IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MAJID KHAN, *et al.* Petitioners, v. GEORGE W. BUSH, President of the United States, *et al.,* Respondents.	Civil Action No. 06-CV-1690 (RBW)

RESPONDENTS' MEMORANDUM IN OPPOSITION TO PETITIONERS' EXPEDITED MOTION FOR RECONSIDERATION OF THE COURT'S NOVEMBER 17, 2006 ORDER, OR IN THE ALTERNATIVE, RENEWED EXPEDITED MOTION FOR EMERGENCY ACCESS TO COUNSEL AND ENTRY OF AMENDED PROTECTIVE ORDER

Respondents hereby oppose petitioners' motion (dkt. no. 12) seeking reconsideration of this Court's November 17, 2006 Order (dkt. no. 11) ("Order"), which denied petitioners' prior expedited motion for emergency access to counsel and for entry of an amended protective order (dkt. no. 2-1). This Court denied petitioners' request because the issue of whether the Military Commissions Act of 2006, Pub. L. No. 109-133 ("MCA"), has divested this Court of jurisdiction to review habeas petitions such as this is pending review in the Court of Appeals for the District of Columbia Circuit. Indeed, as respondents have noted before, any appropriate regime for counsel access should be entered by a forum court that, consistent with the MCA, has jurisdiction to do so.

As explained below, no basis exists for reconsideration of this Court's decision because petitioners simply rehash arguments already considered and rejected by this Court. They point to

no clear error of law nor any significant change in the law or facts since the submission of the issue to the Court. In fact, the only supervening events are that briefing on the MCA issues is now complete in the Court of Appeals and ripe for resolution, and that another judge in this Court has held that the provisions of MCA withdrawing district court habeas jurisdiction in cases such as this are consistent with the Constitution, *see Hamdan v. Rumsfeld*, No. 04-CV-1519 (JR), __ F. Supp. 2d __; 2006 WL 3625015, *9 (D.D.C. Dec. 13, 2006).

As for petitioners' new request for an immediate evaluation of Kahn's mental and physical health by independent health professionals, *see* Petitioners' Motion for Reconsideration at 14-15 ("Petrs' Recon. Mot."), this Court has already held that it cannot order any medical evaluation of Khan "[u]ntil the jurisdictional question is resolved." Order at 4 n.4. Petitioners offer nothing new that would warrant reconsideration, much less that would meet their extraordinary burden for establishing that respondents have been deliberately indifferent to the medical needs of detainees at the United States Naval Base in Guantanamo Bay, Cuba ("Guantanamo"). To the contrary, as the attached declaration of Captain Ronald L. Sollock, M.D., Ph.D. demonstrates, Guantanamo detainees are provided comprehensive medical and mental health care comparable to that provided to active duty military members. Khan is no exception. Accordingly, this Court should deny petitioners' motion for reconsideration and for an independent medical evaluation of Khan.

ARGUMENT

I. PETITIONERS HAVE FAILED TO MEET THE STANDARD FOR RECONSIDERATION OF THIS COURT'S INTERLOCUTORY ORDER

A. Rule 54(b) Reconsideration Standard

Petitioners' motion is devoid of any discussion of the legal standard applicable to a motion for reconsideration of an interlocutory order under FED. R. CIV. P. 54(b). The Supreme Court has admonished that "as a rule courts should be loathe to [revisit their prior decisions] in the absence of extraordinary circumstances such as where the initial decision was clearly erroneous and would work a manifest injustice." *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 817 (1988) (internal quotation marks and citation omitted) (commenting on law of the case doctrine); *see Keystone Tobacco Co., Inc. v. U.S. Tobacco Co.,* 217 F.R.D. 235, 237 (D.D.C. 2003) (Friedman, J.) (quoting *Christianson*, 486 U.S. at 817, and denying Rule 54(b) motion). Thus, this Court has held that a Rule 54(b) reconsideration motion is appropriate only where "justice requires" it, s*ee Singh v. George Washington Univ.*, 383 F. Supp. 2d 99, 101 (D.D.C. 2005) (Lamberth, J.); *Cobell v. Norton*, 355 F. Supp.2d 531, 539 (D.D.C. 2005) (Lamberth, J.); *APCC Servs. v. AT&T,* 281 F. Supp. 2d 41, 44 (D.D.C. 2003) (Huvelle, J.), *rev'd on other grounds*, 418 F. 3d 1238 (D.C. Cir. 2005); *Campbell v. United States Dep't of Justice,* 231 F. Supp. 2d 1, 7 (D.D.C. 2002) (Urbina, J.); *M.K. v. Tenet,* 196 F. Supp. 2d 8, 12 (D.D.C. 2001) (Urbina, J.); *Childers v. Slater,* 197 F.R.D. 185, 190 (D.D.C. 2000) (Urbina, J.), such as "when the court has patently misunderstood a party, has made a decision outside the adversarial issues presented to the Court by the parties, has made an error not of reasoning but of apprehension, or where a controlling or significant change in the law or facts [has occurred] since

