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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FAWZI KHALID ABDULLAH FAHAD AL ODAH, et al.,	)	
Plaintiffs-Petitioners,	)	
v.	)	**No. CV 02-0828 (CKK)**
UNITED STATES OF AMERICA, *et al.*,	)	
Defendants-Respondents.	)	

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

Introduction and Summary

Relying on an incantation of "force protection" that borders on the ridiculous, the government seeks to deny the Kuwaiti Detainees Arabic/English dictionaries that would help them understand court filings and other papers in this case. Furthermore, the government defends its refusal to issue security clearance for experts the Kuwaiti Detainees wish to hire on the ground that *the government* does not think they should employ experts at this time. The government also asserts, without any evidentiary support, that technical problems prevent it from implementing *existing regulations* that would provide counsel with an expeditious means of transmitting interview notes from Guantanamo to Washington, D.C., and it gives no reason for denying counsel access to Internet facilities at Guantanamo that it routinely provides to the media. Finally, the government opposes the appointment of a Special Master – indeed, it opposes consideration of the present motion – because of the stay order issued by the Court on February 3, 2005, but it does explain why the Court should not modify that stay or allow a neutral party to resolve or recommend to the Court ways of resolving access and other issues.

The government's objections to the Kuwaiti Detainees' motion to enforce the Court's Order of October 20, 2004, and to appoint a Special Master have no merit. Therefore, the Court should grant that motion.

1. Arabic-English Dictionaries. As this Court has ruled (Oct. 20 Memo at 17 & n. 12), the Kuwaiti Detainees have a right of access to counsel and the courts, and such access must be "meaningful." *See Lewis v. Casey*, 518 U.S. 343, 351 (1996). To be meaningful, this right necessarily encompasses the right to review relevant legal materials in a language the Kuwaiti Detainees understand. *See, e.g., Bounds v. Smith*, 430 U.S. 817, 828 (1977) (right of access to the courts enjoyed by individuals detained by the government includes a right to review legal materials necessary to challenge their detention). Prison officials are required to make available to convicted prisoners translators and translation devices because, as the Ninth Circuit recognized, "[a] book and a library are of no use, in and of themselves, to a prisoner who cannot read . . . because they are uneducated, illiterate or do not speak English." *Lindquist v. Idaho State Board of Corrections*, 776 F.2d 851, 855-56 (9th Cir. 1985). Even the worst mass murderers thus have an unchallengeable right of access to legal materials they can understand.

Here, however, the government asserts the authority to deny the Kuwaiti Detainees a right that it cannot deny convicted terrorists. The government denies the Kuwaiti Detainees access not only to all law books but even to simple Arabic-English dictionaries, which would enable them to understand court filings, military rules, and other papers that affect their detention and this case.

The government offers no support for its denial of the Kuwaiti Detainees' right to relevant legal materials they can understand other than its bizarre assertion that Arabic-English dictionaries pose a threat to "force protection" at Guantanamo. *See* Respondents' Opposition to

Motion to Enforce Court's Order of October 20, 2004, on Access to Counsel and for Appointment of Special Master ("Gov't Opp.") at 9. With no affidavits or other evidentiary support (*see* Gov't Opp. At 10 n. 8), the government asks this Court simply to accept its counsel's word that dictionaries "create dangers to national security and force protection at GTMO." *Id.* at 14. Moreover, the government argues that its counsel's word is entitled to nearly absolute deference from this Court. *See id.* at 11-13. The Court should reject the government's unsupportable position.

First, the government mistakenly argues that its restrictions on the Kuwaiti Detainees' access to means necessary to understand relevant legal materials should be reviewed solely for reasonableness. *See* Gov't Opp. at 12. The government attempts to support this position by relying on cases addressing the rights of convicted prisoners regarding such matters as magazine subscriptions and non-legal mail. *Id*. at 11-12. But the rationale for giving deference to prison administrators applies with greatly diminished force when prison restrictions inhibit prisoners' rights of access to the courts and legal materials, because the courts' own authority is at issue.

