IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

Ali Saleh Kahlah Almarri,	)	
	)	**C/A 2:05-2259-HFF-RSC**
Plaintiff,	)	**ORAL ARGUMENT REQUESTED**
v.	)	**PLAINTIFF'S REPLY TO DEFENDANTS' RESPONSE TO PLAINTIFF'S OBJECTIONS TO REPORT AND RECOMMENDATION DENYING PLAINTIFF'S MOTION FOR INTERIM RELIEF**
Robert M. Gates, Secretary of Defense of the United States,	)	
Commander John Pucciarrelli, U.S. Naval Brig, Charleston, South Carolina,	)	
Defendants.	)	

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Argument

Defendants' Response to Plaintiff's Objections to the Magistrate Judge's Report and Recommendation (dkt. no. 58) ("Defs.' Resp.") reduces to three main points: (1) Mr. Almarri is not suffering any harm; (2) Mr. Almarri is entitled to less constitutional protection than convicted prisoners, including convicted terrorists; and (3) permitting Mr. Almarri to speak to his family more than once every six months or to read an unredacted newspaper would impose a hardship on the government that outweighs mitigating further harm to Mr. Almarri. Those arguments are without merit. For the reasons previously set forth in Mr. Almarri's Objections to the Magistrate Judge's Report and Recommendation (dkt. no. 52) ("Pl.'s Objections"), and for the additional reasons set forth below, Mr. Almarri is entitled to interim relief under the familiar four-factor test. *Rum Creek Coal Sales, Inc. v. Caperton*, 926 F.2d 353, 359 (4th Cir. 1991).[1]

I. Mr. Almarri Is Suffering Irreversible Harm.

The government (Defs.' Resp. at 7-12) inundates the Court with irrelevant details about the various changes to Mr. Almarri's once brutal conditions of confinement implemented since this suit was filed. Those changes do not alter Mr. Almarri's continued isolation nor the damage it is causing to his health and his ability to participate meaningfully in his defense. Simply put, Mr. Almarri remains virtually alone day after day, month after month, year after year.

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[1] The government (Defs.' Resp. at 5-6) confuses the standard. Because the balance of hardships "tips decidedly" in Mr. Almarri's favor, he must show only that he has "raised questions going to the merits so serious, substantial, difficult and doubtful, as to make them fair ground for litigation and thus for more deliberate investigation." *Rum Creek*, 926 F.2d at 359. However, because Mr. Almarri has also demonstrated a likelihood of success on his claims that his constitutional rights are being violated, he is entitled to interim relief for that reason as well. *See Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms, even for minimal periods of time, unquestionably constitutes irreparable injury."). Where constitutional rights are violated, irreparable harm is presumed and a court has no discretion to deny the injunction. Pl.'s Objections at 11-12; *Eisenberg ex rel. Eisenberg v. Montgomery County Pub. Sch.*, 197 F.3d 123, 129 n.14 (4th Cir. 1999).

The Navy Brig appears to recognize the danger posed by Mr. Almarri's extreme and prolonged isolation, which is why it seeks to provide him with daily contact from staff members, Defs.' Resp. at 9, and does not oppose increased communication with his family, Certification of Andrew J. Savage ¶ 60 ("Savage Cert."), Ex. A to Pl.'s Mot. for Interim Relief (dkt. no. 40). The government, however, argues that these interactions, coupled with calls and visits from counsel, provide all the human contact Mr. Almarri needs. But visits from one's jailors—especially jailors affiliated with the same government that has engaged in brutal interrogation tactics before and insists it may do so again (Defs.' Resp. at 21 n.14)—do not constitute meaningful socialization. Similarly, periodic communication with one's attorneys, whose duty is to provide legal representation, not companionship, fails to fill that void.[2]

The periodic mental health reviews referenced by the government neither address the impact of Mr. Almarri's prolonged isolation nor provide a meaningful assessment of his mental condition generally. To the contrary, they expressly caution: "**CAVEAT: Evaluation represents cursory evaluation of current mental status, only.**" *See, e.g.*, Chronological Record of Medical Care, Mar. 29, 2007, attached as Exhibit 2 (emphasis added). And mental health officials have themselves advocated increased socialization for Mr. Almarri through telephone contact with his family. *Id.* [3]

These cursory reviews pale before the "strikingly specific and detailed" evidence of Mr. Almarri's deteriorating mental state, virtually all of which is unrebutted. Decl. of Dr. Stuart Grassian, M.D. ("Grassian Decl."). That evidence shows, *inter alia*, Mr. Almarri's:

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[2] The government (Defs.' Resp. at 9) also cites visits from the International Committee of the Red Cross. Those visits occur only once every three to four months.

