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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

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

**MEMORANDUM OF POINTS AND AUTHORITIES IN
SUPPORT OF PLAINTIFFS-PETITIONERS' MOTION FOR A
PRELIMINARY INJUNCTION AND PROVISIONAL MOTION TO MODIFY STAY**

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TABLE OF CONTENTS

TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
INTRODUCTION AND SUMMARY	1
STATEMENT	3
ARGUMENT	6
I. The Kuwaiti Detainees Are Likely To Succeed On The Merits.....	7
A. The Kuwaiti Detainees are Likely to Prevail Under the Fifth Amendment and Common Law.....	7
B. The Kuwaiti Detainees are Likely to Prevail Under the Geneva Conventions	11
II. A Preliminary Injunction Is Necessary To Prevent Continued Irreparable Injury to the Kuwaiti Detainees.....	14
III. There Is a Lack of Serious Injury To The Government And a Promotion Of Public Interest.....	15
IV. If Necessary, the Court Should Modify its Stay to Consider and Resolve This Motion.....	18
CONCLUSION	19

TABLE OF AUTHORITIES

CASES

<i>AFGE v. Sullivan</i> , 744 F. Supp. 294 (D.D.C. 1990).....	14, 15, 18
<i>Ahrens v. Thomas</i> , 434 F. Supp. 873 (W.D. Mo. 1977)	11
<i>Askins v. District of Columbia</i> , 877 F.2d 94 (D.C. Cir. 1989).....	9
<i>Bannum, Inc. v. City of Memphis</i> , 666 F. Supp. 1091 (W.D. Tenn. 1987).....	14, 15
<i>Bell v. Wolfish</i> , 441 U.S. 520 (1979)	7, 9
<i>Brock v. Warrant County</i> , 713 F. Supp. 238 (E.D. Tenn. 1989)	11
<i>Brogdsdale v. Barry</i> , 926 F.2d 1184 (D.C. Cir. 1991)	7
<i>Brown v. Plaut</i> , 131 F.3d 163 (D.C. Cir. 1997).....	7
<i>Campbell v. Cauthron</i> , 623 F.2d 503 (8th Cir. 1980).....	11
<i>Campbell v. McGruder</i> , 580 F.2d 521 (D.C. Cir. 1978).....	8
<i>CityFed Financial Corp. v. Office of Thrift Supervision</i> , 58 F.3d 738 (D.C. Cir. 1995).....	15
<i>Cohen v. Coahoma County</i> , 805 F. Supp. 398 (N.D. Miss. 1992).....	14
<i>Compu Serve Data Systems, Inc. v. Freeman</i> , 498 F. Supp. 1316 (D.D.C. 1980).....	15
<i>Davenport v. DeRobertis</i> , 844 F.2d 1310 (7th Cir.1988)	11
<i>Elrod v. Burns</i> , 427 U.S. 347 (1976)	14
<i>Estelle v. Gamble</i> , 429 U.S. 97 (1976)	8, 11
<i>Farmer v. Brennan</i> , 511 U.S. 825 (1994)	11
<i>Gerstein v. Pugh</i> , 420 U.S. 103 (1975).....	7
<i>Haines v. Kerner</i> , 404 U.S. 519 (1972)	7
<i>Hatch v. District of Columbia</i> , 184 F.3d 846 (D.C. Cir. 1999)	9
<i>Hutchings v. Corum</i> , 501 F. Supp. 1276 (W.D. Mo. 1980).....	11

<i>Hutto v. Finney</i> , 437 U.S. 678 (1978).....	9
<i>Johnson v. Avery</i> , 393 U.S. 483 (1969)	7
<i>Jones "El v. Berge</i> , 164 F. Supp. 2d 1096 (W.D. Wis. 2001).....	14
<i>Kirby v. Blackledge</i> , 530 F.2d 583 (4th Cir. 1976).....	11
<i>Lyons v. U.S. Fed. Marshals</i> , 840 F.2d 202 (3rd Cir. 1988).....	7
<i>Marsh v. Johnson</i> , 263 F. Supp. 2d 49 (D.D.C. 2003)	19
<i>In re Medley</i> , 134 U.S. 160 (1890)	9
<i>Monk v. Secretary of the Navy</i> , 793 F.2d 364 (D.C. Cir. 1986).....	7
<i>Morgan Stanley DW Inc. v. Rothe</i> , 150 F. Supp. 2d 67 (D.D.C. 2001).....	6
<i>Mova Pharmaceutical. Corp. v. Shalala</i> , 140 F.3d 1060 (D.C. Cir. 1998).....	6
<i>National Treasury Employees Union v. U.S. Department of Treasury</i> , 838 F. Supp. 631 (D.D.C. 1993)	14, 18
<i>O'Bryan v. Saginaw County, Mich.</i> , 437 F. Supp. 582 (E.D. Mich. 1977).....	11
<i>Parker v. Conner</i> , 66 F.3d 335 (9th Cir. 1995).....	7
<i>In re Permanent Surface Min. Regulation Litigation</i> , 617 F.2d 807 (D.C. Cir. 1980).....	6
<i>Preiser v. Rodriguez</i> , 411 U.S. 475 (1973).....	7
<i>Rhem v. Malcolm</i> , 507 F.2d 333 (2d Cir. 1974)	11
<i>Rhodes v. Chapman</i> , 452 U.S. 337 (1981).....	8, 11
<i>Sampson v. Murray</i> , 415 U.S. 61 (1974)	14
<i>Sandin v. Connor</i> , 515 U.S. 472 (1995).....	9
<i>Sinclair v. Henderson</i> , 331 F. Supp. 1123 (E.D. La. 1971).....	11
<i>Thomas v. Network Solutions, Inc.</i> , 2 F. Supp. 2d 22 (D.D.C. 1998).....	14
<i>Toussaint v. Yockey</i> , 722 F.2d 1490 (9th Cir. 1984).....	11

<i>Washington Metropolitan Area Transit Comm'n v. Holiday Tours</i> , 559 F.2d 841 (D.C. Cir. 1977)	15
<i>Wilwording v. Swenson</i> , 404 U.S. 249 (1971)	7
<i>Women Prisoners of District of Columbia Department of Corrections v. District of Columbia</i> , 877 F. Supp. 634 (D.C. Cir. 1994)	7