This Court expressly rejected the government's argument that restrictions on access to counsel and the courts should be judged on a reasonableness standard, noting that such access "is not a matter of Government discretion." Oct. 20 Memo at 15. The Court held that a higher standard applies in reviewing the government's restrictions on the Kuwaiti Detainees' right of access to counsel and the courts, one under which the government may not "inappropriately burden" that right. *Id.* at 13. The standard applied by this Court to access restrictions has been applied by other courts that have examined restrictions on prisoners' rights of access to counsel and the courts. *See Morgan v. Bennett*, 204 F.3d 360, 367 (2d Cir. 2000) (restrictions on access to counsel may be imposed only when (1) such restrictions are necessary to protect an important

governmental interest, and (2) only when the court establishes a "carefully tailored, limited restriction on the defendant's right to consult with counsel"); *Ching v. Lewis*, 895 F.2d 608, 609 (9th Cir. 1990) ("[w]hile prison administrators are given deference in developing policies to preserve internal order, these policies will not be upheld if they *unnecessarily abridge* the defendant's meaningful access to his attorney and the courts") (emphasis added).

Second, even if it were to be judged by a reasonableness standard, the government's denial of Arabic-English dictionaries should be rejected because it is arbitrary and unreasonable. Under a reasonableness test, restrictions on detainees' rights can be upheld only if the government establishes "a valid, rational connection between the prison regulation and the legitimate governmental interest put forward to justify it." *Turner v. Safley*, 482 U.S. 78, 90 (1987). The government claims that the introduction of Arabic-English dictionaries would "undoubtedly" threaten "force protection" at Guantanamo. Gov't Opp. at 15. Protecting security at Guantanamo unquestionably is a legitimate government interest. But there is no "valid, rational connection" between the government's asserted "force protection" concerns and the provision of Arabic-English dictionaries to the Kuwaiti Detainees.

The theory offered by the government to explain the dangers posed by Arabic-English dictionaries is as follows: (1) if the Kuwaiti Detainees were provided with Arabic-English dictionaries, "their ability to read, speak and understand English would unquestionably improve," Gov't Opp. at 15; (2) if the Kuwaiti Detainees understood English better, they "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," *id.* at 9; and (3) if the Kuwaiti Detainees could better understand what guards, medical staff, and others around the

camp say, or could listen to radio transmissions, they "may attempt to harm the military personnel guarding the camps or to cause disruptions within the camp," *id.*

However, the government has not produced a shred of evidence to support this theory. Moreover, there is no reason to believe that detainees who speak English pose greater threats to security at Guantanamo than those who cannot speak English. The government acknowledges "that many of the detainees speak and understand English to varying degrees." Gov't Opp. at 9. Yet the government offers no proof – in fact, it does not even attempt to show -- that detainees at Guantanamo who understand English pose any greater threats than those who do not. The government acknowledges it already has established security policies to address the fact that many detainees understand English by prohibiting Guantanamo military personnel from discussing "potentially sensitive issues regarding the administration of the camp" within earshot of the detainees. Gov't Opp. 15. There is no basis for a concern that, if the Kuwaiti Detainees had Arabic-English dictionaries, they could glean any sensitive security information from guards or medical personnel. Similarly, there is no basis for a concern that, with Arabic-English dictionaries, the Kuwaiti Detainees might gain access to sensitive information from "radio transmissions," because the Kuwaiti Detainees have no access to radios or media of any sort.

As the Supreme Court held in *Turner*, courts cannot uphold prison policies restricting prisoners' rights when there is no evidence to support them. In *Turner*, the Court held invalid a prison policy forbidding prisoners from getting married without approval by prison officials, and the Court based its holding on the absence of any record evidence to support the prison administrator's assertion of a connection between marriage and prison security. *See* 482 U.S. at 97-100. Many other cases likewise have rejected restrictions on prisoners' rights where no evidence was offered to support them. For instance, in *Bear v. Kautzky*, 305 F.3d 802, 805 (8th