the submission of the issue to the Court." *Singh*, 383 F. Supp. 2d at 101 (citations and internal quotation marks omitted).

Because "the district court's discretion to reconsider a non-final ruling is . . . subject to the caveat that where litigants have once battled for the court's decision, they should not be required, nor without good reason permitted, to battle for it again," *Singh*, 383 F. Supp. 2d at 101 (internal quotation marks and citation omitted), "reconsideration will generally be denied unless the moving party can point to controlling decisions or data that the court overlooked – matters, in other words, that might *reasonably be expected to alter the conclusion reached by the court.*" *Cobell,* 355 F. Supp. 2d at 539 (D.D.C. 2005) (quoting *Shrader v. CSX Transp., Inc.,* 70 F.3d 255, 257 (2d Cir. 1995)) (emphasis in original); *see also Keystone Tobacco Co., Inc.,* 217 F.R.D. at 237 (denying Rule 54(b) reconsideration motion because the movant failed to demonstrate "(1) an intervening change in the law; (2) the discovery of new evidence not previously available; or (3) a clear error of law in the first order") (internal citation and quotation omitted).

As discussed below, petitioners have failed to meet this standard.

B. No Basis Exists to Reconsider This Court's Decision to Await the Court of Appeals' Resolution of the Jurisdictional Question

In its November 17, 2006 Order, this Court effectively stayed this habeas proceeding because the Court of Appeals is currently considering the effect and constitutionality of the Military Commissions Act of 2006 in the appeals of other Guantanamo Bay detainees' habeas cases, *Boumediene v. Bush*, No. 05-5062 (D.C. Cir.), and *Al Odah v. United States*, No. 05-5064 (D.C. Cir.). *See* Order at 3-4. Respondents had noted that the MCA divests the district courts of habeas jurisdiction over all habeas petitions filed by or on behalf of alien detainees who have

been determined by the United States to be enemy combatants or are awaiting such determination, including the present petition. Petitioners, on the other hand, doubted the MCA's constitutionality, specifically adopting arguments made by the *Boumediene* and *Al Odah* petitioners in their supplemental briefs regarding the MCA. *See* Petrs' Corrected Reply in Support of Expedited Mot. for Counsel Access at 3-4 (dkt. no. 10) (" Petrs' Reply in Support of Expedited Mot."). Petitioners further argued that unlike other Guantanamo detainees, Khan has no judicial forum in which to challenge the legality of his detention because he has not yet had a Combatant Status Review Tribunal ("CSRT"), the final determination of which would have been appealable to the Court of Appeals for the District of Columbia Circuit under the Detainee Treatment Act of 2005 ("DTA"). *See id.* at 4-5.

