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

Ali Saleh Kahlah Almarri,	)	
	)	**C/A 2:05-2259-HFF-RSC**
Plaintiff,	)	**ORAL ARGUMENT REQUESTED**
v.	)	**PLAINTIFF'S OBJECTIONS TO THE MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION DENYING PLAINTIFF'S MOTION FOR INTERIM RELIEF FROM PROLONGED ISOLATION AND OTHER UNLAWFUL CONDITIONS OF CONFINEMENT**
Robert M. Gates, Secretary of Defense of the United States,	)	
Commander John Pucciarrelli, U.S. Naval Brig, Charleston, South Carolina,	)	
Defendants.	)	

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Preliminary Statement

Plaintiff Ali Saleh Kahlah Almarri ("Mr. Almarri") has been imprisoned in almost total isolation at the Naval Consolidated Brig ("the Brig") for more than 1,700 days and, if the government's arguments elsewhere prevail, may be held there for the rest of his life. For the first sixteen months of his confinement at the Brig, Mr. Almarri was detained *incommunicado*. He was denied any contact with the world outside, including his family, his lawyers, and the Red Cross. All requests to see, speak to, or communicate with Mr. Almarri were ignored or refused. He was also brutally interrogated, subjected to almost total environmental and sensory deprivation, prevented from practicing his religion, and denied basic necessities.

Although the government has in a number of respects moderated Mr. Almarri's cruel treatment since he filed this suit, the underlying problem of his isolation remains. Mr. Almarri remains socially isolated and denied meaningful family contact. The cumulative and continued effect of this isolation is devastating. It is causing Mr. Almarri's mental deterioration, jeopardizing his ability to participate in his legal defense, and preventing him from maintaining a meaningful relationship with his closest family members.

In a reasonable effort to mitigate these ongoing harms pending resolution of his challenge to his detention—and after counsel's repeated attempts to address these issues with the government failed—Mr. Almarri filed this motion seeking regular and frequent telephone calls with immediate family members and timely processing of his family mail. He also challenged the restrictions on his access to news and the arbitrary denial of religious texts. The government, in turn, produced nothing to contradict the specific evidence of Mr. Almarri's actual mental decline. Nor did it demonstrate that the modest accommodations sought *in this case* would materially burden the government in general or the Brig in particular.

On April 22, 2008, without hearing or oral argument, the Honorable Robert S. Carr, U.S.M.J., issued a Report and Recommendation denying the motion for interim relief. As set forth below, the findings and conclusions of the Report and Recommendation should be rejected. The Court should grant the relief requested or, at a minimum, hold an evidentiary hearing to resolve any factual disputes, including over Mr. Almarri's deteriorating mental state, the continuing harm caused by Mr. Almarri's isolation, and the mitigation of that harm increased communication with his family would provide.

Statement of Material Facts

June 2003 to October 2004

Mr. Almarri has been held in almost complete isolation at the Brig since he was first imprisoned there as an "enemy combatant" on June 23, 2003, almost five years ago. Complaint ("Compl.") ¶¶ 32-35; Certification of Andrew J. Savage ("Savage Cert.") ¶ 3. For the first sixteen months of his confinement at the Brig, Mr. Almarri was detained *incommunicado*. He was denied any contact with the world outside, including his family, his lawyers, and the Red Cross. All requests to see, speak to, or communicate with Mr. Almarri were ignored or refused. Compl. ¶¶ 34-38, 50-52, 57-58; Savage Cert. ¶ 6. Mr. Almarri's only regular human contact during that period was with government officials during interrogation sessions, or with guards when they delivered trays of food through a slot in his cell door, escorted him to the shower, or took him to a concrete cage for "recreation." The guards had duct tape over their name badges and did not speak to Mr. Almarri except to give him orders. Savage Cert. ¶ 7.

Mr. Almarri was also subjected to brutal interrogation measures, including stress positions, prolonged exposure to extremely cold temperatures, extreme sensory deprivation, and threats of violence and death. Interrogators, for example, told Mr. Almarri that they would send

him to Egypt or to Saudi Arabia to be tortured and sodomized and forced to watch as his wife was raped in front of him. They also threatened to make Mr. Almarri disappear so that no one would know where he was. Compl. ¶¶ 68-71; Savage Cert. ¶¶ 23-25. On several occasions interrogators stuffed Mr. Almarri's mouth with cloth and covered his mouth with heavy duct tape. The tape caused Mr. Almarri serious pain. One time, when Mr. Almarri managed to loosen the tape with his mouth, interrogators re-taped his mouth even more tightly. Mr. Almarri started to choke until a panicked agent from the FBI or Defense Intelligence Agency removed the tape. Savage Cert. ¶ 29. In addition, for periods of up to eight days at a time, Mr. Almarri was placed in a completely bare and cold cell simply for refusing to answer questions. When Mr. Almarri asked for extra clothing or a blanket, his requests were denied. *Id*. ¶ 24.

In addition, Mr. Almarri's observance of Islam was restricted and degraded so severely that he could not adhere to the most elemental tenets of his faith. He was denied water to purify himself and a prayer rug to kneel on when praying. Mr. Almarri was also denied a *kofi* to cover his head during prayer; when he used his shirt as a substitute, he was punished by having his shirt removed. Mr. Almarri was prohibited from knowing the time of day or the direction of Mecca, preventing him from properly fulfilling the Islamic requirement of praying five times a day. The only religious item that Mr. Almarri was permitted was a Qur'an, and his copy of the Qur'an was sometimes taken away to facilitate interrogation and at other times was degraded and abused. Compl. ¶¶ 74-87; Savage Cert. ¶¶ 19-21.

Mr. Almarri was also denied basic necessities, including adequate clothing, recreation, and hygiene items such as toilet paper, a toothbrush, toothpaste, and soap. Sometimes, the water to his cell was cut off for up to 20 days. If Mr. Almarri needed water to drink or to wash

himself, he had to ring a buzzer. Brig staff often would not respond for several hours. Compl. ¶¶ 90-91; Savage Cert. ¶¶ 30-33.

October 2004 to August 2005

In October 2004, Mr. Almarri was finally allowed access to counsel, even though that access initially was monitored and severely restricted, and even though the government refused to recognize that Mr. Almarri had a legal right of access to counsel (and still refuses to recognize that right to this day). Compl. ¶¶ 24-27, 65-67; Savage Cert. ¶¶ 6, 34-35.[1] Although direct interrogations of Mr. Almarri ceased after he was finally allowed access to his lawyers, Mr. Almarri's conditions remained unbearably brutal and harsh. He continued to be confined to a 9 by 6 foot cell and denied regular opportunity for physical exercise. On those occasions when he was given the chance to exercise, that exercise took place either in an outdoor cage or indoors, where Mr. Almarri was kept in hand and leg irons. Compl. ¶¶ 37, 89; Savage Cert. ¶¶ 8-10.

The single window in Mr. Almarri's cell remained darkened with an opaque covering that prevented Mr. Almarri from seeing the outside world or knowing the time of day. His cell had only a sink, toilet, and hardened (metal) bed affixed to the wall. Mr. Almarri had no chair on which to sit and no blanket, pillow, or any other soft item inside his cell. Compl. ¶¶ 41, 45; Savage Cert. ¶¶ 11, 13. For more than two years, Mr. Almarri was denied a mattress, causing him discomfort and pain whenever he lay down on the hard and jagged metal surface of his bed. He was finally given a thin mattress at night, but the mattress was removed every morning. As a

[1] Initially, all meetings with counsel were tightly controlled by the Defense Intelligence Agency, whose agents remained in the room for the duration of every meeting. All meetings took place in a non-contact visitation room, and were video and audio recorded. Throughout the meetings, Mr. Almarri remained shackled around both his stomach and legs, and a chain was attached to the floor so that Mr. Almarri could not move his legs or bend his knees. All visits were time-restricted, and Mr. Almarri's counsel were debriefed by the Defense Intelligence Agency after each meeting. Savage Cert. ¶¶ 34-35.

result of these conditions, Mr. Almarri began to experience persistent tingling and pain in his leg, neck, and other parts of his body. When a government doctor finally examined Mr. Almarri, the doctor said that Mr. Almarri should be given a foam mattress, a cushioned chair, and a table (to lean on when sitting to alleviate the pressure). None of these items was provided, and Mr. Almarri continued to suffer. Compl. ¶¶ 43-44; Savage Cert. ¶¶ 14-15, 17.

Mr. Almarri was confined to his cell for 24 hours a day, 7 days a week, for months at a time. Once Mr. Almarri was forced to spend more than 20 days in his metal bed in his freezing cell, shivering under a thin, stiff "suicide blanket," unable even to stand because the floor was too cold and his socks and footwear had been taken away from him. Compl. ¶ 42; Savage Cert. ¶ 16.