Cir. 2002), the Eighth Circuit held that prisoners' right of access to the courts was unreasonably infringed by a policy barring prisoners from communicating with jailhouse lawyers, and the Court emphasized that "defendants introduced no evidence justifying the new policy under the deferential *Turner* standard." To be sure, the District of Columbia has held that a prison regulation restricting prisoners' rights can be upheld without evidentiary support when the regulation is justified by "commonsensical intuitive judgments," such as the supposition that the rehabilitative goals of prison are advanced by a prohibition on inmate consumption of pornography. *See Amatel v. Reno*, 156 F.3d 192, 200 (D.C. Cir. 1998). Yet where there is no connection in common sense between a prison policy and the reasons offered to support it – such as the prohibition on Arabic-English dictionaries and concerns about "force protection" – the policy cannot be sustained absent evidentiary support.

The government also attempts to support the denial of Arabic-English dictionaries by claiming that the Kuwaiti Detainees enjoy an "expansive degree of access" to counsel, who can "explain to the detainees all of the relevant legal materials at issue in this litigation" without the need for Arabic-English dictionaries. Gov't Opp. at 14. This claim is laughable.

The Kuwaiti Detainees and all the other detainees at Guantanamo have extremely limited access to counsel. Until October 20, 2004, when this Court ordered the government to allow unmonitored communications between the Kuwaiti Detainees and their counsel, the government barred the Kuwaiti Detainees from having *any* communications with counsel. Since then there are only two means of attorney-client communication available to the Kuwaiti Detainees. First, the Kuwaiti Detainees may meet with their counsel in person at Guantanamo. But travel to and from Guantanamo is expensive, takes an entire day or portions of two days in each direction, and, all trips must be scheduled at least 20 days in advance. Furthermore, because the military

makes only a few interview cells available to counsel at Guantanamo, trips by the Kuwaiti Detainees' counsel are spaced by the government so they do not overlap with trips by counsel for other detainees. In addition, detainees who are interviewed by counsel at Guantanamo must be shackled before and unshackled after each interview by two or three military guards, a process that can take up to 40 minutes. Finally, interviews at Guantanamo are not permitted before breakfast, during lunch, or after 5:00 P.M. As a result of these limitations, in the six months since this Court's Order of October 20, 2004, each Kuwaiti Detainee has been able to confer with counsel no more than four times and for no longer than a total of approximately 16 hours.

Second, the Kuwaiti Detainees may communicate with counsel by mail. However, mail sent by the Kuwaiti Detainees from Guantanamo takes at least two weeks and frequently longer to arrive at the secure facility in Crystal City, Virginia established pursuant to the Court's Amended Protective Order of November 8, 2004, to receive such mail, which is presumptively classified. Once mail from the Kuwaiti Detainees arrives at the secure facility, it must be translated from Arabic to English to allow counsel to read it. Translation of detainee mail requires that an interpreter with appropriate security clearance travel to the secure facility and translate the letter there, because such mail may not be removed from the secure facility until the "privilege team" established pursuant to the Court's Amended Protective Order determines that it is not classified. Review by the "privilege team" takes anywhere from a week to a month, depending on the content of the mail and the "privilege team's" workload. As a result, it has taken a minimum of six weeks from the time a Kuwaiti Detainee has sent a letter to counsel from Guantanamo before counsel has been able to read and respond to it. Letters from counsel to the Kuwaiti Detainees likewise must be translated from English into Arabic, mailed from the secure

facility to Guantanamo, and delivered to the Kuwaiti Detainees, a process that has taken no less than three weeks.[1]

Thus, it is fantasy for the government to claim the Kuwaiti Detainees enjoy an "expansive degree of access" such that they do not need Arabic-English dictionaries to understand the court papers, military rules, and other English-language papers relevant to their detention and this case. The Kuwaiti Detainees need Arabic-English dictionaries and they have a right to them. There is no reason, and the government has offered none, to support the government's denial of that right.

2. Security clearance forms for experts. The government has unreasonably and without justification denied the Kuwaiti Detainees' requests for security clearance forms for experts, thus preventing the Kuwaiti Detainees from hiring and using experts to review the classified evidence purportedly justifying their ongoing and indefinite detentions.[2] This action is in blatant violation of the Amended Protective Order and Procedures for Counsel Access to Detainees at the United States Naval Base in Guantanamo Bay, Cuba, dated November 8, 2004 (the "Amended Protective Order").

