No. 13-5218
(consolidated with Nos. 13-5220 and 13-5221)

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

SAEED MOHAMMED SALEH HATIM, et al.,

Petitioners-Appellees,

v.

BARACK OBAMA, et al.,

Respondents-Appellants.

On Appeal from the United States District Court
for the District of Columbia, Civil Action Nos. 1:12-mc-00398, 1:05-cv-01429-UNA, 1:06-cv-01766-RCL, 1:07-cv-02338-RCL,
Hon. Royce C. Lamberth, Chief Judge

JOINT PETITION FOR REHEARING EN BANC OF PETITIONERS-APPELLEES

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September 15, 2014

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FED. R. APP. P. 35(B) STATEMENT

This case presents questions of exceptional importance. Most Guantanamo Bay detainees have been held for years pursuant to executive fiat, without charge or trial, and have been allowed to bring only one type of judicial challenge to the legality of their detention—the writ of habeas corpus. For these detainees, confined to an island prison, facing a severe language barrier, and lacking any knowledge of the American legal system, access to the writ requires access to counsel. In 2013, the Guantanamo prison commander ordered a drastic revision to the long-standing procedures governing meetings and telephone calls between detainees and their attorneys. The new procedures require intimate genital-area searches both before and after all meetings or telephone calls with counsel. The result was predictable—numerous detainees would not meet or speak with counsel in order to avoid these culturally and religiously offensive searches. The detainees immediately challenged the search procedures because the denial of access to counsel effectively destroys the habeas right promised in *Boumediene v. Bush*, 553 U.S. 723 (2008). The district court agreed and enjoined their implementation. The panel reversed.

By erroneously holding that the test set forth in *Turner v. Safley*, 482 U.S. 78 (1987), governs judicial review of the new search procedures and by then making the *Turner* test little more than near-blind deference to whatever the prison

commander wants, the panel went far to eviscerate the habeas rights of many Guantanamo detainees. The panel also improperly substituted itself as the fact-finder, effectively dismissing the district court's detailed findings that the purpose and effect of the genital-area searches was to impair detainees' access to counsel. These errors call for review and reversal by the Court en banc.

STATEMENT OF THE CASE

On May 3, 2013, the commander of the Guantanamo prison ordered a major change in the procedures for searching detainees, most of whom are Arab Muslims, both before and after all telephone calls or meetings with counsel. Instead of simply "grasping the detainee's waistband and shaking it vigorously," as had been the practice at the prison for years out of respect for the religious and cultural sensitivities of Arab Muslims, the commander ordered guards to search and frisk the detainees' genital areas. *In re Guantanamo Bay Detainee Litig.*, 953 F. Supp. 2d 40, 46 (D.D.C. 2013). Numerous detainees were unwilling to speak or meet with counsel if as a condition they would have to undergo this "religiously and culturally abhorrent" search of their genital areas. *Id*. at 57.

On May 22, 2013, emergency motions in seventeen pending habeas cases were filed with the district court to challenge the new genital-area search procedures. Following briefing and the presentation of evidence, then-Chief Judge Lamberth issued a comprehensive 35-page decision enjoining the new procedures.

The district court first concluded that it had jurisdiction to consider the motions because they presented challenges to government interference with detainees' access to habeas counsel challenges, which "fall[] squarely within the Court's [habeas] jurisdiction," as implicitly recognized in *Boumediene*. 953 F. Supp. 2d at 50. It then held that the deferential standard applied to constitutional challenges to domestic prison regulations, as set forth in *Turner v. Safley*, 482 U.S. 78 (1987), should not apply to challenges to Guantanamo regulations that burden access to habeas counsel and thus access to the use of habeas to challenge unlawful detention. 953 F. Supp. 2d at 51-53. Chief Judge Lamberth explained that the constitutional right to habeas relief is unlike other constitutional rights, such as freedom of association or speech, that are necessarily limited or withdrawn during incarceration. Unlike those rights, the core habeas right attaches and has meaning only when someone is detained; to limit the right *during detention* "would run counter to the writ's purpose and would eviscerate the writ." *Id.* at 53. The district court nonetheless painstakingly proceeded to apply *Turner* to the new policies and concluded that the new search procedures could not be upheld even under *Turner*, because they lacked "a 'valid, rational connection' to the legitimate government interest—security—put forward to justify them." *Id.* at 54.

The Government appealed. A panel of this Court affirmed that jurisdiction existed to hear the motions.[1] It also "assume[d], without deciding, that the district court was correct in concluding that the detainees' right to habeas includes the right to representation by counsel and that that right has been burdened by the policies that the detainees challenge."[2] Slip op. at 8. Although it recognized "some intuitive appeal" to what it deemed to be "novel reasoning" by the district court, the panel held that it was "compelled to reject" the district court's conclusion that the *Turner v. Safley* standard does not apply to Guantanamo habeas claims because, in the panel's view, the decision in *Lewis v. Casey*, 518 U.S. 343 (1996), "foreclos[ed]" the district court's position. *Id.* at 7. The panel then upheld the search procedures under the *Turner* standard, stating that it had "no trouble concluding" that "the new policies are rationally related to security," "in no small part because that is the government's view of the matter." *Id.* at 9. The panel said

[1] The panel concluded that the district court had jurisdiction to hear the petitioners' claims because in its view they presented challenges to conditions of confinement and are thus reviewable. Slip op. at 5. Petitioners contend that their claims are not simply "conditions of confinement" claims, but are challenges to restraints on access to counsel for purposes of pursuing habeas relief. Thus, jurisdiction exists pursuant to 28 U.S.C. § 2241(a) and 28 U.S.C. § 1331, as well as the Suspension Clause.

