IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

	)	**Civil Action Nos.**
	)	**02-CV-0299 (CKK), 02-CV-00299 (CKK),**
	)	**02-CV-0828 (CKK), 02-CV-1130 (CKK),**
	)	**04-CV-1135 (ESH),**
***In re* Guantánamo Detainee Cases**	)	**04-CV-1136 (JDB), 04-CV-1137 (RMC),**
	)	**04-CV-1142 (RJL), 04-CV-1144 (RWR),**
	)	**04-CV-1164 (RBW), 04-CV-1166 (RJL)**
	)	**04-CV-1194 (HHK), 04-CV-1227 (RBW)**
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PROPOSED PROTECTIVE ORDER AND
JOINT REPORT ON PROTECTIVE ORDER ISSUES

Pursuant to the Court's Order of September 20, 2004, as supplemented by the Court's Order of October 12, 2004, counsel for Respondents and the undersigned Petitioners have reached agreement on the proposed protective order that is submitted herewith, subject to the Court's resolution of three substantial issues that remain in dispute. Other Petitioners agree that the Court should resolve these disputed issues but may desire to press other issues as well.

Number of Secure Areas

Petitioners' Position

1. Respondents propose to arrange for a "secure area" for the use of Petitioners' counsel. Protective Order ¶¶ 14, 20-27. Documents in these cases that contain classified information would be stored in this secure area and could be used by Petitioners' counsel only in this secure area. Petitioners' counsel would be required to prepare briefs and other pleadings that contain or may contain classified information in this secure area and would file all such briefs and pleadings with the Court through the Court Security Office.

2. Respondents propose to arrange for a single such secure area in Crystal City, Virginia. The Court should require Respondents to arrange for secure areas as well in the other

cities where counsel for Petitioners are located – New York, Boston, Chicago, and possibly Minneapolis. Counsel for 35 petitioners are located in or near New York; counsel for 6 Petitioners are located in Boston; counsel for 1 Petitioner are located in Chicago, and counsel for an unknown number of Petitioners are located in Minneapolis. Counsel for only 17 Petitioners are located in Washington, D.C.

3. Providing only a single secure area in Washington, D.C., would impose an unreasonable and unnecessary burden on out-of-town counsel and substantially hinder their representation of their clients, while the cost to the government of providing secure areas in other cities would be trivial. As the Court noted at the Hearing on October 13, 2004, most if not all of Petitioners' counsel are representing their clients without compensation or reimbursement of expenses. Out-of-town counsel should not be forced to bear the further costs of having to journey to, and arrange lodging in, the Washington area whenever they need access to classified information or need to prepare briefs or other substantive pleadings. Respondents should not be permitted to handicap Petitioners by imposing such costs and inconvenience on their counsel.

4. The expense and burden of arranging for a secure facility in another city is insignificant compared to the resources at Respondents' disposal. The budget of the Department of Defense, which would bear the cost of the secure areas, was **$418 billion** in 2004. The Congressional Budget Office estimates that the total cost of "Operation Enduring Freedom" – which covers the invasion of Afghanistan – will reach **$31.8 billion** by the end of 2004. And, according to the Washington Post, the detention camps and related operations at Guantanamo cost about **$118 million** a year and at least **$124.5 million** in construction contracts have been awarded.

5. The government routinely provides secure areas in federal courthouses where criminal cases involving classified information are prosecuted. It should have no difficulty providing such secure areas in connection with these cases, in which Petitioners stand in the position of criminal defendants. It is Petitioners' understanding that the elements required for a secure area are simply (1) a secure room, (2) a safe, (3) one or more secure laptops, and (4) a security officer to oversee the use of the secure room. In addition, because these cases are located in Washington, D.C., appropriately qualified couriers to carry classified materials to and from the secure areas in other cities. Space for a secure area would presumably be provided in the federal courthouses in New York, Boston, Chicago, and Minneapolis as an accommodation to this Court. It is Petitioners' understanding that secure areas already exist in those courthouses for purposes of pending criminal prosecutions, and that, if such areas were not available in federal courthouses in these cities, other facilities could be arranged.

Respondents' Position

6. The protective order as proposed by respondents contains provisions envisioning the creation of one secure facility in the Washington, D.C. area for storage of classified documents and use by petitioners' counsel during the course of this litigation. Petitioners' counsel seek to require the government to establish at least three or four additional secure facilities for use by petitioners' counsel in cities around the country. Petitioners' proposal should be rejected. Any such requirement for multiple secure facilities would impose tremendous logistical burdens and expense upon the government, and, at the very least, would require an unknown amount of time to carry out.

