IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SAIFULLAH PARACHA,

Petitioner,

v.

GEORGE W. BUSH,
President of the United States,
et al.,

Respondents.

Civil Action No. 04-CV-2022 (PLF)

RESPONDENTS' OPPOSITION TO PETITIONER'S MOTION FOR A TEMPORARY RESTRAINING ORDER AND A PRELIMINARY INJUNCTION AGAINST MEDICAL TREATMENT

Respondents hereby oppose petitioner Saifullah Paracha's motion for a temporary restraining order and a preliminary injunction against certain medical treatment (dkt. no. 124) ("Petitioner's Motion"), which seeks extraordinary court intervention in and governance of the medical care provided to petitioner at the United States Naval Base at Guantanamo Bay, Cuba ("Guantanamo"). Petitioner's motion claims that the medical facilities and personnel at Guantanamo are inadequate to perform the cardiac catheterization procedure that petitioner has been scheduled to undergo next week. See Petitioner's Motion at 1-2; Points and Authorities In Support of Petitioner's Motion at 2. The motion seeks an order enjoining respondents from performing a cardiac catheterization on petitioner without the consent of either petitioner's wife or one of his attorneys and suggests transferring petitioner to another facility in the United States or elsewhere to have the procedure done. See Petitioner's Motion at 1-2.

As explained below, the Court should deny petitioner's motion because petitioner has failed to set forth a sufficient factual or legal basis for the relief requested. Contrary to

petitioner's allegations, as a result of the great efforts undertaken by respondents, all necessary medical equipment and highly trained and experienced medical personnel will be in place to perform the procedure on petitioner at the Naval Hospital at Guantanamo. Petitioner, thus, cannot establish that he will suffer irreparably injury absent an injunction. Furthermore, there is no legal basis to support petitioner's requests. The record establishes that the Guantanamo staff has not been deliberately indifferent to petitioner's health or well-being, which is the minimum showing that petitioner must make to warrant court intervention. Moreover, under the recently enacted Military Commissions Act, this Court lacks jurisdiction over petitioner's motion, which concerns petitioner's conditions of confinement. Accordingly, petitioner cannot satisfy the requirements for a temporary restraining order and a preliminary injunction, and his motion, therefore, should be denied.

ARGUMENT

I. A TEMPORARY RESTRAINING ORDER AND A PRELIMINARY INJUNCTION ARE EXTRAORDINARY RELIEF.

It is well-established that a request for a temporary restraining order or preliminary injunctive relief "is an extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion." Mazurek v. Armstrong, 520 U.S. 968, 972 (1997); Cobell v. Norton, 391 F.3d 251, 258 (D.C. Cir. 2004). To prevail in a request for a preliminary injunction or a temporary restraining order, a movant "must 'demonstrate 1) a substantial likelihood of success on the merits, 2) that [he] would suffer irreparable injury if the injunction is not granted, 3) that an injunction would not substantially injure other interested parties, and 4) that the public interest would be furthered by the injunction.'" See Katz v. Georgetown Univ., 246 F.3d 685, 687-88 (D.C. Cir. 2001) (quoting

CityFed Financial Corp. v. Office of Thrift Supervision, 58 F.3d 738, 746 (D.C. Cir. 1995)).[1]

In particular, the irreparable harm that must be shown to justify temporary injunctive relief "must be both certain and great; it must be actual and not theoretical." Wisconsin Gas Co. v. FERC, 758 F.2d 669, 674 (D.C. Cir. 1985). "Injunctive relief will not be granted against something merely feared as liable to occur at some indefinite time; the party seeking injunctive relief must show that the injury complained of is of such imminence that there is a clear and present need for equitable relief to prevent irreparable harm." Id. (citations and internal quotation marks omitted; emphasis in original). Accordingly, the power to issue such exceptional relief should be used sparingly. See Dorfmann v. Boozer, 414 F.2d 1168, 1173 (D.C. Cir. 1969); Guam Indus. Services, Inc. v. Rumsfeld, 383 F. Supp. 2d 112, 116 (D.D.C. 2005).

II. PETITIONER FAILS TO ESTABLISH THAT HE FACES IMMINENT IRREPARABLE INJURY.

Petitioner has failed to carry his burden of establishing imminent irreparable injury, and his motion may be denied on that ground alone. See CityFed Financial Corp., 58 F.3d at 747 (failure to make showing of irreparable injury sufficient to deny preliminary injunction); Wisconsin Gas Co., 758 F.2d at 674 (same).