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[1] Although the Revised Procedures for Counsel Access to Detainees at the U.S. Naval Base in Guantanamo Bay, Cuba (Exhibit A to Amended Protective Order and Procedures for Counsel Access to Detainees at the United States Naval Base in Guantanamo Bay, Cuba, dated November 8, 2004), allow (at § VIII) for telephone communications between the detainees and counsel or other persons on a case-by-case basis, subject to appropriate security procedures, the government has not permitted counsel for any of the detainees at Guantanamo to have a single telephone conversation with a single detainee.

[2] After the present motion was filed, counsel for the Kuwaiti Detainees requested a security clearance form for an Arabic interpreter. Although counsel have access to two Arabic interpreters with security clearances, one of them was unable to accompany counsel on their most recent trip to Guantanamo. To protect against future such occurrences, counsel located and seek a security clearance for a third Arabic interpreter. (Once cleared, this interpreter would be available to counsel for other detainees as well.) However, the government refused to provide counsel with a security clearance form for this third interpreter and told counsel to use one of the two security clearance forms it provided to them months ago for two additional attorneys. The government's refusal to issue a security clearance form for an additional Arabic interpreter is as unreasonable and without justification as its refusal to issue security clearance forms for experts.

The Amended Protective Order defines "petitioners' counsel" to include "interpreters, translators, paralegals, investigators and all other personnel or support staff employed or engaged to assist in the litigation." Amended Protective Order, ¶ 12. It provides that all such "petitioners' counsel" are "presumed to have a 'need to know' information both in their own cases and in related cases pending before this Court." *Id.*, ¶ 29. The Amended Protective Order establishes, in ¶ 29, a mechanism for the government to challenge whether personnel employed by detainees to assist in the litigation, such as the Kuwaiti Detainees' experts, should be allowed access to the classified information: "Counsel for respondents may challenge the 'need to know' presumption on a case-by-case basis for good cause shown." But instead of following this Court-ordered procedure, the government simply has refused to provide security clearance forms for the Kuwaiti Detainees' experts, saying "we do not believe it appropriate at this stage of the case to provide security clearance forms for use by experts." *See* Letter from Terry M. Henry to Neil H. Koslowe, January 28, 2005 (annexed to opening memorandum as Exhibit B).

The Kuwaiti Detainees unquestionably may employ experts to review the evidence offered by the government to justify their continued imprisonment. Although experts and outside consultants are frequently necessary in everyday litigation, *see, e.g., Von Bulow v. von Bulow*, 811 F.2d 136, 146 (2d Cir. 1987), the need for experts is especially strong in this case. The individuals with the greatest ability to evaluate and challenge the evidence offered by the government – the Kuwaiti Detainees themselves – are prohibited from having any access to the classified evidence offered against them. *See, e.g.,* Amended Protective Order, ¶ 30. Experts are needed because the government likely will argue, as it has argued throughout the three-plus years of this litigation, that the Court lacks competence to evaluate the classified evidence and should therefore defer to the government's own supposed expertise in assessing who are "enemy

combatants" that can be imprisoned indefinitely. *See, e.g.*, Respondents' Response to Petitions for Writ of Habeas Corpus and Motion to Dismiss or for Judgment as a Matter of Law and Memorandum in Support, filed October 4, 2004, at 44 (arguing that "the judiciary lacks institutional competence, experience, and accountability" to determine whether the Kuwaiti Detainees are enemy combatants). To effectively challenge the classified evidence offered against them, the Kuwaiti Detainees should be allowed to retain experts to review that evidence.

