

**ORAL ARGUMENT NOT YET SCHEDULED**

No. 13-5218

(consolidated with Nos. 13-5220 and 13-5221)

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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SAEED MOHAMMED SALEH HATIM, et al.,

Petitioners-Appellees,

v.

BARACK H. OBAMA, et al.,

Respondents-Appellants.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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BRIEF FOR THE APPELLANTS

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## **CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES**

### **PARTIES AND AMICI**

The parties in Hatim v. Obama, No. 13-5218, are the same as the parties in No. 05-cv-1429 (D.D.C.): Saeed Mohammed Saleh Hatim, Ali Mohammed Saleh Al-Salahi, Mohammed Nasser Yahia Abdullah Khussrof, and Fatima Nasser Yahia Abdullah Khussrof, Petitioners-Appellees, and Barack Obama, Chuck Hagel, Richard W. Butler, and Donnie Thomas, Respondents-Appellants.

The parties in Hentif v. Obama, No. 13-5220, are the same as the parties in No. 06-cv-1766 (D.D.C.): Fadhel Hussein Saleh Hentif and Haykal Mohammed Saleh Hentif, Petitioners-Appellees, and Barack Obama, Chuck Hagel, Richard W. Butler, and Donnie Thomas, Respondents-Appellants.

The parties in al Shubati v. Obama, No. 13-5221, are the same as the parties in No. 07-cv-2338 (D.D.C.): Abdurrahman Abdallah Ali Mahmoud Al Shubati and Abdullah Ali Mahmoud Al Shubati, Petitioners-Appellees, and Barack Obama, Chuck Hagel, Richard W. Butler, and Donnie Thomas, Respondents-Appellants.

The parties in district court in In re Guantanamo Bay Detainee Litigation, Misc. No. 12-mc-398 are: Zakaria al-Baidany, Hayil Aziz Ahmed al-Mithali, Abdu al-Qader Hussai al-Mudafari, Abdurrahman al-Shubati, Yasein Khasem Mohammad Esmail, Mohammed Rajeb Abu Ghanem, Saeed Mohammed Saleh Hatim, Fadhel Hussein Saleh Hentif, Uthman Abdulrahim Moha Uthman,

Petitioners, and Barack Obama, Respondent. Jason Leopold is a movant in district court.

There are no amici in this Court.

### **RULING UNDER REVIEW**

This is an appeal from an order of the district court (Lamberth, C.J.), entered on July 11, 2013, in In re Guantanamo Bay Detainee Litigation, Misc. No. 12-mc-398 (RCL); Hatim v. Obama, No. 05-cv-1429 (RCL); Hentif v. Obama, No. 06-cv-1766 (RCL); and al Shubati v. Obama, No. 07-cv-2338 (RCL). The order was entered as Docket #426 in No. 05-cv-1429. The memorandum opinion supporting this order was entered as Docket #427.

### **RELATED CASES**

There are no other related cases currently pending in this Court or in any other court of which counsel are aware.

Respectfully submitted

/s/ Edward Himmelfarb

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## **GLOSSARY**

### **Abbreviation**

### **Definition**

ICRC	International Committee for the Red Cross
JDG	Joint Detention Group
JTF-GTMO	Joint Task Force-Guantanamo
SOUTHCOM	United States Southern Command

## STATEMENT OF JURISDICTION

The district court asserted jurisdiction under 28 U.S.C. 2241. As we explain in Point I of the Argument, the court lacked jurisdiction to issue this order. See 28 U.S.C. 2241(e)(2).

The court's order was entered on July 11, 2013. The notice of appeal filed on July 17, 2013, was timely under 28 U.S.C. 2107(b) and Rule 4(a)(1)(B) of the Federal Rules of Appellate Procedure.

This Court has jurisdiction under 28 U.S.C. 1292(a)(1), in that the order on appeal is an order granting an injunction. See Salazar v. District of Columbia, 671 F.3d 1258, 1262 n.4 (D.C. Cir. 2012) (citing this Court's "broad definition of an injunction as any order directed to a party, enforceable by contempt, and designed to accord or protect some or all of the substantive relief sought by a complaint in more than preliminary fashion") (internal quotation marks omitted).

## STATEMENT OF ISSUES

1. Whether 28 U.S.C. 2241(e)(2) withdraws the district court's jurisdiction over the detainees' challenge to security procedures at the Guantanamo detention facility, because that challenge concerns an "aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States."

2. Whether, assuming the district court had jurisdiction, the court erred

in substituting its judgment for that of the military, and imposing its own set of rules governing how detainees will be searched, where meetings with counsel will be conducted, and which vehicles the military must use to transport detainees.

### **STATUTES AND REGULATIONS**

Section 2241(e)(2) provides in relevant part as follows: "(2) \* \* \* 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."

### **STATEMENT OF THE CASE**

This appeal concerns security procedures used at the military detention facility in Guantanamo Bay. The security procedures include a full-body frisk whenever a detainee is moved outside his camp for any reason, including medical appointments, or meetings or phone calls with counsel, and centralized meeting facilities, which are used for meetings and phone calls with counsel. The search procedures are also used whenever a detainee has any external contact, whether with counsel, a representative of the International Committee for the Red Cross (ICRC), or any other non-Joint Task Force-Guantanamo (JTF-GTMO) person. Moreover, the full-frisk search procedure used by JTF-GTMO is the standard

procedure used at Army detention facilities and is comparable to search procedures used in civilian facilities in the United States. JTF-GTMO officials implemented these security procedures because, in their judgment, the procedures were necessary to maintain the safety and the security of detainees, personnel, and visitors at the detention facility.

Although the procedures apply broadly and are not limited to counsel contacts, the district court nevertheless granted the detainees' motion, holding that the procedures restrict Guantanamo detainees' access to counsel – despite the fact that counsel visits and calls between detainees and counsel continue to be arranged in significant numbers. As a result, the court's order enjoins the Department of Defense from implementing routine security procedures at a detention facility holding enemy forces.

The government has appealed the order, and this Court has granted a stay pending appeal.

### **STATEMENT OF FACTS**

1. The appellees are detainees at the military detention facility at Guantanamo Bay. Some, but not all, of the appellees have petitions for writs of habeas corpus pending in the district court or on appeal to this Court. Under a district court protective order issued by Judge Hogan on September 11, 2008, detainees and their habeas counsel are permitted to meet in person and, at the discretion of

JTF-GTMO officials, converse by telephone, subject to appropriate security procedures.

The policy of the United States is to ensure that detainees at Guantanamo have meaningful access to counsel to pursue their habeas rights. See Decl. of General John F. Kelly, U.S.M.C. ¶¶ 11-14, J.A. 181-82.<sup>1</sup> From January through May of this year, over 193 attorney visits were scheduled. Id. ¶ 12, J.A. 181-82. And from March through May of this year, approximately 100 calls between detainees and counsel were arranged, almost as many as scheduled in all of 2012. Id.<sup>2</sup>

2. Most detainees are housed in either Camp 5 or Camp 6, which are separate but adjacent housing facilities operated by JTF-GTMO. Detainee visits with counsel and telephone calls with family members occur at a separate location, Camp Echo, requiring a brief van ride for transportation. Slip op. at 4-5, J.A. 145-46. Given telecommunication requirements, detainee telephone calls with counsel occur at another separate location, Camp Delta, again a brief van ride away. Id.

