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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

REPLY TO DEFENDANTS-RESPONDENTS' OPPOSITION TO MOTION FOR A PRELIMINARY INJUNCTION, PROVISIONAL MOTION TO MODIFY STAY PE NDING APPEALS, AND MOTION FOR LEAVE TO FILE A SECOND AMENDED COMPLAINT

Introduction and Summary

As described in the Kuwaiti Detainees' declarations, the conditions in which they live fall far below the standards for convicted criminals. Indeed, they fall below ***any*** established domestic or international standards for any category of prisoner or detained person – convicted criminals, charged individuals, or military detainees. This showing of irreparable injury is sufficient to warrant the limited injunctive relief the Kuwaiti Detainees seek.

The Kuwaiti Detainees have moved for a preliminary injunction that would require the U.S. military to apply to them the minimal standards of humane conditions of confinement, pending resolution of their claim for broader rights. The basis for the motion is that the Kuwaiti Detainees are suffering irreparable injury due to the inhumane living conditions at Guantanamo, they are likely to succeed on the merits, the public interest favors decent treatment of detainees held without charge, and the grant of injunctive relief will not harm the government.

Remarkably, the government, in its 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 ("Opp."), does not contest (although it tries to belittle) the Kuwaiti Detainees' declarations of severe mistreatment. Instead, the government devotes nearly half the Opposition to door-closing arguments, contending that the Court should not consider the Kuwaiti Detainees' motion because of Judge Green's stay order of February 3, 2005. With particular disingenuity, the government claims this Court has "already twice denied" the Kuwaiti Detainees' request for preliminary injunctive relief. Opp. at 7. Predictably, the government also charges that, by asking the Court to order the military to apply its own detention regulations at Guantanamo, the Kuwaiti Detainees seek to have the Court "assum[e] responsibility over the entire detention center" and "delve into the day-to-day workings of GTMO and regularly second-guess the Military." *Id*. at 26, 29. And although the government has never filed an answer to the Kuwaiti Detainees' original or first amended complaint, it also opposes the Kuwaiti Detainees' related motion for leave to file a second amended complaint on the incredible proposition that the claim the Kuwaiti Detainees propose to add – a challenge to "the lawfulness of the detainees' conditions of confinement" – would "open up a new and radically burdensome front in this litigation." *Id*. at 30.

As the Kuwaiti Detainees will demonstrate, the government's arguments do not withstand scrutiny. First, the stay entered by Judge Green pending appeals from her Order of January 31, 2005, in this and ten other Guantanamo Bay cases is no impediment to the Court's power to consider and grant injunctive relief to the Kuwaiti Detainees to prevent irreparable injury. As Judge Huvelle has observed, Judge Green's stay order was "intended to save time, money, and judicial resources, but 'could not be read to also deprive Petitioners of their rights to seek

emergency assistance …'" *Kurnaz v. Bush*, Civil No. 04-cv-1135 (ESH) (D.D.C. Apr. 12, 2005). Thus, despite Judge Green's stay order, two other Judges of this Court in the past three weeks have granted preliminary injunctive relief to detainees at Guantanamo who claimed they faced irreparable injury as a result of threatened transfers to foreign countries. Contrary to the government's assertion, this Court has ***never*** considered the Kuwaiti Detainees' request for injunctive relief from the inhumane living conditions under which they are confined, and its present consideration of that request may proceed independent of the issues now on appeal.

Second, the grant of the preliminary injunction sought by the Kuwaiti Detainees will not result in micro-management of the detention facilities at Guantanamo by this Court because the Kuwaiti Detainees do not seek judicial review of the military's day-to-day implementation of its detention regulations. Rather, the Kuwaiti Detainees simply seek to have the military apply those regulations at Guantanamo. The Kuwaiti Detainees fully expect that, once ordered to do so, the military will implement those regulations appropriately and without the need for judicial intervention or oversight.