Compounding the harm from these conditions, Mr. Almarri continued to be denied all external stimuli and physical, social, and temporal reference points, including all books, newspapers, magazines, TV, and radio, increasing his sense of isolation and hopelessness. Compl. ¶¶ 37, 89; Savage Cert. ¶ 18. Over the course of his confinement, virtually every aspect of Mr. Almarri's physical environment was manipulated to cause disorientation, discomfort, and despair, from the temperature in his cell to the loud noises and constant banging intended to wake him at night. Compl. ¶ 64; Savage Cert. ¶¶ 38-39.

Mr. Almarri's isolation, in tandem with other conditions of confinement, wore away his health and threatened his mental and physical integrity. Mr. Almarri became increasingly paranoid and unable to tolerate ordinary stimuli. For example, he was tormented by an industrial fan that had been placed near his cell door and that remained on continuously. Mr. Almarri believed that the speed of the fan—and thus the volume of the sound it emitted—was deliberately adjusted to harass him. Compl. ¶ 47; Savage Cert. ¶ 42. Mr. Almarri also believed

noxious odors were being introduced into his cell, and began stuffing his vents with food to try to block the smell. As a result, Mr. Almarri was declared "non-compliant" and punished with even harsher restrictions. Savage Cert. ¶ 41.

In early 2005, matters became so bad that Mr. Almarri started losing his grip on reality. He told his counsel that he was losing his mind and spoke of possible imminent death. *Id*. ¶¶ 46-47.[2]

August 2005 to Present

In August 2005, Mr. Almarri commenced this action challenging his conditions of confinement.[3] Virtually the moment suit was filed, those conditions began to improve, albeit slowly and unevenly. Mr. Almarri is now permitted to move about his cell block (though he remains the only prisoner there) and is given adequate time for recreation. *Id*. ¶¶ 49-50, 54. He now has a mattress in his cell all the time. *Id*. ¶ 50. Mr. Almarri's religious practices are no

[2] The government has never specifically disputed any of the allegations regarding Mr. Almarri's abuse prior to the filing of the instant lawsuit. Notwithstanding its clear legal obligation to preserve this potentially relevant evidence, the government destroyed an unspecified number of recordings of Mr. Almarri's interrogations. Declaration of Robert H. Berry, Jr., Exhibit 2 to Defendants' Response to Plaintiff's Motion for Preservation Order and Inquiry into Spoliation of Evidence (dkt. no. 51) ("Berry Decl."). The one recording—of the nine the government says remain—that has been publicly described by the government shows Mr. Almarri being "manhandled" by his interrogators, according to government officials. Mark Mazzetti & Scott Shane, "Pentagon Cites Tapes Showing Interrogations," *New York Times*, Mar. 13, 2008, Exhibit 1 to Plaintiff's Motion for Preservation Order and Inquiry into Spoliation of Evidence ("Pl.s' Mot. to Preserve") (dkt. no. 41). As Mr. Almarri has described, his mouth was stuffed with cloth and covered with heavy duct tape, while he was chained to the ground in a freezing room during one of the numerous interrogation sessions conducted during his sixteen-month *incommunicado* detention. When Mr. Almarri started to choke, the tape, which had been placed over his mouth both sideways around his ears and from top to bottom from his head to his chin, was ripped violently from his face. Pl.'s Mot. to Preserve at 3 n.3. If the Court has any doubt as to what transpired it can simply direct the government to produce the tape *in camera* and review it.

[3] Mr. Almarri had previously filed a separate habeas action in July 2004 challenging the lawfulness of his detention as an "enemy combatant." That case is currently pending before the full Fourth Circuit. *See Almarri v. Wright*, 487 F.3d 160 (4th Cir. 2007), *rehearing en banc granted sub nom. Almarri v. Pucciarelli* (argued Oct. 31, 2007).

longer degraded; he now can conduct his daily prayers properly and has access to a number of religious texts. *Id*. ¶¶ 51, 64. Attorney visits are now unsupervised, and comfortable chairs are provided. Mr. Almarri is also allowed to speak with his attorneys by telephone. *Id*. ¶ 55. Recently, Mr. Almarri was provided with a computer. *Id.* ¶ 50.[4]

But none of these improvements changes the fact that Mr. Almarri remains almost totally isolated and without any meaningful familial and social contact. For almost five years, Mr. Almarri had no contact or verbal communication with anyone outside the U.S. government except for his lawyers and representatives of the Red Cross. *Id.* ¶¶ 54-55. Mr. Almarri's contact with his immediate family, who live in Saudi Arabia, remains virtually non-existent. On April 29, 2008, he spoke to his family for the first time in almost five years and, if the government prevails, he will be allowed only one more telephone call for an entire year.[5] Mr. Almarri's only other communication with his family is through letters that are subjected to severe delays by the government. *Id*. ¶¶ 56-59. Indeed, the government acknowledges that mail between Mr. Almarri and his family routinely takes between two to four months for the government to process, and has taken considerably longer in the past. Declaration of Brigadier General Gregory J. Zanetti ¶¶ 9-12 ("Zanetti Decl."), Exhibit 3 to Gov't Response to Plaintiff's Motion for Interim Relief ("Response") at 24 n.17 (dkt no. 48); *see also* Savage Cert.¶ 57 (describing delays).

Compounding this isolation, Mr. Almarri's access to news remains severely restricted. The newspapers Mr. Almarri is provided are heavily redacted, and Mr. Almarri is prohibited from watching any news on television. Savage Cert. ¶ 63. In addition, while Mr. Almarri now

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[4] The computer does not have internet access.

[5] The call was arranged after Mr. Almarri's counsel learned from Mr. Almarri's brother Mohammed that Mr. Almarri's father, whose health had been deteriorating, had passed away. Mr. Almarri was not permitted to speak to his father before he died. As discussed below, Mr. Almarri has been so deprived of family contact that the call lifted his spirits even though he had learned the day before from his counsel of his father's passing.

has access to a number of religious texts, he continues to be denied important texts arbitrarily and without explanation or basis. *Id.* ¶ 64.

The Continued Danger and Ongoing Irreparable Harm to Mr. Almarri

Mr. Almarri's continued isolation, in combination with years of deprivation and abuse, are impairing his ability to think, to concentrate, and even to sleep. *Id.* ¶¶ 69, 82-84; Declaration of Stuart Grassian, M.D. ("Grassian Decl.") at 14-15. Mr. Almarri has recently exhibited distressing signs of further deterioration. Savage Cert. ¶¶ 74-79; Grassian Decl. at 13-15. He has become increasingly fixated on mundane aspects of his surroundings, from the humming noise of a fluorescent light to the preparation of his food. Mr. Almarri has also become more paranoid about those around him. Savage Cert. ¶¶ 80, 84-85; Grassian Decl. at 13-15.

Stuart Grassian, M.D., an expert on the psychiatric effects of stringent conditions of confinement, notes that he has "only very uncommonly encountered an individual whose confinement was as onerous as Mr. Almarri's, except for individuals who had been incarcerated brutally in some third-world countries." Grassian Decl. at 15. And Mr. Almarri, Dr. Grassian says, "clearly is suffering quite profoundly from increasingly severe symptoms related to his prolonged incarceration in solitary"—symptoms that are both "strikingly specific and detailed." *Id*. at 16. As Dr. Grassian observes, Mr. Almarri's increasing hypersensitivity to ordinary stimuli, his worsening perceptual problems, his "increasing difficulty with obsessive preoccupations," and his growing manifestation of paranoid thoughts are all the direct result of his prolonged and continuing isolation. *Id.* at 15-16.

As Dr. Grassian also notes, Mr. Almarri's ability to tolerate his confinement has already eroded "to a worrisome degree" and is "clearly eroding severely." *Id.* at 16-17. Mr. Almarri is becoming "increasingly irritable and impulsive, and increasingly obsessional." *Id*. at 17. He will

likely "become more agitated, more impulsive, and more distrustful and isolative" the longer his present conditions of confinement continue. *Id.* at 16. The continued stress of this isolation, in turn, will inflict further harm that may last "for a prolonged period of time, or even indefinitely." *Id.* at 17. The potentially permanent damage to Mr. Almarri's mental faculties is, in this sense, irreparable. Further, the impairments caused by Mr. Almarri's continued isolation are increasingly compromising his ability to work with his attorneys, "potentially hobbling his ability to pursue any appropriate legal remedy." *Id.* And there is no foreseeable end to Mr. Almarri's detention which, as the government recently reiterated, "could go on for a long time."[6]

The Current Motion

After numerous attempts to address the situation with the government failed, Mr. Almarri filed this motion seeking to remedy his deteriorating mental state, his increasing difficulty participating in his defense, and the denial of his constitutional right to intimate association with his family as well as to news and to books. His motion seeks greater communication with his immediate family through weekly or at least monthly telephone calls and timely processing of his family mail. In addition, the motion challenges the sweeping restrictions on his access to news and the arbitrary denial of religious texts for the exercise of his faith.

