IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

RESPONDENTS' OPPOSITION TO PLAINTIFFS-PETITIONERS' MOTION FOR A PRELIMINARY INJUNCTION AND PROVISIONAL MOTION TO MODIFY STAY PENDING APPEALS AND MOTION FOR LEAVE TO FILE SECOND AMENDED COMPLAINT

INTRODUCTION

Despite the fact that the Court has stayed this case for all purposes and has, on two prior occasions, rejected petitioners' nearly identical requests to initiate claims regarding their conditions of confinement, petitioners, remarkably, are asking for a third time to be allowed to proceed with litigation challenging all aspects of the nature of their detention. The Court should not indulge petitioners' third bite at the apple and should deny, out of hand, petitioners' Motion For A Preliminary Injunction And Provisional Motion To Modify Stay Pending Appeals ("Motion For A Preliminary Injunction") and their Motion For Leave To File Second Amended Complaint ("Motion To File A Second Amended Complaint"). Their motions should also be denied because petitioners have failed to demonstrate that the factual and legal assertions reflected in the motions warrant lifting the stay. The purported legal basis for petitioners' conditions of confinement claims is being reviewed on appeal by the D.C. Circuit. Further, the asserted factual basis for the petitioners' claims is insufficient to justify the requested intrusion into the daily operations of the military detention center at Guantanamo Bay. Moreover, petitioners are seeking to raise and litigate entirely new and tremendously burdensome claims in this case, which are not properly raised in a habeas corpus petition. Accordingly, petitioners' motions are inappropriate, unsound, and should be denied.[1]

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[1] The arguments presented herein also support a denial of petitioners' Motion For A Preliminary Injunction under the traditional four-factor analysis requiring an assessment of (1) the movant's likelihood of success on the merits; (2) the possibility of irreparable harm to the movant without interim relief; (3) the harm to others should the injunction be granted; and (4) the public interest, see, e.g., Mova Pharm. Corp. v. Shalala, 140 F.3d 1060, 1066 (D.C. Cir. 1998); however, in light of the fact that this case has been stayed for all purposes, an extensive factor-by-factor analysis of petitioners' motion is neither warranted nor appropriate. If the Court determines, however, that a modification of the stay is justified in order to address in detail the petitioners' claims regarding their conditions of confinement, respondents reserve the right, and request permission, to offer further argument and evidence in opposition to petitioners' motions.

BACKGROUND

Petitioners initiated this action on May 1, 2002, with the filing of a Complaint on behalf of twelve Kuwaiti nationals detained as enemy combatants at the United States Naval Base at Guantanamo Bay, Cuba ("GTMO"). On July 8, 2002, petitioners filed an Amended Complaint raising three claims for relief under the Fifth Amendment, the Alien Tort Statute, and the Administrative Procedure Act. Notably, the Amended Complaint did not seek petitioners' release from custody. Instead, it requested only that petitioners "meet with their families," "be informed of the charges, if any, against them," "designate and consult with counsel of their choice," and "have access to the courts or some other impartial tribunal." See Amended Complaint ¶ 40. The Court, however, has always construed the Amended Complaint "as a petition for writ of habeas corpus."[2] Rasul v. Bush, 215 F. Supp.2d 55, 63-64 (D.D.C. 2002) ("Plaintiffs cannot escape having the Court convert their action into writs for habeas corpus . . . ."); see also Respondents' Opposition to Petitioners' Motion to Compel Responsive Pleading and Return Forthwith (dkt. no. 79).

After the 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 filed a Motion to Dismiss or For Judgment As A Matter of Law. Pursuant to the Court's August 17, 2004 Order and September 15, 2004 Executive Session Resolution, this Court authorized Senior Judge Joyce Hens Green to rule on respondents' motion as well as other issues common to the GTMO habeas cases. See Order (dkt. no. 83) (Sept. 17, 2004).

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[2] Petitioners also filed Applications for Writs of Habeas Corpus on July 27, 2004. See dkt. no. 44.

On January 19, 2005, Judge Richard Leon of this Court issued a Memorandum Opinion and Order granting respondents' Motion to Dismiss or For Judgment As A Matter of Law in two other GTMO detainee cases. See Khalid v. Bush, Boumediene v. Bush, Nos. 04-CV-1142 (RJL), 04-CV-1166 (RJL), 355 F. Supp.2d 311 (D.D.C. 2005). Judge Leon held that "no viable legal theory exists" by which the Court "could issue a writ of habeas corpus" in favor of the GTMO detainees. Id. at 314. In reaching this decision, Judge Leon concluded that aliens held at GTMO, that is, outside the sovereign territory of the United States, are not possessed of constitutional rights.[3] Furthermore, Judge Leon determined that "the Court's role in reviewing the military's decision to capture and detain a non-resident alien is, and must be, highly circumscribed," and that the Court would "not probe into the factual basis for the petitioners' detention." Id. at 329. According to Judge Leon, the Constitution allocates exercise of war powers "among Congress and the Executive, not the Judiciary," and such separation of powers concerns necessarily limits any role of the Court in reviewing challenges of non-resident aliens to their detention in the midst of ongoing armed conflict. Id.

On January 31, 2005, Judge Green entered a Memorandum Opinion and Order 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., In re Guantanamo Detainee Cases, 355 F. Supp.2d

[3] Judge Leon also concluded that assuming petitioners did possess constitutional rights, the Combatant Status Review Tribunal ("CSRT") proceedings the military has used to confirm petitioners' status as enemy combatants afford petitioners appropriate process. See Khalid, 355 F. Supp.2d at 323 n.16.

443 (D.D.C. 2005). In contrast to Judge Leon's decision, Judge Green held that "the detainees at Guantanamo Bay have the fundamental right to due process of law under the Fifth Amendment" to challenge the legality of their detention through petitions for writs of habeas corpus. Id. at 463. Based on this decision, Judge Green concluded that the Combatant Status Review Tribunal ("CSRT") proceedings the military has used to confirm petitioners' status as enemy combatants do not satisfy procedural due process requirements. Id. at 465-78. Judge Green also adopted the reasoning of Judge Robertson in Hamdan v. Rumsfeld, 344 F. Supp.2d 152, 165 (D.D.C. 2004), appeal pending No. 04-5393 (D.C. Cir.), to conclude that Articles 4 and 5 of the Third Geneva Convention are "self-executing" and can provide some petitioners – those held because of their relationship with the Taliban – with a judicially enforceable claim in a habeas action to a hearing consistent with Article 5 of the Third Geneva Convention to determine whether the detainee qualifies for "prisoner of war" protections, as defined by Article 4 of the Convention. Id. at 478-80. Finally, Judge Green dismissed petitioners' remaining claims under the Sixth, Eighth, and Fourteenth Amendments, the Suspension Clause, other international treaties, and under Army Regulation 190-8, the Alien Tort Statute and the Administrative Procedure Act. Id. at 480-81.

In the order accompanying her memorandum opinion, Judge Green requested additional briefing from the parties with respect to how these cases should proceed in light of her decision. 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 of 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 conditions of confinement and

counsel access at GTMO. See Petitioners' Joint Submission Regarding How These Cases Should Proceed (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 As A Matter of Law 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).

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 Petitioners' 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).[4]

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.

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

§ 1292(b), and requested that the appeal proceed on an expedited basis. Petitioners, in responding to the petition for interlocutory appeal, filed their own cross-petition for interlocutory appeal. On March 10, 2005, the D.C. Circuit granted the petition and cross-petition for interlocutory appeal, and set an expedited briefing schedule that concludes on June 28, 2005.[5]

On March 11, 2005, petitioners filed with the Court Security Officers for the GTMO habeas litigation the two motions presently at issue. First, petitioners filed the instant Motion For A Preliminary Injunction And Provisional Motion To Modify Stay Pending Appeals (dkt. no. 215). The motion raises multiple claims regarding the conditions of confinement at GTMO, including, inter alia, challenges to the size, temperature, and lighting of the detainees' cells, the reading materials available to the detainees, the exercise opportunities available to the detainees, and the adequacy of medical and dental care, and mail delivery. As relief, petitioners request a preliminary injunction requiring the government to conform the detention operations at GTMO to the standards "set forth in Army Regulation 190-8 and the Military Police Manual of Internment/Resettlement Operations."[6] See Petitioners' Proposed Order.