Petitioner's motion is based on the mistaken belief that the medical facilities and personnel at Guantanamo Bay are inadequate to perform a cardiac catheterization and any other necessary follow-on procedures. See Points and Authorities In Support of Petitioner's Motion at

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[1] The same legal standards apply for issuance of a temporary restraining order and a preliminary injunction. See Vencor Nursing Centers, L.P. v. Shalala, 63 F. Supp. 2d 1, 7 n.5 (D.D.C. 1999).

2; Declaration of Zachary Philip Katznelson ("Katznelson Decl.") ¶ 12 (Exhibit A to Petitioner's Motion). Petitioner's counsel relies heavily on Mr. Paracha's own belief that the hospital facilities at Guantanamo are "not equipped at all to provide such care," Katznelson Decl. ¶ 12, and on a declaration of a doctor who admits that he is "not familiar with the medical facilities at Guantanamo" but nevertheless assumes that Guantanamo would not be able to provide the necessary equipment and experienced personnel to conduct a cardiac catheterization properly, see Declaration of Dr. David Chomsky ("Chomsky Decl.") ¶¶ 6-9 (Exhibit C to Petitioner's Motion).

The declaration of Dr. Ronald L. Sollock ("Sollock Decl."), however, directly refutes petitioner's unsupported assumptions that the required equipment and skilled personnel to perform a successful cardiac catheterization are not available at Guantanamo and also describes the comprehensive medical care provided to detainees at Guantanamo. Dr. Sollock is the Commander, U.S. Naval Hospital, Guantanamo Bay, Cuba, and he serves as the Joint Task Force Surgeon for Joint Task Force - Guantanamo Bay, Cuba. See Sollock Decl. ¶ 1 (attached as Exhibit 1). He is directly responsible for the medical care provided to personnel living at Guantanamo Bay and oversees the operation of the detention hospital that provides medical care to the detainees held at Guantanamo. Id. As noted by Dr. Sollock, Guantanamo provides extensive medical care facilities and resources for detainees. Id. ¶¶ 4-9.

The detention hospital at Guantanamo provides an 20-bed facility with a hospital medical staff of approximately 100, including five medical doctors, a physician's assistant, nurses, corpsman, various technicians (laboratory, radiology, pharmacy, operating room, respiratory, physical therapy), and administrative staff. Id. ¶ 6. All incoming detainees are given complete

physical examinations. Id. ¶ 4. Detainees continue to receive high-quality medical care throughout their detention. Id. ¶¶ 4-5. Medical issues identified in initial physical examinations, or subsequently, are followed by the medical staff. Id. ¶ 4. A detainee can request medical care not only by notifying guards, who make rounds on the cellblocks multiple times daily, but also by directly approaching medical personnel who make rounds on the cellblocks every day. Id. In addition to following up on detainee requests, the medical staff investigates any medical issues observed by guards or other staff. Id. The availability of this medical care has led to thousands of out-patient contacts between detainees and medical staff, followed by in-patient treatment and care as needed. See id. ¶¶ 4, 8-9.

Detainees have been treated for a variety of medical conditions, including hepatitis, heart ailments, hypertension, combat wounds, diabetes, tuberculosis, appendicitis, inguinal hernia, leishmaniasis, malaria, and malnutrition, and have been provided prescription eyeglasses and prosthetic limbs. Id. ¶ 8. The medical staff at Guantanamo has performed over 290 surgical procedures, including a coronary artery stent placement, on detainees since January 2002. Id. ¶ 9. When necessary, detainees are transferred to the Naval Base Hospital at Guantanamo to receive types of care not available at the detention hospital, and medical specialists are flown in from outside Guantanamo in appropriate cases, such as petitioner's. Id. ¶ 7. Thus, the provision of health care for Guantanamo detainees is comprehensive.

Petitioner himself has received extensive medical care and will continue to be provided with appropriate treatment. The Guantanamo medical staff is aware that petitioner has a history of coronary heart disease, including experiencing two heart attacks prior to his detention at Guantanamo. Id. ¶ 10. In October 2006, after complaining of increased chest pain, petitioner

underwent an exercise stress test (EST) with a stress echocardiogram evaluation by a cardiologist. Id. Petitioner was diagnosed with coronary artery disease with an abnormal EST. Id. ¶ 11. Currently, petitioner's heart condition is stable, and he is being treated with medication in accordance with the standard of care for his condition. Id. ¶ 10. Recent monitoring, blood work, and electrocardiograms indicate that petitioner's condition has not changed since October 2006. Id. Due to his condition though, the Guantanamo medical staff has determined that petitioner needs to undergo a cardiac catheterization, which is a procedure that involves passing a thin flexible tube into the right or left side of the heart in order to obtain diagnostic information about the heart or its blood vessels or to provide treatment for certain types of heart conditions. Id. ¶ 11.