In seeking reconsideration now, petitioners have merely reiterated their prior arguments, *see* Petrs' Recon. Mot. at 4-7, except to add that the *Boumediene* and *Al Odah* appeals involve detainees whose habeas petitions were pending at the time of the DTA's enactment, whereas Khan's petition was filed after the enactment of the DTA, such that, according to petitioners, resolution of those appeals would not be controlling in this case, *id.* at 6. This argument, however, does not warrant reconsideration of this Court's November 17, 2006 decision because the Court of Appeals' resolution of *Boumediene* and *Al Odah* would, at a minimum, significantly impact this Court's consideration of its subject matter jurisdiction. Although Khan's petition was filed after the passage of the DTA, the petition, like those in *Boumediene* and *Al Odah*, was pending at the time of the MCA's enactment. And, the MCA, in amending the DTA, explicitly provides that its jurisdiction-limiting provisions shall apply to "*to all cases, without exception, pending on or after the date of the enactment of this Act* which relate to any aspect of the

detention, transfer, treatment, trial, or conditions of detention of an alien detained by the United States since September 11, 2001." MCA § 7(b) (emphasis added). Thus, the Court of Appeals' decision on the effect and constitutionality of those provisions, including whether the MCA applies to pending cases, would apply with equal force here.

Further, the remote possibility that the Court of Appeals might find the MCA inapplicable to pending cases, leaving petitioners to potentially challenge the constitutionality of the provisions of the DTA withdrawing district courts' habeas jurisdiction, does not justify this Court's consideration of petitioners' jurisdictional arguments in advance of the Court of Appeals' resolution of the MCA issues.[1] Even if the Court of Appeals did not address the constitutionality of the MCA, in such circumstances it will still reach issues potentially impacting the DTA-related jurisdictional and constitutionality issues, such as whether alien detainees at Guantanamo Bay may avail themselves of constitutional rights. That issue was part of the pending appeals even before enactment of the DTA and MCA. *See In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 461-64 (D.D.C. 2005) (Green, S.J.) (Guantanamo detainees have Fifth

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[1] Petitioners cite a Ninth Circuit case, *Yong v. INS*, 208 F.3d 1116 (9th Cir. 2000), in support of their argument that a stay of this habeas case is improper. Petrs' Recon. Mot. at 6. *Yong*, however, is readily distinguishable. The Ninth Circuit held in that case that the district court's stay of a habeas petition pending resolution of all appeals in a related case, including potential review by the Supreme Court and any subsequent remand, was an abuse of discretion after balancing the justifications for the stay, *i.e.*, conservation of the INS's resources and intra-district uniformity (which the court found would not be furthered by the stay, *id.* at 1121) against the duration of the stay. *See id.* at 1119-21. In addition, the issues involved in the case on appeal were not identical, so that judicial economy did not weigh heavily in favor of a stay. *Id.* Here, in contrast, the Court of Appeals' resolution of *Boumediene* and *Al Odah* would be controlling in this case, both as to this Court's jurisdiction and other issues. Further, in addition to judicial economy issues, there are also in these cases significant governmental and public interests involving the Executive's detention of enemy combatants during wartime that support a stay and were not involved in *Yong*.

Amendment procedural due process rights), *appeal pending*; *Khalid v. Bush*, 355 F. Supp. 2d 311, 320-21 (D.D.C. 2005) (Leon, J.) (Guantanamo detainees are not possessed of constitutional rights), *appeal pending.*

Similarly, reconsideration is not warranted by petitioners' argument that Khan is uniquely situated because he has not had a CSRT and the government may indefinitely delay any CSRT or military commission proceedings against him in order to prevent him from ever obtaining a decision eligible for review under the DTA. *See* Petrs' Recon. Mot. at 5-6. Again, petitioners raised this argument before. *See* Petrs' Reply in Support of Expedited Mot. at 4-5. Moreover, there is simply no basis for petitioners' speculation that the government would purposely delay Khan's CSRT in order to avoid judicial review. Not only is the government presumed to act in good faith (and the military's CSRTs are entitled to a strong presumption of regularity),[2] but the reason that Khan has not received a CSRT is due to the fact that he was transferred to Guantanamo only this fall. In fact, except for Khan and 13 other high-value detainees (all of whom were transferred to Guantanamo recently), the government has conducted a CSRT for every Guantanamo detainee, and has released those who were determined not to be enemy combatants. *See* Declaration of Karen L. Hecker (attached as Exhibit A) ¶¶ 3, 5.[3] Consistent

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[2] *See United States v. Armstrong*, 517 U.S. 456, 464 (1996); *Morris v. Sullivan*, 897 F.2d 553, 560 (D.C. Cir. 1990) ("[t]he presumption of regularity supports the official acts of public officers" and, "in the absence of clear evidence to the contrary," courts presume that they will properly discharge their official duties) (quoting *United States v. Chemical Foundation*, 272 U.S. 1, 14-15 (1926)); *FTC v. Owens-Corning Fiberglass, Inc.*, 626 F.2d 966, 975 (D.C. Cir. 1980) ("until evidence appears to the contrary," the government is "entitled to a presumption of administrative regularity and good faith").

