THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANTS' "RESPONSE TO COMPLAINT"

INTRODUCTION

To read the government's papers, one would never know that this case had just been to the Supreme Court of the United States, where the government made—and lost—virtually the same arguments it now recycles here.

On June 28, the Supreme Court rejected the government's argument that these plaintiffs, because they are aliens confined outside the United States, have no access to the U.S. courts. The Court held unequivocally that "[a]liens held at the [Guantanamo] base, no less than American citizens, are entitled to invoke the federal courts' authority under" the habeas statute to test the lawfulness of their detentions. *Rasul v. Bush*, 124 S. Ct. 2686, 2696 (2004).

Shortly after that decision was announced, the government assured this Court that it would allow these plaintiffs to meet and confer with counsel of their choice and would do so "as

quickly as possible."[1] After almost a month of delays and cancelled meetings, on order of this Court, the government last Friday filed a 30-page brief ("Gov't Brief"), together with an affidavit and appendix, setting out its "conditions" for allowing the plaintiffs to communicate with their lawyers.[2]

These are extraordinary documents. The government spends the first 26 pages of its brief arguing that, although these plaintiffs may have the right to go to court to challenge the basis for their imprisonment, they have no right to the assistance of counsel in doing so. The government argues that, because it is allowing them to communicate with lawyers only as a matter of grace, they must agree to whatever conditions on attorney-client communications the government wishes to impose. All of the rhetoric, strained logic and rehashing of old arguments with which the government regales this Court for 26 pages are far wide of the only issue now before the Court, which is these plaintiffs' right to have counsel of their choice represent them adequately in a *habeas corpus* proceeding that the Supreme Court held they are entitled to maintain. The Supreme Court clearly did not expect them to proceed before the courts *pro se*. Their right of access to the courts would be meaningless without access to effective representation by counsel.

The right of a *habeas* petitioner properly before the court to have the assistance of private counsel in presenting his or her case—and to have access to counsel for that purpose—was so obvious to the Supreme Court in the related *Hamdi* case that it spent all of 16 words on the subject, despite the government's laborious arguments to the contrary: "He [Hamdi] unquestionably has the right to access to counsel in connection with the proceedings on remand;" and those 16 words suffice to make all of the first 26 pages of the government's present

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1 Transcript (Tr.) of July 12 hearing at 10.

2 Despite filing a 30-page brief, and in disregard of this Court's Order of July 23, the government failed to address the "underlying" claims for habeas relief in plaintiffs' Amended Complaint.

submission irrelevant. *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2652 (plurality opinion of Justice O'Connor); *see id.* at 2660 (concurring opinion of Justice Souter).

There should be no mistake that the conditions the government has proposed—requiring *post hoc* "classification" reviews or actual "real time" monitoring of attorney-client conversations—would not only limit plaintiffs' access to counsel, they would destroy the possibility of effective representation. As Lawrence J. Fox states in his attached declaration, those proposals would "render the lawyer-client relationship meaningless."[3] Mr. Fox points out, citing Wigmore, that confidentiality of lawyer-client communications has been sacred under the common laws since the time of Elizabeth I.[4] As he concludes: "The right to access to the courts will be a meaningless one if these petitioners are not permitted to meet with their counsel under conditions that all lawyer-client conversations and meetings are cloaked with complete confidentiality."[5]

The government has demonstrated no necessity here for doing such fundamental damage to the attorney-client relationship that is essential for these plaintiffs to pursue the court proceedings that the Supreme Court has held they are entitled to maintain. In addition to being willing to obtain "top secret" security clearances, plaintiffs' counsel almost three weeks ago offered to commit not to disclose to any third party any information they obtained from their clients in this case without prior government approval or, if there was a disagreement, without approval of this Court. Such an agreement should fully address the government's national security concerns that the attorneys might be used as conduits for passing "coded messages" to

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[3] Declaration of Lawrence J. Fox ("Fox Decl."), ¶ 2 (Attachment A).

[4] Fox Decl., ¶ 16.

[5] Fox Decl., ¶ 8.

the outside world. Yet, the government has not even addressed that alternative anywhere in the papers it filed with this Court.

It is worth recalling that throughout our nation's history, and particularly in recent years, private counsel have represented individuals accused of disclosing to foreign powers the most sensitive U.S. military and intelligence secrets without having their client communications reviewed or monitored by the government. Indeed, that is the case at Guantanamo today. The government in its papers claims that three of the 12 plaintiffs in this case are "dangerous" people; it makes no such claim as to any of the others. But none of the plaintiffs, all of whom have been held *incommunicado* at Guantanamo for more than two and a half years and interrogated constantly by the government, has been designated under the President's Military Order as a person whom the government has "reason to believe" supported terrorism or hostile acts against the United States, and none has been charged with any crime.[6] Fifteen others at Guantanamo have been so designated by the government, and four have been charged with crimes. All of those designated and charged have been allowed to meet and communicate with counsel including, at least in one case, counsel from their home country, and those communications have not been reviewed or monitored by the government. There is simply no valid basis for imposing those restrictions on the plaintiffs in this case, denying them effective representation by counsel and the meaningful access to the courts to which the Supreme Court ruled they are entitled.

