IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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| FAWZI KHALID ABDULLAH FAHAD AL ODAH, *et al.*<br><br>Plaintiffs-petitioners,<br><br>v.<br><br>UNITED STATES OF AMERICA, *et al.,*<br><br>Defendants-respondents. | Civil Action No. 02-CV-0828 (CKK) |

**RESPONDENTS' OPPOSITION TO MOTION TO ENFORCE COURT'S ORDER OF OCTOBER 20, 2004, ON ACCESS TO COUNSEL AND FOR APPOINTMENT OF SPECIAL MASTER**

Petitioners' motion to enforce the Court's Order of October 20, 2004 on access to counsel and for appointment of a Special Master should be denied. First, the motion does not involve enforcement of the Court's October 20, 2004 Order. Second, this case has been stayed "for all purposes," see Order Granting in Part and Denying in Part Respondents' Motion for Certification of Jan. 31, 2005 Orders and for Stay (Feb. 3, 2005) (Green, J.), and the relief petitioners seek falls within the scope of the stay. Third, petitioners have appealed the stay order, and petitioners have not demonstrated that it would be appropriate for the Court to exercise jurisdiction now and modify the stay. Finally, even if the Court considers the merits of the motion, the relief sought by petitioners is neither legally nor factually permissible. Accordingly, the motion should be denied.

## BACKGROUND

After this case was remanded to the district court following the Supreme Court's decision in Rasul v. Bush, ___ U.S. ___, 124 S. Ct. 2686 (2004), respondents implemented procedures for counsel access to the detainees held at Guantanamo Bay ("GTMO"), including real-time monitoring of certain communications between detainees and their counsel. The Court considered and resolved petitioners' challenges to these procedures in its October 20, 2004 Order. See Al Odah v. United States, 346 F. Supp. 2d 1 (D.D.C. 2004). Following this decision, a protective order and revised counsel access procedures were entered in the coordinated GTMO habeas cases by Judge Green at the parties' request after the parties had negotiated at length, certain issues were litigated, and Judge Green considered a proposed protective order and counsel access procedures and made her own revisions to them. See November 8, 2004 Amended Protective Order and Procedures for Counsel Access to Detainees at the United States Naval Base in Guantanamo Bay, Cuba, 344 F. Supp. 2d 174 (D.D.C. 2004) ("protective order"). The protective order ultimately superceded, in most respects, the October 20 Order with respect to counsel access issues. See Order of Nov. 23, 2004 (dkt no. 155).

On January 31, 2005, Judge Green entered an order and memorandum opinion in eleven of the pending GTMO habeas cases, including this case, denying in part and granting in part respondents' motion to dismiss or for judgment as a matter of law. See Memorandum Opinion Denying in Part and Granting in Part Respondents' Motion to Dismiss or for Judgment as a Matter of Law, No. 02-CV-0299, et al., 2005 WL 195356 (D.D.C. Jan. 31, 2005). In her order, Judge Green requested additional briefing from the parties with respect to how these cases should proceed in light of the memorandum opinion. Pursuant to this directive, on February 3, 2005,

respondents filed a motion seeking certification of the January 31, 2005 order for interlocutory appeal and filed a motion to stay all the GTMO detainee habeas cases pending at that time, consistent with the need for these cases to proceed in a coordinated fashion. See dkt nos. 192, 193. Conversely, petitioners' filing reflected their intent to conduct discovery as well as litigate claims regarding the detainees' conditions of confinement and issues regarding counsel access at GTMO. See dkt no. 197. Judge Green rejected petitioners' proposed approach. On February 3, 2005, Judge Green certified her January 31, 2005 decision on respondents' motion to dismiss or for judgment for appeal and stayed proceedings in the eleven cases in which the January 31, 2005 order was entered, "for all purposes pending resolution of all appeals." See Order Granting in Part and Denying in Part Respondents' Motion for Certification of Jan. 31, 2005 Orders and for Stay (dkt. no. 196) (Feb. 3, 2005).

Various petitioners in the eleven cases, including petitioners in this case, sought reconsideration of Judge Green's stay order, arguing that the Court should permit factual development and proceedings regarding detainee living conditions to go forward. See Petrs' Motion for Reconsideration of Order Granting Stay Pending Appeal at 9-10 (dkt. no. 203). Judge Green, however, denied the motion for reconsideration

> in light of the substantial resources that would be expended and the significant burdens that would be incurred should this litigation go forward, and . . . [in] recognition that a reversal of the Court's January 31, 2005 rulings would avoid the expenditure of such resources and incurrence of such burdens . . . .

See Order Denying Motion for Reconsideration of Order Granting Stay Pending Appeal (dkt. no. 204) (Feb. 7, 2005). Immediately following the denial of their motion for reconsideration,

petitioners appealed the Court's stay order. See Notice of Appeal (dkt. no. 207) (Feb. 7, 2005).[1]

On February 9, 2005, pursuant to Judge Green's certification, respondents filed a petition for interlocutory appeal of the January 31, 2005 decision with the D.C. Circuit, see 28 U.S.C. § 1292(b), and requested that the appeal proceed on an expedited basis. That matter is fully briefed and under submission. Petitioners, in responding to the petition for interlocutory appeal, filed their own cross-appeal for interlocutory appeal with the D.C. Circuit.

