

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

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2008 APR 22 P 4: 02

ALI SALEH KAHLAH AL-MARRI,	)	C.A. No. 2:05-2259-HFF-RSC
	)	
Plaintiff,	)	
	)	
-versus-	)	<b><u>REPORT AND RECOMMENDATION</u></b>
	)	
ROBERT M. GATES, Secretary of	)	
Defense of the United States,	)	
COMMANDER JOHN PUCCIARRELLI,	)	
U.S.N. Commander, Naval	)	
Consolidated Brig,	)	
	)	
Defendants.	)	

This motion under Rule 65 of the Federal Rules of Civil Procedure is before the undersigned United States Magistrate Judge for a report with recommendations as provided for in Title 28, United States Code, Section 636(b), and the local rules of this court.

Plaintiff al-Marri, an enemy combatant, brought this action challenging the conditions of his confinement at the Naval Consolidated Brig in Charleston, South Carolina. By this motion he seeks a preliminary order directing, "the government to allow [him] regular and frequent (monitored) telephone calls with immediate family members (now in Saudi Arabia), ensure rapid processing of [his] correspondence with those family members (including letters and DVDs); grant [his] unrestricted access to news (in newspapers, in magazines, and on television); and ensure

[his] full and prompt access to religious texts for the exercise of his faith." Plaintiff's Memorandum, Page 3-4 (footnote omitted).

The requirements for granting preliminary relief under Fed. R. Civ. P. 65 are well known. See, e.g., Direx Isreal, Ltd. v. Breakthrough Medical Corp., 952 F.2d 802 (4th Cir. 1991); Rum Creek Coal Sales, Inc. v. Caperton, 926 F.2d 353 (4th Cir. 1991); Blackwelder Furniture Co. v. Seilig Mfg. Co., 550 F.2d 189 (4th Cir. 1977). In Direx Isreal, the Fourth Circuit Court of Appeals outlined the precise analytical framework which courts must employ in determining whether to grant preliminary relief. 952 F.2d at 811. First, the party requesting preliminary relief must make a "clear showing" that he will suffer irreparable harm if the court denies his request. 952 F.2d at 812-13. Second, if the party establishes irreparable harm, "the next step then for the court to take is to balance the likelihood of irreparable harm to the plaintiff from the failure to grant interim relief against the likelihood of harm to the defendant from the grant of such relief." 952 F.2d at 812. Third, if the balance tips decidedly in favor of the party requesting preliminary relief, "a preliminary injunction will be granted if the plaintiff has raised questions going to the merits so serious, substantial, difficult, and doubtful, as to make them fair ground for litigation and thus more deliberate investigation." 952 F.2d at

813. However, "if the balance does not tip decidedly there must be a strong probability of success on the merits." Id. Fourth, the court must evaluate whether the public interest favors granting preliminary relief. The award of preliminary relief is entrusted to the sound discretion of the district court. 952 F.2d at 811; Multi-Channel TV Cable Company v. Charlottesville Quality Cable Operating Company, 22 F.3d 546, 551 (4th Cir. 1994).

Here, the plaintiff has failed to meet even one of the requirements in support of relief under Rule 65.

First, there is no "clear showing" that the plaintiff will suffer irreparable harm if the court denies his request. There is no indication that without receiving his mail more quickly, without unfettered access to the news, without frequent phone calls to a family which he admittedly is reluctant to speak with<sup>1</sup>, or without greater access to religious literature, he will suffer irreparable harm.

To be sure there is evidence that the plaintiff has "experienced extremely severe and prolonged conditions of incarceration in solitary, and ... symptomatic presentation is strikingly consistent with published descriptions of the particular psychopathologic disturbance associated with solitary confinement." See, Declaration of Stuart Grassian, M.D., Pg. 17.

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<sup>1</sup> See, Certification of Andrew J. Savage, III, ¶86

However there is no showing that the remedy sought here is necessary to prevent, or will prevent, irreparable harm. Indeed Dr. Grassian gives no suggestions of changes which would prevent irreparable harm.<sup>2</sup>

Accordingly it is not necessary to address the other steps in the analytical framework which courts must employ in determining whether to grant a Rule 65 motion. Direx Isreal at 811. Nonetheless, even if the plaintiff had made the requisite step one showing, after the balancing test of step two, he cannot show a strong probability of success on the merits.