STATUTES

28 C.F.R. § 431.11	9
28 C.F.R. § 501.2	10
28 C.F.R. § 501.3	10
28 C.F.R. § 540.70	8
28 C.F.R. § 541.12	9
28 C.F.R. § 548.12	8
28 C.F.R. § 548.20	9

TREATIES AND OTHER INTERNATIONAL DOCUMENTS

Convention (III) Relative to the Treatment of Prisoners of War (Third Geneva Convention), August 12, 1949, 6 U.S.T. 3316	12, 13
Standard Minimum Rules for the Treatment of Prisoners, U.N. Doc. A/CONF/611, annex 1, ESC Res. 663C, XXIV (1957), U.N. ESCOR, Supp. No. 1, at 11, U.N. Doc. E/3048 (1957), amended by ESC Res. 2076 (1977), U.N. ESCOR, Supp. No. 1, at 35, U.N. Doc. E/5988 (1977)	13

MISCELLANEOUS

Carla K. Johnson, <i>Parents: Hale Not Involved in Ill. Murders</i> , The Associated Press (Mar. 7, 2005), available at http://story.news.yahoo.com/news?tmpl=story2&u=/ap/20050307/ap_on_re_us/judge_bodies	10
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DHS Detention Operations Manual, Department of Homeland Security, <i>available at</i> http://ice.gov/graphics/dro/opsmanual/index.htm	8, 9
Jodi Wilgoren, <i>F.B.I. Agents Seize Letters from Supremacist's Friend</i> , N.Y. Times (Mar. 5, 2004)	10
<i>Memorandum Discussing Origination of Special Administrative Measures Pursuant to</i> <i>28 C.F.R. § 501.3 for Federal pre-Trial Detainee Zacarias Moussaoui</i> , 10-14, <i>available at</i> http://news.findlaw.com/hdocs/docs/moussaoui/usmouss41702gsam.pdf	10
Military Police Manual of Internment/Resettlement Operations, FM 3-19.40 (August 1, 2001)	16, 17, 18
U.S. Army Regulation 190-8, "Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees," Departments of the Army, the Navy, the Air Force, and the Marine Corps, Washington, D.C. (October 1, 1997)	16, 17, 18

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INTRODUCTION AND SUMMARY

Plaintiffs-petitioners include 11 Kuwaiti nationals (the “Kuwaiti Detainees”) who are in the custody of defendants-respondents (the “government”) at Guantanamo Bay, Cuba, and have been imprisoned for more than three years without being charged with any wrongdoing.¹ They have filed a proposed second amended complaint and a petition for writs of habeas corpus in which they challenge not only the lawfulness of their detention but also the inhumane living conditions at the Guantanamo detention facility in which they suffer daily. The Kuwaiti Detainees now ask the Court to stop the government from continuing to inflict irreparable injury upon them, pending final adjudication of their challenge to the conditions of their confinement, by simply ordering the government immediately to apply the minimum living standards prescribed by the United States Army for all detainees held by the military.

This Court has held that the Kuwaiti Detainees have enforceable rights under the Fifth Amendment and the Third Geneva Convention.² For this reason the Court denied the government’s motion to dismiss the Kuwaiti Detainees’ petition and amended complaint.³ However, the government was granted permission yesterday from the District of Columbia Circuit to take an interlocutory appeal from that ruling. This interlocutory appeal likely will delay the ultimate resolution of the Kuwaiti Detainees’ claims for months if not a year or more.

¹ A twelfth plaintiff-petitioner, Naser Nijer Naser Al Mutairi, was returned to Kuwait in January 2005. The other plaintiffs-petitioners are family members of the Kuwaiti Detainees.

² See Memorandum Opinion Denying in Part and Granting in Part Respondents’ Motion to Dismiss or for Judgment as a Matter of Law, dated January 31, 2005 (“January 31 Opinion”), at 18-38, 68-73.

³ Order Denying in Part and Granting in Part Respondents’ Motion to Dismiss or for Judgment as a Matter of Law and Requesting Briefing on the Future Proceedings in These Cases of January 31, 2005.

Meanwhile, the Kuwaiti Detainees are being held in virtual isolation and under subhuman conditions—conditions far worse than those imposed on convicted criminals incarcerated in the United States. For over three years they have not been allowed to speak to any family members, they have been allowed almost no reading material aside from the Koran, they have been given almost no opportunity to exercise or socialize or leave the confines of their cells, which are inordinately small and constantly flooded with bright lights. Their cellblocks are often set at temperatures that are extremely hot or cold. Mail from their families has been withheld from them for unreasonable lengths of time and has been used as an interrogation tool. Many of the Kuwaiti Detainees have suffered from serious illnesses and injuries but have been denied medical and dental treatment or have been given inadequate treatment and after much delay.

In their proposed second amended complaint, the Kuwaiti Detainees allege that these degrading and inhumane conditions violate the Fifth Amendment, the Geneva Conventions, and common law, and they seek appropriate relief. If the Kuwaiti Detainees ultimately prevail on this claim, the relief they seek would entail significant modifications to the detention facility and policies at Guantanamo.

On the present motion, however, the Kuwaiti Detainees seek only to enjoin those patently substandard conditions that subject them to irreparable psychological harm and physical injury by implementing the government's own published standards for the confinement of detainees. This is the least amount of relief the Kuwaiti Detainees should be granted on an interim basis, especially given the Court's holding that they have enforceable rights under the Fifth Amendment and the Third Geneva Convention.

STATEMENT

Beginning in December 2004, counsel for the Kuwaiti Detainees were allowed by the government to go to Guantanamo to visit with the detainees. During those visits counsel saw and obtained declarations from the Kuwaiti Detainees documenting the substandard and inhumane conditions of confinement that prevail at Guantanamo.