STATEMENT OF FACTS

Plaintiffs have been imprisoned at the Guantanamo Bay Naval Base since January of 2002. They have been held incommunicado without access to their families or counsel or to the courts. They allege that they are innocent of any wrongdoing, have not participated in terrorism

[6] Military Order of Nov. 13, 2001, 66 F.R. 57,833 (Nov. 16, 2001).

or any hostile acts against the United States and were wrongly taken into custody by Pakistani and Afghani tribes people who were paid substantial financial bounties for every Arab they turned in.

While they have been at Guantanamo, they have apparently been subjected to constant interrogation. The government has acknowledged using interrogation techniques specifically designed to break the detainees' will and make them feel helpless and completely dependent on their captors. *See* Pentagon Working Group Report on Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historical, Policy, and Operational Considerations, 65 (Apr. 4, 2003).[7] Interrogation techniques approved for use at Guantanamo include isolation (up to 30 days), 28-hour interrogations, extreme and prolonged stress positions, sleep deprivation, sensory assaults, removal of clothing, hooding, and the use of dogs to create anxiety just short of terror. *See* Action Memo from William J. Haynes II, General Counsel, Department of Defense, to Secretary of Defense (Nov. 27, 2002); Pentagon Working Group Report at 62-65. At least 17 interrogation techniques authorized for use at Guantanamo go beyond those permitted by the Army Interrogation Manual. *See* Memorandum from the Secretary of Defense to the Commander, U.S. Southern Command (April 16, 2004); Action Memo from William J. Haynes II, General Counsel, Department of Defense to Secretary of Defense (December 2, 2002).[8]

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[7] All of the government memoranda cited in this paragraph are available at http://www.washingtonpost.com/wp-dyn/articles/A62516-2004Jun22.html.

[8] In approving these interrogation techniques, the government apparently relied on the legal conclusions of the White House Counsel, the Department of Justice, and the Department of Defense. *See* Memorandum from Jay S. Bybee, Assistant Attorney General, to Alberto R. Gonzales, Counsel to the President, and William J. Haynes II, General Counsel of the Department of Defense (January 22, 2002) (concluding that the Geneva Conventions do not apply to the conflict in Afghanistan and that U.S. officials cannot be charged with war crimes for interrogation methods used on al Qaida or Taliban detainees; further concluding that the President's constitutional authority to manage a military campaign relieves him of strictures posed by anti-torture laws); Memorandum from U.S. Department of Justice, Office of Legal Counsel, to Alberto R. Gonzales, Counsel to the President (Aug. 1, 2002) (concluding that "for an act to

Despite the length of their imprisonment, and the number and methods of interrogations to which they have been subjected, none of the plaintiffs has ever been designated by the government under the President's Military Order as a person whom the government has "reason to believe" was involved with terrorism or other hostile acts against the United States. None has been charged with any crime.[9]

Plaintiffs filed this case on May 1, 2002, invoking the court's jurisdiction under 28 U.S.C.§ 1331 and 1350, among other statutory bases, and asserting causes of action under the Administrative Procedure Act, the Alien Torts Statute and the general federal habeas corpus statute. The government moved to dismiss arguing, primarily on the basis of *Johnson v. Eisentrager*, 339 U.S. 763 (1950), that as aliens detained outside the sovereign territory of the

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constitute torture … it must inflict pain that is difficult to endure … [it] must be equivalent in intensity to the pain accompanying serious physician injury, such as organ failure, impairment of bodily function, or even death. For purely mental pain or suffering to amount to torture … it must result in significant psychological harm of significant duration, e.g. lasting months or even years").

[9] It has now become clear that many of those held at Guantanamo have no connection to terrorism. *See* Tim Golden and Don Van Natta, Jr., *U.S. Said to Overstate Value of Guantanamo Detainees*, *N.Y. Times*, Jun. 21, 2004 (stating that "[o]fficials of the Department of Defense now acknowledge that the military's initial screening of the prisoners for possible shipment to Guantanamo was flawed"); *id.* (citing a 2002 report by a "senior CIA analyst" that concluded that "a substantial number of the detainees appeared to be either low-level militants . . . or simply innocents in the wrong place at the wrong time"); *Frontline: Son of Al Qaeda* (PBS television broadcast, Apr. 11, 2004), transcript available at http://www.pbs.org/wgbh/pages/frontline/shows/khadr/interviews/khadr.html (quoting CIA operative who had spent a year undercover at Guantanamo as estimating that "only like 10 percent of the people that are really dangerous, that should be there and the rest are people that don't have anything to do with it, don't even, don't even understand what they're doing here").

And, while the government asserts in its brief to this Court that Guantanamo "enables the military to gather vital intelligence," *see* Gov't. Brief, pp. 18, that assertion has been called into question by senior military officials, including Steve Rodriguez, the Head of Interrogations at Guantanamo. *See Peter Jennings Reporting: Guantanamo*, (ABC television broadcast, June 25, 2004) (quoting Mr. Rodriguez as stating that only "20, 30, 40, maybe even 50 [of the Guantanamo detainees] are providing critical information today"); *id.* (quoting Lt. Col. Anthony Christino as stating that there is a continuing intelligence value . . . for [s]omewhere around a few dozen, a score at the most" of the Guantanamo detainees). *See* http://abcnews.go.com/2020/2020_guantanamo_040625_1.html.

United States, the plaintiffs have no access to the U.S. courts to contest their detentions. This Court granted that motion on July 30, 2002 and the Court of Appeals affirmed on March 11, 2003.