Second, petitioners filed their current Motion For Leave To File Second Amended Complaint (dkt. no. 216), in which they seek authorization to file a Second Amended Complaint

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[5] This appeal has been docketed with the Court of Appeals as case number 05-8003. Additionally, the D.C. Circuit set a briefing schedule for the appeal of Judge Leon's decision dismissing all detainee claims in Khalid v. Bush, No. 04-CV-1142 (RJL) and Boumediene v. Bush, No. 04-CV-1166 (RJL), 355 F. Supp.2d 311 (D.D.C. 2005), appeals docketed, Nos. 05-5062, 05-5063 (D.C. Cir. Mar. 2, 2005). Briefing concludes in these appeals on June 8, 2005.

[6] Another motion challenging other aspects of the GTMO detainees' conditions of confinement has been filed in O.K. v. Bush, 04-cv-01136 (JDB), with briefing on that motion set to be concluded on April 25, 2005.

containing new legal claims challenging the conditions of confinement at GTMO. Additionally, the proposed Second Amended Complaint raises these claims against a new respondent not previously named in the Amended Complaint and, contrary to the Amended Complaint, asserts all claims against respondents in both their official and individual capacities. The proposed Second Amended Complaint also purports to assert claims on behalf of one petitioner, Nasser Nijer Naser Al Mutairi, who was previously released from detention at GTMO.

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

ARGUMENT

I. Petitioners' Motions For A Preliminary Injunction And To File A Second Amended Complaint Should Be Denied Because The Court Has Already Twice Denied Petitioners' Requests To Proceed With Conditions of Confinement Litigation And Confirmed That Proceedings In This Case 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' motions. Indeed, the Court has twice denied recent filings by petitioners seeking permission to proceed with litigation regarding conditions of confinement at GTMO. Completely disregarding the Court's prior rulings and the current stay of proceedings in this case, petitioners now attempt a third bite at the apple in the form of a Motion For A Preliminary Injunction and a Motion To File A Second Amended Complaint. The Court should reject petitioners' latest attempts to relitigate the prior rulings in this case and deny the motions summarily.

As discussed above, when it certified its order for interlocutory appeal, the Court stayed further proceedings in this case "for all purposes." Notably, the Court issued the stay in spite of the fact that petitioners expressly informed the Court of their intent to file a motion challenging

the conditions of confinement at GTMO. See Petitioners' Joint Submission Regarding How These Cases Should Proceed at 3-4 (dkt no. 197). Petitioners' filing requested permission to seek precisely the relief sought in these motions. See id. Petitioners explained that they intended to file a motion challenging the conditions of confinement at GTMO based on declarations from the detainees – presumably the same declarations that petitioners have produced in support of their present motions. Id. Additionally, petitioners stated that they intended to seek an injunction requiring GTMO to conform to the standards prescribed by various government manuals and regulations. Id. Thus, the Court was made aware of petitioners' desire to initiate litigation regarding conditions of confinement and considered the proposal, but rejected it and stayed the case.

Petitioners next sought reconsideration of the Court's stay order. Petitioners argued that the stay should be lifted in order to proceed with litigation regarding the conditions of confinement at GTMO. See Petitioners' Motion for Reconsideration of Order Granting Stay Pending Appeal at 8-10 (dkt. no. 203). In an attempt to bolster their prior submission, petitioners' motion for reconsideration provided even more detail regarding their proposed challenge to the conditions of confinement at GTMO. Obviously drawing on the same declarations that they presently rely upon to support their current Motion For A Preliminary Injunction, petitioners explicitly itemized their list of alleged conditions of confinement complaints and argued that the Court should modify the stay to permit litigation regarding these claims to go forward.[7] See id. Once again, the Court rejected petitioners' arguments and

[7] Petitioners were in possession of the information in the declarations appended to their Motion For A Preliminary Injunction at the time they made their filing regarding how these cases should proceed on February 3, 2005, and at the time they moved for reconsideration on February

declined to modify the stay, "in light of the substantial resources that would be expended and the significant burdens that would be incurred should this litigation go forward." See Order Denying Motion for Reconsideration of Order Granting Stay Pending Appeal (dkt. no. 204).

Petitioners then appealed the stay, thereby asking the D.C. Circuit to address these very issues. See Notice of Appeal (dkt. no. 207). Now, while their appeal is pending, petitioners want this Court to revisit the issues once again. The Court should deny this request.

Petitioners' arguments reflect that their current motions are nothing more than yet another effort to litigate – for the third time now – the propriety of the stay in this case with respect to conditions of confinement claims. Each of the Court's two prior orders rejecting petitioners' request to litigate the conditions of confinement, however, constitutes the "law of the case" in this action and thus instruct the Court to deny petitioners' instant motions out of hand. See, e.g., PDK Labs Inc. v. Ashcroft, 338 F. Supp.2d 1, 7 n. 4 (D.D.C. 2004) (indicating that "law-of-the-case" doctrine is a prudential rule directing that "a court involved in later phases of a lawsuit should not re-open questions decided . . . by that court or a higher one in earlier phases.") (internal quotations omitted); Horn v. U.S. Dep't Army, 284 F. Supp.2d 1, 7 (D.D.C. 2003) (explaining that law of the case doctrine "provides that the *same* issue presented a second time in the *same* case in the *same* court should lead to the *same* result.") (internal quotations omitted)

4, 2005. See Exhibits A-F, attached to Petitioners' Memorandum of Points And Authorities In Support Of Plaintiffs-Petitioners' Motion For A Preliminary Injunction And Provisional Motion to Modify Stay ("Petitioners' Memorandum") (declarations dated January 28 & 29, 2005). Perhaps unsurprisingly, the alleged conditions of confinement identified in petitioners' motion for reconsideration are identical to the conditions identified in the present motions. Compare Petitioners' Motion for Reconsideration of Order Granting Stay Pending Appeal at 9-10 (dkt. no. 203), with Petitioners' Memorandum at 3-6. Thus, the Court knew of and rejected the very same arguments that petitioners are now pressing here.

(emphasis in original). There is no warrant, especially on the basis put forth by petitioners, for the Court to reconsider, again, the propriety of the stay in this case. Petitioners have pointed to no change in the law or the circumstances in this case since the Court rejected, just a few weeks ago, petitioners' two previous attempts to assert claims regarding the conditions of confinement. Nor do petitioners even attempt to explain the fact that they have had the information in the declarations that provide the factual basis for their present motions for over six weeks, but only now present it to the Court. Petitioners' failure to present this evidence to the Court in their two prior filings does not now entitle them to a third chance in the form of a preliminary injunction motion and a motion to amend their complaint. Cf. Judicial Watch, Inc. v. United States Department of Energy, 319 F. Supp.2d 32, 34 (D.D.C. 2004) (motion for reconsideration is "not simply an opportunity to reargue facts and theories upon which a court has already ruled"). The Court should not waste any additional time or resources on petitioners' redundant motions. See, e.g., United States v. Diabetes Treatment Centers of America, Inc., 238 F. Supp.2d 258, 262 (D.D.C. 2002) (explaining that adherence to the law of the case doctrine promotes judicial economy by "protecting against the agitation of settled issues" and minimizing "expenditure of judicial resources and energy on matters already decided") (internal quotations omitted). Enough is enough. Petitioners' Motion For A Preliminary Injunction and Motion To File A Second Amended Complaint should be denied summarily.[8]

[8] Also in contravention of the Court's stay, petitioners filed a Motion to Enforce Court's Order of October 20, 2004, on Access to Counsel and for Appointment of Special Master (dkt. no. 209). That motion, as well as the present motions, send the clear signal that the stay of proceedings in this case means little to petitioners. To give effect to the stay, and to avoid repetitive litigation that wastes judicial resources, the Court should deny these motions outright, also. See Respondents' Opposition To Motion To Enforce Court's Order Of October 20, 2004, On Access To Counsel And For Appointment of Special Master (dkt. no. 211).

II. No Basis Exists To Modify The Stay Of Proceedings In This Case To Permit Conditions of Confinement Litigation To Go Forward.

Even if the Court were to overlook its two previous denials of petitioners' requests to proceed with claims challenging the detainees' conditions of confinement and consider petitioners' request yet a third time, the Court will find that, once again, modification of the stay to allow petitioners to challenge their conditions of confinement in this case, especially at this time, is unwarranted, imprudent, and improper, for a number of different reasons.

A. The Court Should Not Commence Litigation Regarding The Conditions of Confinement At GTMO While Petitioners' Asserted Legal Basis For Such Claims Is On Appeal To The D.C. Circuit.