[2] The panel assumed what is undisputed. *See* 953 F. Supp. 2d at 62 ("For Guantanamo detainees, it is undisputed that access to the courts means nothing without access to counsel."); *In re Guantanamo Detainee Continued Access to Counsel*, 892 F. Supp. 2d 8, 15 n.10 (D.D.C. 2012) (noting that the government "agrees that the right to counsel attaches to the prisoner's rights of access to the courts" (internal quotations omitted)); *Al-Joudi v. Bush*, 406 F. Supp. 2d 13, 22 (D.D.C. 2005) (recognizing that in the context of Guantanamo, "access to the Court means nothing without access to counsel").

that it would "not second-guess" the "judgment of Guantanamo administrators." *Id.* at 13.

ARGUMENT

I. THE PANEL INCORRECTLY HELD THAT *TURNER* APPLIES TO CHALLENGES TO POLICIES THAT BURDEN GUANTANAMO DETAINEES' ACCESS TO HABEAS COUNSEL.

The panel committed a fundamental error of law in ruling that the counsel-access restrictions at issue in this case are to be reviewed under the standard described in *Turner v. Safley* for review of regulations in domestic prisons.

As the district court recognized, unlike other personal rights, the Great Writ exists solely for those who are detained, and "indeed it is most valuable as a right to one who is incarcerated." 953 F. Supp. 2d at 53. Such constitutional rights as free speech and association are highly limited in domestic prisons because that is what follows from the very nature and purpose of detention. *See Overton v. Bazzetta*, 539 U.S. 126, 131 (2003) ("[F]reedom of association is among the rights least compatible with incarceration" and "[s]ome curtailment of that freedom must be expected in the prison context."). The habeas right, however, could be rendered meaningless if prison officials are free to restrict it in the name of security or "penological" interests. "Since the basic purpose of the writ is to enable those unlawfully incarcerated to obtain their freedom, it is fundamental that access of prisoners to the courts for the purpose of presenting their complaints may not be

denied or obstructed." *Johnson v. Avery*, 393 U.S. 483, 485 (1969). The district court therefore properly concluded that "[t]o restrict a detainee's access to habeas corpus solely by virtue of his detention would run counter to the writ's purpose and would eviscerate the writ." 953 F. Supp. 2d at 53.

The need to preserve an unburdened habeas right is especially important for these petitioners. They have been held for more than a decade, have not been charged or convicted of any crimes, and are being held solely at the direction of the Executive. In such a context, the courts' power to review governmental action has historically been at its apex: "[T]he common-law habeas court's role was most extensive in cases of pretrial and non-criminal detention, where there had been little or no previous judicial review of the cause for detention." *Boumediene*, 553 U.S. at 780. "Where a person is detained by executive order, rather than, say, after being tried and convicted in a court . . . the need for habeas corpus is more urgent." *Id.* at 783.

The panel assumed that the district court correctly concluded that "the detainees' right to habeas includes the right to representation by counsel." Slip op. 8. The truth of this assumption is obvious. Petitioners are confined to an island military prison, have no visitors from family or friends, face a severe language barrier, and lack knowledge of the American legal system. Guantanamo habeas petitioners are provided no form of legal assistance by the Government—such as

law libraries—and are completely dependent in habeas cases on outside counsel. It is beyond rational dispute that the habeas right would mean nothing to Guantanamo detainees without access to counsel. 953 F. Supp. 2d at 49. "Absent aid from counsel, petitioners will be unable to prosecute their habeas claims." *Id.* at 51. Accordingly, impairment of their "access to counsel impairs their access to the courts in a direct and concrete fashion." *Id.*

The panel acknowledged that the district court's reasoning as to *Turner*'s inapplicability had "intuitive appeal," but ruled that it was "compelled to reject it because it directly contravenes *Lewis v. Casey*, 518 U.S. 343 (1996)." Slip op. at 7. This was error. *Lewis* compels no such result, and is plainly inapposite. *Lewis* was not a habeas case. Unlike *Lewis*, the Guantanamo cases involve claims of unlawful detention. *Lewis* did not deal with restrictions on access to habeas counsel that can have the effect of blocking access to the habeas court or of frustrating the *Boumediene* decision. *Lewis* also did not contemplate the special circumstances that exist at Guantanamo, where interference with access to counsel can frustrate the *only* judicial remedy available to detainees who have been neither charged nor convicted. Rather, *Lewis* applied *Turner* to a district court order requiring the state to provide *convicted* Arizona prisoners with access to law library services and other legal assistance. (Unlike *Lewis*, the Government does not pay for Guantanamo habeas counsel's services or expenses, which are typically

provided pro bono.) *Lewis* was "not about a right of 'access to the courts.'" *Lewis*, 518 U.S. at 365 (Thomas, J., concurring). *Lewis* was "about the extent to which the Constitution requires a State to finance or otherwise assist a prisoner's efforts to bring a suit against the State and its officials" (*id.*), which is of no relevance here. The standard for evaluating burdens on habeas access at Guantanamo must be more exacting than the *Turner* standard applied to the law library services at issue in *Lewis*.[3]

II. THE PANEL IMPROPERLY CONSTRUED *TURNER* TO REQUIRE NEAR-BLIND DEFERENCE TO THE DECISIONS OF THE PRISON COMMANDER.

Even if *Turner*'s standard should be applied to the detainees' constitutional entitlement to access to habeas relief through counsel, the panel improperly converted the balancing test contemplated by *Turner* into excessive deference to the prison commander.