Petitioner is currently scheduled to have the cardiac catheterization procedure at the Guantanamo Naval Base Hospital on or around November 21, 2006. Id. ¶¶ 12, 16. Contrary to petitioner's allegations, all necessary medical equipment and highly trained and experienced medical personnel will be in place to perform the procedure on petitioner in compliance with the standard of care for cardiac catheterizations. Id. ¶¶ 12-13. In addition to the extensive equipment and facilities already available at the Naval Base Hospital, specialized medical equipment, including a mobile cardiac catheterization unit and equipment for a full cardiothoracic surgery suite, that is sufficient and appropriate to perform a cardiac catheterization, as well as any foreseeable follow-on work that may be required, such as placement of an artery stent or heart bypass surgery, has been shipped to Guantanamo Bay and will be fully operational for petitioner's procedure. Id. ¶¶ 12-13, 15. Furthermore, highly qualified and specialized medical personnel, including a board-certified cardiologist, a

cardiothoracic surgeon, and a supporting surgical team, who are all experienced in performing cardiac catheterizations, will be conducting the procedure. Id. ¶ 12. These medical personnel come from a facility that has performed over 700 cardiac catheterization procedures since January 1, 2006 and are specifically trained in this procedure and the other types of treatments, such as artery stent placement or bypass surgery, that may be required depending on the results of the catheterization. Id. ¶¶ 12, 15.

Petitioner's concern over the proper functionality and reliability of the imported equipment, moreover, is not warranted. See Petitioner's Motion at 1; Katznelson Decl. ¶ 12. All of the equipment will be tested by the cardiologist and the cardiothoracic surgical team in advance of petitioner's procedure to ensure it is in proper working order. Sollock Decl. ¶ 13. The team will also run through the procedures a sufficient number of times to ensure the equipment is functioning properly. Id. Electrical back-up for the mobile cardiac catheterization unit is available through the hospital generator and the unit's generator. Id. Furthermore, back-up medical equipment, such as an anesthesia machine, is available through the Naval Hospital. Id. Prior to the procedure, the medical personnel will be aware of the type of back-up resources available. Id. In addition, in 2003, a cardiac catheterization and an artery stent placement were performed on another detainee at Guantanamo. Id. ¶ 14; Declaration of Capt. J. S. Edmondson ("Edmondson Decl.") ¶ 2 (attached as Exhibit 2). As in petitioner's case, the requisite medical equipment and specialized medical personnel were brought to Guantanamo to perform these procedures on that detainee, and both procedures were successful. See Sollock Decl. ¶ 14; Edmondson Decl. ¶ 2.

Accordingly, petitioner's suggestions that it is necessary to transfer him to a facility in

the United States or elsewhere in order to receive appropriate treatment lack merit. See Petitioner's Motion at 2 (referring to cardiac catheterization labs at Bethesda Naval Hospital and in Pakistan); Chomsky Decl. ¶ 9. As demonstrated, all of the necessary equipment and personnel to perform a successful cardiac catheterization and any follow-on procedures will be available for Mr. Paracha at Guantanamo. Moreover, it could be detrimental to petitioner's health to further prolong the treatment he needs, which would inevitably result if he were ordered to be transferred to another facility.[2]

As illustrated, petitioner's surgery can be performed effectively at Guantanamo in a manner that satisfies the standard of care for such procedures. Consequently, petitioner has not carried his burden of establishing that he would be irreparably harmed unless an injunction is entered. Petitioner's motion, therefore, should be denied.

III. PETITIONER'S MOTION IS NOT LIKELY TO SUCCEED ON THE MERITS BECAUSE THERE IS NO ADEQUATE LEGAL BASIS FOR THE RELIEF REQUESTED.

In addition to lacking a justifiable factual basis, petitioner's motion lacks an adequate legal basis for the requested intervention into the medical care provided to Guantanamo detainees, such as Mr. Paracha.

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[2] Petitioner has been advised about the surgery and the possibility of any follow-on procedures, and he has preliminarily provided verbal consent to these procedures. Sollock Decl. ¶ 15. If Mr. Paracha were not to consent to the surgery, the Guantanamo medical staff would not perform the procedure. Id. However, because appropriate medical services are being made available to him at Guantanamo, he would not be sent anywhere else to have the procedure done.

A. Petitioner Cannot Demonstrate that the Guantanamo Staff has been Deliberately Indifferent to His Serious Medical Needs.