The Court should not start down the path of entertaining legal challenges to the conditions of confinement at GTMO when the legal basis for any such claims at all is on appeal to the D.C. Circuit. Petitioners rely on the Fifth Amendment and the Third Geneva Convention to support their Motion For A Preliminary Injunction; however, they ignore the fact that appeals are presently pending in the D.C. Circuit that will address the scope of these rights as applied to alien enemy combatants. Although petitioners now contend that Judge Green's opinion held that petitioners have "enforceable rights under the 5th Amendment" to challenge their conditions of confinement, see Petitioners' Memorandum at 7, this position directly contradicts their previous filings in this case.[9] See Petitioners' Joint Submission Regarding How These Cases Should

[9] The inconsistency of petitioners' position is further illustrated by their claim that resolution of the issues raised in their Motion For A Preliminary Injunction will have no impact on the pending appeals in this case. Even if petitioners were correct in their assertion that Judge Green held that petitioners have a Fifth Amendment right to challenge their conditions of confinement – which she did not – this issue undoubtedly would be resolved by the interlocutory appeals presently before the D.C. Circuit. Petitioners are overstating the impact of Judge Green's decision and are blind to the fact that the Fifth Amendment issue is before the D.C. Circuit.

Proceed (dkt no. 197) ("There remains three common issues for the Court to resolve: . . . whether the Fifth Amendment applies to petitioners' conditions of confinement at Guantanamo.").

To set the record straight, Judge Green's opinion did not address whether alien enemy combatants have a constitutional basis to challenge their conditions of confinement, and no other Court has definitively resolved this issue. Judge Green's analysis of the constitutional issues was limited solely to whether GTMO detainees are "entitled to due process under the Fifth Amendment" to challenge "the government's determinations that they are 'enemy combatants.'" See In re Guantanamo, 355 F. Supp.2d at 465. The Court's focus on the legality of the detention – as opposed to the legality of the conditions of confinement – is reflected throughout the opinion. See id. at 464 ("In sum, there can be no question that the Fifth Amendment right asserted by the Guantanamo detainees in this litigation – the right not to be deprived of liberty without due process of law – is one of the most fundamental rights recognized by the U.S. Constitution."); id. at 476 ("[T]he detainee is entitled to fully litigate the factual basis for his detention in these habeas proceedings and to have a fair opportunity to prove that he is being detained on improper grounds."); id. at 477 (stating that a detainee must be provided with a "fair opportunity to challenge . . . the legality of his detention as an 'enemy combatant'"). Put simply, Judge Green only addressed the scope of petitioners' Fifth Amendment rights to challenge the lawfulness of the procedures used to confirm their enemy combatant status; she did not make any findings or conclusions with respect to the scope of any Fifth Amendment right to challenge the conditions of their confinement. Remarkably, petitioners expressly concede this point, noting that their preliminary injunction "motion is not directed at the issue of the lawfulness of the

Kuwaiti Detainees' detention, which was the subject of the January 31 Opinion and accompanying Order, but the conditions of their confinement." See Petitioners' Memorandum at 19.

The distinction between legal challenges to the fact or duration of custody and legal challenges to the conditions of confinement is well-established. See Preiser v. Rodriguez, 411 U.S. 475, 498 (1973). This distinction is based in part on the different legal bases underlying these types of challenges. On the one hand, challenges to the procedures used to determine the lawfulness of custody invoke the procedural due process component of the Fifth Amendment, which requires the government to follow appropriate procedures when its agents or officials decide to deprive a person of liberty. See Daniels v. Williams, 474 U.S. 327, 331 (1986). On the other hand, challenges to conditions of confinement rely on the substantive due process component of the Fifth Amendment, which forbids "certain government actions regardless of the fairness of the procedures used to implement them." See id. Judge Green's opinion addressed only the GTMO detainees' procedural due process rights to challenge the procedures used to confirm their status as enemy combatants. See In re Guantanamo, 355 F. Supp.2d at 465-78 (discussing whether CSRTs comport with procedural due process). Judge Green gave no consideration to whether the detainees have any rights under substantive due process to challenge their conditions of confinement.[10]

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[10] The distinction between conditions of confinement claims and challenges to the legality of custody is also evidenced by the fact that petitioners' conditions claims could continue indefinitely beyond final adjudication of petitioners' challenge to the legality of their confinement. Indeed, recognition of conditions of confinement claims likely will involve the Court in perpetual litigation over the conditions at GTMO if the legality of the petitioners' detention and their enemy combatant status are upheld. Those detainees who are confirmed to be enemy combatants could continue to bring various conditions of confinement claims even though

Nor did Judge Green determine what legal standard would govern GTMO detainees' conditions of confinement claims. Petitioners contend that the Court should analyze the conditions of confinement at GTMO under a de novo standard to determine whether the conditions comport with subjective "contemporary standards of decency" or "broad and idealistic concepts of dignity." See Petitioners' Memorandum at 8. This standard is plainly incorrect. In fact, because no court has ever determined that enemy combatants detained by the military can even bring conditions of confinement claims, no court has determined what legal standard should be applied to evaluate conditions of confinement claims brought by enemy combatants detained by the military, and the question is unsettled. The Supreme Court has explained that constitutional challenges to conditions of confinement brought by convicted criminals are analyzed under the Eighth Amendment's "deliberate indifference" standard, which requires a detainee to establish that prison officials "were knowingly and unreasonably disregarding an objectively intolerable risk of harm to the prisoners' health or safety."[11] Farmer v. Brennan, 511 U.S. 825, 834-35, 846 (1994); see also Ingram v. Wright, 430 U.S. 651, 664 (1977) (holding that the Eighth Amendment applies only to "those convicted of crimes"). In contrast, the

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the Court has determined that their detention is lawful.

[11] This standard is applicable both to claims alleging inadequate medical care as well as challenges to general conditions of confinement, such as inadequate food, clothing, and cell temperature. See Wilson v. Seiter, 501 U.S. 294, 303 (1991) ("Whether one characterizes the treatment received by the prisoner as inhumane conditions of confinement, failure to attend to his medical needs, or a combination of both, it is appropriate to apply the 'deliberate indifference' standard articulated in Estelle [v. Gamble, 429 U.S. 97 (1976)]"). The two-prong deliberate indifference test requires the moving party to establish first that "the deprivation alleged must be, objectively, sufficiently serious, . . . a prison official's act or omission must result in the denial of the minimal civilized measure of life's necessities"; second, a prison official must have a "sufficiently culpable state of mind" – "one of deliberate indifference to inmate health or safety." Farmer, 511 U.S. at 834 (internal quotations omitted).

constitutional standard of care owed to "pretrial detainees" in the criminal justice context – defined by the Supreme Court as "those persons who have been charged with a crime but who have not yet been tried on that charge" – is governed by the Due Process Clause of the Fifth Amendment. Bell v. Wolfish, 441 U.S. 520, 523, 536 (1979). "[W]here it is alleged that a pretrial detainee has been deprived of liberty without due process, the dispositive inquiry is whether the challenged condition, practice, or policy constitutes punishment, for under the Due Process Clause, a detainee must not be punished prior to an adjudication of guilt in accordance with due process of law."[12] Block v. Rutherford, 468 U.S. 576, 583 (1984) (internal quotations omitted); see also Brogsdale v. Barry, 926 F.2d 1184, 1188 n.4 (D.C. Cir. 1991).

Neither of these two standards, however, clearly applies to the GTMO detainees. The petitioners have not been convicted of any crime, thus they cannot rely on the Eighth Amendment as a basis for their conditions of confinement claims. See In re Guantanamo, 355 F. Supp.2d at 465-78 (dismissing Eighth Amendment claims). Similarly, the petitioners are not "pretrial detainees," as defined by the Supreme Court, because they have not been charged with a crime, nor are they being detained as part of the criminal justice system. See Hamdi v. Rumsfeld, 124 S. Ct. 2633, 2640 (2004) (detention of enemy combatants is not punishment nor penal in nature). Furthermore, the criminal justice interests served by confining "pretrial detainees" are completely distinct from the military and national security interests served by

[12] Although the Supreme Court has never resolved the precise relationship between these two tests, see City of Canton v. Harris, 489 U.S. 378, 389 n.8 (1989) (reserving "whether something less than the Eighth Amendment's 'deliberate indifference' test may be applicable in claims by [pretrial] detainees asserting violations of their due process right to medical care while in custody"), the Court has explained that "the due process rights of a pretrial detainee are at least as great as the Eighth Amendment protections available to a convicted prisoner." County of Sacramento v. Lewis, 523 U.S. 833, 849-50 (1998).

detaining petitioners as "enemy combatants." Compare Wolfish, 441 U.S. at 536-37 (criminal justice interest served by pretrial detention is to ensure detainees' presence at trial), with Hamdi, 124 S. Ct. at 2640 ("The capture and detention of lawful combatants and the capture, detention, and trial of unlawful combatants is to prevent captured individuals from returning to the field of battle and taking up arms once again."). The uncertainty of the law in this area is illustrated by the fact that the only Judge of this Court who has touched on the issue of a condition of confinement claim by a GTMO detainee reserved the question whether "the 'deliberate indifference' doctrine is the correct standard for any constitutional claims that petitioners might raise in this case." O.K. v. Bush, 344 F. Supp.2d 44, 60-63 & n.23 (D.D.C. 2004) (Bates, J.) ("Without concluding that the 'deliberate indifference' doctrine applies" to challenges regarding inadequate medical care, "the Court will draw on this well-developed body of law to guide its analysis").