The Magistrate Judge's Report and Recommendation

On April 22, 2008, Magistrate Judge Carr issued his Report and Recommendation ("Report") denying the motion. The Magistrate acknowledged the evidence that Mr. Almarri has experienced "'extremely severe and prolonged conditions of isolation in solitary'" and that his "'symptomatic presentation is strikingly consistent with published descriptions of the particular psychopathological disturbance associated with solitary confinement.'" Report at 3-4 (quoting

[6] Unofficial Tr. of Oral Argument, *Almarri v. Pucciarelli*, at 85 (4th Cir. Oct. 31, 2007) (en banc), *available at* http://brennan.3cdn.net/e75ca720b7416fd646_bym6vjh5i.pdf.

Grassian Decl. at 17). Yet, the Magistrate decided that the relief requested is not "necessary to prevent, or will [not] prevent, irreparable harm." *Id.* at 4. The Magistrate also noted that "any decision granting partial relief would by its very nature harm the defendants" because Mr. Almarri's case is "unprecedented in the annals of American jurisprudence" and "implicates fundamental constitutional issues going to the very nature of the government." *Id.* at 4-5. Further, the Magistrate concluded that there was not a strong possibility of success on the merits because the Military Commissions Act of 2006 appears to eliminate jurisdiction over this action; because there is no precedent for providing Mr. Almarri "the extended 'rights' sought here"; and because the government has not waived sovereign immunity. *Id.* at 6 (citation omitted).

Argument

This Court reviews the Magistrate's Report *de novo*. Fed. R. Civ. P. 72(b)(3); 28 U.S.C. § 636(b)(1)(C); *Duncan v. Langestein*, 2008 WL 153975, at *2 (D.S.C. Jan. 14, 2008) ("The [Magistrate's] recommendation [on a motion for preliminary injunction] has no presumptive weight. The responsibility for making a final determination remains with this court."). The Magistrate correctly identified the legal standard governing Mr. Almarri's motion for interim relief. Report at 2-3 (describing four-part test for preliminary injunctive relief); *Rum Creek Coal Sales, Inc. v. Caperton*, 926 F.2d 353, 359 (4th Cir. 1991) (same). The Magistrate, however, improperly applied that standard, and reached incorrect legal and factual conclusions to which Mr. Almarri objects. As set forth below, Mr. Almarri meets the requirements for the relief requested.

A. Mr. Almarri Faces Continued Irreparable Harm.

The Magistrate mistakenly concluded that Mr. Almarri failed to establish a risk of irreparable harm. Report at 3-4. Mr. Almarri has established irreparable harm for two

independent reasons. First, because Mr. Almarri's demand for meaningful family communication and access to news and books implicates his constitutional rights under the First and Fifth Amendments, he necessarily establishes irreparable harm if he shows a likelihood of success on the merits. Second, Mr. Almarri has made a clear showing that he faces continued irreparable harm from isolation. Even though the requested relief cannot completely prevent or reverse that harm, it will necessarily mitigate it by reducing his isolation.

1. The Ongoing Violation of Mr. Almarri's First and Fifth Amendment Rights Itself Establishes Irreparable Harm.

The Magistrate erred in finding no irreparable harm because irreparable harm is presumed where, as here, a party alleges violations of First and Fifth Amendment rights. *See, e.g.*, *Henry v. Greenville Airport Comm'n*, 284 F.2d 631, 632-33 (4th Cir. 1960); *Eisenberg ex rel. Eisenberg v. Montgomery County Pub. Sch.*, 197 F.3d 123, 129 n.14 (4th Cir. 1999); *Jolly v. Coughlin*, 76 F.3d 468, 482 (2d Cir. 1996) ("[T]he *alleged* violation of a constitutional right … triggers a finding of irreparable harm.") (emphasis in original). Specifically, Mr. Almarri asserts that the government is violating his constitutional right to intimate association with his family under the First Amendment, *see, e.g.*, *Overton v. Bazzetta*, 539 U.S. 126, 131-32 (2003); *Wirsching v. Colorado*, 360 F.3d 1191, 1199 (10th Cir. 2004), as well as his right to safe conditions under the Due Process Clause of the Fifth Amendment, *see, e.g.*, *Youngberg v. Romeo*, 457 U.S. 307 (1982). Further, Mr. Almarri maintains that the government is violating his constitutional right to news and books under the First Amendment, *see, e.g.*, *Johnson v. California*, 543 U.S. 499, 510 (2005); *Stanley v. Georgia*, 394 U.S. 557, 564 (1969), as well as his right to religious freedom under the Religious Freedom Restoration Act, 107 Stat. 1488, 42 U.S.C. § 2000bb *et seq*. Because Mr. Almarri can establish a likelihood of success on the merits of those claims, *see infra* at Point C, he has *necessarily* demonstrated irreparable harm, and the

Court has no discretion to deny him an injunction. *See, e.g.*, *Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."); *Henry*, 284 F.2d at 633 (violation of constitutional rights necessarily constitutes irreparable injury); *Hardaway v. Kerr*, 573 F. Supp. 419, 427 (W.D. Wis. 1983) (ban on visits between inmate and former volunteer at the prison would cause irreparable harm).[7]

2. Increased Access to Mr. Almarri's Family Would Mitigate the Clear Ongoing Harm from Mr. Almarri's Continued Isolation.

The Magistrate also erred for a second and independent reason: the evidence overwhelmingly shows that Mr. Almarri will suffer continuing irreversible harm unless his isolation is remedied. As the Magistrate Judge acknowledged, the evidence shows that Mr. Almarri has experienced "'extremely severe and prolonged conditions in solitary [confinement]'" and that his "'symptomatic presentation is strikingly consistent with published descriptions of the particular psychopathological disturbance associated with solitary confinement.'" Report at 3 (quoting Grassian Decl. at 17). Mr. Almarri's symptoms include increasing hypersensitivity to ordinary stimuli, worsening perceptual problems, increasing anxiety and obsessive preoccupations, and growing manifestation of paranoid thoughts. Grassian Decl. at 15-16. *See generally* Craig Haney, *Mental Health Issues in Long-Term Solitary and 'Supermax' Confinement*, 49 Crime & Delinquency 124, 130-32 (2003) (describing symptoms), attached as Exhibit 1 to Pl.'s Reply on Mot. for Interim Relief ("Reply").[8]

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[7] Mr. Almarri's alleged violation of RFRA similarly necessitates a finding of irreparable harm because, as set forth below, he has established a likelihood of success on the merits of that claim as well. *See, e.g.*, *Jolly*, 76 F.3d at 482 (2d Cir. 1996); *Stuart Circle Parish v. Board of Zoning Appeals of City of Richmond,* 946 F. Supp. 1225, 1235 (E.D. Va. 1996).

[8] Contrary to the Magistrate's suggestion (Report at 4 n.2), the Haney article was not submitted to show Mr. Almarri's mental deterioration, of which there was already ample record evidence.

Moreover, the damage that is being inflicted has potentially permanent—and thus irreparable—effects. Grassian Decl. at 17. The government does not challenge the evidence connecting Mr. Almarri's continued isolation and deteriorating mental health; nor could it. The symptoms Mr. Almarri is experiencing are fully consistent with the well-documented effects of prolonged isolation. *See, e.g.*, *Davenport v. DeRobertis*, 844 F.2d 1310, 1313 (7th Cir. 1988) ("[T]he record shows, what anyway seems pretty obvious, that isolating a human being from other human beings year after year or even month after month can cause substantial psychological damage, even if the isolation is not total."); *Madrid v. Gomez*, 889 F. Supp. 1146, 1230 (N.D. Cal. 1995) ("Social science and clinical literature have consistently reported that when human beings are subjected to social isolation and reduced environmental stimulation, they may deteriorate mentally and in some cases develop psychiatric disturbances.").