7. The simple fact of locating additional office space that is suitable for use by petitioners' counsel in the context of this case is a formidable task on its own. It has taken the

Department of Defense a number of weeks to locate and begin establishing appropriate space in the Washington, D.C., area, despite the fact that the Department occupies or has access to considerable office space in the area. Duplicating this task of establishing a secure facility in other cities away from the seat of government, where the Department may have less of a presence, would present an even greater logistical challenge. Such an undertaking could involve a number of burdens and challenges, all of which would be time-consuming. It could require obtaining leases on new office space, if such space could be identified. If space already being used by the Department of Defense or other agencies could be located, converting such space so as to provide appropriate privacy and other arrangements for use by petitioners' counsel could involve the displacement and relocation of any work or employees currently occupying the space, which might or might not be possible. Even if accessible space were located, the logistics, expense, and time to outfit the space appropriately, including with secure computers, secure copy machines, safes, and furniture, could be significant and burdensome. And this does not include the burden, expense, and time required to supply any staff, i.e., Court Security Officer designees, to manage the area (under the supervision of the Court Security Officers) and receive any classified materials delivered to the facilities.[1]

8. Even if any one problem identified above was not insurmountable, taken together the issues discussed present a logistical nightmare that could take significant time and resources to resolve appropriately. These cases have been filed in, or otherwise been assigned to the District

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[1] Such materials might include, for example, classified government filings in the case or classified materials delivered to the area from privilege team review or from Guantanamo Bay.

It is our understanding that a requirement for multiple secure areas will also present logistical problems for the Court Security Officers, such as ensuring the security of documents at multiple locations and potentially needing to travel to multiple cities in order to pick up or deliver classified filings.

Court for the District of Columbia, and this area is the most appropriate location for a secure facility. Any requirement for multiple secure facilities around the country would be unduly burdensome.

Information-Sharing Among Counsel

Petitioners' Position

9. Respondents propose, through the exercise of their "need to know" authority, *see* ¶¶ 17(a) and 29, that counsel for Petitioners in these cases not be allowed to share classified documents or information with one another. Counsel for the Abdah group of Petitioners, for example, could not exchange classified information with counsel for the Al Odah group of Petitioners. Petitioners request that the Court require such information-sharing among Petitioners' counsel to be allowed.

10. It is fundamentally unfair for Respondents, who have access to all classified information regarding all Petitioners, to prevent information-sharing among Petitioners' counsel. Suppose, for example, that Respondents seek to justify detaining Petitioner A on the basis of statements made by Petitioner B (which are themselves automatically classified until determined otherwise), and suppose further that counsel for Petitioner B has classified information proving that these statements were coerced. Counsel for Petitioner B plainly should be able to share that information with counsel for Petitioner A. No legitimate governmental interest justifies keeping counsel from discovering whether other counsel know of classified information that could be relevant to counsel's representation of his or her own client.

Respondents' Position

11. Petitioners take issue with language in the proposed protective order, see ¶ 29, that prohibits the disclosure of classified information learned by petitioners' counsel in one case to

counsel in separate cases brought by or on behalf of other Guantanamo Bay detainees. Such a provision is both necessary and appropriate. The granting of a security clearance to counsel does not automatically guarantee counsel access to any and all classified information he or she wishes to gain access to. Rather, as provided in Executive Order 12958, as amended, in order to be eligible to be granted access to classified information, a person must receive an appropriate security clearance, must sign an approved nondisclosure agreement, and must be determined to have a "need to know" the information to which he or she is given access. Executive Order 12958, as amended, Sec. 4.1(a).

12. In these cases, in which the government is voluntarily providing access to classified information to facilitate these challenges to the detention of enemy combatants, Petitioners' counsel have been determined to have a "need to know" only classified information regarding their particular, represented detainee(s) for the purposes of assessing the status of the detainee(s) as enemy combatant(s) subject to detention. Petitioners' counsel, however, do not have a need to know any and all classified information pertaining to detainees they do not represent simply because those other detainees are also litigating, in this Court, the propriety of their detention. The challenged provision, therefore, is reasonable.