In analogous cases involving allegations of inadequate medical care by other Guantanamo detainees, other Judges of this Court have applied the "deliberate indifference" standard in rejecting claims for court intervention in the provision of medical care at Guantanamo. See O.K. v. Bush, 344 F. Supp. 2d 44, 60-63 & n.23 (D.D.C. 2004) (Bates, J.); Al Odah v. United States, 406 F. Supp. 2d 37, 42-44 (D.D.C. 2005) (Kollar-Kotelly, J.) (applying "deliberate indifference" standard in rejecting request for Court intervention into medical care provided to hunger-striking Guantanamo detainees). In O.K. v. Bush, Judge Bates comprehensively explained the application of the deliberate indifference standard:

> . . . the issue of a dereliction of medical care for a person detained by the government usually arises in the context of constitutional challenges to prison conditions. The Supreme Court has emphasized on several occasions that a claim of deficient medical care will not be cognizable under the Constitution unless a prisoner can show a level of dereliction so grave that it amounts to a ''deliberate indifference'' to the prisoner's ''serious medical needs.'' Neitzke v. Williams, 490 U.S. 319, 321, 109 S. Ct. 1827, 104 L. Ed. 2d 338 (1989); Estelle v. Gamble, 429 U.S. 97, 104, 97 S. Ct. 285, 50 L. Ed. 2d 251 (1976). A prisoner challenging his medical care must be prepared to show that officials ''were knowingly and unreasonably disregarding an objectively intolerable risk of harm to the prisoners' health or safety.'' Scott v. District of Columbia, 139 F.3d 940, 943 (D.C. Cir.1998) (quoting Farmer v. Brennan, 511 U.S. 825, 846, 114 S. Ct. 1970, 128 L. Ed. 2d 811 (1994)).
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> This standard means that ''courts will not intervene upon allegations of mere negligence, mistake or difference of opinion.'' Bowring v. Godwin, 551 F.2d 44, 48 (4th Cir.1977); see also Estelle, 429 U.S. at 106, 97 S. Ct. 285 (''Medical malpractice does not become a constitutional violation merely because the victim is a prisoner.''). Absent a showing of misconduct that rises to the level of deliberate indifference, courts will not sit as boards of review over the medical decisions of prison officials, and they will not second-guess the adequacy of a particular course of treatment. Bowring, 551 F.2d at 48; see also Berman, 874 F.Supp. at 106 (''[I]t is not in the public's interest for the court to usurp the Bureau of Prisons' authority and micromanage the medical needs of a particular inmate.''). In particular, a prisoner has no discrete right to outside or independent

> medical treatment. See Roberts v. Spalding, 783 F.2d 867, 870 (9th Cir. 1986) (‘‘A prison inmate has no independent constitutional right to outside medical care additional and supplemental to the medical care provided by the prison staff within the institution.’’).
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> Petitioners do not explain why these principles should be diluted in the context of military detention centers . . . .

O.K. v. Bush, 344 F. Supp. 2d at 61 (footnote omitted).[3] The Court ultimately rejected the Guantanamo detainee’s request for relief. Id. at 62-63.

Here, petitioner clearly has failed to establish that the Guantanamo medical staff’s plan to perform his cardiac catheterization at the Guantanamo Naval Hospital amounts to deliberate indifference to his serious medical needs. To the contrary, as demonstrated previously, Guantanamo has undertaken significant efforts to ensure that all necessary equipment and medical personnel will be available to provide the appropriate procedures to petitioner in order to protect his life and health. See supra Section II; Sollock Decl. ¶¶ 10-15. Although petitioner may desire to have the surgery performed at a different facility, he has no right to choose where

[3] The Court further noted that “[t]he ‘deliberate indifference’ standard was developed to assess the claims of prisoners under the Eighth Amendment. Estelle, 429 U.S. at 104, 97 S. Ct. 285. The standard of care for a pre-trial detainee who has not yet been convicted, however, is governed by the Due Process Clause of the Fifth and Fourteenth Amendments rather than by the Eighth Amendment. See, e.g., Hill v. Nicodemus, 979 F.2d 987, 990 (4th Cir. 1992). Although the Supreme Court has said that the due process rights of pre-trial detainees are ‘at least as great’ as the Eighth Amendment rights of a convicted prisoner, see City of Revere v. Massachusetts Gen. Hosp., 463 U.S. 239, 244, 103 S. Ct. 2979, 77 L. Ed. 2d 605 (1983), most courts have applied the ‘deliberate indifference’ standard in both settings, see Hill, 979 F.2d at 991–92 (collecting cases). Without concluding that the ‘deliberate indifference’ doctrine is the correct standard for any constitutional claims that petitioners might raise in this case, the Court will draw on this well developed body of law to guide its analysis on this emergency motion.” Id. at 61 n.23. In light of the fact that petitioner is challenging the treatment provided by a military detention center during a time of war, separation of powers principles may require satisfaction of an even more stringent standard before judicial intervention is justified than in the traditional penal context. See infra note 4. Moreover, whether petitioner even has a constitutional basis to assert this conditions of confinement claim is doubtful at best. See infra section III.C.