Finally, the Kuwaiti Detainees should be granted leave to add claims challenging their inhumane living conditions. Such claims are cognizable both in habeas and under *Bivens*. The only reason they were not included in the original or first amended complaint is that the Kuwaiti Detainees had no access to counsel at that time and, therefore, no means of informing counsel about the inhumane conditions of their confinement. The addition of such claims imposes no greater litigation burden on the government than it already bears as a result of its unlawful detention of the Kuwaiti Detainees.

ARGUMENT

I. The Stay Entered by Judge Green Does Not Deprive the Court of the Power to Prevent Irreparable Injury and Grant Emergency Relief to the Kuwaiti Detainees

Contrary to the government's argument (Opp. at 7-11), the Court should not summarily deny the Kuwaiti Detainees' motion because of the stay entered by Judge Green in this case and ten other Guantanamo Bay cases on February 3, 2005, pending appeals from her Order of January 31, 2005. Judge Green's stay order does not give the government a free hand to inflict irreparable injury upon the detainees while the appeals wind their way through the higher courts. Judge Huvelle explained this well: "The stay entered by Judge Green does not bar the Court's consideration of Kurnaz's motion for injunctive relief. As noted by Judge Collyer [who granted a temporary restraining order in another case despite the stay], the stay was intended to save time, money, and judicial resources, but 'could not be read to also deprive Petitioners of their rights to seek emergency assistance when faced with continued detention at the request of the United States but no venue in which to challenge its legality.'" *Kurnaz v. Bush*, Civil No. 04-cv-1135 (ESH) (D.D.C. Apr. 12, 2005). Similarly, in *Al-Shiry v. Bush*, Civil No. 05-cv-0490 (PLF) (D.D.C. Mar. 23, 2005), which was filed after Judge Green entered her stay order, Judge Friedman granted a virtually identical stay but made clear that it would not "bar the filing or disposition of any motion for emergency relief . . . ."

Other Judges of this Court presiding over Guantanamo Bay cases have ruled that the stay order entered by Judge Green is no bar to their power to grant preliminary injunctive relief to prevent irreparable injury. In the past three weeks Judges Kennedy and Kessler have granted preliminary injunctive relief to detainees who alleged they faced irreparable injury because of their threatened transfer to foreign countries, despite Judge Green's stay order. *Al Joudi v. Bush*, Civil No. 05-cv-301 (GK) (D.D.C. Apr. 4, 2005); *Al-Mohammed v. Bush*, Civil No. 05-cv-247 (HHK) (D.D.C. Mar. 30, 2005); *Al-Marri v. Bush*, Civil No. 04-cv-2035 (GK) (D.D.C. Apr. 4, 2005); *Abdah v. Bush*, Civil No. 04-cv-1254 (HHK) (D.D.C. Mar. 29, 2005). Judges Roberts

and Huvelle granted the identical relief in other Guantanamo Bay cases despite Judge Green's stay order and then denied the underlying motions for preliminary injunctive relief as moot. *Kurnaz v. Bush*, Civil No. 04-cv-1135 (ESH) (D.D.C. Apr. 12, 2005); *El Banna v. Bush*, Civil No. 04-cv-1144 (RWR) (D.D.C. Apr. 8, 2005). In granting this relief to prevent irreparable injury to the detainees at Guantanamo, those four Judges rejected the government's arguments that such relief impermissibly intruded on the foreign policy prerogatives of the Executive Branch, arguments that are not even available to the government on the Kuwaiti Detainees' present motion.

Moreover, all the Judges of this Court who are presiding over Guantanamo Bay cases have the inherent authority to modify the stay entered by Judge Green. *Marsh v. Johnson*, 263 F. Supp. 2d 49, 52 (D.D.C. 2003). Such action is particularly compelling where, as here, "circumstances have changed such that the court's reasons for imposing the stay no longer exist or inappropriate." *Id*. Thus, in *El Banna v. Bush*, Civil No. 04-cv-144 (RWR) (D.D.C. Apr. 8, 2005) Judge Roberts expressly modified Judge Green's stay order to allow detainees to "seek emergency relief from [the] court" should they find it necessary to do so.[1]