The Magistrate Judge, nevertheless, concluded that "there is no showing that the remedy sought here is necessary to prevent, or will prevent, irreparable harm." Report at 4. But irreparable harm has *already* been inflicted. Grassian Decl. at 17 (detailing harm); *see also* Addendum to Declaration of Stuart Grassian, M.D. ("Grassian Addendum"), attached hereto as Exhibit 1 (concluding "to a reasonable degree of medical certainty [that] Mr. Almarri suffers severe psychiatric harm as a result of his prolonged incarceration in solitary in the Charleston, S.C. Naval Brig, and some of this harm is likely to be permanent").[9] The motion therefore properly seeks to mitigate the *ongoing* harm and to retard Mr. Almarri's further deterioration by

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Rather, the article, along with the numerous judicial decisions cited in Mr. Almarri's briefs, was submitted to rebut the government's mistaken suggestion that prolonged isolation does not ordinarily have harmful psychological consequences. *See* Haney, *Mental Health Issues*, at 132 (finding that "there is not a single published study of solitary or supermax-like confinement…that failed to result in negative psychological effects").

[9] Dr. Grassian's Addendum addresses the impact of Mr. Almarri's first telephone call with his family, which took place after the Magistrate issued his Report. *See* Fed. R. Civ. P. 72(b)(3).

addressing Mr. Almarri's prolonged and continued isolation. *See, e.g.*, *Harris v. Board of Supervisors*, 366 F.3d 754, 766 (9th Cir. 2004) (granting preliminary injunction to avoid additional suffering); *Temple Univ. – of the Com. Sys. of Higher Educ. v. White*, 732 F. Supp. 1327, 1328 (E.D. Pa. 1990) ("[It] is appropriate to grant relief to mitigate irreparable loss which the [movant] would otherwise suffer…."). The evidence clearly shows that Mr. Almarri's mental health is deteriorating *as a result of* his prolonged isolation and other deprivations at the Brig. Increasing Mr. Almarri's communication with his family would necessarily reduce his isolation and at least mitigate the ongoing harm that his continued isolation is causing.

Indeed, Mr. Almarri's recent phone call with his family demonstrates the clear positive effect increased family communication would have on his mental health and well-being. As counsel who spoke to Mr. Almarri after the call have described, Mr. Almarri was elated and very grateful for the call. Grassian Addendum at 2. He cried tears of joy and asked if he could have another call again soon. *Id.* Mr. Almarri also was not fixated on the "little things" that have been such a constant preoccupation in recent interactions with counsel, such as the buzzing of the fluorescent light in his cell block. *Id*. Brig staff similarly described Mr. Almarri as being in "great spirits" after the phone call. *Id.*

The call's positive effects are hardly surprising. As Dr. Grassian explains, "[Mr. Almarri] has been utterly isolated from his family ever since his incarceration, and inevitably, being able to actually speak to them, to hear their voices, gave him a renewed sense of connection and of purpose." *Id*. The call "allowed him to focus his attention on something very attractive and positive" and gave him "something that could keep him oriented, alert, and engaged, for days or weeks afterwards." *Id.* at 3. But, as Dr. Grassian also cautions, "this ameliorative effect cannot be expected to be permanent. Mr. Almarri is in desperate need of

continued enrichment of his social and perceptual environment." *Id*. More frequent family phone calls—ideally weekly but at least monthly—are necessary for this ameliorative effect to be maintained. Even though increased communication with Mr. Almarri's family will not prevent further irreparable harm from his continued isolation, it will likely decrease the totality of that harm. *Id*. In light of the grave and present danger to Mr. Almarri's health, this ameliorative measure is plainly warranted, especially where it would come at so little cost to the government.[10]

3. At a Minimum, the Magistrate Erred in Failing to Conduct an Evidentiary Hearing to Resolve Disputed Facts.

At a minimum, the Magistrate should have held an evidentiary hearing to resolve any disputed facts raised by the government's response. The government points to numerous improvements in Mr. Almarri's conditions since this suit was filed. But none of those improvements materially alters Mr. Almarri's continued isolation or denial of meaningful family contact. And none addresses the *effect* those conditions have had on him. The government, for example, has provided nothing to controvert the detailed observations of Mr. Almarri's actual mental deterioration, from his increasing hypersensitivity to external stimuli like the fluorescent light in his cell block to his growing paranoia over mundane matters like the preparation of his food. Grassian Decl. at 13-14; Savage Cert. ¶¶ 78, 84.[11] To be sure, the government refers to

[10] Contrary to the Magistrate's suggestion (Report at 3), Mr. Almarri was never "reluctant" to speak to his family because he did not want to talk to them. He does and always has. Rather, Mr. Almarri's isolation had become so unbearable that he was understandably scared of the pain and sense of loss that the fleeting communication finally allowed by the government could cause, making it even more difficult for Mr. Almarri to bear his continued isolation at the Brig. In any event, Mr. Almarri's recent communication with his family makes clear that any such question of "reluctance" is moot.

[11] Indeed, the government's response to the latter symptom illustrates its failure (or refusal) to acknowledge what is actually happening to Mr. Almarri. The government (Response at 7) says that it gave Mr. Almarri a private tour of the galley to observe how his food was being prepared.

reviews by unspecified mental health professionals. But it never says what those reviews actually determined about Mr. Almarri. Indeed, the government appears to miss the point entirely: Mr. Almarri is not seeking better "mental health care." Response at 12. Rather, he is seeking to mitigate the ongoing harm caused by prolonged isolation and to redress the denial of his constitutional right to intimate association with his family, a right to which he is entitled regardless of the harmful effects his isolation is causing.[12]

Instead of offering evidence of its own, the government seeks to assail the credibility of Dr. Stuart Grassian, Mr. Almarri's mental health expert. That effort is without merit and, at most, shows the need for an evidentiary hearing. Dr. Grassian, a Board-certified psychiatrist, is a widely regarded expert on the psychiatric impact of prolonged isolation on prisoners. Dr. Grassian has provided expert oral and written testimony in dozens of cases, and that testimony has consistently been credited by courts. *See, e.g.*, *McClary v. Coughlin*, 87 F. Supp. 2d 205, 218 (D.N.Y. 2000) ("The expert testimony of Dr. Stuart Grassian as to the damage caused by years of isolation…was compelling and certainly supported a substantial verdict."); *Coleman v.*

But the reason that Mr. Almarri had to inspect the galley in the middle of the night, and the reason that he has twice in the last year refused all food for months except Meals Ready-to-Eat ("MREs"), is that he is suffering from the harmful effects of extreme and prolonged isolation. Grassian Decl. at 16; Savage Cert. ¶¶ 78-79. The government (Response at 15) also tries to portray Mr. Almarri's difficulty sleeping in the fall of 2007 as a result of the Brig's effort to accommodate his sleep-wake cycle during Ramadan. But Mr. Almarri's sleeping problems lasted well beyond the Ramadan period, and this was not the first time he had this problem. Further, difficulty sleeping is only one of the numerous harmful effects of prolonged isolation that Mr. Almarri has exhibited. Savage Cert. ¶¶ 79-85 (describing these effects).

[12] The suggestion (Response 13-14) that treatment would be available to Mr. Almarri if he sought it says nothing about his actual condition. Moreover, as even the study cited by the government acknowledges, "few" prisoners subject to prolonged isolation "regard themselves as having psychological problems" and seek out treatment. David A. Ward & Thomas G. Werlich, *Alcatraz and Marion: Evaluating super-maximum custody*, Punishment & Society 5(1) (2003), at 68, Exhibit 4 to Gov't Response; *see also* Haney, *Mental Health Issues*, at 138 (showing that prisoners suffering from the harmful effects of prolonged isolation often do not seek out treatment).

Wilson, 912 F. Supp. 1282, 1321 (D. Cal. 1995) ("Dr. Grassian's findings concerning the seven actively psychotic inmates…and the response of [prison] staff to those conditions…fully support the magistrate judge's findings.") Indeed, courts have consistently cited Dr. Grassian's work even where he has not proffered his services as an expert. *See*, *e.g.*, *Davenport*, 844 F.2d at 1316 (citing Dr. Grassian's research into the "ill effects of solitary confinement"); *Kane v. Winn*, 319 F. Supp. 2d 162, 207 (D. Mass. 2004) (describing and listing cases citing Dr. Grassian's work).[13]

It is true that Dr. Grassian has not examined Mr. Almarri. But that is only because the government has refused to allow such an examination. Letter of Andrew J. Savage to Lt. Cdr. Frank D. Hutchinson dated July 24, 2006; Letter of Lt. Cdr. Frank D. Hutchinson to Andrew J. Savage dated Aug. 11, 2006, attached as Exhibit 2 to Reply. And the government, for its part, presents nothing to rebut Dr. Grassian's findings about Mr. Almarri's mental state, all of which are based on counsel's specific first-hand observations of Mr. Almarri himself. Savage Cert. ¶¶ 70-87. It is at best hypocritical for the government to criticize Dr. Grassian for relying on those observations after denying him access to Mr. Almarri.[14]

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[13] The government (Response at 16 n.9) cites two cases to try to discredit Dr. Grassian. But neither questions his qualifications. Moreover, in one, the court credited all of Dr. Grassian's testimony except a single assertion. *United States v. Hammer*, 404 F. Supp. 2d 676, 725 (M.D. Pa. 2005). In the other, the court merely found the mental health testimony of the state's expert more persuasive. *State v. Ross*, 863 A.2d 654, 673 (Conn. 2005). That decision is no help here to the government since the government has failed to provide any mental health evidence to rebut Dr. Grassian's testimony.