On February 24, 2005, petitioners filed the present motion, styled as a "Motion to Enforce Court's Order of October 20, 2004, On Access to Counsel and For Appointment of Special Master and Protective Motion for Modification of Stay Pending Appeal." In the motion petitioners' seek five distinct claims for relief: 1) release of an Arabic-English dictionary to the detainees at GTMO; 2) additional security clearance applications for experts; 3) alternative methods of transporting counsel's notes from GTMO to the secure work facility for habeas counsel; 4) access to a high-speed internet connection during counsel's visits to GTMO; and 5) appointment of a Special Master to address future issues regarding the detainees' conditions of confinement and counsel access.

For the reasons explained below, petitioners' motion should be denied.

## ARGUMENT

### I. The Court Should Not Entertain Petitioners' Motion Given That Proceedings In This Court Are Stayed For All Purposes.

Petitioners attempt to ignore or discount the procedural posture of this case, a posture that warrants summary denial of petitioners' motion. As discussed above, when it certified its order

[1] This appeal has been docketed with the Court of Appeals as case number 05-5064.

for interlocutory appeal, the Court stayed further proceedings in this case "for all purposes," and after the Court denied petitioners' motion for reconsideration of the stay, petitioners immediately appealed the stay order to the Court of Appeals. Petitioners fail to mention their appeal and, nonetheless, argue that the Court may consider their motion because it does not involve issues that are the subject of respondents' petition for interlocutory appeal, currently before the Court of Appeals, but only seeks enforcement of the October 20 Order in this case. In any event, petitioners argue, the Court should exercise jurisdiction and lift the stay to permit consideration of the motion. See Pets' Mot. at 2, 12-13. Petitioners arguments are wrong and should be rejected.

Without question, the relief sought in petitioners' motion falls within the scope of the stay "for all purposes" in this case. Petitioners seek to change the status quo in this litigation in significant respects. They seek an order overriding GTMO detention policy and requiring respondents to provide petitioner-detainees with an Arabic-English dictionary. They seek an order requiring respondents to begin distributing security clearance forms for petitioners' experts, in view of granting experts, for the first time, access to the classified information in the factual returns in this matter for the purpose of factual development and analysis with respect to the merits of petitioners' detention. They seek an order requiring respondents to permit counsel to act as couriers of classified information on interstate and international travel and requiring respondents to establish, for petitioners' counsel's use, computer facilities for transmission of classified information over electronic mail. And they ask the Court to appoint a special master to address counsel access matters and detainee living conditions. It defies reason that such matters would properly proceed as a matter of course in a case stayed "for all purposes." Indeed, in

proposing future proceedings in this matter prior to entry of the stay, and then in seeking reconsideration of the stay, petitioners requested that the Court permit proceedings on these same subjects. They requested the Court to permit them to pursue immediate factual development and discovery in the case;[2] they asked the Court to undertake to address detainee living conditions;[3] and they asked the Court to permit proceedings on counsel access procedures, including methods of delivery of counsel notes from GTMO to the secure facility.[4] The Court rejected these requests, and stayed the case "for all purposes."[5] Accordingly, the relief requested in petitioners' motion falls within the scope of the stay.

That the Court upheld the stay in the face of petitioners' request for factual development in the case makes clear that petitioners' request for security clearances for experts so as to permit factual development, is, contrary to petitioners' assertion, bound up in respondents' requested interlocutory appeal of the January 31, 2005 order on the motion to dismiss or for judgment. The January 31 Order contemplated further factual development of these cases, leading the Court to stay proceedings in order to avoid such burdens that were likely to be imposed absent a stay. See

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[2] Petrs' Motion for Reconsideration of Order Granting Stay Pending Appeal at 9-10 (dkt. no. 203). Petrs' Joint Submission on How These Cases Should Proceed at 3-4 (dkt. no. 194).

[3] Petrs' Motion for Reconsideration of Order Granting Stay Pending Appeal at 8-9 (dkt. no. 203); Petrs' Joint Submission on How These Cases Should Proceed at 3-4 (dkt. no. 194).

[4] Petrs' Joint Submission on How These Cases Should Proceed at 4-5 (dkt. no. 194).

[5] That the Court upheld the stay in the face of petitioners' request for factual development in the case makes clear that petitioners' request for security clearances for experts so as to permit factual development, is, contrary to petitioners' assertion, bound up in respondents' requested interlocutory appeal of the January 31, 2005 order on the motion to dismiss or for judgment. The January 31 Order contemplated further factual development of these cases, leading the Court to stay proceedings in order to avoid such burdens that were likely to be imposed absent a stay. See supra pp. 2-4.

supra pp. 2-4. Thus, petitioners do not just seek to have the Court proceed contrary to the previously entered stay, they ask the Court to proceed down a path the propriety of which will, but has yet to be, determined by the D.C. Circuit.

