IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ABU WA'EL (JIHAD) DHIAB, ***Petitioner/Plaintiff,*** **v.** **BARACK H. OBAMA, et al.,** ***Respondents/Defendants.***	**Civ. No. 05-1457 (GK)** ~~**FILED UNDER SEAL**~~

REPLY MEMORANDUM IN SUPPORT OF
PETITIONER'S APPLICATION FOR PRELIMINARY INJUNCTION AND AN IMMEDIATE ORDER FOR DISCLOSURE OF PROTOCOLS FORTHWITH

JON B. EISENBERG (CA State Bar #88278)
1970 Broadway, Suite 1200
Oakland, CA 94612
(510) 452-2581

REPRIEVE
Clive Stafford Smith (LA Bar #14444)
Cori Crider (NY Bar #4525721)
Alka Pradhan (D.C. Bar #1004387)
P.O. Box 72054
London EC3P 3BZ
United Kingdom
011 44 207 553 8140

LEWIS BAACH PLLC
Eric L. Lewis (D.C. Bar #394643)
Elizabeth L. Marvin (D.C. Bar #496571)
1899 Pennsylvania Avenue, NW, Suite 600
Washington, DC 20006
(202) 833-8900

Counsel for Petitioner/Plaintiff

Dated: May 12, 2014

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

MISCELLANEOUS

INTRODUCTION

Respondents' opposition to Petitioner's application for preliminary injunction only serves to confirm the need for injunctive relief against abusive force-feeding of hunger-striking detainees at Guantánamo Bay.

Most importantly, the opposition utterly fails to rebut Petitioner's showing of abuse, effectively admitting Petitioner's factual allegations. Respondents have not submitted a single declaration from any doctor, nurse or guard who has conducted, facilitated or witnessed force-feedings of Petitioner or any other Guantánamo Bay detainee since early 2006. Respondents' exhibits are silent as to force-feeding practices at Guantánamo Bay between early 2006 and early 2013. Their only "evidence" describing Petitioner's force-feedings since April of 2013 consists of a declaration by the new Senior Medical Officer (SMO) at Guantánamo Bay, who arrived there a week after Petitioner's most recent force-feeding. This new SMO lacks personal knowledge of nearly all the facts he asserts, and Respondents have not yet submitted the medical records on which he relies in purporting to describe Petitioner's treatment.

Respondents do not deny, and the new SMO all but admits, that some detainees have been force-fed at a speed and quantity that is fairly characterized as torture. There now can be no doubt that the most disturbing of Petitioner's allegations—describing the infliction of water torture by "pumping"—is true.

Respondents invoke a generally applicable 2006 Department of Defense instruction that properly restricts force-feeding of Department of Defense detainees to situations where it is immediately needed to prevent death or serious harm. That instruction, however, is trumped by conflicting and more specific provisions of the 2013 Guantánamo Bay force-feeding protocols, which unlawfully authorize force-feeding of Guantánamo Bay detainees in situations *short* of imminent death or great bodily injury.

Respondents also challenge Petitioner's standing and his invocation of the *Turner* standard for assessing the lawfulness of Respondents' force-feeding practices. Both of those challenges are meritless.

This reply memorandum is filed under seal solely because Respondents have filed nearly the entirety of their opposition memorandum and supporting exhibits under seal, to which Petitioner objects. If Respondents do not, within a reasonable period of time, prepare a proposed redacted version of all their opposition papers for public filing, upon which the parties can then meet and confer to determine whether they can agree on the extent of appropriate redactions, Petitioner will move this Court for an order compelling such action.

ARGUMENT

I. RESPONDENTS' EVIDENCE DEMONSTRATES A COMPELLING NEED FOR THIS COURT TO ENJOIN ABUSIVE FORCE-FEEDING PRACTICES AT GUANTÁNAMO BAY.

A. Respondents have failed to rebut Petitioner's showing of abuse.

Respondents have submitted a peculiar collection of exhibits in opposition to Petitioner's application for preliminary injunction. Detainees at Guantánamo Bay have been force-fed since at least 2005, yet Respondents' exhibits only address general force-feeding practices *prior to early 2006* and Petitioner's own force-feedings *since April of 2013*, leaving a huge evidentiary gap for the seven-year interim period.

Respondents speak only in the present tense when describing the process of force-feeding at Guantánamo Bay. Respondents state that the force-feeding "is" conducted humanely, and that detainees "are" not being force-fed at quantities and speeds amounting to water torture. Respondents' Opposition to Petitioner's Application for Preliminary Injunction ("Resp'ts' Opp'n") at 6, 8. That might be partially true *today*, to the extent Respondents have suspended

some (but not all) of their abusive practices during the pendency of litigation challenging those practices. But Respondents utterly fail to rebut Petitioner's showing of *past* abusive practices. A seven-year period remains hidden from this Court's view.

This failure of proof strongly suggests that even if some past abuses have been suspended for the time being, those practices threaten to resume absent this Court's intervention.

Respondents have submitted a single declaration purporting to describe Petitioner's force-feedings between April of 2013 and February 19, 2014. That declaration, however, is by the *current* SMO at Guantánamo Bay—U.S. Navy Commander [redacted]—who assumed that position on *February 26, 2014*.[1] *See* Resp'ts' Opp'n Exh. 9 ¶ 1. Commander [redacted] cannot have any personal knowledge concerning Petitioner's force-feedings, which were suspended a week before Commander [redacted] arrived.