The government (Response at 14) also cites an article by two non-clinicians (one employed by the Bureau of Prisons) criticizing a study Dr. Grassian published in the *American Journal of Psychiatry*, a leading clinical journal. Ward & Werlich, *Alcatraz and Marion*, *supra* note 12. But the views expressed in that article, which has never been cited by any court, are contradicted by the overwhelming evidence of the harms prolonged isolation can cause. More to the point, the article says nothing about Mr. Almarri's mental condition and how his prolonged isolation has affected him.

[14] The government also objected to Dr. Grassian's description of Mr. Almarri's conditions as "some of the most severe conditions seen in any American prison setting" and akin to those in "some third-world countries." Grassian Decl. at 15. But Dr. Grassian was simply summarizing

In sum, the government has failed to challenge the detailed evidence of Mr. Almarri's deteriorating mental state caused by his prolonged isolation. To the extent, however, that the Court believes the government has produced sufficient evidence to materially dispute Mr. Almarri's numerous and specific allegations, it must hold an evidentiary hearing and not simply accept as fact the government's untested and conclusory assertions. *See*, *e.g.*, *McDonald's Corp v. Robertson*, 147 F.3d 1301, 1312 (11th Cir. 1998) ("[W]here facts are bitterly contested and credibility determinations must be made to decide whether injunctive relief should issue, an evidentiary hearing must be held."); *Dixon v. Vanderbilt*, 122 Fed. Appx. 694, 695-96 (5th Cir. 2004) (evidentiary hearing required to resolve prisoner's specific allegations). There, the government will be free to challenge, through an adversary process, the otherwise uncontradicted evidence of Mr. Almarri's worsening mental state, the continued irreparable harm he is enduring, and the effect that increasing his communication with his family would have in mitigating the ongoing harm he is suffering.

B. The Exceedingly Modest Relief Requested Here Would Not Burden the Government.

The Magistrate assumed that because this case is "unprecedented in the annals of American jurisprudence," any decision granting partial relief would necessarily impose an undue burden on the government. Report at 4-5. In effect the Magistrate held that because Mr. Almarri has been subject to an unprecedented deprivation of liberty by the government, he is subject to special barriers in challenging that liberty deprivation. This is perverse. Moreover, merely because a case raises new and perhaps difficult legal issues does not excuse a court from

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Mr. Almarri's conditions over time in assessing the cumulative effect those conditions have had on him. *Id.* at 7-11; Savage Cert. ¶¶ 6-47. The government, moreover, does not deny, nor could it, that Mr. Almarri's prior conditions, including *incommunicado* detention, extreme sensory and environmental deprivation, religious persecution, and denial of basic necessities, were beyond the pale, even by third-world standards.

deciding them. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (Marshall, C.J.) ("It is emphatically the province and the duty of the judicial department to say what the law is."). And the fact that "fundamental constitutional issues" are at stake *sharpens*, not diminishes, that court's duty to protect the rights of the individual. *Cf. Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004) (plurality opinion) ("Whatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake.").

More specifically, the Magistrate assumed (without evidence) that the requested relief would have "far reaching consequences" on the government's "handling of enemy combatants." But this case does not address the "handling" of "enemy combatants." Rather, it addresses the treatment of a single "enemy combatant": one human being who has been imprisoned without charge in almost complete isolation and without meaningful family contact for almost five years, a situation the government itself recognizes as "unique[]." Response at 15, 23. The narrow question, therefore, is what burden, if any, allowing *Mr. Almarri* more frequent phone calls, processing *Mr. Almarri's* mail in a more timely fashion, and allowing *Mr. Almarri* greater access to news would impose on the government.

The only burden that the Magistrate identifies is that of creating "temporary, new procedures." But the issue is not whether procedures are "new" or "temporary" since the uniqueness of Mr. Almarri's detention renders all procedures novel. Rather, the specific question is what burden, if any, would be imposed on the government by the change and whether that burden is outweighed by the harm it would prevent or mitigate. *See Blackwelder Furniture Co. v. Seilig Mfg. Co.*, 550 F.2d 189, 196 (4th Cir. 1977) (courts must assess "how much the precaution will cost the defendant" in relation to the harm suffered by the plaintiff). The

Magistrate, however, simply assumed that some undefined harm would accrue to the government from creating "new procedures," and then further speculated that this hypothetical harm would outweigh the likelihood of harm to Mr. Almarri in spite of the clear showing that his mental condition is deteriorating because of his continued isolation. This determination was erroneous, as set forth more fully below.[15]

1. Family Phone Calls. The Federal Bureau of Prisons ("BOP") allows prisoners at least one family telephone call every month, including those prisoners convicted of the most serious terrorist offenses. 28 C.F.R. § 540.100; Pl.'s Mot. for Interim Relief ("Pl.'s Mot.") at 22 n.10. Many federal prisoners, moreover, are allowed more frequent calls. *See infra* Point C.2.a (describing BOP phone rules and polices). And the Brig, for its part, not only places no limits on the number of calls other prisoners can make to their respective families but also expressly encourages those calls where they will boost prisoners' morale and help promote their well-being.[16] Yet, the government offers no evidence and articulates no specific reason why allowing Mr. Almarri more frequent monitored phone calls with his immediate family would impose any danger. *Cf. Valdez v. Rosenbaum*, 302 F.3d 1039, 1042 (9th Cir. 2002) (approving temporary restrictions on indicted drug smuggler's telephone calls imposed in connection with specifically articulated threat). Even if the non-punitive nature of Mr. Almarri's detention and the severity of his isolation does not entitle him to more frequent family phone calls than convicted criminals, including convicted terrorists, held in federal prisons throughout the United States (*see infra*

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[15] The government, moreover, has had no problem changing its procedures applicable to Mr. Almarri before in response to this litigation. And on the crucial issue of family phone calls, there would not even be a need for "new procedures" since the government says that it now has in place a procedure for such calls. That existing procedure need only be modified to ensure a sufficient frequency of calls to make this family communication meaningful.

[16] *See* U.S. Dep't of the Navy, *Corrections Manual* 8-40 to 8-41, *available at* http://doni.daps.dla.mil/Directives/01000%20Military%20Personnel%20Support/01-600%20Performance%20and%20Discipline%20Programs/1640.9C.pdf.

Point C.1), surely it would not burden the government to let this one prisoner speak to his family as least as often as it allows those other prisoners to speak to their respective families (*i.e.*, a minimum of once a month).[17]

2. Family Mail. The government concedes that mail between Mr. Almarri and his family takes at least "two to four months to process" and has sometimes taken considerably longer. Response at 24 n.17; Savage Cert. ¶ 57. The government has other options available to reduce this extraordinary delay, including processing Mr. Almarri's mail in Norfolk, Virginia (as Brig staff suggested, *see* Savage Cert. ¶ 59), or processing his mail more quickly at Guantánamo. The government could also process Mr. Almarri's mail at a federal prison, as it does for convicted terrorists throughout the United States. How the government processes Mr. Almarri's family mail is ultimately for the government to decide. But the government must do better if written communication is to be meaningful. The government *chose* to incarcerate Mr. Almarri. Whether or not it acted lawfully in so doing, it must still allow Mr. Almarri to maintain a meaningful relationship with his family, even in time of war. *Cf.* Pl.'s Mot. at 18 (citing Geneva Conventions' requirement of "rapid" and "speed[y]" delivery of a prisoner's family mail).[18]

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[17] Contrary to the Magistrate's suggestion (Report at 5 n.3), there was nothing "vague" about Mr. Almarri's request. His motion specifically requested regular and frequent telephone calls with immediate family and maintained that the government's recently announced policy of two phone calls a year was inadequate. Mr. Almarri subsequently asserted that he should be permitted one call per week in light of his unique situation and deteriorating mental health, but that, at a minimum, he should be allowed at least the one call per month minimum that convicted federal prisoners enjoy. Not only was this request sufficiently specific for the Magistrate to invalidate the current restrictions and enter appropriate relief, but Federal Rule of Civil Procedure 65(d)'s particularity requirement itself applies only to an *order* granting an injunction. *See, e.g., Western Colo. Fruit Growers Ass'n v. Marshall*, 473 F. Supp. 693, 699-700 (D. Colo. 1979).