It is simply not true, as the government claims, that the Court has "twice denied" requests by the Kuwaiti Detainees for the preliminary injunctive relief they seek and that they now are attempting a "third bite at the apple." Opp. at 7. In her Order of January 31, 2005, before she entered her stay, Judge Green directed the parties in the 11 Guantanamo Bay cases over which she presided to file briefs outlining how they expected their cases to proceed in light of that

[1] In transferring this case and 12 other Guantanamo Bay cases to Judge Green for coordination, the Court's Executive Committee provided that "[a] Judge who does not agree with any substantive decision reached [by Judge Green] . . . may resolve the issue in his or her own case as he or she deems appropriate." Resolution of the Executive Committee of the United States District Court for the District of Columbia (D.D.C. Sept. 15, 2004). This confirms the Court's authority to review *de novo* Judge Green's stay order and modify the stay to prevent irreparable injury to the Kuwaiti Detainees by granting preliminary injunctive relief.

Order. The detainees in those 11 cases, including the Kuwaiti Detainees, filed a Joint Submission Regarding How These Cases Should Proceed in compliance with that order.[2] They mentioned in that submission that they intended to challenge the inhumane conditions of confinement at Guantanamo. But neither the Kuwaiti Detainees nor any of the other detainees filed a motion at that time challenging those conditions or seeking injunctive relief.

A few days later, after Judge Green entered her stay order of February 3, 2005, without affording the detainees a prior opportunity to be heard, the detainees filed a motion for reconsideration. In that motion the detainees argued that, unless the stay were modified, it could be interpreted to prevent them from, among other things, filing a motion to challenge the inhumane conditions of confinement at Guantanamo and seeking injunctive relief. Again, neither the Kuwaiti Detainees nor any of the other detainees filed such a motion at that time. Consequently, Judge Green's denial of the motion for reconsideration was not a denial of any motion for injunctive relief to protect the Kuwaiti Detainees from irreparable injury caused by the inhumane living conditions at Guantanamo.[3] The present motion is the first such motion to be presented to the Court for consideration and disposition.

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[2] The government ignored this order and did not file such a brief. Instead, it sought a stay pending appeal.

[3] Noting that the declarations supporting the Kuwaiti Detainees' motion for preliminary injunction are dated January 28 and January 29, 2005, the government claims that the Kuwaiti Detainees "were in possession" of the information about inhumane treatment in those declarations when they moved for reconsideration and that the description of inhumane treatment in the motion for reconsideration is "identical" to the information in the declarations. Opp. at 8-9 n. 7. Therefore, the government argues that Judge Green "knew of and rejected the very same arguments that petitioners are now pressing here." *Id*. However, the declarations were executed by the Kuwaiti Detainees at Guantanamo. As a result, they were deemed classified and could not be removed by counsel for the Kuwaiti Detainees from Guantanamo. Instead, they were mailed by U.S. military personnel to the secure facility in Crystal City, Virginia, and did not arrive there until February 17, 2005, two weeks *after* Judge Green considered and denied the motion for reconsideration. Furthermore, the declarations were not cleared as unclassified by the "privilege team" and rendered fit for unsealed filing until at least seven days later. Thus, contrary to the government's claim, the Kuwaiti Detainees were not "in possession" of the detailed information in the declarations when they moved for reconsideration and Judge Green was unaware of it when she denied that motion.

Therefore, the Court clearly has the power to protect the Kuwaiti Detainees from irreparable injury by granting them preliminary injunctive relief. Given the immediacy and magnitude of the irreparable injury the Kuwaiti Detainees are suffering as a result of their inhumane living conditions, it is appropriate that the Court exercise this power.

II. Consideration and Grant of Preliminary Injunctive Relief is Not Precluded by the Court of Appeals' Review of Judge Green's Order of January 31, 2005

There is no merit to the government's argument that the Court should deny the Kuwaiti Detainees' motion for preliminary injunction because the legal basis for their claims is on appeal to the District of Columbia Circuit from Judge Green's Order of January 31, 2005. Opp. at 11. First, to the extent the Kuwaiti Detainees' motion rests in part on Judge Green's ruling that they have enforceable rights under the Fifth Amendment and the Geneva Conventions, that ruling is binding during the pendency of the government's appeal. Second, as the government itself contends, the issue of the conditions of confinement raised by the Kuwaiti Detainees in their present motion is distinct from the issues of the lawfulness of detention resolved by Judge Green. Thus, the issue of conditions of confinement is not before and will not be resolved by the District of Columbia Circuit on the government's appeal from Judge Green's ruling. Therefore, there is no reason for this Court to abstain from ruling on that issue on the Kuwaiti Detainees' motion.

