular medical calls.<sup>32</sup> Many of the prisoners were soon in varying states of physical peril. M.C., the juvenile prisoner who was just 14 years old when he was seized, became so weak that he collapsed. He suffered a serious blow to his forehead resulting in a scar.<sup>33</sup> Shaker Aamer lost 35 pounds during the strike.<sup>34</sup> The prisoners spent “twenty six days of no food” and when some of them also refused water; “the conditions of some prisoners became so critical that all the detainee hospital had no more beds and they had to take prisoners to the navy hospital.”<sup>35</sup>

At this point, Colonel [XXXX]<sup>36</sup> seemed to negotiate seriously with the prisoner representatives. However, there were real concerns from the prisoners as to whether the military could be trusted to abide by their oral promises, and some prisoners were loath to give up their strike without concrete assurances.<sup>37</sup> Indeed, it appeared that he could not deliver on his promises, and when the military first backed off from his proposals, those prisoners “in hospital, when told this news of betrayal, tore out their IV’s and prepared for death within 48 hours.”<sup>38</sup>

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<sup>31</sup> See *Memo on Conditions in Guantanamo Bay at 1* (August 13, 2005).

<sup>32</sup> See *Memo on Conditions in Guantanamo Bay at 2* (August 13, 2005).

<sup>33</sup> See *Memo on Conditions in Guantanamo Bay at 4* (August 13, 2005).

<sup>34</sup> See *Memo on Conditions in Guantanamo Bay at 4* (August 13, 2005).

<sup>35</sup> *Shaker Aamer statement* (August 11, 2005).

<sup>36</sup> The name is omitted since the military takes the position that the names of those involved in events at Guantanamo Bay should, for some reason, not be made public. While Petitioners beg to differ, and believes that all those who take actions in Guantanamo should be held personally responsible for their actions, this is not a debate that Petitioners seek to hold at this point, as there are more urgent matters at stake.

<sup>37</sup> See *Memo on Conditions in Guantanamo Bay at 2* (August 13, 2005).

<sup>38</sup> *Shaker Aamer statement* (August 11, 2005).

The prison doctor apparently sought and obtained legal advice, determining that he could not forcibly resuscitate prisoners who might die and – in front of witnesses – “the doctor in charge ... took verbal statements from dying prisoners refusing resuscitation efforts if they lapsed into coma.”<sup>39</sup>

At this point, faced with the imminent deaths of several prisoners, the military chose to negotiate with the prisoners:

The colonel held a third meeting and made various promises involving conditions. The US agreed with some claims ‘consistent’ with the Geneva Conventions, involving an organisational structure for the prisoners – with a central committee of six respected prisoners and leaders in each block.<sup>40</sup>

The Prisoners’ Council includes Shaker Aamer (a British resident from Saudi Arabia) and Abdurrahman Fatur (from Egypt) -- the only ones who have been publicly named to date.<sup>41</sup> The Colonel in charge announced to the prisoners “that he had permission from Donald Rumsfeld himself to change the camp to be ‘consistent with’ the Geneva Conventions.”<sup>42</sup> He agreed that everyone would be made Level One, and there would not be distinctions between prisoners.<sup>43</sup> He agreed that the prisoners could have input towards improving the food.<sup>44</sup> The prisoners were promised that they would have three bottles of proper water each day.<sup>45</sup> Various other issues were subject to negotiation, including the closure of Camp V. All of these agreements reflected the conceded problems with the state of the prison.

These promises resulted in the suspension of the hunger strike on July 28, 2005.<sup>46</sup>

## **5. THE CURRENT HUNGER STRIKE AROSE OUT OF THE MILITARY’S REFUSAL TO HONOR ITS AGREEMENT WITH THE PRISONERS**

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<sup>39</sup> Id.

<sup>40</sup> Id.

<sup>41</sup> See *Memo on Conditions in Guantanamo Bay* at 1, 4 (August 13, 2005).

<sup>42</sup> See Id. at 2.

<sup>43</sup> Id.

<sup>44</sup> Id.

<sup>45</sup> Id.

<sup>46</sup> Id.

Unfortunately – no matter what the personal good faith of the colonel who conducted the negotiations – the military in general proved wholly unreliable. The Pentagon has not even been forthright about the agreement that it reached with the prisoners to end the hunger strike last time:

Prison command staff responding to Globe questions in writing, said, “There is no new committee formed by the detainees. Camp leadership routinely receives and addresses concerns from detainees consistent with the spirit of the Geneva Conventions. . . . [Prison staff are working] to increase the selection of books in our library” and “is always working to improve the manner in which we provide safe and human [sic] detention of enemy combatants.”<sup>47</sup>

Again, this is simply not true. “As a result of the hunger strike, a colonel . . . set up a committee which has six prisoners on it that meets together. They are from different areas of the camp. They are allowed limited ability to speak to other prisoners. They are allowed to meet for a few hours a week, and occasionally should be meeting with the colonel.”<sup>48</sup>

The urgent moment when prisoners might start dying having passed, the military then reneged on the deal.<sup>49</sup> On August 5, Hisham Sliti was ordered that he must go to interrogation. Mr. Sliti was taken from his cell in shackles, and questioned by a male interrogator<sup>50</sup> who has a reputation for violence. Although Mr. Sliti was in shackles, the interrogator became physically threatening towards him, and ultimately Mr. Sliti was assaulted in three different ways. First, there was a mini-refrigerator in the room, and the interrogator picked it up and literally threw it at Mr. Sliti. Second, he took a chair and struck Mr. Sliti about the head with it, resulting in a

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<sup>47</sup> Charlie Savage, *Lawyers cite Guantanamo concessions US said to be negotiating with prisoners*, BOSTON GLOBE (August 13, 2005), available at [http://www.boston.com/news/nation/washington/articles/2005/08/13/lawyers\\_cite\\_guantanamo\\_concessions?mode=PF](http://www.boston.com/news/nation/washington/articles/2005/08/13/lawyers_cite_guantanamo_concessions?mode=PF).

<sup>48</sup> *Id.*

<sup>49</sup> *See Memo on Conditions in Guantanamo Bay* at 3 (August 13, 2005).

<sup>50</sup> The name and description of this interrogator have been omitted from the memo and this pleading since the military takes the position that such identifying information should remain classified. Again, Petitioners comply with this under protest, since he believes that those responsible for violence in Guantanamo Bay should be identified, investigated and prosecuted.

serious injury about the eye. Third, the MP's who came in upon hearing this ruckus beat Mr. Sliti further.<sup>51</sup>

There were other events that immediately followed this. One of the Kuwaiti prisoners was sexually harassed at interrogation, and ERF'd. The Canadian juvenile prisoner was violently ERF'd.<sup>52</sup>

The hunger strike has started again.<sup>53</sup> Since that time, in another unfortunately provocative act, the military rounded up the Prisoners' Council and put them in isolation.<sup>54</sup>

As of August 11<sup>th</sup>, 2005, there were 150 prisoners who had joined the strike in Camps I, II & III, with additional prisoners set to join it from Camp IV and V. This means that many prisoners have been without food for at least two weeks, and some may have been going without water. Potentially fatal consequences may begin after two weeks of such a strike. Thus, the situation is very urgent.

The fact that these prisoners are serious is perhaps illustrated by the fact that Ahmed Abdulaziz, from Mauritania, asked counsel to draw up his last will and testament,<sup>55</sup> in case he does not survive.

## **B. THREE TIERS OF PROBLEMS FACED BY THE PRISONERS THAT MUST BE ADDRESSED BY THIS COURT**

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<sup>51</sup> See *Memo on Conditions in Guantanamo Bay* at 3 (August 13, 2005).

<sup>52</sup> See *Memo on Conditions in Guantanamo Bay* at 3 (August 13, 2005).

<sup>53</sup> The immediate cause of the renewed hunger strike was confirmed by Shaker Aamer, one of the members of the Prisoners' Council:

Sliti suffered a terrible beating and his Qur'an was twice desecrated in one day. Saad was abused and humiliated for 5 1/2 hours by a female interrogator. \* \* \* The final straw came when Saad was ERF'd on Sunday for another abusive interrogation, and Abdusalaam al-Hayla was taken for 'interrogation' for 5 hours and nobody questioned him. The military refused dinner to kilo Block D then ERF'd Saad very savagely, forcing his face in the toilet.

*Shaker Aamer statement* (August 11, 2005).

<sup>54</sup> *Shaker Aamer statement* (August 11, 2005).

<sup>55</sup> See *Memo on Conditions in Guantanamo Bay* at 4 (August 13, 2005).

There are three distinct tiers of problems faced by the prisoners in Guantanamo Bay, each of which falls within this Court's historical role as arbiter of illegal conditions of confinement.

## **1. THE OVERALL NEED FOR FAIR TREATMENT**

The first tier of the complaints is simple: That more than 500 people have been held without any meaningful charges or trial for upwards of three years. The prisoners demand meaningful access to court – that they should be charged or released:<sup>56</sup>

First and foremost among the issues, of course, it has been over three years and nothing has been decided. “We are dying a slow death in here. And you have to remember that we have not been charged with any crime. I do not understand what America is doing.”<sup>57</sup>

In other words, the prisoners have been held for more than three years without official charges, and without a meaningful trial where they could prove their innocence before a fair tribunal. “The demands called for respect for . . . fair trials with proper legal representation.”<sup>58</sup>

## **2. THE TREATMENT OF PRISONERS IN CAMP V, THE ‘INNOCENT,’ AND JUVENILES AS WELL AS CONTINUED ABUSE OF THE QUR’AN**

The second tier of complaints involves conditions in Camp V, the juveniles held there, the CSRT-innocent prisoners, and on-going violations of the prisoners' religious rights:<sup>59</sup>

In addition to seeking a fair resolution of their status, the prisoners' other main demands are as apparently follows:

1. The immediate liberation of those determined to be 'innocent' through the CSRT's who continue to be held

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<sup>56</sup> See *Memo on Conditions in Guantanamo Bay* at 1 (August 13, 2005).

<sup>57</sup> *Deghayes Memo* at 1; see also Al Jazeera, *Guantanamo inmates on hunger strike* (July 22, 2005) (main complaint of the prisoners is “their indefinite detention and the inhuman conditions at Guantanamo”), available at <http://english.aljazeera.net/NR/exeres/1AF53F-2A54-43B5-A049-9B673AF6D241.htm>.