[18] Indeed, the government now acknowledges that it can do better, explaining that it is implementing measures "to improve processing times of plaintiff's mail and videos." Response at 24. Prompt action by the government implementing satisfactory measures would be a welcome step that could further narrow the limited issues presently before the Court.

3. Access to News. The government claims that allowing Mr. Almarri to read an unredacted newspaper or watch the news would "threat[en]…the core purposes of the enemy combatant detention"—*i.e.*, to prevent his "return to the battlefield"—because he might "learn of news of a particular setback for the United States and its coalition partners." Response at 19. Accordingly, the government claims it must censor all stories pertaining to the "War on Terror," a term it interprets to include stories ranging from debates in Congress and the presidential election to stories about Iraq, Afghanistan, Israel, Palestine, and virtually every country in the Middle East as well as numerous countries in Africa and Asia. But such news poses no threat, and the government's restrictions bear no relation to preventing any putative "return" to "the battlefield." If Mr. Almarri is properly detained, he will be detained until the "War on Terror" is over; and if he is not properly detained, the restrictions on his access to news have no legitimate basis in the first place. Further, nothing in the record remotely suggests that allowing Mr. Almarri to read a major national newspaper such the *Washington Post* (at his expense) or watch a major news channel like *CNN* (or a network news program on an already-available television) would pose any concern to Brig staff or Brig operations in general.

4. Denial of Religious Texts. Similarly, it would not burden the government to allow Mr. Almarri access to the religious texts he has specifically requested, all of which would be provided at his or the Red Cross's expense. Mr. Almarri's motion identifies four Islamic texts—all written approximately six centuries ago—that the government has prohibited him from receiving.[19] The government has never said why it denied Mr. Almarri these texts nor has it demonstrated any burden in allowing him access to these texts. Plainly, there is no burden.

[19] The texts are: *Sahi Mawaridh al Dahman* (a book containing the Hadith or oral traditions relating to the words and deeds of the Prophet Mohammed); *Al Nihaya Fighareeb al Hadith* (an Arabic-Arabic dictionary used for difficult words in the Hadith); *Al Bath al Hadith* (a book used

C. Mr. Almarri Has Established a Sufficient Likelihood of Success on the Merits.

While Mr. Almarri is likely to prevail on the merits, he has at a minimum "raised questions going to the merits so serious, substantial, difficult and doubtful, as to make them fair ground for litigation and thus for more deliberate investigation," which is all that is required since the balance of hardships "tips decidedly" in his favor. *Rum Creek*, 926 F.2d at 359; *see also Blackwelder*, 550 F.2d at 196 ("The decision to grant or deny a preliminary injunction depends upon a flexible interplay among all the factors considered.") (internal quotation marks omitted).

1. Mr. Almarri Is Entitled to Greater Protections Than Convicted Criminals Because He Is Being Detained for a Non-Punitive Purpose.

The Magistrate's Report does not directly address the legal standard governing Mr. Almarri's claims. Report at 6. It is clear, however, that his claims must be evaluated under the more liberal standard governing non-punitive detention and that his conditions of confinement must be consistent with the non-punitive purpose of that detention. *See, e.g.*, *Youngberg*, 457 U.S. at 321-22; *Patten v. Nichols*, 274 F.3d 829, 840-41 (4th Cir. 2001). The Supreme Court has explained that "[c]aptivity in war is neither revenge, nor punishment, but solely protective custody, *the only purpose* of which is to prevent the prisoners of war from further participation in the war." *Hamdi*, 542 U.S. at 518 (plurality opinion) (internal quotation marks and citation omitted) (emphasis added). Moreover, the government, as noted, has claimed that Mr. Almarri is not being punished for wrongdoing but is being held merely as a "simple war measure" to "prevent his return to the battlefield." Answer to Petition for Writ of Habeas Corpus 8, *Almarri*

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to determine the authenticity of Hadith); and *Bidayat al Mujtahid* (a comparison of the four major schools of Islam on disputed issues in Islamic jurisprudence). *See* Savage Cert. ¶ 64. Like other religious texts, those texts would be provided by Mr. Almarri's counsel or the Red Cross, not the government.

v. Hanft, No. C/A No. 02:04-2257-26AJ (D.S.C.) (dkt. no. 11). Mr. Almarri, therefore, is entitled to greater protections than prisoners who are being punished for crimes proved beyond a reasonable doubt, and whose conditions reflect the punitive purpose of their confinement. *See, e.g.*, *Sandin v. Conner*, 515, U.S. 472, 485 (1995) ("'[L]awful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by considerations underlying our penal system.'") (quoting *Price v. Johnston*, 334 U.S. 266, 285 (1948)); *Overton v. Bazzetta*, 539 U.S. 126, 139-40 (2003) (Thomas, J., concurring) (restrictions on the constitutional rights of prisoners flow from the punitive function of sentences). As explained more fully in Mr. Almarri's prior submissions, his prolonged isolation and denial of meaningful communication with his family violates the Constitution because it contributes to unsafe conditions of confinement, Pl.'s Mot. at 14-16; and because it exceeds the permissible purpose of his detention, which is merely to prevent his return to the battlefield, not to punish him, *id.* at 16-20.

2. Even if Mr. Almarri Is Judged by the Same Standard as Convicted Prisoners, He Has a Right to the Relief Requested.

The Magistrate also failed to afford Mr. Almarri the minimal protections to which convicted prisoners in the United States, including convicted terrorists, are entitled. *See Turner v. Safley*, 482 U.S. 78, 84 (1987) ("Prison walls do not form a barrier separating prison inmates from the protections of the Constitution."). Even if Mr. Almarri is not entitled to greater protections because of the non-punitive purpose of his detention and the severity of his isolation, he still must be allowed the minimum monthly family phone call those other prisoners receive.

Because Mr. Almarri's challenge to prison policy (*i.e.*, the Defense Department's policy regarding family phone calls, family mail, and access to news and books) implicates his First and Fifth Amendment rights, *see supra* at 11-12, it is analyzed under *Turner v. Safley*, 482 U.S. at

89-90. In evaluating constitutional challenges to prison policies, courts must determine: (i) whether there is a "valid rational connection between the prison regulation and the legitimate governmental interest put forward to justify it"; (ii) whether "alternative means" for exercising the right at issue remain open to the inmate; (iii) what impact "accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prisoner resources generally"; and (iv) whether there are "ready alternatives" for furthering the government interest available. *Id.* (internal quotation marks and citations omitted). Mr. Almarri meets each part of this standard.

a. Meaningful Family Communication. The government has advanced no legitimate interest for limiting Mr. Almarri's calls to his family to every six months or for taking at least two to four months—and sometimes considerably longer—to process his family mail. Nor has the government presented any basis, let alone concrete explanation, for concluding that these calls—all of which will be monitored—would somehow endanger security. Nor has the government said that it is prohibiting Mr. Almarri from speaking to his family more frequently than once every six months because of prison management or in response to some misconduct by Mr. Almarri. Indeed, the government has not alleged that Mr. Almarri has ever used family mail—the one form of family communication that he has been allowed—for anything but the intended and legitimate purpose of sharing his personal thoughts and feelings with his loved ones and learning about their lives back home, including the lives of his children who are growing up without ever speaking to their father. Instead, all the government presents is sweeping rhetoric and conclusory assertions about the danger that allowing Mr. Almarri reasonable access to his family would pose to the "War on Terror." Even *Turner* does not give the government such

unfettered deference. *Thornburgh v. Abbott*, 490 U.S. 401, 414 (1989) (*Turner*'s "reasonableness standard is not toothless").

As noted above, federal regulations require that convicted prisoners be allowed at least one non-legal phone call per month. 28 C.F.R. § 540.100; *see also id.* § 541.12 ("[Inmates] have the right to visit and correspond with family members, and friends."). This requirement applies even to prisoners whose telephone use has been restricted by the warden. *Program Statement: Inmate Telephone Regulations*, U.S. Dep't of Justice, Federal Bureau of Prisons, No. P5264.08, at 14 (Feb. 11, 2008), *available at* http://www.bop.gov/DataSource/execute/dsPolicyLoc. In fact, BOP practice is to provide inmates with approximately five hours of non-legal phone calls per month. *Id.* at 9-10 (inmates receive 300 minutes per month and 400 minutes in November and December, excluding legal calls). Even those charged with terrorism offenses receive more than one family call a month. *See, e.g.*, *United States v. El-Hage*, 213 F.3d 74, 78 (2d Cir. 2000); *United States v. Abu Ali*, 396 F. Supp. 2d 703, 710 (E.D. Va. 2005). The BOP, moreover, views a prisoner's family calls as an important part of prison management because of the benefit they provide to a prisoner's well-being. 28 C.F.R. § 540.100 ("Telephone privileges are a supplemental means of maintaining community and family ties that will contribute to an inmate's personal development."). And the Navy Brig, with the exception of Mr. Almarri, places no limit at all on the number of family calls prisoners can make or receive. *Navy Corrections Manual*, *supra* note 16, at 8-40 to 8-41. Like the BOP, the Brig views these calls as an important part of correctional management because of the beneficial effects they have on a prisoner's health and morale. *Id*.

