IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

RESPONDENTS' REPLY MEMORANDUM IN FURTHER SUPPORT OF RESPONSE TO COMPLAINT

INTRODUCTION

Despite the government's showing in its opening brief, petitioners offer no rebuttal to the extensive case law rejecting petitioners' right to counsel under the Constitution and international treaties. Instead, they dismiss as somehow "irrelevant" respondents' exposition of settled case law from the Supreme Court and the D.C. Circuit demonstrating that aliens outside the sovereign territory of the United States and lacking a voluntary connection to this country lack cognizable constitutional rights to assert in this litigation. They are similarly silent with respect to the government's essential showing that the treaties identified in the habeas petition in this case are not self-executing, and accordingly are not judicially enforceable.

Respondents' arguments concerning the Constitution and international treaties could not be more relevant. Without rights grounded in the Constitution or the laws and treaties of the United States, petitioners have no basis to assert that they are entitled to unqualified access to

their attorneys for the purpose of pursuing their habeas petition – much less to secure the ultimate relief they seek in that petition. As respondents explained in their opening brief, both the demands in the petition as well as petitioners' affiliated request for unmonitored and unlimited access to counsel fail as a matter of law because there is no legal basis for such relief.

In apparent recognition of the strength of the government's legal position and of their burden to identify some legal basis for their claimed entitlement to counsel, petitioners seek to infer such a right from the Supreme Court's decision in Rasul v. Bush, 124 S. Ct. 2686, 2696 (2004). But while Rasul held that 28 U.S.C. § 2241 provides jurisdiction for the claims asserted, it says nothing at all to suggest that the habeas statute (or any other source of law) affords petitioners a right to counsel, much less a right to the type of unrestricted access to counsel they seek, in order to pursue their case. Indeed, 28 U.S.C. §§ 2241 *et seq.* do not even mention a right to counsel. Nevertheless, petitioners would have this Court conclude that, by enacting those provisions, Congress intended to confer upon aliens detained as enemy combatants during on-going hostilities not only a right to counsel, but a right to unrestricted counsel access at a secure military base outside the sovereign territory of the United States for the purpose of engaging in communications, which may involve highly classified and sensitive information related to those on-going hostilities or actual attempts by highly trained al Qaida operatives to further terrorist operations. This proposition is untenable.

But even if there were some sort of implied right to counsel under the habeas statute or other authority, as respondents have explained, there can be no question but that the counsel access respondents are affording petitioners is reasonable, appropriate, and sufficient. Under the "Procedures for Counsel Access to Detainees at the US Naval Base in Guantanamo Bay, Cuba"

(the "Procedures"), attorney-detainee communications remain uncompromised. See Ex. A to Response to Complaint in Accordance with Court's Order of July 25 [sic], 2004 ("Resps.' Br."). Although information exchanged between counsel and a detainee will undergo a classification review in order to ensure proper handling and protection of classified information as required by law, counsel and the detainee remain free to discuss the facts necessary to resolve this habeas petition, even if facts known to the detainee happen to be classified. And, in those circumstances where an individualized assessment of national security concerns requires that communications between counsel and a detainee be monitored to alleviate potential immediate and substantial harm to the United States, counsel and the detainee nevertheless remain free to communicate with respect to the issues in habeas and other federal court proceedings. Importantly, any classification review of material or monitoring of communications is to be performed by a special "privilege team" comprised of persons who will neither participate in proceedings concerning the detainee nor disclose attorney-detainee communications to government personnel who are involved such proceedings. Thus, there can be no reasonable concern that attorney-detainee communications will be unduly "chilled."

To be sure, petitioners offer alternate proposals for counsel access that, in their view, meet the concerns raised by the government. But no principle of law or reason entitles alien enemy combatants detained on a military base outside the sovereign territory of the United States to define the terms of their access to counsel. The Department of Defense ("DoD") has carefully crafted the Procedures in light of the national security concerns implicated in this unique context, as well as DoD's on-the-ground assessment of the practicalities of accommodating potentially

dozens, if not hundreds, of lawyers representing hundreds of detainees in habeas cases and other matters. These procedures are reasonable and must be upheld.