The panel did not dispute the district court's findings that the new genital-area search procedures were intended to have, and did have, the practical effect for many detainees of blocking access to counsel, thereby frustrating their habeas remedy. 953 F. Supp. 2d at 57-58. The panel, however, did not evaluate the extent of this impact on detainees when considering whether the new search procedures

[3] The district court did not find it necessary to determine the contours of the appropriate test for prison regulations that burden the Guantanamo detainees' access to habeas counsel because it concluded that the challenged policies could not pass even the *Turner* test. Slip op. at 8 n.1; 953 F. Supp. 2d at 53.

should be upheld under *Turner*. It was evidently enough for the panel that the prison commander claimed that the new procedures were justified for security reasons. The panel stated that it had "no trouble concluding that" the new policies are "rationally related to security," "in no small part because that is the government's view of the matter." Slip op. at 9. The panel added that it would not "second-guess" the "judgment of Guantanamo administrators." Slip op. at 13.

Although *Turner* requires a degree of deference to the experience of prison officials, it does not require courts to ignore their common sense and blindly defer to the prison commander's "view of the matter." "[W]hen a prison regulation or practice offends a fundamental constitutional guarantee, federal courts will discharge their duty to protect constitutional rights." *Turner*, 482 U.S. at 85 (internal quotations omitted). In *Turner* itself, the Supreme Court invalidated a prison regulation restricting marriage because the purported security justification defied "[c]ommon sense." *Id.* at 98. "[T]he *Turner* . . . reasonableness standard is not toothless." *Thornburgh v. Abbott*, 490 U.S. 401, 414 (1989) (internal quotations omitted). "*Turner* requires prison authorities to show more than a formalistic logical connection between a regulation and a penological objective." *Beard v. Banks*, 548 U.S. 521, 535 (2006). There must be a "reasonable relation" between the prison regulation and a legitimate government interest. *Id.* Deference under *Turner* requires a court to recognize that prison officials have more

experience with such issues as prison security than do the courts, just as courts are required to recognize the greater expertise of administrative agencies. But it does not relieve the court of the need to evaluate the reasonableness of the challenged regulation.[4]

It is manifest that the panel gave excessive deference to the prison's purported security justifications. In the district court, the prison commander asserted that he changed the search procedures because the modified procedures that had been put in place at Guantanamo to respect "detainee cultural sensitivities" were "contrary" to standard Army procedure. J.A. 112. He asserted a fear that the guards would conduct searches "inconsistently," and that "contraband will be overlooked." *Id*. The district court carefully examined this claim, and found that it did "not hold water." 953 F. Supp. 2d at 55. The panel did not even mention the "inconsistency" claim, which the Government made no attempt to defend on appeal, but this was the principal security justification by the prison commander and it is now undisputed that it did "not hold water."

The panel nonetheless held that the prison commander's decision must be upheld because it was supposedly a response to smuggling of medications by a

[4] Contrary to the panel's assertion that the district court "failed" to give deference (slip op. at 11), the district court in fact acknowledged the "special expertise" of the Government "in prison administration" and its "own limited expertise in that area." 953 F. Supp. 2d at 54.

detainee who allegedly committed suicide and to the discovery of contraband in prison cells. Slip op. at 3. Had the panel subjected these supposed justifications to a proper *Turner* evaluation, it should have concluded that they too had no basis in common sense.

The alleged episode of smuggled medications was obviously irrelevant to detainees' meetings and phone calls with lawyers. The medications would have been obtained from medical personnel at the prison clinic, not from lawyers or during visits with lawyers. 953 F. Supp. 2d at 56. There was no reason to suspect any risk of medication smuggling as a result of meetings with lawyers, and there is obviously zero risk in the case of telephone calls with lawyers. The search policy "sweeps much more broadly than can be explained by [the government's] penological objectives" and is therefore not "reasonably related to the articulated . . . goal." *Turner*, 482 U.S. at 98.

The fact that "contraband" was discovered in detainees' cells likewise had no rational connection to visits or phone calls with lawyers. Detainees had met with lawyers for nearly a decade with no genital-area searches, yet there was "nothing in the record [that] indicates that detainees have received any contraband from their attorneys or that detainees have attempted to pass contraband to each other during phone calls or meetings with attorneys." 953 F. Supp. 2d at 57. It is *physically impossible* for detainees to obtain contraband from lawyers during

telephone calls. It is also virtually impossible during meetings. Detainees are shackled and escorted by a team of guards when they are moved to meet with counsel and they are subject to visual monitoring by the guards during the meetings. The lawyers have secret security clearances and thus have already been vetted, and are themselves searched prior to and after meetings with detainees. *See In re Guantanamo Bay Detainee Litig.*, 577 F. Supp. 2d 143, 157-64 (D.D.C. 2008).[5]

