

[No Oral Argument Set]

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

HUZAIFA PARHAT, *et al.*,
Petitioners/Plaintiffs,

v.

Case No. 06-1397

ROBERT M. GATES, *et al.*,
Respondents/Defendants.

**PETITIONERS' EMERGENCY MOTION FOR LEAVE TO SUPPLEMENT
THE RECORD ON PENDING MOTIONS WITH JANUARY 20, 2007
DECLARATION OF SABIN WILLETT**

Pursuant to Circuit Rule 27(f) governing emergency motions, and the All Writs Act, 28 U.S.C. § 1651, and for the reasons set forth below, Petitioners request that the Court grant them leave to supplement the record as to the pending motions (identified below) with the January 20, 2007 Declaration of Sabin Willett ("Decl."). As grounds, Petitioners say:

Background

1. On December 22, 2006, we filed "Petitioners' Emergency Motion for an Order Setting Procedures Governing Petition for Immediate Release and Other

Order and for Order Setting Procedures and Cross Motion to Enter Proposed Protective Order and to Stay Proceedings” (the “Cross-Motion to Stay”).

2. During his January 15-18, 2007 visit to JTF Guantanamo, Petitioners’ counsel learned of shocking facts previously undisclosed by Respondents to this Court and previously unknown to counsel. The facts bear urgently on the need for an expedited hearing. They show that, shortly after the Petition was filed, Respondents profoundly degraded the Petitioners’ conditions of confinement, imposing on them a degree of cruelty universally condemned under all bodies of law related to incarceration. Where, as here, the discovery of these new facts was undertaken diligently, this Court has the discretion to permit the record to be supplemented.

3. The conditions described below constitute an immediate and urgent threat to the Petitioners’ mental and physical health. Respondents’ unilateral imposition of these conditions should bar Respondents from seeking any stay or other delay of this matter.

Basis for Relief

4. When Respondents filed their Cross Motion for Stay, they did not advise this Court that, within days after the filing of the Petition, they moved all of the Petitioners to Camp 6. Decl. ¶¶ 12, 32.

5. Although confinement at Guantanamo Bay has always been harsh, the Uighurs had never¹ been held in solitary confinement. Decl. ¶ 27-29. Originally, there were approximately 22 Uighurs at the base. After interrogators advised a number of them in the Spring of 2003 that their interrogations were closed and that they had been determined to be “innocent”² and were shortly to be released, they were transferred to Camp 4, where they lived communally in a bunk house, ate communally at picnic tables, had 24-hour access to a small outside area (and thus to sunlight and fresh air), and most significantly, had 24-hour access to each other. *Id.*

6. Companionship has been the lynchpin that has sustained the Uighurs, for their cultural isolation at Guantanamo has been far more acute than that of Arab and Afghan prisoners. It is surpassingly difficult to obtain and clear reading material in Uighur, so Uighurs never see newspapers, magazines or other current writings in their languages. The camp library’s few Uighur books were read and reread years ago. Decl. ¶ 18. Base secrecy, together with fear of family persecution by the Chinese makes it very difficult for the families of the men to communicate with them. *See Id.* ¶ 47-50.

¹ One of more Uighurs may, from time to time, have been subjected to brief periods of solitary confinement as punishment for perceived indiscipline, but the general conditions of their imprisonment had never, so far as counsel is aware, previously included solitary confinement.

² Our clients use the word, “gunasiz,” when relating what interrogators said to them. “Gunasiz” is, on information and belief, the Uighur word for “innocent.”

7. For reasons that are not entirely clear, many of the Uighurs were later dispersed from Camp 4 to the harsher conditions of Camps 1-3, where prisoners are housed in cages contained in cell blocks, and have much less access to fresh air, sunlight, and recreation. As harsh as that was, the cages afforded the men opportunity to see, talk to, pray with, console and draw strength from each other.

8. In December, 2006, each Petitioner was moved to Camp 6. Two Petitioners said this occurred in approximately mid-December. Two thought it was later in December. Decl. ¶ 12.