The unsettled nature of the law governing petitioners' conditions of confinement claims bolsters the reasons why the Court should not modify the stay to address these claims. Whether and to what extent petitioners have any Fifth Amendment rights at all is an issue presently before the D.C. Circuit. In light of the potential for the D.C. Circuit's ruling to moot or at least significantly impact the constitutional basis for the present motions, and the likelihood that any decision by this Court regarding petitioners' right to challenge their conditions of confinement would have to be relitigated or revisited once the Court of Appeals provides guidance on the Fifth Amendment issues, there is no reason to begin litigation concerning the conditions of confinement at GTMO until the appeals are resolved. Furthermore, any decision to initiate new litigation at this time would be at odds with Judge Green's conclusion that the burdens associated

with additional litigation warrant a stay of proceedings in this case. See Order Denying Motion for Reconsideration of Order Granting Stay Pending Appeal (dkt. no. 204) (staying proceedings "in light of the substantial resources that would be expended and the significant burdens that would be incurred should this litigation go forward").

The same types of considerations hold true with respect to petitioners' Third Geneva Convention claims. Although petitioners assert in a conclusory fashion that they have judicially "enforceable rights under the Geneva Conventions" to raise conditions of confinement claims, see Petitioners' Memorandum at 11, Judge Green's opinion never made such a holding, either generally or with respect to the Al Odah petitioners in particular. Instead, Judge Green adopted the reasoning of Judge Robertson in Hamdan v. Rumsfeld, 344 F. Supp.2d 152, 165 (D.D.C. 2004), appeal pending No. 04-5393 (D.C. Cir.), to conclude that certain articles of the Conventions are "self-executing" and can provide some, but not all, petitioners with a claim in a habeas action. See In re Guantanamo, 355 F. Supp.2d at 478-80 (quoting Hamdan, 344 F. Supp.2d at 165, in which Judge Robertson stated, "I conclude that, insofar as it is pertinent here, the Third Geneva Convention is a self-executing treaty."). In Hamdan, however, Judge Robertson did not address the panoply of articles in the Third Geneva Convention relied upon by petitioners,[13] but rather confined his ruling to Articles 5 and 102, the only ones that were pertinent in the case.[14] 344 F. Supp.2d at 164 ("Articles 5 and 102 . . . are dispositive of

[13] Petitioners base their Motion For A Preliminary Injunction on the following Articles of the Third Geneva Convention: 22, 25, 26, 29, 31, 34, 38, 70, and 71.

[14] In Hamdan the sole issue was the validity of trying Hamdan by military commission for alleged criminal violations of the laws of war. Article 102 concerns the criminal sentencing of prisoners-of-war, while Article 5 provides that POW status may be determined by a tribunal in cases of doubt as to the status of an individual.

Hamdan's case"), 165 ("insofar as it is pertinent here, the Third Geneva Convention is a self-executing treaty" (emphasis added)). Since Judge Robertson simultaneously stated that "'[s]ome provisions of an international agreement may be self-executing and others non-self-executing,'" id. at 165 (citing Restatement (Third) of Foreign Relations Law of the United States § 111 cmt. h), his ruling on Articles 5 and 102 cannot reasonably be read to necessarily embrace the other articles cited by petitioners.

Similarly, Judge Green did not devote attention to the status of Convention articles relied upon by petitioners to support their conditions of confinement claims. Specifically, Judge Green first found that detainees held as members of al Qaeda are not entitled to Geneva Convention protections at all. In re Guantanamo, 355 F. Supp.2d at 479. She then concluded that only those detainees held because of their relationship with the Taliban may raise an individual challenge under Article 5 of the Third Geneva Convention to the extent that specific findings were not made by a CSRT regarding the detainee's qualification for POW status.[15] See id. at 479-80.[16]

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[15] Thus, Judge Green rejected the decision of the President to exclude the Taliban categorically from POW status. See In re Guantanamo, 355 F. Supp.2d at 479-80.

[16] Judge Green stated:

> Clearly, had an appropriate determination been properly made by an Article 5 tribunal that a petitioner was not a prisoner of war, that petitioner's claims based on the Third Geneva Convention could not survive the respondents' motion to dismiss. But although numerous petitioners in the above-captioned cases were found by the CSRT to have been Taliban fighters, nowhere do the CSRT records for many of those petitioners reveal specific findings that they committed some particular act or failed to satisfy some defined prerequisite entitling the respondents to deprive them of prisoner of war status. Accordingly, the Court denies that portion of the respondents' motion to dismiss addressing the Geneva Convention claims of those petitioners who were found to be Taliban fighters but who were not specifically determined to be excluded from prisoner of war status by a competent Article 5 tribunal.

The Court, however, did not address articles of the Convention cited by petitioners, and because it was merely deciding whether to dismiss all Geneva Conventions claims, it certainly did not provide a definitive ruling giving the Third Geneva Convention the spectacular reach petitioners seek with respect to conditions of confinement claims.[17]

Importantly, Judge Green's rulings on respondents' motion to dismiss the Geneva Conventions claims did not address the Al Odah petitioners in particular because, for one thing, the petitioners had not asserted claims under the Conventions. See id. at 478 ("petitioners in all of the above captioned cases except Al Odah v. United States, 02-CV-0828, have also asserted claims based on the Geneva Conventions"). To the extent Judge Green's ruling on the Third Geneva Convention is applicable, however, the claims under the Convention of all but four of the current petitioners, only one of whom has provided a declaration in support of petitioners' Motion For A Preliminary Injunction, are invalid, as only four petitioners were found by their CSRTs to be associated with the Taliban.[18] Perhaps more to the point with respect to the four, however, Judge Green did not opine as to whether CSRT proceedings for any Al Odah petitioner lacked the specific findings that Judge Green believed necessary regarding POW status.

In re Guantanamo, 355 F. Supp.2d at 480.

[17] Indeed, the prospect of a morass of litigation by enemy combatants contesting the Executive's implementation (or alleged lack of implementation) of every applicable provision of the Convention, from those regarding participation in meal preparation (art. 26) to guaranteeing delivery of sports outfits and scientific equipment (art. 72), is daunting.

[18] The factual returns submitted by respondents in this case, see dkt. nos. 85, 86, 94, 104, 108, 109, 110, 111, 113, 124, 173, demonstrate that, of the current petitioners, only petitioners Al Odah, Al Rabiah, Al Ajmi, and Mishal Al Mutairi were determined by CSRTs as being properly detained as Taliban-associated. The other petitioners were determined to be al Qaeda. Of the Taliban petitioners, only petitioner Al Rabia has submitted a declaration in this matter.

Thus, Judge Green's decision on the motion to dismiss in this case does not provide a basis for petitioners' assertion of conditions of confinement claims under the Third Geneva Convention. In any event, however, the question of whether the Third Geneva Convention gives rise to any judicially enforceable rights, whether generally or with respect to al Qaeda- or Taliban-associated petitioners, is now on appeal to the D.C. Circuit in Hamdan, In re Guantanamo, and Khalid, just as the scope of petitioners' rights under the Fifth Amendment is on appeal in In re Guantanamo and Khalid. Because the law in this Circuit is presently unsettled, it makes no sense even to begin litigation in the first instance regarding petitioners' conditions of confinement under the Fifth Amendment or the Third Geneva Convention when the Court of Appeals will provide guidance on the scope of any rights of petitioners on an expedited basis. Thus, to avoid the needless expenditure of judicial and litigation resources, the Court should not modify the current stay of proceedings in this case.