Under standard procedure, detainees are searched whenever they are moved

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<sup>1</sup> Gen. Kelly's declaration was submitted below in support of the government's motion for a stay pending appeal.

<sup>2</sup> The Department of Defense informs us that, since May 2013, JTF-GTMO has scheduled an additional 291 legal visits and an additional 90 attorney calls, numbers that easily surpass the totals in 2012.

to a facility external to their housing camp, including for phone calls to family or counsel, for medical appointments, or for meetings with any non-JTF-GTMO personnel, such as ICRC visitors, or the detainees' counsel. Searches are conducted twice, once before leaving the camp or attending the meeting, and once upon conclusion of their external contact.

a. Searches. Until recently, search policy did not permit guards to search the area from a detainee's waist to his mid-thigh unless authorized by the Joint Detention Group (JDG) Commander. Slip op. at 6, J.A. 147. The JDG Commander in place when the earlier policy was implemented recognized that it "carrie[d] a level of risk" but "accepted that risk out of an elevated respect for religious concerns of the detainees." Walsh Report at 26 (available at <http://tinyurl.com/dy4nyf>).

On May 3, 2013, however, the United States Southern Command (SOUTHCOM) and JTF-GTMO leadership, including the JDG Commander, after considering new information and evaluating the risks involved, determined that the search procedure should be revised. This decision was based on three factors. First, after taking command of the JDG, Col. John V. Bogdan, U.S. Army, became concerned that the search procedure then in use (the so-called "modified search procedure") might be ineffective in identifying weapons and contraband. Kelly Decl. ¶ 9, J.A. 180; Decl. of Col. John V. Bogdan, U.S. Army ¶ 17, J.A. 111-

12.<sup>3</sup>

Second, the September 2012 suicide of detainee Adnan Farhan Abd Latif (ISN 156), who overdosed on medication that he had hoarded over a period of days, prompted a command investigation. The resulting command investigation report, conducted by an objective senior officer in the rank of Colonel who was not assigned to JTF-GTMO or the JDG, was issued in November 2012 and recommended that Col. Bogdan reconsider the search procedures then being used, which were deemed possibly ineffective to detect hoarded medications. Kelly Decl. ¶¶ 7-8, J.A. 179-80. After carefully considering the investigation report, JTF-GTMO leadership determined that safety and security at the base required more thorough search protocols, but also decided to phase in the new procedures gradually to minimize camp disruption. Id. ¶ 9, J.A. 180.

Third, when Camp 6 was converted to single-cell housing in April 2013, JTF-GTMO personnel discovered that detainees were in possession of potentially dangerous contraband, such as shanks, nails, and sharpened metal rods (which could be turned into weapons). Kelly Decl. ¶ 10, J.A. 181. This discovery convinced Col. Bogdan that he could no longer delay implementing the new search

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<sup>3</sup> The declaration of Col. Bogdan, which describes the search procedure in detail, was filed under seal in district court and is included in unredacted form in the Joint Appendix, filed under seal.

procedure in full. Id. Confirming Col. Bogdan's concern, JTF-GTMO uncovered another large stash of contraband in late June 2013. Id. ¶ 18, J.A. 183. Photographs of the contraband are attached as Exhibit A to General Kelly's declaration. J.A. 188-89. Among the seized items were nails, shanks, and a 10-inch T-handled Allen wrench. Kelly Decl. ¶ 18, J.A. 183.

Given what Gen. Kelly called "an unacceptable risk" of using the existing search procedures, Kelly Decl. ¶¶ 9, 10, J.A. 180-81, JTF-GTMO instituted the standard protocol that includes frisking the area between the detainee's waist and mid-thigh and hand-wanding the detainee's entire body with a metal detector, an Army-wide procedure in which JTF-GTMO personnel have been trained, and which is used at other military detention facilities and prisons worldwide. Slip op. at 6, J.A. 147. The security procedures were not designed to restrict counsel access, but instead were implemented because, in the judgment of the military officials at Guantanamo, they were necessary to maintain the safety and the security of detainees, personnel, and visitors at the detention facility. Kelly Decl. ¶ 11, J.A. 181.

b. Location of Meetings. Prior to June 2012, two rooms at Camp 6 were used occasionally for counsel visits.<sup>4</sup> After Col. Bogdan assumed command of the

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<sup>4</sup> In Camp 5, there were no rooms available for meetings with counsel. Bogdan Decl. ¶ 11, J.A. 110. Although the district court referred to a room in  
(continued...)

JDG in June 2012 and reviewed all policies and procedures for the operation of the detention facility, he concluded that counsel meetings in Camp 6 should no longer be permitted. His reasons for this conclusion, grounded in facility security, included (a) the need for counsel to be screened at Camp Echo; (b) Camp Echo's centralized room-monitoring facility, which frees guards for duties other than standing watch outside the meeting room, and permits counsel to watch DVDs, read books, and share food with their clients; and (c) Camp Echo's larger rooms, which include a separate restroom facility in each meeting room and a space that can be used by the detainee for prayer (alleviating the need for mid-meeting detainee movement and resultant meeting disruption), both of which are absent in Camp 6. Bogdan Decl. ¶¶ 5, 6, 14, J.A. 108-09, 111.

c. Transportation. When detainees are transported from Camp 5 or Camp 6 for legal or other calls and meetings external to their camp, they are taken in full-sized vans. On April 1, 2013, JTF-GTMO introduced a number of new vans after completing a routine fleet upgrade. Bogdan Decl. ¶ 22, J.A. 113. The new vans addressed detainee complaints by providing better air conditioning than the older vans. While the new vans have larger air ducts that improve air flow, they

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Camp 5 that was used for a counsel meeting in 2009, that room is very small, is not soundproofed, and lacks visual monitoring capability. Kelly Decl. ¶ 23, J.A. 184-85.

have correspondingly lower ceilings. The benches on which the detainees sit were initially made too high for the lower ceiling of the new vans, causing the detainee to have to sit in a hunched position for the short ride to a new location. However, if a detainee's documented medical condition required, JTF-GTMO would transport him in an older van that has higher ceilings. Slip op. 7-8, 33-34, J.A. 148-49, 174-75. After the district court proceedings here, however, JTF-GTMO finished modifying the new vans to enable all detainees to sit upright, and those vans are currently in use.

3. The present dispute stems from two motions. Detainees Abdurrahman Abdallah Ali Mahmoud al Shabiti and Fadhel Hueein Saleh Hentif filed an Emergency Motion to Enforce the Right of Access to Counsel. Detainee Saeed Mohammed Saleh Hatim filed an Emergency Motion Concerning Access to Counsel. In both motions, the detainees alleged that recently changed security procedures inhibited the right to counsel access and sought an order permitting detainees to meet with counsel without being subject to the new security protocol. These detainees also sought an order permitting them to meet with counsel within their housing camps, and an order precluding the transportation of detainees in new vans that they contend force them into painful stress positions.