9. Each cell is constructed entirely of solid metal. Cells admit no natural air or light, and have no window except 4" x 24" glass strips in and adjacent to the door, which give a view of the corridor, a clock, and the MPs who watch the men. Petitioners can converse with no one while in their cell. They can communicate only by kneeling at the door and attempting to shout greetings to nearby cells through the small gap between door and floor. They eat and pray alone. They have no books or reading materials other than the Koran. Decl. ¶¶ 15-18.

10. Petitioners are never permitted to leave their cells, except for a daily two-hour "rec" period, which alternately occurs by day or night, and in the case of two men by day only on every third day. Thus they spend a minimum of 22 hours per day in solitary. Rec is spent alone in a 3 x 4 meter confined space, with a two-story concrete walls topped with fencing. Daytime rec provides the only exposure

to outside air or the sky, but because of the height of the walls, it rarely permits the Petitioners to see the sun. Petitioners reported variously that they had seen the sun only two to four times since mid-December. Night-time rec is often offered after 11 p.m., and has been offered as late as 2 a.m. Petitioners are encouraged by MPs to refuse night-time rec, and generally do. "Rec" requires full-shackling and transfer through a series of remotely locked doors. Rec is, however, the only opportunity the Petitioners have to speak to another human being other than an MP. This must be done through a mesh fence. It is an offense to touch the neighbor. Decl. ¶¶ 19-24.

11. The impact on Petitioners has been profound. They have never experienced anything like this at Guantanamo. Decl. ¶¶ 27-29. They pass days of infinite tedium and loneliness. Decl. ¶ 25. One man's neighbor is constantly hearing voices, shouting out, and being punished. Decl. ¶ 41. All describe a feeling of despair, crushing loneliness, and abandonment by the world. One said he felt he was in "the dungeon above the ground;" another said, "it feels like we are in tunnels." Decl. ¶¶ 30-42. All expressed a desperate desire for sunlight, fresh air, and someone to speak to. *Id.*

12. Petitioner Abdusemet, who on two previous visits had appeared gentle and pleasant, quick to laugh and smile, appeared to be in despair. He said he was beginning to hear voices. Decl. ¶ 42. He asked, "Why do they hate us so much?"

13. Counsel was advised that Petitioner Hammad is in approximately the ninth day of a hunger strike, and is extremely weak. Decl. ¶ 37.

14. So intense is the isolation that the men did not even know who was in Camp 6, except for the five men in their immediate "pod."

15. Abdunnasser, one of the men being subjected to this nightmarish isolation reported that he received a notice in approximately October, 2005, that his annual review board had concluded that he was not a threat to the United States. Decl. ¶ 43-46. Others said they had never been invited to participate in any ARB or received any notice of any ARB result. Our firm has never been advised of any results of an ARB. *Id.*

Discussion

16. Our Petition shows, with detailed citation to all of the record that is available, that there is no lawful basis for Petitioners' imprisonment. There has never been any evidence that any of them was an "enemy" or a "combatant," CSRT records show factual histories identical in all respects to five Uighur prisoners determined by the military to be noncombatants, and a sixth Uighur prisoner originally so determined. Petition ¶ 8. They have repeatedly been advised by military personnel of their innocence, and that their release was imminent. *Id.* ¶¶ 85, 158. Respondents admitted that they have approached as many as 25 U.S.

allies seeking to find a place to repatriate them. *Id.* ¶ 89. Obviously they did not seek to settle dangerous persons on the nation's allies.

17. To every request for judicial relief, Respondents have responded with requests for delay. They did so in 2005, when the habeas petition was filed before Judge Urbina; they did so when an appeal of that court's inaction was pending here; they did so again in this proceeding on December 29, 2006.

18. When Aristotle described man as "politikon zoon,"³ he did not mean Republican or Democrat. He meant that man is a creature of the *polis* -- the community. He depends for sanity on human companionship and cannot function without it. That is why courts have long considered solitary confinement an unusually cruel form of punishment. *Candin v. Conner*, 515 U.S. 472, 475 n.1 (1995); *In re Medley*, 134 U.S. 160, 168-70 (1890) (solitary confinement an "infamous punishment" at common law); *Hatch v. District of Columbia*, 184 F. 3d 846, 848 (D.C. Cir. 1999).