[3] The November 3, 2006 Declaration of Ms. Hecker states that three detainees determined by CSRTs to be "no longer enemy combatants" remain detained at Guantanamo; those three detainees subsequently were released from United States custody, however.

with its practice with respect to all Guantanamo detainees, the Department of Defense is currently in the process of preparing Khan's CSRT. *Id.* at ¶ 5; *see also* Petrs' Opposition to Respondents' Mot. for Extension of Time, ¶ 5 (dkt. no. 14).

Finally, petitioners boldly assert, as they did before (*see* Petrs' Reply in Support of Expedited Mot. at 12), that even detainees held with Khan in secret CIA detention are currently able to meet with their attorneys at Guantanamo. *See* Petrs' Recon. Mot. at 9. Although they cite the habeas petition of *Rabbani v. Bush,* Civ. Action No. 05-1607 (JR), regarding two Pakistani brothers who were taken into custody in Pakistan and now detained at Guantanamo, *see* Petrs' Recon. Mot. at 9 & n.8, there is no showing that the Rabbani brothers were actually held in CIA secret detention, much less with Khan. Indeed, as discussed in respondents' opposition to petitioners' prior motion, Khan's situation is unique in that many aspects of the CIA's high-value terrorist detainee program – a special, limited program operated by the CIA to detain (in secret, off-shore facilities) and interrogate key terrorist leaders and operatives in order to help prevent terrorist attacks – to which he was exposed remain classified as TOP SECRET, Sensitive Compartmented Information. Suffice it to say that the Rabbani brothers were not among the thirteen terrorist leaders and operatives who, along with Khan, were only recently transferred from this program to Guantanamo. They are not similarly situated to Khan, and any protective order that might have been entered in their cases regarding counsel access would not have the appropriate provisions and protections to govern information classified at the TOP SECRET//SCI level.

C. Petitioners Raise No New Argument Regarding Putative Counsel's Asserted Immediate Need to Access Khan

Petitioners also rehash arguments already made and rejected by this Court as to why, even if this case is stayed, immediate access to Khan is nevertheless necessary. *See* Order at 1-2 (describing petitioners' arguments); Petrs' Reply in Support of Expedited Mot. at 23-25; Petrs' Recon. Mot. at 9-14. Reconsideration of this Court's denial of the prior motion is unwarranted because petitioners' arguments rest on nothing more than pure speculation: according to counsel, because Khan's health is allegedly deteriorating rapidly, he likely will not remember the past torture he allegedly was subjected to during his CIA detention (presumably for purposes of a future condition of confinement claim not in issue in this case).[4] Similarly, because Khan has only recently arrived in Guantanamo, petitioners allege that he might become "dependent upon the new interrogators and guards [at Guantanamo]" and thus, unable to establish "a trusting attorney-client relationship" with putative counsel. Petrs' Recon. Mot. at 13. These speculative assertions can hardly override the real national security concerns posed by putative counsel's requested access and fully discussed in respondents' opposition to petitioners' prior motion.

