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

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

**MOTION FOR RECONSIDERATION OF**
**ORDER GRANTING STAY PENDING APPEAL**

Plaintiffs-petitioners Fawzi Khalid Abdullah Fahad Al Odah *et al*. (the "Kuwaiti Detainees"), move for reconsideration of the portion of the Court's Order of February 3, 2005, staying proceedings in this case "for all purposes pending resolution of all appeals in this matter" from the Court's Memorandum Opinion and Order of January 31, 2005. Defendants-respondents (the "government") did not "make out a clear case of hardship or inequity in being required to go forward" with the proceedings in this case pending appeal. *Landis v. North American Co.*, 299 U.S. 248, 255 (1936). Although the government claims that, if this case goes forward, the Executive's ability to perform its military duties may be compromised, the Supreme Court has unanimously rejected the argument that the Executive's participation in litigation that allegedly intrudes on its performance of core constitutionally-mandated functions warrants a stay of ongoing civil proceedings. *Clinton v. Jones*, 520 U.S. 681, 707-708 (1997). Therefore, the Court should vacate the stay it has granted.

Alternatively, the Court at least should modify its stay to prevent irreparable injury to the Kuwaiti Detainees during the pendency of any appeal. The Kuwaiti Detainees have been tortured by the government and the conditions of their confinement are inhumane. Accordingly,

the Court should modify its stay to permit the Kuwaiti Detainees, pending appeal, to seek and obtain relief from this Court to prevent ongoing torture and inhumane conditions of confinement. Furthermore, the Court should modify its stay to allow the Kuwaiti Detainees to proceed with the factual development of their cases. Otherwise, if the Court's Memorandum Opinion and Order of January 31, 2005, is affirmed on appeal, the time spent on appeal will be an irretrievable loss to the Kuwaiti Detainees, and their three-year quest for release from unlawful custody will be delayed unnecessarily and unjustifiably.

**ARGUMENT**

Congress has expressly provided that an application for interlocutory appeal under 28 U.S.C. § 1292(b) "shall *not* stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order" (emphasis added). Although "[t]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants," the party seeking a stay "must make out a clear case of hardship or inequity in being required to go forward, if there is even a fair possibility that the stay for which he prays will work damage to someone else." *Landis*, 299 U.S.at 254-255.

Thus, "[i]n deciding to stay proceedings indefinitely, a trial court must first identify a pressing need for the stay" and "then balance interests favoring a stay against interests frustrated by the action." *Cherokee Nation of Oklahoma v. United States*, 124 F.3d 1413, 1416 (Fed. Cir. 1997). "Where," as here, "a discretionary stay is proposed, something close to genuine necessity should be the mother of its invocation." *Coastal (Bermuda) Ltd. v. E.W. Saybolt & Co.*, 761 F.2d 198, 203 n. 6 (5th Cir. 1985). Because of "the court's paramount obligation to exercise jurisdiction timely in cases properly before it" (*Cherokee Nation*, *id.*), "'the right to proceed in

court should not be denied except under the most extreme circumstances.'" *GFL Advantage Fund, Ltd. v. Colkitt*, 216 F.R.D. 189, 193 (D.D.C. 2003).

As the Kuwaiti Detainees shall establish in the first part of this Argument, the government has not come close to making out "a clear case of hardship or inequity," a "pressing need," a "genuine necessity," or "extreme circumstances" that would justify the stay granted by the Court. If this case goes forward and results in the release of any of the Kuwaiti Detainees, the government will have a right of appeal. The government's obligation to participate in ongoing civil proceedings pending appeal of an adverse interlocutory decision is a routine obligation borne by the government and other litigants every day. Accordingly, on reconsideration the Court should vacate the stay it has granted.

Alternatively, as the Kuwaiti Detainees shall establish in the second part of this Argument, if the Court does not vacate the stay, it at least should modify the stay to prevent irreparable injury to the Kuwaiti Detainees pending appeal. Justice Cardozo wrote in *Landis* that, "[e]specially in cases of extraordinary public moment, the individual may be required to submit to delay not immoderate in extent and not oppressive in its consequences if the public welfare or convenience will thereby be promoted." 299 U.S. at 256. But the stay granted by the Court is both "oppressive in its consequences" – it prevents the Kuwaiti Detainees from seeking relief from ongoing torture and inhumane conditions of confinement – and "immoderate in extent" – it prevents the Kuwaiti Detainees from developing their cases factually and legally "pending resolution of all appeals in this matter." Accordingly, on reconsideration the Court at least should modify its stay.

**A. The Government Failed To Make The Requisite Showing For A Stay**

The government failed to satisfy the requirements for the indefinite stay pending interlocutory appeal granted by the Court. *See* Motion and Memorandum for Certification of January 31, 2005 Interlocutory Orders for Appeal Pursuant to 28 U.S.C. § 1292(b) and for Stay of Proceedings Pending Appeal ("Gov't Mot.") at 21-31. The government asserted that a stay is necessary to allay "separation of powers concerns." *See* Gov. Mot. at 22-25. However, each of the purported separation of powers concerns identified by the government involves judicial oversight of Executive Branch functions, and the government's stay motion was entirely premised on the perceived need to insulate the detentions at Guantanamo from judicial inquiry. The government did not meet its burden of showing that a stay was necessary on that premise.