<sup>58</sup> ABC News Online, *Guantanamo detainees give demands to end hunger strike* (July 23, 2005), available at <http://www.abc.net.au/news/newsitems/200507/s1420814.htm>; Al Jazeera, *Guantanamo inmates on hunger strike* (July 22, 2005) (“The prisoners are demanding . . . fair trials with proper legal representation;” strike to protest “their indefinite detention and the inhuman conditions at Guantanamo.”), available at <http://english.aljazeera.net/NR/exeres/1AF53F-2A54-43B5-A049-9B673AF6D241.htm>; see also Associated Press, *Afghans tell of hunger strike at Guantanamo*, TAIPEI TIMES (July 22, 2005) (“To protest alleged mistreatment and to push for freedom”), available at <http://www.taipetimes.com/News/world/archives/2005/07/22/2003264520>.

<sup>59</sup> See *Memo on Conditions in Guantanamo Bay* at 1 (August 13, 2005).

months after this determination (without prejudice to the prisoners' claims that the CSRT's are wholly unfair, and that there are thus many more prisoners who are innocent than reflected in the CSRT results).

2. Removal of those who were seized as juveniles from Camp V, and their housing in an appropriate facility pending their release (such as the much-publicised Camp Iguana that the U.S. military originally said was for Juveniles), where they are not abused, and where they can receive education. Juveniles in Camp V are identified to include M.C, O.K, and H.B.A.

3. Cessation of the continued denigration of the prisoners' religious beliefs.<sup>60</sup>

#### **a. THE HORRENDOUS CONDITIONS OF CAMP V**

One of the main demands is to close "Camp V, a facility designed to destroy people both mentally and physically."<sup>61</sup> The terrible conditions of Camp V remain a major focus of this strike, because they are simply inhumane.

The prisoners there are held in solitary isolation, and noise-making fans have been introduced to try to ensure that there should be no meaningful communication among the prisoners:

The cells in Camp V are concrete isolation cells. It is very difficult to hear or see anyone. The guards try to prevent meaningful communication. We would try to shout at each other, so they placed guards in the corridors. If he hears anyone trying to talk, he would come and bang loudly on the doors to stop this. But we were too many, and we talked all at the same time to frustrate their plans. They tried using noisy fans to drown out any conversation.<sup>62</sup>

Contrary to the occasional military statements to the contrary, the prisoners get very limited time outside their solitary isolation cells:

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<sup>60</sup> *Deghayes Memo* at 2.

<sup>61</sup> *Shaker Aamer statement* (August 11, 2005); see also ABC News Online, *Guantanamo detainees give demands to end hunger strike* (July 23, 2005) (the "prisoners [are] frustrated by their indefinite detention and what they described as the inhuman conditions at Guantanamo, specifically in a facility known as camp five."), available at <http://www.abc.net.au/news/newsitems/200507/s1420814.htm>.

<sup>62</sup> *Deghayes Memo* at 2.

For one year, I have walked on the rec yard only once a week, and that is when I am lucky, as sometimes we do not go out at all and two weeks pass without leaving the cells. Sometimes the excuse is that someone else is on the yard. This could be the Red Cross, or anyone on the yard – then nobody can go out. Sometimes the Red Cross is here for many days, which makes our conditions even worse rather than the promise that they will be better. The “yard” itself is only twice as big as the cell. We are never under the sun, as the ‘yard’ is covered. Sometimes we are walked at night. Sometimes there are two people out in separate rec yards at the same time, and it is possible to talk. But there are some prisoners who are only ever taken out when there is nobody else there, so that they will never have another person to talk to. We are told that this is done on the instructions of the interrogators.<sup>63</sup>

Some of the prisoners suffer badly from this, both physically and mentally. For example, M.C., the juvenile prisoner, has suffered skin diseases because of his lack of exposure to sunlight. Despite his complaints to the medical officers, this persisted for many months.<sup>64</sup>

Reflecting the limited recreation, the prisoners in Camp V are also denied reasonable sanitary facilities including showers: “We only go to the shower when we go to rec, so that means that if you don’t get outside, you don’t get to clean yourself.”<sup>65</sup>

Despite the military’s public assurances that any use of light as a coercive interrogation tool was limited to Afghanistan and the early days of Guantanamo, this technique is still in use in Camp V:

The lights are some of the worst tools used against us. They are neon, two and a half metres long, glaring 24 hours a day. They are fitted directly above the concrete tomb that is meant to be our bed. They are never dimmed. Have you ever lived in bright lights for 24 hours a day, every day? It is a constant struggle to get any sleep at all. Many in the camp suffer mentally from sleep deprivation.<sup>66</sup>

Likewise, although the military insists that any physical mistreatment of prisoners is a thing of the past, the experience of Camp V prisoners shows this to be false:

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<sup>63</sup> *Deghayes Memo* at 2.

<sup>64</sup> Source: unclassified memo concerning M.C.

<sup>65</sup> *Deghayes Memo* at 2.

<sup>66</sup> *Deghayes Memo* at 3.

The Physical abuse is very bad. On May 25, at 06.35, one of the MP's slammed the *beenhole* [what we call the grate] on M.C.'s hand. M.C as you know is one of the juveniles. The MP was the one who abused the Qur'an. He is Hispanic, heavysset, tall and middle-aged. He later did the same thing to two other prisoners, Awaisha and Ahmad, apparently causing them broken bones.

They continue to use the ERF [Emergency Reaction Team] for abusing prisoners in Camp V. Indeed, the verb 'to be ERF'd' has long since entered our language. A prisoner called Farid was beaten by the ERF team and left naked for three weeks. Farid is already lame because the guards in Kandahar broke his knee.

Saud Jihani, Issa Murbati and Hisham Sliti have also been particular victims of the ERF team. All three were beaten and left naked. When Sliti returned from a lawyer visit in Camp Echo in May, four of the ERF team 'mules' came into his cell, beat him, held him to the floor, and then rifled through his Qur'an solely to offend him.

At the end on 2004, O<sup>67</sup> was in my block, and he refused to give back his paper plate as a minor protest over something. Five members of the ERF team came in on him and three kneed him in the stomach until they had knocked him to the floor. This ruptured his stomach and he suffered constant and increasing pain. He asked for medical care for several months. Finally, on May 7, 2005, he saw a doctor, who said his situation was very dangerous. He has to undergo an operation as a result of this. He was kept at the hospital for only two days, and then returned to Camp V. We have heard his screams of pain whenever he uses the toilet. One day he collapsed in his cell, and so we felt forced to conduct joint protest on his behalf. Part of his problem is that he does not speak English, so that when he needs help, and when the MP's finally respond to his cries, they say that there is no translator. It is cruel. Finally, we were able to pressure the military into taking him back to the clinic. As they took him to the clinic, he was crying out in pain, and the guards – sad to say – were laughing at him. When he came back, he was put in the cell across from me, so I would hear each time he called for help from the MP's. The MP's often refuse to respond to him, walking directly by his cell. Last week [June 2005], he collapsed in his cell again and they took him back to the clinic. As of this writing, he has not returned. Beating him so badly was, in the first place, a vicious act for so minor a rule violation – a rule violation committed by someone who is being held without being proven guilty of any crime. He has received permanent injury from this.<sup>68</sup>

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<sup>67</sup> Name omitted for reasons of medical privacy. (Note that according to Mr. Deghayes the prisoner has specifically authorized that his name be used to bring attention to his plight, but counsel has been informed that the government takes the position that this may violate his right to privacy, and is therefore omitting the name.)

<sup>68</sup> *Deghayes Memo* at 3-4.

These abuses leave the prisoners with permanent damage. Omar Deghayes, the British refugee from Libya, has been blinded by the U.S. military: “I have previously described to you the abuse I suffered from the ERF team when they gouged by eyes and left me permanently blind in my right eye. While I can see nothing out of it, my eye is very sensitive to light. It is particularly painful because they leave the bright neon lights on all the time.”<sup>69</sup>

The treatment of prisoners in Guantanamo Bay – and particularly in Camp V – therefore go well beyond anything that might be deemed reckless abuse. It remains brutal, intentional and systematic.

#### **b. THE MISTREATMENT OF THE ‘INNOCENT’**

A second element of the prisoners’ complaints involves those who have been found ‘innocent’ in the CSRT process. Sami Al Laithi is one such person:

They have prisoners here who are treated shamefully. One would be [Sami Al Laithi]. He has been found ‘innocent’ by the CSRT process. He was brutally abused and had his back broken by the guards at the hospital, which means that he is confined to a wheelchair. The treatment here is particularly harsh on him as he cannot get any help with therapy when he is being held in solitary confinement. He cannot stand unless he has other prisoners (or someone) to help him. He is very afraid that he will become totally paralysed if he is not allowed to do physical therapy.<sup>70</sup>

Mr. Al Laithi was – when counsel last saw him on August 8, 2005 – still being held in Camp V, under the shocking conditions previously described, three months after being found innocent by the CSRT process.

#### **c. THE ABUSE OF JUVENILES, PARTICULARLY IN CAMP V**

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<sup>69</sup> *Deghayes Memo* at 4.

<sup>70</sup> *Deghayes Memo* at 6.

Extraordinarily, Respondents have also held juveniles<sup>71</sup> in Camp V, under conditions that are unacceptable for anyone, let alone someone who was a child when seized. The unclassified evidence reveals that at least three juveniles – MC, OK and HBA – have been held routinely in Camp V.<sup>72</sup>

This mistreatment is particularly harmful for the juveniles, as illustrated by the following description:

With MC<sup>73</sup> (a juvenile) he has suffered continuous skin rashes from the absence of sunlight. The doctors said it was caused because he was not exposed to fresh air and sunlight, and because his clothes and blankets were changed so rarely. After the doctor's diagnosis, MC was still only allowed one hour outside in two weeks – despite the promise of the regulations that we would get three hours a week. When he was taken outside, he therefore refused to come in until the issue was addressed. The guards called the ERF team hooligans, and they beat him (and another prisoner) up and forced them back into their cells. Both were left naked but for boxer shorts for three weeks. They had their bedclothes confiscated, and had to sleep on bare concrete. Nothing has been done to redress the problem of his skin condition.

