IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

	)	**Civil Action Nos.**
	)	**02-CV-0299 (CKK), 02-CV-0828 (CKK),**
	)	**02-CV-1130 (CKK), 04-CV-1135 (ESH),**
	)	**04-CV-1136 (JDB), 04-CV-1137 (RMC),**
***In re* Guantánamo Detainee Cases)**	)	**04-CV-1142 (RJL), 04-CV-1144 (RWR),**
	)	**04-CV-1164 (RBW), 04-CV-1166 (RJL),**
	)	**04-CV-1194 (HHK), 04-CV-1227 (RBW)**
	)	**04-CV-1254 (HHK), 04-CV-1519 (JR)**
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PETITIONERS' COMMENTS ON PROPOSED COUNSEL ACCESS PROCEDURES FILED IN *BEGG v. BUSH*, No. 04-CV-1137

Pursuant to the Court's Order of November 1, 2004, Petitioners represented by the undersigned counsel submit these comments on the counsel access procedures proposed by Petitioners in *Begg v. Bush*, No. 04-CV-1137. The *Begg* procedures are based on procedures proposed by Petitioners in *Al Odah v. United States*, No. 02-0828 (CKK), which were adopted by the Court on October 20, 2004.

Petitioners generally concur with the *Begg* procedures insofar as those procedures would replace all three sets of procedures proposed by the government – that is, Exhibits A, B, and C to the government's Notice of Supplemental Counsel Access Procedures filed September 29, 2004. Petitioners here address matters that were not at issue in *Begg* and that were left unaddressed by the motion.[1]

[1] Petitioners join in the objections previously filed by the *Al Odah* Petitioners to the government's "Procedures for Counsel Access to Detainees at the US Naval Base in Guantanamo Bay, Cuba" (Ex. A to government's Response to Complaint in Accordance with Court's Order of July 25, 2004, filed July 30, 2004, and Ex. A to government's Notice of Supplemental Counsel Access Procedures, filed Sept. 29, 2004). Petitioners also join in the objections filed by the *Begg* Petitioners concerning the government's proposed procedures in Ex. B and C to its Notice of Supplemental Counsel Access Procedures (filed Sept. 29, 2004). The *Al Odah* Petitioners reaffirm the objections they asserted in their Memorandum of August 4, 2004.

1. Verification of Representation, Section III.C.1: The third sentence requires counsel for a Petitioner to provide "sufficient details regarding the circumstances of his/her detention to demonstrate the counsel's authority or standing to bring a habeas or other federal court action on the client's behalf." This vague requirement should be replaced with a requirement that "Counsel shall provide evidence of his or her authority to represent the detainee."

2. Verification of Representation, Section III.C.2: The first sentence requires that the "Acknowledgment of Representation" be provided by counsel to DOD "after meeting with the client." Government counsel told the Court at unreported sessions among the parties on August 23 and 27, 2004 that "after meeting with the client" means after counsel's *first* meeting with the client. This is unreasonable. Counsel may not be in a position to provide an acknowledgment of representation after the first meeting. The requirement should be replaced with a requirement that "Counsel shall provide evidence of his or her authority to represent the detainee not later than 60 days following counsel's second meeting with the detainee; provided, that counsel shall be permitted to meet with the detainee as often as reasonably necessary to prepare the detainee's case."

3. Mail Sent by Counsel to a Client ("Incoming Mail"), Section IV.A.4, and Mail Sent by Client to Counsel ("Outgoing Mail"), Section IV.A.4 and Section IV.B.5: The first sentences of Section IV.A.4 and Section IV.B.5 should be modified as to read as follows: "Counsel is required to treat all written and verbal statements of a client as classified, unless and until the information is determined to be otherwise by the privilege team or by this Court or another court." Where the government is in a position to abuse its classification authority to gain a litigation advantage, judicial intervention should be available. *See*, e.g., *Stillman v. CIA*, 319 F.2d 546 (D.C. Cir. 2003) (upholding judicial review of classification determinations).

4. Materials Brought Into a Client Meeting by Counsel, Section V.A: This provision prohibits counsel from bringing into a meeting with a detainee anything other than legal mail without the prior approval of the Commander, JTF-Guantanamo. A second sentence should be added as follows: "The Commander shall not withhold approval for counsel to bring into a meeting with a detainee letters, tapes, or other communications introducing counsel to the detainee, if the government has first reviewed the communication and determined that sharing the communication with the detainee would not threaten the security of the United States. The government shall decide whether to approve the communication on that basis within two business days after the detainee's counsel furnishes it to the government."

5. Classification Determination of Client Communications (VII.B, C, and E):

(a) The second sentence of paragraph B should state that "The privilege team may not disclose the communications in question to any person involved in the interrogation of a detainee, and no such individual may make any use of those communications whatsoever."

(b) For the reasons given above, paragraph C should also be amended to incorporate opportunity for judicial review of classification determinations by the privilege team.