If the party establishes irreparable harm, "the next step then for the court to take is to balance the likelihood of irreparable harm to the plaintiff from the failure to grant interim relief against the likelihood of harm to the defendant from the grant of such relief." Direx Israel at 812.

The defendant correctly notes that this case is unprecedented in the annals of American jurisprudence and implicates fundamental constitutional issues going to the very

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<sup>2</sup> The plaintiff fails to recognize his burden of presenting evidence that without the changes sought here he will suffer irreparable harm. In his reply brief he attaches still more general literature (Plaintiff's Reply, Attachment A) concerning long-term solitary confinement, but argues that his motion should be granted because the government has presented no evidence why it can not make the concessions he seeks or why it can not do things his way. Plaintiff's Reply pgs. 6-9. In making this argument he fails to recognize the constitutional and wide-spread consequences granting this relief would have on the executive branch.

nature of the government, including but not limited to the nature of the separation of governmental powers. Thus any decision granting partial relief would by its very nature harm the defendants. Further however, if granted, the relief sought by the plaintiff would require the defendants to establish new, yet temporary, procedures with regard to the handling of enemy combatants on an incomplete record, on imprecise terms<sup>3</sup> and with far reaching consequences.

Reasonable people may disagree as to the weight to be given the prospective harm to the plaintiff, if any, and the harm to the defendants resulting from the granting or the denying of the pending motion. However, it cannot be said that the likelihood of irreparable harm to the plaintiff from the failure to grant interim relief, when balanced against the likelihood of harm to the defendants from the grant of such relief, tips decidedly in favor of the plaintiff.

Next, the plaintiff faces the insurmountable problem of showing a strong probability of his success on the merits, step three in the analytical framework.

It appears to the court that there is not a strong probability of success in this instance. That opinion is

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<sup>3</sup> Recognizing the vague nature of the relief sought, the plaintiff asserts in his reply brief that he actually seeks weekly calls to family in Saudi Arabia and correspondence processed within a month. Plaintiff's Reply pgs. 6-7 and footnote 5.

informed by the presumptively valid<sup>4</sup> provisions of United States law which provides,

No court, justice, or judge shall have jurisdiction to hear or consider any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

28 U.S.C. § 2241(2).

Further the plaintiff's claim for habeas corpus relief challenging his designation as an enemy combatant has been denied by this court and has been pending before the Fourth Circuit Court of Appeals for some time. al-Marri v. Wright, 487 F.3d 160 (4th Cir. 2007) (rehearing en banc granted August 22, 2007), al-Marri ex rel. Berman v. Wright, 443 F.Supp.2d 774 (D.S.C. 2006).

There is no precedent for providing enemy combatants, or for that matter providing law enforcement prisoners, the extended "rights"<sup>5</sup> sought here. Finally, the United States has not waived

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<sup>4</sup> "Statutes are presumed constitutional. . ." Bush v. Vera 517 U.S. 952, 116 S.Ct. 1941 (1996); "Every legislative act is to be presumed to be a constitutional exercise of legislative power until the contrary is clearly established." Close v. Greenwood Cemetery, 107 U.S. 466, 2 S.Ct. 267 (1883)

<sup>5</sup> The plaintiff asserts a "right" to "Regular and frequent telephone calls," "rapid processing" of correspondence, "unrestricted access to news (in newspapers, in magazines and on television)", and "full and prompt access to religious texts." In deed, the plaintiff, while in his reply brief now further specifies his "right" to weekly calls to Saudi Arabia, acknowledges that even

sovereign immunity or consented to suit on the instant causes of action.

Given the outcome of the first, second and third elements of the analytical framework which courts must employ in evaluating a motion under Rule 65, it is unnecessary to consider the fourth element, the public interest in granting the motion.

Accordingly, for the reasons set forth above, it is recommended that the motion be denied.

Respectfully Submitted



Robert S. Carr  
United States Magistrate Judge

Charleston, South Carolina

April 22, 2008

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U.S. citizens in the custody of the Bureau of Prisons are only granted one call per month. Plaintiff's Reply pg. 7.