Indeed, they came to MC and told him that he has to submit an injection. He refused because he did not know what it was. They entered his cell again, and one guard called [NAME OMITTED] knocked him down to the ground. The others held him down to the ground. The others held him down and they forcibly injected him,

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<sup>71</sup> Respondents take an extraordinary view of the definition of 'juvenile':

At the outset, this discussion requires a definition of "juvenile." The United States military applies this only to persons under the age of 16. \* \* \* Clearly, this position is unacceptable.

Melissa Jamison, *Detention of Juvenile Enemy Combatants at Guantanamo Bay: The Special Concerns of the Children*, 9 U.C. Davis J. Juv. L. & Pol'y 127, 150 (2005) (footnotes omitted). Every legal body defines a 'juvenile' or 'child' prisoner as one who was detained for offences committed prior to his eighteenth birthday. This is the case according to the Convention on the Rights of the Child, Feb. 16, 1995, arts. 1, 38, 1577 U.N.T.S. 3 (CRC Article 1 defines "child," for the purposes of its protection, to mean "every human being below the age of 18 years"); Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, July 5, 2000, arts. 1-4, 6, 7, GA Res. 263, UN GAOR, 54th Sess., Supp. 49, UN Doc. A/RES/54/263; United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules) (the Beijing Rules state, "[a] juvenile is every person under the age of 18."). Furthermore, the military seems now to justify treating juvenile prisoners as badly as they treat adults on the grounds that they have now reached the age of 18. It is very hard to believe that holding a juvenile illegally for several years can be used to justify mistreating him now.

<sup>72</sup> Petitioners do not mean to suggest that these are the only juveniles who have been held in Camp V, only that the evidence reveals that these prisoners have been.

<sup>73</sup> Name omitted because MC is a juvenile.

while his blood was flowing on the floor. The rest of us were banging on the doors and loudly objecting, as it is shameful that they treat a kid this way. The injection was a sedative of some sort, and MC was comatose for three full days after the injection. We were very concerned about him, as we could not wake him, and he did not even wake for prayer. He did not know anything, and afterwards he could not remember anything about what had happened to him.

For more than a year now, MC has constantly been coming in for this mistreatment. It began just before he came to Camp V, when he was in Camp Delta. MC had just move cell when, at roughly 3 a.m, the ERF team burst into his cell, pulled him off his bed, and beat him. They broke two of his teeth, and he was bleeding. They shackled him and took him onto the rec yard where they hosed him down before throwing him back on the floor of his cell. MC had no idea what this was about, although he thought this beating had been ordered by his interrogator, [NAME OMITTED], who had been angry because MC would not say what he wanted to hear. But the next day a translator came in and told him it had been a mistake, and the ERF team had not realized that he had moved cell. The previous occupant had committed some offence, apparently spitting on the General or a senior officer, and was meant to be punished for this.<sup>74</sup>

MC is not the only juvenile to have suffered. Indeed, one of the precipitants to the August hunger strike has been the violent physical abuse of the juvenile OK by the ERF team, after the military's purported agreement not to mistreat the prisoners in the way that has unfortunately been commonplace.

Another factor that particularly affects the juveniles in Camp V, but which had an impact on all others -- is the total lack of education available for the prisoners

Education is most important for the young who are here. But it makes no sense not to allow meaningful access to books. We do not even ask them to pay for books. Although even convicted criminals in jail can receive books from their families, we cannot.<sup>75</sup>

The treatment of juveniles has been a source of great frustration for the more mature prisoners, as well as for the juveniles themselves. As well as being a precipitant of the hunger strike, it is also a violation of the law.

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<sup>74</sup> *Deghayes Memo* at 4.

<sup>75</sup> *Deghayes Memo* at 8.

**d. VARIOUS ISSUES OF RELIGIOUS INTOLERANCE,  
AND THE CONTINUING DESECRATION OF THE  
QUR'AN**

“The demands called for respect for their religion, including an end to what they described as desecration of the Qu’ran and religious discrimination. . . .”<sup>76</sup> There are several issues involved here that violate the law.

The first issue is the attempt by the military to manipulate the hours when the prisoners pray. This is a strange strategy indeed, as if somehow having a person pray at the wrong time were a legitimate governmental goal:

The authorities manipulate religious issues for very cheap reasons. For example, one time I was in Camp Echo they had the wrong prayer times. It was for this reason that Shaker Aamer asked counsel to process a proper time schedule through to the prisoners, so that we could pray at the right times. It seems absurd that they would try to make us pray at the wrong times, as what does that achieve? They have now replaced this with the proper schedule.<sup>77</sup>

The military has also been playing the prayer call over the public address system at the wrong time and the personnel have tried to disrupt prayer:

They play the call to prayer over the public address system at the wrong times and sometimes they do not play it at all. The guards have recently increased their efforts to disrupt prayer, by raising their voices as if they were kids playing with a new toy. They also make other noises at time of prayer, like increasing the volume of the fans, talking louder, or running races in the corridor. It is childish. At other times in the day it is totally quiet, and it is often very difficult to find a guard when we need help.<sup>78</sup>

Indeed, the call to prayer also included erroneous words in it.<sup>79</sup>

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<sup>76</sup> ABC News Online, *Guantanamo detainees give demands to end hunger strike* (July 23, 2005), available at <http://www.abc.net.au/news/newsitems/200507/s1420814.htm>; see also Al Jazeera, *Guantanamo inmates on hunger strike* (July 22, 2005) (“The prisoners are demanding ... greater respect for their religion - including an end to desecration of the Qu’ran”), available at <http://english.aljazeera.net/NR/exeres/1AF53F-2A54-43B5-A049-9B673AF6D241.htm>.

<sup>77</sup> *Deghayes Memo* at 5.

<sup>78</sup> *Deghayes Memo* at 5.

<sup>79</sup> Source: unclassified memo of Usama Abu Kabir.

The prisoners have also demanded the return of religious books that had been taken away. For example, the prison had instituted a rule that each prisoner could only have a Qur'an in Arabic or another language, which is detrimental to the many prisoners who do not read Arabic well. It is very important to have a copy in the original (Arabic) but also in an edition that the prisoners can understand.<sup>80</sup> At the same time, the prisoners have not been allowed copies of other religious books.

There have been many other ways in which the military have sought to insult the integrity of the prisoners' religious beliefs, including exploiting the Muslim's proscription against partial nakedness:

In other Camps there are similar problems. Camp Romeo is the most notorious of course. I was held there, and the prisoners continue to be held in only their shorts, because the authorities know that this is inappropriate and humiliating for a Muslim. It is strange that they chose the name Camp Romeo for this treatment, too. They have been using this form of mistreatment in Camp V recently too. The prisoners who have been treated this way include MC (who is one of the juveniles) and four others.<sup>81</sup>

Again, it is hard to see a penological purpose for such humiliation of prisoners, particularly if the military now concedes that it should be acting in accordance with the Geneva Conventions, without coercive interrogation of the prisoners.

Perhaps most significant, however, in light of the history of abuse of the Muslim holy book, is the continued problems with the desecration of the Qur'an. This had caused immense discord in the prison before, as well as around the world. Unfortunately, the issue has not been resolved. As repeatedly reported, the Qur'an has been mistreated for the entire history of the Guantanamo experiment:

I know that the U.S. First Amendment protects the right to freedom of religious practice. I have heard of a law called the Religious Freedom Restoration Act in the U.S., which protected prisoner's rights to

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<sup>80</sup> Source: unclassified memo of Usama Abu Kabir.

<sup>81</sup> *Dehayes Memo* at 5.

religious liberty, and sounded like a very appropriate thing though I also heard there were challenges to its constitutionality. Unfortunately, the authorities in Guantanamo Bay do not live up to this promise.

\* \* \*

Abuse of our religion and the Qur'an still continues. In all the time I have been here, I have never been visited by a Muslim 'chaplain' or Imam. I have been asking for such help for over a year now. When I returned to Camp V from my counsel meeting in May, the Qur'an that I had to leave in my cell had been searched in my absence. As everyone knows, this is very offensive to Muslims as a non-Muslim did this. We had hoped that we had made this point by prior non-violent protests, but the abuse of the Qur'an continues in far worse ways than this as well. When the prisoners read the newspaper reports where the military denied abusing the Qur'an it was very sad – the acts taken against the Qur'an have been so offensive that they do not bear to mention here.<sup>82</sup>

Unfortunately, this abuse continues to this day. While the military has promised that the Qur'an would not be subject to desecration again, this has not been the case. Indeed, in the abuse of Hisham Sliti that was the precipitating misconduct leading to the new hunger strike, the Qur'an has reportedly been desecrated twice more.<sup>83</sup>

### 3. GENERAL ISSUES OF CONFINEMENT

The third tier of complaints involved general conditions at the prison, with the prisoners demanding that they be held consistent with the Geneva Conventions, as promised by the authorities.<sup>84</sup> These issues concern medical mistreatment of the prisoners, and the general conditions of confinement that must be addressed.<sup>85</sup>

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<sup>82</sup> *Deghayes Memo* at 5.

<sup>83</sup> *Mohammed Statement* ("Hisham from Tunisia was savagely beaten in his interrogation, and they public[ly] desecrated the Qur'an (again).").

<sup>84</sup> *See Memo on Conditions in Guantanamo Bay* at 1 (August 13, 2005).