The Kuwaiti Detainees are being held in virtual isolation in cells no bigger than 9' 1/2" x 5' 1/2". *See* Declaration of Fouad Al Rabiah ¶5 (“[F]or more than 230 days I have been completely isolated. I have not seen the faces of the other 13 detainees on my Block.”) (“Al Rabiah Decl.,” attached as Exhibit A); Declaration of Mohammed Fenaital Al Daihani ¶3 (while in Camp Delta, he has been “completely isolated” and is only able to socialize by yelling across to detainees in neighboring cells) (“Al Daihani Decl.,” attached as Exhibit B); Declaration of Fawzi Al Odah ¶5 (“Al Odah Decl.,” attached as Exhibit C); Declaration of Fayiz Al Kandari ¶3 (“F. Al Kandari Decl.,” attached as Exhibit D). Additionally, the cells and/or cellblocks are kept brightly lit all day and night. *See* Al Rabiah Decl. ¶12 (“Bright lights are always kept on and the walls are painted glossy white in the cells making it very difficult to sleep and causing severe eye strain and headache.”); Al Odah Decl. ¶11 (“Very bright lights are kept on in my cell 24 hours a day, making it very difficult to sleep and hurting and damaging my eyes.”); F. Al Kandari Decl. ¶8; Declaration of Omar Rajab Amin ¶5 (“Amin Decl.,” attached at Exhibit E).

The Kuwaiti Detainees are further isolated and kept from engaging in any intellectual activity due to the denial of almost all reading materials except the Koran. Mohammed Al Daihani’s statement exemplifies the mental deprivations imposed upon the Kuwaiti Detainees: “I have not been permitted to read or receive books, newspapers, or magazines. The only reading material I have been permitted is the Qu’ran.” Al Daihani Decl. ¶7; *see also* Al Odah Decl. ¶9

(not permitted to read or receive books, newspapers, or magazines for the last two years); Declaration of Abdullah Kamel Al Kandari ¶5 (“A. Al Kandari Decl.,” attached as Exhibit F) (for over a year, he was not permitted any books, newspapers or magazines, other than the Qu’ran); Al Rabiah Decl. ¶15 (other than the Qu’ran, permitted one copy of National Geographic dated April 1984); Amin Decl. ¶4 (“allowed to read some books but none of [his] choosing”).

Communications with the Kuwaiti Detainees’ families are also severely limited. For the last three years, none of the Kuwaiti Detainees has been allowed to speak or meet with any family members, including their children. *See, e.g.*, F. Al Kandari Decl. ¶5. Additionally, mail from their families has been withheld for unreasonably long periods of time and sometimes has been used as an interrogation tool. *See* Al Daihani Decl. ¶¶4, 5 (“I know that the Kuwaiti delegation brought mail from my family but I did not receive it for over 7 months” and “[m]ail has been withheld from me by interrogators as an interrogation technique.”); A. Al Kandari Decl. ¶3 (“In some cases, I did not receive a letter until 6 months after it was sent.”); Amin Decl. ¶2 (“I often received letters through the Red Cross 4-6 months after they were sent.”); Al Rabiah Decl. ¶14 (“My mail has been withheld by interrogators as an interrogation technique, and I have been given very few letters in the last two years.”).

The Kuwaiti Detainees are given virtually no opportunity for exercise. In many cases, they have been “allowed to exercise outside [their] cell for no more than one hour per week” in an area “consist[ing] of a small cement block enclosed by a fence with no exercise facilities or equipment.” Al Odah Decl. ¶10; F. Al Kandari Decl. ¶7; Al Rabiah Decl. ¶¶7, 8. *See also* Al Daihani Decl. ¶8 (only recently allowed to exercise on a daily basis, which is 30 minutes a day). Furthermore, the Kuwaiti Detainees are not allowed to go outdoors to breathe fresh air or see the sun or the sky on any regular basis. *See* Al Rabiah Decl. ¶7 (“[R]ecreation and showers can be

cancelled for any reason and many times without any reason so we end up seeing sunlight once or twice per month.”).

The cells in which the Kuwaiti Detainees are confined practically around the clock are often maintained at very hot or cold temperatures. The Kuwaiti Detainees have stated that the “temperatures are kept too hot or too cold” to allow them to sleep. A. Al Kandari Decl. ¶8. *See also* Amin Decl. ¶6 (“[T]he extreme fluctuations in temperature has greatly aggravated my sinus infection.”); Al Daihani Decl. ¶10 (“My cellblock has no air conditioning, making it extremely hot and difficult to sleep.”); F. Al Kandari Decl. ¶9 (“Usually the temperature has been kept far too cold, so that everyone walks around with their blankets shivering.”).⁴

Finally, and most disturbingly, many of the Kuwaiti Detainees have suffered serious medical problems, for which they have been denied treatment or treated inadequately and with much delay, in some cases up to one year. For example, Mohammed Al Daihani suffers from a heart condition of which he informed Guantanamo personnel. When he experienced chest pains he requested a doctor but was not examined by a doctor for his heart condition until two years later. Al Daihani Decl. ¶2. Mr. Al Daihani also suffered from a severe toothache for which he requested dental treatment. He “was provided with a dentist 1 year and 8 months later.” *Id.* ¶2. Abdullah Al Kandari developed a painful boil in his groin area; he was not, however, given any medicine until the boil had already subsided. A. Al Kandari Decl. ¶2.⁵ Fouad Al Rabiah requested glasses for his deteriorating vision but “was given glasses with a prescription that they

⁴ Other inhumane conditions include: (1) “The use of highly concentrated disinfectants without dilution is usually used on the blocks which causes us to suffocate and cough [and] many will have eye irritation and continuous tears for many hours.” Al Rabiah Decl. ¶11; and (2) “[T]he air conditioning emits dirt and other materials that causes rashes and breathing problems.” *Id.* ¶17.

⁵ Mr. Al Kandari also developed a skin rash so unbearably irritating that he scratched his skin until it was bleeding. Although he requested a doctor, one was never provided. Mr. Al Kandari was eventually given some medicine, which did not adequately cure his allergy, and he continues to suffer from severe skin

[medical personnel] told [him] was wrong . . .” These glasses have caused his vision to deteriorate even further. Al Rabiah Decl. ¶2.⁶ See also Al Odah Decl. ¶2 (medical treatment for an illness was delayed until Mr. Al Odah lost so much weight—over 20% of his body weight—that his life was in danger and only then was any medical treatment provided); Amin Decl. ¶1 (severe sinus infection went untreated until his glands became swollen; the treatment provided was ineffective as they continue to be swollen for 2 years now); F. Al Kandari Decl. ¶2.