The government attempts to hide behind the stay order issued by the Court on February 3, 2005, to justify its decision to disregard the Amended Protective Order and to restrict the Kuwaiti Detainees' ability to consult with experts by withholding security clearance forms for them. *See* Gov't Opp. at 16-18. The stay, however, does not give the government unilateral, unreviewable authority to use its power over security clearance applications to prevent the Kuwaiti Detainees from employing experts to examine the classified evidence against them. In its order of February 3, 2005, the Court stayed all "proceedings," meaning *judicial* proceedings. *See* Order Denying Motion for Reconsideration of Order Granting Stay Pending Appeal, dated February 7, 2005. The stay was explicitly based on the need to preserve *judicial* resources. The stay did not suspend the operation of the Amended Protective Order. Nor does the stay prevent the Kuwaiti Detainees from examining and evaluating the classified evidence already submitted by the government in this case. The government cannot use the stay to prevent the Kuwaiti Detainees from continuing to develop their cases during the pendency of appeals from the Court's Order of January 31, 2005.

Moreover, the government does not actually construe the stay to relieve it of the obligation to provide security clearance forms to "petitioners' counsel," as that term is defined in the Amended Protective Order. As the government acknowledges, it continues to provide

security clearance forms to lawyers and support staff in this and other Guantanamo Bay detainee cases. *See* Gov't Opp. at 17-18 & n. 16. On its own whimsical authority, however, the government has decided not to provide security clearance forms for the Kuwaiti Detainees' experts. Perhaps the government does not want the evidence subjected to thorough examination and evaluation. Whatever the reason for the denial of the security clearance forms, the government has no authority to prevent the Kuwaiti Detainees from using experts to review the classified evidence offered to justify their ongoing detentions.

The denial of security clearances to experts may well have the effect of keeping the Kuwaiti Detainees unlawfully imprisoned and delaying the eventual resolution of this case. At the first appropriate opportunity, the Kuwaiti Detainees will challenge the factual sufficiency of the evidence the government has offered against them. While it is possible, as the government asserts, that the appeal of this Court's Memorandum Opinion and Order of January 31, 2005, will result in the denial of the Kuwaiti Detainees' claims, it is at least equally possible that these claims will proceed.[3] The Kuwaiti Detainees are entitled to a speedy resolution of their claims, including judicial review of the classified evidence submitted by the government.[4] As a result, the Kuwaiti Detainees are entitled to consult with experts *now* to prepare for the day they bring their challenge to the classified evidence offered against them. This is not a decision that should be left to the government.

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[3] *See Abdah v. Bush*, Civil Action No. 04-1254 (HHK) (D.D.C. March 12, 2005), slip opinion at 7 (granting a temporary restraining order against the transfer of detainees from Guantanamo and noting that the detainees have at least a 50% chance of prevailing on the appeal of the Court's Memorandum Opinion and Order of January 31, 2005).

[4] *See, e.g.*, *Preiser v. Rodriguez*, 411 U.S. 475, 495 (1973) ("the federal habeas statute provides for a swift, flexible, and summary disposition of [the detainee's] claim"); *Carafas v. LaVallee*, 391 U.S. 234, 238 (1968) (the "province [of habeas jurisdiction], shaped to guarantee the most fundamental of all rights, is to provide an effective and speedy instrument by which judicial inquiry may be had into the legality of the detention of a person"); *Stack v. Boyle*, 342 U.S. 1, 4 (1952) ("[r]elief in this type of case must be speedy if it is to be effective").

It will be several months before the District of Columbia Circuit resolves the appeal from the Court's Memorandum Opinion and Order of January 31, 2005; briefing alone will not be completed until June 28, 2005. If the government concludes after the resolution of the appeal that it is then an "appropriate time" to provide security clearance forms for the Kuwaiti Detainees' experts, it will take additional months for the security clearance applications to be processed and granted. As a result, the government's *present* refusal to issue security clearance forms for experts may prevent those experts from reviewing the classified evidence against the Kuwaiti Detainees for a year or more, thereby delaying the eventual resolution of this case. It appears that is precisely the government's strategy. The Court should not allow it to succeed.