Commander [redacted] purports to rely on "discussions I personally had with other JMG medical staff involved in the medical care and treatment of Mr. Dhiab, and a review of Mr. Dhiab's medical records." Resp'ts' Opp'n Exh. 9 ¶ 3. But Respondents refuse to submit either the full medical records on which Commander [redacted] relies or any declarations by the staff with whom he has discussed Petitioner's medical care.[2] Respondents' failure to submit Petitioner's

[1] This was just fifteen days after the Court of Appeals ruled in *Aamer v. Obama*, 742 F.3d 1023 (D.C. Cir. 2014) that this Court has habeas jurisdiction over conditions of confinement at Guantánamo Bay.

[2] Respondents' opposition filed May 7, 2014 contains no medical records at all. On May 8, 2014, Petitioner's counsel emailed Respondents' counsel requesting full medical records for the period April 9, 2013 to May 7, 2014, as well as any and all videotapes made of Petitioner's Forcible Cell Extractions and/or force-feedings during the period April 9, 2013 to February 19, 2014. On May 12, 2014, Respondents' counsel replied by email that the Department of Defense will provide medical records only for the period January 1, 2014 to May 7, 2014 and refuses to provide medical records for 2013. (As of this writing, Petitioner's counsel have not yet received the 2014 medical records.) Respondents' counsel also stated in the email of May 12, 2014 that

full medical records should preclude Commander [redacted] from relying on them in his declaration of May 7, 2014.

Respondents have also failed to submit a supplemental declaration by the SMO who *would* have personal knowledge of Petitioner's medical care—U.S. Navy Commander [redacted] whom Commander [redacted] replaced—even though Commander [redacted] submitted a declaration in this Court last year, dated July 3, 2013. *See* Doc. #178-1. Instead, Respondents simply resubmit Commander [redacted] 2013 declaration, which provides only a general description of the March 2013 force-feeding protocols and says nothing about the force-feeding of Petitioner specifically. *See* Resp'ts' Opp'n Exh. 7 ¶¶ 9-19, 24. There is a complete failure of proof regarding Petitioner's own force-feeding.[3]

In short, Respondents have neither rebutted Petitioner's showing of historical force-feeding practices nor provided sufficient evidentiary support for Respondents' claims regarding Petitioner's force-feeding. Thus, the situation here is very different from a previous Guantánamo Bay habeas case before this Court, where the Government "explicitly, specifically, and vigorously denied" the petitioners' allegations of "conduct of which the United States can hardly be proud." *Al-Joudi v. Bush*, 406 F. Supp. 2d 13, 16 (D.D.C. 2005). Here, Petitioners' allegations stand unrebutted—and they demonstrate conduct of which Respondents should be ashamed.

the Department of Defense refuses to provide any videotapes. Petitioner will shortly file a motion to compel production of full medical records and videotapes.

[3] It is not as if Respondents could not find Commander [redacted] to obtain his supplemental declaration addressing Petitioner's force-feeding. A quick internet search indicates that Commander [redacted] is currently posted to the Naval Hospital at the Jacksonville Naval Station in Jacksonville, Florida.

B. Respondents do not deny, and Commander [redacted] effectively admits, force-feeding at a speed and quantity that is fairly characterized as water torture.

Surely the most disturbing of Petitioner's allegations is that detainees have been force-fed at such extreme quantities and speeds as to constitute a form of water torture. Respondents' *counsel* responds: "Allegations that detainees are being enterally fed more than 2,000 ml of fluid in a short time are false." Resp'ts' Opp'n at 8. But Respondents *themselves* say no such thing, and Commander [redacted] all but *admits* these allegations. Even counsel's "denial" is phrased in the present tense and does not deny *past* instances of water torture at Guantánamo Bay.

Petitioner has demonstrated that the March 2013 Guantánamo Bay force-feeding protocols prescribe rapid bolus force-feeding for a man of average weight at a rate of up to 2,300 milliliters (ml) in 20 to 30 minutes, and that the December 2013 protocols impose no restrictions whatsoever on the speed with which detainees may be force-fed. *See* Doc. #203-1 at 25; Suppl. Mem. In Supp. of Mot. for Prelim. Inj. at 2. Respondents do not contend otherwise.

Petitioner has also submitted evidence that, consistent with the March 2013 protocols, detainees *actually have* been subjected to rapid bolus force-feeding in quantities totaling 2,300 ml or more. *See* Doc. #203-1 at 17; Doc. #203-4 ¶¶ 48 & 49. Again, Respondents *themselves* do not contend otherwise, despite what their attorneys say. Respondents have failed to submit declarations from anyone who has *actually conducted, facilitated or witnessed* force-feedings at Guantánamo Bay since early 2006, who would therefore have personal knowledge of the truth. We have not heard from a single doctor, nurse, or guard who has been involved in Petitioner's force-feedings.[4]

[4] This is no mere oversight by Respondents. In the reply memorandum for *Hassan v. Obama* filed on April 28, 2014, Petitioner's counsel noted a similar failure of proof in that case. *See Hassan v. Obama*, No. 04-cv-1194 (UNA), Reply Mem. In Supp. of Pet'r's Appl. Prelim. Inj. at

Commander [redacted] has this to say on the subject of rapid bolus force-feeding: "Th[e] flow rate and time can be highly variable . . . . Some patients can tolerate a very rapid delivery rate without problem." Resp'ts' Opp'n Exh. 1 ¶ 26. Thus, far from denying a history of force-feeding at Guantánamo Bay at rates of up to 2,300 ml in as little as 20 to 30 minutes, Commander [redacted] tries to *justify* it by saying, in effect, "they can handle it." Yet neither he nor any of Respondents' other declarants takes issue with Dr. Stephen H. Miles's assertion that force-feeding at such rates "is an extraordinary departure from customary medical practice" and "echoes a practice of torture called 'Water Cure' that has been practiced since the Middle Ages." Doc. #203-5 ¶ 8(d).[5]

Moreover, Commander [redacted] cannot possibly know how much "free water," *see* Doc. #203-8 at 24, has been force-fed to Petitioner—on top of the nutritional mixture—in force-feedings prior to Commander [redacted] arrival at Guantánamo Bay on February 26, 2014. The medical records upon which Commander [redacted] purports to rely cannot shed any light on the subject because, although the "Enteral Feed Nursing Notes" form that JTF-GTMO staff use to record force-feedings includes checkboxes and spaces for indicating how much nutrient is given and how much water and other additives (if any) are added to the nutrient in order to comprise

4. It is now evident that Respondents have made a conscious decision *not* to submit any declarations by JTF-GTMO personnel who have actually implemented force-feedings.