<sup>85</sup> For example, "[t]hey also said they needed adequate supplies of food and clean water, and needed direct sunlight and not to be forced to go for months without seeing daylight." ABC News Online, *Guantanamo detainees give demands to end hunger strike* (July 23, 2005), available at <http://www.abc.net.au/news/newsitems/200507/s1420814.htm>; *see also* Al Jazeera, *Guantanamo inmates on hunger strike* (July 22, 2005) ("The prisoners are demanding clean food and water, better medical care, more access to sunlight, contact with relatives"), available at <http://english.aljazeera.net/NR/exeres/1AFAF53F-2A54-43B5-A049-9B673AF6D241.htm>; Associated Press, *Afghans tell of hunger strike at Guantanamo*, *TAIPEI TIMES* (July 22, 2005),

### **a. ISSUES OF MEDICAL MALPRACTICE**

The medical malpractice that has been commonplace in the Guantanamo camps has been detailed in a recent pleading filed in the case of the Egyptian prisoner, Sami Al Laithi, and is incorporated herein by reference in its totality.<sup>86</sup>

Sad to say, in addition to providing wholly inadequate medical care to the prisoners, the military has made the right to necessary medical care contingent on the prisoners' cooperation with interrogation, a policy that shocks the conscience:

The plight of the people who have had limbs amputated is among the saddest of the conditions of this ugly camp. I have twice been housed next to prisoners with prosthetic limbs. It was one of the most depressing experiences I have endured. The prisoners were effectively blackmailed by their interrogators who said that they had to cooperate in order to get their prosthetic devices back. They are denied the toilet chairs, the sticks they need to walk and even the cream they need to ensure that the wound will not become infected and inflamed. The pain is apparently particularly great when they are denied the necessary prosthetic socks, so that the wounds are exposed to the extreme cold of the cells.<sup>87</sup>

This medical abuse of prisoners is employed throughout the camps.

### **b. ISSUES OF SANITATION**

There are various issues of basic sanitation that continue to plague the prisoners. For example, scorpions are present in the camps, and even make it into the prisoners' food:

Scorpions just walk around in Camp V. In June 2004, Juma was bitten by one in the cell in front of me. The incident should be registered with the medical staff, who treated him for it. As related below, Hisham Sliti found one in his food.<sup>88</sup>

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("A 'widespread' hunger strike over the amount and quality of their drinking water.") available at <http://www.taipeitimes.com/News/world/archives/2005/07/22/2003264520>.

<sup>86</sup> See *Motion for a Preliminary Injunction Requiring that Respondents provide his Counsel with a Complete Copy of his own Medical Records and Cease their Practice of Intentional Medical Malpractice against Him*, filed July 21, 2005, in *Sliti v. Bush*, Civ. No. 05-0429 (RJL).

<sup>87</sup> *Deghayes Memo* at 6.

<sup>88</sup> *Deghayes Memo* at 6.

The toilets often do not function properly, overflowing and resulting in other unsanitary conditions:

There are frequent overflows, and occasional blockages of the toilets. Apart from other disgusting consequences, this seems to dramatically increase the number of mosquitoes. When I see you next, I will show you my hands and feet so that you can see the bites everywhere. This suffering is continuous.<sup>89</sup>

The prisoners asked that they be permitted to have drinkable water available. The water is a yellow-brown color and has a very bad odor.<sup>90</sup>

### **c. GENERAL QUESTIONS OF ABUSIVE TREATMENT**

There have been various hold-overs from the more overt policies of coercion used to break the prisoners down in Guantanamo. One issue was sleep deprivation. The prisoners requested that no movement or interrogation of prisoners would take place between 10 p.m. and 6 a.m., as this caused a great disturbance on the blocks and made it impossible for the prisoners to sleep. They also asked that there be no cleaning of the blocks at night with the extremely pungent pine oil cleaner that was slobbered around causing breathing problems for asthmatics and others. The military agreed to this, but did not respect it. For example, the military tried to move prisoners for legal visits in the middle of the night – as late as 03.00 a.m. – and then when the prisoners objected to the timing, represented that they “refused” to see counsel.<sup>91</sup>

A second such hold-over is the continued use of excessive cold and noise to break down the prisoners:

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<sup>89</sup> *Deghayes Memo* at 6.

<sup>90</sup> See Associated Press, *Afghans tell of hunger strike at Guantanamo*, *TAIPEI TIMES* (July 22, 2005) (describing a “widespread” hunger strike over the amount and quality of their drinking water.”), available at <http://www.taipeitimes.com/News/world/archives/2005/07/22/2003264520>.

<sup>91</sup> This fact has not yet cleared classification review, but was reported by both Jamil El Banna and Bisher Al Rawi to their counsel on August 6-7, 2005.

The strong A/C is fitted to blow directly on the concrete bed. If you lie down the stream blows directly in your face, unless you turn around in which case you have to put your face directly into the stainless steel toilet. You have your Hobson's choice, between illness and odour. The A/C is particularly strong in Wing D, where it is used as a particular abuse. Thankfully, I have not had to deal with this lately, as it is generally reserved for the new arrivals from Bagram. But if you anger the interrogators, you can end up there. Three people were sent there recently. Indeed, recently there has been a new tool for our torture. They put very large noisy fans in every corridor, even though there is nobody in the corridors, so they do nobody any good. They make very disturbing noises and they are left on all day and night, even the time for prayer. They are there just to make a noise to make communications between prisoners even more difficult.

\* \* \*

Yet the fans are only minor in the pantheon of abuses that we suffer in Camp V. But if the central command is unhappy at us in Camp V they raise the level of the fans to make life more intolerable. If an interrogator is angry at a particular prisoner, he moves the fan in front of the prisoner's door. Only when an important visitor comes do they turn the fans off. Does anyone really believe that the U.S. could spend all the millions they have spent on Camp V and not get fans that do not do this? I was in a Pakistani prison and they had fans that were silent there. Does Pakistan have better technology than the U.S?<sup>92</sup>

The prisoners also request that the sexual humiliation of prisoners in Camp Romeo cease at once. This, as discussed above, has been an on-going sore in the conditions of the prison.

#### **d. MAIL PRIVILEGES ARE CONSTANTLY ABUSED**

Another significant complaint that precipitated the July hunger strike was the intentional interference with the prisoners' mail. The prisoners requested that family letters no longer be delayed. The 'normal' delay in delivery was two months, and sometimes it would take as long as one year for the letters to be delivered – if they were at all.

#### **e. THE DIET IS UNACCEPTABLE**

Various comments have been made publicly by Respondents and their Congressional allies about the supposedly high quality of the food in Guantanamo Bay, including statements to the effect that prisoners enjoy such delights as lemon chicken and rice pilaf. This is apparently

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<sup>92</sup> *Dehayes Memo* at 7.

the fruit of false information provided to important visitors in an effort to use them to relay misinformation back to the public:

Mr. Deghayes noted that there are a series of prisoners who are working with the military who are used to meet with important visitors to make the Camp look good. One such person was in Camp Romeo with Mr. Deghayes and he eventually confessed that he was working with the military. He had been picked because he spoke various languages. \* \* \* There are at least seven people who have either confessed to this, or been exposed as having done it.<sup>93</sup>

In truth,

The food is terrible. In June 2005, one evening at about 6pm, Hisham Sliti found a dead scorpion cooked in his dinner. He had already eaten some of it, and he began to get a bad pain in his stomach, and then vomited. He showed the scorpion to the MP, and the sergeant.<sup>94</sup>

It is not simply a matter of finding poisonous insects in the food. The general level of food quality is abysmal. A representative selection of assessment by the prisoners is as follows:

“The food is very, very terrible. I would prefer to eat grass.”<sup>95</sup>

“The last time we had Lemon Chicken in Guantanamo Bay was never. I have never even seen a lemon in this place.”<sup>96</sup>

The main meal at breakfast, served every second day for the past two years, consists of two pancakes (often cold), with a piece of fruit. This is alternated with two other breakfasts, served on the second and fourth day in each rotation. On the second day, the meal is eggs with oatmeal – the oatmeal is the dish that most often comes with undesirable items in it such as worms. On the fourth day, it is cornflakes with a vegetarian burger.<sup>97</sup> This is a very strange mix, and the vegetarian burger is very unappetizing.

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<sup>93</sup> Source: “*Misleading Visiting VIP’s*” memo (July 19, 2005), unclassified July 21, 2005. (Names of the informants were omitted for security purposes).

<sup>94</sup> *Deghayes Memo* at 6.

<sup>95</sup> Source: *Sami Al Laithi Statement*, July 3, 2005 (unclassified 7/21/05).

<sup>96</sup> Source: *Bisher Al Rawi Statement*, June 28, 2005 (unclassified 7/21/05).

<sup>97</sup> Source: *Usama Abu Kabir Statement*, June 30, 2005 (unclassified 7/20/05).

“The lunch includes boiled tinned vegetables that are tasteless, almost inedible, and most people do not eat them.”<sup>98</sup> For example, as counsel observed, on July 3<sup>rd</sup>, 2005, the lunch included boiled tinned okra, very dry undercooked rice, and a piece of fish that was rancid. On July 4<sup>th</sup>, 2005, the lunch included boiled tinned potatoes, mushy carrots (that had a bitter taste and were totally inedible) with kidney beans. The food was all boiled without spices – and was all tasteless except for the bad tinned flavor. There was a slice of stale brown bread, and a tasteless apple. On July 5<sup>th</sup>, 2005, the lunch included a veggie burger (like the one served at breakfast), tinned brussel sprouts boiled like the English do (soggy and tasteless), very dry undercooked rice, and brown pita bread with a strange aftertaste. For Respondents to suggest that this food is of a high quality is risible.

The prisoners have sometimes been given food that is incompatible with their religious beliefs:

The food is always very limited. One month ago [May 2005] they suddenly started serving food that was clearly unsuitable for Muslims. This went on for a week. Fortunately, only those who could read English knew this, so the others did not starve. But they were very sad when they learned later when word was able to spread that they had been duped into eating such food.<sup>99</sup>

Prisoners have the right to basic, decent nutrition.

## **II. LEGAL CLAIMS FOR RELIEF**

The various facts set forth above give rise to several claims for legal relief. The first we consider are the prohibitions against the abuse of the prisoners’ rights to religious freedom.

### **A. THE RIGHT TO RELIGIOUS FREEDOM: CONTINUALLY VIOLATED**

Initially, one must ask why Respondents and the U.S. military would want to violate the prisoners’ right to religious freedom, enshrined as one of the most basic issues of our nation in the First Amendment.

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<sup>98</sup> Source: *Bisher Al Rawi Statement*, June 28, 2005 (unclassified 7/21/05).

<sup>99</sup> *Deghayes Memo* at 6.