he receives his medical treatment. O.K. v. Bush, 344 F. Supp. 2d at 61 (finding that "a prisoner has no discrete right to outside or independent medical treatment"); Roberts v. Spalding, 783 F.2d 867, 870 (9th Cir. 1986) (same). Furthermore, the deliberate indifference standard calls for deference to the judgment of prison administrators, especially in the provision of medical care.[4] See O.K., 344 F. Supp. 2d at 61; Inmates of Allegheny County Jail v. Pierce, 612 F.2d 754, 762 (3d Cir. 1979) (stating that federal courts will "disallow any attempt to second-guess the propriety of a particular course of treatment" chosen by prison doctors). Because petitioner has not satisfied the deliberate indifference standard, his motion cannot succeed and should be denied.

B. The Court Lacks Jurisdiction Over This Action Under the Military Commissions Act of 2006.

The preceding analysis under the deliberate indifference standard, of course, presumes that petitioner's present motion pertaining to his conditions of confinement at Guantanamo Bay

[4] Whether the "deliberative indifference" standard applied in the domestic prison context translates without alteration to the context involved in this case, i.e., the detention of an enemy combatant by the military during a time of war, is debatable, at best. Cf. O.K. v. Bush, 377 F. Supp. 2d 102, 112-13 n.10 (D.D.C. 2005) (noting that substantive due process analysis is dependent upon the precise circumstances involved and that "[n]o federal court has ever examined the nature of the substantive due process rights of a prisoner in a military interrogation or prisoner of war context"). Indeed, separation of powers principles would require satisfaction of an even more stringent standard before judicial intervention is warranted in a case like this. See, e.g., Hamdi v. Rumsfeld, 542 U.S. 507, 124 S. Ct. 2633, 2647 (2004) (plurality opinion) (stating that "[w]ithout doubt, our Constitution recognizes that core strategic matters of warmaking belong in the hands of those who are best positioned and most politically accountable for making them"); Almurbati v. Bush, 366 F. Supp. 2d 72, 81 (D.D.C. 2005) (Walton, J.) (indicating that "it is a fundamental principle under our Constitution that deference to the Executive Branch must be afforded in matters concerning the military and national security matters."); Khalid v. Bush, 355 F. Supp. 2d 311, 328 (D.D.C. 2005) (explaining that management of wartime detainees' confinement conditions is the province of the Executive and Legislative branches, thus precluding judicial scrutiny of such conditions).

is properly before the Court. The Court, however, lacks jurisdiction over the motion because the Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 ("MCA"), which became law on October 17, 2006, amends 28 U.S.C. § 2241 to provide that "[n]o court, justice, or judge shall have jurisdiction" to consider any action "relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement" of aliens detained by the United States as enemy combatants. See MCA § 7. This new amendment to § 2241 took effect on the date of enactment and applies specifically "to all cases, without exception, pending on or after the date of the enactment of this Act which relates to any aspect of the detention, transfer, treatment, trial, or conditions of detention of an alien detained by the United States since September 11, 2001." Id.

The relief requested by petitioner would, therefore, require an assertion of jurisdiction and authority in this case inconsistent with the MCA's withdrawal of jurisdiction specifically over claims relating to conditions of confinement, such as petitioner's present motion.[5] Respondents' jurisdictional argument is in no way immaterial or premature. See Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 94 (1998) (" 'Without jurisdiction [a] court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause.' " (quoting Ex parte McCardle, 74 U.S. (7 Wall.) 506, 514 (1868)). Accordingly, due to the Court's lack of jurisdiction to consider petitioner's conditions of confinement claim, petitioner's

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[5] The MCA also provides that "[n]o court, justice, or judge shall have jurisdiction" to consider habeas petitions filed by aliens detained by the United States as enemy combatants. MCA § 7. Accordingly, this Court lacks jurisdiction over petitioner's underlying habeas petition as well.

motion is not likely to succeed on its merits.[6]

C. Petitioner Lacks a Constitutional Foundation for his Conditions of Confinement Claim Challenging his Proposed Medical Treatment.