[5] Commander [redacted] says more generally that a "typical" hunger-striking detainee who is not drinking any fluids on his own "would" consume 474 ml of nutrient and "may have up to" 750 ml of water at each feeding. Resp'ts' Opp'n Exh. 1 ¶ 27. But Commander [redacted] does not address the circumstances of an "atypical" hunger striker, and even this so-called "typical" bolus of 1,224 ml is still nearly five times the quantity and rate set forth in the enteral feeding guidelines promulgated by the American Gastroenterological Association. *See* Doc. #203-1 at 18; *see also* Resp'ts' Opp'n Exh. 6 ¶ 14 (description of one detainee's twice-daily force-fed caloric intake in January 2006 as 2,500 calories, which is equivalent to 1,185 ml of nutrient in each of two daily boluses).

the nutritional mixture, the form contains no checkbox or space for indicating how much free water is given in *addition* to the nutritional mixture. *See id.* at 22. Commander [redacted] states that Petitioner "typically" has been force-fed 487 ml of nutrient and water in an "average" of ten minutes, Resp'ts' Opp'n Exh. 9 ¶ 6, but Commander [redacted] does *not* say whether there have been any "atypical" force-feedings of Petitioner or describe the quantities and speeds of force-feedings on such "atypical" occasions. In this respect there a suspicious lapse in Commander [redacted] hearsay assertions, and we have not heard from anyone who has personal knowledge of the truth.

As previously noted, one hunger-striking Guantánamo Bay detainee recently reported that frequently, after force-feeding, the guards "press my back forcefully, squeezing out any remaining feeding solution from the previous force-feeding session." Moath al-Alwi, *A letter from Guantanamo: "Nobody can truly understand how we suffer"* (Mar. 13, 2014), *available at* www.aljazeera.com/indepth/opinion/2014/03/letter-from-guantanamo-nobody-c-20143138564274715 4.html. Respondents do not deny the truth of this report. And just a few weeks ago, Petitioner similarly reported the application of pressure to his stomach after force-feedings. *See* Doc. #208-1 ¶ 14. The current Commander of JTF-GTMO, Colonel John V. Bogdan, responds to this new report with nothing more than his assertion that "written records" for the period January 1, 2014 through February 19, 2014 do not reflect any complaints by Petitioner about pain or injuries. *See* Resp'ts' Opp'n Exh. 10 ¶ 6. Again, however, Respondents have not yet submitted the medical records on which Colonel Bogdan relies, which in any case do not cover Petitioner's force-feedings in 2013; and one can hardly expect a guard who has committed such brutal acts to memorialize them in the victim's medical records. Nor have Respondents submitted any declarations by the persons who Petitioner says committed these

acts—the guards themselves. It is telling indeed that Respondents have made so little effort to address this most shocking of Petitioner's allegations.

Respondents contend JTF-GTMO policy is that "[t]he quantity and flow rate of enteral feedings are carefully managed to prevent detainee discomfort." Resp'ts' Opp'n at 8. But Respondents have failed to present any evidence indicating whether such policy is carried out in *practice*. In fact, the force-feeding protocols in effect during most of Petitioner's force-feedings instructed staff to *disregard* any complaints by detainees about the speed of force-feeding. *See* Doc. 203-7 at 27.

Given what Respondents' exhibits say—and do *not* say—about force-feeding practices at Guantánamo Bay, there can be no doubt that water torture by "pumping" has occurred there.

C. Respondents have failed to show any justification for twice-daily reinsertion of feeding tubes.

Respondents cannot deny the twice-daily reinsertion of feeding tubes at Guantánamo Bay. Commander [redacted] admits quite plainly: "Our standard procedure is to remove the enteral feeding tube after each feeding." Resp'ts' Opp'n Exh. 1 ¶ 24.

Commander [redacted] attempts to justify this standard procedure. First, he contends twice-daily reinsertion of feeding tubes is necessary to "reduce [ ] the risk of sinus, nasal, and middle ear infections that is inherent in keeping the feeding tube in place." Resp'ts' Opp'n Exh. 1 ¶ 24. But Petitioner has cited published medical authority which recommends keeping nasogastric feeding tubes in place for *four to six weeks*. Doc. #203-1 at 14-15. Commander [redacted] cites no contrary published authority suggesting that a four-to-six-week feeding tube placement would pose a significant risk of infection—perhaps because no such authority exists. Generally available authorities addressing the complications of long-term nasogastric tube feeding describe

risks such as aspiration, diarrhea, nausea, vomiting and abdominal bloating—but they do not warn of a risk of infection from a weeks-long placement of the tube. *See, e.g.,* Shai Gavi *et al.*, *Management of Feeding Tube Complications in the Long-Term Care Resident*, Annals of Long-Term Care, vol. 15, issue 4 (Apr. 2008), *available at* http://www.annalsoflongtermcare.com/article/8614; Peter L. Beyer, MS, RD, "Complications of Enteral Nutrition," in L.E. Matarese & M.M. Gottschlich, eds., *Contemporary nutrition support practice: a clinical guide* 216-28 (1998), *available at* www.coursewareobjects.com/objects/evolve/E2/book_pages/nutrition/pdfs/matereseCh17.pdf. [6]