B. The Factual Record Fails to Demonstrate That The Detainees' Confinement Conditions Warrant Lifting the Stay and Immediate Attention.

The petitioners have also failed to substantiate their assertions that the detainees' living conditions at Guantanamo Bay are so deplorable that an immediate modification of the stay is necessary to litigate these claims or to issue a preliminary injunction. The declarations submitted with petitioners' Motion For A Preliminary Injunction consist primarily of vague and unsubstantiated contentions, generally provide a laundry list of non-emergency complaints, and, in many instances, indicate that the detainees are, in fact, being treated humanely and receiving adequate medical attention.

Petitioners' allegations, for the most part, lack specificity in details, dates, and times, or

are otherwise too conclusory to warrant lifting the stay to provide the sweeping injunctive relief requested. For instance, one declarant generally asserts that he has "been ill or suffered from disease" and that he has been subjected to "physical, mental, emotional stress and abuse" but fails to elaborate any further regarding these contentions. See Declaration of Fouad Al Rabiah ¶¶ 1, 18 ("Al Rabiah Decl.," attached as Exhibit A to Petitioners' Memorandum (dkt. no. 215)). Another detainee complains that he has had an ongoing problem with hemorrhoids that has been treated only "with inadequate medicines and with an improper diet." Declaration of Fawzi Al Odah ¶ 3 ("Al Odah Decl.," attached as Exhibit C to Petitioners' Memorandum). The detainee fails, however, to specify when, during the period of his confinement, he requested treatment, what medicines were provided to him, what his alleged "improper diet" consists of, or what he believes a proper diet or proper medicines would be. Similarly, another declarant broadly claims that he has "been ill and requested medical treatment which has often been denied." Declaration of Faviz Al Kandari ¶ 2 ("F. Al Kandari Decl.," attached as Exhibit D to Petitioners' Memorandum). Again, the detainee does not specify what his illness is, when or how he requested medical assistance, or what he means by his requests being "denied." These vague and general complaints do not amount to sufficiently compelling evidence on which to allow petitioners' to proceed with their claims challenging the conditions of confinement.

Additionally, the bulk of the declarations merely consist of numerous complaints regarding non-serious ailments or inconveniences such as complaints about the concentrated disinfectants used to clean the facilities; air conditioners emitting too much dirt; fans making too much noise; exercise areas being too small and lacking equipment; untimely delivery of the mail; and detainees afflicted with hemorrhoids, hair loss, and boils. See, e.g., Al Rabiah Decl. ¶¶ 10,

11, 17; Declaration of Mohammed Fenaital Al Daihani ¶ 4 ("Al Daihani Decl.," attached as Exhibit B to Petitioners' Memorandum); Al Odah Decl. ¶¶ 3, 6; Declaration of Omar Rajab Amin ¶ 2 ("Amin Decl.," attached as Exhibit E to Petitioners' Memorandum); Declaration of Abdullah Kamel Al Kandari ¶ 2 ("A. Al Kandari Decl.," attached as Exhibit F to Petitioners' Memorandum). Even if taken at face value, the declarations do not allege that the confinement conditions present emergency situations requiring the Court's immediate attention. In fact, many of the declarations contain statements that rebut other allegations therein and tend to indicate that the detainees' medical and other complaints have been and are being addressed by the personnel at Guantanamo. See, e.g., Al Daihani Decl. ¶¶ 2, 8 (indicating that detainee received dental treatment for a toothache and medical treatment for a heart condition and that detainee currently receives thirty minutes of exercise per day); Al Odah Decl. ¶ 3 (revealing that hemorrhoid problem has been treated with medicine but merely complaining that medicine has not been effective); F. Al Kandari Decl. ¶¶ 4, 6 (indicating that detainee has received mail, although not as quickly as he prefers, and detainee has received books to read from interrogators); Amin Decl. ¶¶ 2, 3, 5 (demonstrating that detainee received antibiotics for sinus infection, had two operations for hemorrhoids, receives mail, and is allowed to read books); A. Al Kandari Decl. ¶¶ 2, 5 (indicating that detainee received medicine for a skin allergy, but complained that medicine was ineffective; obtained medical treatment for a boil within one week of requesting it, although boil had subsided; and receives books to read).[19] Moreover, typewritten assertions that several

[19] Several statements in the declarations have also been crossed out or struck through indicating the declarant's disagreement with language presumably drafted by counsel. See, e.g., Al Daihani Decl. ¶ 11 (striking through allegations that someone was impersonating a lawyer and that meal portions are inadequate); A. Al Kandari Decl. ¶ 6 (striking through complaints about exercise time and facilities).

detainees have been "completely isolated" are negated by handwritten inserts indicating that the detainees do have contact with detainees in neighboring cells. See Al Daihani Decl. ¶ 3; Al Odah Decl. ¶ 5.

Other competent sources of information also belie many of the assertions in petitioners' declarations. Contrary to the petitioners' allegations, the detainees receive extensive, high-level medical and dental care. The detention center hospital is an 18-bed facility with a medical staff of seventy consisting of highly trained doctors, nurses, technicians, and administrative personnel. See Declaration of Dr. John S. Edmondson ¶ 3 ("Edmondson Decl.," attached hereto as Exhibit A; originally submitted in O.K. v. Bush, 04-cv-01136). Detainees receive a comprehensive physical exam on their arrival and can request medical assistance at any time by telling a guard or medical personnel who make rounds to the cellblocks every other day. Id. ¶ 5. In 2002 and 2003, the hospital staff conducted over 30,000 outpatient visits and has treated the detainees for a wide variety of medical conditions including hepatitis, diabetes, and tuberculosis. Id. ¶¶ 5, 7. The staff has also provided prosthetic limbs to some detainees and has removed cancerous tumors from several of them. Kathleen T. Rhem, "Guantanamo Detainees Receiving 'First Rate' Medical Care," American Forces Information Service, February 18, 2005 (attached as Exhibit B). There is also a full-time active-duty dentist assigned to the detention center, who responds to specific requests for dental treatment and has started to provide routine dental care on a recurrent basis to each detainee. Kathleen T. Rhem, "Navy Dentist Stays Busy at Guantanamo Bay Detainee Camp," American Forces Information Service, February 18, 2005 (attached as Exhibit C). In sum, the detainees receive high quality medical and dental care that is comparable to the care provided to active duty members of the armed forces. Id.; Edmondson Decl. ¶ 8; see also

O.K. v. Bush, 344 F. Supp.2d 44, 62 (D.D.C. 2004) (finding that Dr. Edmondson's declaration describes "in substantial detail a high level of medical care" provided at the Guantanamo detention center medical facility and noting that newspaper reports corroborate that description).

Many of the other complaints regarding the mail and other general conditions of confinement are also refuted by personnel at Guantanamo Bay. For instance, despite the contentions of the petitioners, each detainee is given the opportunity to send and receive mail, and a detainee may not lose mail privileges for any reason – including for interrogation or disciplinary purposes. See Declaration of 1LT Wade M. Brown ¶ 2 ("Brown Decl.," attached hereto as Exhibit D; originally submitted in John Does 1-570 v. Bush, et al. No. 05-cv-0313 (CKK)). The mail center for the detainees takes about fourteen days to process both incoming and outgoing mail, and it processed approximately 14,000 pieces of mail from September 2004 through February 2005.[20] Id. ¶¶ 3, 5. Additionally, the detainees receive culturally sensitive food, including water and dates at the appropriate times during Ramadan fasting, and each cell contains a Koran which is hung in a place of reverence.[21] See Kathleen T. Rhem, "Detainees

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[20] In addition, 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), permit counsel to send legal mail to the detainees on an expedited basis.

[21] On Friday, April 1, 2005, petitioners filed a "Supplement to Plaintiffs-Petitioners' Motion For A Preliminary Injunction Regarding Defendants-Respondents' Denial of Koran With Commentary to Plaintiffs-Petitioners" ("Supp. Mem."). See dkt no. 227. As a threshold matter, it is important to understand the essence of the dispute raised by petitioners' supplemental filing. Petitioners do not contest the fact that all detainees are provided with their own individual copy of the Koran that they may keep in their cells. Instead, petitioners complain that the detainees are not permitted to have access to their own four-volume supplemental commentary to the Koran. Petitioners, of course, offer no legal authority to justify this demand, and the basis for their request is founded upon incomplete and misleading facts.