3. Transmission of Interview Notes from Guantanamo. The government has refused to make available an expeditious method of transmitting counsel's interview notes taken at Guantanamo to the secure facility in Crystal City, Virginia. Government regulations and procedures provide at least two methods for expeditiously transmitting classified materials that the government has unreasonably refused to make available to the Kuwaiti Detainees' counsel. First, the regulations permit classified documents to be hand-carried by "[c]ouriers and authorized persons." 32 C.F.R. § 2001.45(b)(2), (c)(2)(i). Second, Defense Department procedures allow classified information to be transmitted over the Secret Internet Protocol Router Network ("SIPERnet"). The government has refused the requests from counsel for the Kuwaiti Detainees to use either of these methods for the transmission of their interview notes from Guantanamo instead of using certified mail, which, as noted above, can take up to a month. This refusal has impaired counsel's ability to take swift action in Court based on information provided to them by the Kuwaiti Detainees.

Although the government admits that "there were some delays at the outset of th[e] process" of transmitting attorney interview notes from Guantanamo to the secure facility by classified mail, and it claims that, at the present time, the transmission of those notes takes "approximately two weeks, *see* Gov't Opp. at 19-20, the government argues that it should not be required to allow more expeditious transmission of notes due to various alleged logistical problems. *See* Gov't Opp. at 20-22. For instance, the government posits that, if counsel for the Kuwaiti Detainees were allowed to hand-carry their notes from Guantanamo but were unable to reach the secure facility in a single day, provision would have to be made for the secure storage of counsel notes during overnight stops. *Id.* at 21. The government says it "should be under no duty to make such accommodations." *Id.* Similarly, while not denying that the government could make available its SIPERnet for the expeditious transmission of attorney interview notes from Guantanamo to the secure facility without jeopardizing attorney-client privilege, the government argues that it "should not have to burden DoD information technology personnel" with enabling such transmission. *Id*. at 22.

The Revised Procedures for Counsel Access to Detainees at the U.S. Naval Base in Guantanamo Bay, Cuba (Exhibit A to Amended Protective Order) provide, in §VI.B, that attorney interview notes shall be transmitted from Guantanamo to the secure facility "in the manner required for classified materials." This does not authorize the government unilaterally to pick the slowest manner for transmission. Undoubtedly the government makes "accommodations" and "burden[s]" its information technology personnel to permit the expeditious transmission of its own classified materials. The government should be ordered to do the same for the transmission of interview notes from Guantanamo to the secure facility.

4. Internet Access. While counsel for the Kuwaiti Detainees are at Guantanamo visiting the Kuwaiti Detainees, they are virtually *incommunicado* themselves. There are no offices for counsel at Guantanamo. Counsel spend their time either in their rooms at the Combined Bachelors Quarters located on a small island (the "Leeward" side of Guantanamo) across the bay from the main base facilities (the "Windward" side of Guantanamo) or in the prison camp on the Windward side used for interviews. The Quarters telephones are not equipped with voicemail and the Quarters staff does not take messages. Cellphone service is not available at the Quarters, the camps, or anywhere else at Guantanamo. The only way counsel can maintain contact with their office is by electronic mail over the Internet. The government provides the media with access to state-of-the-art computers and the Internet at two media centers, one located next door to the Quarters on the Leeward side of Guantanamo and one located not far from the camps on the Windward side. The government has refused to allow counsel for the Kuwaiti Detainees to use the communications facilities at either of these media centers.[5]

The government does not even attempt to justify this discrimination.[6] Instead, it derides the Kuwaiti Detainees' claim regarding access for counsel to the Internet as "petty" and suggests the Kuwaiti Detainees are attempting to involve the Court in "minutiae" that have "little, if

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[5] Counsel are able to purchase access to the Internet from a private contractor, Satellite Communication Systems, Inc. ("SCSI"), whose service theoretically is available in the Quarters rooms to counsel who bring their own "laptop" computers and also pay SCSI for long-distance telephone service. Although counsel for the Kuwaiti Detainees paid SCSI for such service, SCSI was unable to provide it due to repeated technical problems, and military personnel at Guantanamo refused to help. There is also a small Internet "café" at the base library on the Windward side. However, the café has a limited number of computers and the maximum amount of time one may use a computer in the café is 30 minutes. Moreover, because counsel do not have their own transportation at Guantanamo and may go only where their military escorts will take them, they generally can get to the café only during lunch, when it is very crowded and they have only a few spare minutes. During counsel's trip to Guantanamo earlier this month, repeated equipment failures at the café prevented them from accessing their office electronic mail.