Second, Commander [redacted] contends removal of nasogastric tubes after each feeding "reduces the ability of detainees to purge feeds," Resp'ts' Opp'n Exh. 1 ¶ 24, which purportedly could be accomplished by using the tube to syphon recently-introduced stomach contents. *See* Resp'ts' Opp'n Exh. 6 ¶ 5. As Commander [redacted] acknowledges, however, force-fed detainees are kept restrained for "the time required to administer a feeding *and to ensure the nutritional supplement is digested properly*." Resp'ts' Opp'n Exh. 1 ¶ 31 (emphasis added); *see also* Resp'ts' Opp'n Exh. 6 ¶ 8 (detainees are restrained "to ensure that the required amount of nutrition is given *and retained*" (emphasis added)); Resp'ts' Opp'n at 10-11 ("Also, by keeping the detainee restrained for a period after the feeding is complete to allow the stomach contents to drain to the small intestine, the ability of the detainees to purge is minimized."). If a detainee is

[6] Respondents contend it is not "practical" to leave the detainees' feeding tubes in place, as is customary for hospitalized patients, because force-fed detainees are not hospitalized but rather are "living in their cells." Resp'ts' Opp'n at 28. Respondents have not, however, made any showing why force-fed detainees cannot be hospitalized so that enteral feeding can be done in accordance with sound medical practices. In 2005, *all* force-fed detainees were hospitalized. See Resp'ts' Opp'n Exh. 4 ¶¶ 4-5; *id.* Exh. 6 ¶ 5.

prevented from purging, there cannot be any justification for removing his tube after each feeding.

In some instances, JTF-GTMO staff actually *will* leave feeding tubes in place from one feeding to the next. Commander [redacted] states that "when there is a *justifiable medical need*, such as an anatomical deformity, JMG staff will allow a detainee to keep the tube in place for *up to three days*." Resp'ts' Opp'n Exh. 1 ¶ 24 (emphasis added). Commander [redacted] claims, however, that "[i]n most cases, there is no medical need to . . . keep the tube in place . . . ." *Id.* But according to Dr. Stephen H. Miles, there is *always* a "justifiable medical need" to leave nasogastric feeding tubes in place from one feeding to the next: "A procedure of routinely removing and reinserting a nasogastric feeding tube increases the risk that the tube will go into the lungs where it or inadvertently administered feeding solution could cause serious injury or death." Doc. #203-5 ¶ 8(a). Commander [redacted] himself admits that "[t]ube misplacement has occurred in the past." Resp'ts' Opp'n Exh. 1 ¶ 23.[7] Also, twice-daily reinsertion of feeding tubes is painful. *See* Doc. #203-1 at 6, 7.

Surely the pain and risk of complications from twice-daily reinsertion constitutes a "justifiable medical need" to depart from the current standard procedure at Guantánamo Bay, in favor of leaving feeding tubes in place from one feeding to the next—at least for the three days that even Commander [redacted] deems safe, which alone would reduce the incidence of painful reinsertions by 83 percent.[8]

[7] Commander [redacted] says that, "as far as I am aware," tube misplacement "has always been identified and corrected before the enteral feeding was started . . . ." Resp'ts' Opp'n Exh. 1 ¶ 23. But Commander [redacted] cannot possibly know that to be true, because he has only been at Guantánamo Bay since February 26, 2014. *Id.* ¶ 1.

[8] In *Al-Adahi v. Obama*, 596 F. Supp. 2d 111 (D.D.C. 2009), the petitioners withdrew a prior request for this Court to order that feeding tubes remain in place between feedings. The Court

D. Respondents have failed to justify the confirmation of feeding tube placement by auscultation.

Absent any justification for twice-daily reinsertion of feeding tubes, there can be no justification for JTF-GTMO's use of auscultation as a method for confirming their proper placement. Commander [redacted] admits (with considerable understatement) that "auscultation is not the preferred method in the medical community," but he attempts to justify its use at Guantánamo Bay by rejecting the standard use of x-rays to confirm tube placement, arguing that, *because feeding tubes are inserted twice daily*, confirmation of placement by x-rays would cause excessive exposure to radiation. Resp'ts' Opp'n Exh. 1 ¶ 23. This argument collapses with the rejection of twice-daily tube reinsertion.

E. Respondents are hiding new evidence on use of the restraint chair.

In *Al-Adahi*, 596 F. Supp. 2d at 121, this Court rejected a previous challenge to the use of restraint chairs on hunger-striking Guantánamo Bay detainees. Respondents contend that "Petitioner presents no new evidence to alter this result." Resp'ts' Opp'n at 31. Petitioner's counsel, however, are still in the process of gathering new evidence regarding current restraint chair practices (efforts that have been frustrated by Respondents' persistently impeding counsel's access to their clients). And to the extent there is not yet new evidence regarding the protocols governing use of restraint chairs, it is only because Respondents are *hiding* that new evidence.

observed that this was "presumably because [the petitioners] recognized that leaving the tube in place was causing its own set of medical problems, i.e., sinusitis, bacterial infection, irritation, etc." *Id.* at 115 n. 6. The issue was never litigated and thus remains open at this time. We submit that any risk of infection must be balanced against the painful complications of twice-daily reinsertion, and it should be the detainee's decision whether the risk of infection is worth avoiding the pain of twice-daily reinsertion.

In late 2013, Petitioner's counsel determined that Respondents possess, but have not yet disclosed to Petitioner's counsel, a secret new set of protocols (or, in Respondents' lingo, "SOP") which now govern the use of restraint chairs at Guantánamo Bay *See* Doc. #203-2 ¶¶ 2-4. Since then—and as recently as May 12, 2014—Respondents have repeatedly refused requests by Petitioner's counsel for disclosure of this new evidence. Consequently, Respondents should be estopped to claim there is no new evidence that could alter the result in *Al-Adahi*.