[3] Despite his numerous earlier requests, copies of these mental health review forms were not provided to counsel until after Mr. Almarri completed his objections to the Report and Recommendation. This form is provided by way of example. All contain the same caveat.

- increasing hypersensitivity to external stimuli such as odors and sounds (Grassian Decl. at 16; Savage Cert. ¶¶ 40-41, 84-85);

- worsening perceptual problems (Grassian Decl. at 16);

- growing manifestation of paranoid thoughts about Brig staff and his own attorneys (Grassian Decl. at 16; Savage Cert. ¶¶ 80, 85);

- and increasing difficulty with obsessive preoccupations such as the preparation of his food or perceived slights by Brig staff (Savage Cert. ¶¶ 78-79; Grassian Decl. at 16).[4]

Dr. Grassian acknowledges that Mr. Almarri's mental state clearly has not reached "the agitated, confusional, hallucinatory psychosis" that is prolonged solitary confinement's most severe psychiatric consequence, a fact he attributes partly to Mr. Almarri's "fairly strong premorbid emotional and cognitive functioning." Grassian Decl. at 15. But Dr. Grassian also explains that Mr. Almarri is just as clearly "suffering quite profoundly from increasingly severe symptoms related to his prolonged incarceration in solitary," *id.* at 16, and that his "psychological resilience has eroded to a worrisome degree." *id.* at 17. He concludes that effects of this prolonged isolation are irreversibly damaging Mr. Almarri's mental health and interfering with his ability to participate in his legal defense. *Id.* The government fails to rebut these findings, offering only baseless attacks on Dr. Grassian's credentials (*see* Pl.'s Objections at 16-17) and conclusions based upon its own mental health reviews that are concededly too cursory to provide an accurate picture of Mr. Almarri's mental state.

[4] The government continues to miss the point about Mr. Almarri's concerns about Halal food preparation, which caused him, as the government acknowledges, to eat primarily Meals-Ready-to-Eat ("MRE"s") for months at a time twice during the last year. Defs.' Resp. at 8-9 n.5; Supplemental Decl. of Commander John Pucciarelli, Ex. 6 to Defs.' Resp. The point is not that Mr. Almarri was under-nourished or that Brig staff was insensitive. It is that Mr. Almarri's obsessional fixation with how his food was being prepared—despite the Brig's repeated assurances that it was being prepared in strict accordance with Halal requirements—shows that Mr. Almarri's mental state is deteriorating. Grassian Decl. at 16-17.

The government also seeks to discount its past mistreatment of Mr. Almarri, which included *incommunado* detention, total sensory deprivation, and brutal interrogations techniques bordering on if not amounting to torture. This mistreatment was intentionally designed to make Mr. Almarri feel totally isolated and hopeless. The trauma and harm it inflicted on Mr. Almarri is relevant here not because this motion seeks to enjoin such abuse in the future, as the government mistakenly suggests (Defs.' Resp. at 6-7), but because it informs Mr. Almarri's present mental status as well as his ability to withstand continued isolation.[5]

In short, Mr. Almarri has experienced the type of extreme and prolonged isolation that can cause severe and irreversible mental harm. He has presented evidence that he is actually suffering from this harm. And he has shown that providing more frequent communication with his family would at least mitigate the harm. Addendum to Declaration of Stuart Grassian, M.D., Ex. 1 to Pl.'s Objections ("Grassian Addendum"). Accordingly, Mr. Almarri has established grounds for relief or, at a minimum, the need for an independent mental health evaluation and evidentiary hearing to resolve any factual dispute over his deteriorating mental condition.

II. Mr. Almarri Has Established a Violation of His Constitutional Rights.

Both sides acknowledge that no precedent directly addresses the issues raised in this motion. But existing jurisprudence entitles Mr. Almarri to *greater* protection than convicted criminals because he has not been charged and tried and because he is not being punished for any wrongdoing. He is being held solely in "protective custody" for non-punitive purposes. *Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (plurality opinion); *see also Youngberg v. Romeo*, 457 U.S. 307,

[5] As previously noted (Pl.'s Objections at 17-18 n.14), in explaining that he had "only very uncommonly encountered an individual whose confinement was as onerous as Mr. Almarri's, except for individuals who had been incarcerated brutally in some third-world countries," Grassian Decl. at 15, Dr. Grassian was not inaccurately describing Mr. Almarri's current conditions but was *accurately describing* Mr. Almarri's conditions over time in considering their cumulative impact.

