IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ABI WA'EL (JIHAD) DHIAB,

Petitioner/Plaintiff,

v.

BARACK H. OBAMA, et al.,

Respondents/Defendants.

Civ. No. 05-1457 (GK)

PETITIONER'S REPLY TO RESPONDENTS' OPPOSITION TO EMERGENCY MOTION FOR ORDER COMPELLING PRESERVATION OF EVIDENCE AND LIMITED DISCOVERY, BY MAY 18, 2014, OF MEDICAL RECORDS AND VIDEOTAPES OF FORCE-FEEDINGS AND FORCIBLE CELL EXTRACTIONS

Petitioner responds as follows to Respondents' opposition to Petitioner's emergency motion:

1. Respondents contend that because there is not yet "a complete factual record," this Court should postpone the May 21, 2014 hearing "until … the record is complete." Doc. #219 at 2-3. But a complete factual record *is not required* for issuance of a preliminary injunction. "[A] preliminary injunction is customarily granted on the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits. A party thus is not required to prove his case in full at a preliminary-injunction hearing." *University of Texas v. Camenisch*, 451 U.S. 390, 395 (1981); *see also Sherley v. Sebelius*, 689 F.3d 776, 782 (D.C. Cir. 2012), *cert. denied*, 133 S. Ct. 847 (2013) ("In appellate review, the court of appeals must often consider such preliminary relief without the benefit of a fully developed record and often on briefing and argument abbreviated or eliminated by time considerations."). This Court has discretion to determine " 'what evidence can properly be adduced in the limited time that can be

devoted to a preliminary injunction hearing.' " *National Wildlife Federation v. Burford*, 835 F.2d 305, 324 (D.C. Cir. 1987) (holding that "[t]he record before the district court was complete enough" to support preliminary relief). A complete factual record is required only for this Court to issue a *permanent* injunction, which Petitioner intends to seek.[1]

2. Respondents state Petitioner's motion "does not contend that the information he seeks is newly discovered." Doc. #219 at 3. Not so. Petitioner's motion clearly states that his counsel learned for the first time on May 13, 2014 that JTF-GTMO has made videotapes of force-feedings at Guantánamo Bay. *See* Doc. #217 at 2.

3. Respondents contend that because Petitioner's medical records for the period April 9, 2013 to December 31, 2013 could only show prior abuse, they are "not material" to the request for prospective injunctive relief. Doc. #219 at 6. But instances of abuse within the past year are surely material to the question whether there is a threat of future abuse. Respondents cannot evade injunctive relief by simply ceasing the challenged conduct during the pendency of litigation. *See, e.g.*, *Lane v. Kitzhaber*, 283 F.R.D. 587, 599 (D. Or. 2012). Respondents fault Petitioner for not submitting "a declaration identifying any specific instances of abuse during his prior enteral feedings," Doc. #219 at 6, but given JTF-GTMO's extraordinary obstacles to client access at Guantánamo Bay the evidence Petitioner has submitted in support of his application for preliminary injunction is sufficient to justify disclosure of the medical records Petitioner seeks.

4. Respondents ask for 21 days to produce Petitioners medical records for the period April 9, 2013 to December 31, 2013. *See* Doc. #219 at 8. Respondents make no showing,

[1] A continuance of the May 21, 2014 hearing date would also be unfair to Petitioner's counsel, who has already purchased a nonrefundable airline ticket for the flight from Oakland, California to Washington D.C.

however, why it should take so long for them to do so. They note that the names of JTF-GTMO personnel must be redacted from those records, *see id.* at 8 n. 3, but that can be done very easily.

5. Respondents contend Petitioner is not entitled to the videotapes he seeks because he "has not identified any specific FCE that he contends is unlawful." Doc. #219 at 9. Not so. Petitioner contends that *each and every* FCE for purposes of force-feeding has been unlawful. *See* Doc. #203-1 at 5. Respondents also contend Petitioner has failed to show "any details regarding specific instances of mistreatment," Doc. #219 at 9, but, again, to whatever extent Petitioner's evidence might be sketchy on this point it is largely due to the extraordinary obstacles to client access. *See supra* at 2.[2]

6. Respondents request an additional period of time to review and redact the videotapes Petitioner seeks, offering to provide a status report within 14 days of a production order prescribing a schedule for production. *See* Doc. #219 at 10-12. Petitioner has no objection to this request. As noted above, a complete factual record is not essential to preliminary injunctive relief at this time. *See supra* at 1-2. Petitioner is willing to await production of the videotapes for a future evidentiary hearing on permanent injunctive relief.