As an initial matter, petitioners incorrectly contend that their motion for preliminary injunction "argued, among other things, that the government was denying [petitioners] the

Living in Varied Conditions at Guantanamo," American Forces Information Service, February 16, 2005 (attached as Exhibit E). Cooperative detainees receive additional privileges including all day access to exercise yards, a soccer area, and a volleyball court, and they live and eat together with other detainees in a communal setting. Id. A librarian also periodically provides books and other reading material in Arabic to the detainees. Id. As demonstrated, the numerous deficiencies of petitioners' declarations combined with the foregoing evidence rebutting petitioners' allegations indicate that modifying the stay to allow petitioners to raise claims

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opportunity to practice their religion while imprisoned without charge." See Supp. Mem. at 1. Petitioners did not clearly make any such argument in support of their motion for preliminary injunction, and their supporting declarations do not evidence any complaints regarding the detainees' religious practices.

Regarding the facts of this situation, petitioners' counsel initially approached government counsel regarding the location of petitioner Al Ajmi's Koran, informing government counsel that Mr. Al Ajmi's Koran was "lost" and requesting that government counsel look into the matter. See Supp. Mem, Ex. A. Petitioners' counsel also expressed his intent to deliver to Mr. Al Ajmi a replacement Koran that contained a four-volume commentary during his next visit to GTMO. Id., Ex. A & B. After some investigation, petitioners' counsel was informed that Mr. Al Ajmi's Koran was not lost; instead, Mr. Al Ajmi voluntary turned his Koran over to military authorities at GTMO as part of a protest – a fact petitioners do not dispute. Id., Ex. B. Consequently, petitioners' counsel was informed that he would not be permitted to deliver to Mr. Al-Ajmi a replacement Koran with a four-volume commentary. Id. Instead, Mr. Al Ajmi would receive his original Koran back upon request. Id. Unsatisfied with that response, petitioners' counsel now demands that all petitioners - not simply Mr. Al Ajmi - are entitled to a four-volume commentary.

Petitioners, however, do not support this demand with any applicable legal authority. The only legal support offered by petitioners is the Military Police Internment/Resettlement Operations Manual, which merely provides that "Enemy Prisoners of War" have "active programs of religious worship." See Petitioners' Motion For A Preliminary Injunction, Exhibit I, § 7-76. Even assuming the terms of this Manual are both applicable to alien enemy combatants and judicially enforceable - they are not - petitioners fail to explain how its provisions or other competent authority require release of four-volume commentaries to all GTMO detainees. As explained infra, see section II.C., petitioners essentially request that this Court become enmeshed in the daily operations at GTMO, serving here as the clearinghouse for all religious materials distributed to the detainees and determining the appropriate types of "programs of religious worship" for the detainees. There is simply no legal or factual basis for such judicial intervention in this case.

challenging their conditions of confinement is not warranted.[22]

C. The Court Should Not Entertain the Prospect of Assuming Responsibility Over the Entire Detention Center at Guantanamo Bay.

Although unsupported by the record, the relief sought by petitioners, nevertheless, has the potential to impact almost every aspect of the detention operations at GTMO.[23] As petitioners' Motion For A Preliminary Injunction makes clear, they seek to challenge everything from the type of disinfectant used to clean the detainees' cells to the quality of the air conditioners. See Petitioners' Memorandum at 5 n.4. In fact, petitioners' goal appears to be to place GTMO into some type of judicial receivership in which the Court, as opposed to the military authorities with expertise in such matters, will take over the day-to-day operations at GTMO and decide such issues as the appropriateness of the detainees' exercise and meal plans.[24] The Supreme Court,

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[22] Thus, respondents vehemently dispute the assertion that petitioners' conditions of confinement are inadequate. As mentioned previously, however, should the Court determine that a modification of the stay order is warranted in order to consider petitioners' challenges to their confinement conditions, respondents reserve and request the right to supplement their factual submissions and legal arguments in opposition to petitioners' motions.

[23] Both the petitioners' immediate request to have the Court issue a preliminary injunction requiring compliance with Army Regulation 190-8 and the Army Field Manual and their ultimate request for relief pertaining to their proposed claims challenging the conditions of confinement would require the Court's oversight of the day-to-day operations of the GTMO detention center. Additionally, such relief would impact not only petitioners in this case, but all detainees at GTMO.

[24] Petitioners may attempt to cast the relief they are seeking in modest terms by stressing, for example, that they are not asking the Court to develop standards anew but only to order compliance with pre-existing standards in Army Regulation 190-8 or other documents. This argument, however, would be a red herring. Army Regulation 190-8, for example, is a 29-page manual containing hundreds of discrete provisions, many of them subjective in nature and application. Thus, an injunction to comply with Army Regulation 190-8 would serve as little more than a ticket to come back into court when the first dispute over the implementation of that directive arises. Moreover, as discussed infra, an injunction to comply with Army Regulation 190-8 (or any other provision) is wholly irreconcilable with the principles that forbid (1)

however, has stated that the operation of even domestic "correctional facilities is peculiarly the province of the Legislative and Executive Branches of our Government, not the Judicial," and has admonished lower courts to avoid becoming "enmeshed in the minutiae of prison operations." Bell v. Wolfish, 441 U.S. 520, 548, 562 (1979). Only upon a showing that prison conditions or care sink to the level of "deliberate indifference" to an inmate's health or well-being is a court justified in intervening into the treatment of inmates even in a traditional penal prison setting.[25] See Neitzke v. Williams, 490 U.S. 319, 321 (1989). Accordingly, the Supreme Court has directed 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." Wolfish, 441 U.S. at 547; see also Thornburgh v. Abbott, 490 U.S. 401, 408 (1989) ("Acknowledging the expertise of these officials and that the judiciary is 'ill equipped' to deal with the difficult and delicate problems of

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injunctions that simply direct someone to comply with the law; and (2) injunctions that define the prohibited acts solely by reference to another document. See infra note 26 and accompanying text.

[25] As explained above, the specific standard that would apply with respect to judicial review of the GTMO detainees' conditions of confinement claims is not entirely clear. See supra § II. A. However, the only court to touch on this issue referenced the "deliberate indifference" standard in discussing whether similar claims from a GTMO detainee would merit judicial relief. See O.K. v. Bush, 344 F. Supp.2d 44, 60-62 (D.D.C. 2004). In light of the fact that petitioners would be challenging the practices of a military detention center during a time of war, separation of powers principles indicate that, at a minimum, petitioners would have to satisfy the "deliberate indifference" standard, if not an even more stringent standard, before judicial intervention would be warranted. Petitioners' suggestion, though, that the federal Bureau of Prison's ("Bureau") regulations and the Department of Homeland Security's ("DHS") Detention Operations Manual regarding detention of aliens with immigration issues provide sources for "contemporary standards of decency" to determine if Fifth Amendment Due Process rights are violated, see Petitioners' Memorandum at 8-9, is misplaced in the context of this case. Simply put, neither the Bureau's regulations nor DHS's Manual apply to military prisons or detention of enemy combatants.

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."). These same principles counsel that the Court should decline Petitioners' invitation to entangle itself in the daily operations of the Guantanamo detention center.

Additionally, petitioners' request for a preliminary injunction that simply commands obedience to Army Regulation 190-8 and the Army Field Manual is far too general and amorphous to be an appropriate remedy. Such a blanket instruction would fail to satisfy the specificity requirements for injunctions and would violate the prohibition against mere cross-references to other documents. See Fed. R. Civ. P. 65(d) (indicating that "[e]very order granting an injunction . . . shall be specific in terms; [and] shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained . . . ."); cf. Common Cause v. Nuclear Regulatory Comm'n, 674 F.2d 921, 927 (D.C. Cir. 1982) (finding that injunction restraining NRC from closing meetings "similar in nature" to meeting which gave rise to cause of action violated the specificity requirements of Rule 65(d)). The often general terms of Army Regulation 190-8 and the Army Field Manual, themselves, indicate the difficulty of applying their provisions through a court injunction. See, e.g., Army Regulation 190-8, Ch 3-3(a)(3) (requiring that prisoners be provided with "humane treatment, health and welfare items, quarters, food, clothing, and medical care."). How would it be determined whether, for example, the detainees were being provided with sufficient "health and welfare items?"[26] Such a broad