321-22 (1982) ("Persons who have been involuntarily committed are entitled to more considerate treatment and conditions of confinement than criminals whose conditions of confinement are designed to punish."); *Patten v. Nichols*, 274 F.3d 829, 841 (4th Cir. 2001) (contrasting relatively short confinement of pre-trial detainees with "lengthy and even lifelong confinement" for non-criminal commitments). The following two principles must therefore guide the Court's analysis of Mr. Almarri's First and Fifth Amendment challenges: first, Mr. Almarri must be afforded *at least* the same protection as convicted criminals, including convicted terrorists; and second, the standard governing those claims in the convicted prisoner context should be applied more liberally given the non-punitive purpose of his detention.[6]

A. Prolonged Isolation Violates Due Process.

Mr. Almarri's prolonged isolation violates his rights under the Due Process Clause of the Fifth Amendment because it creates unsafe conditions of confinement and exceeds the permissible purpose of his non-punitive detention. *See* Pl.'s Mot. for Interim Relief, at 14-20; *Youngberg*, 457 U.S. at 315 (due process right to safe conditions of confinement for unconvicted prisoners); *see also DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189, 200 (1989). For the reasons explained above and in prior submissions, Mr. Almarri's prolonged isolation, with its severe and irreparable effects, is creating an unsafe condition of confinement which increased communication with his family would help to mitigate. The government's

[6] The government (Defs.' Resp. at 21 n.15) incorrectly relies on cases involving detainees at Guantánamo Bay, Cuba, who under current precedent have no constitutional rights. *See Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir.), *cert. granted* 127 S. Ct. 2078 (2007). Legal resident aliens arrested and held inside this country, however, unquestionably do have constitutional rights. *See, e.g.*, *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 126 S. Ct. 2669, 2681-2682 (2006) (Fifth and Sixth Amendments); *Wong Wing v. United States*, 163 U.S. 228, 237-238 (1896) (same); *Bridges v. Wixon*, 326 U.S. 135, 148 (1945) (First Amendment); *Parcham v. INS*, 769 F.2d 1001, 1004 (4th Cir. 1985) (same).

intent is immaterial: Mr. Almarri is being held in protective custody for non-punitive purposes, and there is a categorical duty to ensure his safety.[7]

B. Restrictions on Family Contact and News and Texts Violate the First Amendment.

In the convicted prisoner context, the First Amendment right to intimate association with family members and to news and texts is analyzed under *Turner v. Safley*, 482 U.S. 78 (1987); *see also, e.g.*, *Beard v. Banks*, 542 U.S. 521, 126 S. Ct. 2572 (2006); *Overton v. Bazzetta*, 539 U.S. 126 (2003). Under *Turner*, the government must show that the restrictions on Mr. Almarri's family telephone calls, his family mail, and his access to news and religious texts are reasonably, not merely rationally, related to a legitimate government interest. *Turner*, 482 U.S. at 89-90. To make this showing, the government must demonstrate that the restrictions have "more than a formalistic logical connection" to such an interest. *Beard*, 126 S. Ct. at 2581; *accord King v. Federal Bureau of Prisons*, 415 F.3d 634, 639 (7th Cir. 2005); *West v. Frank*, 492 F. Supp. 2d 1040, 1047 (W.D. Wis. 2007).[8] Specifically, the government must introduce concrete evidence in support of its position, for example, through affidavits, other testimony, or policy manuals. *Banks*, 126 S. Ct. at 2577; *Dreibelis v. Marks*, 675 F.2d 579 (3d Cir. 1982);

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[7] In this context, the contours of that right are further informed by laws of war, which mandate that detainees "in all circumstances be treated humanely." Geneva Convention Relative to the Treatment of Prisoners of War, art. 3, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287; *cf. Hamdan v. Rumsfeld*, 548 U.S. 557, 126 S. Ct. 2749, 2795 (2006) (federal statute governing trials by military commissions must be interpreted in light of Common Article 3). This guarantee prohibits not only abusive interrogation methods and other cruel treatment, but also any act that "seriously endanger[s]" a prisoner's health, including prolonged isolation. Human Rights Committee, General Comment 20, Article 7, ¶ 6, U.N. Doc. HRI/GEN/1/Rev.6 at 151 (2003) ("prolonged solitary confinement" can constitute inhumane treatment).

[8] Although Mr. Almarri may bear the ultimate burden of *persuasion* (as distinct from production), the government shoulders "the initial burden to demonstrate an adequate justification for the restriction." *West*, 492 F. Supp. at 1047; *see also Jones v. Brown*, 461 F.3d 353, 360 (3d Cir. 2006) (demonstration of "rational relationship" between policy and legitimate government interest merely "commences rather than concludes [the judicial] inquiry").

King v. 415 F.3d at 639. Further, the government interest must be tethered to the specific plaintiff in question. *See, e.g., West*, 492 F. Supp 2d at 1047-48 (noting the government's failure to adduce any evidence that the prisoner posed a security risk) (citing *Banks*, 126 S. Ct. at 2581).