The Supreme Court granted certiorari and, on June 28, 2004, reversed. In doing so, the Court emphasized the critical role that the writ of habeas corpus has played in our common law heritage:

> Habeas corpus is . . . "a writ antecedent to statute, . . . throwing its root deep into the genius of our common law." . . . . The writ appeared in English law several centuries ago, became "an integral part of our common-law heritage" by the time the Colonies achieved independence, . . . and received explicit recognition in the Constitution . . . .

124 S. Ct. at 2692. The Court held that the *Eisentrager* decision was not controlling and that these plaintiffs, "[a]liens held at the [Guantanamo] Base, no less than American citizens, are entitled to invoke the federal courts' authority under" the habeas statute. *Id.* at 2696.

ARGUMENT

I. Plaintiffs Clearly Have a Right to Counsel to Present Their Claims in Federal Court

Although the government apparently accepts the Supreme Court ruling that plaintiffs have the right to test the basis for their detentions in federal court, it contends that they have no right to assistance of counsel in doing so. That argument is simply absurd. The government makes no attempt to explain how plaintiffs could present or even develop their claims without effective assistance of counsel. Clearly, the Supreme Court did not expect the plaintiffs to present their claims *pro se*. Their right of access to the courts to develop and pursue their habeas and non-habeas claims would be meaningless without a concomitant right of access to counsel. As the Second Circuit has stated, "a necessary concomitant to the right of access [to the courts] is

the right of access to counsel." *Goodwin v. Oswald*, 462 F.2d 1237, 1241 (2d Cir. 1972); *see also Chandler v. Fretag*, 348 U.S. 3, 10 (1954).

The right of a habeas petitioner properly before the Court to have the assistance of counsel in developing and presenting his case – and to have access to counsel for that purpose – was so clear to the Supreme Court that, in *Hamdi*, it summarily dismissed the government's arguments to the contrary with a simple statement: "He [Hamdi] unquestionably has the right to access to counsel in connection with the proceedings on remand." 124 S. Ct. at 2652 (plurality opinion of Justice O'Connor); *see id.* at 2660 (concurring opinion of Justice Souter). That simple and clear statement disposes of the government's arguments that the plaintiffs here, who are properly before the Court on remand, have no right to counsel. The plaintiffs, "[a]liens held at the [Guantanamo] base, no less than American citizens," like Hamdi, "are entitled to invoke the federal court's authority" and to be represented by counsel in doing so.

The government's argument is also directly contradicted by the Supreme Court's holding in this very case. The government argues, for instance, that the source of any right to counsel cannot be found in the Constitution, international law, or the treaties of the United States. (Gov't Brief, pp. 9-23). This argument flies in the face of the Supreme Court's statement in this case that the plaintiffs' allegations of detention "*without access to counsel* and without being charged with any wrongdoing – unquestionably describe 'custody *in violation of the Constitution or laws or treaties of the United States*.'" *Rasul*, 124 S. Ct. at 2698 n.15 (emphasis added). The government dismisses this statement as "cryptic dicta" (Gov't Brief, p. 16 n. 6), but it is neither "cryptic" nor "dicta." It specifically addresses and rejects the government's argument (repeated here) that plaintiffs have no right to counsel because they have no rights to vindicate through habeas or otherwise.

In any event, as the government apparently concedes (Gov't Brief, pp. 23-24 n.10), the habeas statute, the Criminal Justice Act, 18 U.S.C. § 3006A(20(B), and the All Writs Act, 28 U.S.C. § 1651(a), provide a sufficient statutory basis for granting habeas petitioners a right of access to counsel to develop and pursue their claims.

There is no doubt, these plaintiffs have a right to counsel to pursue their claims.

II. The Government's Proposed "Classification" Reviews and "Real Time" Monitoring of Attorney-Client Communications Would Effectively Destroy Plaintiffs' Right To Counsel and Their Right to Pursue Their Claims in the Federal Courts

What the government has proposed are not "limitations" on access to counsel. There are many limitations on access that will necessarily result from the confinement of the plaintiffs at Guantanamo Bay, which plaintiffs and their counsel will unfortunately have to accept. The government's proposals go much further. The *post-hoc* "classification" reviews it proposes for all the plaintiffs, and the "real time" monitoring it proposes for some, would effectively destroy the confidentiality which is at the heart of the lawyer-client relationship.

The *post-hoc* "classification review procedures would require counsel to divulge for review by a U.S. military "privilege team" all written materials brought into or out of the attorney-client meetings, including all notes and other written materials created by counsel, and all oral communications from the detainee during those meetings. The government's proposed "real time" monitoring for three of the plaintiffs would, in addition, authorize a U.S. military "privilege team" to record all attorney-client communications by audio and video recording devices, to listen to attorney-client conversations while they occur, and to terminate the attorney-client meetings. As Lawrence Fox concludes in his attached declaration, these conditions

"would violate fundamental principles of lawyer ethics and render the lawyer-client relationship meaningless."[10]

The right to maintain the confidence of communications between a client and his attorney is fundamental to our legal system.[11] The attorney-client privilege is the oldest recognized privilege for confidential communications.[12] As the Supreme Court has explained, the fundamental purpose of the attorney client privilege is to "encourage full and frank communication between attorneys and their clients and thereby promote broader public interest in the observance of law and the administration of justice." *Swidler & Berlin v. United States*, 524 U.S. 399, 403 (1998). Such full and frank communication cannot occur when attorney-client communications are monitored or reviewed by agents for the opposing party.