19. The degree of isolation into which these Petitioners were thrown, just days after they filed this Petition, comports with no system of law, and is an outrage to any decent human being.

20. No legal theory can justify these imprisonments, but the area of law that comes closest is that which addresses the confinement of the enemy prisoner

³ Aristotle, *Politics* I, 1.

of war. Petitioners were captured and are held by the military; they were classified as "enemy combatants," Respondents have always claimed this was done under the President's war powers; the captivity remains today, as it was in the beginning, clothed in martial rhetoric. Petitioners are, we hear, "detainees" in the "global war on terror."

21. A well-developed body of law regulates the imprisonment of prisoners of war (known as "EPWs") under Army Regulation 190-8, Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees (1997), and the Military Police Internment/Resettlement Operations (the "Field Manual") No. FM 3-19.40. Affording EPWs social interaction is *required*. "Except in extreme circumstances, in the best interests of the individual, EPW/RP will not be interned in correctional facilities housing military or civilian prisoners." AR 190-8 § 3-2(b). "EPW will be interned in camps according to their nationality and language. *They will not be separated from other prisoners belonging to the Armed Forces with which they were serving at the time of their capture, except with their consent.*" *Id.* 3-4 (b) (emphasis added). The enemy prisoner of war's lot abounds with social activity: he eats communally, FM 3-19.40 Ch. 4-66, he may have a job, he may pursue social leisure activities; he may plant gardens, play musical instruments, read newspapers.⁴ The Field Manual even contains a POW

⁴ See AR 190-8 § § 3-4, 3-5, 4-1.

camp layout that makes graphically clear that prisoners are to live communally and not to be isolated. FM 6-8, fig. 6-1. One example among many in the Field Manual illustrates how far gone Camp 6 is. "When practical, EPWs should raise vegetables for their use; the labor is classified as paid work. Do not overlook the importance of developing an agriculture program. Agriculture and gardening projects are particularly desirable because they provide gainful employment for several individuals." FM 3-19.40 Ch. 4-86.

22. In short, solitary confinement is simply unthinkable under our well-developed rules for detaining the enemy. The very concept is labeled, "confinement," and reserved as a disciplinary tool for serious infractions of camp discipline, with strict procedural safeguards and time limits. AR 190-8 3-7(c).

23. The principle that a captive must not be isolated also runs deeply through our federal system of criminal incarceration. "In consideration of inmate education, occupation, and leisure-time needs, the Bureau of Prisons affords inmates the opportunity to improve their knowledge and skills through academic, occupation and leisure-time activities." 28 CFR §544.80. "The Warden is to ensure, to the extent possible, that leisure activities are provided to meet social, physical, psychological, and overall wellness needs of inmates." *Id.* §544.32. Prisoners are encouraged "to make constructive use of leisure time and offers movies, games, sports, social activities, arts and hobbycrafts, wellness and other

group and individual activities.” *Id.* §544.31(b).

24. For example, a person duly charged and convicted of a violent crime - and sentenced to serve a life term at Leavenworth, may expect to participate in a community both inside and outside the prison walls. Within the prison he may eat meals communally, work in a job with other people, study GED and other courses, and participate in leisure activities and social sports. *See* http://www.lvarea.com/data/usp_info.htm#Programs. He participates indirectly in the outside world too, with television, radio, movies, newspapers, magazines, family visits, letters, photographs. *Id.* The Uighurs have none of this. The regime at Camp 6 approaches, and in some respects surpasses in psychological brutality the most extreme forms of punishment imposed only on a handful of the most violent and incorrigible convicted offenders, held at the “ADMAX” facility at Florence, Colorado.