Petitioner's present motion and the prior discussion of the deliberate indifference standard also presume that Guantanamo detainees, such as petitioner, possess constitutional rights that enable them to challenge their conditions of confinement. No court decision, however, including the decisions of Judges Green and Leon in the Guantanamo detainee cases currently pending before the Court of Appeals,[7] has held that Guantanamo detainees are possessed of constitutional rights with respect to conditions of confinement claims. Indeed, Judge Leon in Khalid v. Bush, Boumediene v. Bush, 355 F. Supp. 2d 311 (D.D.C. 2005), found that aliens held at Guantanamo, that is, outside the sovereign territory of the United States, are not possessed of any constitutional rights, id. at 320-21, and concluded that "no viable legal theory exists" by which the Court "could issue a writ of habeas corpus" in favor of the Guantanamo detainees, id. at 314. Judge Leon also noted that challenges to the conditions of confinement did not support the issuance of a writ of habeas corpus because such claims, even if

[6] The issue of the effect of the Detainee Treatment Act ("DTA") and the MCA on this Court's jurisdiction over Guantanamo detainee habeas cases, including the instant case, remains pending before the Court of Appeals. Indeed, the MCA is the subject of supplemental briefing in the Court of Appeals that is scheduled to be completed on November 20, 2006. See Boumediene v. Bush, No. 05-5062 and Al Odah v. United States, No. 05-5064 (D.C. Cir.). While arguments have been asserted that the DTA's and MCA's elimination of habeas jurisdiction violates the Suspension Clause of the Constitution, the MCA's removal of jurisdiction to consider claims pertaining to conditions of confinement, such as petitioner's motion, clearly does not implicate the Suspension Clause.

[7] See Boumediene v. Bush, No. 05-5062 and Al Odah v. United States, No. 05-5064 (D.C. Cir.).

true, would not render the custody itself unlawful. Id. at 324-25.[8] Judge Leon explained that separation of powers principles prevent the judiciary from scrutinizing the conditions of the aliens' detention because such matters are the province of the Executive and Legislative branches. Id. at 328.

In addition, Judge Green in In re Guantanamo Detainee Cases, 355 F. Supp. 2d 443, 464 (D.D.C. 2005), while concluding that "the detainees at Guantanamo Bay have the fundamental right to due process of law under the Fifth Amendment" to challenge the legality of their detention through petitions for writs of habeas corpus, did not address whether alien enemy combatants have a constitutional basis to challenge their conditions of confinement, nor did her decision authorize such claims.[9] Judge Green's analysis of the constitutional issues was limited

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[8] Indeed, it is not even settled that petitioner may assert his present conditions of confinement claim as part of his habeas case. Neither the Supreme Court nor the D.C. Circuit have squarely resolved whether challenges to conditions of confinement may be brought under habeas proceedings. See Bell v. Wolfish, 441 U.S. 520, 526 n.6 (1979) ("Thus, we leave for another day the question of the propriety of using a writ of habeas corpus to obtain review of the conditions of confinement, as distinct from the fact or length of confinement itself."); Brown v. Plaut, 131 F.3d 163, 168-69 (D.C. Cir. 1997) (acknowledging that habeas corpus might conceivably be used to challenge prison conditions, but indicating that requiring use of habeas corpus in such cases would extend the writ beyond its core). Courts in other jurisdictions that have squarely addressed the issue, however, have affirmatively held that conditions of confinement claims that do not seek accelerated release from custody are not within the scope of the writ of habeas corpus. See, e.g., Cochran v. Buss, 381 F.3d 637, 639 (7th Cir. 2004); Carson v. Johnson, 112 F.3d 818, 820-21 (5th Cir.1997); McIntosh v. United States Parole Commission, 115 F.3d 809, 811-12 (10th Cir. 1997); Badea v. Cox, 931 F.2d 573, 574 (9th Cir. 1991).

[9] In fact, in light of the pending appeals, Judge Green, acting as coordinating judge, stayed the coordinated cases and twice rejected petitioners' requests to assert claims objecting to their confinement conditions. See In re Guantanamo Detainee Cases, Order Granting in Part and Denying in Part Respondents' Motion for Certification of Jan. 31, 2005 Orders and for Stay (Feb. 3, 2005); Order Denying Motion for Reconsideration of Order Granting Stay Pending Appeal (Feb. 7, 2005) (refusing to allow claims regarding conditions of confinement to proceed "in light of the substantial resources that would be expended and the significant burdens that would be incurred should this litigation go forward").