While courts accord respect to the professional judgments of prison administrators in examining the government interest at stake, they may not "rubber stamp or mechanically accept the judgments of [those] administrators" or accept "superficial" explanations for policies that restrict individual rights. *See Lovelace v. Lee*, 472 F.3d 174, 190 (4th Cir. 2006); *accord Shimer v. Washington*, 100 F.3d 506, 510 (7th Cir. 1996). This is particularly true where the record contains conflicting or inconsistent testimony from within the prison as to the difficulty of making accommodations. *See Makin v. Colo. Dep't of Corr.*, 183 F.3d 1205, 1213 (10th Cir. 1999) (dietary restrictions during Ramadan that ostensibly promoted "deterrence, rehabilitation, security, and budget" were suspect due to evidence of the minimal impact of relaxing those restrictions). A "[j]ustification for infringing an inmate's constitutional right requires more than an assumption. It requires a fact." *Fontroy v. Beard*, 485 F. Supp. 2d 592, 599 (E.D. Pa. 2007); *accord West*, 492 F. Supp. 2d at 1048 ("If the First Amendment is to have any meaning in the prison setting, a reason of 'because we said so' without further support cannot be sufficient to pass constitutional muster.") (citing *Thornburgh v. Abbott*, 490 U.S. 401, 414 (1989)).

Here, the government has not adduced any evidence supporting the challenged restrictions. The record, moreover, contradicts the government's assertions by showing that increasing Mr. Almarri's access to his family and to news would not present any risk or impose any hardship on the government. Simply put, the government is seeking deference not to the professional judgment of prison administrators but to government lawyers' invented reasons for unexplained policies. That is no basis for deference.

1. *Family Calls*. The government asserts (Defs.' Resp. at 22) that allowing Mr. Almarri more than one phone call every six months to his wife, children, and other immediate family members would impose a logistical and financial hardship and present a possible security risk. But the government provides no evidence to support this proposition. The record, moreover, suggests the opposite. The Defense Department has already implemented "arrangements for satisfactory verification of call participant identities," Defs.' Opp. to Mot. for Interim Relief at 9 n.4 (dkt. no. 48), and those procedures were successfully used in Mr. Almarri's first call with his family last month.[9] Also, Brig staff members, who have closely observed Mr. Almarri now for five years, say that accommodating his request for regular telephone calls with his immediate family members would present no problem from a financial, operational, or security perspective. Savage Cert. ¶ 60.

To be sure, providing Mr. Almarri with more family calls (whether weekly or monthly) would impose some logistical and financial cost. Such costs, however, must be a "closer fit" with the policy at issue. *West*, 492 F. Supp. at 1246 (quoting *Thornburgh*, 490 U.S. at 412). The government has not presented any evidence that simply using its existing calling procedure more frequently would impose more than a *de minimis* burden. *See*, *e.g.*, *Makin*, 183 F.3d 1213-14 (finding only a *de minimis* burden in accommodating an inmate's meal requirements during Ramadan where the government presented only conclusory budgetary evidence to the contrary). That *de minimis* burden does not justify the permanent and severe restrictions on Mr. Almarri's communication with his family, particularly given the harm caused by his prolonged isolation and the mitigating effect increased family communication would have. *See* Grassian Addendum.

[9] Participant identities are verified through the International Federal of the Red Crescent, which is the functional equivalent of the Red Cross in Saudi Arabia. The Red Crescent has volunteered to verify participant identities as needed. Savage Cert. ¶ 60.

The government's own policies for convicted prisoners, including convicted terrorists, further contradict its assertions. As previously demonstrated, those prisoners are permitted at least one family phone call per week (and often more). 28 C.F.R. § 540.100; Pl.'s Objections at 26. The government argues (Defs.' Resp. at 32 n.26) that rules for the Bureau of Prisons ("BOP") "do not apply" to military custody. But this ignores the obvious point: although the BOPs's rules do not directly govern Mr. Almarri, they demonstrate that the current restrictions on his family telephone calls are not reasonably related to any legitimate government interest. *Turner*, 482 U.S. at 87.

The government (Defs.' Resp. at 32 n.26) also mischaracterizes the rules governing prisoner calls at the Navy Brig where Mr. Almarri is confined. Those rules not only allow more phone calls than the two per year Mr. Almarri is allowed, but also place no restrictions on the number and frequency of family calls a prisoner can make or receive.[10] Moreover, the Navy Brig, like the BOP, views these calls as an important part of correctional management because of their beneficial effect on prisoners' health and morale, thus further contradicting the government's assertion that the restrictions on Mr. Almarri's family calls are reasonably related to a legitimate government interest. Pl.'s Objections at 26 (citing BOP and Navy Brig policies).