The non-punitive purpose of Mr. Almarri's detention, the fact he was denied any family calls for almost five years, and the magnitude of the harm caused by his continuing isolation all

support providing him with a weekly call to his immediate family. But at a minimum, Mr. Almarri must be allowed at least the monthly family phone call that even convicted federal prisoners receive. Anything less would grossly exceed any legitimate government interest.

Second, there are no other means available for Mr. Almarri to exercise his right to intimate association with his immediate family. *See, e.g.*, *Valdez*, 302 F.3d at 1049 (upholding *temporary* restrictions on telephone use for a prisoner *because* he could receive visitors as well as send mail); *Pope v. Hightower*, 101 F.3d 1382, 1385 (11th Cir. 1996) (upholding restrictions on the *number* of people that a prisoner held in the highest security level of the prison could call *because* "he could receive visitors and correspond with virtually anyone he wished"). Mr. Almarri is not allowed any visits from his family and his correspondence is, as noted, heavily censored and exceedingly slow. It is absurd, if not downright callous, to suggest that Mr. Almarri has an alternative means of meaningful communication with his wife, children, and other immediate family. On the contrary, the specific polices of the BOP and Navy Brig that allow for much more frequent phone calls in addition to visitation show he does not.

Finally, as to the third and fourth prongs, there are "ready alternatives" to mitigate the harmful effects of Mr. Almarri's continuing isolation and denial of meaningful family contact with only *de minimis* cost to the government. *Turner*, 482 U.S. at 90. The government could simply do what it does for other prisoners, including convicted terrorists, in federal custody throughout the United States: allow Mr. Almarri to call his family at least once a month (if not once a week) and process his mail more quickly than the minimum of two to four months it now takes.

b. Restrictions on News. *First*, there is no legitimate interest that justifies the current overbroad restrictions on Mr. Almarri's access to news. As explained above, if the government

interest is in keeping Mr. Almarri ignorant of the progress of the "War on Terror," that interest is insufficient to limit severely his First Amendment rights because: if he is properly detained, he will be detained until the "war" is over; and, if he is not properly detained, the limitation is without basis in the first place.

Further, even for convicted prisoners, the government may not regulate speech based upon its content or the ideas it expresses. *See, e.g.*, *Thornburgh*, 490 U.S. at 405; *Turner*, 482 U.S. at 90. Courts, therefore, have not permitted restrictions on inmates' access to publications except where necessary to prevent an "intolerable risk of disorder" in the institution, *Thornburgh*, 490 U.S. at 417; *Cline v. Fox*, 319 F. Supp. 2d 685, 693 (N.D. W. Va. 2004), or to regulate the behavior of intractably violent prisoners through an incentive system, *Beard v. Banks*, 126 S. Ct. 2572, 2579 (2006). Here, the government provides no evidence that restricting Mr. Almarri's access to news is related to institutional security. The restrictions are not the result of any violent or disruptive activity on Mr. Almarri's part. Nor are they "incentives" intended to "improve behavior." *Beard*, 126 S. Ct. at 2579. The government also cannot plausibly contend that allowing Mr. Almarri fuller access to news would create any risks outside the Brig since, as noted above, it intends to hold Mr. Almarri until the end of the "War on Terror" if he is properly detained as an "enemy combatant." Rather, these restrictions are based upon the ideas expressed, and are not rationally related to any legitimate government interest. *See Thornburgh*, 490 U.S. at 404-05 (a publication may be restricted "'only if it is determined detrimental to the security, good order, or discipline of the institution or if it might facilitate

criminal activity'") (quoting 8 C.F.R. § 540.71(b)); U.S. Dep't of the Navy, *Corrections Manual*, *supra* note 16, at 8-34 to 8-35 (same).[20]

Second, there are no alternative means available for Mr. Almarri. While he has access to some news, the government prohibits him from seeing any news "related" to the "War on Terror," which it defines to include a wide range of topics on domestic and international affairs. Under this vague and overbroad restriction, Mr. Almarri cannot read about such issues as the military conflict in Iraq, the peace process in the Middle East, or even debate by lawmakers over the very issues that affect his fate. This information black-out provides no alternative.

Finally, as with family phone calls and mail, there are "ready alternatives" with no cost to the government. *Turner*, 482 U.S. at 90. The government could simply stop redacting Mr. Almarri's newspapers and allow him to watch the news on the already-available television. It could also allow him to purchase a subscription to a mainstream national newspaper or periodical like *Time* or *Newsweek*. For the reasons set forth above, none of these alternatives would impose any burden on the government in general or the Navy Brig in particular.

c. Access to Religious Texts. The government mischaracterizes the problem with Mr. Almarri's access to religious texts. The issue is not the quantity of the religious texts Mr. Almarri currently has: after being denied any texts for years, he now has a good number, all of which he was finally allowed only after he filed this lawsuit. The sole issue on this motion concerns the criteria the government uses in reviewing religious texts and its arbitrary and unexplained decision to deny Mr. Almarri access to certain texts. As noted above, the

[20] Mr. Almarri would have no objection to the government's redacting classified advertisements or letters to the editor if the government believed those sections of the newspaper could be used as a forum for information to be passed by unknown and/or unverified individuals. Rather, he objects to the wholesale redaction of a wide range of news articles published in the nation's leading newspapers and periodicals, preventing him from knowing about many of the most important issues of the day.

government recently denied Mr. Almarri access to four texts from approximately six centuries ago, all of which he views as important to his exercise, study, and observance of Islam. Pl.'s Mot. for Interim Relief ("Pl.'s Mot.") at 24-25 n.15; Savage Cert. ¶ 64. The government, however, has never provided any reason for this denial despite Mr. Almarri's repeated requests to government counsel. Nor is there any plausible basis for the government's refusal to allow Mr. Almarri access to these texts, all of which would be provided by his counsel or by the Red Cross. These restrictions violate Mr. Almarri's rights under the First Amendment and the Religious Freedom Restoration Act ("RFRA").

As to the First Amendment, there is no legitimate interest that justifies this restriction on Mr. Almarri's right to freedom of expression. In response to this motion, the government has for the first time provided the criteria it uses to review books, including books with "religious themes." Zanetti Decl. ¶¶ 14-15. The government says that it approves books based on the following themes: family, tolerance, and mental stimulation, and that it typically approves religious books except those "with the potential to create controversy or security risks in the camp." *Id.* But the government has never explained why it denied Mr. Almarri the religious texts specifically cited in his motion. Nor can it plausibly argue that those centuries-old texts pertaining to Hadith—oral traditions relating to the words and deeds of the Islamic prophet Muhammad that are second only to the Qur'an in theological import[21]—would "create controversy" or a "security risk" at the Brig. Instead, the government's denial of these texts is a

[21] *See, e.g.*, Wael B. Hallaq, *A History of Islamic Legal Theories: An Introduction to the Sunnī uṣūl al-fiqh* 13-15, 58-68 (2002) (explaining the history and salience of Hadith); *accord* Akbar S. Ahmed, *Discovering Islam: Making Sense of Muslim History and Society* 24 (1988); Shahul Hameed, "The Importance of Hadith in Islam," *IslamOnline.net*, May 8, 2006, *available at* http://www.islamonline.net/servlet/Satellite?c=Article_C&cid=1158658489489&pagename=Zone-English-Living_Shariah%2FLSELayout.

flagrant violation of constitutionally protected expression wholly unrelated to any legitimate government interest. *Thornburgh*, 490 U.S. at 415-16.