The still-secret restraint chair protocols might indicate that detainees are being placed under maximum restraint even when they are compliant with their force-feeding. That would be a departure from the situation in *Al-Adahi*, where complaint detainees were not being subjected to full restraints. *See Al-Adahi*, 596 F. Supp. 2d at 121 & n. 10. Or the new protocols might indicate that restraint chairs are now being used in some aggravated manner that constitutes an exaggerated response to prison concerns. *See Turner v. Safley*, 482 U.S. 78, 90-91 (1987). Given that Respondents have exclusive control over access to the new protocols, the burden is on Respondents, not Petitioner, to produce this essential new evidence. *See, e.g., Shaffer v. Weast*, 546 U.S. 49, 60 (2005) (burden of proof shifts when facts are "peculiarly within the knowledge" of defendant); *National Commc'ns Assn. v. AT&T Corp.*, 238 F.3d 124, 130 (2d Cir. 2001) ("all else being equal, the burden is better placed on the party with easier access to relevant information").

Respondents' opposition memorandum does not assert any purported justification for keeping the new restraint chair protocols secret, but simply contends that Petitioner's request for a disclosure order "should be ignored" as an "improper discovery request [that] falls outside the government discovery procedures established by the Case Management Order § I.E.2 . . . ."

Resp'ts' Opp'n at 32 n. 21.[9] Thus, Respondents have waived any substantive objection to a disclosure order. Their objection seems to be purely procedural.

Section I.E.2 of the Case Management Order states that "Petitioner may, for good cause, obtain limited discovery beyond that described in the preceding paragraph" (which pertains to documents or objects referenced in or relating to information contained in a factual return). Such a request must "explain why the request, if granted, is likely to produce evidence that demonstrates that Petitioner's detention is unlawful." *Id.*

Respondents do not state a basis for their contention that Petitioner's request "falls outside" Section I.E.2. Resp'ts' Opp'n 32 n. 21. Perhaps it is because the request did not cite Section I.E.2, or perhaps Respondents think there has not been a sufficient showing of a likelihood of producing evidence demonstrating unlawful detention. Whatever Respondents think the problem might be, Petitioner now remedies it in this reply memorandum by citing Section I.E.2 of the Case Management Order and explaining that the new restraint chair protocols are likely to demonstrate that Petitioner's detention is unlawful to the extent he is being subjected to or threatened with abusive force-feeding practices.[10]

[9] The email from Respondents' counsel dated May 12, 2014, *see supra* at 3 n. 2, states only summarily that the request for production of the undisclosed protocols "is immaterial, overbroad, and unduly burdensome."

[10] Section I.E.2 also states that a motion for limited discovery "must be filed no later than 14 days after completion of discovery pursuant to Section I.D. and I.E of this Order." That deadline, however, would seem to be inapplicable in the present context, because discovery in this habeas proceeding challenging conditions of confinement has not even begun, much less been completed. In any case, the prescribed deadline does not purport to be jurisdictional. To whatever extent it might apply here, Petitioner requests relief from any untimeliness, on the ground this Court lacked jurisdiction during the pendency of the appeal in *Aamer v. Obama* until the Circuit Court's mandate issued on April 13, 2014. Petitioner filed the present application just two days after the mandate issued.

Petitioner respectfully requests this Court to forthwith issue the previously-submitted proposed Order for Disclosure of the still-secret protocols. *See* Doc. #203-9.

F. Respondents have confirmed, not rebutted, Petitioner's showing that detainees have defecated in the restraint chair.

Commander [redacted] states: "I have not personally observed a detainee having a bowel movement during enteral feeding nor have I heard that this has happened." Resp'ts' Opp'n Exh. 1 ¶ 32. Commander [redacted] lack of personal observation is no surprise, however, since he has been at Guantánamo Bay only since February 26, 2014.

Colonel Bogdan similarly states: "I have not heard of detainees having bowel movements or urinating during enteral feedings," but "[i]f this happened," JTF-GTMO staff "would take immediate action" to clean the detainee. Resp'ts' Opp'n Exh. 5 ¶ 15. This is not a denial; it is an assertion of lack of personal knowledge, along with a guess as to how staff *might* handle the problem. Petitioner's medical records cannot be illuminating, given that the "Enteral Feed Nursing Notes" form used to record force-feedings lacks a checkbox or space for indicating whether a detainee has defecated during the process. *See* Doc. #203-8 at 22.

This is an instance where the absence of evidence is not evidence of absence. And the persons who *do* have personal knowledge in this regard—the JTF-GTMO staff who have performed and been present at Petitioner's force-feedings—have not spoken up.

One of Colonel Bogdan's predecessors as Commander of JTF-GTMO has, in fact, *admitted* that force-fed detainees have defecated in the restraint chair, describing 20 such

occasions during the course of 700 force-feedings in 2006. Resp'ts' Opp'n Exh. 4 ¶ 12. Those numbers yield a three percent rate of defecation during force-feeding.[11]

It is distressing to read and write about such things, but it is surely far more distressing for the Guantánamo Bay detainees to have lived through them.

G. It is nonsense for Commander [redacted] to claim that weighing below 85% of Ideal Body Weight creates a dire need for force-feeding.

Commander [redacted] insists that hunger-striking detainees who weigh less than 85% of Ideal Body Weight (IBW) require force-feeding because they are in danger of "serious medical consequences, such as dehydration and severe electrolyte shifts causing seizures and cardiac arrhythmias," and are at "greatly increase[d] risk for heart valve disorders, heart failure, bone density loss, muscle loss and weakness, gastroparesis, abdominal pain, and potential kidney failure," all of which "have the ability to lead to death or permanent disability." Resp'ts' Opp'n Exh. 1 ¶ 13.