Finally, the government's reliance (Defs.' Resp. at 33 nn.27-28) on *Overton v. Bazzetta*, 539 U.S. 126 (2003), is misplaced because the prohibition on visitation in *Overton* applied only to inmates with a proven history of criminal conduct within the institution, was temporary in nature, was intended as an incentive for compliance with prison rules, and still allowed for frequent family communication through other means. *Id.* at 134-35. The opposite is true here:

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[10] *See* U.S. Dep't of the Navy, *Corrections Manual* 8-40 to 8-41, *available at* http://doni.daps.dla.mil/Directives/01000%20Military%20Personnel%20Support/01-600%20Performance%20and%20Discipline%20Programs/1640.9C.pdf.

the restrictions on Mr. Almarri's family calls are not temporary measures to instill good behavior but permanent prohibitions imposed regardless of Mr. Almarri's conduct, are unsupported by any evidence, and leave Mr. Almarri without any other means of meaningful family communication.[11]

2. *Family Mail*. Although the government complains that Mr. Almarri's request lacks specificity, it really objects to any order requiring expeditious processing of his family mail. Defs.' Resp. at 24-25.[12] On this point, the government has submitted evidence, in the form of a declaration. Decl. of Brig. Gen. Gregory J. Zanetti ¶¶ 3-12 ("Zanetti Decl."), Ex. 3 to Defs.' Resp. to Pl.'s Mot. for Interim Relief (dkt no. 48). But that evidence does not support the government's position. The Zanetti declaration merely describes the current process for reviewing Mr. Almarri's mail. It does not dispute that his mail could be reviewed more quickly, by screening it at the military facility in Norfolk, Virginia, as Brig staff recommended, Savage Cert. ¶ 59, or by prioritizing processing of his mail at Guantánamo, a step warranted by Mr. Almarri's almost complete isolation and by what the government itself calls the "uniqueness of [his] situation," Defs.' Resp. to Mot. for Interim Relief at 15.

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[11] The government also argues that isolation conditions in federal super-max prisons do not violate the Eighth Amendment. Defs.' Resp. at 32 n. 25 (citing *Bruscino v. Carlson*, 854 F.2d 162 (7th Cir. 1988), and *Hill v. Pugh*, 75 Fed. Appx. 715, 2003 WL 22100960 (10th Cir. 2003)). Whether true or not, the application of punitive conditions normally reserved for a tiny minority of the most violent and unreformed of convicted federal prisoners to an unconvicted detainee, with no history of violence or disciplinary violations, and no opportunity to earn relief through good behavior, would be "so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience." *Hawkins v. Freeman*, 195 F.3d 732, 738 (4th Cir. 1999) (quoting *County of Sacramento v. Lewis*, 523 U.S. 833, 847 n.8 (1998)).

[12] As previously explained (Pl.'s Objections at 21 n.17), Federal Rule of Civil Procedure 65(d)'s particularity requirement applies to *orders* granting injunctions, not to requests for injunctive relief. Whatever the allowable time period, it cannot be open-ended and must be shorter than the two to four months that the government says it now normally takes to review Mr. Almarri's mail, and the more than six months it has sometimes taken in the past. Savage Cert. ¶ 57.

3. *Access to News.* The requested relief is narrow: Mr. Almarri simply wants to read an unredacted national newspaper and to watch news programs on television. There is nothing nefarious about Mr. Almarri's desire to learn what is happening in the world in general or the Middle East in particular, the region he is from and in which he has lived most of his life, and where his family still resides. *See West*, 492 F. Supp. 2d at 1046 (even convicted prisoners have a right to be informed and educated about the world). But the government's redaction of all stories pertaining to the "War on Terror" (Defs.' Resp. at 11, 20) prevents Mr. Almarri from reading a wide variety of stories about domestic and international affairs, most of which have nothing to do with al Qaeda. Pl.'s Objections at 22. The government provides no legitimate interest that justifies this "exaggerated response" and sweeping infringement of First Amendment rights. *Turner*, 482 U.S. at 87; *see also, e.g.*, *Fontroy*, 485 F. Supp. 2d at 599 (connection to policy cannot be "tenuous and remote," and must not be an "overreaction" on the prison's part).

The government's brief (Defs.' Resp. at 20) warns about the "pernicious effects" of allowing Mr. Almarri access to news. But none of the government's evidence shows how permitting Mr. Almarri to read an unredacted copy of a national newspaper like the *Washington Post* or *New York Times* (at his own expense) or to watch the news on the already-available television would "encourag[e] belligerence" or otherwise pose a risk to Brig staff. Defs.' Resp. at 20-21. Nor does the government's evidence show how allowing Mr. Almarri such access to news would pose any risk outside the Brig.[13] The absence of such statements is marked given that Mr. Almarri has been detained by the military for five years and was incarcerated by civilian

[13] Plainly, there is no such risk since the government plans to imprison Mr. Almarri until the end of the "War on Terror" if his detention is upheld, and to limit his contact with the outside world to counsel with security clearance and to monitored communications with immediate family.

authorities for almost two years before that. *See Thornburgh*, 490 U.S. at 412-13 (citing record evidence of the actual danger particular publications posed to institutional order and security).