ARGUMENT

When contemplating the grant of a preliminary injunction, courts evaluate four factors: the likelihood that the movant will prevail on the merits of the underlying claim, the possibility that the movant will suffer irreparable injury without interim relief, the harm caused to others by granting the injunction, and the public interest. See *Mova Pharm. Corp. v. Shalala*, 140 F.3d 1060, 1066 (D.C. Cir. 1998); *In re Permanent Surface Min. Regulation Litigation*, 617 F.2d 807, 808 (D.C. Cir. 1980); *Morgan Stanley DW Inc. v. Rothe*, 150 F. Supp. 2d 67, 72 (D.D.C. 2001). All these factors militate in favor of granting the Kuwaiti Detainees’ motion for a preliminary injunction that would enjoin the government from refusing immediately to apply to them the confinement standards prescribed by the United States Army for individuals detained by the military, pending final adjudication of their challenge to the living conditions at Guantanamo. To the extent the Court’s stay of February 3, 2005 is thought to be an obstacle to the consideration of the Kuwaiti Detainees’ motion for a preliminary injunction, the Court should modify the stay to permit consideration and grant of that motion.

irritation today. Though he has repeatedly requested medical assistance, it has been refused. A. Al Kandari Decl. ¶2.

⁶ Mr. Al Rabiah also suffers from “severe arthritis and back and neck pain for which [he has] requested and been denied treatment.” Al Rabiah Decl. ¶2.

I. The Kuwaiti Detainees Are Likely To Succeed On The Merits.

The conditions in which the Kuwaiti Detainees are being held fall well below contemporary standards of decency and below even those standards for convicted criminals in federal prisons. As a result, the Kuwaiti Detainees are likely to succeed on the merits of their claim that these conditions violate the Fifth Amendment, the Geneva Conventions, and the common law.⁷

A. The Kuwaiti Detainees are Likely to Prevail Under the Fifth Amendment and Common Law.

This Court has already held that the Kuwaiti Detainees have enforceable rights under the Fifth Amendment. *See* Memorandum Opinion Denying in Part and Granting in Part Respondents' Motion to Dismiss or for Judgment as a Matter of Law, dated January 31, 2005 ("January 31 Opinion") at 18-38. The Fifth Amendment guarantees to every individual detained but not yet tried or convicted of a crime conditions of confinement at least equal to and no worse than those guaranteed to convicted prisoners under the Eighth Amendment. *See Bell v. Wolfish*, 441 U.S. 520, 535 (1979) (conditions that amount to punishment violate the Fifth Amendment); *Women Prisoners of Dist. of Columbia Dep't of Corr. v. Dist. of Columbia*, 877 F. Supp. 634, 665 n.38 (D.C. Cir. 1994) (threshold for establishing a constitutional violation is lower for pretrial detainees than for convicted criminals); *Brogsdale v. Barry*, 926 F.2d 1184, 1190 (D.C.

⁷ As mentioned at the outset, the Kuwaiti Detainees have challenged the living conditions at Guantanamo both in their proposed second amended complaint, in which they allege violations of the Fifth Amendment, the Geneva Conventions, and the common law, and their petition for writs of habeas corpus. It is well settled that the Kuwaiti Detainees may challenge the conditions of their confinement by the federal government in a *Bivens*-type action under the Fifth Amendment. *See generally Parker v. Conner*, 66 F.3d 335 (9th Cir. 1995); *Lyons v. U.S. Fed. Marshals*, 840 F.2d 202 (3rd Cir. 1988); *Monk v. Sec'y of the Navy*, 793 F.2d 364 (D.C. Cir. 1986). This is analogous to a § 1983 civil rights action when one is challenging the conditions of confinement by state officials. *See, e.g., Gerstein v. Pugh*, 420 U.S. 103, 107 n.6 (1975); *Haines v. Kerner*, 404 U.S. 519, 520 (1972). The Kuwaiti Detainees' challenge to their conditions of confinement also is cognizable in habeas. *Preiser v. Rodriguez*, 411 U.S. 475, 499 (1973); *Wilwording v. Swenson*, 404 U.S. 249, 251 (1971); *Johnson v. Avery*, 393 U.S. 483, 484-86 (1969); *Brown v. Plaut*, 131 F.3d 163, 168 (D.C. Cir. 1997).

Cir. 1991). Thus, conditions of confinement that are inconsistent with “contemporary standards of decency” or “broad and idealistic concepts of dignity, civilized standards, humanity, and decency,” *see Estelle v. Gamble*, 429 U.S. 97, 102-03 (1976), and do not afford the “minimal civilized measure of life’s necessities,” *see Rhodes v. Chapman*, 452 U.S. 337, 347 (1981), violate the Kuwaiti Detainees’ Fifth Amendment rights.

These same principles governing the care of pretrial detainees exist under the common law. Long before the Bill of Rights, a minimum standard of care was required for those placed in the “King’s custody.” As Blackstone remarked: “But this imprisonment, as has been said, is only for safe custody, and not for punishment; therefore, in this dubious interval between the commitment and the trial, a prisoner would to be used the utmost humanity, and neither be loaded with needless fetters, or subject to other hardships than such as are absolutely requisite for the purpose of confinement only.” *Campbell v. McGruder*, 580 F.2d 521, 527 (D.C. Cir. 1978) (quoting 4 William Blackstone, Commentaries *300).

A ready source of “contemporary standards of decency” that provide a “minimal civilized measure of life’s necessities” are the government’s own published standards for the confinement of individuals in federal custody. The federal Bureau of Prisons has published regulations regarding living conditions for all prisoners in federal custody, and the Department of Homeland Security has established standards in its Detention Operations Manual for aliens detained during the immigration/asylum/deportation process. Together these minimum standards require that:

- (1) Correspondence be sent and received in a timely manner, 28 C.F.R. § 540.70; DHS Detention Operations Manual “Correspondence and Other Mail”;
- (2) Mail to and from family members not be withheld as an interrogation technique, DHS Detention Operations Manual, “Disciplinary Policy”;
- (3) Prisoners/detainees be allowed to subscribe to and receive publications—including security-cleared newspapers, magazines, and books—subject to reasonable restrictions required for the safety, security, and orderly operations of the detention facility, 28 C.F.R. § 548.12;