The panel's assessment of the other *Turner* factors is also toothless. As *Turner* cautioned, it is "[w]hen accommodation of an asserted right will have significant 'ripple effect' on fellow inmates or on prison staff, [that] courts should be particularly deferential" to prison officials. 482 U.S. at 90. Furthermore, *Turner* recognized that if alternative procedures that accommodate the prisoner's rights impose only a "*de minimis* cost to valid penological interests, a court may consider that as evidence that the regulation does not satisfy the reasonable relationship standard." *Id.* at 91. The panel gave little weight to these prescriptions, saying that it would not "second-guess" the prison administrators. Slip op. at 13. Given that counsel access had been permitted for years without

[5] The district court's order, moreover, is very limited because it only bars genital-area searches in connection with counsel meetings and calls. The detainees are subject to full-frisk searches at all other times (*e.g.*, in connection with trips to the clinic) and their cells can likewise be searched at will. Any security interest in searching the genital areas of detainees in connection with counsel meetings and calls is vanishingly small.

genital-area searches and with no evident problems, there is no reason to defer to the government's assertion that returning to the previous search policies would place any burdens on the prison staff.

As to alternative means for counsel access, the panel stated that detainees can still communicate by letter. The panel declined, however, to decide whether letter communications were an adequate replacement for in-person contacts, and the district court had specifically found that they were not. Slip op. at 12; 953 F. Supp. 2d at 58. In the panel's view, however, it was irrelevant that letter communications might be inadequate (slip op. at 12), which is essentially a ruling that the prison commander is free to adopt additional "security" measures even if they would block all practical access to counsel. This could empower the commander to destroy meaningful habeas review, because counsel access is a *sine qua non* for such review.

The panel, while giving excessive deference to the prison commander, failed to respect the district court's detailed findings concerning both the commander's motivation for adopting new search policies and the effect of those policies on the detainees and their habeas rights. For instance, the panel was dismissive of the district court's finding that the real motive for the genital-area searches was "not to enhance security but to deter counsel access." 953 F. Supp. 2d at 57. The district court provided a detailed explanation for this finding, including a history in which

the Government "seemingly at every turn, has acted to deny or to restrict Guantanamo detainees' access to counsel." *Id*. at 56. The panel said that it thought that the evidence of improper motive was "tenuous" (slip op. at 14), but it did not treat any of the district court's findings as clearly erroneous. Had it respected the district court's findings, which it was bound to follow absent clear error, it could not have reversed.[6]

There was an additional reason for deferring to the district court. The Supreme Court in *Boumediene* emphasized that procedures for counsel access are "within the expertise and competence of the District Court in the first instance." 553 U.S. at 796. The district court for years has supervised the interaction between counsel, prison staff, and detainees in the Guantanamo cases. The district court's decision was a classically correct exercise of its equitable supervisory power, as necessary to ensure that the cases before it are not sabotaged by one of the parties.

CONCLUSION

The panel allowed an impairment of the habeas right largely because it accepted "the government's view of the matter" and refused to "second-guess" the "judgment" of prison officials. It did so in the face of detailed findings that the claimed "judgment" was pretextual. Slip op. at 9, 13. The panel's purported

[6] *See Ellipso, Inc. v. Mann Techs.*, 480 F.3d 1153, 1157 (D.C. Cir. 2007); *Awad v. Obama*, 608 F.3d 1, 7 (D.C. Cir. 2010). This deferential standard of review also applies to district courts' application of *Turner*. *See, e.g.*, *Quinn v. Nix*, 983 F.2d 115, 118-19 (8th Cir. 1993); *Williams v. Lane*, 851 F.2d 867, 877 (7th Cir. 1988).

Turner review of the policies was an empty exercise (going so far as to permit genital-area searches in connection with phone calls, where there is no possibility of "smuggling" medications or contraband), with no consideration of the extent of the harm to petitioners, and no real evaluation of the reasonableness of the challenged policies. Respectfully, the Court should grant the petition for rehearing en banc.

September 15, 2014

Respectfully submitted,

/s/Brian E. Foster

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing Petition complies with the page limitations of Federal Rule of Appellate Procedure 35(b)(2) because it is less than fifteen pages, excluding the portions of the petition excluded by Fed. R. App. P. 32(a)(7)(B)(iii) and D.C. Cir. R. 32(a)(1). This brief complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman 14-point font.

/s/Brian E. Foster
Brian E. Foster

CERTIFICATE OF SERVICE

I certify that true and correct copies of the foregoing petition of the petitioners-appellees were served today upon counsel of record for the appellants via the CM/ECF system.

Dated: September 15, 2014

/s/Brian E. Foster
Brian E. Foster

ADDENDA

CERTIFICATE AS TO PARTIES AND AMICI CURIAE

The parties in *Hatim v. Obama*, No. 13-5218, are the same as the parties in No. 05-cv-1429 (D.D.C.): Saeed Mohammed Saleh Hatim, Ali Mohammed Saleh Al-Salahi, Mohammed Nasser Yahia Abdullah Khussrof, and Fatima Nasser Yahia Abdullah Khussrof, Petitioners-Appellees, and Barack Obama, Chuck Hagel, Kyle J. Cozad, and David E. Heath, Respondents-Appellants.

The parties in *Hentif v. Obama*, No. 13-5220, are the same as the parties in No. 06-cv-1766 (D.D.C.): Fadhel Hussein Saleh Hentif and Haykal Mohammed Saleh Hentif, Petitioners-Appellees, and Barack Obama, Chuck Hagel, Kyle J. Cozad, and David E. Heath, Respondents-Appellants.