The government (Defs.' Resp. at 32) cites *Beard v. Banks*. But the regulation in *Beard* was based upon a constellation of factors that rendered the ban reasonably related to a legitimate penological interest: it applied only to inmates with the most serious behavioral problems and a demonstrated history of violence at the institution, 126 S. Ct. at 2576, 2579-80; was a content-neutral restriction intended to encourage those inmates to obey prison rules, *id.* at 2579; and was supported by an affidavit from a prison official explaining the nexus between the policy and institutional security, *id.* None of those factors is present here.

In sum, the government's restrictions on Mr. Almarri's access to news are overbroad and are not reasonably related to a legitimate government interest. Mr. Almarri should, at a minimum, be permitted to read a national newspaper of his choice (at his expense), and the government should at most be permitted to redact only specific information that it can show poses an actual security risk, not all stories related to the "War on Terror."

4. *Religious Texts*. The government confuses the number of religious texts with the standard used to determine whether Mr. Almarri can receive religious texts, which has resulted in the arbitrary and unexplained denial of various texts. The government avoids any discussion of that standard—*i.e.*, whether they have "the potential to create controversy or security risks in the camp" (Zanetti Decl. ¶¶ 14-15)—or its application to the four religious texts identified in Mr. Almarri's motion. Pl.'s Objections at 30-31. The government does not offer, and there does not exist, any legitimate government interest for denying Mr. Almarri access to these centuries-old books (all purchased at his expense), and the government has never shown how those texts could

"create controversy or security risks" at the Brig. *See Thornburgh*, 490 U.S. at 406 (prison required to inform inmate promptly in writing of reasons for rejection).

The government's denial of these texts also violates the Religious Freedom Restoration Act ("RFRA"). RFRA applies to all persons in the United States, including those in the custody of the U.S. military. *See* Pl.'s Opp. to Defs.' Mot. to Dismiss at 33-34 (dkt. no. 11); H.R. Rep. No. 103-88 (1993) ("Pursuant to [RFRA], the courts must review the claims of prisoners and military personnel under the compelling governmental interest test."); *see also* S. Rep. No. 103-111, at 12 (1993) (noting RFRA's application to the military). In rejecting a RFRA claim by Guantánamo detainees, the District of Columbia Circuit recently made clear that RFRA applies to all resident aliens detained by the military. *Rasul v. Myers*, 512 F.3d 644, 671-72 (D.C. Cir. 2008). Mr. Almarri, therefore, is clearly protected by RFRA, and the government cannot "substantially burden [his] exercise of religion" unless it can demonstrate that it is "in furtherance of a compelling governmental interest" and "is the least restrictive means of furthering that … interest." 42 U.S.C. § 2000bb-1(a) to 1(b), a standard more stringent than *Turner*'s "reasonability" requirement. For the reasons set forth previously (Pl.'s Objections at 31), the government's denial of the four religious texts requested by Mr. Almarri imposes such a burden without any justification or explanation, let alone proof that the government employed the least restrictive means of meeting a compelling interest.

III. The Relief Requested Will Not Impose Any Hardship on the Government.

The thrust of the government's argument (Defs.' Resp. at 17-19) is that because the President has declared Mr. Almarri an "enemy combatant," *any* judicial review of his treatment would impermissibly trench on Executive authority. This is the same argument the government has repeatedly pressed—and lost—with respect to judicial review of the Executive's detention

and trial of "enemy combatants." *See Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (rejecting argument that "enemy combatant" captured on battlefield has no due process right to challenge his detention); *Rasul v. Bush*, 542 U.S. 466 (2004) (rejecting argument that "enemy combatants" at Guantánamo have no right to habeas corpus); *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) (rejecting argument that "enemy combatant" captured in Afghanistan can be tried by a presidentially created military commission that does not adhere to federal statutes or the laws of war). That argument, moreover, would not simply bar the Court from remedying Mr. Almarri's mental deterioration and denial of meaningful family communication; it would also prohibit the Court from remedying the egregious abuses alleged in the Complaint or future abuses. Judicial review does not itself constitute a burden on the government, and the Court should resist the Executive's continued effort to obtain a "blank check" for its treatment of prisoners. *Hamdi*, 542 U.S. at 536 (plurality opinion).