[26] The Supreme Court has explained that Rule 65(d)'s specificity requirement "was designed to prevent uncertainty and confusion on the part of those faced with injunctive orders, and to avoid the possible founding of a contempt citation on a decree too vague to be understood." Schmidt v. Lessard, 414 U.S. 473, 476 (1974). Here, petitioners seek an injunction requiring respondents to comply with the terms of various regulations, yet fail to tie such broad

standard would require the Court to delve into the day-to-day workings of GTMO and regularly second-guess the Military, which, as just explained above, the Supreme Court has instructed the Judiciary to do in other contexts only when absolutely necessary.[27] See Occoquan, 844 F.2d at 841 ("But in carrying out their remedial task, courts are not to be in the business of running prisons. The cases make it plain that questions of prison administration are to be left to the discretion of prison administrators."). In fact, Judge Green previously rejected petitioners' claims based on Army Regulation 190-8, citing arguments explaining that determinations of whether the Military has complied with Army Regulation 190-8 are better left to the Executive, not the Judiciary. See In re Guantanamo Detainee Cases, 355 F. Supp.2d 443, 480-81 (D.D.C. 2005). Thus, petitioners' attempt to entangle the Court, through an improper injunction, in the minutiae of GTMO operations demonstrates that it would not be appropriate to modify the stay to

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relief to any of the specific allegations in their declarations. Such relief is improper. Cf., e.g., NLRB v. Express Publ'g Co., 312 U.S. 426, 435-36 (1941) (denouncing broad injunctions that merely instruct the enjoined party to comply with the law); Calvin Klein Cosmetics Corp. v. Parfums de Coeur, Ltd., 824 F.2d 665, 669 (8th Cir. 1985) ("Broad language in an injunction that essentially requires a party to obey the law in the future is not encouraged and may be struck from an order for injunctive relief, for it is basic to the intent of Rule 65(d) that those against whom an injunction is issued should receive fair and precisely drawn notice of what the injunction actually prohibits."). The relief petitioners request does not provide respondents with sufficient notice as to what specific conduct is prohibited; thus respondents would essentially be left to guess as to the meaning of the injunction. See, e.g., Army Field Manual § 4-67 ("Ensure that adequate medical and sanitation standards are met.").

[27] The requested injunction is likewise problematic in that petitioners have failed to demonstrate that Army Regulation 190-8 and the Army Field Manual present standards that are constitutionally required, even if petitioners could establish that their current conditions of confinement at GTMO are inconsistent with those standards. Furthermore, courts lack authority to command that prison conditions surpass constitutional requirements. See Inmates of Occoquan v. Barry, 844 F.2d 828, 842 (D.C. Cir. 1988) (explaining that "[t]he District Court's power, it bears repeating, was to bring the prison into compliance with the Constitution; the court was powerless to seek to make [the prison] a 'better place' or to bring it within 'sound penological practices.'").

address petitioners' conditions of confinement claims.

D. The Court Should Not Allow Petitioners To Pursue Entirely New and Burdensome Claims Which Do Not Belong In This Habeas Corpus Action.

Contrary to petitioners' assertion, the fact that the Motion For A Preliminary Injunction and Motion to File A Second Amended Complaint raise new legal claims not addressed in Judge Green's opinion warrants continuing the stay of proceedings in this case. Thus far, the GTMO habeas litigation has focused exclusively on the legality of the detainees' confinement. The petitioners' motions, however, seek to open up a new and radically burdensome front in this litigation – the lawfulness of the detainees' conditions of confinement. As explained above, petitioners propose to challenge nearly every conceivable aspect of the manner in which they are detained, which would require the expenditure of substantial resources both by the parties to litigate and by the Court to adjudicate. Indeed, it was precisely the burdens associated with additional litigation that prompted the Court to stay proceedings in this case when it certified its opinion for interlocutory appeal. See Order Denying Motion for Reconsideration of Order Granting Stay Pending Appeal (dkt. no. 204) (staying proceedings "in light of the substantial resources that would be expended and the significant burdens that would be incurred should this litigation go forward"). Those burdens are even more apparent here, as petitioners now seek to initiate expansive litigation regarding conditions of confinement at GTMO based on legal theories that are presently being reviewed by the D.C. Circuit. For this reason, the current stay of proceedings should be maintained pending resolution of all appeals.

The Court also should not lift the stay to address petitioners' motions because petitioners cannot challenge their conditions of confinement through their current habeas petition. As

explained above, the Court has always construed petitioners' Amended Complaint "as a petition for writ of habeas corpus." Rasul v. Bush, 215 F. Supp.2d 55, 63-64 (D.D.C. 2002). Consequently, the Court concluded that the only "jurisdictional basis" for the Amended Complaint is 28 U.S.C. § 2241. Id. Petitioners' motions now seek relief that extends far beyond that permitted by the writ of habeas corpus and section 2241. Petitioners summarily claim that their conditions of confinement challenges are "cognizable in habeas," see Petitioners' Memorandum at 7 n.7, but neither the Supreme Court nor the D.C. Circuit has reached this conclusion. Indeed, both the Supreme Court and the D.C. Circuit have never squarely resolved whether challenges to conditions of confinement that do not impact the fact or duration of confinement may be brought under habeas proceedings, or are restricted exclusively to Bivens or 42 U.S.C. § 1983 actions. See Wolfish, 441 U.S. at 526 n. 6 (1979) ("Thus, we leave for another day the question of the propriety of using a writ of habeas corpus to obtain review of the conditions of confinement, as distinct from the fact or length of confinement itself."); Preiser v. Rodriguez, 411 U.S. 475, 499-500 (1973) ("[W]e need not in this case explore the appropriate limits of habeas corpus."); Blair-Bey v. Quick, 151 F.3d 1036, 1042 (D.C. Cir. 1998) ("It is possible that habeas corpus might be available to challenge prison conditions in at least some situations."); Brown v. Plaut, 131 F.3d 163, 168-69 (D.C. Cir. 1997) ("Habeas corpus might conceivably be available to bring challenges to" conditions of confinement "such as visitation, mail, shower, or library privileges."). Consistent with the Supreme Court's well-established distinction between claims that seek relief from the conditions of prison life and claims that seek

either immediate release or the shortening of the term of confinement,[28] courts in other jurisdictions that have squarely addressed the issue have affirmatively held that conditions of confinement claims that do not seek accelerated release from custody are not within the scope of the writ of habeas corpus. See, e.g., Cochran v. Buss, 381 F.3d 637, 639 (7th Cir. 2004); Carson v. Johnson, 112 F.3d 818, 820-21 (5th Cir. 1997); McIntosh v. United States Parole Commission, 115 F.3d 809, 811-12 (10th Cir. 1997); Badea v. Cox, 931 F.2d 573, 574 (9th Cir. 1991). The conclusion reached in these cases is consistent with the D.C. Circuit's reasoning in Plaut, which, although it did not resolve the issue, expressed concern that using the writ of habeas corpus to raise conditions of confinement claims "would extend Preiser far beyond the 'core' of the writ that Preiser set out to protect."[29] 131 F.3d at 168-69. Because the relief sought by petitioners' motions does not impact the length or duration of their confinement, it is not legally cognizable pursuant to a section 2241 habeas petition.[30]

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[28] The Supreme Court recently affirmed this distinction in Wilkinson v. Dotson, 125 S. Ct. 1242 (2005).

[29] Preiser explained that the "core of habeas corpus" consists of those challenges by petitioners that attack "the very duration of their physical confinement itself" and seek "either immediate release from that confinement or the shortening of its duration." 411 U.S. at 487-89.

[30] In Khalid, Judge Leon rejected the argument that the conditions of confinement at GTMO impact the legality of the custody:

> And with respect to their allegations that the conditions of their custody might violate existing United States law, such alleged conduct, even if it had occurred, and there is no specific allegation that it did, does not support the issuance of a writ because, though deplorable if true, it does not render the custody itself unlawful.

355 F. Supp.2d at 324-25; see also Gomez v. United States, 899 F.2d 1124, 1126 (11th Cir. 1990) ("[T]his Court has held that even if a prisoner proves an allegation of mistreatment in prison that amounts to cruel and unusual punishment, he is not entitled to release."). Judge Leon also concluded that the authority to remedy any mistreatment "should remain with the military

By filing their Motion To File A Second Amended Complaint which purportedly raises their conditions of confinement claims through "a Bivens-type action," see Petitioners' Memorandum at 7 n.7, petitioners implicitly concede that habeas is not the proper vehicle for such claims. Although petitioners likely will contend that the Motion To File A Second Amended Complaint eliminates any barrier to the Court considering their conditions of confinement claims, this argument is without merit. The relief petitioners seek in their Motion For A Preliminary Injunction would only be appropriate, if at all, after the Court considers the propriety of the Motion To File A Second Amended Complaint. That motion, however, only underscores the fact that petitioners intend to open up a new front in the GTMO litigation at a time when this case is "stayed for all purposes." Petitioners are not seeking relief related to existing claims in their current Amended Complaint/habeas petition. Instead, they are attempting to add entirely new claims to this lawsuit. As discussed above, the Court stayed proceedings in this case precisely because of the burdens associated with additional litigation. The conditions of confinement litigation that petitioners propose to begin here undoubtedly will magnify these burdens exponentially; thus, there is no reason to depart from the present stay.