25. That even a guilty or violent prisoner must be afforded human contact is a staple of all civilized incarceration regimes. *See generally*, Geneva Convention III Relative to the Treatment of Prisoners of War art. 25, Aug. 12, 1949, 6 U.S.T. 2063 (“Prisoners of war shall be quartered under conditions as favourable as those for the forces of the Detaining Power who are billeted in the same area. The said conditions shall make allowance for the habits and customs of the prisoners and shall in no case be prejudicial to their health.”); art. 38 (“The

Detaining Power shall encourage the practice of intellectual, educational, and recreational pursuits, sports and games amongst prisoners, and shall take the measures necessary to ensure the exercise thereof by providing them with adequate premises and necessary equipment. Prisoners shall have opportunities for taking physical exercise, including sports and games, and for being out of doors. Sufficient open spaces shall be provided for this purpose in all camps.); art. 71 (“Prisoners of war shall be allowed to send and receive letters and cards”).⁵

26. In sum, Respondents have imposed on Petitioners a regimen of isolation and cruelty unheard of in penal or military law, and unknown to civilized people. They have done so not with respect to convicted, or even accused terrorists, but only with respect to so-called “enemy combatants.” As the Petition shows, these classifications are transparently false.

27. This matter is, regrettably, even worse than the fig-leaf “enemy combatant” classification would suggest. When Petitioners urged expedition, this Court was assured, at 24-26 of the Cross-Motion to Stay, that the “Annual Review Boards” afford all the process necessary to address claims of innocence. What was

⁵ See also INS Detention Standard --Disciplinary Policy III.H (identifying “segregation” as a form of punishment generally not to exceed 60 days); Fourth United Nations Congress on Prevention of Crime and Treatment of Offenders, Standard Minimum Rules for the Treatment of Prisoners (1955) at Rules 11 (right to read or work by natural light); 21 (right to suitable exercise in the open air); 27 (“no more restriction than is necessary for safe custody and well-ordered *community* life”) (emphasis added), 37 (rights to communicate with family and reputable friends); 39 (right to regular information and news), available at http://www.unhcr.ch/html/menu3/b/h_comp34.htm.

learned in Guantanamo this week was quite a different thing, and raises deeply troubling questions about Respondents' credibility with this Court.

28. Abdunnasser, one of the 13 identically-situated Uighurs, and on information and belief the only one who reads some English, reported that *he was cleared by the ARB more than a year ago*. Decl. ¶ 43-46. Some of the other Petitioners advised that they neither participated in nor received an ARB, nor a notice of any Annual Review Board. Were they also cleared? Did they have ARBs at all? Respondents have never produced any evidence of any ARB result. But this much is sure: at least one of the Uighurs, whose case is identical to those of the others, has been cleared for more than a year. This result got him assignment to the equivalent of a Supermax prison.

29. All of Respondents' "processes," from the CSRTs to the ARBs, are utterly arbitrary, and as we discovered with the Non-combatant cases, meaningless. Prisoners go when the Respondents say they can go, and not before, regardless of the facts. After being cleared, the conditions of their captivity are made more monstrous.

30. In sum, the declaration shows that Respondents' deliberate acts, undertaken within days after the filing of the Petition, have profoundly degraded Petitioners' health. These facts must be placed before the Court as it considers the

Motion to Expedite and Cross Motion for Stay. Respondents cannot be heard simultaneously to request yet more delay and subject Petitioners to this kind of cruelty. Their isolation of the Petitioners requires that this Court immediately hear and determine the Petition.

Conclusion

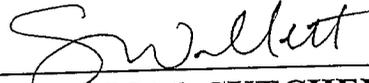
31. When these Petitioners asked for *habeas* relief in 2005, the district judge did nothing. All through 2006 Petitioners urged this Court to direct the lower court to hear the case, and *it* did nothing. Now it is 2007, and Petitioners have been sent to the dungeon above the ground, and the question is whether this Court will indulge yet another Executive call for judicial inaction.

32. Truth is a tortoise, but it overtakes Propaganda's hare in the end. It will be so for Guantanamo. There is no doubt -- not the slightest -- of what that truth will show about these Petitioners, and what that truth, so long concealed, will say about this nation. The question for this Court, and for this Court alone, is whether that truth will be aired before, or after the Executive's senseless new regime of solitary confinement has driven innocent men insane.

WHEREFORE, the record should be supplemented with the Declaration filed herewith, the Motion to Expedite should be allowed, and the Cross-Motion

for Stay denied, and the Petitioners afforded such other and further relief as may be just and proper.

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