As the courts have repeatedly held, the confidential nature of the communication between attorney and client is essential to effective representation: "Effective representation is not possible unless the defendant is able to confer in private with his attorney. … If a state agent interferes with confidential attorney-client communications, not only is there a risk of disclosure of confidential information but also such an intrusion chills free discussion between a defendant and his attorney." *Bach v. Illinois*, 504 F.2d 1100 (7th Cir. 1974); *see also Sallier v. Brooks*, 343 F.3d 868, 877 (6th Cir. 2003) ("We find that the prisoner's interest in unimpaired confidential communication with an attorney is an integral component of the judicial process."); *Mann v. Reynolds*, 46 F.3d 1055 (10th Cir. 1995) ("While prison administrators are given deference in developing policies to preserve internal order, these policies will not be upheld if they

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10 Fox Decl., ¶ 2.

11 Fox Decl., ¶¶ 13, 16-18.

12 *See* e.g., *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981); *Hunt v. Blackburn*, 128 U.S. 464 (1888).

unnecessarily abridge the defendant's meaningful access to his attorney and the courts. The opportunity to communicate privately with an attorney is an important part of that meaningful access."); *Adams Carlson*, 488 F.2d 619 (7th Cir. 1973) ("An inmate's need for confidentiality in his communications with his attorneys through whom he is attempting to redress his grievances is particularly important. We think that contact with an attorney and the opportunity to communicate privately is a vital ingredient to the effective assistance of counsel and access to the courts.").

The Supreme Court has directly addressed the chilling effect that would result from government monitoring of attorney-client communications. In *Weatherford v. Bursey*, 439 U.S. 545 (1977), the Supreme Court acknowledged that "[o]ne threat to the effective assistance of counsel posed by government inception of attorney-client communications lies in the inhibition of free exchanges between defendant and counsel because of fear of being overheard." The Supreme Court specifically noted the inhibitory effect of "the government [] monitoring those communications through electronic eavesdropping." *Id*. at 554.[13] And in *Hamdi* the Supreme Court expressly observed that the kind of access to counsel Hamdi was granted and to which he was entitled was "unmonitored" access. *Hamdi*, 124 S. Ct. at 2652 (plurality opinion of O'Connor, J.).

The government argues that plaintiffs' ability to speak honestly with counsel would not be chilled because the U.S. military "privilege team" would not provide any information it

[13] The government's "classification" review and "real time" monitoring proposals also may drive a wedge between counsel and detainee and undermine the fundamental requirement of client loyalty. Government surveillance of every word uttered and every note made by an attorney could cause the attorney to elevate self-preservation concerns over the duty of assuring the client's best interest. It could also lead to a situation in which the attorney unknowingly became an agent for the government, gathering information from the detainee on its behalf. *See* Fox Dec., ¶¶ 22-24.

learned to Department of Defense personnel involved in the present litigation or military proceedings involving them. Gov't Brief, pp. 28-29. That is hardly likely to be reassuring, however. As Judge Posner observed in *United States v. DiDomenico*, 78 F.3d 294, 299 (7th Cir. 1996), a policy of monitoring and recording attorney-client communications, like the one proposed by the government here, would "greatly undermine the freedom of communication between defendants and their lawyers and with it the efficacy of the right to counsel" even if prosecution was never given access to recordings because the clients would be "reluctant to make candid disclosures." As Judge Posner cogently explained, "Totalitarian-style continuous surveillance must surely be a great inhibitor of communication." *Id.*[14]

That reasoning applies with special gravity in the circumstances of this case. Plaintiffs have been jailed and held *incommunicado* for over two and a half years by the U.S. military thousands of miles from their homes and families. They have been interrogated ceaselessly under conditions that published Defense Department documents acknowledge were designed to make them feel helpless, totally dependent on the will of their captors, bereft of any legal rights, and without assurance of release by any date certain. Now they are told that they have legal rights (under a legal system foreign to them); that they can appeal to a court (which they have never seen and have no reason to trust), that they will have lawyers (who they have never seen and have no reason to trust); that they should tell those lawyers what the lawyers need to know to

[14] These dangers are not restricted to "real time" monitoring. The Supreme Court long ago recognized a strong public policy against requiring lawyers to turn over notes of their conversations with clients and other work product: "[M]uch of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served." *Hickman v. Taylor*, 329 U.S. 495 (1947). As the Court later stated, "Forcing an attorney to disclose notes and memoranda of witnesses' oral statements is particularly disfavored." *Upjohn Co. v. United States*, 449 U.S. 383, 402 (1981).

represent them faithfully (in proceedings they cannot possibly fathom); but the first thing that those lawyers are ethically obliged to tell them (through an interpreter) when the lawyers are finally admitted is that every piece of paper they exchange and every note the lawyers take will be reviewed by agents of the U.S. military for "classification" purposes, and in some cases everything said will be heard and taped in "real time" by those military agents. It defies common sense to suppose that the plaintiffs could or would, under surreal circumstances such as these that undoubtedly have the effect of destroying the slightest possibility of trust or confidence, confide in their lawyers to the extent necessary to enable those lawyers to develop their claims and represent them adequately.