(c) The timetable proposed in paragraph E for classification determinations by the privilege team is unreasonably long.[2] Experience has shown that the access procedures can-

[2] Particularly problematic in this regard has been the inordinate delay associated with privilege team review of notes and communications between the detainees and their lawyers thus far. Some examples:

- On October 13, counsel in *Kurnaz v. Bush*, 04-CV-1135 (ESH), handed government agents at Guantanamo a one-page letter from his client addressed to counsel. Two-and-one-half weeks later, on November 1, counsel was informed by a Department of Justice lawyer that the letter had arrived in Washington, D.C., for review by the privilege team. When asked by counsel how long it would take the privilege team to review the letter, the DOJ lawyer responded that he could make no estimate.

(footnote cont'd)

not function in an acceptable manner unless the government is bound by strict, short deadlines for the completion of their enumerated responsibilities. Given these already inordinate delays, the time periods set forth in paragraph VII.E for classification review should be shortened and sanctions for failing to meet them must be articulated. Instead of a turnaround time of 10 days for information written in English, 20 days for information in another language, and 30 days for information where the privilege team believes code has been used, the time periods should be shortened to 3, 5 and 10 days, respectively, except as otherwise allowed by the Court for good cause shown. The government should also be required to inform the Court *in camera* promptly when the privilege team determines that a detainee communication to counsel must be disclosed to the camp commander.

6. Redactions of publicly filed documents. Counsel's ability to represent Petitioners has been compromised by the arbitrary manner in which the government has chosen to

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- Also on October 13, *Kurnaz* counsel handed Government agents an affidavit and documents from his client for eventual submission to German immigration courts. Counsel has asked DOJ where those documents are at present and when they would receive classification review, but DOJ counsel responded that he had no knowledge that the documents had even reached the privilege team.

- On October 5, counsel in *El-Banna v. Bush*, 04-CV-1144 (RWR), handed Government agents at Guantanamo notes from interviews with his clients. Nearly four weeks later, on November 1, a DOJ lawyer informed counsel that his notes were available to be viewed at the court security office in D.C., but had not yet been reviewed by a privilege team.

- On October 7, Petitioner in *El-Banna* sent a letter to counsel. A DOJ lawyer notified counsel on November 1 that the letter could be viewed at the court security office in D.C. No privilege team review of the letter has yet taken place.

- Counsel in *O.K. v. Bush*, 04-CV-1136 (JDB), was notified on November 2 that DOJ was in possession of a letter from his client. The letter had not been reviewed by the privilege team. DOJ told counsel that the letter could neither be viewed nor discussed except at the court security office in Washington, D.C.

- To the best of counsel's knowledge, ***none*** of the documents in *Begg* have been cleared through the privilege team.

redact legal documents. The government has refused, for instance, to allow Petitioner in *O.K.* access to an unredacted version of the habeas corpus petition that has been publicly filed on his behalf. The petitions in *Abdah v. Bush*, 04-CV-1254 (HHK), and other cases have likewise been redacted before they were allowed to be seen by the detainees. The government should be prohibited from limiting Petitioners' review of their own public pleadings.

7. Clearances for non-U.S. counsel. The government should be required to process clearance applications for non-U.S. counsel for a detainee, and to make the clearance determination on the merits, or accept equivalent security clearances from other governments (as was done in *Hicks*). Petitioners in *O.K.* and *Anam v. Bush*, 04-CV-1194 (HHK), for example, are represented in part by Canadian nationals, and petitioner in *Kurnaz* is similarly represented by German counsel, and each has obtained an equivalent security clearance from the Canadian government. And in *Al Odah*, the government refused to allow U.S. counsel to be accompanied by Kuwaiti counsel who has the highest security clearance conferred by the Kuwaiti Government. (The *Al Odah* Petitioners have raised this issue in connection with respect to their pending motion before Judge Kollar-Kotelly.) Nevertheless, the United States has refused them access to Guantanamo and, under the proposed access rules, would be denied access to classified information, leaving them unable to participate meaningfully in the representation of their clients or assist U.S. counsel in investigating relevant, classified facts related to a Petitioner's alleged activities in his home country.

8. Clearance for additional counsel and support staff. The government has refused to process security clearance applications for paralegals, secretarial staff, or lawyers who do not themselves intend to visit Guantanamo, an issue as to which the *Al Odah* Petitioners have filed a Motion to Compel in this Court. The government has also set arbitrary limits on the

number of lawyers who may seek clearance to visit Guantanamo. Counsel in *Abdah*, for instance, represent thirteen detainees; DOJ lawyers have thus far refused requests to process security clearances for two lawyers on the ground that *Abdah* counsel has already received security clearance for two lawyers and has applications pending for two more. By exercising this gatekeeper function, the government is effectively dictating staffing levels for the firms representing the detainees. "The government has been using the existence of classified information and the need for petitioners' counsel to obtain security clearance for strategic advantage."

Respectfully submitted,

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