The disingenuous nature of petitioners' argument regarding the applicability of the stay is cemented by petitioners' attempt to characterize their motion as one merely to enforce the Court's October 20, 2004 Order. Petitioners can point to nothing in the October 20 Order that comes close to addressing the matters on which they seek relief. The October 20 Order addressed only "two narrow" questions: first, whether three of the detainees in this case[6] had a right to counsel and, second, in light of the decision on the first issue, whether the government's proposed real time monitoring of meetings between counsel and the three detainees was legally permissible. See 346 F. Supp. 2d at 2, 4-5. The October 20 Order did not discuss the legal standard for reviewing internal rules regarding contraband at GTMO, security clearance applications for expert witnesses, the methods of transmitting notes from GTMO,[7] and the appropriate speed of counsel's access to the internet while visiting GTMO. In fact, counsel access issues were negotiated and implemented separate and apart from the October 20 Order through the November 8, 2004 Amended Protective Order and Procedures for Counsel Access to Detainees at the United States Naval Base in Guantanamo Bay, Cuba, 344 F. Supp. 2d 174

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[6] The October 20 Order addressed only the "procedures as they apply to Mohammed Ahmed al Kandari, Fawzi Khalid Abdullah Fahad al Odah, and Khalid Abdullah Mishal al Mutairi." 346 F. Supp. 2d at 2; see id. at 4-5.

[7] All the October 20 Order said regarding transportation of notes was "[t]he Court notes that counsel for Petitioners and the Government would need to have significant discussions surrounding the securing and transportation of notes taken during the meetings." 346 F. Supp. 2d at 13 n.17. Those discussions were part of the negotiations regarding the Protective Order that ultimately superceded, in most respects, the October 20 Order. See supra pp. 2-4.

(D.D.C. 2004). The protective order and accompanying revised counsel access procedures govern counsel's access to all detainees at GTMO for purposes of habeas litigation. See Revised Procedures For Counsel Access to Detainees at the U.S. Naval Base in Guantanamo Bay, Cuba at ¶ I. Moreover, the October 20 Order in this case was superceded in almost all respects, at petitioners' behest, by the protective order. See Order of Nov. 23, 2004. Accordingly, petitioners cannot legitimately seek refuge from the effect of the stay in this case, or claim entitlement to modification of the stay, by invoking the October 20 Order.

The flimsy nature of petitioners' arguments reflects that the current motion is nothing more than yet another effort to litigate, or re-litigate, the propriety of the stay in this case, and the Court should reject this latest attempt summarily. First, as discussed above, petitioners urged the Court to permit factual development in this case to address issues regarding detainee living conditions and counsel access issues. The Court rejected that approach and stayed the case. Petitioners then asked the Court to reconsider the stay to permit proceedings on several of the same issues. The Court rejected petitioners' proposal. Petitioners then appealed the stay, thereby asking the D.C. Circuit to address those same matters. Now, while their appeal is pending, they want this Court to revisit the issues once again. There is no warrant, especially on the paltry basis put forth by petitioners, for the Court to reconsider, again, the propriety of the stay in this case.

The relief sought by petitioners would require a modification of the stay in this case and petitioners offer no legitimate basis for such modification. Accordingly, petitioners' motion should be denied.

## II. Even If The Court Considers The Merits Of The Motion, The Relief Requested Should Be Denied.

In any event, even if the Court considers the merits of the present motion, petitioners have not provided any persuasive legal or factual justification for the expansive relief that they seek. As explained below, petitioners raise five distinct claims that would require the Court to enmesh itself into the minutiae of the administration of GTMO and military affairs. Because petitioners fail to offer any legal basis or justification for such intrusive judicial oversight, their motion should be denied.

### A. The Prohibition Of Arabic-English Dictionaries Is A Reasonable Restriction In Furtherance of Force Security At GTMO.

On February 8, 2005, petitioners' counsel requested permission to deliver an Arabic-English dictionary to the petitioners during their next scheduled visit to GTMO. This request was denied in accordance with GTMO's standard operating procedure that prohibits English translation dictionaries from the detention camps for force protection reasons. See Pets' Mot., Ex. A.

The principle reason for prohibiting translations dictionaries is force protection. GTMO is concerned that detainees may attempt to collect information against United States forces by listening, for example, to guards, medical staff, or others in and around the camp, or to radio transmissions. Armed with this information, detainees may attempt to harm the military personnel guarding the camps or to cause disruptions within the camp. Although GTMO is aware that many of the detainees speak and understand English to varying degrees, GTMO is nonetheless concerned with limiting the detainees' ability to collect information that may be used to harm United States military personnel. If detainees are permitted to have Arabic-English

dictionaries, it would provide them with a tool that may be used against the troops who are charged with maintaining security within the detention camps.[8]

Petitioners characterize GTMO's reasons for prohibiting translation dictionaries as "spurious" and "wholly implausible." See Pets' Mot. at 4. As a threshold matter, however, petitioners have cited no authority to support to support judicial review of challenges to conditions of confinement for alien enemy combatants detained overseas in a military facility during a time of war. Indeed, there is no constitutionally mandated requirement for review of conditions of confinement claims for aliens detained at GTMO.[9] Cf. Johnson v. Eisentrager, 339 U.S. 763 (1950). Moreover, such review would unquestionably raise serious separation of powers concerns regarding the administration of military affairs. See Dep't of the Navy v. Egan, 484 U.S. 518, 530 (1988) ("[C]ourts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs"); see also Hamdi v. Rumsfeld, __ U.S. __, 124 S. Ct. 2633, 2647 (2004) ("Without 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").

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[8] In light of the procedural impropriety of this motion, see supra § I, respondents reserve the right, and request they be permitted, if necessary, to further support these force protection reasons justifying the prohibition of Arabic-English dictionaries with declarations from appropriate military personnel charged with maintaining security at GTMO.