- (4) Prisoners/detainees have a reasonable opportunity to observe their Islamic dietary practices, 28 C.F.R. § 548.20, Bureau of Prisons Operations Memorandum No. 110-84 (5360) (May 30, 1984); DHS Detention Operations Manual, "Food Service";
- (5) Prisoners/detainees have an opportunity to take outdoor recreation no less than five days a week for a minimum of one hour per day and additionally outdoor time at least three times a week for a minimum of one hour per day, 28 C.F.R. §§ 431.11, 541.12; DHS Detention Operations Manual, "Recreation";
- (6) Detainees be permitted to socialize with other detainees for at least one hour per day, DHS Detentions Operations Manual, "Special Management Unit (Administrative Segregation), § III.D.8;
- (7) The detainees' cells be maintained at a temperature that is neither too hot nor too cold; lights and music in the cellblocks be turned off at night so detainees can sleep; and mattresses, blankets, pillows and sheets are not to be withheld from the detainees as a sanction, DHS Detentions Operations Manual, "Disciplinary Policy," § III.A.3; and
- (8) Detainees have access to medical and dental specialists of their choosing; medical records are stored separately from detainees' other records; and only detention facility medical personnel and individuals authorized by the detainees or their counsel have access to such medical records, Detention Operations Manual, "Medical Care."

The living conditions at Guantanamo, however, do not meet these federal standards. As described above, the Kuwaiti Detainees are being held in virtual isolation or solitary confinement in exceptionally small cells that are constantly brightly lit.⁸ They may not speak to or visit with their families, including their children. They are given little or no opportunity to exercise or socialize with other detainees or allowed outside on a regular basis to see the sun or sky. They are given little or no reading materials other than the Koran. Mail from their families has been withheld for unreasonably long periods of time and sometimes used as an interrogation tool.

⁸ The courts long have considered solitary confinement or administrative segregation to be a "punishment." See e.g., *Sandin v. Connor*, 515 U.S. 472, 475 n.1 (1995); *Hutto v. Finney*, 437 U.S. 678, 685 (1978); *Hatch v. Dist. of Columbia*, 184 F.3d 846, 848 (D.C. Cir. 1999); *Askins v. Dist. of Columbia*, 877 F.2d 94 (D.C. Cir. 1989). Even at common law, solitary confinement was considered "an infamous punishment." *In re Medley*, 134 U.S. 160, 168-70 (1890) ("it [solitary confinement] was considered as an additional punishment of such a severe kind that it is spoken of in the preamble as 'a further terror and peculiar mark of infamy' to be added to the punishment of death. In Great Britain, as in other countries, public sentiment revolted against this severity, and by the statute of 6&7 Wm. IV. C. 30, the additional punishment of solitary confinement was repealed."). Under *Bell v. Wolfish*, 441 U.S. at 534, the Fifth Amendment is violated when the conditions of confinement for pretrial detainees amount to punishment.

They have been subject to extreme hot and cold temperatures as a matter of course. And many of the Kuwaiti Detainees have suffered serious medical problems, for which they have been denied treatment or treated inadequately and after much delay, in some cases up to one year.

Even domestic terrorists in federal custody against whom “Special Administrative Measures” may be applied, *see* 28 C.F.R. §§ 501.2, 501.3, are afforded more decent living conditions than the Kuwaiti Detainees, who have not been charged with any wrongdoing. For example, Matthew Hale, the accused domestic terrorist charged with plotting to kill a federal judge, is permitted to speak to his family on the telephone once a week, visit with his parents every other week, correspond with friends, and receive paperback books in the mail.⁹ Likewise, Zacarias Moussaoui is allowed to make and receive calls to his immediate family, visit with family members one at a time, and send and receive both legal and non-legal mail, which the government may delay for screening and analysis for no more than five days (ten if the mail is not in English).¹⁰ Furthermore, the restrictions imposed under the Special Administrative Measures on a handful of federal prisoners such as Hale and Moussaoui may be imposed only for a period of up to of 120 days or, with the approval of the Attorney General, up to one year, and may be extended for a period up to a year only by permission of the Attorney General and the Director of the Federal Bureau of Prisons. *See* 28 C.F.R. § 501.3(c).

In sum, the Kuwaiti Detainees are being subjected to living conditions that do not comport with “contemporary standards of decency,” or “broad and idealistic concepts of dignity,

⁹ *See* Jodi Wilgoren, *F.B.I. Agents Seize Letters from Supremacist’s Friend*, N.Y. Times (Mar. 5, 2004), attached as Exhibit G; Carla K. Johnson, *Parents: Hale Not Involved in Ill. Murders*, The Associated Press, (Mar. 7, 2005), available at http://www.story.news.yahoo.com/news?tmpl=story2&u=/ap/20050307/ap_on_re_us/judge_bodies.

¹⁰ *See Memorandum Discussing Origination of Special Administrative Measures Pursuant to 28 C.F.R. § 501.3 for Federal pre-Trial Detainee Zacarias Moussaoui*, 10-14, available at <http://news.findlaw.com/hdocs/docs/moussaoui/usmouss41702gsam.pdf> (last visited Mar. 10, 2005).

civilized standards, humanity, and decency,” and that do not afford them the “minimal civilized measure of life’s necessities.” See *Estelle v. Gamble*, 429 U.S. at 102-03; *Rhodes v. Chapman*, 452 U.S. at 347.¹¹ Therefore, the Kuwaiti Detainees are likely to prevail on their claim that the conditions of confinement at Guantanamo violate their Fifth Amendment rights and their rights at common law.