Surely the architect of the United States Constitution, President James Madison—who, at 5'4" and 100 pounds, was 77% of IBW—would have been chagrined to learn that a latter-day Commander in the United States Navy would think him in dire need of force-feeding. The same would likely be true of Justice Ruth Bader Ginsberg at 83% of IBW, President Andrew Johnson at 84% of IBW (the same as Petitioner), Mahatma Gandhi at 77% of IBW, and Geoffrey Mutai, a

[11] Major General Hood said in 2006 that "there is no record" of one detainee, Mohammed Bawazir, defecating while in the restraint chair, Resp'ts' Opp'n Exh. 4 ¶ 12, but surely that is because JTF-GTMO keeps no such records.

Kenyan long-distance runner who, at 82% of IBW, ran the world's fastest-ever marathon in 2011 and won this year's New York City half-marathon.[12]

A less-than-ideal body weight alone should not be a basis for force-feeding Petitioner. The determining factor is whether he is at imminent risk of death or great bodily injury.

II. THE GUANTÁNAMO BAY PROTOCOLS, WHICH UNLAWFULLY AUTHORIZE FORCE-FEEDING EVEN ABSENT AN IMMINENT RISK OF DEATH OR GREAT BODILY INJURY, TRUMP CONFLICTING PROVISIONS IN THE DEPARTMENT OF DEFENSE INSTRUCTION.

Respondents contend that "[b]y Department of Defense instruction, a hunger striking detainee may be involuntarily treated, including being enterally fed, only if such treatment is immediately needed to prevent death or serious harm." Resp'ts' Opp'n at 5; *see also id.* at 26. But the 2006 Department of Defense instruction cited by Respondents, *see* Resp'ts' Opp'n Exh. 3, applies only *generally* to detainees under the control of the Department of Defense, whereas the 2013 Guantánamo Bay force-feeding protocols apply *specifically* to the detainees at Guantánamo Bay. Although the 2006 Department of Defense instruction states that, for Department of Defense detainees generally, involuntary medical treatment may be undertaken when "immediate treatment or intervention is necessary to prevent death or serious harm," *id.* ¶ 4.7.1, the 2013 Guantánamo Bay protocols specifically authorize force-feeding *for Guantánamo Bay detainees* in circumstances *short* of imminent death or great bodily injury (a point

[12] Major General Hood uses 75% of IBW as the threshold for being "significantly malnourished." Resp'ts' Opp'n Exh. 4 ¶ 6. Captain Hooker uses 70% of IBW as the threshold for "severe malnutrition." *Id.* Exh. 6 ¶ 13; *see, e.g.*, World Food Programme, A Manual: Measuring and Interpreting Malnutrition and Mortality 20 (2005) (defining "severely malnourished" as less than 70% of IBW).

Respondents do not dispute). *See* Doc. 203-1 at 27-31; Suppl. Mem. In Supp. of Mot. Prelim. Inj. at 3-4.[13]

Thus, in this respect, the 2013 Guantánamo Bay protocols are in *direct conflict* with the 2006 Department of Defense instruction. A familiar canon of statutory construction is that "[w]here two statutes conflict, the later-enacted, more specific provision generally governs." *United States v. Juvenile Male*, 670 F.3d 999, 1008 (9th Cir.), *cert. denied*, 133 S. Ct. 234 (2012). This canon, applied in the analogous context of agency regulations, compels a determination that the 2013 Guantánamo Bay protocols trump the 2006 Department of Defense instruction to the extent the two are in conflict. And, indeed, Commander [redacted] seems to treat the Guantánamo Bay protocols as prevailing over the Department of Defense instruction. He states that detainees will be force-fed upon a determination that it is necessary to preserve "life and health." Resp'ts' Opp'n Exh. 1 ¶ 15. Force-feeding simply to keep a detainee "healthy" is far more expansive than force-feeding only when there is an imminent risk of death or great bodily injury.[14]

Respondents do not dispute the proposition that a hunger-striking detainee must not be force-fed absent an imminent risk of death or great bodily injury. They should therefore have no

[13] Respondents' counsel say these prescribed circumstances are "a necessary but not a sufficient condition to prescribe enteral feeding," Resp'ts' Opp'n at 5, but neither the Guantánamo Bay protocols nor Commander [redacted] say anything of the sort.

[14] As for the assertions by Respondents' declarants that JTF-GTMO has used the federal Bureau of Prisons regulations as a "model" for managing hunger strikes at Guantánamo Bay, *see* Resp'ts' Opp'n Exh. 5 ¶ 4 & Exh. 6 ¶ 8, that is not the same as an assertion that the Bureau of Prisons regulations and the Guantánamo Bay protocols are *substantially the same*. Respondents do not take issue with Petitioner's accounting of at least six ways in which they differ. *See* Doc. #203-1 at 31-34. Captain Hooker said in 2006 that the Bureau of Prisons "model" entails twice-daily force-feeding in a restraint chair, *see* Resp'ts' Opp'n Exh. 6 ¶ 8, but the Bureau of Prisons *regulations* say nothing of the sort. *See* Doc. #203-1 at 31-34.

objection to this Court enjoining the premature force-feeding that the Guantánamo Bay protocols authorize.