On July 11, 2013, the district court issued an opinion and order granting the motions in part. The court first held that it was not deprived of jurisdiction under

28 U.S.C. 2241(e)(2), because the present challenge to the security procedures is "not a general challenge to petitioners' treatment of conditions of confinement," but instead a "narrow challenge to alleged government interference to petitioners' access to counsel that prevents them from prosecuting habeas cases before this Court." Slip op. at 13, J.A. 154.

On the merits, the court held that the security procedures implemented by JTF-GTMO violate the detainees' habeas rights. The court stated that the deferential standard governing prison regulations in Turner v. Safley, 482 U.S. 78 (1987), is logically inapplicable here, since this case involves the right to pursue a petition for a writ of habeas corpus. Slip op. at 16, J.A. 157. However, the court found no need to define an alternate standard, because it held that the procedures fail under Turner, which it considered more deferential to the government.

With respect to detainee searches, the court held that the rationale for the new procedures was a pretext for an intent to interfere with access to counsel. It first opined that the procedures had no rational connection to security, slip op. at 20, J.A. 161, and were an "exaggerated response" to security concerns. Id. at 25, 28, 33, J.A. 166, 169, 174. The court suggested that the earlier search procedures previously in effect at Guantanamo had not in fact been ineffective. Id. at 21-22, J.A. 162-63. Although Col. Bogdan explained that the decision to return to standard searches, including in the groin area, was based on the investigation into

detainee Latif's suicide and concerns for the safety of JTF-GTMO personnel and detainees from smuggled contraband, Bogdan Decl. ¶ 18, J.A. 112; see also Kelly Decl. ¶ 9, J.A. 180, the court dismissed those concerns. The court expressed skepticism about whether Latif had in fact hidden the medications in the groin area, slip op. at 22, J.A. 163, and it announced that the reliance on Latif's suicide had "the patina of pretext," id., and was "merely an afterthought," since the new policy was not fully implemented until six months later. Id. at 23, J.A. 164.

The court accepted that the discovery of weapons and other contraband in the possession of detainees would be reasonably related to an interest in security, but it nevertheless determined that these concerns did not justify the new search procedure in light of the government's "previous actions at Guantanamo" unrelated to the search policy, which the court characterized as seeking to restrict detainee access to counsel "seemingly at every turn." Id. at 24, J.A. 165. These previous actions, the court held, were evidence that the search policy "is mere pretext" to deprive detainees of access to counsel. Id. at 25, J.A. 166. The court then held that the government may not present detainees with "the choice between submitting to a search procedure that is religiously and culturally abhorrent or foregoing counsel," a situation the court believed "effectively presents no choice for devout Muslims like petitioners." Id.

With respect to the location of counsel visits and phone calls, the court

acknowledged that the protective order entered by Judge Hogan in September 2008 allows JTF-GTMO to designate the room, slip op. at 28-29, J.A. 169-70, but held that the use of Camp Delta and Camp Echo was unreasonable, and it "easily dismissed" all of the justifications offered for using those locations. Id. at 30, J.A. 171. The court suggested that depriving detainees who are engaged in a hunger strike of the use of visit rooms in their own housing units "seems less like a valid choice" than an attempt to deny counsel access "through alternative means." Id. at 32, J.A. 173.

Last, while recognizing that new vans were being used to provide better air conditioning, the court held that certain detainees must be given the choice of being transported in the old vans. Slip op. at 32-33, J.A. 173-74.

4. This Court issued an administrative stay of the district court's order on July 17, 2013, and a stay pending appeal on August 15, 2013.

### **SUMMARY OF ARGUMENT**

The district court in this case took the unprecedented step of restricting a military commander from implementing routine security procedures at a detention facility holding enemy forces, despite the universally recognized need for the maintenance of discipline and order in law-of-war detention facilities. In doing so, the court disregarded the compelling security concerns articulated by the commander of the JDG, including the discovery of weapons and other contraband

and the suicide of a detainee whose ability to hoard medication may have been aided by the prohibition against searching a detainee's groin area. In fact, the district court went so far as to suggest that the security procedures were merely pretexts designed to deny detainees the right to meet with counsel, even though the procedures apply across the board (and are not limited to meetings with counsel), and even though counsel visits and phone calls have continued under the procedures.

I. The district court lacked jurisdiction over this challenge to the conditions under which these detainees are confined at Guantanamo. Congress explicitly barred jurisdiction over cases "relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement" of detainees held as enemy combatants. 28 U.S.C. 2241(e)(2). The search procedures to which detainees are subjected when moved outside their camps or when having contact with any non-JTF-GTMO person are classic conditions of confinement, as are the policies regarding meeting rooms and the use of vans to transport detainees.

The district court's rationale that these matters are outside the scope of section 2241(e)(2) because they interfere with the detainees' access to counsel is incorrect. The search procedures are central to the security of the military detention facility, and they apply to all detainee movements that heighten exposure of the detainee to contraband, whether it involves a phone call to family, a medical

visit, a meeting with the ICRC, or a call or visit with counsel. Under the district court's rationale, section 2241(e)(2) could be easily evaded simply by recasting a conditions-of-confinement claim as a complaint about access to counsel. Section 2241(e)(2) does not allow the district court to bootstrap itself into jurisdiction over conditions of confinement simply because they are in some way connected to access to counsel.

II. Even if the district court had jurisdiction, its injunctive order cannot stand. The challenged policies are reasonably related to the legitimate governmental interest in base security. As the declaration of Col. Bogdan demonstrates, it was necessary to change the former search procedures, which had been implemented out of cultural and religious sensitivities, because the risks they posed were no longer acceptable. A November 2012 command investigation report into the suicide of a detainee by overdose found that the detainee hoarded medications and recommended reconsideration of the modified search procedures, because they were thought ineffective to detect hoarded medications. In April 2013, a stash of contraband was discovered among the detainees, including homemade weapons, such as shanks, and prohibited electronic devices.

The district court recognized that this policy was reasonably related to the governmental interest in security at Guantanamo, but it held that the true subjective intent behind the policy was a desire to limit detainee access to counsel. This

Court, however, has held that Turner v. Safley establishes an objective standard similar to rational basis in the equal-protection context. Subjective motivation is outside the scope of Turner analysis. In any event, Col. Bogdan's declaration, confirmed by the declaration of Gen. Kelly, amply demonstrates the reasonable bases for the policy. The court's inference of an improper motive is unsupported by the record. Further, the district court's conclusion that the former search policy, in which the groin area was not searched, is a ready alternative to the full-frisk searches fails to respect the judgment of military officials overseeing a detention facility for enemy forces that the limited searches posed an unacceptable security risk.