B. The Kuwaiti Detainees are Likely to Prevail Under the Geneva Conventions.

The Kuwaiti Detainees also are likely to prevail on their claim that the living conditions at Guantanamo violate their rights under the Geneva Conventions. The Court already has held that the Kuwaiti Detainees have enforceable rights under the Third Geneva Convention. See January 31 Opinion at 68-73.¹² Like domestic law, the Third Geneva Convention seeks to ensure

¹¹ See also *Farmer v. Brennan*, 511 U.S. 825, 832-33 (1994) (Constitution imposes a duty on prison officials to “ensure that inmates receive adequate food, clothing, shelter and medical care,” and take “reasonable measures to guarantee the safety of the inmates.”); *Davenport v. DeRobertis*, 844 F.2d 1310, 1315 (7th Cir. 1988) (affirming district court order that prison afford inmates five hours of exercise per week and stating that “we are impressed by the number of decisions that hold or suggest that a failure to provide inmates . . . with the opportunity for at least five hours a week of exercise outside the cell raises serious constitutional questions”); *Toussaint v. Yockey*, 722 F.2d 1490, 1493 (9th Cir. 1984) (affirming preliminary injunction requiring that prison afford prisoners more exercise opportunities based on district court finding that “many of the inmates were confined to their cells for as much as 23 1/2 hours a day”); *Campbell v. Cauthron*, 623 F.2d 503, 507 (8th Cir. 1980) (relying on uncontradicted evidence “of the detrimental physical consequences of enforced idleness in a small living space” and ordering that each prisoner “be given the opportunity to exercise for at least one hour per day outside the cell”); *Kirby v. Blackledge*, 530 F.2d 583, 587 (4th Cir. 1976) (holding that “intolerable summertime conditions,” only two hours of recreation a week, inadequate heating and ventilation have the “cumulative effect of being cruel and unusual punishment as well as deprivation of due process”); *Rhem v. Malcolm*, 507 F.2d 333, 337, 342 (2d Cir. 1974) (finding that 50-minutes a week of exercise and extreme heat and noise were unconstitutional conditions of confinement); *Brock v. Warrant County*, 713 F. Supp. 238, 242 (E.D. Tenn. 1989) (inadequate ventilation and high temperatures in cell were violation of Eighth Amendment); *Hutchings v. Corum*, 501 F. Supp. 1276, 1294 (W.D. Mo. 1980) (“one hour per day of exercise outside the cells is a constitutionally intolerable condition”); *O’Bryan v. Saginaw County, Mich.*, 437 F. Supp. 582, 592 (E.D. Mich. 1977) (“The opportunity for frequent exercise and recreation, in addition to sufficient means for diversion, are essential for the mental, physical, and emotional well being of inmates who are confined for extended periods within a jail facility”); *Ahrens v. Thomas*, 434 F. Supp. 873, 897-98 (W.D. Mo. 1977) (holding there are minimal constitutional standards for indoor and outdoor exercise and maintenance of proper heat in winter and proper cooling in summer); *Sinclair v. Henderson*, 331 F. Supp. 1123, 1129-31 (E.D. La. 1971) (death row inmates had constitutional right to more exercise than 15 minutes a day).

¹² The Court held that the Kuwaiti Detainees and other detainees at Guantanamo have enforceable rights under the Third Geneva Convention, dealing with the treatment of prisoners of war, to the extent they are alleged to have been Taliban fighters or associated with both the Taliban and Al Qaida. January 31

living conditions for prisoners that are necessary to maintain an individual's physical and mental health.

For example, in addition to requiring that prisoners be treated humanely at all times,¹³ the Third Geneva Convention mandates that captured enemy prisoners of war are to be held only in premises "affording every guarantee of hygiene and healthfulness,"¹⁴ and are to be quartered under conditions no less favorable than those provided to the armed forces of the detaining power, a measure which is specifically applicable to the size of the prisoners' cells and the installations in those cells, such as bedding.¹⁵ The Third Geneva Convention also requires that prisoners of war have adequate toilets and bathing facilities, and enough time to attend to their personal hygiene.¹⁶ Prisoners of war must be given enough food to prevent weight loss,¹⁷ and are to be allowed to present themselves for medical exams when desired and receive appropriate treatment whenever necessary.¹⁸ Prisoners are to be allowed to send cards and letters and to receive mail, including parcels containing food, clothing, books, papers, articles of a religious educational or recreational character or medical supplies including musical instruments, sports outfits and materials allowing prisoners of war to pursue their studies or their cultural activities.¹⁹

Opinion at 70. The Kuwaiti Detainees maintain they have enforceable rights as well under the Fourth Geneva Convention, dealing with the protection of civilians in time of war.

¹³ Convention (III) Relative to the Treatment of Prisoners of War (Third Geneva Convention), August 12, 1949, art. 13, 6 U.S.T. 3316.

¹⁴ *Id.* at art. 22.

¹⁵ *Id.* at art. 25.

¹⁶ *Id.* at art. 29.

¹⁷ *Id.* at art. 26.

¹⁸ *Id.* at art. 31.

¹⁹ Convention (III) Relative to the Treatment of Prisoners of War (Third Geneva Convention), August 12, 1949 at art. 70-71.

Prisoners must have time and space for physical exercise, and to be outdoors in general.²⁰ They shall enjoy complete latitude in the exercise of their religious duties, including attendance at the service of their faith, on the condition that they comply with the disciplinary routine prescribed by the military authorities.²¹ Finally, the United States, as the “detaining power,” must encourage the practice of intellectual, education and recreational pursuits, sports and games among prisoners, and must ensure the exercise these practices by providing the prisoners with adequate premises and necessary equipment.²²

The living conditions for the Kuwaiti Detainees at Guantanamo fall far short of the international standards established in the Third Geneva Convention and elsewhere.²³ Accordingly, the Kuwaiti Detainees are likely to prevail on the merits of their challenge to those conditions under the Geneva Conventions.

²⁰ *Id.* at art. 38.

²¹ *Id.* at art. 34.

²² *Id.* at art. 38.

²³ The United Nations “Standard Minimum Rules for the Treatment of Prisoners” sets forth similar standards for the treatment of *all* categories of prisoners, including pretrial detainees, convicted criminals, and individuals held for security reasons. These standards require that (1) Every prisoner shall, in accordance with local or national standards, be provided with a separate bed, and with separate and sufficient bedding which shall be clean when issued, kept in good order and changed often enough to ensure its cleanliness; (2) Every prisoner who is not employed in outdoor work shall have at least one hour of suitable exercise in the open air daily if the weather permits; (3) Prisoners shall be allowed under necessary supervision to communicate with their family and reputable friends at regular intervals, both by correspondence and by receiving visits; (4) Prisoners shall be kept informed regularly of the more important items of news by the reading of newspapers, periodicals or special institutional publications, by hearing wireless transmissions, by lectures or by any similar means as authorized or controlled by the administration; and (5) Every institution shall have a library for the use of all categories of prisoners, adequately stocked with both recreational and instructional books, and prisoners shall be encouraged to make full use of it. Standard Minimum Rules for the Treatment of Prisoners U.N. Doc. A/CONF/611, annex 1, ESC Res. 663C, XXIV (1957), U.N. ESCOR, Supp. No. 1, at 11, U.N. Doc. E/3048 (1957), amended by ESC Res. 2076 (1977), U.N. ESCOR, Supp. No. 1, at 35, U.N. Doc. E/5988 (1977), ¶¶ 19, 21(1), 37, 39, 40.