No immediate access is justified also because the MCA has clearly divested this Court of jurisdiction over not only habeas claims but also conditions of confinement claims by alien detainees held as enemy combatants, and there is no serious doubt as to the MCA's

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[4] Petitioners attach to their motion a psychiatrist's declaration regarding Jose Padilla, a United States citizen who was previously detained as an enemy combatant in South Carolina and is currently facing criminal proceedings. Even aside from the fact that petitioners' counsel mischaracterizes many of the vague and outlandish allegations by Mr. Padilla (allegations being disputed by the government in the ongoing criminal proceedings) and that counsel makes the unsupported assertion that Khan has been treated in a similar fashion, Petrs' Recon. Mot. at 11, there is simply no basis to draw any connection between the alleged mental condition of Padilla with that of Khan.

constitutionality. In fact, as noted before, another judge in this Court has recently upheld both the MCA's application and its constitutionality. *See Hamdan v. Rumsfeld*, No. 04-CV-1519 (JR), __ F. Supp. 2d __; 2006 WL 3625015, *9 (D.D.C. Dec. 13, 2006) (dismissing habeas petition by alien enemy combatant held at Guantanamo because the petitioner did not have a constitutional right to habeas and because the MCA validly divests the district court of jurisdiction).

II. THIS COURT SHOULD DENY PETITIONERS' REQUEST FOR AN INDEPENDENT MEDICAL EVALUATION OF KHAN

In its November 17, 2006 Order, the Court encouraged respondents to provide a medical evaluation of Khan, though the Court acknowledged that it could not order any such evaluation "until the jurisdictional issue is resolved." Order at 4 n.4. According to petitioners, however, this Court "misapprehended" the situation and putative counsel's request. *See* Petrs' Recon. Mot. at 9, 14-15. Putative counsel state that they do not want respondents to assess Khan's mental and physical health and report back the result, as the Court suggested. Instead, they want the Court to order an immediate mental and physical health evaluation of Khan by independent health professionals. *Id.* at 14. Even leaving aside the issue of the lack of jurisdiction in this case, there is no justification for such extraordinary court intervention into the medical care provided at Guantanamo.

As has been explained in the context of cases involving requests for independent medical examinations of Guantanamo detainees, "[a]bsent a showing of misconduct that rises to the level of deliberate indifference," courts will not sit as "boards of review over the medical decisions" of officials at Guantanamo, nor will they "second-guess the adequacy of a particular course of treatment." *O.K. v. Bush*, 344 F. Supp. 2d 44, 61 (D.D.C. 2004 (Bates, J.) ; *Al-Ghizzawi v. Bush*,

No. 05-2378, 2006 WL 2844781, at *4 (D.D.C. Oct. 2, 2006) (Bates, J.); *cf. Inmates of Occoquan v. Barry*, 844 F.2d 828, 841 (D.C. Cir. 1988) (noting that "courts are not to be in the business of running prisons" and that "questions of prison administration are to be left to the discretion of prison administrators").[5] There is no showing that the government has been deliberately indifferent to the medical needs of Guantanamo detainees. *See O.K. v. Bush*, 344 F. Supp. 2d 44, 61 (D.D.C. 2004) (Bates, J.); *Al-Ghizzawi v. Bush,* No. 05-2378, 2006 WL 2844781, at *4 (D.D.C. Oct. 2, 2006) (Bates, J.), *appeal pending*. To the contrary, detainees at Guantanamo are provided comprehensive and attentive medical care, the quality of which is comparable to that provided to active duty military members.[6]

Specifically, medical care for detainees in Guantanamo is provided by the Joint Medical Group ("JMG") at Guantanamo, and care facilities include a Detention Hospital and a Behavioral Health Unit. *See* Declaration of Capt. Ronald L. Sollock, M.D., Ph.D. ("Sollock Decl.") ¶¶ 6-7

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[5] Other judges of this Court have also applied the Eighth Amendment "deliberate indifference" standard used in the domestic prison context in rejecting claims for court intervention in the provision of medical care at Guantanamo. *See, e.g., Al Odah v. United States*, 406 F. Supp. 2d 37, 42-44 (D.D.C. 2005) (Kollar-Kotelly, J.) (applying "deliberate indifference" standard in rejecting request for Court intervention into medical care provided to hunger-striking Guantanamo detainees). Leaving aside the issue of whether that standard is appropriate in the context of military detentions during wartime, *cf. O.K. v. Bush,* 377 F. Supp. 2d 102, 112-13 n.10 (D.D.C. 2005) (noting that substantive due process analysis is dependent upon the precise circumstances involved and that "[n]o federal court has ever examined the nature of the substantive due process rights of a prisoner in a military interrogation or prisoner of war context"); *see also, Hamdi v. Rumsfeld*, 542 U.S. 507, 531 (2004) (plurality opinion) (stating that "[w]ithout doubt, our Constitution recognizes that core strategic matters of warmaking belong in the hands of those who are best positioned and most politically accountable for making them"), petitioners cannot meet that standard.