These are not merely hypothetical observations. Civilian defense counsel for David M. Hicks, one of the Guantanamo detainees who has been criminally charged and faces military commission proceedings, have had unmonitored access to Mr. Hicks at Guantanamo. They have submitted affidavit testimony verifying that it would have been impossible for them to fulfill their professional obligations to Mr. Hicks and render him effective legal assistance if their communications with him were subject to *post hoc* "classification" review or "real time" monitoring. Affidavit of Joshua L. Dratel, ¶¶ 10-11, annexed as Attachment B; Affidavit of Stephen J. Kenny, ¶ 6, annexed as Attachment C.

In sum, the *post hoc* "classification" review and "real time" monitoring procedures that the government proposes will effectively destroy the plaintiffs' right to counsel and their right to pursue their habeas and non-habeas claims in the courts. By imposing these conditions, the government would be able to deprive plaintiffs of meaningful access to the courts – accomplishing its objective of the past two and a half years and effectively circumventing the decision of the Supreme Court.

III. The Government Can Show No Necessity that Would Justify Depriving Plaintiffs of Their Right to Counsel

The premise of the government's submission is that the government—the respondent in a *habeas corpus* proceeding—can impose restrictions on plaintiffs' access to private counsel in connection with the proceeding so long as the restrictions are "reasonable." That premise is fundamentally wrong.

It is well-established that the government cannot impose even modest restrictions on a client's access to counsel, let alone measures that effectively destroy the right to counsel, in the absence of a showing that such measures are both necessary to serve important governmental interests and are narrowly tailored to serve those interests. For instance in *Geders v. United States*, 425 U.S. 80 (1976), the Court held that a defendant was unconstitutionally denied the right to counsel when a judge ordered him not to confer with counsel during a 17-hour recess in order to prevent counsel from coaching the defendant on his upcoming cross-examination. The Court held that the restriction on access to counsel was indefensible because "[t]here are a variety of ways to further the purpose served by sequestration without placing a sustained barrier to communication between a defendant and his lawyer" *Id.* at 91. The Court has likewise held that intrusions on attorney-client confidentiality, such as "[f]orcing an attorney to disclose notes and memoranda of witnesses' oral statements" cannot be justified even "on a showing of substantial need and inability to obtain the equivalent without undue hardship." *Upjohn Co. v. United States*, 449 U.S. 383, 402 (1981).[15]

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[15] The three cases cited by the government, *see* Gov't Brief, pp. 25, do not remotely support the proposition that restrictions on access to counsel may be approved as long as they are "reasonable." First, in *United States v. Bin Laden*, 58 F. Supp. 2d 113, 120-121 (S.D.N.Y. 1999), the court held that requiring defendant's counsel to obtain security clearances before gaining access to classified information did not restrict defendant's right to counsel. The court thus did not face the question of what standard would apply in judging restrictions on the right to counsel. The court later faced that question and did not apply the reasonableness standard now advanced

The restrictions on plaintiffs' right to counsel proposed by the government here far exceed the modest restriction held unconstitutional in *Geders*, and the government has not, and cannot, make the extraordinary showing that such restrictions are necessary to protect national security. The government's assertion that national security interests justify monitoring attorney-client communications flies in the face of longstanding traditions, under which the government has not interfered with attorney-client communications even when it has jailed persons alleged to be extremely dangerous, such as Manuel Noriega, mob bosses, drug kingpins, mass murderers, and Nazi war criminals. Convicted spies such as Richard Hanssen and Aldrich Ames, who undoubtedly possessed top secret classified information the dissemination of which posed a substantial threat to national security, were allowed to meet and confer confidentially with counsel. As discussed above, the Supreme Court declared that accused enemy combatant Yasser Hamdi, who has been accorded unmonitored access to counsel, "unquestionably" has a right to counsel to pursue his habeas claim. *See Hamdi*, 124 S. Ct. at 2652.

Although the government asserts that national security requires that government agents monitor plaintiffs' communications with counsel, review counsel's notes, and review any attorney-client correspondence, the government fails to mention that other alleged enemy

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by the government but instead held that "restrictions on communication between a defendant and his attorney should only be imposed in limited circumstances and should be no more restrictive than necessary to protect the countervailing interests at stake." *United States v. Bin Laden*, 2001 WL 66393 *3 (S.D.N.Y. Jan. 25, 2001). Second, the government cites *Padilla v. Bush*, 233 F.Supp.2d 564 (S.D.N.Y. 2002), but that decision did not mention or employ a reasonableness standard and, in any event, no longer has any force because it was reversed on appeal, *see Padilla v. Rumsfeld*, 352 F.3d 695 (2d Cir. 2003), and again by the Supreme Court, *Rumsfeld v. Padilla*, 124 S.Ct. 2711 (2004). Third, the government cites *United States v. El-Hage*, 213 F.3d 74, 81 (2d Cir. 2000), but that case did not in any way address allegations involving the denial of the right to counsel. Any suggestion that the Second Circuit has adopted the government's reasonableness test is directly contradicted by *Morgan v. Bennett*, 204 F.3d 360, 367 (2d Cir. 2000), which holds that, "absent an important need to protect a countervailing interest," a court cannot "restrict the defendant's ability to consult with his attorney," and that any restrictions meeting the test of necessity must be "carefully tailored" and "limited."