[6] During counsel's trip to Guantanamo earlier this month, a crew from the British Broadcasting Corporation were accompanied at all times by a military aide who made sure the facilities at the media center on the Leeward side, next door to counsel's Quarters rooms, were working properly. As noted above, the government refuses to provide any assistance to counsel in gaining access to the Internet.

anything, to do with issues actually raised in the petitions in this case." Gov't Opp. at 25. The government also expressly discounts the Kuwaiti Detainees' assertion that they need reliable access to the Internet to communicate with their office about events transpiring during their visits at Guantanamo. *Id*. at 24-25 n. 28.

But events that transpired during counsel's visit to the Kuwaiti Detainees at Guantanamo March 14-18, 2005, illustrate the extent of the prejudice the Kuwaiti Detainees suffer as a result of the government's refusal to allow their counsel to have access to the Internet at the media centers. Some months ago the government announced that, beginning after February 1, 2005, the detainees at Guantanamo would be given the opportunity to appear before a military Administrative Review Board ("ARB") which would determine whether they should remain imprisoned, should be returned to their home countries for criminal prosecution, or should be returned to their home countries for outright release. Although it is obvious counsel should be able to advise the detainees about the ARBs, the government has refused to notify counsel when the ARBs will be held for their clients.

One of the Kuwaiti Detainees' counsel who was at Guantanamo from March 14 through March 17 returned to the United States the evening of March 17 and accessed his electronic mail at 11:00 P.M. that night. One of the electronic messages sent the previous evening was that the Government of Kuwait had been informed by the Government of the United States that the ARBs for the Kuwaiti Detainees would be held the week of March 28, 2005. The following morning he contacted co-counsel who was about to leave Guantanamo and gave him this message. Co-counsel immediately sought permission from military personnel at Guantanamo to extend his visit so he could meet with the Kuwaiti Detainees and advise them about this development. The military refused to extend the visit. Counsel then asked Department of

Justice counsel to arrange for them to return to Guantanamo during the week of March 21, 2005, to advise the Kuwaiti Detainees about this development. Justice Department counsel informed counsel for the Kuwaiti Detainees that such a return visit was not feasible and would not be arranged. Furthermore, Justice Department counsel rejected the request by counsel for the Kuwaiti Detainees to talk by telephone to the Kuwaiti Detainees by about this development or to send them letters by expeditious means that would guarantee delivery prior to March 28, 2005.

If counsel for the Kuwaiti Detainees had been allowed access to the Internet facilities at either one of the two media centers, they would have been able timely to advise some or all of the Kuwaiti Detainees about the ARB development. Because of the government's refusal to grant counsel access to those facilities, the Kuwaiti Detainees irretrievably lost the benefit of that advice. The Court should not permit this to continue.

5. Special Master. The government opposes the appointment of a Special Master because it envisions a "regime in which the Court and the Special Master – instead of the Executive" will administer the detention facility at Guantanamo. Gov't Opp. at 26. The government also characterizes the Kuwaiti Detainees' request for a Special Master as an attempted "end run around the stay of the proceedings in this case." *Id.*

Contrary to the government's vision, the appointment of a Special Master will not displace the Executive as administrator of the detention facility at Guantanamo. Rather, it will relieve the Court of the burden of dealing with disputes that the parties, with some outside guidance, can resolve themselves, and it will provide the Court with recommendations from a neutral third party for the resolution of disputes the parties cannot resolve themselves. What the government wants is *carte blanche* to treat the Kuwaiti Detainees and administer the detention facility at Guantanamo as it sees fit, without regard to the Kuwaiti Detainees' rights. The Court,

in its Order of October 20, 2004, already has rejected that. For the same reasons the Court should reject the government's opposition to the appointment of a Special Master.