III. PETITIONER HAS STANDING.

Respondents contend that Petitioner lacks Article III standing because he "is not currently approved for enteral feeding" and therefore "cannot claim any current actual or imminent injury traceable to Respondents' enteral feeding policies." Resp'ts' Opp'n at 20. But it is undisputed that, as of April 23, 2014, Petitioner has resumed hunger-striking, at least partially. *See Id.* at 16 & Exh. 9 ¶ 5. According to Commander [redacted] as of April 30, 2014 Petitioner's weight was down to 84% of IBW. *See Id.* Commander [redacted] warns: "If Mr. Dhiab's condition deteriorates due to lack of eating, JTF-GTMO will follow the standard policies and procedures to maintain his health, including, if necessary, *the policies governing enteral feeding . . . .*" *Id.* (emphasis added). This warning alone demonstrates the "real and immediate threat" that is essential to standing. *See City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983). Petitioner's newly-resumed hunger-strike *will* lead to force-feeding absent this Court's intervention.[15]

IV. RESPONDENTS' INVOCATION OF THE "DELIBERATE INDIFFERENCE" STANDARD IS UNAVAILING.

Respondents contend the standard for assessing the lawfulness of force-feeding practices at Guantánamo Bay should not be whether those practices are "reasonably related to legitimate penological interests," *Turner v. Safley*, 482 U.S. at 89, but rather whether Respondents have

[15] Respondents insinuate that Petitioner has resumed hunger-striking at the urging of his attorneys. *See* Resp'ts' Opp'n at 16. Not so. During the telephone call of April 22, 2014, Petitioner explained to counsel that he had temporarily suspended his hunger strike in anticipation of his promised release [redacted] that he had only agreed to eat "as long as he sincerely believed his release to be imminent," and that "he no longer believed that to be the case." Suppl. Decl. of Cori Crider ¶¶ 4-5; *See also* Doc. #208-1 ¶¶ 5-7.

acted with subjective "deliberate indifference" to the detainees' health or safety. Resp'ts' Opp'n at 22-23 & n. 15; *see, e.g., Estelle v. Gamble*, 429 U.S. 97, 104 (1976). Respondents seem to be advocating for a rule that "anything goes" at Guantánamo Bay unless a brutalized detainee can prove a culpable *state of mind* on the part of the drafters of the force-feeding protocols or the JTF-GTMO staff who implement those protocols. Respondents rely on this Court's invocation of the deliberate indifference standard in *Al-Adahi,* 596 F. Supp. 2d at 120.

The deliberate indifference standard, however, is specific to claims of cruel and unusual punishment under the Eighth Amendment. *See, e.g., Wilson v. Seiter*, 501 U.S. 294, 303 (1991); *Farmer v. Brennan*, 511 U.S. 825, 837 (1994); *Fuentes v. Wagner*, 206 F.3d 335, 345 (3d Cir. 2000). This Court effectively treated *Al-Adahi* as an Eighth Amendment case, and the parties agreed that the applicable standard was deliberate indifference. *See Al-Adahi*, 596 F. Supp. 2d at 120.

Here, in contrast, Petitioner alleges unlawful violation of *the constitutional right to refuse unwanted medical treatment*. *See* Doc. #203-1 at 20 (citing *Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261, 278-79 (1990)). The *Turner v. Safley* standard for assessing the deprivation of a prisoner's constitutional rights applies to such allegations.

It would be unwise to adopt the deliberate indifference standard in the present context. The *Turner* standard is objective, and in guarding against abusive conditions of confinement at Guantánamo Bay the focus should be on how the detainees are affected, not on an abuser's subjective state of mind. If there is no legitimate penological interest in brutalizing a detainee, it should not be justifiable by a mere assertion of benign intent.

In any case, even under the deliberate indifference standard, Respondents' defense of their force-feeding practices is unavailing, because the requisite state of mind is demonstrated in

several ways. General Bantz J. Craddock admitted in 2006 that his purpose in changing the force-feeding practices at Guantánamo Bay was to coerce an end to hunger-striking by making it less "convenient"—that is, *more painful*. *See* Doc. #203-1 at 12-13. Additionally, the 2006 declarations of Major General Hood and Captain Hooker demonstrate that both men were well aware that the 85%-of-IBW threshold for force-feeding is an exaggerated response. *See* Resp'ts' Opp'n Exh. 4 ¶ 6 (Major General Hood's use of 75% of IBW as the threshold for being "significantly malnourished"); *id.* Exh. 6 ¶ 13 (Caption Hooker's use of 70% of IBW as the threshold for "severe malnutrition"); *see supra* at 16 n. 12..

Moreover, deliberate indifference can be inferred from the very manner in which Respondents have handled Petitioner's allegations of abuse. There is no indication that Respondents have interviewed *any* of the JTF-GTMO personnel who have been involved in the force-feeding of Petitioner or any other detainee. If Respondents *did* conduct such interviews, they have kept the results hidden from this Court. One would have expected that such serious allegations as Petitioner has leveled would have led to a prompt and thorough investigation and a candid report of its results to this Court. Surprisingly, that seems not to be the case.[16]

V. ALL FOUR REQUIREMENTS FOR PRELIMINARY INJUNCTIVE RELIEF ARE SATISFIED HERE.

As this Court has previously observed, "the granting of preliminary injunctive relief is an extraordinary measure" which requires Petitioner to demonstrate (1) a substantial likelihood of success on the merits, (2) that Petitioner would likely suffer irreparable harm absent a

[16] Respondents' behavior seems akin to a government official's "willful blindness" to torture, which may itself constitute a violation of Article I of the United Nations Convention Against Torture. *See, e.g., Silva-Rengifo v. Atty. Gen. of the United States*, 473 F.3d 58, 70 (3d Cir. 2007); *Zheng v. Ashcroft*, 332 F.3d 1186, 1194-95 (9th Cir. 2003); *Ontunez-Turios v. Ashcroft*, 303 F.3d 341, 354 (5th Cir. 2002).

preliminary injunction, (3) that the injunction would not substantially injure Respondents, and (4) that the injunction would serve the public interest. *Al-Joudi*, 406 F. Supp. 2d at 19. Petitioners have amply demonstrated the substantial likelihood of their success. The other three requirements are also satisfied.