[9] Judge Green's memorandum opinion in this case is not to the contrary. The opinion did not address whether the detainees have any constitutional or other right to challenge their conditions of confinement. Petitioners' concede this very point in their submission to the Court regarding how these cases should proceed. See Petitioners' Joint Submission Regarding How These Cases Should Proceed at 3-4 (dkt. no. 197) (arguing that the Court should resolve whether the Fifth Amendment applies to petitioners' conditions of confinement claims). Further, Judge Green dismissed all of petitioners' statutory claims.

Nevertheless, even if the Court analyzes GTMO's contraband policy under the assumption that the GTMO detainees are entitled to protections similar to those of United States citizens detained for purposes of criminal punishment, the law would not afford them the relief that they seek. In evaluating the legality of regulations prohibiting contraband communications from entering detention facilities in the criminal justice context, the Supreme Court has explained that prison administrators "should be accorded 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 v. Wolfish, 441 U.S. 520, 547 (1979) (upholding "publisher-only" rule, which permitted inmates to receive books and magazines from outside the prison only if the materials were mailed directly from a publisher or book club); see Thornburgh v. Abbott, 490 U.S. 401, 404 (1989) (upholding Bureau of Prisons regulation that authorized prison warden to reject incoming publications on the grounds that the publications are "detrimental to the security, good order, or discipline of the institution"); Robinson v. Palmer, 619 F. Supp. 344, 347-48 (D.D.C. 1985), aff'd in relevant part, 841 F.2d 1151 (D.C. Cir. 1988) (explaining that the Court should defer to the reasonable judgment of prison officials as to the details of prison contraband policy because of the security objectives behind the contraband policy and the dangers posed by the introduction of contraband). Considerations regarding institutional security are within "the province and professional expertise of corrections officials, and, in the absence of substantial evidence in the record to indicate that the officials have exaggerated their response to these considerations, courts should ordinarily defer to their expert judgment in such matters." Wolfish, 441 at 548. Judicial deference is accorded to these decisions "not merely because the administrator ordinarily will, as

a matter of fact in a particular case, have a better grasp of his domain than the reviewing judge, but also because the operation of our correctional facilities is peculiarly the province of the Legislative and Executive Branches of our Government, not the Judicial."[10] Id.; see also Abbott, 490 U.S. at 408 ("Acknowledging the expertise of these officials and that the judiciary is 'ill equipped' to deal with the difficult and delicate problems of prison management, this Court has afforded considerable deference to the determinations of prison administrators who, in the interest of security, regulate the relations between prisoners and the outside world."). Judicial deference is also due in order to prevent federal courts from becoming "enmeshed in the minutiae of prison operations," which is precisely what petitioners would have the Court do in this case.[11] Wolfish, 441 U.S. at 562.

As a result of these concerns, courts considering the legality of restrictions on access to detained individuals in the criminal justice system have essentially used a reasonableness standard, consistent with the standard applied by the Supreme Court in reviewing claims of prisoners that restrictions placed on their access to publications violate the inmates' constitutional rights. "[T]he relevant inquiry is whether the actions of prison officials were

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[10] The Wolfish Court emphasized that the judicial deference is driven by institutional concerns that stand independently of whether the inmate has been convicted of a crime or whether the detainee is a pretrial detainee. See Wolfish, 441 U.S. at 547 n.29.

[11] In evaluating conditions of confinement claims in state prisons, the Supreme Court has explained that federalism concerns warrant additional deference to prison officials: "where state penal institutions are involved, federal courts have a further reason for deference to the appropriate prison authorities." See Procunier v. Martinez, 416 U.S. 396, 405 (1974). Although federalism concerns are not present here, there exist weighty separations of powers concerns regarding the propriety of judicial intervention in the internal operations of a military detention facility. In light of these concerns, additional deference should be accorded to the decisions military officials charged with maintaining safety and security at GTMO.

'reasonably related to legitimate penological interests.'" See Abbott, 490 U.S. at 409 (quoting Turner v. Safley, 482 U.S. 78, 89 (1987)).[12] In the unique and unprecedented context of this case – involving the military detention of alien enemy combatants overseas during a time of war in the interests of national security – the military's judgment regarding the types of prohibited contraband at GTMO is entitled to considerable deference and should be upheld, as reasonable, even under the standard applicable with respect to United States citizens detained in the criminal justice context.[13]

As discussed above, the purpose of the regulation that prohibits Arabic-English dictionaries is unquestionably legitimate. First, the express purpose of GTMO's policy is to protect force security, a purpose that is central to all detention facilities. See Wolfish, 441 U.S. 559 ("A detention facility is a unique place fraught with serious security dangers."). Second, GTMO's policy imposes, if at all, on only one limited aspect of the means of communication between counsel and petitioners with regard to understanding the legal materials in this case.

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[12] In Turner, the Court described four factors "relevant in determining the reasonableness of the regulation at issue": (1) whether there is "a valid rational connection between the prison regulation and the legitimate governmental interest put forward to justify it"; (2) whether the prisoners have alternative means of exercising the right at issue; (3) "the impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally"; and (4) "the absence of ready alternatives," i.e., alternatives that "fully accommodate[] the prisoner's rights at de minimis cost to valid penological interests." 483 U.S. at 89-91 (internal quotation marks omitted).