Our commitment to religious freedom has recently been reaffirmed in the Religious Freedom Restoration Act, where Congress reminded the nation that: “the framers of the Constitution, recognizing free exercise of religion as an unalienable right, secured its protection in the First Amendment to the Constitution.” Religious Freedom Restoration Act, 42 U.S.C. § 2000bb(a)(1) (1993). Under RFRA, the federal government:

shall not substantially burden a person’s exercise of religion even if the burden results from a rule of general applicability, except ... if it demonstrates that application of the burden to the person (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.

RFRA clearly covers the military as the act states: “the term ‘government’ includes a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States.” And, it clearly covers Guantanamo Bay. Respondents depend on the Joint Congressional Resolution of September 2001, as the power under which it can detain prisoners at Guantanamo Bay. Section 2000bb-3 of RFRA states that: “Federal statutory law adopted after November 16, 1993 is subject to [RFRA] unless such law explicitly excludes such application by reference to this chapter.” There is absolutely no provision of the September 2001 statute that even mentions RFRA, let alone explicitly excludes application of it to prisoners of the Bush/Cheney War on Terror. See Authorization of the Use of Military Force, Pub. L. No. 107-40, § 2, S.J. Res. 23 (2001) (stating in relevant part that “[t]he President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons”).<sup>100</sup>

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<sup>100</sup> Numerous Courts of Appeal have held that even after City of Boerne v. Flores, 512 U.S. 507, 117 S.Ct. 2157 (1997), which invalidated RFRA as applied to States and their subdivisions, “RFRA ... remains operative as to the Federal Government and federal territories and possessions. See O’Bryan v. Bureau of Prisons, 349 F.3d 399, 400-401 (C.A.7 2003); Guam v. Guerrero, 290 F.3d 1210, 1220-1222 (C.A.9 2002); Kikumura v. Hurley, 242 F.3d 950,

The government cannot even begin to suggest a compelling interest that would justify the abuse of the Qur'an, the refusal to allow prisoners access to religious ministers and books, their right to assemble for prayers, the constant ridicule heaped on the prisoners' exercise of their religious freedom, and so forth.

A compelling governmental interest is defined as an "interest[] of the highest order." Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 546, 113 S.Ct. 2217 (quoting McDaniel v. Paty, 435 U.S. 618, 628, 98 S.Ct. 1322 (1978)) (stating "[t]o satisfy the commands of the First Amendment, a law restrictive of religious practice must advance 'interests of the highest order' and must be narrowly tailored in pursuit of those interests"). There is no such interest here to justify the substantial burdens Respondents have placed on Guantanamo prisoners' exercise of religion. There is no compelling governmental interest in having fans turned up so loudly that prisoners cannot hear a call to prayer, no interest in desecrating the Qur'an, no interest in denying a copy of the Qur'an in a prisoner's mother tongue in addition to the religiously-mandated Arabic edition, and no interest in stripping the clothes off prisoners to humiliate them in violation of their religious beliefs.

Even if Respondents were to risk public ridicule by proposing some "compelling governmental interest" in denying prisoners religious books, there would be no way that "the least restrictive means" test could be met. Respondents' actions are gratuitous and violate the Constitution and RFRA. They must stop.

## **B. THE RIGHT TO ADEQUATE MEDICAL CARE: INTENTIONALLY AND SYSTEMATICALLY VIOLATED**

The prisoners of Guantanamo Bay are entirely at the whim of the United States military when it comes to the provision of medical care. Though the prisoners have been neither charged

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958-960 (C.A.10 2001); *In re Young*, 141 F.3d 854, 858-863 (C.A.8 1998)." Cutter v. Wilkinson, 125 S.Ct. 2113, 2118 n.2. (2005) (noting Supreme Court has not yet had occasion to rule on the matter).

with nor convicted of any crimes, Respondents hold them as one might a duly sentenced criminal, yet fail to provide the level of medical care owed even to convicts. Respondents want it both ways: refuse to ever give the prisoners a chance at freedom, but continuously ignore their own resulting responsibilities. Worse yet, Respondents condition medical care on Petitioners' cooperation with illegally coercive interrogation.

As the Supreme Court has stated:

An inmate must rely on prison authorities to treat his medical needs; if the authorities fail to do so, those needs will not be met. In the worst cases, such a failure may actually produce physical "torture or a lingering death," In re Kemmler, [136 U.S. 436, 447, 10 S.Ct. 930, 933 (1890)], the evils of most immediate concern to the drafters of the [Eighth] Amendment. In less serious cases, denial of medical care may result in pain and suffering which no one suggests would serve any penological purpose. Cf. Gregg v. Georgia, [482 U.S. 153], at 173, 96 S.Ct. at 2924-25 [(1976)] (joint opinion). The infliction of such unnecessary suffering is inconsistent with contemporary standards of decency as manifested in modern legislation codifying the common-law view that "(i)t is but just that the public be required to care for the prisoner, who cannot by reason of the deprivation of his liberty, care for himself." ... Spicer v. Williamson, 191 N.C. 487, 490, 132 S.E. 291, 293 (1926).

Estelle v. Gamble, 429 U.S. 97, 103-104, 97 S.Ct. 285 (1976).<sup>101</sup> See also DeShaney v.

Winnebago County Dept. of Social Services, 489 U.S. 189, 200, 109 S.Ct. 998 (1989) (stating

"when the State by the affirmative exercise of its power so restrains an individual's liberty that it

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<sup>101</sup> The Eighth Amendment applies "only after the State has complied with the constitutional guarantees traditionally associated with criminal prosecutions . . . . [T]he State does not acquire the power to punish with which the Eighth Amendment is concerned until after it has secured a formal adjudication of guilt in accordance with due process of law." Ingraham v. Wright, 430 U.S. 651, 671-672 n. 40, 97 S.Ct. 1401 (1977). There of course has been no formal adjudication of guilt for Petitioners and their fellow prisoners. Far from it. But Respondents are treating them as if there had been, therefore they must assume all responsibilities toward the prisoners required by the Eighth Amendment. It would perhaps be more apt to look at the Guantanamo prisoners as they really are: pretrial detainees. The government does not get off the hook by doing that either, however. "Due process requires that a pretrial detainee not be punished." Bell v. Wolfish, 441 U.S. 520, 535 n.16, 99 S.Ct. 1861 (1979). Failure to provide medical care is just such an illicit punishment. See Cupit v. Jones, 835 F.2d 82, 85 (5th Cir. 1987) (holding that pretrial detainees are entitled to reasonable medical care); Hamm v. DeKalb County, 774 F.2d 1567, 1574 (11th Cir. 1985) (holding "that in regard to providing pretrial detainees with such basic necessities as food, living space, and medical care, the minimum standard allowed by the due process clause is the same as that allowed by the Eighth Amendment for convicted persons.").

renders him unable to care for himself, and at the same time fails to provide for his basic human needs - *e.g.*, food, clothing, shelter, medical care, and reasonable safety - it transgresses the substantive limits on state action set by the Eighth Amendment and the Due Process Clause. ... The affirmative duty to protect arises not from the State's knowledge of the individual's predicament or from its expressions of intent to help him, but from the limitation which it has imposed on his freedom to act on his own behalf. In the substantive due process analysis, it is the State's affirmative act of restraining the individual's freedom to act on his own behalf- through incarceration, institutionalization, or other similar restraint of personal liberty-which is the 'deprivation of liberty' triggering the protections of the Due Process Clause ... .").<sup>102</sup>

"[D]eliberate indifference to serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain,' *Gregg v. Georgia*, 482 U.S. [153,] 173, 96 S.Ct. [2909,] 2925 (joint opinion), proscribed by the Eighth Amendment. This is true whether the indifference is manifested by prison doctors in their response to the prisoner's needs or by prison guards in intentionally denying or delaying access to medical care or intentionally interfering with the treatment once prescribed." *Estelle*, 429 U.S. at 104-105.

And it is not prison guards and doctors alone who can be held liable for deficient medical care. The implementation of deficient policies by a supervisor can amount to direct participation in a constitutional violation. See *Redman v. County of San Diego*, 942 F.2d 1435, 1446 (9th Cir. 1991) ("Supervisory liability exists even without overt personal participation in the offensive act if supervisory officials implement a policy so deficient that the policy itself is a repudiation of constitutional rights and is the moving force of the constitutional violation.") (citation omitted).

Responsibility for Guantanamo Bay rises all the way to the Commander-in-Chief. He is fully aware of the substantial risk of serious harm that exists there, as is the Secretary of State,

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<sup>102</sup> The Due Process Clauses of the Fifth and Fourteenth Amendments are co-extensive. See, *e.g.*, *Plyler v. Doe*, 457 U.S. 202, 210, 102 S.Ct. 2382 (1982); *Bolling v. Sharpe*, 347 U.S. 497, 498-99, 74 S.Ct. 693 (1954). Therefore, Fourteenth Amendment jurisprudence is instructive – and indeed binding – on this Court.

his main deputies, every commanding officer at Guantanamo and those they oversee. The inference is unmistakable: the medical care is systemically horrendous and prisoners are suffering greatly as a result.<sup>103</sup> Everyone up the chain of command must be held responsible. The insanity must stop.

### **C. THE RIGHT TO LIFE: IN IMMINENT JEOPARDY**

The protection of life is a profound obligation of the Government of the United States. See Roe v. Wade, 410 U.S. 113, 162, 93 S.Ct. 705 (1973) (recognizing government has an “important and legitimate interest in protecting the potentiality of human life”); Cruzan v. Missouri, 497 U.S. 261, 283 n.10, 110 S.Ct. 2841 (1990) (stating government has “institutional interests ... in life”); U.S. CONST. amend. V (“No person shall ... be deprived of life ... without due process of law”). Indeed, President Bush declared in a debate with Senator Kerry just last year that: “I think it’s important to promote a culture of life. I think a hospitable society is a society where every being counts and every person matters.”<sup>104</sup>

Guantanamo prisoners face certain death due to Respondents’ unnecessary, illegal policies. Respondents reneged on their promises without any regard for the consequences. The sanctity of life must be preserved. Prisoners should not have to die to be treated as human beings.