## **ARGUMENT**

**Standard of Review.** On appeal from the grant of an injunction, "questions of law are reviewed 'essentially de novo.'" Ellipso, Inc. v. Mann, 480 F.3d 1153, 1157 (D.C. Cir. 2007) (quoting Serono Labs., Inc. v. Shalala, 158 F.3d 1313, 1318 (D.C. Cir. 1998)).

### **I. THE DISTRICT COURT LACKED JURISDICTION TO ISSUE THE ORDER.**

The district court was without jurisdiction to issue its order enjoining the use of full-frisk searches of detainees. Congress has statutorily barred jurisdiction over conditions-of-confinement cases like this one.

A. Federal courts are courts of limited subject matter jurisdiction. See,

e.g., Al-Zahrani v. Rodriguez, 669 F.3d 315, 318 (D.C. Cir. 2012). Accordingly, for a federal court to exercise jurisdiction, "the Constitution must have supplied to the courts the capacity to take the subject matter and an Act of Congress must have supplied jurisdiction over it." Id. The rule that a court's jurisdiction must be established as a threshold matter "is 'inflexible and without exception.'" Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 94-95 (1998) (quoting Mansfield, C. & L.M.R. Co. v. Swan, 111 U.S. 379, 382 (1884)).

Here, through section 7 of the Military Commissions Act of 2006, 28 U.S.C. 2241(e), Congress has exercised its constitutional prerogative to withdraw from the federal courts jurisdiction to adjudicate conditions of confinement and treatment claims by detainees at Guantanamo Bay:

[N]o 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.

28 U.S.C. 2241(e)(2) (emphasis added). The clear language of section 2241(e)(2) unequivocally bars conditions-of-confinement claims by Guantanamo detainees.<sup>5</sup>

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<sup>5</sup> As the district court itself recognized, slip op. at 13, section 2241(e)(2) remains viable after Boumediene v. Bush, 553 U.S. 723 (2008), which invalidated only section 2241(e)(1) with respect to Guantanamo detainees. See Al-Zahrani v. Rodriguez, 669 F.3d 315, 319 (D.C. Cir. 2012); Kiyemba v. Obama, 561 F.3d 509, (continued...)

This Court has held that section 2241(e)(2) means what it says. See Al-Zahrani v. Rodriguez, 669 F.3d at 319 (because Bivens action is "plainly" an action other than habeas corpus, "this action is excluded from the jurisdiction of this court by the 'plain language' of an Act of Congress"). Moreover, numerous district court decisions have held that section 2241(e)(2) barred jurisdiction over challenges to a variety of conditions of confinement.<sup>6</sup>

B. Just as in those cases, the district court here had no jurisdiction to enjoin the use of full-frisk search procedures, because those procedures involve the "treatment" of detainees and are "conditions of confinement" within the meaning of section 2241(e)(2).

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512 n.1 (D.C. Cir. 2009), cert. denied, 559 U.S. 1005 (2010).

<sup>6</sup> See Aamer v. Obama, \_\_\_ F. Supp.2d \_\_\_, 2013 WL 3651393, at \*4 (D.D.C. July 16, 2013), appeal pending, No. 13-5223 (D.C. Cir.) (challenge to enteral feeding of detainees engaged in hunger strike); Dhiab v. Obama, \_\_\_ F. Supp.2d \_\_\_, 2013 WL 3388650 (D.D.C. July 8, 2013), appeal pending, No. 13-5076 (D.C. Cir.) (same); Tumani v. Obama, 598 F. Supp.2d 67, 69 (D.D.C. 2009) (demand to transfer detainee "to a less secure facility, providing access to his father and prohibiting further interrogations"); al-Adahi v. Obama, 596 F. Supp.2d 111, 119 (D.D.C. 2009) (actions taken in response to hunger strike); al-Shurfa v. Obama, No. 05-431, 2009 WL 1451500, at \*1 (D.D.C. May 21, 2009) (transfer to a less restrictive camp); Khadr v. Bush, 587 F. Supp.2d 225, 230, 234-37 (D.D.C. 2008) (request for transfer to "rehabilitation and reintegration program appropriate for former child soldiers"); In re Guantanamo Bay Detainee Litigation, 577 F. Supp.2d 312, 315-16 (D.D.C. 2008) (request for mattress and blanket). See also Ameur v. Gates, \_\_\_ F. Supp.2d \_\_\_, 2013 WL 3120205 (E.D. Va. June 20, 2013) (section 2241(e)(2) deprives court of jurisdiction to consider detainee's claims related to detention and treatment).

In the domestic law-enforcement context, the meaning of "conditions of confinement" is well established:

"Conditions of confinement" is not a term of art; it has a plain meaning. It quite simply encompasses all conditions under which a prisoner is confined for his term of imprisonment. These include terms of disciplinary or administrative segregation such as keeplock or solitary confinement, as well as more general conditions affecting a prisoner's quality of life such as: the revocation of telephone or mail privileges or the right to purchase items otherwise available to prisoners, and the deprivation of exercise, medical care, adequate food and shelter, and other conditions that, if improperly imposed, could violate the Constitution. In short, any deprivation that does not affect the fact or duration of a prisoner's overall confinement is necessarily a condition of that confinement.

Jenkins v. Haubert, 179 F.3d 19, 28 (2d Cir. 1999) (emphasis added and citations omitted). In other words, in this domestic context, there is a sharp distinction between conditions of confinement (which domestic prisoners may challenge only in a civil-rights action) and the fact or duration of confinement (which may be challenged by way of habeas). See, e.g., Robinson v. Sherrod, 631 F.3d 839, 840-41 (7th Cir.), cert. denied, 132 S. Ct. 397 (2011) ("When there isn't even an indirect effect on duration of punishment \* \* \* we'll adhere to our long-standing view that habeas corpus is not a permissible route for challenging prison conditions."); Standifer v. Ledezma, 653 F.3d 1276, 1280 (10th Cir. 2011) (prisoners who wish to challenge only the conditions of their confinement, as opposed to its fact or duration, may not do so in federal habeas corpus proceedings).

Search procedures at domestic detention facilities are routinely treated as conditions of confinement. See, e.g., Block v. Rutherford, 468 U.S. 576, 578 (1984) (pretrial detainees challenged "various policies and practices of the jail and conditions of their confinement," including "jail's practice of permitting irregularly scheduled shakedown searches of individual cells in the absence of the cell occupants"); Bell v. Wolfish, 441 U.S. 520, 523, 527 (1979) (suit challenging "numerous conditions of confinement and practices at the Metropolitan Correctional Center" alleged that pretrial detainees were subject to, among other things, "improper searches"); Florence v. Board of Chosen Freeholders, 621 F.3d 296, 302 (3d Cir. 2010), aff'd, 132 S. Ct. 1510 (2012) ("Among the conditions of confinement challenged by the inmates [in Bell v. Wolfish] was the policy of strip and visual body-cavity searches after contact visits with outsiders.").