[13] Notably, petitioners cite no authority in which a court has overruled the decision of prison personnel with respect to the scope of prohibited contraband. To the contrary, courts routinely uphold restrictions on contraband as necessary and appropriate to maintain order and security in detention facilities. See, e.g., Robinson v. Palmer, 619 F. Supp. 344, 347-48 (D.D.C. 1985), aff'd in relevant part, 841 F.2d 1151 (D.C. Cir. 1988); see also Sisneros v. Nix, 884 F. Supp. 1313, 1331 (S.D. Iowa 1995) (upholding prison policy requiring that all mail be sent and received in English because of security reasons).

Indeed, petitioners are provided with multiple opportunities to communicate with their counsel about the legal materials in this case in ways that do not create dangers to national security and force security at GTMO. For example, under the protective order, habeas counsel are permitted to send "legal mail" in English or the detainee's native language directly to the detainee without review by any military personnel. See Revised Procedures For Counsel Access to Detainees at the U.S. Naval Base in Guantanamo Bay, Cuba at ¶ IV. Additionally, counsel are permitted to visit the detainees at GTMO to conduct in-person interviews with translators who speak the detainees' native language. In fact, counsel in this case, along with multiple translators, have visited GTMO on four separate occasions for a total of twenty days and they have a fifth visit scheduled for next week, March 14-18, 2005. During these interviews, counsel are permitted to explain to the detainees all of the relevant legal materials at issue in this litigation in English or in the detainees' native language.

In light of this expansive degree of access, petitioners' motion appears to be driven largely by convenience. Petitioners assert in conclusory fashion that an Arabic-English dictionary is necessary because "[i]t is not feasible or within the Kuwaiti Detainees' means for counsel to obtain translators for all the legal materials relevant in their cases." See Pets' Mot. at 4. Petitioners, of course, provide no support for this position, and it appears to be a questionable rationale in light of the fact that petitioners have retained two interpreters to perform translation services for them during their visits to GTMO. Counsel also do not explain their apparent assumption that translation of every word of every legal document in this case is necessary. Even assuming that translation services involve expense or burden to some degree for petitioners' counsel, however, respondents should not have to compromise institutional security at GTMO

for the mere convenience or economy of petitioners' counsel. In short, there are sufficient alternatives available for petitioners' counsel to communicate with the detainees about the legal materials in this case without creating a potential danger to national security and the personnel at GTMO.[14]

The introduction of translation dictionaries to detainees at GTMO would undoubtedly have an adverse impact on the security and administration of the GTMO detention facility. GTMO already takes a number of steps to ensure that the detainees do not intercept communications between the guards, such as avoiding speaking directly in front of the detainees about potentially sensitive issues regarding the administration of the camp. Additionally, all personnel who enter the detention facility are required to cover the names on their military uniforms with tape in order to protect their identities and to mitigate potential threats from the detainees. If detainees were provided with unfettered access to English language dictionaries, their ability to read, speak and understand English would unquestionably improve. This development would therefore require personnel at GTMO to implement even more arduous measures to ensure force security within the camp. The military personnel at GTMO should not be required to implement additional force security measures simply because petitioners' counsel find it inconvenient to obtain Arabic translations of legal documents.

Furthermore, the impact of the Court setting aside GTMO contraband policy with respect

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[14] While petitioners at several points imply that translation dictionaries are required in order for them to fulfill the functional access-to-counsel rights that the Court has recognized under the habeas statute, they offer no sound basis for any such assertion. There is no reason to believe that the purposes of their attorney-client relationships cannot be served under the counsel access procedures already approved by the Court (e.g., through reliance on security-cleared translators to translate conversations and documents).

to English translation dictionaries would potentially reach well beyond this particular case. There are currently pending thirty-six individual habeas suits on behalf of 111 GTMO detainees, the majority of whom do not speak English. A decision permitting translation dictionaries to be provided to the detainees in this case would very likely lead to similar requests or orders in other cases, resulting in translation dictionaries being in the hands of approximately 20% of the detainee population. Thus, the potential security risks and the need for additional security measures would be magnified greatly.

For the reasons stated above, there is no legal basis for judicial scrutiny of GTMO's contraband policy. However, even the Court considers the merits of prohibition on Arabic-English dictionaries, this regulation is reasonable and, pursuant to established Supreme Court precedent, the Court should defer to the judgment and expertise of the military officials charged with maintaining security within the detention facility at GTMO.

**B. Because This Case Is Stayed For All Purposes Pending Resolution Of All Appeals, Petitioners Are Not Entitled To Security Clearance Forms for Experts.**

Respondents refusal to grant petitioners' counsel additional security clearance applications for experts is reasonable in light of the present posture of this litigation. As explained above, Judge Green stayed proceedings in this case "for all purposes pending resolution of all appeals." See Order Granting in Part and Denying in Part Respondents' Motion for Certification of Jan. 31, 2005 Orders and for Stay (Feb. 3, 2005). Petitioners moved for reconsideration of this Order, arguing that "the Court should modify its stay to allow the Kuwaiti Detainees to proceed with the factual development of their cases." See Petrs' Motion for Reconsideration of Order Granting Stay Pending Appeal at 2 (dkt. no. 203). Judge Green denied

the motion for reconsideration

> in light of the substantial resources that would be expended and the significant burdens that would be incurred should this litigation go forward, and . . . [in] recognition that a reversal of the Court's January 31, 2005 rulings would avoid the expenditure of such resources and incurrence of such burdens . . . .