The parties in *al Shubati v. Obama*, No. 13-5221, are the same as the parties in No. 07-cv-2338 (D.D.C.): Abdurrahman Abdallah Ali Mahmoud Al Shubati and Abdullah Ali Mahmoud Al Shubati, Petitioners-Appellees, and Barack Obama, Chuck Hagel, Kyle J. Cozad, and David E. Heath, Respondents-Appellants.

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

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

In addition, the motion for relief that was granted in the district court was also filed on behalf of the petitioners in the following cases: *Abdullah v. Bush*, Civ. No. 05-0023 (RWR) (D.D.C.); *Al-Baidany v. Obama*, Civ. No. 05-2380 (CKK) (D.D.C.); *Al-Bihani v. Obama*, Civ. No. 05-1312 (RJL) (D.D.C.); *Alhag v. Obama*, Civ. No. 05-2199 (RCL) (D.D.C.); *Al-Mithali v. Obama*, Civ. No. 05-2186 (UNA) (D.D.C.); *Al-Zarnouqi v. Obama*, Civ. No. 06-1767 (RCL) (D.D.C.); *Anam v. Obama*, Civ. No. 04-1194 (TFH) (D.D.C.); *Al Qyati and Al Azani v. Obama*, Civ. No. 08-0219 (RBW) (D.D.C.); *Al Warafi v. Obama*, Civ. No. 09-2368 (RCL) (D.D.C.); *Hidar v. Obama*, Civ . No. 05-2386 (RBW) (D.D.C.); *Mohammed v. Obama*, Civ. 05-2385 (UNA) (D.D.C.); *Obaydullah v. Obama*, Civ. No. 08-1173 (RJL) (D.D.C.); *Odah v. Obama*, Civ. No. 06-1668 (TFH) (D.D.C.); *Sanad al-Kazimi v. Obama*, Civ. No. 05-2386 (RBW) (D.D.C.).

There have been no amici in the district court or this Court.

OPINION OF THE PANEL OF THIS COURT

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued December 9, 2013 Decided August 1, 2014

No. 13-5218

SAEED MOHAMMED SALEH HATIM, DETAINEE, CAMP DELTA, ET AL.,
APPELLEES

v.

BARACK OBAMA, ET AL.,
APPELLANTS

Consolidated with 13-5220, 13-5221

Appeals from the United States District Court
for the District of Columbia
(No. 1:12-mc-00398)
(No. 1:05-cv-01429-UNA)
(No. 1:06-cv-01766-RCL)
(No. 1:07-cv-02338-RCL)

Edward Himmelfarb, Attorney, U.S. Department of Justice, argued the cause for appellants. With him on the briefs were *Stuart F. Delery*, Assistant Attorney General, and *Matthew M. Collette*, Attorney. *Ronald J. Whittle, II*, Attorney, entered an appearance.

S. William Livingston argued the cause for appellees. With him on the brief were *Brian E. Foster*, *David H. Remes*, *Brent Nelson Rushforth*, and *David Muraskin*. *Alan A. Pemberton* entered an appearance.

Before: GARLAND, *Chief Judge*, and HENDERSON and GRIFFITH, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* GRIFFITH.

GRIFFITH, *Circuit Judge*: Guantanamo Bay detainees challenge two new policies they claim place an undue burden on their ability to meet with their lawyers. The district court upheld the detainees' challenge, but we reverse, concluding that the new policies are reasonable security precautions.

I

The first challenged policy concerns where the detainees may meet with their lawyers. In the past, detainees at Guantanamo Bay would meet with visitors in nearby Camp Echo, to which they were driven in vans, or occasionally in Camps 5 and 6, the camps where most detainees are housed. Meetings in the housing camps would take place in small interview rooms with a guard posted outside the door. It is easier to monitor detainees' meetings with visitors in Camp Echo. There is no need to post a guard outside each meeting because the interview rooms are equipped with video-monitoring equipment, and visitors can summon a guard at the touch of a button. The Camp Echo rooms are also larger than those in the housing camps and include restroom facilities and space for prayer, which means that guards need not move detainees to other rooms mid-meeting to use the bathroom or worship, as they must in the housing camps.

Citing the ability to provide more security with fewer guards at Camp Echo, in September 2012 the government implemented a new policy that required that *all* detainee meetings with visitors take place there instead of in the housing camps.

The second challenged policy involves the search the detainees must undergo when meeting with their lawyers. It has long been Guantanamo policy that detainees are searched both before and after any meeting with a visitor. Standard protocol in military prisons calls for a non-invasive search of the genital area of a prisoner. In the past, searches at Guantanamo departed from that element of the protocol in an effort to accommodate the religious sensibilities of the detainees. Under the old policy, guards would grasp a detainee's waistband and shake his pants in an attempt to dislodge any items that might be hidden, careful to avoid contact with a detainee's genital area. Concerns arose that not searching the genital area was posing a security threat. Those concerns escalated with the suicide of a detainee who took an overdose of medication that he had smuggled into his cell and the discovery of shanks, a wrench, and other weapons in the housing camps that had evaded the searches.

In May 2013 the government revised the search procedures for Guantanamo to conform to standard military prison procedure. According to the protocol, the guard places his hand as a "wedge between the scrotum and thigh, and us[es] the flat hand to press against the groin to detect anything foreign attached to the body. A flat hand is used to ensure no contraband is hidden between the buttocks." The guard also passes a hand-held metal detector a few inches over the detainee's body, including the area of his groin and

buttocks. At no time is the detainee's groin visually exposed to the guard.