### **D. THE GENEVA CONVENTIONS: ROUTINELY FLOUTED**

The Bush Administration initially stated that the Geneva Conventions would be applied in Guantanamo<sup>105</sup> and later – wriggling in a way that ill-befits our government – stated that the treatment of the prisoners in Guantanamo Bay would be “consistent” with the Geneva

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<sup>103</sup> See, e.g., Carol D. Leonnig, *Guantanamo Detainee Says Beating Injured Spine*, WASH. POST, August 13, 2005 (reporting beating by U.S. military personnel at Guantanamo hospital; forcing of large object into prisoner’s anus on “pretext” of doing a medical exam).

<sup>104</sup> *Third Presidential Candidates’ Debate*, October 13, 2004, transcript available at <http://www.debates.org/pages/trans2004d.html>.

<sup>105</sup> Initially, “President Bush agreed to apply the sections of the 1949 Geneva Conventions pertaining to prisoners.” French, *Trials in Times of War: Do the Bush Military Commissions Sacrifice Our Freedoms?*, 63 Ohio St. L.J. 1225, 1273 (2002-03).

Conventions. The semantic distinction should not matter. Treatment is either “consistent” with the Conventions, or it is not. If Respondents’ actions are inconsistent with the Conventions, then the promise is a false one.

Additionally, however, the military promised the prisoners, in exchange for an end to the July hunger strike, that their treatment would be in accordance with the Geneva Conventions. Again, this is either true or false – but it adds an element otherwise not present in the case, which is a contractual arrangement between the prisoners and their warders, which can be enforced in such a court as this.

There are four Geneva Conventions, signed August 12, 1949, and the two additional Protocols of June 8, 1977.<sup>106</sup> Geneva IV states in Article 1 that persons ‘taking no active part in the hostilities’ should ‘in all circumstances be treated humanely.’<sup>107</sup> This should provide the bedrock for all decisions in Guantanamo Bay<sup>108</sup> – yet it cannot be said that the prisoners have been – or are – treated humanely there.

Turning to each of the claims made by the prisoners in their hunger strike, and again by Petitioners in this pleading, the Geneva Conventions provide the answer to each question. When

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<sup>106</sup> Convention I is for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Convention II is for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea. Convention III is “Relative to the Treatment of Prisoners of War.” Convention IV is “Relative to the Protection of Civilian Persons in Time of War.” Protocol I Additional to the Geneva Conventions of 12 August 1949, relates to the Protection of Victims of International Armed Conflict and extends protections to victims of wars against racist regimes and wars of self determination. Protocol II Additional to the Geneva Conventions of 12 August 1949, relates to the Protection of Victims of Non-International Armed Conflicts, and extends protections to victims of internal conflicts in which an armed opposition controls enough territory to enable them to carry out sustained military operations. The Conventions are available at <http://www.ohchr.org/english/law/index.htm>.

<sup>107</sup> See also Geneva IV, Article 3. There is little material distinction between the relevant rights found in Geneva III and Geneva IV relating to civilians, and so the fact that most of the prisoners in Guantanamo Bay should be treated as interned civilian prisoners rather than military prisoners makes little difference, and the two conventions are therefore cited almost interchangeably in this pleading.

<sup>108</sup> The bottom line must be that there may be *no physical abuse*. Geneva III, Article 17 (“No physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatever. Prisoners of war who refuse to answer may not be threatened, insulted, or exposed to unpleasant or disadvantageous treatment of any kind.”).

the military denies that there is the right to have a Prisoners' Council, and forcibly seeks to prevent such a council from operating, this is clearly inconsistent with the law.<sup>109</sup>

When the military seeks to force prisoners to speak with coercive or even torturous tactics, this clearly violates the Conventions.<sup>110</sup> Abusive incarceration such as Camp V is also clearly illegal.<sup>111</sup>

The prisoners should be allowed to take part in the preparation of the food.<sup>112</sup> Indeed, every prison in the world has prisoners taking part in the preparation of food. The issue of sanitary drinking water should hardly be contentious.<sup>113</sup> Neither should medical care since it is

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<sup>109</sup> The relevant provisions of Geneva III are Articles 79 (“In all places where there are prisoners of war, except in those where there are officers, the prisoners shall freely elect by secret ballot, every six months, and also in case of vacancies, prisoners’ representatives entrusted with representing them before the military authorities, the Protecting Powers, the International Committee of the Red Cross and any other organization which may assist them. These prisoners’ representatives shall be eligible for re-election.”), Article 81 (“Prisoners’ representatives may appoint from amongst the prisoners such assistants as they may require. All material facilities shall be granted them, particularly a certain freedom of movement necessary for the accomplishment of their duties (inspection of labour detachments, receipt of supplies, etc.). ... Prisoners’ representatives shall be permitted to visit premises where prisoners of war are detained, and every prisoner of war shall have the right to consult freely his prisoners’ representative.”).

<sup>110</sup> See Geneva III, Article 17 (“Every prisoner of war, when questioned on the subject, is bound to give only his surname, first names and rank, date of birth, and army, regimental, personal or serial number, or failing this, equivalent information. \*\*\* No physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatever. Prisoners of war who refuse to answer may not be threatened, insulted, or exposed to unpleasant or disadvantageous treatment of any kind.”).

<sup>111</sup> See Geneva III, Article 21 (“Subject to the provisions of the present Convention relative to penal and disciplinary sanctions, prisoners of war may not be held in close confinement except where necessary to safeguard their health and then only during the continuation of the circumstances which make such confinement necessary.”); Article 22 (“Except in particular cases which are justified by the interest of the prisoners themselves, they shall not be interned in penitentiaries.”).

<sup>112</sup> See Geneva III, Article 26 (“The basic daily food rations shall be sufficient in quantity, quality and variety to keep prisoners of war in good health and to prevent loss of weight or the development of nutritional deficiencies. \* \* \* Prisoners of war shall, as far as possible, be associated with the preparation of their meals; they may be employed for that purpose in the kitchens. Furthermore, they shall be given the means of preparing, themselves, the additional food in their possession.”).

<sup>113</sup> See Geneva III, Article 26 (“Sufficient drinking water shall be supplied to prisoners of war.”).

squarely covered by the Conventions.<sup>114</sup> Mail is another major issue, also clearly covered by the law.<sup>115</sup>

Finally, issues of freedom of religion are very important, and also covered by the Conventions.<sup>116</sup>

The issues of the independent enforcement of the Geneva Conventions have been thoroughly discussed in briefing. The additional element in this case is the contractual arrangement that has been created by the military in the wake of the July hunger strike. A binding contract arises between a private party and the United States when there is: (1) mutuality of intent to contract; (2) consideration; (3) an unambiguous offer and acceptance, and (4) actual authority on the part of the government's representative to bind the government. See Schism v. U.S., 316 F.3d 1259, 1278 (Fed. Cir. 2002). All those factors are met here. The prisoners sought adherence to the Geneva Conventions and were willing to starve themselves to death to achieve it.<sup>117</sup> Exactly that – that the United States would finally follow the Geneva Conventions for all

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<sup>114</sup> See Geneva III, Article 15 (“The detaining power has to provide free medical attention for POWs.”); Article 30 (“Every camp shall have an adequate infirmary where prisoners of war may have the attention they require, as well as appropriate diet. Isolation wards shall, if necessary, be set aside for cases of contagious or mental disease.” ... Prisoners of war may not be prevented from presenting themselves to the medical authorities for examination. \*\*\* Prisoners of war shall have the attention, preferably, of medical personnel of the Power on which they depend and, if possible, of their nationality.”); Article 31 (“Medical inspections of prisoners of war shall be held at least once a month. They shall include the checking and the recording of the weight of each prisoner of war.”).

<sup>115</sup> See Geneva III, Article 71 (“POWs are to be allowed a minimum of two letters and four cards monthly.”); Article 72 (“Prisoners of war shall be allowed to receive by post or by any other means individual parcels or collective shipments containing, in particular, foodstuffs, clothing, medical supplies and articles of a religious, educational or recreational character which may meet their needs, including books, devotional articles, scientific equipment, examination papers, musical instruments, sports outfits and materials allowing prisoners of war to pursue their studies or their cultural activities.”); Article 76 (“Censoring should be done as quickly as possible.”).

<sup>116</sup> See Geneva III, Article 34 (“Prisoners of war shall enjoy complete latitude in the exercise of their religious duties, including attendance at the service of their faith, on condition that they comply with the disciplinary routine prescribed by the military authorities.”); Article 35 (“Chaplains who fall into the hands of the enemy Power and who remain or are retained with a view to assisting prisoners of war, shall be allowed to minister to them and to exercise freely their ministry amongst prisoners of war of the same religion, in accordance with their religious conscience. They shall be allocated among the various camps and labor detachments containing prisoners of war belonging to the same forces, speaking the same language or practicing the same religion. They shall enjoy the necessary facilities, including the means of transport provided for in Article 33, for visiting the prisoners of war outside their camp.”); Article 36 (“Prisoners of war who are ministers of religion, without having officiated as chaplains to their own forces, shall be at liberty, whatever their denomination, to minister freely to the members of their community. For this purpose, they shall receive the same treatment as the chaplains retained by the Detaining Power.”).

<sup>117</sup> See Statement of Binyam Mohammed (August 11, 2005).

prisoners at Guantanamo – was offered by Colonel [XXXX], the second in command at Guantanamo Bay, who told prisoners that Donald Rumsfeld himself had approved the change.<sup>118</sup> Respondents were desperate to end the hunger strike. The prisoners had achieved their major aim, so they accepted. In exchange, they ended their strike, their lives being the only currency they had to offer. There was unambiguous offer and acceptance.

Respondents have clearly reneged on this contract. Beatings are absolutely not permitted by the Geneva Conventions, and the Conventions require respect of religious practice, but Respondents continue to abuse prisoners and desecrate the Qur'an.<sup>119</sup> To remedy this breach, as money damages will in no way help Petitioners and their fellow prisoners, the Court should order specific performance, namely the adherence to the Geneva Conventions. See RESTATEMENT (SECOND) OF CONTRACTS §§ 357-359 (1981).