See Order Denying Motion for Reconsideration of Order Granting Stay Pending Appeal (dkt no. 204).

Although petitioners correctly note that the purpose of a stay is to preserve the status quo, petitioners' request for security clearance applications for experts is actually an attempt to change the status quo. Petitioners asked the court for permission to engage in factual development in their motion for reconsideration and the Court rejected their request. The present motion is a thinly veiled attempt to assert – once again – their arguments that factual development in this case should proceed. Such development should not proceed, and respondents should not be under any obligation to provide petitioners with security clearance applications for experts at this time.

The issue of disclosure of classified national security information to persons other than counsel or translators is a significant one – indeed, one that could be obviated entirely by a decision of the Court of Appeals in In re Guantanamo Detainee Cases, No. 02-CV-0299, *et al.*, 2005 WL 195356 (D.D.C. Jan. 31, 2005).[15] Furthermore, if security clearance applications are provided to petitioners' experts in this case, it will set a precedent that will have to be followed in

[15] Notably, the Court's October 20 Order stated that classified information shall not be disclosed to anyone outside of counsel, including law firm colleagues or support staff. See Al Odah, 346 F. Supp. 2d at 13.

the thirty-four other pending GTMO detainee cases.[16] Such a requirement will increase exponentially the number of persons with access to classified national security information – thereby increasing the risk of an unauthorized disclosure – and may cause delays for counsel in many of the new GTMO cases who have applied for security clearance applications with the expectation of visiting GTMO to meet their putative clients in the near future.

In light of the present posture of this case, the potential that the need for further factual development will be precluded by the Court of Appeals, and the risks and burdens that would be imposed on the government by the requested relief, including with respect to processing of additional security clearance applications for experts in all the GTMO cases, petitioners motion should be denied.[17]

**C. Respondents Have Provided Petitioners With Reasonable and Timely Means To Transmit Interview Notes From Guantanamo.**

In a further attempt to have this Court micro-manage and oversee the administration of GTMO, petitioners complain that the respondents have not provided expeditious methods for the transportation of notes taken during interviews with the detainees from Guantanamo to the secure work facility for habeas counsel in the Washington, D.C. area. Pursuant to the revised procedures for counsel access, any documents and written materials brought out of interviews with the detainees must "be handled as classified material as required by Executive Order 12958,

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[16] Since January 31, 2005 – the date Judge Green issued her memorandum opinion – fourteen new habeas petitions on behalf of fifty detainees have been filed, and respondents anticipate that more will be filed in the near future. Counsel in most of these cases have requested security clearance applications or have applications currently pending.

[17] Respondents, of course, do not concede that experts are or will be needed to resolve any of the issues raised in the GTMO habeas cases.

DoD Regulation 5200.1-R and AI-26, OSD Information Security Supplement to DoD Regulation 5200.1R." See Revised Procedures For Counsel Access to Detainees at the U.S. Naval Base in Guantanamo Bay, Cuba at ¶ VI. To ensure timely and accurate delivery of these materials to the secure work facility for habeas counsel, the documents are sealed in the presence of counsel, annotated properly, and sent via registered mail to the offices of the Court Security Officers ("CSOs") for GTMO litigation. See id. at ¶ VI.B; see also DoD Regulation 5200.1-R, § C7.1.3.6 (stating that classified information from military postal service facilities must be sent by U.S. Postal Service registered mail). Additionally, respondents have made available a secure fax machine for the purpose of sending attorney notes directly to the CSOs. This option permits habeas counsel to send their notes and documents to the secure facility or offices of the CSOs immediately following completion of their interviews, thereby ensuring that copies of the notes are available in the secure habeas work facility following counsel's return from GTMO.[18]

In their motion, petitioners contend – without support – that the process of sending interview notes from GTMO to Washington, D.C., via certified mail has "caused interminable delays in counsel's receipt of their notes." See Pets' Mot. at 8. While there were some delays at the outset of this process when counsel visits to GTMO – in other cases – first began approximately six months ago, the process by which interview notes are now sent from GTMO

[18] Petitioners also complain about the efficiency of the secure fax method and the substantial time required to send documents via secure fax. See Pets' Mot. at 8 n.2. This is simply one of the realities of sending and handling classified information. The modern conveniences that petitioners' counsel are accustomed to in their law offices are not always available in the classified information context. For example, in order to ensure a secure transmission of sensitive materials, classified fax machines frequently require several minutes per page. In the event counsel do not want to spend time performing this task, respondents have provided a security clearance to counsel's paralegal, who has traveled to GTMO to assist counsel with their interviews.

to the CSOs takes approximately two weeks. In fact, during petitioners' counsel's most recent visit to GTMO, their interview notes arrived in Washington, D.C. eight business days after the conclusion of their visit.[19]

Moreover, petitioners fail to explain how the alleged delays in the transmission of their notes have caused them harm or impaired their ability to represent their clients. It certainly has not stopped them from filing motions in this case. Additionally, the contention that the alleged delays have prevented them from conducting follow-up investigation and from discussing the detainees' condition with their families and the media is without merit. Indeed, it seems unlikely that absent their notes petitioners' counsel can remember nothing from their interviews of the detainees sufficient to permit any factual investigation of petitioner's claims during the interim period between the conclusion of their visit to GTMO and the arrival of their notes.