ARGUMENT

I. PETITIONERS HAVE NO RIGHT TO COUNSEL

A. Petitioners Lack Any Right To Counsel Under The Constitution Or Treaties

As respondents explained in their opening brief, petitioners lack any constitutional rights – including the claimed right to access to counsel – because they are aliens detained outside the sovereign territory of the United States. See Resps.' Br. at 9-16. Petitioners make no effort to rebut respondents' arguments. They thus concede that they may not base any request for access to counsel (or any other request for relief identified in their "Complaint") on the Constitution.

Petitioners likewise fail to challenge respondents' arguments that there is no self-executing or congressionally-implemented treaty that provides them with a right to counsel to challenge their detention. See Resps. Br. at 21-23. Thus, petitioners concede that they cannot ground any argument for access to counsel on international treaties.

B. Petitioners Have No Right To Counsel Under Recent Supreme Court Decisions, The Habeas Statute, Or Other Statutory Sources

Unable to ground their request for access to counsel on the Constitution or international treaties, petitioners postulate other possible sources for their asserted right to access to counsel. Each of their theories fail.

1. Rasul Does Not Confer An Implied Right To Counsel

Petitioners' principal tack is to argue that the Supreme Court's decision in Rasul somehow provides them an implied right to access to counsel. According to petitioners, the

Supreme Court in Rasul identified a "right of access to the courts to develop and pursue their habeas and non-habeas claims." Mem. of Points & Auths. in Opp. to Defs.' "Response to Complaint" ("Pets.' Br.") at 7. This right, petitioners assert, "would be meaningless without a concomitant right of access to counsel." Id.

But petitioners stretch Rasul way out of proportion. The Supreme Court in Rasul was not presented with the question of petitioners' right or ability "to develop and pursue" their claims. Instead, the sole question presented in Rasul was the limited jurisdictional question whether the habeas statute, 28 U.S.C. § 2241, by its terms, "confer[red] on the District Court jurisdiction to hear petitioners' habeas corpus challenges." See 124 S. Ct. at 2698. In fact, the Court repeatedly framed its inquiry in terms of the District Court's "jurisdiction," not some amorphous "right of access to the courts" belonging to petitioners. See id.; see also id. at 2690 ("These two cases present the narrow but important question whether the United States courts lack jurisdiction to consider challenges to the legality of the detention of foreign nationals captured abroad."); id. at 2691 (reversing Court of Appeals decision "that the District Court lacked jurisdiction"); id. at 2695 ("Eisentrager plainly does not preclude the exercise of § 2241 jurisdiction.").

To be sure, the Court in Rasul ultimately did rule in petitioners' favor, overturning the dismissal of their claims. But the Court highlighted that it had reached this result through a straightforward analysis of 28 U.S.C. § 2241, not a consideration of the rights of petitioners:

> In the end, the answer to the question presented is clear. Petitioners contend that they are being held in federal custody in violation of the laws of the United States. No party questions the District Court's jurisdiction over petitioners' custodians. Section 2241, by its terms, requires nothing more. We therefore hold that § 2241 confers on the District Court jurisdiction to hear petitioners' habeas corpus challenges to the legality of their detention at Guantanamo Bay Naval Base.