Detainees challenged these two new policies in habeas corpus proceedings in district court, arguing that they have the purpose and effect of discouraging meetings with their counsel. The detainees claimed that their poor health made it difficult to make the trip by van to meet with their lawyers in Camp Echo and that their religious beliefs made it impossible to meet with counsel at all if genital searches were required to do so. The detainees sought an order permitting them to meet with counsel within the housing camps and without being subject to the new search procedures.

The district court granted the detainees' motion in part. The district court found that the new procedures were an exaggerated response to overstated security concerns, concluding that the rationales offered by the government were but a pretext for the real purpose, which was to restrict detainees' access to counsel. The court entered an order barring use of the new search procedures when meeting with counsel. It also ordered that ill and injured detainees be allowed to meet with their lawyers in the housing camps instead of in Camp Echo. *See In re Guantanamo Bay Detainee Litig.*, 953 F. Supp. 2d 40, 59-61 (D.D.C. 2013). The government appealed, and we stayed the district court's order pending resolution of this appeal.

II

There is no doubt that we have jurisdiction over an appeal from a district court order granting injunctive relief, 28 U.S.C. § 1292(a)(1); *see also Salazar ex rel. Salazar v. District of Columbia*, 671 F.3d 1258, 1261-62 (D.C. Cir. 2012), but there

is a question in this case whether the district court had jurisdiction to issue that order in the first place. Congress has granted district courts jurisdiction to hear habeas claims. 28 U.S.C. § 2241(a); *see also Rasul v. Bush*, 542 U.S. 466, 481 (2004) (holding that § 2241 extends to Guantanamo detainees). But in the Military Commissions Act of 2006 (MCA), Congress barred the federal courts from hearing the habeas claims of Guantanamo detainees. 28 U.S.C. § 2241(e)(1). The MCA also stripped the federal courts of jurisdiction over "any other action . . . relating to any aspect of [their] detention, transfer, treatment, trial, or conditions of confinement." *Id.* § 2241(e)(2).

In *Boumediene v. Bush*, the Supreme Court invalidated subsection (e)(1)'s ban on *habeas* claims of Guantanamo detainees, 553 U.S. 723, 792 (2008), but (e)(2) remains a bar to any "other action" by detainees, *see Al-Zahrani v. Rodriguez*, 669 F.3d 315, 319 (D.C. Cir. 2012). Thus, the district court has jurisdiction under § 2241(a) to hear the detainees' habeas challenges, but is prohibited by (e)(2) from hearing any of their other claims. The government contends that the detainees' claims in this matter do not sound in habeas and are therefore barred by (e)(2) because they relate to their "treatment" and "conditions of confinement." The district court found jurisdiction, holding that the alleged interference with access to counsel infringed the right to habeas relief announced in *Boumediene*. *See In re Guantanamo Bay Detainee Litig.*, 953 F. Supp. 2d at 49-50.

We need not determine whether the district court's view of the scope of habeas is correct, for this challenge falls squarely within the jurisdiction we recognized recently in *Aamer v. Obama*, 742 F.3d 1023 (D.C. Cir. 2014). In *Aamer*, we held that challenges to conditions of confinement can

properly "be raised in a federal habeas petition under section 2241," and when so raised are not barred by (e)(2)'s prohibition on *non*-habeas actions. *Id.* at 1030, 1038. The government has expressly conceded that the procedures challenged by these habeas petitions are "conditions of confinement." Br. of Appellant at 17-19. The district court thus had jurisdiction under *Aamer*, and we need not address other jurisdictional theories.

III

We review constitutional challenges to prison policies under the test announced by the Supreme Court in *Turner v. Safley*, 482 U.S. 78, 89 (1987). This deferential standard applies to military detainees as well as prisoners. *See Florence v. Bd. of Chosen Freeholders of Cnty. of Burlington*, 132 S. Ct. 1510, 1518 (2012) (applying the *Turner* test in the context of pre-trial detention); *United States v. White*, 2014 WL 354661 (N-M Ct. Crim. App. Jan. 31, 2014) (applying the *Turner* test to challenges to policies in a military prison); *United States v. Phillips*, 38 M.J. 641, 642-43 (A.C.M.R. 1993) *aff'd*, 42 M.J. 346 (C.A.A.F. 1995) (same); *see also Amatel v. Reno*, 156 F.3d 192, 196 (D.C. Cir. 1998) (observing that in the military context, the "government is permitted to balance constitutional rights against institutional efficiency" in a manner similar to the *Turner* test).

In *Turner*, the Supreme Court explained that although incarcerated individuals do not completely lose their constitutional rights, "problems of prison administration" allow the government to restrict those rights in ways that would be unacceptable for persons not incarcerated. To prevent judicial overreaching into matters of prison administration, courts are to uphold prison regulations that

"impinge on inmates' constitutional rights" as long as those regulations are "reasonably related to legitimate penological interests," *id.* at 84-85, 89—a stark departure from the "inflexible strict scrutiny" analysis that normally applies when the government infringes on constitutional rights, *id.* at 89.