As an alternative to certified mail and classified fax, petitioners' motion proposes two alternative means to transmit notes from GTMO to Washington, D.C. First, petitioners request that "private couriers – such as Federal Express or counsel themselves – be allowed to deliver notes in sealed packages to the secure facility." See Pets' Mot. at 8. Second, petitioners request that they be permitted "to transmit electronically scanned copies of their notes from Guantanamo to the secure facility over the Secret Internet Protocol Network ("SIPERnet") employed by the Department of Defense ("DoD") for e-mail transmission of classified communications." Id. at 9. As a threshold matter, petitioners provide no legal basis to support such expansive intervention

[19] The notes were mailed from GTMO on February 18, 2005 and they arrived at the offices of the CSOs on March 1, 2005. To ensure timely processing of the notes, military personnel at GTMO provide both petitioners' counsel and respondents' counsel with certified mail tracking numbers that may be entered into to the United States Postal Service web site to monitor the status of the delivery of the package.

by the Court into this matter. In any event, there are significant and unavoidable problems with each of petitioners' proposed alternatives.

With respect to the private courier proposal, Federal Express does not send packages to or deliver packages from GTMO.[20] Additionally, the Executive has not authorized habeas counsel to serve as couriers of national security information. See DoD Regulation 5200.1-R, § C7.3.1.1.3 (stating that handcarry may be authorized only when approved by the appropriate official as required by the Component head). Even if counsel did have authorization to courier their notes, the logistics of transporting this material from GTMO to the secure facility would create serious difficulties and security risks. For instance, habeas counsel routinely cannot travel from GTMO to the secure facility in a single day via commercial airlines.[21] Thus, during overnight stops, classified information would have be housed in appropriately designated safes at military facilities, embassies, or cleared contractor facilities. See DoD Regulation 5200.1-R, § C7.3.1.2.2. Petitioners' proposal thus seeks to saddle respondents with the burden of locating and arranging access by petitioners' counsel to such facilities, on a schedule coordinated with counsel's planned or actual travel itinerary. Respondents should be under no duty to make such accommodations for petitioners' counsel. Furthermore, petitioners have offered no justification to support the implementation of the burdensome procedures for hand-carrying classified information aboard commercial passenger aircraft. See id. at § C7.3.1.3 (explaining that advance

[20] Respondents also should not have to undertake the burden of making arrangements for the notes to travel with third-parties on aircraft traveling from GTMO to the United States.

[21] Even if they could arrive in Washington, D.C. on the same day, it is doubtful they could arrive at the secure facility during business hours to deposit the classified information in the appropriate safes.

coordination should be made with airline and departure terminal officials, intermediate transfer terminal officials, and the Federal Aviation Administration).

Petitioners also provide no legal support for their request to send their notes via the Department of Defense's SIPERnet. While DoD has a secure e-mail network available for military and civilian DoD personnel in the performance official duties, there is no basis to require respondents to provide habeas counsel with access to this network. SIPERnet is a communications medium exclusively reserved for DoD personnel to perform their official functions. It is not a public e-mail system available for use habeas counsel. Moreover, there is no guarantee that petitioners' notes sent over the network would remain privileged because copies of all e-mails are saved in various severs and system administration files. To maintain counsel's notes consistent with the privilege asserted with respect to them, respondents would have to go to the extraordinary burden of creating a secure international e-mail network exclusively for petitioners' counsel. Second, neither the offices of the CSOs nor the secure habeas work facility have the capability to send or receive DoD SIPERnet e-mails. Respondents should not have to burden DoD information technology personnel to construct a SIPERnet e-mail system in these offices merely for the convenience of petitioners' counsel.[22]

The burden of providing SIPERnet access to petitioners' counsel in this case, as well as to counsel in the other thirty-four GTMO cases, is unreasonable and unwarranted. Accordingly, petitioners' motion to compel respondents to create alternative means for them to transmit their notes from GTMO should be denied.

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[22] In light of the procedural impropriety of this motion, see supra § I, respondents reserve the right, and request they be permitted, if necessary, to further articulate the burdens implicated by petitioners' request with declarations from appropriate DoD personnel.

**D. Petitioners' Baseless Demand For High-Speed Internet Access Should Be Denied.**

Petitioners' counsel also seek relief from this Court because the speed of their internet access at GTMO is, in their view, too slow. Of course, petitioners do not identify any basis for a purported right to high-speed internet access, nor do they provide any persuasive justification for the Court to grant their requested relief. For these reasons, petitioners' request must be denied.

During visits to GTMO, habeas counsel are provided with lodging in the Bachelor Officer Quarters on the "Leeward" side of the base. In their rooms, they are provided with a telephone and a phone line, which can be used to make international calls as well as access the internet.[23] Internet access is provided to habeas counsel in the same fashion it is provided to all personnel who are stationed on the base. A third party contractor – Satellite Communication Systems, Inc. ("SCSI") – provides dial-up internet access service that can be purchased for a fee of $30 per month. After paying the fee and receiving a username, subscribers dial in to the internet though a local telephone number.[24]

Unsatisfied with this level of service,[25] petitioners' request that the Court compel respondents to provide them with access to the media center on the Leeward side of the base,

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[23] Habeas counsel are permitted to bring their laptop computers to GTMO; however, they cannot bring them into their interviews with the detainees for security reasons.