See id. at 2698. Accordingly, there is no basis for petitioners' assertion that, by issuing its limited decision on a question of statutory jurisdiction, Rasul provided petitioners with an implied right to counsel, much less a right to unmonitored and unlimited access to counsel, or any other substantive right.[1]

2. The Habeas Statute Does Not Confer A Right To Counsel

To the extent that petitioners are asserting that the habeas statute itself provides a right to access to counsel, that assertion can be easily disposed of. It takes no more than a glance to see that the language of 28 U.S.C. §§ 2241 *et seq.* does not address any right to access to counsel; petitioners do not argue otherwise. And it is, of course, not the province of this Court to confer statutory rights beyond the plain and unambiguous language of the statute. United States v. Ron Pair Enterp., Inc., 489 U.S. 235, 242 (1989) ("The plain meaning of legislation should be conclusive, except in the 'rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters.'" (citation omitted)); Engine Mfrs. Ass'n v. E.P.A., 88 F.3d 1075, 1089 (D.C. Cir. 1996) ("[T]he court's role is not to 'correct' the

[1] Footnote 15 of the Court's opinion in Rasul, which petitioners cite here, by no means disposes of the issue presented. The footnote observes that petitioners' 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.'" 124 S. Ct. 2698 n.15. However, as discussed above and in respondents' opening brief, the Court's holding is clear that it decides only the statutory jurisdiction of a court to hear petitioners' claim. Indeed, the narrowness of the specific issue before the Court in Rasul was expressly recognized at oral argument, in questions distinguishing between the merits of the petitioners' claims – which were not before the Court – and the jurisdiction of the Court to consider them. See Rasul v. Bush, Oral Argument Transcript, 2004 WL 94367, at 12-13. Thus, at most, the Rasul footnote indicates that the claims asserted by petitioners are proper subjects for a statutory habeas action; it does not hold that petitioners are, in fact, entitled to the rights they claim have been infringed, including any right to access to counsel.

text so that it better serves the statute's purposes, for it is the function of the political branches not only to define the goals but also to choose the means for reaching them.").

In the face of the habeas statute's silence about the right they assert, petitioners advance a functional argument – that since the detainees have a right to invoke the jurisdiction of the federal courts, and cannot "present or even develop their claims without effective assistance of counsel," they must have a right to consult with a lawyer for this purpose. Pets.' Br. at 7. Even if accepted at face value, however, petitioners' functional analysis does not support the specific demands they make here, i.e., to engage in entirely unreviewed communications with lawyers concerning highly classified subjects, and to have the liberty, potentially, to use those lawyers to pass messages to others or otherwise aid those who are hostile to the United States. Indeed, in the circumstances of this case, respondents submit that no attorney-client consultation concerning the "facts" of detainees' capture, treatment, and detention is required, inasmuch as petitioners' claims concerning the legality of DoD's actions – based on constitutional rights that plainly do not apply to the detainees at Guantanamo and based on treaty rights that may not be vindicated in court – can readily be disposed of on the pleadings. And even if the resolution of petitioners' claims required the taking of evidence, it is plain that the detainees' asserted need to consult with lawyers for this purpose need not, and should not, override national security interests that require classification review and selective monitoring of detainees' communications with counsel.

3. No Other Statute Provides A Right To Counsel Here

Nor is it the case, as petitioners argue, that the All Writs Act, 28 U.S.C. § 1651(a), or the Criminal Justice Act, 18 U.S.C. § 3006A(2)(B), confer the entitlement they seek. The All Writs Act says nothing at all about counsel, but instead provides generally that "all courts . . . may issue

all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to usages and principles of law." 28 U.S.C. § 1651(a). As demonstrated in respondents' opening brief and further herein, the unqualified right to counsel sought by petitioners is neither "necessary or appropriate" nor required under any "usages or principles of law," especially given the national security concerns presented in this case.

The Criminal Justice Act, also cited by petitioners, is inapplicable for the same reason that the Sixth Amendment (if it applied to aliens outside the United States) could have no application to this proceeding: petitioners are not being held on criminal charges. Indeed, "the legislative history accompanying the CJA amendment which added the provision providing for the appointment of counsel at government expense in some habeas corpus proceedings . . . makes it clear that the statute and its amendment provide for the appointment of counsel in *criminal* proceedings or in those proceedings 'intimately related to the criminal process.'" Perez-Perez v. Hanberry, 781 F.2d 1477, 1480 (11th Cir. 1986) (quoting H.R. Rep. No. 1546, 91st Cong., 2d Sess. (1970)) (emphasis in original). Because there have been no criminal charges or criminal proceedings with respect to these detainees, the Criminal Justice Act cannot serve as a source of authority for any right to counsel here.