1. Judge Green held that the detainees at Guantanamo have enforceable rights under the Fifth Amendment and the Third Geneva Convention.[4] *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 465, 478-80 (D.D.C. 2005), *appeals pending*. Although the government has appealed this holding, the law is settled that "the pendency of an appeal does not diminish the *res*

[4] The government contends that Judge Green's ruling on the Third Geneva Convention does not apply to the Kuwaiti Detainees because they "had not asserted claims under the Conventions," citing *In re Guantanamo*, 355 F. Supp. 2d at 478. Opp. at 19. That reference in Judge Green's order is incorrect. The Kuwaiti Detainees consistently have asserted claims under the Geneva Conventions.

judicata effect of a judgment rendered by a federal court." *Hunt v. Liberty Lobby, Inc*., 707 F.2d 1493, 1497 (D.C. Cir. 1983). Therefore, unless and until Judge Green's holding is overturned, the law of the case is that the Kuwaiti Detainees have enforceable rights under the Fifth Amendment and the Third Geneva Convention. To the extent the Kuwaiti Detainees' present motion is based on their contention that, given Judge Green's ruling, they are likely to succeed on the merits of their conditions of confinement claim, the motion is unaffected by the government's appeal from Judge Green's holding.

2. The government repeatedly argues that the issue of conditions of confinement raised by the Kuwaiti Detainees on their present motion is distinct from the issues of lawfulness of detention considered and resolved by Judge Green. Opp. 12-16. Specifically, the government maintains that Judge Green's holding that, with regard to the lawfulness of their detention, the detainees have rights to procedural due process and fundamental fairness under the Fifth Amendment and Third Geneva Convention may have no bearing on their claim, with regard to the conditions of their confinement, that they have substantive rights under the Fifth Amendment and the Third Geneva Convention. *Id*. at 16-20. The government then contends that its appeal from Judge Green's Order of January 31, 2005, will provide "guidance" on the "unsettled" issue of the detainees' substantive rights under the Fifth Amendment and Geneva Conventions, and that, as a result, this Court should stay its hand pending the outcome of the government's appeal. *Id*. at 16.

However, the government cannot have it both ways. If, as the government maintains, Judge Green's ruling on the detainees' rights under the Fifth Amendment and Geneva Conventions has no bearing on the issue of conditions of confinement raised by the Kuwaiti Detainees in their present motion, the government's appeal from that ruling similarly has no

bearing on that issue. In that case, there is no reason for this Court to stay its hand on the Kuwaiti Detainees' motion pending the government's appeal.

That the law on conditions of confinement may be "unsettled" (Opp. at 16) is no reason for this Court to avoid addressing the issue.[5] After all, one of the important functions of the courts is to address and resolve previously "unsettled" issues. The government's speculation that the District of Columbia Circuit's decision on the government's appeal from Judge Green's Order of January 31, 2005, will provide this Court with "guidance" on the issue of the conditions of confinement is an insufficient reason to deny the motion, especially in the face of the Kuwaiti Detainees' detailed demonstration of the irreparable injury they are suffering.

III. The Kuwaiti Detainees Have Demonstrated Irreparable Injury

Without challenging the veracity of any of the Kuwaiti Detainees who submitted declarations to the Court detailing their severe mistreatment and abuse at the hands of their captors at Guantanamo, the government belittles the declarations and argues that the Kuwaiti Detainees have "failed to substantiate" that their living conditions are "so deplorable" as to warrant the injunctive relief they seek. Opp. at 20-22. The government claims the declarations "lack specificity in details, dates and times," and "are otherwise too conclusory." *Id*. at 20-21. For example, the government chides one detainee who described an ongoing and untreated problem with hemorrhoids for failing "to specify when, during the period of his confinement, he requested treatment," and "what medicines were provided to him." *Id*. at 21. It characterizes the "bulk" of the declarations as consisting of complaints about mere "inconveniences." *Id*.