Here, however, the district court took the view that *Turner*'s deference to reasonable prison regulations does not apply to habeas claims, holding that "[s]ince the right to seek habeas relief is not limited or withdrawn in the prison context, neither may the Executive or the Legislature circumscribe the petitioners' right." *In re Guantanamo Bay Detainee Litig.*, 953 F. Supp. 2d at 53. Although there is some intuitive appeal to this novel reasoning, we are compelled to reject it because it directly contravenes *Lewis v. Casey*, 518 U.S. 343 (1996). *Lewis* involved a class action alleging that inadequacies in the Arizona prison system deprived inmates of their constitutional right to access the courts by limiting the prisoners' ability to bring various types of lawsuits, including habeas petitions. *See id.* at 346, 354-55. The Supreme Court held that "*Turner*'s principle of deference" applies to prison officials' interference with inmates' attempts to bring their habeas claims, *id.* at 350, 361, foreclosing the district court's suggestion that *Turner* does not govern a prisoner's claim that his habeas rights have been abridged by prison officials. *See also Phillips v. Bureau of Prisons*, 591 F.2d 966, 974 (D.C. Cir. 1979) (applying a *Turner*-like test to prison regulations limiting access to paralegals); *cf. Toolasprashad v. Bureau of Prisons*, 286 F.3d 576, 584-85 (D.C. Cir. 2002) (applying *Turner* to allow limitations on prisoners' ability to file grievances against prison administrators). We therefore

proceed to consider the detainees' claims under the *Turner* framework.[1]

IV

We assume, without deciding, that the district court was correct in concluding that the detainees' right to habeas includes the right to representation by counsel and that that right has been burdened by the policies that the detainees challenge.[2] *See Overton v. Bazzetta*, 539 U.S. 126, 131-32 (2003) (declining to define the asserted right where, even if such a right existed and was violated, the regulations survived *Turner*). *Turner* requires that we look to four factors to determine if these new policies are reasonable: (1) whether there is a "valid, rational connection between the prison regulation and the legitimate governmental interest put

[1] Although the district court held that a test less deferential than *Turner* applies to regulations affecting habeas claims, it declined to specify the features of that test because it found that the challenged policies failed even under *Turner*.

[2] Although the detainees claim that the new policies cut off their ability to meet with counsel, we note that the Guantanamo administrators have not done so directly. They have only required searches before meetings with any visitors, including counsel. In the face of those searches, which the detainees find objectionable on religious grounds, the detainees have made the decision that they will not meet with counsel. *See O'Lone v. Estate of Shabazz*, 482 U.S. 342, 351-52 (1987) ("While we in no way minimize the central importance of [religious beliefs] to respondents, we are unwilling to hold that prison officials are required by the Constitution to sacrifice legitimate penological objectives to that end.").

forward to justify it," *Turner*, 482 U.S. at 89 (internal quotation marks omitted); (2) "whether there are alternative means of exercising the right that remain open to prison inmates," *id.* at 90; (3) "the impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally," *id.*; and (4) "the absence of ready alternatives" to the regulation, *id.* Although we examine each factor, the first is the most important. *Amatel*, 156 F.3d at 196 ("[T]he first factor looms especially large. Its rationality inquiry tends to encompass the remaining factors . . . ."); *see also Beard v. Banks*, 548 U.S. 521, 532 (2006) (plurality opinion).

Prison security, the government's asserted purpose for the challenged policies, is beyond cavil a legitimate governmental interest. *See Bell v. Wolfish*, 441 U.S. 520, 546-47 (1979). *Turner* teaches that, and common sense shouts it out. The only question for us is whether the new policies are rationally related to security. We have no trouble concluding that they are, in no small part because that is the government's view of the matter. "The task of determining whether a policy is reasonably related to legitimate security interests is peculiarly within the province and professional expertise of corrections officials." *Florence*, 132 S. Ct. at 1517 (internal quotation marks omitted). We must accord "[p]rison administrators . . . wide-ranging deference in the adoption and execution of policies and practices that *in their judgment* are needed to preserve internal order and discipline and to maintain institutional security." *Bell*, 441 U.S. at 547 (emphasis added); *see Florence*, 132 S. Ct. at 1517; *cf. Phillips*, 591 F.2d at 972.

The touchstone of our deference, of course, is whether the government's assertion of a connection between prison

security and the challenged policy is reasonable. Here, Guantanamo officials explained that they adopted the new search policies to address the risk to security posed by hoarded medication and smuggled weapons. It stands to reason that enhancing the thoroughness of searches at Guantanamo in the way called for by standard Army prison protocol would enhance the effectiveness of the searches. *See Florence*, 132 S. Ct. at 1516-17. The detainees make no claim to the contrary. Instead, they argue that more thorough searches are not needed during their visits with counsel because the government failed to provide evidence that the contraband was smuggled into the housing camps during these visits. But the authorities at Guantanamo do not know how or when detainees obtain contraband. *Cf. Shaw v. Murphy*, 532 U.S. 223, 231(2001) ("Prisoners have used legal correspondence as a means for passing contraband."); *Wolff v. McDonnell*, 418 U.S. 539, 577 (1974) ("The possibility that contraband will be enclosed in letters, even those from apparent attorneys, surely warrants prison officials' opening the letters."). In light of such uncertainty and the fact that smuggling takes place, we think administering a more thorough search in connection with attorney visits as well as with any other detainee movements or meetings is a reasonable response to a serious threat to security at Guantanamo.