The restrictions on religious texts also violate RFRA, which provides that the "[g]overnment shall not substantially burden a person's exercise of religion." 42 U.S.C. § 2000bb-1(a). This statute was enacted to restore the compelling interest test set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963), and applies to "*all cases* where free exercise of religion is substantially burdened." *See* 42 U.S.C. § 2000bb(b)(1) (emphasis added); *see also Goodall v. Stafford County Sch. Bd.*, 60 F.3d 168, 171 (4th Cir. 1995); *cf*. *Rasul v. Myers*, 512 F.3d 644, 671-72 (D.C. Cir. 2008) (recognizing RFRA's applicability to all persons within the United States). RFRA, moreover, protects "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. § 2000cc-5(7)(A); *see also*, *e.g.*, *Madison v. Riter*, 355 F.3d 310, 315 (4th Cir. 2003).

While the government now allows Mr. Almarri to practice Islam and has ceased denigrating his religion, its restrictions on his access to religious texts substantially burden Mr. Almarri's exercise of religion.[22] As noted, these texts are important to Mr. Almarri's exercise, study, and observance of Islam. The government, however, has provided no explanation, let alone demonstrated a compelling interest, for refusing to allow Mr. Almarri access to these texts. Further, the government's denial of these texts shows that its stated policy for reviewing religious texts is not "the least restrictive means" of furthering any such interest, as RFRA explicitly requires. 42 U.S.C. § 2000bb-1(b); *Goodall*, 60 F.3d at 171.

[22] Although not before the Court on this motion, the government's prior RFRA violations remain the subject of final relief under the Complaint. Compl. ¶¶ 74-87; Savage Cert. ¶¶ 19-21.

3. The Pending Jurisdictional Issue Is No Obstacle to Interim Relief.

The Magistrate concluded that there was not a strong probability of success on the merits because the "presumptively valid provisions" of the Military Commissions Act of 2006 ("MCA"), Pub. L. No. 109-366, 120 Stat. 2600, eliminate jurisdiction over this action. Report at 5-6. The Magistrate, however, misconstrues the MCA as well as the authority of courts to grant interim relief pending resolution of jurisdictional issues.

First, contrary to the Magistrate's suggestion, the MCA is no obstacle to providing relief here because the statute *does not apply* to Mr. Almarri under ordinary principles of statutory construction. *See Al-Marri v. Wright*, 487 F.3d 160, 167-73 (4th Cir. 2007) (finding that the MCA applies only to foreign nationals held at Guantánamo or elsewhere outside the U.S. mainland).[23] Further, the government barely sought *en banc* review of the panel's decision on the threshold jurisdictional issue, only briefly mentioning that issue on the final page of its rehearing petition. Petition for Rehearing and Rehearing En Banc, at 15, *Al-Marri v. Wright* (No. 06-7427). Instead, the principal issue the government briefed and argued to the *en banc* Fourth Circuit was the *merits* question of whether the President has legal authority to detain Mr.

[23] Mr. Almarri alternatively maintains that construing the MCA to repeal jurisdiction over his habeas action would violate the Suspension, Due Process, and Equal Protection Clauses. Because the Fourth Circuit ruled unanimously that the MCA did not repeal jurisdiction over Mr. Almarri's habeas action, it did not address those constitutional issues. The constitutionality of the MCA's clear jurisdictional ouster over the petitions of detainees at Guantánamo Bay, Cuba,—all foreign nationals captured and detained outside the United States—is pending before the Supreme Court. *Boumediene v. Bush*, __ U.S. __, 127 Sup. Ct. 3078 (June 29, 2007) (granting certiorari). A decision in *Boumediene* upholding the MCA as to Guantánamo Bay detainees will not, and cannot, resolve the distinct statutory and constitutional arguments raised here by a lawful resident arrested and detained inside the United States.

Almarri as an "enemy combatant," *not* whether the MCA repealed jurisdiction over Mr. Almarri's habeas action.[24]

Second, even if a case presents a "substantial" jurisdictional question, the Court may, under the All Writs Act, 28 U.S.C. § 1651, act to preserve its jurisdiction while that issue is being resolved. *United States v. United Mine Workers*, 330 U.S. 258, 293 (1947). Indeed, that is precisely what the D.C. Circuit recently did *even though* that Circuit had already held in *Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007), that the MCA eliminated federal court jurisdiction over the habeas corpus petitions of Guantánamo Bay detainees. *Belbacha v. Bush*, __ F.3d __, 2008 WL 680637, at *2-*3 (D.C. Cir. Mar. 14, 2008) (emphasizing the Supreme Court's grant of certiorari in *Boumediene* and concluding that the district court retained jurisdiction to enjoin the detainee's transfer from Guantánamo). Mr. Almarri similarly seeks to preserve the Court's jurisdiction by preventing his further psychological deterioration and erosion of his relationship with his family before the jurisdictional issues in his case are definitively resolved. And the basis for action is even stronger here because the appeals panel held that there was jurisdiction and because the government barely sought review of that holding.

Third, the fact that Mr. Almarri's appeal has been "pending … for some time," as the Magistrate notes (Report at 6), heightens the need for interim relief. Final resolution of this case by the Fourth Circuit and by the U.S. Supreme Court may take months if not years more. The more time that passes, the more harm Mr. Almari is likely to suffer. Further, if the final resolution is that Mr. Almarri cannot lawfully be held as an "enemy combatant," he will have

[24] There are two jurisdictional provisions of the MCA at issue. Section 7(a)(1) addresses habeas corpus jurisdiction; Section 7(a)(2) concerns "any other action." As the government recognizes, the two provisions are linked in that Section 7(a)(2)—the provision potentially applicable to this action—would arguably repeal jurisdiction only if Section 7(a)(1)—the provision now before the Fourth Circuit—in fact repealed jurisdiction over Mr. Almarri's habeas action. Section 7(b) merely addresses the effective date of those other two provisions.

endured years of profound psychological trauma and will have lost forever irreplaceable time with his closest loved ones as a result of a detention that was itself illegal. If, on the other hand, he can be held as an "enemy combatant," then Mr. Almarri will face continued isolation and denial of meaningful family communication for potentially the rest of his natural life under conditions not justified to date by any asserted governmental interest. Either way, there is no basis to wait to address Mr. Almarri's motion for interim relief.

4. The Government's "Sovereign Immunity" Argument Is Wholly Without Merit.

The Magistrate noted that defendants argue they are immune from suit, an issue that is the subject of a pending and fully briefed motion. That argument is wholly without merit and contravenes a black-letter principle of American jurisprudence for the reasons set forth more fully in Mr. Almarri's prior submission. *See* Plaintiff's Mem. of Law in Opp. to Def.s' Mot. to Dismiss 2-9 (dkt. no. 11). Simply put, no court in the history of the United States has ever held that federal officials are immune from a suit seeking *equitable relief* for *constitutional* violations, and there is no basis whatsoever for the position asserted by the government here. Indeed, if that position were accepted, it would not simply bar the relief sought here, but would also preclude injunctive relief to halt torture and other abuse in the United States. The government's "sovereign immunity" argument is a frivolous one, and should be rejected.[25]

D. The Public Interest Strongly Favors Granting Interim Relief.

The public interest strongly favors granting relief here.[26] As the Fourth Circuit's grant of *en banc* review makes plain, Mr. Almarri's detention raises profoundly important questions,

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[25] The government's assertion (Response at 19-20 n.11) that it can interrogate Mr. Almarri again—and therefore impose the same brutal interrogation regime it imposed previously—further underscores the need for a judicial ruling establishing clear rules as to what the government can and cannot do. *See, e.g.*, *United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953).

[26] The Magistrate did not address this factor of the preliminary injunction test.

including whether he can be held as "enemy combatant" at all. It is certainly in the public interest to mitigate the ongoing harm to the corpus of the habeas litigation—harm that is threatening Mr. Almarri's mental state and ability to work with counsel—before those issues can be definitely resolved by the Fourth Circuit and U.S. Supreme Court. That is particularly true where, as here, the need for increased social contact and family communication is so imperative on the one hand, and the burden on the government in meeting that need is so minimal on the other.

Conclusion

At bottom, the government maintains that courts have no role to play in the detention and treatment of so-called "enemy combatants." That proposition, however, has been thoroughly rejected by the Supreme Court. *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Rasul v. Bush*, 542 U.S. 466 (2004); *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006). And it is particularly specious where the so-called "enemy combatant" involves a person who was lawfully residing in the United States and who is unquestionably protected by the Constitution. As the Second Circuit recently emphasized, "The strength of our system of constitutional rights derives from the steadfast protection of those rights in both normal and unusual times." *Iqbal v. Hasty*, 490 F.3d 143, 159 (2d Cir. 2007) (affirming the "right not to be subject to needlessly harsh conditions of confinement" including prolonged isolation).

Here, the Court should vindicate those constitutional rights by granting the exceedingly modest yet profoundly important relief requested in this motion or, at a minimum, conducting an evidentiary hearing to resolve any disputed facts.

Respectfully submitted,

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