#### **E. OTHER LEGAL CLAIMS FOR RELIEF**

There are various other legal claims for relief. For example, the Supreme Court has long recognized that:

the right to personal security constitutes a “historic liberty interest” protected substantively by the Due Process Clause. *Ingraham v. Wright*, 430 U.S. 651, 673, 97 S.Ct. 1401, 1413, 51 L.Ed.2d 711 (1977). And that right is not extinguished by lawful confinement, even for penal purposes. See *Hutto v. Finney*, 437 U.S. 678, 98 S.Ct. 2565, 57 L.Ed.2d 522 (1978). If it is cruel and unusual punishment to hold convicted criminals in unsafe conditions, it must be unconstitutional to confine the involuntarily committed—who may not be punished at all—in unsafe conditions.

Youngberg v. Romeo, 457 U.S. 307, 315, 102 S.Ct. 2452 (1982) (holding mentally retarded adult involuntarily committed to a mental institution had constitutionally protected liberty interests under the due process clause of the Fourteenth Amendment to reasonably safe conditions of

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<sup>118</sup> Id.

<sup>119</sup> See Geneva III, Article 3 (“the following acts are and shall remain prohibited at any time and in any place whatsoever ... (a) Violence to life and person, in particular ... mutilation, cruel treatment and torture; ... (c) outrages upon personal dignity, in particular humiliating and degrading treatment”); Article 93 (“Internees shall enjoy complete latitude in the exercise of their religious duties”).

confinement, freedom from unreasonable bodily restraints, and such minimally adequate training as reasonably might be required by these interests).

Indeed, “[l]iberty from bodily restraint always has been recognized as the core of the liberty protected by the Due Process Clause from arbitrary governmental action.” Greenholtz v. Nebraska Penal Inmates, 442 U.S. 1, 18, 99 S.Ct. 2100 (1979).

**III. PETITIONERS MEET ALL THE CRITERIA FOR A TEMPORARY RESTRAINING ORDER OR PRELIMINARY INJUNCTION AS HE WILL DIE WITHOUT AN END TO THE HUNGER STRIKE, WHICH WILL ONLY STOP ONCE RESPONDENTS AGREE TO IMPLEMENT THE GENEVA CONVENTIONS AS PREVIOUSLY PROMISED.**

In considering Petitioners’ request for a preliminary injunction, the Court must consider four factors: (1) whether the plaintiff has a substantial likelihood of success on the merits; (2) whether the plaintiff would suffer irreparable injury were an injunction not granted; (3) whether an injunction would substantially injure other interested parties; and (4) whether the grant of an injunction would further the public interest.<sup>120</sup> See Davenport v. Int’l Bhd. of Teamsters, AFL-CIO, 166 F.3d 356, 360 (D.C. Cir. 1999). “These factors interrelate on a sliding scale and must be balanced against each other.” Id. at 361. “If the arguments for one factor are particularly strong, an injunction may issue even if the arguments in other areas are rather weak.” CityFed Fin. Corp. v. Office of Thrift Supervision, 58 F.3d 738, 746 (D.C. Cir. 1995). “An order maintaining the status quo is appropriate when a serious legal question is presented, when little if any harm will befall other interested persons or the public and when denial of the order would inflict irreparable injury on the movant. There is substantial equity, and need for judicial protection, whether or not movant has shown a mathematical probability of success.” Washington Metro. Area Transit Comm’n v. Holiday Tours, Inc., 559 F.2d 841, 844 (D.C. Cir. 1977).

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<sup>120</sup> The standard for granting a temporary restraining order and a preliminary injunction is one and the same. See Walters v. National Ass’n of Radiation Survivors, 473 U.S. 305, 349 n.26, 105 S.Ct. 3180 (1985).

**A. PETITIONERS HAVE A SUBSTANTIAL LIKELIHOOD OF SUCCESS ON THE MERITS AS THEY AND THEIR FELLOW PRISONERS ARE BEING HELD IN CONDITIONS IN COMPLETE VIOLATION OF THE UNITED STATES CONSTITUTION, FEDERAL AND INTERNATIONAL LAW.**

“[E]ven in times of emergency – indeed, particularly in such times – it is the obligation of the Judicial Branch to ensure the preservation of our constitutional values and to prevent the Executive from running roughshod over the rights of citizens and aliens alike.” Gherebi v. Bush, 374 F.3d 727, 730 (9th Cir. 2004). Prisoners at Guantanamo Bay absolutely have rights. See Gherebi v. Bush, 374 F.3d 727, 733 (9th Cir. 2004) (“[Guantanamo Bay] detainees are not wholly without rights to challenge in habeas their ... conditions of ... detention.”). They have constitutional rights, including the right to freedom of religion and equal protection. See Turner v. Safley, 482 U.S. 78, 84, 107 S.Ct. 2254, 96 L.Ed.2d 64 (1987) (“Prison walls do not form a barrier separating prison inmates from the protections of the Constitution.”); O’Lone v. Shabazz, 482 U.S. 342, 349, 107 S.Ct. 2400 (1987) (stating prison regulations offend Free Exercise Clause if they are not reasonably related to legitimate penological interests); City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 439, 105 S.Ct. 3249 (1985) (stating Equal Protection Clause directs that “all persons similarly situated should be treated alike”); In re Guantanamo Bay Cases, 355 F. Supp. 2d 443, 445 (D.D.C. 2005). They are protected by the Geneva Conventions and the Convention Against Torture.<sup>121</sup> See In re Guantanamo Bay, 355 F. Supp. 2d at 478-480; Khalid v. Bush, 355 F.Supp.2d 311, 327 n.21 (D.D.C. 2005) (“The implementing legislation for CAT confers [upon aliens] standing to sue”). They are protected by the Religious

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<sup>121</sup> Geneva Convention Relative to the Protection of Civilian Persons in Time of War, October 21, 1950, available at <http://www.unhchr.ch/html/menu3/b/92.htm>; Geneva Convention Relative to the Protection of Prisoners of War, October 21, 1950, available at <http://www.unhchr.ch/html/menu3/b/91.htm>. Enemy combatants are protected under the provisions of the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War. This Convention also applies to civilian non-combatants who are affected by the conflict and due special protections as “protected persons.” In other words, the Fourth Geneva Convention covers people being held who are totally innocent yet remain in U.S. custody.

Freedom Restoration Act against the imposition of substantial burdens on their religious exercise. See 42 U.S.C. § 2000cc-1. And the Court must act to protect those rights. See Rasul v. Bush, 542 U.S. 466, 124 S.Ct. 2686, 2698-2699 (2004) (stating “[t]he fact that [Guantanamo] petitioners ... are being held in military custody is immaterial to the question of the District Court’s jurisdiction over their nonhabeas statutory claims”); Disconto Gesellschaft v. Umbreit, 208 U.S. 570, 578, 28 S.Ct. 337, 52 L.Ed. 625 (1908) (“Alien citizens, by the policy and practice of the courts of this country, are ordinarily permitted to resort to the courts for the redress of wrongs and the protection of their rights”).

### **1. THERE IS NO VALID PENOLOGICAL INTEREST TO JUSTIFY THE CONDITIONS AT GUANTANAMO BAY**

Given the plethora of protections due the prisoners at Guantanamo Bay, the Court must turn to caselaw regarding prison conditions litigation. See Turner, 482 U.S. at 84 (“Because prisoners retain these rights, ‘[w]hen a prison regulation or practice offends a fundamental constitutional guarantee, federal courts will discharge their duty to protect constitutional rights.’”) (quoting Procunier v. Martinez, 416 U.S., at 405-406, 94 S.Ct., at 1807-08). The Supreme Court has established that only regulations reasonably related to legitimate penological interests pass constitutional muster. See Turner, 482 U.S. at 84; O’Lone v. Shabazz, 482 U.S. 342, 107 S.Ct. 2400 (1987). Under Turner, the Court must weigh four factors in making this determination: first, whether the regulation bears a “valid, rational connection” to a legitimate and neutral governmental objective; second, whether prisoners have alternative ways of exercising the circumscribed right; third, whether accommodating the right would have a deleterious impact on other inmates, guards, and the allocation of prison resources generally; and fourth, whether alternatives exist that “fully accommodate[ ] the prisoner’s rights at de minimis cost to valid penological interests.” Turner, 482 U.S. at 90-91.

The conditions suffered by the Guantanamo prisoners these last three and a half years are not reasonably related to a legitimate penological interest. What is the interest that justifies medical care so deliberately indifferent that a broken bone in a prisoner's foot leads to the amputation of half his leg? What interest justifies stomping on the Qu'ran or throwing it to the ground? What interest justifies barring a translation of the Qu'ran for prisoners who do not speak Arabic well, to accompany the religiously-mandated text in the original language? What interest justifies holding innocent prisoners and juveniles in conditions worse than any Death Row?<sup>122</sup> What interest justifies denying people access to edible food and drinkable water? The answer to all these questions is simple, a conclusion this Court should trumpet from the heights of justice: there is absolutely no justification for the U.S. military's horrendous treatment of prisoners at Guantanamo Bay.

There is no alternative to the current system for prisoners to access decent medical care, food or water, religious practice or a fair trial. There would be no deleterious impact on fellow prisoners, guards or prison resources were Respondents to adhere to the Geneva accords. In fact, the cost to penological interests of following the Geneva Conventions would be de minimis.

Respondents refuse to end the shocking abuse of human rights at Guantanamo. The prisoners can do no more to convince their minds to get the basics they need, to exercise their religious freedoms and right to equal protection of the laws. They are now apparently willing to

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<sup>122</sup> A deprivation violates the Constitution if "it imposes an 'atypical and significant hardship' on an inmate in relation to the most restrictive confinement conditions that prison officials, exercising their administrative authority to ensure institutional safety and good order, routinely impose on inmates serving similar sentences." Hatch v. District of Columbia, 184 F.3d 846, 856 (D.C. Cir. 1999) (quoting Sandin v. Conner, 515 U.S. 472, 484, 115 S.Ct. 2293 (1995)). Designed for the "worst of the worst," Camp V is definitely an atypical and significant hardship for innocent men like Sami Al Laithi. Secretary of the Navy Gordon England has represented to the public that once a prisoner is cleared by the Combatant Status Review Tribunal: "They're free. We just move them to a different area on Guantanamo. ... It's a better environment, I believe, it is a different area than they've been in, while waiting to be transferred. And we do that as quickly as we can." Secretary England, Defense Department Special Briefing on Combatant Status Review Tribunals (March 29, 2005) (transcript available at <http://www.defenselink.mil/transcripts/2005/tr20050329-2382.html>). At least, that's what he's told the press the military does.

sacrifice their very lives to enforce their rights, to maintain a shred of dignity. They cannot be forced to die. The Court must intervene.