The government thus claims that irreparable injury would result if courts undertake "evidentiary inquiry" into petitioners' claims, including their "allegations of mistreatment." Gov. Mot. at 23. Likewise, the government claims that irreparable injury would result from judicial "second-guessing as to the level of activity or association with potential terrorism" sufficient to classify petitioners as enemy combatants. *Id.* at 24. Finally, the government asserts that irreparable injury is likely because further proceedings in these cases might cause the Judiciary to "inject[] itself deeply into core military matters, including into methods of obtaining and using information about the enemy." *Id.* At bottom, the government's claims of irreparable harm amount to a simple attack on the role of the Judiciary, restating its longstanding argument that the courts have no business determining the lawfulness of petitioners' confinement.

But this attack does not remotely justify a stay of the proceedings in this case pending appeal. Judicial inquiry into the lawfulness of the Kuwaiti Detainees' imprisonment, standing alone, cannot inflict irreparable injury upon the government. Even if, as a result of that inquiry,

the Court should decide that the Kuwaiti Detainees have been unlawfully imprisoned and should be released, the government would have the right to appeal and to seek a stay of that release pending appeal. Although the government contends that continued judicial proceedings themselves, with attendant discovery and judicial examination, could result in the disclosure of national security information, warning ominously that judicial inquiry into petitioners' claims of torture could give "a surreptitious enemy . . . unprecedented insights into our interrogation methods" (Gov. Mot. at 23), such disclosures are prohibited by the Court's Amended Protective Order on pain of contempt and by federal law on pain of criminal prosecution. Plainly, this Court has the ability to ensure that classified information and other information vital to national security is not improperly disclosed. The stay granted by the Court is not necessary to prevent such information from falling into the wrong hands.

In any event, the Supreme Court already has rejected the arguments the government presses here. In *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2647-2648 (2004), as here, the government argued that its ability to conduct the war on terrorism would be irreparably harmed if enemy combatant determinations were subject to judicial proceedings consistent with due process. In holding that persons detained as enemy combatants "must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker," a plurality of the Justices unequivocally rejected the government's argument that such proceedings would undermine national security: "We think it unlikely that this basic process will have the dire impact on the central functions of warmaking that the Government forecasts." *Id.* at 2648, 2649. The plurality added: "We have no reason to doubt that courts faced with these sensitive matters will pay proper heed both to the matters of national security that might arise in an individual case and to the constitutional limitations safeguarding

essential liberties that remain vibrant even in times of security concerns." *Id*. at 2652. Given the Supreme Court's conclusion that it is "unlikely" that national security would be threatened by allowing alleged enemy combatants to challenge their detention in processes consistent with due process, the government's arguments for a stay do not withstand scrutiny.

Similarly, in *Clinton v. Jones* a unanimous Supreme Court was unpersuaded by the government's separation of powers arguments and decided that "interactions between the Judicial Branch and the Executive Branch, even quite burdensome interactions," do not require federal courts to stay civil proceedings against a sitting President. 520 U.S. at 702, 706-708. In holding that the district court abused its discretion by deferring a trial in that case until after the President left office, the Supreme Court observed: "Such a lengthy and categorical stay takes no account whatever of the respondent's interest in bringing the case to trial." *Id*. at 707. It added that "delaying trial would increase the danger of prejudice resulting from the loss of evidence, including the inability of witnesses to recall specific facts, or the possible death of a party." *Id*. at 707-708.

Moreover, the Court itself, in its Memorandum Opinion of January 31, 2005 ("Mem. Op."), rejected the government's claims of harm. The government argued in its motion to dismiss that separation of powers principles prohibit the Court from reviewing the government's definition of "enemy combatants" who are subject to indefinite detention. The Court disagreed and held the government adopted an overly broad definition of enemy "combatants" that would allow persons to be detained based on their associations with Al Qaida or the Taliban without any showing that they actively and directly supported armed conflict against the United States. *See* Mem. Op. at 59-68. Again, invoking separation of powers principles, the government now argues that judicial scrutiny of its definition of the category of "enemy combatant" causes

irreparable injury. *See* Gov. Mot. at 24 (arguing that irreparable harm results from "second-guessing of conclusions of the military as to the level of activity or association with potential terrorism and other combatant activities that warrants detention of an individual"). Having concluded that separation of powers principles do not bar the Court from assessing the scope of the term "enemy combatant," this Court should not conclude that such an assessment causes irreparable harm.