In any event, the statute provides only that a court "may" provide representation for a habeas petitioner when "the interests of justice so require." 18 U.S.C. § 3006A(2)(B). The discretionary nature of this provision thus only highlights that the habeas statute itself confers no absolute entitlement to counsel. And, again, respondents submit that the access to counsel that DoD is voluntarily providing to petitioners is more than sufficient to satisfy the "interests of justice" in light of the threats to national security presented in this context.

4. Hamdi Does Not Confer Or Identify A Right To Counsel

Finally, petitioners seek to base their supposed right to counsel on a misleading clause quoted out of context from the closing passage of Hamdi v. Rumsfeld, 124 S. Ct. 2633, 2651 (2004) (plurality). The clause in question is one that stated that Hamdi, an American citizen detained in the United States as an enemy combatant, "unquestionably has the right to access counsel in connection with the proceedings on remand." Id.

While petitioners argue that this passage acknowledges that habeas petitioners have a right to an attorney, in context, it is clear that the Court *declined to consider the question*:

> Hamdi asks us to hold that the Fourth Circuit also erred by denying him immediate access to counsel upon his detention and by disposing of the case without permitting him to meet with an attorney. Brief for Petitioners 19. Since our grant of certiorari in this case, Hamdi has been appointed counsel, with whom he has met for consultation purposes on several occasions, and with whom he is now being granted unmonitored meetings. He unquestionably has the right to access to counsel in connection with the proceedings on remand. *No further consideration of this issue is necessary at this stage of the case.*

124 S.Ct. 2652 (emphasis added). As the full quoted passage makes plain, in noting that Hamdi "unquestionably has the right to access to counsel," the Court was not drawing a legal conclusion concerning Hamdi's rights but merely observing that Hamdi had, in fact, now been granted counsel for purposes of future proceedings. Accordingly, it was not necessary for the Court to further consider the question of his right to counsel. Indeed, it would have been remarkable for the Court to have overturned the decision of the Fourth Circuit and identified a new right to counsel for habeas petitioners without any analysis or citation whatsoever. Petitioners' attempt to argue otherwise is plainly mistaken. In any event, any analysis of the rights of Hamdi, a U.S. citizen, cannot be generalized to apply to the detainees here, aliens outside U.S. sovereign

territory whose only voluntary association to the United States was their decision to wage war against it and its allies.

II. EVEN IF ACCESS TO COUNSEL WERE REQUIRED, THE CONDITIONS ON ACCESS HERE ARE REASONABLE AND APPROPRIATE

Even if petitioners could identify a source for a right to counsel, it is clear that the conditions imposed on counsel access are reasonable and appropriate in light of the national security concerns presented in this and numerous other pending Guantanamo Bay habeas cases, and allow the detainees sufficient access to their attorneys for purposes of the litigation. It is also clear that petitioners' preferred approaches would be both inadequate to account for the serious national security concerns involved in these and similar proceedings and unworkable and unduly burdensome to the parties and the courts.

A. The Conditions Imposed Here Are Reasonable

As respondents noted in their opening brief, restrictions on the rights of prisoners (including the right to counsel) are to be upheld "if [they] are reasonably related to legitimate penological interests." See Turner v. Safley, 482 U.S. 78, 89 (1987). The unique military and national security context presented here, of course, requires substantially more deference to the government than that accorded in the prison context. Indeed, it is beyond cavil that, in light of the on-going hostilities, the Court should give significant deference to the judgments of the military with respect to matters such as these that implicate national security. As the Supreme Court has recognized, "[m]atters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention." Haig v. Agee, 453 U.S. 280, 292 (1981); see also Dep't of Navy v. Egan, 484 U.S. 518, 530 (1988) ("Courts traditionally have been reluctant

to intrude upon the authority of the Executive in military and national security affairs."); Tiffany v. United States, 931 F.2d 271, 277 (4th Cir. 1991) ("Of the legion of governmental endeavors, perhaps the most clearly marked for judicial deference are provisions for national security and defense."). But even if a reasonableness standard did apply, the limitations on petitioners' access to counsel here, as contained in the Procedures and elaborated in the declaration of the Acting Commander at Guantanamo Bay, pass muster.

