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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MAHMOAD ABDAH, *et al.*, **Petitioners,** ***v.*** **GEORGE W. BUSH, *et al.*,** **Respondents.**	**Civil Action No. 04-1254 (HHK)**

PETITONERS' EMERGENCY MOTION FOR ORDER ALLOWING COUNSEL TO SHOW PETITIONERS VIDEO MESSAGES FROM THEIR FAMILIES

Petitioners, Guantánamo detainees, respectfully move for an order allowing their counsel to show them short video messages from their families – which counsel recorded last month in Yemen – when counsel next visit petitioners in Guantánamo beginning on June 16, 2005.

The videos provide living images and voices of wives, children, parents and siblings whom Petitioners have not seen for more than three-and-one-half years. In the videos, the families express their love and support for Petitioners and convey family news. The families also endorse counsel's efforts and encourage Petitioners to trust counsel and accept their assistance.

The only way Petitioners will be able to see these family video messages is if counsel are allowed to show the messages to them. The procedures established by Judge Joyce Hens Green would allow counsel to show the videos to Petitioners with Respondents' approval, and there is no legitimate reason for Respondents to withhold such approval. Respondents, however, have withheld such approval because "GTMO does not permit detainees . . . to view video messages."

Respondents' refusal to allow counsel to show these videos to Petitioners is arbitrary and cruel. It is also an unlawful use of Respondents' custodial power to prevent counsel from counteracting Respondents' efforts to undermine Petitioners' trust and confidence in counsel. To the extent that granting the requested relief would require the Court to modify the procedures established by Judge Green, the Court can and should do so.

Because of the emergency nature of the requested relief, the Court should order Respondents to answer this motion before 6:00 p.m. on Tuesday, June 7, 2005, and should hear any argument on the motion as soon thereafter as the Court's schedule allows.

STATEMENT OF FACTS

1. Petitioners are thirteen Yemeni nationals held as "enemy combatants" in Guantánamo. As detailed in their habeas petition, filed on July 30, 2004, all deny being "enemy combatants" and maintain that they are being unlawfully held by Respondents. Counsel first visited Petitioners at Guantánamo in November 2004. *See* Ex. B, Declaration of Marc D. Falkoff ("Falkoff Decl.") ¶ 5. Counsel have visited three more times and will next visit them on June 16, 2005. *Id.*

2. Although not dispositive for purposes of this motion, Respondents have hindered efforts by Petitioners' families to communicate with Petitioners. Petitioners report that they have failed to receive many letters sent by their families, that many of the letters they have received have taken months to reach them, and that many of those letters have been heavily redacted. Falkoff Decl. ¶ 7. Moreover, as discussed below, Petitioners report that Respondents have acted to undermine the attorney-client relationship between detainees and their counsel.

3. From May 16 through May 21, 2005, counsel traveled to Yemen to meet with Petitioners' families. Falkoff Decl. ¶ 12. During those visits, counsel recorded short video messages to Petition-

ers from their families expressing love and support, conveying family news, and encouraging Petitioners to have confidence in and accept assistance from their counsel. *Id.*

The procedures established by Judge Joyce Hens Green to govern counsel meetings with Guantánamo detainees provide that counsel may not bring anything other than "legal mail, writing utensils and papers" into a meeting with a detainee "unless counsel has received prior approval from the Commander, JTF-GTMO." Ex. A, Amended Protective Order ("APO") and Revised Access Procedures ("RAP"), RAP § V.A. at 6.

Accordingly, on May 24, 2005, counsel requested permission from Respondents to show Petitioners their families' video messages on counsel's next visit (now scheduled for June 16, 2005) and offered to provide Respondents with English translations of the messages at counsel's expense. *See* Ex. C, E-Mail from Marc D. Falkoff to Andrew I. Warden.

On June 3, 2005, Respondents denied the request, except as to a family video message introducing counsel to a detainee whom they will be visiting for the first time. *See* Ex. D, E-Mail from Andrew I. Warden to Marc D. Falkoff. Respondents' sole explanation for denying the request as to the other family messages was that, except for the purpose of introducing counsel to a detainee, "GTMO does not permit detainees . . . to view video messages." *Id.*

ARGUMENT

Under the All Writs Act, 28 U.S.C. § 1651(a), this Court has power to issue "all writs necessary or appropriate in aid of [its] jurisdiction[ ] and agreeable to the usages and principles of law." The Act "empowers a district court to issue injunctions to protect its jurisdiction," *SEC v. Vision Communications, Inc.*, 74 F.3d 287, 291 (D.C. Cir. 1996); *Envtl. Def. Fund v. EPA*, 485 F.2d 780, 784 n.2 (D.C. Cir. 1973), and "to achieve the ends of justice entrusted to it." *Adams v. United*

States, 317 U.S. 269, 273 (1942). Where "alternative remedies" are unavailable, *Clinton v. Goldsmith,* 526 U.S. 529, 537 (1999), a court may use the Act to order appropriate relief.

This Court should exercise this authority and grant the requested relief. *First*, Respondents' refusal to allow counsel to show the videos to Petitioners is arbitrary: Respondents have not offered, and do not have, any legitimate basis for refusing to do so. *Second*, Respondents' refusal is cruel: Petitioners have been imprisoned in near-total isolation for three-and-one-half years, and have received only limited communications from their families during that time. *Third*, Respondents' refusal is an unlawful and unfair use of their custodial power to prevent counsel from counteracting actions taken by Respondents that, by design or effect, undermine the attorney-client relationship between Petitioners and their counsel.