Moreover, the current evolution of proceedings in this case – and the GTMO habeas litigation as a whole – militates against recognizing conditions of confinement claims in habeas. Rasul held that section 2241 "confers on the District Court jurisdiction to hear petitioners' habeas corpus challenges to the legality of their detention at the Guantanamo Bay Naval Base." 124 S. Ct. at 2698; id. at 2699 ("What is presently at stake is only whether the federal courts have jurisdiction to determine the legality of the . . . detention . . . ."). However, nothing that the

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and the military judicial process." 355 F. Supp.2d at 324 n.18.

Supreme Court said in Rasul brings within the scope of the habeas statute conditions of confinement claims previously cognizable only, if at all, through civil rights claims. Because Rasul focused exclusively on "challenges to the legality of [petitioners'] detention," subsequent proceedings in the GTMO habeas litigation have proceeded along this course. As discussed previously, Judge Green only addressed the rights of petitioners to challenge the lawfulness of the procedures used to confirm their status as enemy combatants; she did not engage in any analysis of their rights to challenge their conditions of confinement. Notwithstanding this procedural situation, petitioners now want to initiate new litigation contesting their conditions of confinement. Such claims have not been contemplated thus far in this litigation and there is no reason to begin consideration of them at the present time, in light of the current stay of proceedings, the pending appeals before the D.C. Circuit, and the burdens associated with litigating the claims at this time. For these reasons, the Court should not modify the current stay of proceedings to address the merits of petitioners' Motion For A Preliminary Injunction or their Motion to File a Second Amended Complaint.

III. Leave To File A Second Amended Complaint Should Not Be Granted.

In addition to the reasons discussed above, petitioners' Motion to File a Second Amended Complaint should also be denied because allowing petitioners to amend their complaint would unduly prejudice respondents and the amendments would be futile.

At this stage of the case, petitioners may amend their complaint only by leave of the Court or through the consent of all parties. Fed. R. Civ. P. 15(a). The decision to deny or grant petitioners' Motion To File A Second Amended Complaint is within the Court's discretion. Firestone v. Firestone, 76 F.3d 1205, 1208 (D.C. Cir. 1996). Although Rule 15(a) provides that

leave shall be freely given when justice so requires, denial of leave to amend is appropriate in cases of "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, [or] futility of amendment." Foman v. Davis, 371 U.S. 178, 182 (1962); Mittleman v. United States, 997 F. Supp. 1, 10 (D.D.C. 1998). Undue prejudice is present in this case because, as indicated, the Court has already twice denied petitioners' requests to proceed with litigation regarding conditions of confinement at GTMO, the Court has stayed this case "for all purposes," and the legal bases underlying petitioners' Second Amended Complaint are presently on appeal to the D.C. Circuit.

Additionally, petitioners fail to mention that their proposed Second Amended Complaint differs in several significant respects from their Amended Complaint. In addition to raising "wholly new claims" regarding the conditions of confinement at GTMO, see Petitioners' Motion To File A Second Amended Complaint at 5, petitioners also assert claims against a new respondent not previously named in the Amended Complaint. See Second Amended Complaint ¶ 7 (naming Esteban Rodriguez). More importantly, petitioners now purport to sue the new and prior respondents in both "their official and individual capacities." See id. Previously, petitioners disclaimed "any construction of their complaint and petition to assert claims against individuals in their individual capacities." See Al Odah Plaintiffs' Response to the Individual Defendants' Motion to Dismiss (dkt. no. 137). Respondents will be prejudiced if the Court permits petitioners to litigate new claims asserted against them in their individual capacities while the legal bases for any claims at all are under review by the D.C. Circuit. Such individual capacity claims would completely change the character of this litigation. Respondents should not

have to undertake the burdens of defending against these claims when resolution of the pending appeals in this case could moot many of the issues raised in petitioners' Second Amended Complaint. See May v. Sheahan, 226 F.3d 876, 880-81 (7th Cir. 2000) (explaining the burdens on the judiciary and public official defendants when courts permit plaintiffs to file amended complaints while interlocutory appeals related to existing complaints are pending). For example, if petitioners' proposed Second Amended Complaint goes forward, respondents may file an answer or a motion to dismiss, and possibly appeal any unfavorable decision. Such a course of action would undoubtedly lead to piecemeal adjudication of this case and unnecessarily burden the resources of the judiciary, thereby undermining the compelling interests that initially prompted Judge Green to stay these proceedings.

Leave to amend also should not be granted because many of the claims raised in the Second Amended Complaint are futile. Futility means, inter alia, that the proposed claim would not survive a motion to dismiss. Mittleman, 997 F. Supp. at 10 (citing James Madison Ltd. v. Ludwig, 82 F.3d 1085, 1099 (D.C. Cir. 1996)); see also Montaup Elec. Co. v. Ohio Brass Corp., 561 F. Supp. 740, 750 (D.R.I. 1983) ("Leave to amend should not be granted where the effect of the amendment would be to place before the court a claim upon which relief patently could not be granted."). Petitioners seek leave to raise legal claims under Army Regulation 190-8, the Alien Tort Statute, and the Administrative Procedure Act,[31] see Second Amended Complaint at

[31] In addition, petitioners' proposed complaint asserts claims on behalf of a detainee who has been released from United States custody. See Second Amended Complaint ¶ 4 (stating that Nasser Nijer Naser Al Mutairi was released from custody in January 2005). Not only are these claims futile, see Respondents Motion to Dismiss Petition for Writ of Habeas Corpus by Petitioner Nasser Nijer Naser Al Mutairi (dkt no. 187), but respondents will be prejudiced by defending against such claims, which even further alter the complexion of this litigation beyond the bounds of "core" habeas claims. See Preiser, 411 U.S. 487-88.

15-17, but ignore the fact that Judge Green dismissed these claims. See In re Guantanamo Detainee Cases, 355 F. Supp.2d at 480-81 (D.D.C. 2005). As noted above, petitioners have filed a cross-petition for interlocutory appeal with the D.C. Circuit regarding the dismissal of these claims, but this fact only strengthens the reasons why the Court should deny the Motion To File A Second Amended Complaint, pending resolution of the appeals in the D.C. Circuit. In short, the Court should not begin entertaining new claims for relief while the legal bases underlying the new claims and petitioners' existing claims are on appeal to the D.C. Circuit. See Florida Evergreen Foliage v. E.I. DuPont De Nemours and Co., 165 F. Supp.2d 1345, 1362 (S.D. Fla. 2001) (declining to grant plaintiffs' motion for leave to amend complaint under Rule 15 because of the pendency of an interlocutory appeal and noting that "federal courts that have addressed this issue typically disallow motions to amend a complaint at the district court level after a court of appeals accepts jurisdiction over an interlocutory appeal"). Indeed, the Court arguably would lack jurisdiction to grant leave to amend the complaint to the extent the issues raised in petitioners' Second Amended Complaint are on appeal. See, e.g., United States v. DeFries, 129 F.3d 1293, 1302 (D.C. Cir. 1997) ("The filing of a notice of appeal, including an interlocutory appeal, confers jurisdiction on the court of appeals and divests the district court of control over those aspects of the case involved in the appeal.") (internal quotations omitted).

Of course, denying the Motion To File A Second Amended Complaint will not prevent petitioners from moving to amend their complaint following resolution of the appeals, if such amendments are warranted, but it will give the Court of Appeals the opportunity to address many of the legal claims petitioners likely will end up relying on in their Second Amended Complaint and offer further guidance to this Court on the legal issues involved in the case. In light of these

concerns, as well as for the reasons discussed elsewhere in this memorandum, petitioners' Motion To File A Second Amended Complaint should be denied.

CONCLUSION

For the foregoing reasons, petitioners' motions should be denied. As noted previously, respondents do, however, reserve and request the right to further respond to the merits of petitioners' motions if the Court should decide to lift or modify the stay to allow petitioners' motions to proceed.

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