[6] Moreover, the International Committee of the Red Cross is permitted access to Guantanamo detainees, and has been given access to Khan. *See* Washington Post, *Red Cross Meets With 14 Moved to Guantanamo Bay* (Oct. 13, 2006) (available at<<www.washingtonpost.com/wp-dyn/content/article/2006/10/12/AR2006101200635.html>>).

(attached as Exhibit B). The Detention Hospital provides a 20-bed facility with a hospital medical staff of approximately 100, including five medical doctors, a physician's assistant, nurses, corpsmen, various technicians (laboratory, radiology, pharmacy, operating room, respiratory, physical therapy), and administrative staff. *See id.* ¶ 6. The Behavioral Health Unit maintains a 21-member staff, including a Board Certified Psychiatrist, a Ph.D. Psychologist, psychiatric nurses and psychiatric technicians. *See id.* ¶ 7. The Behavioral Health Unit staff conducts mental health assessments, provides crisis intervention, develops individualized treatment plans, and formulates behavior modification plans for management of acute and high-risk behaviors in detainees that pose a threat to the detainee himself or to others. *Id*. Long-term supportive care and psychotropic medication therapy is also provided to treat symptoms of major psychiatric disorders. *Id.*

All incoming detainees are given complete physical examinations, and any medical issues identified in initial physical examinations, or subsequently, are followed by the medical staff. *Id.* ¶ 4. A detainee can request medical care not only by notifying guards, but also by directly notifying medical personnel who make rounds every day. *Id.* In addition to following up on detainee requests, the medical staff investigates any medical issues observed by guards or other staff. *Id.*

The availability of medical care at Guantanamo has led to thousands of outpatient contacts between detainees and medical staff, followed by inpatient treatment and care as needed. *See id.* ¶¶ 4, 9-10. Detainees have been treated for a variety of medical conditions, including hepatitis, heart ailments, hypertension, combat wounds, diabetes, tuberculosis, appendicitis, inguinal hernia, leishmaniasis, malaria, and malnutrition, and have been provided prescription

eyeglasses and prosthetic limbs. *Id.* ¶ 9. The medical staff at Guantanamo has performed more than 300 surgical procedures on detainees since January 2002, ranging from common procedures, such as appendectomies, to more complex intervention, such as coronary artery stent placement. *Id.* ¶ 10. When necessary, detainees are transferred to the Naval Base Hospital at Guantanamo to receive types of care not available at the Detention Hospital, and medical specialists are flown in from outside Guantanamo in appropriate cases. *Id.* ¶ 8.

The provision of health care for Guantanamo detainees is robust and comprehensive, and there is simply no basis for petitioners' request that this Court order a medical examination of Khan by outside medical professionals. *Cf. O.K.*, 344 F. Supp. 2d at 61 (finding that "a prisoner has no discrete right to outside or independent medical treatment"); *Roberts v. Spalding*, 783 F.2d 867, 870 (9th Cir. 1986) (same). Further, granting putative counsel's request would raise the same concerns as putative counsel's proposal for access to Khan in the absence of a protective order regime sufficient to protect information classified at the TOP SECRET//SCI level. *See* Resps' Opp. to Mot. for Access § II (dkt. no. 6).

In sum, this Court should deny putative counsel's request for extraordinary Court intervention into the comprehensive medical care provided to Guantanamo detainees, including Khan.

CONCLUSION

For the foregoing reasons, petitioners' expedited motion for reconsideration of this Court's November 17, 2005 Order, or in the alternative, renewed expedited motion for emergency access to counsel and entry of an amended protective order should be denied.

Dated: December 28, 2006

Respectfully submitted,

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