Petitioners' request that their counsel be allowed to show them the family video messages does not depend on whether Respondents have hindered family communications with detainees or taken actions that undermine the attorney-client relationship. It is worth considering, however, that the lawyer-client relationship is difficult to establish and maintain at Guantánamo in the best of circumstances, and even more difficult when undermined by Respondents. Counsel recorded the video messages for the specific purpose of reinforcing and maintaining that relationship and believe that showing Petitioners the video messages is vital for that purpose.

The relationship between attorney and client demands "personal faith and confidence in order that they may work together harmoniously." *Lee v. United States,* 235 F.2d 219, 221 n.5 (D.C. Cir. 1956). "Nothing is more fundamental to the lawyer-client relationship than the establishment of trust and confidence." American Bar Association Standards for Criminal Justice, commentary to § 4.29 (2d ed. 1980). Accordingly, as Judge Kollar-Kotelly emphasized in this litigation last October,

"the Government is not entitled to unilaterally impose procedures that abrogate the attorney-client relationship" or "inappropriately burden that relationship." *Al Odah v. United States,* 346 F. Supp. 2d 1, 5, 9 (D.D.C. 2004).

Under the best of circumstances, Guantánamo presents daunting challenges to counsel seeking the trust of their detainee clients. Counsel must ask Petitioners, who have no access to news, to accept that the same government that has held them virtually *incommunicado* for three-and-a-half years, and has used all means – fair and foul – to "break" them, has nevertheless allowed counsel to assist them in seeking their freedom. Counsel speak the language of their captors, and the legal system they describe is strange and counterintuitive to Petitioners.

Beyond these intrinsic challenges, the detainees have reported many actions by Respondents that, by design or effect, or both, undermine Petitioners' trust in counsel. For example, some detainees have reported that interrogators told them not to trust their lawyers because they are Jewish; these reports have prompted one Member of Congress to call for a congressional investigation. *See* Ex. E, Letter from Congressman Henry A. Waxman to Hon. Joseph E. Schmitz; *see also* Frank Davies, *Guantánamo Bay: Complaint: Detainees Told Not To Trust Lawyers,* The Miami Herald (May 14, 2005), attached as Ex. F.

Other detainees have reported that interrogators question them about their attorney-client conversations, tell them not to trust their attorneys because they are with the CIA, and mock them for signing forms acknowledging representation. *See* Ex. G, Declaration of Joshua Colangelo-Brian, ¶¶ 5-6. Petitioners report being visited in their interview cells and questioned, shortly after their counsel depart, by other Americans dressed in civilian clothes. Falkoff Decl. ¶ 10. Other detainees have told their attorneys and their fellow detainees that individuals have come into their cells claim-

ing to be their lawyers and trying to extract information from them. *See id.*; Sam Hananel, *Lawyers Describe Guantanamo Detainees,* LancasterOnline.com (Jan. 19, 2005), attached as Ex. H. Petitioner Esmail has told counsel that such incidents have made many detainees skeptical of their lawyers. Falkoff Decl. ¶ 10.

Petitioners have complained that Respondents would move them days in advance of their meetings with counsel to isolation cells at the compound that Respondents use for such meetings, and left them in those cells for days afterward before returning them to their regular quarters. Falkoff Decl. ¶ 8. Petitioners Yasein Khasem Mohammad Esmail and Adnan Farhan Abdul Latif have told counsel that, after counsel's first visit in November 2004, Respondents confiscated all personal items of the two Petitioners, including legal papers and pencils, and placed those Petitioners in solitary confinement for a month. *Id.* ¶ 9.

Mr. Esmail has further reported that, after counsel's visit in December 2004, guards again confiscated his possessions and forced him to wear shorts for a month, a religious humiliation; and Petitioner Makhtar Yahia Naji Al-Wrafie has reported that, following this visit, guards turned up the air conditioning in his cell to full blast for hours. *Id.* According to Mr. Esmail, all of the detainees in "Camp 4" have had their legal papers searched. *Id.* Petitioner Sadeq Muhammad Sa'id Ismail has reported that punishments for detainees with lawyers generally have increased since lawyers began visiting. *Id.*

When Judge Green established procedures to govern counsel meetings with detainees, counsel had not yet visited Petitioners. Neither the Court nor counsel were fully aware of the degree of Petitioners' isolation. Nor did they anticipate that Respondents would attempt to interfere with the attorney-client relationship. Judge Green, however, made provision for future modifications of the

procedures she established; her order specifies that the procedures "may be modified by further order of the Court sua sponte or upon application of any party," and that the Court retains "continuing jurisdiction to enforce or modify the terms of the order." Ex. A, APO ¶ 3, p. 2. Accordingly, to the extent necessary, the Court should modify the procedures to require that Respondents allow Petitioners to view video messages from their families on the next visit by Petitioners' counsel.

CONCLUSION

For the reasons discussed above, the motion should be granted. Because counsel will next visit Petitioners on June 16, 2005, the Court should require Respondents to answer this motion by 6:00 p.m. on Tuesday, June 7, 2005, and should hear any argument on the motion as soon thereafter as the Court's schedule allows.

Dated: Washington, D.C.
June 6, 2005

Respectfully submitted,

COVINGTON & BURLING

/s/

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