solely to whether Guantanamo detainees are "entitled to due process under the Fifth Amendment" to challenge "the government's determinations that they are 'enemy combatants.'" See In re Guantanamo, 355 F. Supp. 2d at 465. The Court's focus on the legality of the detention – as opposed to the legality of the conditions of confinement – is reflected throughout the opinion. See id. at 464 ("In sum, there can be no question that the Fifth Amendment right asserted by the Guantanamo detainees in this litigation – the right not to be deprived of liberty without due process of law – is one of the most fundamental rights recognized by the U.S. Constitution."); id. at 476 ("[T]he detainee is entitled to fully litigate the factual basis for his detention in these habeas proceedings and to have a fair opportunity to prove that he is being detained on improper grounds."); id. at 477 (stating that a detainee must be provided with a "fair opportunity to challenge . . . the legality of his detention as an 'enemy combatant'"). Put simply, Judge Green only addressed the scope of petitioners' Fifth Amendment rights to challenge the lawfulness of the procedures used to confirm their enemy combatant status; she did not make any findings or conclusions with respect to the scope of any Fifth Amendment right to challenge the conditions of their confinement.[10] Accordingly, petitioner has not established that he has a

[10] The distinction between legal challenges to the fact or duration of custody and legal challenges to the conditions of confinement is well-established. See Preiser v. Rodriguez, 411 U.S. 475, 498 (1973). This distinction is based in part on the different legal bases underlying these types of challenges. On the one hand, challenges to the procedures used to determine the lawfulness of custody invoke the procedural due process component of the Fifth Amendment, which requires the government to follow appropriate procedures when its agents or officials decide to deprive a person of liberty. See Daniels v. Williams, 474 U.S. 327, 331 (1986). On the other hand, challenges to conditions of confinement rely on the substantive due process component of the Fifth Amendment, which forbids "certain government actions regardless of the fairness of the procedures used to implement them." See id. Judge Green's opinion addressed only the Guantanamo detainees' procedural due process rights to challenge the procedures used to confirm their status as enemy combatants. See In re Guantanamo, 355 F. Supp. 2d at 465-78 (discussing whether CSRTs comport with procedural due process). Judge Green gave no

constitutional basis for his challenge to the medical treatment that the Guantanamo staff has carefully arranged to provide to him. As a result, his motion is not likely to succeed and should be denied.[11]

IV. THE RELIEF CONTEMPLATED BY PETITIONER WOULD IMPOSE UNDUE BURDENS ON THE GOVERNMENT AND INJURE ITS INTERESTS.

In addition to seeking an injunction prohibiting respondents from subjecting petitioner to a cardiac catheterization at any facility without the express approval of either his wife or one of his attorneys, the clear implication of petitioner's motion is that he also seeks to be transferred to another facility in the United States or elsewhere to have the procedure done. See Petitioner's Motion at 2 (referring to cardiac catheterization labs at Bethesda Naval Hospital and in Pakistan); Chomsky Decl. ¶ 9 (mentioning Bethesda Naval Hospital as an appropriate place for a cardiac catheterization). Petitioner's contemplated relief would impose substantial burdens on the government and interfere with the appropriate operation of Guantanamo's provision of medical care. Petitioner's motion seeks to interfere with the competent medical judgment and expertise of the Guantanamo medical staff as to what medical facilities are appropriate to provide petitioner with a particular medical treatment and where that treatment should be

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consideration to whether the detainees have any rights under substantive due process to challenge their conditions of confinement.

[11] Petitioner's assertion that he "has a high likelihood of eventually getting a hearing on the legality of his confinement" lacks merit and is misplaced. See Points and Authorities in Support of Petitioner's Motion at 3-4. For the reasons discussed previously in section III.B., petitioner will not likely have a hearing in this Court due to the Court's lack of jurisdiction over petitioner's habeas petition. In any event, the likelihood of petitioner having a hearing on the merits of his habeas case is not the relevant inquiry with respect to his current motion. Instead, the relevant inquiry is petitioner's likelihood of success in obtaining the relief he has requested regarding the medical treatment he is challenging. As demonstrated, petitioner's request is not likely to succeed.

provided. Petitioner's apparent desire to be transferred to another medical facility for the procedure would be unduly burdensome on the government since it would require the transfer of petitioner out of Guantanamo despite the availability of all necessary medical equipment and personnel to perform the procedure appropriately at Guantanamo.[12] Respondents already have gone to great lengths to ensure that the necessary equipment and personnel will be at Guantanamo for petitioner's scheduled procedure. Thus, should the Court grant petitioner's suggested relief, such efforts would have been in vain.