The government (Defs.' Resp. at 18) cites the treatment of "hundreds of thousands of alien enemy combatants" held in the United States during World War II. But this reliance is misplaced. Those individuals were held as prisoners of war in strict accordance with the legal requirements of the Geneva Conventions. Here, the government has refused to apply the Geneva Conventions to Mr. Almarri, and has instead sought to deny him any legal protections whatsoever.

Prisoners of war also "must be released and repatriated without delay after the cessation of active hostilities." Geneva Convention Relative to the Treatment of Prisoners of War, art. 118, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287. Mr. Almarri, by contrast, has already been detained for five years, longer than any prisoner of war held by the United States during the two world wars. His detention is not cabined by concrete rules mandating a release point but will

continue indefinitely, or, as the government recently put it, "for a long time."[14] Mr. Almarri thus faces a lifetime of solitary confinement and separation from his family, a fate far more severe than that of prisoners of war detained by the United States during World War Two.

Finally, Mr. Almarri is not one of "hundreds of thousands" of prisoners in military custody in the United States. He is the only prisoner held as an "enemy combatant" in the United States, and one of only three prisoners ever held as "enemy combatants" in this country. The detention of the hundreds of thousands of prisoners of war during World War Two presented issues of an entirely different order of magnitude than the detention of this solitary prisoner does today.

Mr. Almarri recognizes the unprecedented nature of his situation. But the solution is not to exclude the Court altogether, as the government proposes. Rather, it is for the Court to assess carefully the actual burden, if any, imposed on the government in providing the narrow but exceedingly important relief requested in this motion.[15]

Conclusion

For the foregoing reasons, the motion should be granted.

[14] Unofficial Tr. of Oral Argument, *Almarri v. Pucciarelli*, at 85 (4th Cir. Oct. 31, 2007) (en banc), *available at* http://brennan.3cdn.net/e75ca720b7416fd646_bym6vjh5i.pdf.

[15] The Court continues to have jurisdiction over this case, which the government still has not moved to dismiss on this basis even though the Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600, was enacted almost two years ago. For reasons previously explained (Pl.'s Objections at 32-34), this Court should exercise jurisdiction to remedy the continuing and irreversible harm to Mr. Almarri rather than waiting the months, if not years, it will take for other courts to resolve definitively whether he can even be detained as an "enemy combatant" in the first place.

Respectfully submitted,

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Dated: Charleston, South Carolina
June 3, 2008

EXHIBIT 2

HEALTH RECORD	CHRONOLOGICAL RECORD OF MEDICAL CARE

DATE	SYMPTOMS, DIAGNOSIS, TREATMENT, TREATING ORGANIZATION *(Sign each entry)*

Date: 29 Mar 07

NAVCONBRIG at CHARLESTON, SC – SHU CONFINEMENT FACILITY

CLINICAL SERVICES / EVALUATION NOTE

TRIAGE LEVEL: Routine

Reason for Evaluation: Routine Mental Health Monitoring (as per standard procedures)

S: Provider spoke with prisoner for 17 minutes. Prisoner was cooperative. Prisoner raised the following issues as areas of concern:

REVIEWED INFORMATION REQUESTED BY EC TWO ON 15 MAR 07. INFORMATION:
1) AND 2) DENTAL AND OPTOMETRY APPTS SCHEDULED FOR 4 APR.

3) MEDICAL - BLOOD WORK FROM LAST SEMI-ANNUAL WAS SAME AS WHAT DR. [redacted] INITIALLY ORDERED FOR EC EXCEPT FOR CHOLESTEROL TEST. EC ASKED IF URINE WAS SUPPOSED TO BE CHECKED; PROVIDER INFORMED EC THAT SHE WOULD CHECK WITH MEDICAL AND UPDATE HIM NEXT WEEK.

4) MEDICAL – DR. [redacted] IS EC'S PRIMARY DOC.

5) MAGAZINES - RECEIVED NO LIST OF MAGAZINES (EC PROVIDED LIST OF FOUR MAGAZINES - WILL INFORM HIM OF WHETHER POSSIBLE TO ORDER MAGAZINES AT NEXT VISIT.

REVIEWED INFORMATION REQUESTED BY EC TWO ON 22 MAR 07. INFORMATION:
1) MEDICAL APPT WITH DR. [redacted] IS SCHEDULED FOR 10 APR.