7. Respondents contend there is no need for a preservation order because they have assured Petitioner's counsel that "the Department of Defense will preserve any video recordings falling within the scope [of] Petitioner's discovery request." Doc. #219 at 12. But the May 13, 2014 email exchange between Petitioner's counsel and Respondents' counsel, *see* Doc. #217 at 2, demonstrates otherwise. During that email exchange, Petitioner's counsel stated: "I'd like

[2] Respondents state that each videotape of FCEs related to force-feeding "typically lasts approximately 15 minutes on average." Doc. #219 at 10. That statement seems to confirm that detainees are indeed being force-fed extraordinarily quickly, given Respondents' assertion that "some of the videos recorded both the FCE process and the enteral feeding process." Doc. #217 at 2.

your immediate assurance that you are taking steps to preserve this videotape evidence and to ensure against its destruction." Respondents' counsel replied: "DoD is aware of its preservation obligations and *has no reason to believe* that the videotapes you seek in your motion have been destroyed." (Emphasis added.) The equivocation in the italicized language leaves open the possibility that evidence *has in fact been destroyed* and suggests that the Department of Defense *does not even know* and *has made no effort to determine* whether evidence has in fact been destroyed. Given Respondents' evident failure to take affirmative steps to prevent destruction of evidence, their reassurance now that they will preserve the requested videotapes should not be enough to evade a preservation order.[3] In any case, given Respondents' representation that the videotapes will not be destroyed, "entering a preservation order will inflict no harm or prejudice upon them." *Al-Marri v. Bush*, No. 04-2035 (GK), Order, at 1-2 (Mar. 7, 2005).[4]

We believe it is necessary to expand the preservation order to include videotapes of *all* force-feedings at Guantánamo Bay, not just Petitioner's. We also suggest the Court should order Respondents to provide an accounting of such videotapes, including their current place of storage and the name of their current custodian.[5]

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[3] We note that JTF-GTMO has a history of failing to preserve FCE videotape. *See* Eric Saar & Viveca Novac, Inside the Wire 102 (Penguin Press 2005) (describing "loss" of FCE videotape sought by former Guantánamo Bay interpreter).

[4] Respondents state that Petitioner's counsel "did not inform the Court of the representation by Respondents' counsel" during the email exchange of May 13, 2014. Doc. #219 at12. But Respondents' Exhibit 1—an incomplete copy of that email exchange—does not include the final email message in that exchange, in which Petitioner's counsel stated, at 12:32 p.m., "You'll see that the motion was filed while I was at lunch." The present motion was being filed when Respondents' counsel sent his assurance, which is why the motion did not mention that assurance.

[5] Respondents contend "[a] preliminary injunction standard should be used for evaluating Petitioner's request for a preservation order," Doc. #219 at 13 n. 6, but this Court has previously rejected that argument. *See Al-Marri*, *supra* at 1.

8. Respondents contend there is no need for disclosure of the still-secret force-feeding and restraint chair protocols because Respondents' prior filings "explain in detail the process by which enteral feeding and the restraint chair are conducted both generally and as applied to Petitioner." Doc. #219 at 13 n. 7. But yesterday, May 15, 2014, brought yet another troubling revelation in this case. Over the course of ten email exchanges yesterday morning between opposing counsel, Respondents' counsel eventually admitted that he *does not even know* whether, in addition to the December 16, 2013 force-feeding protocols and the still-secret restraint chair protocols, there are any *other* current protocols or SOPs relating to force-feeding, enteral feeding, hunger-striking, and/or non-religious fasting at Guantánamo Bay. Further, Respondents' counsel never gave a clear reply to an inquiry by Petitioner's counsel whether the Department of Defense or JTF-GTMO knows the answer to that question. Respondents' counsel simply said "DoD has not reviewed its SOPs to determine which, if any, are responsive." Surely it cannot be possible that the Department of Defense and JTF-GTMO do not even know what SOPs govern force-feeding at Guantánamo Bay. In any case, however, given the admitted ignorance of Respondents' counsel, they cannot possibly know that there is no reason for disclosure of the still-secret protocols.

9. Finally, in separate email to Respondents' counsel on May 15, 2014, Petitioner's counsel asked the following question: "Are there any *still-shot photographs* of any enteral feedings of any of the detainees at Guantánamo Bay?" (Emphasis added.) As of this writing, Respondents' counsel have not responded to this inquiry. Consequently, Petitioner respectfully requests that the Court's preservation and disclosure order include all such photographs.

Respectfully submitted,

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