There is no indication that Congress could have intended the phrase "conditions of confinement" in section 2241(e)(2) to be interpreted differently from the well established meaning of the phrase. See Dunn v. CFTC, 519 U.S. 465, 478 (1997) (courts should interpret statutes in light of contemporary legal context in which statute was drafted). Indeed, proponents of the Military Commissions Act indicated that detainees should not be allowed to use the courts to challenge "conditions of confinement," a term within which they included "base security procedures." 152 Cong. Rec. S10367 (daily ed. Sept. 28, 2006) (Sen. Graham).

C. The district court nevertheless held that it had jurisdiction to enjoin the military's security procedures on the theory that these procedures affected the detainees' access to counsel for their habeas petitions:

The instant litigation, however, is not a general challenge to petitioners' treatment or conditions of confinement. Instead, it is a narrow challenge to alleged government interference to petitioners' access to counsel that prevents them from prosecuting habeas cases before this Court. Petitioners' challenge falls squarely within the Court's jurisdiction.

Slip op. at 13, J.A. 154. The court inferred from a statement in Boumediene v. Bush, 553 U.S. 723 (2008) – that the Supreme Court was not "attempt[ing] to anticipate all of the evidentiary and access-to-counsel issues" that the district courts may face – that district courts have unrestricted jurisdiction over such issues. Id. at 13-14, J.A. 154-55. It then distinguished the numerous contrary district court cases as being unrelated to the right to counsel. Id. at 14, J.A. 155.

But the district court applied a concept of access to counsel that is logically flawed and considerably overbroad. The district court's decision is based upon the notion that any condition of confinement that affects – however indirectly – the detainees' interaction with counsel falls within its jurisdiction over habeas cases and outside the jurisdictional bar for conditions of confinement found in section 2241(e)(2), no matter how universally the condition applies to the detainees outside of the counsel context. Here, the contested search procedures apply uni-

versally, whenever a detainee is moved outside his camp or has contact with a non-JTF-GTMO person, regardless whether it is the detainee's counsel. Nor can one reasonably conclude that the disputed security procedures are so burdensome that they preclude counsel visits. As Gen. Kelly documented, JTF-GTMO has facilitated numerous detainee meetings with counsel under these procedures. Kelly Decl. ¶ 12, J.A. 181-82. The court, however, incorrectly treated the search policy as a restriction on the relationship with counsel.<sup>7</sup>

Thus, under the district court's rationale, section 2241(e)(2) could be easily evaded simply by recasting a conditions-of-confinement claim as a complaint about access to counsel. If such artful pleading were upheld, a court could dictate all of the internal security procedures governing a military detention facility, and not just protect detainees' access to habeas. Indeed, the district court's decision applies regardless of whether a detainee has a pending or contemplated habeas petition.<sup>8</sup>

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<sup>7</sup> As we will explain in Point II below, the court improperly considered the subjective motivation of the military officers behind the new policy and then incorrectly inferred a motivation to restrict or deny access to counsel in the face of a sworn declaration to the contrary.

<sup>8</sup> The district court previously held that its protective order "governs access to counsel issues for Guantanamo detainees who have a right to petition for habeas corpus relief, whether or not such a petition has been dismissed or denied." See In re Guantanamo Bay Detainee Continued Access To Counsel, 892 F. Supp.2d 8, 10 (D.D.C. 2012) (Lamberth, C.J.). Two of the detainees in this appeal, Yasein (continued...)

Conditions of confinement do not lose their statutory status as conditions of confinement simply because the policies also apply to visits or calls with counsel. If the district court is correct that general policies on the use of vans, meeting rooms, and security procedures at Guantanamo do not count as conditions of confinement because they apply to counsel visits as well as to other movements of detainees, it is difficult to discern any aspect of the military's management of the Guantanamo base that the court cannot regulate in the guise of protecting access to counsel. Under the district court's holding, any aspect of detention that causes a particular detainee to refuse to meet with counsel – dissatisfaction with security procedures, the condition of the detainee's cell, food, medical care, or recreational opportunities – becomes a "counsel access" claim for which the jurisdictional bar under section 2241(e)(2) no longer applies. The language and purpose of section 2241(e)(2) do not permit such a result.

**II. EVEN ASSUMING THE DISTRICT COURT HAD JURISDICTION, THE COURT HAD NO BASIS FOR ENJOINING THE MILITARY FROM APPLYING ITS SECURITY MEASURES TO DETAINEES, OR FOR DICTATING THE LOCATIONS OF COUNSEL VISITS AND THE MEANS OF TRANSPORTATION.**

In the event the Court determines that this is not a "conditions of confine-

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Khasem Mohammad Esmail (ISN 522) and Uthman Abdulrahim Moha Uthman (ISN 27), no longer have pending habeas claims.

ment" case within the meaning of the section 2241(e)(2) jurisdictional bar, the Court should reverse the district court's injunction against the Guantanamo policy on the merits, because, under Turner v. Safley, 482 U.S. 78 (1987), it is reasonably related to a legitimate penological interest – namely, security at the Guantanamo military detention facility.

**A. The Proper Standard Of Review Is At Least As Deferential As Turner v. Safley.**

While expressing doubt, the district court decided this case under the standard in Turner – which applies in terms to domestic prison facilities and has since been extended to domestic jails holding pre-trial detainees. The court's doubts are misdirected. The appropriate standard of review of a security policy established for the Guantanamo military base, where detainees are being held as enemy combatants under the law of war, is at least as deferential as the standard in Turner.

1. In Turner, the Supreme Court set forth the standard that applies in a constitutional challenge to a prison regulation: "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests. In our view, such a standard is necessary if 'prison administrators . . . , and not the courts, [are] to make the difficult judgments concerning institutional operations.'" 482 U.S. at 89 (quoting Jones v. North Carolina Prisoners' Union, 433 U.S. 119, 128 (1977)). Turner is based on the idea that

"[r]unning a prison is an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government," and that "[p]rison administration is \* \* \* a task that has been committed to the responsibility of those branches, and separation of powers concerns counsel a policy of judicial restraint." Id. at 84-85.

Although jails (unlike prisons) are mostly populated by pre-trial detainees and other inmates who have not been convicted, the courts of appeals "routinely applied Turner to jail regulations." Jones v. Salt Lake County, 503 F.3d 1147, 1155 n.7 (10th Cir. 2007) (citing, inter alia, Mauro v. Arpaio, 188 F.3d 1054, 1058-59 (9th Cir. 1999) (en banc), cert. denied, 529 U.S. 1018 (2000); Barney v. Pulsipher, 143 F.3d 1299, 1313 n.17 (10th Cir. 1998); Siddiqi v. Leak, 880 F.2d 904, 908-10 (7th Cir. 1989)). See also Hrdlicka v. Reniff, 631 F.3d 1044, 1051 (9th Cir. 2011), cert. denied, 132 S. Ct. 1544 (2012). The correctness of their decision to do so was confirmed in Florence v. Board of Chosen Freeholders, 132 S. Ct. 1510, 1515-16 (2012), a case in which a pre-trial detainee challenged his strip searches in two local jails. There, the Supreme Court applied Turner in the context of what it called "[j]ails (in the stricter sense of the term, excluding prison facilities)." The Court in Florence treated Bell v. Wolfish as "the starting point" in addressing a challenge to strip searches, Florence, 132 S. Ct. at 1516, but the Court

explicitly held that "[t]he current case is \*\*\* governed by the principles announced in Turner and Bell." Id. at 1518.