Furthermore, petitioner's desired relief cannot be viewed in isolation or confined to just

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[12] The prospect of ordering petitioner to be transferred to the United States in order to have the catheterization procedure done presents significant obstacles and issues. Primarily, the Court lacks authority to order petitioner to be admitted into the United States. Petitioner is not currently in the United States because, under the Immigration and Nationality Act ("INA"), the U.S. Naval Base at Guantanamo Bay, Cuba, is not part of the "United States." See INA § 101(a)(38), 8 U.S.C. § 1101(a)(38) (defining "United States" for geographical purposes as including only "the continental United States, Alaska, Hawaii, Puerto Rico, Guam, and the Virgin Islands of the United States"). Under well-established doctrines and principles of separation of powers, the admission or removal of aliens is a quintessential sovereign function reserved exclusively to the political branches of government, particularly the Executive, and courts may not second-guess Executive determinations regarding such issues. See, e.g., Fong Yue Ting v. United States, 149 U.S. 698, 713 (1893) ("[t]he power to exclude or to expel aliens, being a power affecting international relations, is vested in the political departments of the government."); Knauff v. Shaughnessy, 338 U.S. 537, 542-43 (1950) (stating that the power to exclude aliens "is inherent in the executive power to control the foreign affairs of the nation," and that "it is not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of the Government to exclude a given alien."); City of New York v. Baker, 878 F.2d 507, 512 (D.C. Cir. 1989) (finding that only the Executive Branch, not the Courts, can issue a visa); Qassim v. Bush, 407 F. Supp. 2d 198, 202-03 (D.D.C. 2005), appeal dismissed, 2006 WL 2933322 (D.C. Cir. Aug. 14, 2006) (concluding that court lacked the power to order detainees at Guantanamo Bay into the United States). Additionally, Congress has provided by statute that the decision to admit an alien is discretionary, is vested solely in the Executive Branch, and cannot be reviewed or overridden by any court. See INA § 221(a)(1); 8 U.S.C. § 1201(a)(1); INA § 242(a)(2)(B)(ii), 8 U.S.C. § 1252(a)(2)(B)(ii). Accordingly, the Court should not countenance petitioner's desire to have the procedure done in the Untied States.

the petitioner at issue in the present motion, because any order granting the types of relief contemplated by petitioner could prompt counsel for many detainees in other cases to demand similar remedial measures. Detainees may request to be flown all over the world for various medical procedures that they allege cannot be done at Guantanamo as well as at some other facility. Accordingly, providing petitioner with the relief requested would result in a significant burden on the military authorities and medical staff at Guantanamo and should therefore be denied.

V. DENYING PETITIONER'S MOTION WOULD BEST SERVE THE PUBLIC INTEREST.

The public has a strong interest in assuring that the military operations and medical care provided at Guantanamo are not interrupted, overly burdened, and second-guessed by the unwarranted demands of a detainee pertaining to the particulars of his medical care. As demonstrated above, the Guantanamo staff has taken and will continue to take appropriate and careful measures to address the health and medical needs of petitioner. In particular, respondents have arranged to have all necessary equipment and personnel available to perform petitioner's scheduled cardiac catheterization and any follow-on procedures in a manner that satisfies the standard of care for such treatment.[13] See Sollock Decl. ¶¶ 12-15.

In addition, the public interest favors allowing the Executive Branch, which is constitutionally vested with the authority to conduct military functions, such as detention of

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[13] Accordingly, petitioner's allegation that the public interest would be damaged if petitioner were to die in U.S. custody as a result of receiving medical treatment at an inadequate facility is unavailing. See Points and Authorities In Support of Petitioner's Motion at 4. Contrary to petitioner's assertion, the appropriate equipment and personnel will be in place to perform the procedures, and the Guantanamo staff is treating petitioner properly and has taken all necessary precautions to ensure petitioner's well-being. See Sollock Decl. ¶¶ 12-15.

enemy combatants for the duration of hostilities, to act without undue intrusion within its constitutional sphere of responsibility. As one Judge of this Court has held:

> [T]here is a strong public interest against the judiciary needlessly intruding upon the foreign policy and war powers of the Executive on a deficient factual record. Where the conduct of the Executive conforms to law, there is simply no benefit – and quite a bit of detriment – to the public interest from the Court nonetheless assuming for itself the role of a guardian ad litem for the disposition of these detainees.

Al-Anazi v. Bush, 370 F. Supp. 2d 188, 199 (D.D.C. 2005). Accordingly, to avoid the unnecessary burdens imposed by petitioner's motion, the public interest would best be served if the Court denied the motion.

CONCLUSION

For the reasons stated above, respondents respectfully request that petitioner's motion for a temporary restraining order and a preliminary injunction against certain medical treatment be denied in all respects.

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Respectfully submitted,

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