[24] The phone number is a local number on the base. Petitioners' counsel are not required to use a calling card or dial an international phone number.

[25] Although petitioners assert in their motion that they have had "problems" accessing the internet at GTMO, respondents are aware of no systemic problems with the internet access at GTMO. The fact that the internet service provider may have been having difficulties accessing the internet during counsel's last visit appears to be nothing more than an inconvenience of modern life in the internet age. Respondents certainly cannot be held accountable for any inevitable technological problems that may arise from time to time.

which petitioners incorrectly believe has a "high-speed" internet connection. As an initial matter, the media center does not have a high-speed internet connection; it simply has computers with access to the same dial-up internet connection that is provided to petitioners' counsel and the other base personnel.[26] Furthermore, the media center is reserved exclusively for members of the media who need access to the computers and internet in order to file their stories. Petitioners' counsel are provided with the same degree of internet access in their lodging quarters, thus there is no justification for the Court to compel respondents to grant them access to this facility.

Moreover, petitioners offer no compelling reason for the Court to became "enmeshed in the minutiae" of disputes over the speed of internet access. Cf. Wolfish, 441 U.S. at 562. Petitioners primary complaint appears to be that dialing into the internet is "difficult" for them. See Pets' Mot. at 11. This is not a sufficient basis for judicial intervention.[27] Furthermore, petitioners' motion reveals that the motivation behind their request for GTMO to provide them with high-speed internet access and the other modern conveniences of their personal law offices is not any need associated with this case, but rather their desire to "work[] on non-Guantanamo matter[s]" while visiting the base.[28] Id. Again, this is not a sufficient reason to justify the relief

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[26] SCSI is the only contractor that currently provides internet services at GTMO. Prior contractors provided varying degrees of high-speed access (e.g., DSL), but these contractors no longer provide internet services at GTMO. SCSI is presently working to install faster internet bandwidth at GTMO.

[27] Petitioners assert without any accompanying support that telephone service is "sporadic." See Pets' Mot. at 11. Respondents are unaware of any problems with the phones at GTMO, and petitioners' counsel have not provided any factual basis to support this claim. To the extent they have problems in this regard, the military escorts and the personnel who provide the internet and telephone services on the base are available to help them.

[28] Petitioners' also claim that they need the reliable internet access to communicate with the offices about "events transpiring during their visits at Guantanamo." Pets' Mot. at 11. Of

petitioners seek.

It is important to remember that petitioners' counsel are provided with access to GTMO so they can interview the detainees and perform their duties as counsel in this case. In light of the unique circumstances regarding the location of petitioners' detention, respondents have gone to great lengths to accommodate petitioners' counsel as much as possible in order to create an atmosphere that meets their needs. These accommodations include providing them with a military escort at all times during their visit, transportation around the base, lodging quarters in the officers' housing area, telephone and internet access, and meals at the military dining facilities. Petitioners' increasingly petty complaints regarding these accommodations – minutiae that have little, if anything, to do with issues actually raised in the petitions in this case – such as the speed of their internet access, are not appropriate subjects for judicial resolution. Consequently, their request for high-speed internet access must be denied.

**E. The Court Should Not Appoint A Special Master To Supervise Negotiations In This Case.**

Finally, petitioners request that the Court appoint a Special Master "to supervise negotiations between the parties over counsel access and detainee living conditions and make recommendations to the Court if the parties are unable to resolve those issues." See Pets' Motion at 11. Contrary to the authority cited above, see Wolfish, 441 U.S. at 562, petitioners' apparently

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course, pursuant to the protective order, any information "learned from the detainee" during counsel's interviews is presumptively classified and may not be communicated over an unsecure telephone or internet connection. See Revised Procedures For Counsel Access to Detainees at the U.S. Naval Base in Guantanamo Bay, Cuba at ¶ VII. Accordingly, the information that counsel could communicate back to their home offices about their interviews with the detainees is necessarily limited. In any event, the telephone and internet access that counsel are provided is sufficient for them to communicate with their offices and families during their visits to GTMO.

envision a regime in which the Court and the Special Master – instead of the Executive – will become "enmeshed in the minutiae" of administering GTMO and will resolve disputes over such issues as the detainees' diet, recreational opportunities, and access to library materials. Such judicial intervention and oversight is wholly improper as a general matter, but it is even more inappropriate in light of the posture of the present litigation. As discussed above, Judge Green stayed this case "for all purposes" and in doing so she rejected petitioners' express arguments that proceedings should go forward regarding petitioners' conditions of confinement. See Petrs' Motion for Reconsideration of Order Granting Stay Pending Appeal at 2 (dkt. no. 203). See Petrs' Motion at 11. Petitioners' request to appoint a Special Master is simply another way in which petitioners' are attempting to end-run around the stay of the proceedings in this case. This request should be denied.

## CONCLUSION

For the foregoing reasons, petitioners' motion should be denied.

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Respectfully submitted,

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