II. A Preliminary Injunction Is Necessary To Prevent Continued Irreparable Injury to the Kuwaiti Detainees.

As the Supreme Court has observed, “the basis of injunctive relief in the federal courts has always been irreparable harm and inadequacy of legal remedies.” *Sampson v. Murray*, 415 U.S. 61, 88 (1974) (quoting *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959)). Accord, e.g., *Thomas v. Network Solutions, Inc.*, 2 F. Supp. 2d 22, 33 (D.D.C. 1998) (“[t]he threat of irreparable injury is perhaps the key reason to grant a motion for preliminary injunction”). The Kuwaiti Detainees, who have never been charged with wrongdoing,²⁴ have conclusively demonstrated in their attached declarations that they are being irreparably injured every day they are subject to the substandard and inhumane conditions at Guantanamo. There are no legal remedies to prevent this irreparably injury.

The courts uniformly have held that even the temporary violation of fundamental constitutional rights constitutes irreparable injury for purposes of granting preliminary injunctive relief. See, e.g., *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (the loss of fundamental constitutional rights “for even minimal periods of time, unquestionably constitutes irreparable injury”); *Jones “El v. Berge*, 164 F. Supp. 2d 1096, 1122 (W.D. Wis. 2001) (“the violation of a fundamental constitutional right constitutes irreparable harm, even if temporary”); *Nat’l Treasury Employees Union v. U.S. Dep’t of Treasury*, 838 F. Supp. 631, 640 (D.D.C. 1993) (the “threatened loss of constitutional rights” is irreparable injury); *AFGE v. Sullivan*, 744 F. Supp. 294, 298 (D.D.C. 1990) (“plaintiffs will suffer irreparable injury” if challenged government plan “is implemented in violation of their constitutional rights”); *Cohen v. Coahoma County*, 805 F. Supp. 398, 406

²⁴ The military has concluded, two and half years after the Kuwaiti Detainees were abducted and imprisoned at Guantanamo, that they are “enemy combatants” based on a process that this Court has determined violated the Kuwaiti Detainees’ Fifth Amendment rights. See January 31 Opinion at 55.

(N.D. Miss. 1992) (“[i]t has repeatedly been recognized by the federal courts at all levels that violation of constitutional rights constitutes irreparable harm as a matter of law”); *Bannum, Inc. v. City of Memphis*, 666 F. Supp. 1091, 1096 (W.D. Tenn. 1987) (due process rights are “so fundamental to our legal system and to our society that any violation thereof will cause irreparable harm irrespective of the financial impact”). Because the Court already has held that the Kuwaiti Detainees have enforceable rights under the Fifth Amendment, the ongoing violation of those rights plainly constitutes irreparable injury.²⁵

III. There Is a Lack of Serious Injury To The Government And a Promotion Of Public Interest.

The government cannot claim it will be seriously injured – or injured at all – if, as the Kuwaiti Detainees request, the Court enjoins the government from refusing immediately to apply to the Kuwaiti Detainees the minimum standards prescribed by the United States Army for the confinement of individuals by the military. On the contrary, such an injunction simply would direct the government to put in place standards designed precisely for the type of military detention that is now occurring at Guantanamo.

The United States Army’s standards for the confinement of individuals detained by the military are contained in Army Regulation 190-8 and the Military Police Manual of Internment/Resettlement Operations (the “Field Manual”). Those standards expressly govern the detention of “enemy prisoners of war” (“EPWs”), “civilian internees (“CIs”), and “other

²⁵ Indeed, because the Kuwaiti Detainees’ claim of irreparable injury is so strong, the Court may grant their motion for preliminary injunction on this factor alone. See *CityFed Fin. Corp. v. Office of Thrift Supervision*, 58 F.3d 738, 746 (D.C. Cir. 1995) (“[i]f the arguments for one factor are particularly strong, an injunction may issue even if the arguments in other areas are rather weak”); *Washington Metro. Area Transit Comm’n v. Holiday Tours*, 559 F.2d 841, 843 (D.C. Cir. 1977); *AFGE v. Sullivan*, 744 F. Supp. at 298 (“where the injury factors favor injunctive relief, preliminary relief may be granted even if the case only raises a serious legal question going to the merits”); *Compu Serve Data Sys., Inc. v. Freeman*, 498 F. Supp. 1316, 1319 (D.D.C. 1980) (“[i]f it appears that there is compelling proof on the showing of irreparable harm, then the Court may award the requested [preliminary injunctive] relief even though its

detainees” (“ODs”).²⁶ An EPW is any person who meets the criteria for classification as a prisoner of war.²⁷ A CI is any person who does not meet the criteria for classification as a prisoner of war but who the government has designated as a security risk or who has committed an offense against the United States and, therefore, must be detained.²⁸ An OD is “[a] civilian whose status cannot be determined.”²⁹ The Field Manual requires that “[a]ll rules, regulations, and privileges applicable to an EPW apply to an OD.”³⁰ Thus, even if the Kuwaiti Detainees’ status as “enemy combatant” had been lawfully and correctly determined by the government, they are still *either* EPWs or CIs, and the government has no basis for claiming injury if it is ordered to treat them in accordance with the minimum Field Manual standards applicable to either EPWs or CIs.

The government also cannot claim that the Field Manual’s standards already are being implemented at Guantanamo. Under the Field Manual EPWs must be provided with “basic, daily food ration that is sufficient in quantity, quality, and variety to keep them in good health

view on the merits of the dispute differs from the plaintiff’s”). The preliminary injunction should also be granted, however, because all four traditional factors weigh strongly in the Kuwaiti Detainees’ favor.