combatants held at Guantanamo, even those who have been designated as suspected terrorists and charged with crimes before military tribunals, have been given unmonitored access to counsel. Attached are affidavits of Joshua L. Dratel and Stephen J. Kenny, American and Australian counsel for Guantanamo detainee David Hicks. Att. B and C. Mr. Hicks is an Australian citizen detained at Guantanamo who has been charged with conspiracy, attempted murder by an unprivileged belligerent, and aiding the enemy. Att. B ¶ 3. As Mr. Hicks' counsel attest, they have met repeatedly with Mr. Hicks without any government monitoring, both before and after Mr. Hicks was charged with crimes. Att. C ¶ 3. Indeed, the government assured Mr. Hicks' counsel that their conversations were not recorded or otherwise monitored. Att. B ¶ 5; Att. C ¶ 4. Counsel for Mr. Hicks have never been required to produce their notes from these meetings or any other documents shown to their client. Att. B ¶ 6; Att. C ¶ 5. Nor have they been required to meet with a "privilege team" to discuss their meetings with their client. Att. B ¶ 7; Att. C ¶ 6. Hicks' counsel understand that other Guantanamo detainees have also been allowed to meet with counsel without government review and monitoring. Att. B, ¶13, Att. C, ¶9. As mentioned, Mr. Hicks' counsel conclude that it would have been impossible for them to develop any trust or rapport with their clients had their conversations or notes been monitored, and they could not render effective representation had they been faced with the conditions the government now proposes. Att. B, ¶11; Att. C, ¶10.

Against this background, in which attorney-client confidentiality has been respected even when clients are alleged to hold classified and other sensitive national security information, the government asserts that monitoring plaintiffs' attorney-client communications is reasonable because it serves the government's interests in protecting against the dissemination of classified and other sensitive national security information. Without question, the government has valid

interests in protecting against the dissemination of classified and sensitive information. Preventing the disclosure of classified information or any other information that could pose a threat to the United States does not, however, necessitate the conditions proposed by the government because alternate measures that would not eviscerate the right to counsel can be implemented.

In examining the government's proposal to monitor various attorney-client communications, it bears emphasis that the government's concerns revolve around the fear that *plaintiffs' counsel*, knowingly or unknowingly, might disseminate classified or sensitive national security information. The government does not assert that plaintiffs, who are under lock and key at one of the most secure facilities in the world, and who are subject to repeated and ongoing interrogations, themselves could pose any direct threat to national security while detained at Guantanamo. The only conceivable mechanism by which communications between plaintiffs and their counsel could lead to the divulgence of classified or other security-sensitive information, and the only such mechanism identified by the government, is that *plaintiffs' counsel* could divulge such information. The government thus identifies as national security risks the possibility that plaintiffs' counsel might intentionally or unwittingly disseminate classified or other sensitive information to terrorists or other persons outside Guantanamo; that counsel might not treat classified information properly because they did not know that the information is classified; or that counsel might knowingly or unknowingly pass along sensitive information to the detainees themselves. *See* Gov't Brief, pp. 27-28. The government thus identifies dissemination of classified or sensitive material by *plaintiffs' counsel* as the sole national security threat justifying its proposed conditions.

Any concern that plaintiffs' counsel do not understand their obligations not to disclose classified information, or that plaintiffs' counsel might knowingly or intentionally divulge classified or sensitive information, is fully addressed by the issuance of security clearances by the Department of Justice.[16] Under the Department's regulations, security clearances may only be issued if investigation of applicants' personal and professional histories "affirmatively indicated their loyalty to the United States, strength of character, trustworthiness, honesty, reliability, discretion, and sound judgment, as well as freedom from conflicting allegiances and potential for coercion, and willingness and ability to abide by regulations governing the sue, handling, and protection of classified information." 28 C.F.R. § 17.41(b). The government may provide such clearance to plaintiffs' counsel only if it has concluded that plaintiffs' counsel can be trusted to handle classified national security information and not to violate the restrictions on the dissemination of such information.[17] Because security clearances represent the government's conclusion that plaintiffs' counsel can be trusted to possess classified and security-sensitive

[16] The government has granted one of plaintiffs' counsel clearance for information classified at the "secret" level, and clearances at this level are pending for three others. Plaintiffs' counsel have offered to go through the process necessary to get the highest level of clearance, i.e., "top secret" clearance, but the government has not agreed to process counsel's applications at that level, stating that a higher clearance level is not necessary. The government nonetheless relies on the possibility that plaintiffs may have information classified at a level higher than "secret" as a reason for justifying its proposed conditions on access to counsel.

[17] Moreover, in obtaining security clearances, plaintiffs' attorneys each signed Form 312, which declares that counsel will not disclose any classified information they might obtain. In addition, concerns that classified information obtained by plaintiffs' counsel could be used in documents submitted to the Court are addressed in the Classified Information Procedures Act, 18 U.S.C. App. 3, which provides numerous options for handling the use of classified information in judicial proceedings to protect the interests of the government while also serving the interests of justice.

information, there is no reason to impose additional restrictions to prevent plaintiffs' counsel from mishandling information they know to be classified.[18]