The principal reason for applying Turner to jails, where many, if not most, of the inmates have not been convicted of a crime, is that many of the same penological interests that concern prison administrators also concern jail administrators: "While penological interests in punishment or rehabilitation may not be applicable outside of a prison setting, the penological interest in security and safety is applicable in all correction facilities." Bull v. City and County of San Francisco, 595 F.3d 964, 974 n.10 (9th Cir. 2010) (en banc). Bull noted that the Supreme Court in Bell had not distinguished between pretrial detainees and convicted inmates when it reviewed the challenged security practices, and had recognized that pretrial detainees "'in certain circumstances \*\*\* present a greater risk to jail security and order'" than convicted prisoners. Id. (quoting Bell, 441 U.S. at 547 n. 28). The goal of institutional security is "'central to all other correctional goals,'" and its legitimacy is "beyond question." Thornburgh v. Abbott, 490 U.S. 401, 415 (1989) (quoting Pell v. Procunier, 417 U.S. 817, 823 (1974)).

2. The district court's skepticism about the application of Turner to Guantanamo detainees, slip op. at 16-19, J.A. 157-60, is unwarranted. According to the court, the "logical foundation" of Turner "lies in striking a balance between a circumscribed constitutional right and the judgment of prison administrators," id. at

16, J.A. 157, but such balance would be inappropriate to apply "to the right of habeas corpus itself." Id. at 18, J.A. 159.

However, this case squarely presents a question of the judgment of prison administrators – or, in this case, the administrators of the detention facility at Guantanamo – about security needs at the facility. Indeed, the district court's lengthy analysis of the security justifications surrounding the policy, slip op. at 20-26, J.A. 161-67, makes that clear. The right asserted here is not grounded in habeas, but is an assertion that detainees should be free from full-frisk searches.<sup>9</sup>

A second reason for applying Turner to jails is that courts give deference to jail administrators, just as they do to prison administrators. Florence, 132 S. Ct. at 1515 (Turner standard confirms "the importance of deference to correctional officials"); Overton v. Bazzetta, 539 U.S. 126, 132 (2003) ("We must accord substantial deference to the professional judgment of prison administrators, who bear a significant responsibility for defining the legitimate goals of a corrections system and for determining the most appropriate means to accomplish them."); Turner, 482 U.S. at 86 ("judgments regarding prison security 'are peculiarly within the province and professional expertise of corrections officials, and, in the absence of substantial evidence in the record to indicate that the officials have exaggerated

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<sup>9</sup> The appellees have not identified what constitutional rights they possess, if any, that would give rise to a claim to be free from the search protocol.

their response to these considerations, courts should ordinarily defer to their expert judgment in such matters") (quoting Pell, 417 U.S. at 827); Bell, 441 U.S. at 547 (jail officials entitled to "wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security").

While the Guantanamo detention facility is neither a prison nor (strictly speaking) a jail, and domestic law has limited application to it, a standard that is at least as deferential as Turner should apply here, because the security of the facility is a legitimate – indeed, a paramount – governmental interest,<sup>10</sup> and the military officers who administer the facility are entitled to a similar kind of judicial deference in their assessment of the security needs of the facility. See Winter v. Natural Resources Defense Council, Inc., 555 U.S. 7, 24 (2008) ("We 'give great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest.'") (quoting Goldman v. Weinberger, 475 U.S.

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<sup>10</sup> See Jean S. Pictet, ed., Geneva Convention Relative to the Treatment of Prisoners of War: Commentary at 238 (Geneva: Int'l Comm. of the Red Cross, 1960) (As reflected in the commentary to Chapter VI of the Third Geneva Convention of 1949, the law of war recognizes that a "Detaining Power can carry out its duty to treat prisoners of war in accordance with the Convention only if it ensures that discipline is maintained in prisoner-of-war camps. And in fact disciplinary measures do assist the application of standards designed to improve the situation of the prisoners in the camp. A considerable part of the Convention is therefore composed of Articles providing for the establishment or strengthening of discipline in prisoner-of-war camps \* \* \*").

503, 507 (1986)); *cf. In re Navy Chaplaincy*, 697 F.3d 1171, 1179 (D.C. Cir. 2012) ("in assessing the balance of equities and the public interest, we must "give great deference to the professional judgment of military authorities" regarding the harm that would result to military interests if an injunction were granted").

**B. The Discovery Of Contraband Among The Detainees In April And June Fully Justifies The Security-Based Procedures Now Challenged.**

The district court failed to "accord substantial deference to the professional judgment of prison administrators, who bear a significant responsibility for defining the legitimate goals of a corrections system and for determining the most appropriate means to accomplish them." *Overton*, 539 U.S. at 132. In fact, the record demonstrates that the challenged policies are reasonably related to the legitimate interest in security at Guantanamo.

1. *Turner* sets forth four factors that are relevant to the ultimate determination whether a corrections policy is reasonably related to a legitimate governmental interest, and the burden is on the person who challenges the policy to show that the policy is unreasonable. *Overton*, 539 U.S. at 132 ("The burden, moreover, is not on the State to prove the validity of prison regulations but on the prisoner to disprove it."); *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 350 (1987) (court of appeals failed to give appropriate deference to prison authorities when it "plac[ed] the burden on prison officials to disprove the availability of alternatives").

The first and most important part of the Turner analysis is whether there is a "valid, rational connection' between the prison regulation and the legitimate governmental interest put forward to justify it." Turner, 482 U.S. at 89. See Al-Owhali v. Holder, 687 F.3d 1236, 1240 (10th Cir. 2012) ("Among these factors, the first is the most important; as we have noted, it is 'not simply a consideration to be weighed but rather an essential requirement.'") (quoting Boles v. Neet, 486 F.3d 1177, 1181 (10th Cir. 2007)); Amatel v. Reno, 156 F.3d 192, 196 (D.C. Cir. 1998), cert. denied, 527 U.S. 1035 (1999) ("the first factor looms especially large").

The other three factors are whether there are alternative means of exercising the asserted right that remain open to the detainees; whether accommodation of the right will have an impact on guards and other inmates; and whether there are alternatives to the policy that fully accommodate the prisoner's rights at de minimis cost to valid penological interests. Turner, 482 U.S. at 89-91. In this case, "the second, third, and fourth factors, being in a sense logically related to the Policy itself, here add little, one way or another, to the first factor's basic logical rationale." Beard v. Banks, 548 U.S. 521, 532 (2006).