²⁶ U.S. Army Regulation (“AR”) 190-8, “Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees,” Departments of the Army, the Navy, the Air Force, and the Marine Corps, Washington, D.C. (October 1, 1997) (relevant excerpts attached as Exhibit H); Military Police Manual of Internment/Resettlement Options, FM 3-19.40 (August 1, 2001) (“FM 3-19.40,” relevant excerpts attached as Exhibit I).

²⁷ FM 3-19.40, Ch 1-4.

²⁸ FM 3-19.40, Ch 5, Introduction; AR 190-8, Ch 1-6.

²⁹ An OD is an individual in the custody of US armed forces who has not been classified as an EPW or a CI but who is treated as an EPW until a legal status is ascertained by competent authority. FM 3-19.40, Ch 1-10. Under Army Regulation 190-8, the competent authority—a military tribunal—may make only one of four possible status determinations: EPW, retained personnel (“RP”), innocent civilian, who should be released, and civilian internee, who for reasons of operational security or probable cause incident to criminal investigation, should be detained. AR 190-8, Ch 1-6(e)(10). Thus, there is no black hole into which the Kuwaiti Detainees fall.

³⁰ FM 3-19.40, Chapter 5, Introduction.

and to prevent weight loss and nutritional deficiencies,”³¹ and sufficient clothing and footwear for the climate of the place where they are housed.³² They are to be given adequate opportunities and facilities for religious worship and recreation and military personnel is to “encourage and support active education” and “active programs for religious worship, recreation . . .”³³ EPWs also are permitted to receive all letters, cards and parcels sent to him.³⁴ Furthermore, EPWs are not to be placed in confinement in excess of thirty days, even as a disciplinary measure.³⁵ The Kuwaiti Detainees’ declarations demonstrate that these Field Manual standards are not being implemented at Guantanamo.

Similarly, under the Field Manual, CIs are permitted visits by close relatives.³⁶ They are allowed freedom of worship, including attendance at services of their faith held within the internment facility.³⁷ They are also permitted, even encouraged, to engage in recreational and intellectual activities. The Field Manual provides that military personnel are to “[e]ncourage and support active participation in recreation activities to promote general health and welfare and to alleviate tension and boredom” of CIs,³⁸ and “encourage and support an active intellectual education program for CIs.”³⁹ Even a CI who is subject to confinement for pretrial, post-trial, or in connection with disciplinary or judicial proceedings is entitled to physical exercise and open

³¹ FM 3-19.40, Ch 4-64. *See also* AR 190-8, Ch 3-3(a)(3).

³² FM 3-19.40, Ch 4-61. *See also* AR 190-8, Ch 3-3(a)(3).

³³ FM 3-19.40, Ch 4-76. *See also* AR 190-8, Ch 3-3(a)(4), Ch 3-4(d).

³⁴ FM 3-19.40, Ch 4-71. *See also* AR 190-8, Ch 3-3(a)(6), Ch 3-5(a), Ch 3-5(k).

³⁵ FM 3-19.40, Ch 4-60. *See also* AR 190-8, Ch 3-7(e)(5).

³⁶ FM 3-19.40, Ch 5-61. *See also* AR 190-8, Ch 6-7(b)(2).

³⁷ FM 3-19.40, Ch 5-60. *See also* AR 190-8, Ch 6-7(d)(1).

³⁸ FM 3-19.40, Ch 5-63. *See also* AR 190-8, Ch 6-7(a)(1)-(2).

³⁹ FM 3-19.40, Ch 5-59. *See also* AR 190-8, Ch 6-7(c).

air two hours per day, enough food to maintain his health, spiritual assistance, hygienic living conditions, adequate bedding, and the supplies and facilities necessary to maintain personal cleanliness.⁴⁰ In addition, a confined CI may still receive letters and telegrams, attend daily sick call, and receive medical attention if necessary.⁴¹ These standards are not being implemented at Guantanamo, either.

Finally, the grant of the requested preliminary injunctive relief also is consistent with and, indeed, promotes the public interest. For the purpose of deciding whether to grant injunctive relief, “the public may be deemed to have an overriding interest in assuring that the government remains within the limit of its constitutional authority.” *Nat’l Treasury Employees Union v. U.S. Dept. of Treasury*, 838 F. Supp. at 640; *see AFGE v. Sullivan*, 744 F. Supp. at 298-99 (preliminary injunction against unconstitutional government drug-testing program is consistent with “the public interest in careful evaluation and protection of fundamental constitutional interests”). Thus, there is overwhelming public interest in preventing the government from continuing to behave in a manner that violates the Constitution and the Third Geneva Convention and contradicts civilized nations’ principles of decency and humanity.

IV. If Necessary, the Court Should Modify its Stay to Consider and Resolve This Motion.

Although the Court, in its Order Granting in Part and Denying in Part Respondents’ Motion for Certification of January 31, 2005 Orders and for Stay dated February 3, 2005, ordered that the proceedings in this and ten other Guantanamo Bay cases are stayed for all purposes pending resolution of all appeals, this stay should not preclude the Court from considering and granting the Kuwaiti Detainees’ motion for a preliminary injunction. This

⁴⁰ FM 3-19.40, Ch 5-45. *See also* AR 190-8, Ch 6-11(b).

⁴¹ FM 3-19.40, Ch 5-45. *See also* AR 190-8, Ch 6-12(h).

motion is directed not 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. The Court's consideration and resolution of the motion will have no impact on any appeals from that Opinion and Order.

In any event, the Court is fully empowered to modify the stay for the purpose of considering and resolving the Kuwaiti Detainees' motion for a preliminary injunction. As the Court has held, "the same court that imposes a stay of litigation has the inherent power and discretion to lift the stay," especially where circumstances are such that maintenance of the stay is "inappropriate." *Marsh v. Johnson*, 263 F. Supp. 2d 49, 52 (D.D.C. 2003). The circumstances here are such that the Court should exercise its discretion to modify the stay to consider and resolve the Kuwaiti Detainees' motion for a preliminary injunction.

CONCLUSION

For these reasons the Court should enter the accompanying order enjoining the government from refusing immediately to apply the standards in Army Regulation 190-8 and the Army Field Manual to the confinement of the Kuwaiti Detainees at Guantanamo, pending final adjudication of the Kuwaiti Detainees' challenge to the living conditions at Guantanamo.

Respectfully submitted,

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