As explained in respondents' opening brief, in addition to requiring counsel to obtain a security clearance, the Procedures emphasize two conditions of access: classification review and monitoring. Classification review applies to each detainee here and requires that a privilege team review mail and "all written materials brought into or out of the meeting by counsel or counsel's staff." Resps.' Br., Ex. A § VII.A. This review is required because detainees possess sensitive or classified information, including information about secure military detention facilities, the security at such facilities, or military operations, including specific circumstances of a detainee's capture. It is critical that classified information be identified because it must be properly processed and protected in accordance with United States government requirements for handling, transporting, and storing such information. See Resps.' Br., Ex. B ¶ 16; Resps.' Br., Ex. A § XI.b.; see also Exec. Order No. 12,958 § 4.2, 60 Fed. Reg. 19825, 19836 (April 17, 1995); DOJ Security Program Operating Manual, available at http://10.173.2.12/jmd/seps/table.htm.

Real-time monitoring is an additional procedure that will be imposed with respect to three of the detainees in this case, each of whom poses "an extreme risk to the national security of the United States," and is required "to protect against immediate and substantial harm to national

security." Resps.' Br., Ex. B ¶ 17.[2] These detainees' communications will be monitored by a DoD privilege team that has not participated and will not participate in proceedings involving the detainees. The privilege team will disclose to the Commander at Guantanamo Bay monitored communications that "convey information that reasonably could be expected to result in immediate and substantial harm to the national security." Resps.' Br., Ex. A § X.B. However, such communications "will not be disclosed to any Government personnel involved in court, military commission, or enemy combatant status proceedings involving the detainee." Id. § X.D.

As the Acting Commander of the Joint Task Force Guantanamo Bay explains in his declaration, the procedures for counsel access, including classification review and monitoring, are "necessary and appropriate, both for the protection of national security information and in order to prevent future terrorist attacks." Resps.' Br., Ex. B ¶ 8. "Many of the detainees . . . are in possession of vital and highly classified information, the disclosure of which could immediately jeopardize the safety of United States and coalition forces engaged in ongoing operations in Afghanistan and elsewhere." Id. ¶ 9. Indeed, "a number of the detainees are closely associated with known . . . terrorist organizations that remain at large," id. ¶ 10, and "[t]he information in the possession of the detainees . . . could be used by those terrorists who are

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[2] These detainees include: a "spiritual advisor to Usama bin Laden," who is a "well-trained member of the al Qaida network with significant influence," Resps.' Br., Ex. B ¶ 18; an admitted affiliate of al Qaida who is "believed to be connected to Usama bin Laden's bodyguards" and retains the ability to communicate effectively with his comrades and leadership, id. ¶ 19; and "an associate of high-level Taliban leaders" who has expressed desire "to engage in terrorist and other violent activity against Americans," id. ¶ 20. All three of these individuals are aware of U.S. intelligence collection tools and methods, as well as gaps in U.S. intelligence, and, it is believed, "will attempt to further terrorist operations or otherwise disclose information that will cause immediate and substantial harm to national security if [they are] granted unmonitored communications with [their] counsel." Id. ¶¶ 18-20.

still free and waging war against the United States," id. ¶ 7. Moreover, many of the detainees may "have received extensive training from al Qaida and other terrorist organizations . . . in . . . how to pass coded messages in furtherance of terrorist operations through unwitting counsel and others." Id. ¶ 7. Accordingly, the Acting Commander has concluded, among "the various options open to the United States government as far as monitoring and other restrictions on access," the particular procedures adopted "provide the greatest degree of counsel access consistent with essential national security protections." Id. ¶ 8.