2. Search policy. Under the former policy, search of the detainee's groin area was not permitted, and wandng was allowed only if the guards suspected that contraband was hidden there. The policy was implemented out of "cultural and religious sensitivities," recognizing that the more limited search procedures posed

some risk to security. Bogdan Decl. ¶ 17, J.A. 111-12.<sup>11</sup> In September 2012, detainee Adnan Farhan Abd Latif (ISN 156), committed suicide, overdosing on medication that he had hoarded over a period of days, a death that prompted a command investigation. The resulting November 2012 command investigation report recommended that Col. Bogdan reconsider the search procedures then being used, which may have contributed to the detainee's ability to hoard medications. Kelly Decl. ¶ 7, J.A. 179-80. Because of his concern about the risk to security, informed by that command investigation and his overall review of standard operating procedures at the facility, Col. Bogdan planned a gradual return to standard Army procedures that involved a search of the groin area and full-body wandering. Bogdan Decl. ¶ 18, J.A. 112. The return to standard search procedures had to be expedited after the transition of Camp 6 from communal living to single cells in April 2013 "resulted in the discovery of a number of contraband items, including homemade weapons, such as shanks, and prohibited electronic devices."

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<sup>11</sup> The Walsh report cited by the district court stated: "The CJDG recognizes that the SOP does not permit searching of the Koran or detainee groin areas, which is contrary to standard security procedures in most detention facility operations, and that it carries a level of risk. However, he has accepted that risk out of an elevated respect for religious concerns of the detainees." Walsh Report at 26 (available at <http://tinyurl.com/dy4nyf>). Adm. Walsh was thus describing the policy in effect at that time, not prescribing a policy that should be implemented.

Id.<sup>12</sup> Following that discovery, JTF-GTMO moved promptly to institute standard Army search procedures on May 3, 2013.

3. Meeting room policy. Security considerations also led JTF-GTMO to change its policy and require attorney meetings to take place in Camp Echo and not in Camps 5 and 6. To begin with, available records indicate that no legal visits or phone calls have taken place in Camp 5 since 2009. Bogdan Decl. ¶ 9, J.A. 110. There are no rooms in Camp 5 designed for use in attorney-detainee meetings, and any such meeting would have to occur either on the cell block where detainees are housed or in a storage or utility room. Id. ¶ 11, J.A. 110. In the past, the presence of non-JTF-GTMO personnel on the blocks inside the camps has led to mass cell-block disturbances by detainees, which disrupted the good order of the facility and put the safety of both GTMO personnel and detainees at risk. Id. In addition, while counsel meetings were held in Camp 6 until September 2012, the two small interview rooms there have room for only three people (as opposed to five at Camp Echo) and the distance of these Camp 6 rooms from normal operations require that additional staff be diverted from their normal duties and assigned to monitor the safety of counsel for the duration of the meetings. Id. ¶ 14, J.A. 111. This cannot be done with the same personnel who escort detainees and counsel, because that

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<sup>12</sup> In June 2013, there was a second discovery of contraband, including "nails, shanks, and a 10-inch T-handled allen wrench." Kelly Decl. ¶ 18, J.A. 183.

staff is used for other detainee movements throughout the day. Id.; see id. ¶ 7, J.A. 109.

In contrast, Camp Echo is designed to handle counsel meetings securely and safely.<sup>13</sup> There are six meeting rooms there, enabling simultaneous attorney-detainee meetings to occur, potentially up to 12 meetings a day. Bogdan Decl. ¶ 5, J.A. 108-09. Unlike Camp 6 rooms, Camp Echo rooms have restroom facilities, and they are designed to enable detainee prayer, thus permitting counsel meetings to continue without having to move a detainee in the middle of the meeting. Id. All screening of visitors for contraband takes place at Camp Echo, and guards do not have to be posted outside the meeting rooms, because observation can be conducted remotely through visual monitoring, as permitted by the Protective Order. Id. ¶ 6, J.A. 109. Camp Echo also allows for private discussions between counsel and the Privilege Team (as defined in the Protective Order) in the event there is a disagreement related to materials that counsel seek to bring into a meeting with a detainee. Furthermore, at Camp Echo, counsel may bring food for detainees, as well as books and commercial DVDs, which are subject only to the standard scrutiny at Camp Echo. Id. This would not be the case at Camp 6 where

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<sup>13</sup> While detainee telephone calls are generally made from Camp Echo, calls specifically to counsel are made from Camp Delta "a location that is specifically designed and equipped for telecom operations." Bogdan Decl. ¶ 8, J.A. 109.

introduction of these items into the camp would significantly increase the likelihood of the introduction of contraband into the housing facility. Id.

4. Van policy. The vans that are used to transport detainees from their housing camps to Camp Echo were upgraded to include air conditioning, but the larger air ducts that were required reduced the head room for detainees. This issue was identified and was in the process of being rectified independent of the detainees' motions. Bogdan Decl. ¶ 22, J.A. 113. The Department of Defense informs us that all vans have now been modified to permit detainees to sit up straight. To the extent the order directed JTF-GTMO to allow certain detainees to be transported in the older vans, Order at 3, J.A. 141; see Slip op. at 33-34, J.A. 174-75, that portion of the order is now moot.

5. Continued efforts to facilitate counsel meetings. The United States has a strong interest in ensuring the detainees at the Guantanamo Bay detention facility have meaningful access to counsel to pursue their habeas rights. Kelly Decl. ¶¶ 11-14, J.A. 181-82. Indeed, from January through May of this year, over 193 attorney visits were scheduled. Id. ¶ 12, J.A. 181-82. And from March through May of this year, approximately 100 calls between detainees and counsel were arranged, almost as many as were scheduled in all of 2012. Id. Moreover, Gen. Kelly's declaration makes clear that the security procedures were not designed to restrict counsel access, but instead were implemented because, in the

judgment of the military officials at Guantanamo, they were necessary to maintain the safety and the security of detainees, personnel, and visitors at the detention facility, including attorneys visiting the detainees. Id. ¶ 11, J.A. 181.

6. Under the Turner standard, the security policies discussed above are reasonably related to the legitimate governmental interest in security at Guantanamo.<sup>14</sup> The declarations of both Gen. Kelly and Col. Bogdan support the reasonable belief that security needs at JTF-GTMO require the policies and that the policies were implemented precisely because of those security needs. And, as noted above, despite some detainees' dissatisfaction with the policies, the government continues to facilitate both telephone calls and in-person meetings between detainees and their counsel.

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<sup>14</sup> More intrusive searches have been upheld in domestic correctional institutions, even in connection with attorney visits. See Bell, 441 U.S. at 560 (rejecting Fourth Amendment challenge to visual-body-cavity searches on pretrial detainees after contact visits, despite alleged impact on the detainees' meetings with their attorneys); Goff v. Nix, 803 F.2d 358, 366-70 (8th Cir. 1986), cert. denied, 484 U.S. 835 (1987) (upholding visual-body-cavity searches of prison inmates after any contact visits, including visits with family, medical personnel, attorneys, and prison chaplain; and compiling cases); id. at 369 ("although it may be true that the prison chaplains and the ombudsman are unlikely to be involved in smuggling contraband to prisoners, there is nothing in the record to suggest that prisoners could not obtain contraband from other sources during visits with the prison chaplains and the ombudsman").