13. In any event, control of access to classified information, including any "need to know" determination, is exclusively an Executive Branch function, committed to the broad discretion of the Executive in the exercise of its national security responsibilities. See Dep't of the Navy v. Egan, 484 U.S. 518, 526-30 (1988); Stehney v. Perry, 101 F.3d 925, 931-32 (3d Cir. 1996). The proposal of Petitioners' counsel, in essence, seeks improperly to shift the prerogative for any "need to know" determination from the Executive to Petitioners' counsel themselves, i.e., they wish to be able to determine that counsel in other of these cases have a need to know

information they have learned in their case and share that information with the other counsel. However, in the context of this case in which the government is voluntarily providing access to classified information for a specific purpose, a protective order cannot and should not displace the judgment of the Executive Branch in these matters.

Public Comment by Petitioners' Counsel

Petitioners' Position

14. Paragraph 33 specifies (in negative terms) that the proposed Protective Order bars Petitioners' counsel from citing or repeating information in the public domain if counsel knows the information is classified information or a classified document, or is derived from classified information or a classified document.

15. Once classified information is in the public domain, their counsel should be free to refer to and repeat such information, as long as such counsel do not confirm that the information is indeed classified. Suppose, for example, that the New York Times publishes what it describes as a classified document outlining torture of detainees at Guantanamo.[2] Under the proposed Protective Order, counsel for a Petitioner who knew that the document is indeed classified would be unable to call for a Congressional investigation on the basis of this press report or criticize government policy on the basis of the report. Such a prior restraint would be an unjustifiable abridgment of First Amendment rights.

16. It is no an answer to this objection that anything a Petitioner's counsel might say about the report would be viewed as confirming the authenticity of the document or the veracity of the information, or otherwise be treated as authoritative. Paragraph 33 applies, as it must,

[2] Cf. "Broad Use of Harsh Tactics Is Described at Cuba Base," New York Times, Oct. 17, 2004, at A!, available at http://www.nytimes.com/2004/10/17/politics/17 gitmo.html.

only to information that counsel knows to be classified. No member of the public could know, however, whether a Petitioner's counsel does know that particular information is classified. No one, therefore, could infer anything about the authenticity of the document or the reliability of the information from counsel's discussion of the report. The Court should not permit the government to gag Petitioners' counsel in this manner.

Respondents' Position

17. Respondents have proposed language in the protective order that limits petitioners' counsel from commenting on classified information known to counsel that may improperly become public, e.g., through publication in the media as the result of a leak or other unauthorized disclosure. See ¶ 33. This provision is entirely appropriate. As explained below, any comment by petitioners' counsel on information known to counsel to be classified or derived from classified information and not properly in the public domain would be potentially detrimental to national security interests.

18. The dangers of commenting on classified information not properly in the public domain by a person privy to classified information were clearly described by the Fourth Circuit in Knopf v. Colby, 509 F.2d 1362, 1369 (4th Cir. 1975):

> Rumors and speculations circulate and sometimes get into print. It is one thing for a reporter or author to speculate or guess that a thing may be so or even, quoting undisclosed sources, to say that it is so; it is quite another thing for one in a position to know of it officially to say that it is so. The reading public is accustomed to treating reports from uncertain sources as being of uncertain reliability, but it would not be inclined to discredit reports of sensitive information revealed by an official of the United States in a position to know of what he spoke. . . [S]ecurity of all official secrets would break down if speculative and unattributed reports were held to have removed all of their protection from them.

As indicated in Knopf, even if Petitioners' counsel were to avoid specifically addressing the truth or authenticity of reported information, any comment made would doubtless be accorded special

or unusual credibility given counsel's known access to classified information in these cases, which, in turn, could be interpreted as confirmation or denial of, or a comment on the authenticity of, the information. No matter the extent to which any comment by petitioners' counsel might be qualified or hedged, the association of the commenter with access to classified information in these cases inevitably will lead to such a result and, concomitantly, a potential threat to the security of the information at issue.

19. Petitioners' counsel are being given access to classified information that is unprecedented in the civil context; counsel likewise must be bound by the responsibilities that go along with such access to avoid real or perceived public comment on such information to the extent it is not properly placed in the public domain through an official or officially sanctioned disclosure.

CONCLUSION

For the foregoing reasons, Respondents and the undersigned Petitioners respectfully request that the Court approve the proposed Protective Order subject to the Court's resolution of the three disputed issues identified herein.

Respectfully submitted,

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