Respondents contend Petitioner is not at risk of irreparable harm because he "is not currently approved for enteral feeding and has not been for some time." Resp'ts' Opp'n at 40. As previously demonstrated, however, Petitioner is very much at risk of abusive force-feeding, because he has resumed hunger-striking and has been expressly put on notice that his force-feeding may soon resume. *See supra* at 18. The "real and immediate threat" of force-feeding that gives Petitioner standing, *see id.*, also puts him at risk of irreparable harm.

Respondents contend injunctive relief would harm them because it "would interfere with the legitimate medical and security judgments of JTF-GTMO personnel as it would require the Court to substitute its judgment for that of the professional medical staff and detention authorities at Guantánamo Bay." Resp'ts' Opp'n at 40. There cannot, however, be any sound medical or security justification for such abuses as rapid bolus force-feeding that amounts to water torture. Certainly this Court should not interfere with JTF-GTMO's legitimate medical and security judgments, but nor should the Court permit shockingly abusive practices that are not reasonably related to legitimate penological interests.[17]

[17] Respondents object to paragraph 2 of Petitioner's proposed order to the extent it requires, as a condition of force-feeding, that an "independent physician" determine there is an imminent risk of death or great bodily injury, because this "would inject an unspecified outside expert into the administration of the military detention facility." Resp'ts' Opp'n at 41 n. 25. Unfortunately, given the massive failure of medical ethics and sound medical judgment at Guantánamo Bay, we fear that JTF-GTMO cannot be trusted with this decision. If, however, this Court believes the decision-maker need not be "independent," it is simple enough for the Court to strike that word from the proposed order.

Finally, Respondents offer the following argument regarding the public interest: "The lack of an injunction will not affect any public interest in the humane treatment of detainees at Guantánamo Bay because the detainees are treated humanely." Resp'ts' Opp'n at 41. There can no longer be any doubt, however, that the detainees have *not* been treated humanely, for many years. The injunctive relief Petitioner seeks does nothing more than hold JTF-GTMO to well-settled legal, ethical and moral standards of human decency. There can be no greater service of the public interest than that.

CONCLUSION

We acknowledge the difficulty inherent in this proceeding, for all concerned. Nobody wants Mr. Dhiab to starve himself to death—not even Mr. Dhiab himself, although he is prepared to risk serious bodily injury in order to speak out against his indefinite detention.

The status quo, however, has become untenable. Mr. Dhiab has been cleared for release since 2009, yet he *still* languishes at Guantánamo Bay, three months after the latest seemingly-empty promise of release was dangled before him. *See supra* at 18 n. 15; *see also* Resp'ts' Opp'n Exh. 8 ¶ 2. He is losing hope, and he fears that he will never again see his wife and children. *See* Doc. #208-1 ¶ 6.

The Circuit Court has made clear that Respondents may force-feed a hunger-striking Guantánamo Bay detainee who is actually facing an *imminent risk of death or great bodily injury*. *See Aamer*, 742 F.3d at 1041. Short of such a risk, however, force-feeding of the detainees is rightly shunned as "a painful, humiliating, and degrading process" which "violates article 7 of the International Covenant on Civil and Political Rights." Doc. #183 at 2-3. And on the rare occasions when a hunger-striking detainee reaches the point where force-feeding is

authorized by American law, there can be no legitimate justification for making the process unnecessarily brutal, as has occurred at Guantánamo Bay.

For more than twelve years now, JTF-GTMO personnel have had the difficult task of implementing the indefinite detention of hundreds of men, many of whom have long been cleared for release. The result has been to degrade and dehumanize nearly everyone involved in the process—from the brutalized and demoralized detainees, to the guards who are the object of detainees' anger and resentment, to the doctors and nurses who are required to violate fundamental standards of medical ethics by employing gratuitously painful force-feeding practices.

There has to be a better way. The purpose of this litigation is to find it.

Respectfully submitted,

/s/ Jon B. Eisenberg
JON B. EISENBERG (CA State Bar #88278)
1970 Broadway, Suite 1200
Oakland, CA 94612
(510) 452-2581
jeisenberg@horvitzlevy.com

/s/ Cori Crider
REPRIEVE
Clive Stafford Smith (LA Bar #14444)
Cori Crider (NY Bar #4525721)
Alka Pradhan (D.C. Bar #1004387)
P.O. Box 72054
London EC3P 3BZ
United Kingdom
011 44 207 553 8140
clive.stafford.smith@reprieve.org.uk
cori@reprieve.org.uk
alka.pradhan@reprieve.org

/s/ Eric L. Lewis
LEWIS BAACH PLLC
Eric L. Lewis (D.C. Bar #394643)
Elizabeth L. Marvin (D.C. Bar #496571)
1899 Pennsylvania Avenue, NW, Suite 600
Washington, DC 20006
(202) 833-8900
eric.lewis@lewisbaach.com
elizabeth.marvin@lewisbaach.com

Counsel for Petitioner/Plaintiff

Dated: May 12, 2014

CERTIFICATE OF SERVICE OF SEALED DOCUMENT

I hereby certify that I caused a true and correct copy of the Reply Memorandum In Support of Petitioner's Application for Preliminary Injunction, to be served via email on May 12, 2014, to the following:

Andrew I. Warden
U.S. Department of Justice
Federal Programs Branch
20 Massachusetts Avenue, NW
Washington, DC 20530
Email: Andrew.warden@usdoj.gov

/s/ Elizabeth L. Marvin
Elizabeth L. Marvin
Counsel for Petitioner/Plaintiff