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[5] The government claims it is unsettled because the Kuwaiti detainees are neither convicted nor charged and, therefore, the Eight and Fifth Amendment standards do not apply to them. Opp. at 15. That is patently absurd logic. The fact that they are neither convicted criminals nor charged with a crime shows the need for a higher standard of treatment, not a lower one. In the very least, these detainees should have no worse treatment than convicted mass murderers or serial rapists.

This section of the government's Opposition reeks of arrogance and suggests its authors have never set foot in Guantanamo or seen, as the Kuwaiti Detainees' counsel have seen, the truly deplorable conditions of the Kuwaiti Detainees' confinement. At great personal risk of retaliation from guards and interrogators, several Kuwaiti Detainees – who are not given newspapers, have no calendars, and have extremely limited access to their counsel – have vividly described as best they can a small fraction of the severe mistreatment and abuse they and their fellow detainees have suffered daily for more than three years, even though they have never been charged with wrongdoing. The government presumably has records about each of the Kuwaiti Detainees who submitted declarations in support of the Kuwaiti Detainees' motion for preliminary injunction. Yet the government has not submitted counter declarations disproving a single fact the declarants have averred. Instead, the government relies on generalized statements by two military personnel and articles by its press flack about the facilities at Guantanamo and about how things are ***supposed*** to operate there. Opp. at 23-25.

As described in the Kuwaiti Detainees' declarations, the living conditions at Guantanamo fall far below the standards for convicted criminals. Indeed, they fall below ***any*** established domestic or international standards for any category of prisoner or detained person – convicted criminals, charged individuals, or, as set forth in Army Regulation 190-8 and the Army Field Manual, military detainees. This showing of irreparable injury is sufficient to warrant the limited injunctive relief the Kuwaiti Detainees seek.

IV. The Grant of a Preliminary Injunction Will Not Enmesh the Court In the Day-to-Day Operations of the Detention Facilities at Guantanamo

The government trots out a 'parade of horribles' to dissuade the Court from granting the modest preliminary injunctive relief the Kuwaiti Detainees seek. Opp. at 26-30. Using its most overblown rhetoric, the government imagines that the Kuwaiti Detainees "seek to challenge

everything from the type of disinfectant used to clean the detainees' cells to the quality of the air conditioners," and that their "goal" is "to place GTMO into some type of judicial receivership." *Id*. at 26. But the government's effort to frighten the Court should not succeed in allowing it to escape its obligation to provide humane conditions of confinement for those it detains without charge.

The Kuwaiti Detainees are not challenging the ***substance*** of the military's detention regulations at Guantanamo. Rather, they are challenging the ***absence*** of such regulations. The Kuwaiti Detainees are asking the Court to order the military to fill the regulatory vacuum at Guantanamo with Army Regulation 190-8 and the Army Field Manual. Contrary to the government's assertion (Opp. at 28), such an order would be neither "too general" nor "amorphous." It would simply direct the military to treat the detainees at Guantanamo exactly the same way it has treated other military detainees for years without difficulty. The government has not offered any reason why the military could not or should not implement its time-tested detention regulations at Guantanamo. The Kuwaiti Detainees are confident that, once the military is ordered to do so, it will faithfully obey that order. Such obedience will pretermit judicial oversight and judicial intervention in the day-to-day operations at Guantanamo.