**2. THIS MOTION IS NOT BARRED BECAUSE OF A FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES; THERE ARE NONE AT GUANTANAMO AND THE MILITARY REFUSES TO BE REASONABLE**

The Prison Litigation Reform Act requires federal prisoners bringing actions concerning prison conditions to exhaust all available administrative remedies before suing in federal court. See 42 U.S.C. § 1997e(a); Porter v. Nussle, 534 U.S. 516, 532, 122 S.Ct. 983 (2002). The prisoner has the burden of demonstrating that he has exhausted these remedies. Brown v. Toombs, 139 F.3d 1102, 1104 (6th Cir. 1998) (per curiam). Unexhausted claims should be dismissed without prejudice. Hartsfield v. Vidor, 199 F.3d 305, 310 (6th Cir. 1999); 42 U.S.C. § 1997e(c). But the courts have recognized the inherent limitation on such a requirement when no administrative system exists. See, e.g., Massey v. Hellman, 196 F.3d 727, 733 (7th Cir. 1999) (“if a prison *has* an internal administrative grievance system through which a prisoner can seek to correct a problem, then the prisoner must utilize that administrative system before filing a claim”) (emphasis added).

There is no such thing as an administrative remedy at Guantanamo Bay. There is no grievance process. After more than three years of verbal and written pleas regarding their simple requests, the prisoners took the only step remaining to them: they started a non-violent protest, a hunger strike. Tens were hospitalized as a result, overflowing the prison’s medical facilities. Its wards got so full, the health status of the hunger strikers so tenuous, that medics stopped giving out medicine or attending to anyone else who was sick. The government’s response was to lie to the prisoners to get them to eat and drink, and then, once they were no longer on the verge of death, renew beatings, desecration of the Qur’an, forcible cell extractions and a shameful variety of sexual and other humiliations.

When the military created a renewed crisis by beating Mr. Sliti, counsel brought this to the attention of the military authorities by letter dated August 8, 2005, but received no reply.<sup>123</sup> Counsel asked to meet with the Colonel,<sup>124</sup> but was told orally that the Colonel would not meet counsel.<sup>125</sup> Counsel asked to meet with General Hood, but was told that he was off the island.<sup>126</sup>

Petitioners have more than exhausted remedies. There is no legal basis to deny a hearing on these claims.

**B. WITHOUT COURT INTERVENTION, PETITIONERS WILL CERTAINLY SUFFER IRREPARABLE INJURY – THEY WILL DIE DUE TO THEIR CONTINUING HUNGER STRIKE**

A hunger strike will inevitably do irreparable damage to the body. Do it for long enough and the prisoner will die. Before that almost-merciful death, the prisoner will suffer from severe abdominal pains, vomiting, constipation, headaches and dizziness. He will begin to hallucinate. Dementia sets in. Muscle tissue deteriorates. Bones get brittle. Intestines wither.<sup>127</sup> After four weeks, potentially permanent brain damage sets in. After four to five weeks, internal organs begin to break down and fail.

Prisoners at Guantanamo Bay recently fasted for upwards of 30 days to protest their treatment. All these things began to happen to their bodies. Numerous prisoners came within 48 hours of death.

This time, they will surely die. No verbal agreement the Respondents make can be trusted by Petitioners and their fellow prisoners. Respondents have reneged on the truth so many times already. What would stop them from doing so again? The Court must force the issue.

**C. RESPONDENTS WILL SUFFER NO INJURY IF THEY ARE FORCED TO LIVE UP TO THEIR OWN PREVIOUS PROMISE OF ENFORCING THE GENEVA CONVENTIONS**

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<sup>123</sup> See *Memo on Conditions in Guantanamo Bay* at 4 (August 13, 2005).

<sup>124</sup> *Id.*

<sup>125</sup> Oral conversation with Lt. Cdr. De Alaconté (August 13, 2005).

<sup>126</sup> *Id.*

<sup>127</sup> See *Legal And Ethical Implications Of Medically Enforced Feeding Of Detained Asylum Seekers On Hunger Strike*, Mary A Kenny, Derrick M Silove and Zachary Steel, MJA 2004; 180 (5): 237-240, available at [http://www.mja.com.au/public/issues/180\\_05\\_010304/ken10552\\_fm.html](http://www.mja.com.au/public/issues/180_05_010304/ken10552_fm.html).

Respondents have already promised once to adhere to the Geneva Conventions. The problem is that they have reneged on that promise. But their promise alone is enough to show that they will not suffer any injury if they are forced to follow the Conventions.

Under the Geneva Conventions, prisoners may be prosecuted for the same offenses for which the forces of the detaining power could be tried, including common crimes unrelated to the conflict, war crimes, and crimes against humanity. Therefore, the United States is free to actually charge prisoners with crimes, no matter the conditions under which they are held. Of course, that would mean actually having to present a legitimate case for holding these men, something the government has been loathe to do to date, apparently in fear that the truth would come out: the United States has been holding numerous innocent men for over three years. But is embarrassment at mistaken identity or wrongful imprisonment worse than losing 40-plus months of your life? Under no standard can that be considered a fair trade-off. It is a fundamental provision of the Geneva Conventions that all detainees are entitled to “all the judicial guarantees recognized as indispensable by civilized peoples.”<sup>128</sup> Nonprivileged combatants are entitled to trial before a “properly constituted, non-political military court,” to be informed of the charges against them, to present their defense and call witnesses, to be assisted by qualified counsel of their own choice, to have an interpreter, and to mount an appeal against the conviction and sentence.<sup>129</sup>

The time has come for honest trials for the prisoners of Guantanamo.

**D. THE PUBLIC INTEREST STRONGLY SUPPORTS ENDING TORTURE AND AVOIDING THE LOSS OF LIFE AT THE HANDS OF THE UNITED STATES MILITARY**

The public has a profound interest in ensuring that Respondents live up to their obligations under United States law and the Convention Against Torture. See G & V Lounge,

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<sup>128</sup> Geneva IV, Article 3; Geneva III, Article 3.

<sup>129</sup> See Geneva IV, Articles 71-73; Geneva III, Articles 99-106.

Inc. v. Mich. Liquor Control Comm'n, 23 F.3d 1071, 1079 (6<sup>th</sup> Cir. 1994) (“[i]t is always in the public interest to protect the violation of a party’s constitutional rights”); Gannett Co., Inc. v. DePasquale, 443 U.S. 368, 383, 99 S.Ct. 2898 (1979) (“The public ... has a definite and concrete interest in seeing that justice is swiftly and fairly administered”); Abdah v. Bush, 2005 WL 711814, at \*6 (2005) (“the public has a strong interest in ensuring that its laws do not subject individuals to indefinite detention without due process”).

If the United States is to be a beacon of democracy and hope in this world, it must start to adhere to those principles within its own institutions. A government considered hypocritical by the world will be able to accomplish nothing. But that is where we stand today. Brutal interrogations, sexual and physical abuse, scandalous medical care, debasement of religion, and a complete and utter lack of the fair trials the United States insists upon for its citizens worldwide. Guantanamo must change. It is of course in the prisoners’ interest. Else, they will die. But it is also in the vital national interest of the United States.

At minimum, Petitioners have presented “a serious legal question.” Washington Metro. Area Transit Comm’n v. Holiday Tours, Inc., 559 F.2d 841, 844 (D.C. Cir. 1977). The temporary restraining order and preliminary injunction should be granted.

**E. THIS IS A TRUE EMERGENCY – IF THE COURT DOES NOT ACT IMMEDIATELY, PRISONERS WILL DIE**

Time is absolutely of the essence here. The Court must act and act swiftly. Respondents are paralyzed by their arrogance, blinded by their misguided quest for vengeance. They appear prepared to sit back and have prisoners starve themselves to death in search of dignity and justice. “Delays that might be altogether reasonable in the sphere of economic regulation are less tolerable when human lives are at stake.” Public Citizen Health Research Group v. Aucther, 702 F.2d 1150, 1158 (D.C. Cir. 1983). Indeed, even though there can be no question that Death hovers over Petitioners and their fellow prisoners, “[t]he risk to human life need not be a

certainty to justify expedition.” Id. at 1159 n.26. Rather, all that must be shown is that a serious hazard is presented for a significant number of people. See, e.g., Environmental Defense Fund, Inc. v. Hardin, 428 F.2d 1093, 1099 (D.C. Cir. 1970) (“With regard to the request for interim suspension of the registration of DDT, we agree that inaction is tantamount to an order denying suspension. The suspension power is designed to protect the public from an ‘imminent hazard’; if petitioners are right in their claim that DDT presents a hazard sufficient to warrant suspension, then even a temporary refusal to suspend results in irreparable injury on a massive scale.”).

The hunger strike advances and with each day, the danger to the prisoners’ lives deepens. There are two roads to travel down: justice or death. This Court should choose justice.

#### **IV. PRAYER FOR RELIEF**

WHEREFORE, Petitioners pray for relief as follows:

1. Order an expeditious evidentiary hearing on the issues set forth in this motion;
2. Order that Petitioners be brought before the Court or before a Magistrate Judge assigned by the Court to conduct proceedings under the supervision of the Court to vindicate his rights;
3. Order Respondents to cease all acts of torture and cruel, inhuman and degrading treatment of Petitioners;
4. Enter a Preliminary Injunction mandating that Respondents treat Petitioners at least according to minimum acceptable standards; and,
5. Grant such other relief as the Court may deem necessary and appropriate to protect Petitioners’ rights under the common law, the United States Constitution, federal statutory law, and international law.

Dated: August 29, 2005

Respectfully submitted,



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**CERTIFICATION AND VERIFICATION**

Counsel for Petitioners certifies that the foregoing pleading is true and accurate to the best of his information and belief, and that a copy of the foregoing document has been served this day upon Andrew Warden, counsel for Respondents.

Dated: August 29, 2005

A handwritten signature in black ink, appearing to read "Clive A. Stafford Smith", is written over a horizontal line. The signature is contained within a light gray rectangular box.

P.P. Clive A. Stafford Smith