**C. The District Court Misapplied Turner By Focusing On What It Thought Was The Subjective Motivation Behind The Policy.**

The district court recognized that the record evidence of the need for the new policies would justify them as reasonably related to the goal of security, but it declined to credit the evidence. Although the court purported to apply Turner to the circumstances presented, its application of Turner was fundamentally flawed, in that it sought the subjective motivation behind the challenged policy, when Turner in fact establishes an objective standard of validity.

1. The first prong of Turner – whether there is a "'valid, rational connection' between the prison regulation and the legitimate governmental interest put forward to justify it," Turner, 482 U.S. at 89 – is equivalent to rational-basis review in the equal-protection context, which examines the connection between the policy and the goal "put forward" in support of it. There is no room in this analysis to second-guess that goal and inquire into the subjective motivation of the officials who devised the policy.

Turner itself speaks of the connection with the goal or interest that is "put forward" by the officials in charge of the facility. The goal that is "put forward" is the goal announced in conjunction with the policy – not some subjective and unarticulated goal of the officials that is alleged to exist. This is confirmed by the fact that, when the Supreme Court rejected the use of Turner in race-discrimination

cases in prisons, it explained that the objective Turner standard could allow blatant racial segregation "if prison officials simply asserted that it was necessary to prison management." Johnson v. California, 543 U.S. 499, 514 (2005); see id. at 513 (Turner not designed to "ferret out" subject motivations like "invidious uses of race"). In other words, Turner is based on what officials say, not what the court may think they secretly desire.

This Court and at least two other circuits have held that the analysis under the first prong of Turner requires attention to the objective basis for the policy. In Amatel v. Reno, 156 F.3d at 199, this Court held that the first prong of Turner is, "if not identical, something very similar" to rational-basis review in the equal-protection context, where the actual intentions of a legislature do not control and the law is upheld if a court can even hypothesize a possible reason for the policy. Although the government in Amatel had provided the Court with no evidence of the connection between the statutory policy prohibiting federal inmates from receiving publications that were sexually explicit or featured nudity and the penological interest in rehabilitation, and an amicus brief laid out only what might have supported such a connection, the Court had no difficulty determining that such a connection was based on "common sense." Id. at 198; see Waterman v. Farmer, 183 F.3d 208, 215 (3d Cir. 1999) (first Turner prong is "similar to rational-basis review"). The Seventh Circuit more recently has confirmed that subjective

motivation is irrelevant in the Turner analysis: "The Supreme Court did not search for 'pretext' in Turner; it asked instead whether a rule is rationally related to a legitimate goal. That's an objective inquiry." Hammer v. Ashcroft, 570 F.3d 798, 803 (7th Cir. 2009) (en banc), cert. denied, 559 U.S. 991 (2010).

2. In its decision below, the district court accepted that the search policy was reasonably related to the goal of security at Guantanamo but held that it was invalid because of the officials' subjective motivation:

When viewed in isolation, as the government has presented it, the presence of contraband makes the new search procedure appear reasonably related to the government's legitimate penological interest in security. The Court, however, must view the new procedure and the proffered justification in light of the government's previous actions at Guantanamo.

Slip op. at 24, J.A. 165. The "previous actions" that the court referred to were the supposed attempts by the government to deny detainees access to counsel. According to the court, "[t]he government, seemingly at every turn, has acted to deny or to restrict Guantanamo detainee's [sic] access to counsel." Id.<sup>15</sup>

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<sup>15</sup> See also Slip op. at 22, J.A. 165 (expressing skepticism about military's statement that Latif may have hidden medications in groin area, stating that reliance on Latif suicide had "the patina of pretext," and speculating that this was "merely an afterthought," given that the policy was implemented six months after the report); id. at 32, J.A. 173 (military's requiring detainees, some of whom are engaged in a hunger strike, to use visiting rooms outside the housing units seems like an attempt to deny counsel access "through alternative means").

But this statement is both incorrect and irrelevant. It is incorrect, because Col. Bogdan, the commander at Guantanamo, stated in his declaration that the motivation for the search policy was a concern for the security needs of the facility in light of the suicide of detainee Adnan Farhan Abd Latif (ISN 156), Bogdan Decl. ¶ 17, J.A. 111-12, and the discovery of contraband, *id.* ¶ 10, J.A. 110 (when Camp 6 was converted to single-cell housing in April 2013, detainees were found to be in possession of contraband, including shanks, nails, and sharpened metal rods); see also Kelly Decl. ¶ 18, J.A. 183 (large stash of contraband uncovered in late June 2013). Gen. Kelly specifically addressed the accusation that the policy was motivated by a desire to restrict access to counsel: "[A]t no time during this or any other period during my command was the idea of limiting detainees' access to legal counsel considered or even discussed, and certainly not as a reason for adopting the standard search procedure or any other decision made regarding the secure operation of the detention facilities at Guantanamo. If anyone had made such a suggestion, I would have immediately informed them that such a consideration is inappropriate." Kelly Decl. ¶ 11, J.A. 181. The appellees have offered no evidence to the contrary.

And the court's statement is irrelevant under Turner, because if a policy is objectively reasonable without regard to subjective motivation, as the court had to concede it was, its reasonableness is not vitiated by some inference of improper

motivation or pretext. Turner involves an objective inquiry, not a search for pretext. Hammer v. Ashcroft, 570 F.3d at 803.

3. The district court's suggestion that the old search policy of avoiding the groin area out of religious and cultural sensitivity is a "ready alternative" to full-frisk searches, slip op. at 26-28, J.A. 167-69, fails to accord sufficient deference to the military's judgment that the limited searches posed an unacceptable security risk. What appears to be an acceptable risk at one point may be shown to be an unacceptable risk in light of new circumstances. Bogdan Decl. ¶¶ 17-18, J.A. 111-12 (noting report on Latif suicide and discovery of contraband in April 2013); see also Kelly Decl. ¶ 5, J.A. 179 ("While the prior Joint Detention Group (JDG) Commander 'accepted that risk out of an elevated respect for religious concerns of the detainees,' we discovered that such elevated risk was no longer acceptable in light of the suicide of Adnan Latif and other recent events discussed here."); id. ¶ 18, J.A. 183 (describing "large stash" of contraband discovered in June 2013).

The JDG Commander reasonably determined that the old policy was inadequate to further the goal of base security. The district court's decision to substitute its own judgment or that of the Commander should be reversed.

## CONCLUSION

For the foregoing reasons, the order of the district court should be reversed.

Respectfully submitted,

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## **CERTIFICATE OF COMPLIANCE**

I certify that this brief is proportionately spaced, using Times New Roman, 14 point font. Based on a word count under Microsoft Word 2010, this brief contains 9,594 words, including the footnotes, but excluding the tables, certificates, and addenda.

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I hereby certify that on September 20, 2013, I served the foregoing Brief for the Appellants on the following by filing it through the CM/ECF system:

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