Because there can be no legitimate concern that plaintiffs' counsel would divulge information they know to be classified or of a security-sensitive nature, the only legitimate concern identified by the government is that plaintiffs' counsel might *unwittingly* divulge such information. In this regard, the government places repeated emphasis on the possibility that plaintiffs' counsel may receive coded information that they do not recognize and unwittingly disclose to terrorists or their associates outside Guantanamo. *See* Decl. of Martin J. Lucenti, Jr., ¶ 14. The concern that counsel might divulge information that they do not know to be classified or which otherwise threatens national security, however, is fully addressed by plaintiffs' counsel's willingness to commit not to disclose *any* information, classified or unclassified, obtained from plaintiffs without first notifying the government and seeking its authorization. That is, plaintiffs' counsel are willing to agree not to disclose any information obtained from plaintiffs to any third party without first providing the government notice of the anticipated disclosure, an opportunity to promptly review the information, and the ability to assert that the information should not be disclosed. Plaintiffs' counsel would thus refrain from disclosing any information obtained from the plaintiffs to plaintiffs' family members, potential witnesses, the press, and even this Court. Plaintiffs' counsel would only disclose information obtained from these plaintiffs after giving the government a reasonable opportunity to promptly review the

[18] In addition, as members of the bar, plaintiffs' counsel can be expected to adhere to the Code of Professional Ethics, which prohibits them from allowing their services to be used for any illegal purposes and which allows them to reveal client confidences when necessary to prevent future criminal acts. *See* Rule 1.6, D.C. Rules of Professional Conduct. Plaintiffs' counsel can assure the Court that they will immediately inform the government if they receive any information involving future terrorist acts.

information and determine whether such information is or should be classified and therefore not disclosable.

Plaintiffs' proposal precludes any possibility that counsel will accidentally divulge classified information or unwittingly serve as agents for terrorists because plaintiffs' counsel would not disseminate *any* information received from plaintiffs without first seeking the government's authorization. If that proposal is accepted, there would be no need to monitor attorney-client communications to prevent such unwitting disclosure. At the same time, plaintiffs' proposal allows plaintiffs and their counsel to discuss plaintiffs' claims under the cloak of confidentiality, thus allowing plaintiffs to pursue the claims allowed by law and recognized by the Supreme Court. As Lawrence Fox states:

> That [proposal] would both preserve the confidentiality of attorney-client communications and the government's concern about the passing of sensitive information from the detainees to the outside world. If the government does not accept such a reasonable compromise, then one must wonder whether the government's true motive is not turning these lawyers into substitute agents of the government, turncoats masquerading as zealous advocates. That is a role a lawyer simply cannot play.

Fox Decl. ¶ 33.

IV. The Government Has Proposed Other Conditions that Unnecessarily Infringe on the Right to Counsel and Has Refused Plaintiffs' Reasonable Requests Regarding Access

A. The Government Has Proposed Other Unnecessary Conditions

In addition to the proposed conditions discussed above, the government has proposed other conditions that would also unreasonably limit plaintiffs' access to counsel. Such additional conditions include the following:

1. The government proposes that, after an initial meeting, counsel should be allowed to continue meeting with plaintiffs only after plaintiffs sign an "Acknowledgment of

Representation." *See* Gov. Exh. B, II.C.2. The proposal is unclear when such an Acknowledgment must be obtained. Even if confidentiality of communications between plaintiffs and counsel were assured, it is unreasonable to assume that counsel will be able to win the detainees' trust in a single meeting sufficient to get them to sign the Acknowledgment. *See* Declaration of Joshua L. Dratel ¶ 10 (stating that building rapport with client detained at Guantanamo required numerous meetings).

2. The government proposes that only one attorney will be allowed to meet with a detainee at a time. *See* Gov. Exh. B, III.D.2. Such a condition, which the government makes no effort to explain, would prevent counsel from having one attorney ask questions while another take notes, thus preventing counsel from efficiently using the time allotted for meeting with plaintiffs and better preserving a record of the conversation.

3. The government proposes that, in addition to requiring that plaintiffs' counsel possess valid security clearances in order to meet their clients, *see* Gov. Exh. B, III.A.1, counsel who do not already have a security clearance must "pay any actual costs associated with processing of the same," *id.* III.A.3. Counsel should not be required to pay the costs associated with satisfying the government that they are sufficiently trustworthy to meet their own clients.

4. The government proposes to review all attorney-client correspondence. *See* Gov. Exh. B., VI. Such review, like the review of counsels' notes, would greatly undermine plaintiffs' ability to pursue their claims and could only be justified by a showing of necessity. *See Smith v. Lane*, 1981 U.S. Dist. LEXIS 16655 *5-6 (N.D. Ill. 1981) ("While it is true that restrictions on general mail and correspondence are Constitutionally proper, communications with an attorney are privileged and restrictions are allowed only in exceptional circumstances."). For the nine plaintiffs whose conversations with counsel the government does not propose to monitor, the

proposal to review correspondence only discourages plaintiffs and their counsel from communicating in writing and encourages them to hold face-to-face communications to avoid government monitoring. In any event, plaintiffs' proposal not to disclose any information obtained from plaintiffs obviates any national security concerns addressed by reviewing attorney-client correspondence.

5. The government proposes that *unclassified* information obtained from a detainee may be disseminated only for the purpose of preparing for or conducting litigation involving the detainee. Gov't Exh. B, XI.A. But assuming the government does not regard such unclassified information as threatening, counsel should not be restricted from disseminating it for other purposes, such as assuring families of the detainees' well-being.

B. The Government Has Unreasonably Withheld "Top Secret" Security Clearances

The government is unreasonably withholding "top secret" security clearance from at least one counsel for the plaintiffs who is eligible to receive it and has refused to process the remaining security clearance applications by plaintiffs' counsel for "top secret" clearance.