Furthermore, the fact that Guantanamo is a military detention center does not excuse the Court from ensuring that the military's treatment of the Kuwaiti Detainees is within lawful bounds. *See Rhodes v. Chapman*, 452 U.S. 337, 362 (1981) (although deference to prison administrators is desirable, courts must step in when necessary); *Bell v. Wolfish*, 441 U.S. 520, 562 (1979) (concluding that courts have largely discarded the "hands-off" approach to prison administration and waded into this complex arena when oversight is appropriate); *United States v. United States District Court (Keith)*, 407 U.S. 297, 320 (1972) ("[w]e cannot accept the

Government's argument that internal security matters are too subtle and complex for judicial evaluation."); *Campbell v. McGruder*, 580 F.2d 521, 552 (D.C. Cir. 1978) (requiring district court to evaluate administration of jail in order to protect rights of pretrial detainees).

Guantanamo is not a law-free zone. As William H. Taft, IV, the former legal counsel to the Department of State, recently remarked:

> Nor is it tenable after the Supreme Court's rulings last summer to assert that detainees have no legal rights of any kind, that they may not contest with the assistance of competent counsel of their own choosing the legal basis of their detention, that the government has complete discretion to determine the conditions of their detention, or that whether they are treated humanely or not is a question only of policy. How our government treats people should never, at bottom, be a matter of policy, but a matter of law.[6]

V. The Kuwaiti Detainees Should be Allowed to File a Second Amended Complaint

The government has failed to demonstrate it would be unjust to grant the Kuwaiti Detainees leave to file their proposed second amended complaint. *See* Fed. R. Civ. P. 15(a). Although, as the government observes (Opp. at 30), the Kuwaiti Detainees' proposed claims about the conditions of their confinement are "new," the only reason they were not included in the Kuwaiti Detainees' original and first amended complaint is that the Kuwaiti Detainees had no access to counsel when those were filed two years ago and no means to inform counsel about the inhumane conditions of their confinement. As the Court recognized in its Order of October 20, 2004, holding that the Kuwaiti Detainees have a right to counsel and a right of access to counsel, the Kuwaiti Detainees cannot be expected to develop and present their claims to the Court by themselves. It follows that they should not be denied the opportunity to present claims to the Court that their counsel have only recently discovered.

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[6] William H. Taft, Keynote Address at The Geneva Conventions and the Rules of War in the Post-9/11 and Iraq World conference, Washington College of Law, American University (Mar. 24, 2005).

Although the government raises questions about whether the Kuwaiti Detainees' claims about the conditions of their confinement are cognizable in habeas (Opp. at 30-32), the government concedes they are cognizable as *Bivens*-type claims (*Id*. at 33). Accordingly, there is no legal bar to their consideration by the Court. Moreover, the government will not be prejudiced by the grant of leave to the Kuwaiti Detainees to file their proposed second amended complaint. As the Kuwaiti Detainees have established and contrary to the government's contention (Opp. at 34-35), consideration of the Kuwaiti Detainees' claims regarding the conditions of their confinement is not foreclosed by the government's pending appeal from Judge Green's Order of January 31, 2005. Nor are the Kuwaiti Detainees' claims regarding the conditions of their confinement "futile," as the government suggests (Opp. at 34-38). If anything, Judge Green's denial of the government's motion to dismiss the Kuwaiti Detainees' Fifth Amendment and Geneva Convention claims portends success for the Kuwaiti Detainees on their conditions of confinement claims.

Finally, the government will not be prejudiced by the grant of leave to the Kuwaiti Detainees to file their proposed second amended complaint.[7] The government has not yet answered the Kuwaiti Detainees' original or first amended complaints. It will be no burden on the government to answer the second amended complaint.

[7] The government points out that, in the proposed second amended complaint, the Kuwaiti Detainees name a defendant who was not named in the original or first amended complaints. Opp. at 35. However, the government does not explain how it is prejudiced by this. The government also points out that, in the proposed second amended complaint, the Kuwaiti Detainees sue defendants in their individual capacities as well as their official capacities. Opp. at 35. However, in the proposed second amended complaint the Kuwaiti Detainees seek only injunctive relief. Such relief would run against the government, not against any individuals.

CONCLUSION

For these reasons and the reasons given in the Kuwaiti Detainees' opening memorandum, the Court should grant the Kuwaiti Detainees' motion for a preliminary injunction and motion for leave to file a second amended complaint and enter the proposed orders attached to those motions.

Respectfully submitted,

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