Finally, the government bases its claims of harm justifying a stay on unsupportable speculation, positing that, if these cases were to proceed, the Judiciary "would be injecting itself deeply into core military matters, including . . . into judgments about what is required to successfully disable and defeat the enemy." Gov. Mot. at 24. The government offers no explanation why further proceedings pursuant to this Court's order would involve any inquiry into such matters. The Kuwaiti Detainees have never sought to inquire into military judgments and, instead, simply seek to demonstrate that they are innocent civilians held by mistake. Nor is there anything in this Court's order that would require inquiry into military judgments. Even if there were a basis for believing that future proceedings in these cases could touch on matters of military judgments, there is no support, and the government offers none, for the apocalyptic speculation that such inquiry "implicates the safety of the Nation's troops and citizens, and those of coalition partners; it potentially damages the Executive's ability to obtain cooperation and information from other nations; and it ultimately impairs the military's ability to wage war successfully." *Id.* at 24-25. Such unsupported and unsupportable allegations of irreparable harm cannot form the basis of a stay.

In sum, the government has failed government to make out "a clear case of hardship or inequity," a "pressing need," a "genuine necessity," or "extreme circumstances" that would justify the stay granted by the Court. For that reason the stay should be vacated.

**B. Alternatively, The Court At Least Should Modify The Stay To Prevent Irreparable Injury To The Kuwaiti Detainees Pending Appeals**

If the Court does not vacate its stay, at the very least it should modify the stay to prevent irreparable injury to the Kuwaiti Detainees pending appeals. Specifically, the stay should be modified to enable the Kuwaiti Detainees to seek and obtain relief during the pendency of appeals from torture and inhumane living conditions and to pursue the factual development of their cases in Court.

The government has tortured, severely mistreated, abused the detainees at Guantanamo during the three years they have been confined there. FBI reports indicate torture and abuse of the detainees by interrogators and guards.[1] Published reports describe this abhorrent behavior and the extent to which it has been employed at the detention facility. These reports are not simply unsubstantiated allegations. As counsel's unclassified notes reflect, conversations with the Kuwaiti Detainees have confirmed the repeated torture, severe mistreatment, and abuse perpetrated on them by interrogators and guards at Guantanamo.

The Kuwaiti Detainees have been beaten, punched, kicked, hung from the wrists and beaten, stripped naked, hooded, and sexually taunted. Some of have been subjected to electric shocks and some have even been sodomized. The government cannot be free to continue these unlawful practices in the months and perhaps even years that will pass before the issues that this Court has certified for interlocutory appeal are finally resolved. There is no way to compensate for the abuses that the detainees, some of whom this Court has suggested may be innocent of all

[1] *See* Exhibits A – F of Petitioners' Motion for Leave to Take Discovery and for Preservation Order.

wrongdoing, have already suffered. At least the Court should not deny the Kuwaiti Detainees access to this Court to prevent these practices from continuing indefinitely during the pendency of appeals.

Similarly, the Kuwaiti Detainees at least should not be denied access to this Court pending appeals to challenge the inhumane conditions of detention under which they now live. Counsel have personally observed, and many of the Kuwaiti Detainees have prepared and signed declarations, confirming this inhumane treatment. The detainees at Guantanamo are confined all day and night in cells approximately 9.5 feet by 5.5 feet that are constantly lit, with little in the way of bedding. They are allowed almost no exercise and no opportunity to be outside of their cells, and most are kept in isolation without the opportunity to see or socialize with other detainees. They are allowed to shower three times a week for five minutes at a time. They are permitted *no reading material* except for the Qu'ran, and mail from the detainees' families has been withheld from them for unreasonable lengths of time and sometimes used as an interrogation tool. Many of the detainees have suffered serious medical problems, for which they have been denied treatment altogether or treated inadequately. Conditions such as these have caused the detainees to suffer inordinately, and the government should not be allowed to prolong their inhumane treatment of the detainees while appellate review of this Court's decision is pending.

Finally, the Kuwaiti Detainees should not be made to wait until any appeals are finally resolved, only then to start their cases all over again. This case now has been in Court since May of 2002. It has been more than seven months since the Supreme Court has decided the Kuwaiti Detainees have the right to pursue their claims in the federal courts. They should be allowed to pursue the factual development of their cases pending appeals. A hiatus in factual development

will irreparably injure the Kuwaiti Detainees. If the Court does not modify its stay and the Kuwaiti Detainees are denied the opportunity to pursue the factual development of their cases pending appeal, they will suffer the irretrievable loss of months or years of time proving that they have been unlawfully detained and should be released. Such impairment of their liberty interest should not be permitted to occur. *See Rafeedie v. INS*, 688 F.Supp. 729, 754 (D.D.C. 1988) (J. H. Green, J.), *aff'd in part and rev'd on other grounds*, 880 F.2d 506 (D.C. Cir. 1989).

**CONCLUSION**

For the foregoing reasons the Court, on reconsideration, should vacate its stay. Alternatively, the Court should modify the stay to allow the Kuwaiti Detainees to seek and obtain relief from torture, severe mistreatment, and abuse, and inhuman living conditions, and to pursue the factual development of their cases, pending appeals.

Respectfully submitted,

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