Clearance at the "top secret" level is necessary for plaintiffs' counsel to represent the plaintiffs effectively. According to the government, each of the Kuwaiti Detainees "is in possession of *highly classified* information." Declaration of Martin J. Lucenti, Sr., annexed as Exhibit B to Gov't Brief (emphasis added). Under section 1.2 of Executive Order 13292, the highest classification level for information is "top secret." Furthermore, in connection with the forthcoming deposition of the government's declarant, Brigadier General Lucenti, on August 9, 2004, plaintiffs served a request under Fed. R. Civ. P. 34 for the production of the intelligence files on the plaintiffs, which may also contain "top secret" information. Without "top secret"

security clearance, counsel for the Kuwaiti Detainees will not have access to this "top secret" information, which they may need to be able effectively to represent the plaintiffs.

One of the plaintiffs' counsel, Neil H. Koslowe, who has been granted "secret" security clearance, was informed by the Department of Justice on July 28, 2004, that he is eligible for "top secret" clearance and could get it with "the stroke of a pen" if government counsel requested it. As a result, Mr. Koslowe asked government counsel to request that he be granted "top secret" clearance. Inexplicably, government counsel has declined as of this writing to make such a request.

There is no justification for the government's refusal to request that Mr. Koslowe (or other counsel for plaintiffs be granted "top secret" security clearance. At least one civil defense counsel for David M. Hicks, a Guantanamo detainee now facing criminal proceedings before a military commission, has been granted "top secret" clearance. Att. B, ¶ 4. Moreover, during the telephone conference held by the Court with the parties on July 23, 2004, Mr. Koslowe proposed, the Court endorsed, and government counsel agreed that counsel for plaintiffs would be processed simultaneously for "secret" and "top secret" security clearances. July 23 Tr., pp. 37-39. Under these circumstances, the Court should order the government to grant "top security" clearance forthwith to Mr. Koslowe and any other counsel for plaintiffs who is eligible to receive it.

C. The Government Has Unreasonably Refused to Grant Abdul Rahman R. al Haroun Access to the Plaintiffs

Since the inception of this case, plaintiffs have been represented not only by U.S. counsel but also by Kuwaiti counsel, Abdul Rahman R. al Haroun. Although Mr. al Haroun has not been admitted *pro hac vice*, he is the author of a declaration that was submitted to the Court in support of plaintiffs' original motion for a preliminary injunction. Mr. al Haroun has been in touch with

the plaintiff family members of the Kuwaiti Detainees throughout this litigation and knows several of the Kuwaiti Detainees personally.

After this case was remanded from the Supreme Court, counsel for plaintiffs asked government counsel to grant Mr. al Haroun security clearance to join them in meeting with plaintiffs. Mr. al Haroun's presence is vital not simply because he would act as translator for the Arabic-speaking Kuwaiti Detainees, but also because the Kuwaiti Detainees have no idea who their U.S. counsel are and no reason to trust or have confidence in them. Even when language is not a barrier, it is difficult for counsel representing Guantanamo detainees to establish a relationship of trust and confidence with their clients. For example, one of the civilian defense counsel for David M. Hicks has provided affidavit testimony that it required long, intensive, and frequent sessions to build such a relationship with Mr. Hicks because he has not had access to the outside world or to counsel for more than two years. Att. B, ¶ 10.

To date, the government has claimed that, because it is the general policy of the Department of Justice not to grant security clearances to non-U.S. citizens, it cannot grant such a clearance to Mr. al Haroun, and that without a security clearance Mr. al Haroun cannot have access to the Kuwaiti Detainees. But the government has also acknowledged that it granted access to Australian civil defense counsel for Mr. Hicks, despite the fact that he is not a U.S. citizen, simply on the strength of a representation by the Government of Australia that counsel had an appropriate security clearance from that Government and was trustworthy.

On July 28, 2004, the Government of Kuwait notified the Government of the United States that it has appointed Mr. al Haroun its special counsel for the purpose of having unmonitored communications with the Kuwaiti Detainees. *See* Attachment D. It further advised the Government of the United States that, as a Member of the Board of the Supreme Oil Council

of Kuwait, Mr. al Haroun is privy to the most sensitive Kuwaiti national security information related to the oil sector, that he has the highest security clearance granted by the Government of Kuwait, that he is a respected attorney, and that he is absolutely trustworthy. *Id.* Counsel for the Kuwaiti Detainees delivered a copy of this letter to government counsel. *Id.*

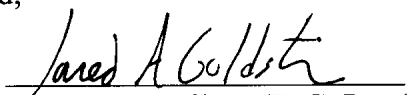
Nevertheless, as of this writing the government has not granted Mr. al Haroun access to the Kuwaiti Detainees or offered any explanation why it will not do so or why it would treat him differently from Australian counsel for Mr. Hicks. It is apparent that the government is seizing upon Mr. al Haroun's importance to U.S. counsel's ability properly to represent the Kuwaiti Detainees to impede that representation and frustrate the Kuwaiti Detainees' ability fully to develop and pursue their habeas and non-habeas claims.

The Court should not tolerate such behavior by the government. It should order the government to grant Mr. al Haroun access on the same terms as such access is granted to U.S. counsel for the Kuwaiti Detainees.

CONCLUSION

For the foregoing reasons, this Court should grant the attached Order.

Respectfully submitted,



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