2) DENTAL APPT MOVED TO 19 APR DUE TO SCHEDULE CONFLICT (EC REPORTED INTERMITTENT PAIN; STATED THAT VISIT WAS FOR F/U);

3) MEDICAL - URINE IS NOT SUPPOSED TO BE CHECKED UNLESS SYMPTOMS REPORTED INDICATE SO;

4) SOCIALIZATION AND FAMILY - DISCUSSED LOCAL STAFF'S CONTINUED SUPPORT OF EC'S CONTACT WITH FAMILY. INFORMED HIM THAT WE ARE AWAITING APPROVAL FROM HIGHER HQ. INFORMED HIM THAT WE WOULD CONTINUE TO ADVOCATE FOR HIS CONTACT WITH HIS FAMILY;

5) BOOKS, JOURNALS & DVDS/TV - CURRENTLY, THEY ARE NOT LIKELY TO BE ORDERED. MAY BE RECONSIDERED IN THE FUTURE. INFORMED EC THAT ANOTHER JOURNAL/MAGAZINE MAY BE ORDERED IF ONE OF THE ONE'S HE CURRENTLY RECEIVES IS DISCONTINUED. EC TWO STATED THAT HE WOULD CHECK WITH THE MAJ ABOUT IT.

ON 29 MAR 07, EC TWO REPORTED THAT HE WANTED INFORMATION ON THE FOLLOWING ISSUES:
1) IMAM - WOULD LIKE AN IMAM TO VISIT THAT SPEAKS ARABIC. WOULD LIKE THE IMAM TO VISIT MORE FREQUENTLY. WOULD LIKE THE IMAM THAT CAN HELP TEACH THE EC

2) SOCIALIZATION - WOULD LIKE MORE FREQUENT VISITS BY A LOCAL OR CLOSE BY IMAM. EC REPORTED THAT HE WOULD TALK WITH HIS LAWYERS (SAVAGES) THAT HE WOULD LIKE THEM TO COORDINATE WITH MAJ TO ENSURE THAT THEIR VISITS ARE SPREAD OUT WITH THE ICRC AND IMAM;

3) FAMILY - HE WOULD LIKE TO CALL HIS FAMILY;

4) EC STATED THAT HE HAD NO ADDITIONAL MEDICAL CONCERNS AT THIS TIME.

O: ☑ General Appearance (including summary review of Activities of Daily Living (ADLS) WNL
☑ Evaluation Completed at Cell Front ☐ Evaluation Completed during Outdoor Recreation ☐ Evaluation Completed in Interview Room
☑ Medical Record Reviewed (please note any relevant changes in weight, health, etc.) N/A

O: Prisoner appeared oriented x4. Mood: ☐ Elevated ☑ Euthymic ☐ Dysphoric ☐ Anxious Affect (Range of Expression): ☐ Appropriate ☐ Inappropriate
Range: ☐ Full Range ☐ Restricted (mild, moderate, severe) Communication: ☑ Organized ☐ Disorganized (mild, moderate, severe)

** Prisoner did not endorse suicidal/homicidal ideations or auditory/visual hallucinations at the time of his participation in this evaluation. He did not appear depressed nor did he display overt signs and symptoms consistent with a major mental illness. A brief assessment of cognitive functions did not indicate evidence of gross, measurable impairment.**

A: Participation in session: ☑ Participatory ☐ Nonparticipatory ☑ Attentive ☐ Inattentive

P: ☐ Continue with treatment plan ☐ Modify treatment plan ☑ Other: (1) The prisoner does not present with a condition or symptoms necessitating mental health care at this time. (2) Liaison with appropriate personnel, as needed. (3) Psychologically fit and suitable for current correctional housing assignment.

(cont)

PATIENT'S IDENTIFICATION *(Use this space for Mechanical Imprint)*

RECORDS MAINTAINED AT: ▶	Naval Consolidated Brig Charleston	
PATIENT'S NAME *(Last, First, Middle Initial)*		SEX
al-Marri, Kahlah Saleh, Ali		M
RELATIONSHIP TO SPONSOR		RANK/GRADE
Self	EC	----
SPONSOR'S NAME		ORGANIZATION
Self		NAVCONBRIG At Charleston, SC
DEPART./SERVICE	SSN/IDENTIFICATION NO.	DATE OF BIRTH
DoD	350-72-6046	24Sep65

CHRONOLOGICAL RECORD OF MEDICAL CARE — STANDARD FORM 600 (REV. 5-8) Prescribed by GSA and ICMR

14/53

DATE	SYMPTOMS, DIAGNOSIS, TREATMENT, TREATING ORGANIZATION *(Sign each entry)*
29 Mar 07 [redacted]	

Additional Comments or Concerns:

[redacted] 29Mar07
Clinician Signature (Print, date, and sign)

☐ Prisoner refused evaluation this date. ADLS, Medical Record reviewed and Monitoring Correctional Staff Inte[redacted] Maj, USAF, BSC
Licensed Clinical Psychologist; AFSC: 42P3

CAVEAT: Evaluation represents cursory evaluation of current mental status, only.