6. The Stay. Finally, the government argues that, due to the stay order issued by the Court on February 3, 2005, the Court should not exercise its authority to consider or grant the Kuwaiti Detainees' present motion. Gov't Opp. 4-8. The government does not challenge this Court's inherent authority to lift or modify the stay when justice requires, nor could it. *See Marsh v. Johnson*, 263 F. Supp. 2d 49, 52 (D.D.C. 2003) ("the same court that imposes a stay has the inherent power and discretion to lift the stay"). Rather, the government contends that modification of the stay would be inappropriate because the present motion does not actually seek to enforce this Court's October 20 ruling, in that the October 20 ruling did not address the specific acts the Kuwaiti Detainees now challenge. Gov't Opp. at 7.

Of course, the government is correct that the Court's Order of October 20, 2004, did not address the government's authority to deny the Kuwaiti Detainees Arabic-English dictionaries or security clearance forms for experts or the other matters raised in the present motion because those actions had not been taken before that Order was issued. Nevertheless, the Court held on October 20, 2004, that the Kuwaiti Detainees are entitled to access to counsel and the courts, and that the government cannot impose restrictions that "inappropriately burden" those rights. Oct. 20 Memo at 13. Specifically, the Court held that the Kuwaiti Detainees have a right of access to the courts to present their habeas claims, *id.* at 8; that this right includes the right "to careful consideration and plenary processing of their claims including full opportunity for presentation of relevant facts," *id.*. at 9; that the Kuwaiti Detainees are entitled to access to counsel to develop the factual and legal challenges to their detention, *id.* at 12; that access to counsel is necessary because the Kuwaiti Detainees "face an obvious language barrier" and because the

"circumstances of their confinement render their ability to investigate nonexistent," *id.* Thus, while it is true that, on October 20, 2004, the Court invalidated different restrictions than those the Kuwaiti Detainees challenge in the present motion, the rights at issue here and the legal standards are precisely those recognized by the Court in its October 20 ruling.

The purpose of a stay is to preserve the *status quo*, not to give one party unreviewable authority to deny unquestioned rights. *See In re A.H. Robins Co.*, 828 F.2d 1023, 1026 (4th Cir. 1987) ("[o]ur system of law universally frowns on a party who would use the stay as both a sword and a shield"). The Kuwaiti Detainees unquestionably have rights of access to counsel and the courts, and those rights exist during the pendency of appeal. Indeed, the government has recognized the continued existence of the Kuwaiti Detainees' right to counsel because it has not attempted to prevent counsel from continuing to meet with the Kuwaiti Detainees notwithstanding the appeal and stay. Under the government's position, however, it could unilaterally prevent the Kuwaiti Detainees from meeting with counsel or could deprive the Kuwaiti Detainees' of legal papers, and this Court would be powerless to act. No principle of law or logic supports such a restriction on this Court's power.[7]

Moreover, the pendency of appeal provides no basis for the Court to decline to address the Kuwaiti Detainees' rights of access to counsel and the courts, because those rights are not at issue in the appeal. Because the consideration and resolution of this motion will have no impact on the appeal pending before the D.C. Circuit, this Court remains free to address it.

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[7] On March 12, 2005, notwithstanding the stay order of February 3, 2005, this Court issued a temporary restraining order preventing the government from transferring detainees from the detention facility at Guantanamo on motion by the detainees that the transfer would abrogate their rights, including their rights under the Court's Order of October 20, 2004. *See Abdah v. Bush*, Civil Action No. 04-1254 (HHK) (D.D.C. March 12, 2005). That order was continued for another ten days on March 22, 2005, pending a decision on the detainees' motion for a preliminary injunction.

CONCLUSION

For these reasons and the reasons given in the Kuwaiti Detainees' opening papers, the Court should grant the Kuwaiti Detainees' motion and order the government (i) to allow the Kuwaiti Detainees to receive Arabic-English dictionaries; (2) to provide the Kuwait Detainees' counsel with security clearance forms for its experts, including additional interpreters; (3) to allow attorney interview notes to be transmitted from Guantanamo to the security facility by secured counsel hand-delivery or by SIPERnet; (4) to allow the Kuwaiti Detainees' counsel to have access to the computers and Internet services at the medias center at Guantanamo to the same extent as the media; and (5) to appoint a Special Master to deal with future counsel access and detainee living conditions issues.

Respectfully submitted,

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