Likewise, it is reasonable to require that all meetings between detainees and their visitors, including counsel, take place in Camp Echo, which requires fewer guards than the housing camps. Each meeting room in Camp Echo, unlike those in the detainees' housing camps, has a restroom and a space for prayer, which means that guards are not needed to transfer detainees mid-meeting. And the video monitoring in Camp Echo eliminates the need to post guards outside each

meeting room, as is necessary in Camps 5 and 6. Guards who would have to stand sentry if the visits took place in a housing camp are instead available for postings elsewhere at Guantanamo, enhancing the facility's overall security.

The district court failed to defer to the government's justifications for the new policies, concluding that they were not rationally related to a legitimate government interest. The court required proof from the military that the old procedures were ineffective and in need of change and that the detainee who committed suicide had managed to repeatedly evade the search by hiding the hoarded medication in his groin area. The district court also dismissed the military's expert judgment that some of the guards needed for monitoring visits with detainees in their housing camps could be better used for other security needs, substituting its own assessment that "allowing attorney-client meetings [in the housing camps] would divert a maximum of two to three guards in Camp 5 and four to six guards in Camp 6. The Court is confident the [military] can spare these guards . . . ." *In re Guantanamo Bay Detainee Litig.*, 953 F. Supp. 2d at 61.

This misapprehends something fundamental about challenges to prison administration: "The burden . . . is not on the State to prove the validity of prison regulations but on the prisoner to disprove it." *Overton*, 539 U.S. at 132; *see also O'Lone v. Estate of Shabazz*, 482 U.S. 342, 350 (1987) ("By placing the burden on prison officials to disprove the availability of alternatives, the approach articulated by the Court of Appeals fails to reflect the respect and deference that the United States Constitution allows for the judgment of prison administrators."). The district court required no such showing of the detainees and erred by failing to defer to the

reasonable explanation of Guantanamo officials for decisions within their area of authority and expertise.

Turner next requires that we consider whether the new policies leave the detainees with some other means to exercise their right to counsel. Detainees who forego visits with their lawyers to avoid the searches can still communicate with counsel via letter. Supreme Court precedent teaches that alternative means of exercising the claimed right "need not be ideal, however; they need only be available." *See Overton*, 539 U.S. at 135. But we need not decide whether letters are an adequate replacement for meetings in person, because even if we were to agree with the detainees that they are not, the lack of an alternative "is not conclusive of the reasonableness of the [regulation]" because the other factors must still be considered, *Beard*, 548 U.S. at 532 (plurality opinion) (internal quotation marks omitted).

Both of the remaining factors cover much of the same ground as the first and reinforce our conclusion that these policies are reasonable. *See Amatel*, 156 F.3d at 196. As to the third factor, the impact of an accommodation, we have already concluded that the new search procedures promote the safety of the guards and inmates by more effectively preventing the hoarding of medication and the smuggling of dangerous contraband, and thus the accommodation the detainees seek would necessarily have a negative impact "on guards and other inmates." *See Turner*, 482 U.S. at 90; *Beard*, 548 U.S. at 532 (plurality opinion). Allowing counsel meetings with detainees to take place in the housing camps instead of Camp Echo would burden "the allocation of prison resources." *See Turner*, 482 U.S. at 90.

Finally, the detainees have pointed to no "ready alternative[]" to the new policies. *Id.* To be "ready," a policy must be an "obvious regulatory alternative that fully accommodates the asserted right while not imposing more than a *de minimis* cost to the valid penological goal." *Overton*, 539 U.S. at 136. The detainees' suggested alternative of reverting to the old policies does not meet this "high standard." *Id.* Having already determined that we defer to the military's judgment that the old policies hinder the government's interest in security, we can hardly say that they are nonetheless "ready alternatives." In the considered and experienced judgment of Guantanamo administrators, the old policies contributed to the troubling lapses in security. We will not second-guess that determination. *See id.*; *see also Thornburgh v. Abbott*, 490 U.S. 401, 419 (1989) ("[W]hen prison officials are able to demonstrate that they have rejected a less restrictive alternative because of reasonably founded fears that it will lead to greater harm, they succeed in demonstrating that the alternative they in fact selected was not an 'exaggerated response' under *Turner*.").

The district court's very different take on these reasonable changes to policy at Guantanamo appears to stem from its view that the changes in policy were pretextual and the result of the government's plan to inhibit detainees' access to counsel. It is unclear what role, if any, motive plays in the *Turner* inquiry. *Compare Hammer v. Ashcroft*, 570 F.3d 798, 803 (7th Cir. 2009) (en banc), *with Salahuddin v. Goord*, 467 F.3d 263, 276-77 (2d Cir. 2006), *and Quinn v. Nix*, 983 F.2d 115, 118 (8th Cir. 1993). Even if some quantum of evidence of an unlawful motive can invalidate a policy that would otherwise survive the *Turner* test, the evidence of unlawful motive in this case is too insubstantial to do so. The district court drew inferences from past conduct by former

commanders and dismissed as unbelievable the sworn statements of military officials. We find such an approach unwarranted. Although we must not give prison administrators a free hand to disregard fundamental rights, this case is a far cry from instances where administrators have acknowledged their intent to extinguish prisoner rights and acted accordingly. *Cf. Hammer*, 570 F.3d at 802-03. The tenuous evidence of an improper motive to obstruct access to counsel in this case cannot overcome the legitimate, rational connection between the security needs of Guantanamo Bay and thorough searches of detainees.

V

For the foregoing reasons, the decision of the district court is reversed.