B. Petitioners' Challenges To The Procedures Are Without Merit

Petitioners challenge the conclusion of the ranking military official at Guantanamo Bay, arguing that the Procedures create an undue and unnecessary restriction on their right to counsel. But petitioners' arguments are misguided.

1. As an initial matter, although petitioners argue that even modest restrictions on a client's access to counsel are disfavored and subject to rigorous review, none of the cases cited by petitioners suggest that the limitations here are inappropriate. Virtually all of the cases cited involved communications between a criminal defendant and his counsel, at trial or post-conviction. See, e.g., Geders v. United States, 425 U.S. 80 (1976) (trial); Chandler v. Fretag, 348 U.S. 3 (1954) (trial); Sallier v. Brooks, 343 F.3d 868 (6th Cir. 2003) (post-conviction); Morgan v. Bennet, 204 F.3d 360 (2d Cir. 2000) (trial); Mann v. Reynolds, 46 F.3d 1055 (10th Cir. 1995) (post-conviction); Bach v. Illinois, 504 F.2d 1100 (7th Cir. 1974) (post-conviction); Adams v. Carlson, 488 F.2d 619 (7th Cir. 1973) (post-conviction); see also Weatherford v. Bursey, 429 U.S. 545 (1977) (pretrial). There was thus no question before the courts in those cases as to whether the defendants (who were presumably U.S. citizens or persons being tried or

incarcerated within the United States) were entitled to certain constitutional rights. Indeed, the particular constitutional right implicated by the attorney-client communication is specifically identified in several of the decisions. See Weatherford, 429 U.S. at 554 & n.4 (Sixth and Fourteenth Amendments); Geders, 425 U.S. at 91 (Sixth Amendment); Chandler, 348 U.S. at 10 (1954) (Fourteenth Amendment due process); Sallier, 343 F.3d at 873-74 (First Amendment right to receive mail, "right of access to the courts," and "right to be represented by counsel"); Morgan, 204 F.3d at 366 (Sixth Amendment); United States v. DiDomenico, 78 F.3d 294, 300 (7th Cir. 1996) (Sixth Amendment); Mann, 46 F.3d at 1059-60 (Sixth Amendment); Bach, 504 F.2d at 1102 ("constitutionally protected rights"); Adams, 488 F.2d at 630 (Sixth Amendment); Goodwin v. Oswald, 462 F.2d 1237 (2d Cir. 1972) (First, Sixth, and Fourteenth Amendments).

Here, in contrast, petitioners are not being tried or sentenced in the United States on criminal charges and therefore entitled to the protections of the Sixth Amendment or other constitutional provisions; they are enemy combatants detained outside U.S. sovereign soil in order prevent them from reentering on-going hostilities and to enable the military to gather vital intelligence that will advance of the prosecution of the war. Thus, the entire context for the discussion of attorney-client communications in the cases relied upon by petitioners is fundamentally different than the context presented here.

More importantly, in none of the cases cited by petitioners did an attorney-client communication present the possibility of a threat to national security. Thus, any interest of the government in limiting or conditioning access to counsel was far less pronounced than here.[3]

[3] Notably, in several of the cases relied upon by petitioners, courts did, in fact, acknowledge that threats to prison security or other penological interests could justify restrictions on a prisoner's access to counsel. See Sallier, 343 F.3d at 873-74; Mann, 46 F.3d at 1059-61;

Accordingly, it is not the case, as petitioners argue, that any restriction on access to counsel here must be disregarded unless it is narrowly tailored to achieve an extraordinary governmental interest or satisfies some other heightened standard of review. Given the absence of any constitutional right to access to counsel (or any right to access to counsel based on any other source), and in light of the deference that must be accorded to the military with respect to matters implicating national security, at most a reasonableness standard applies – a standard easily satisfied here.[4]

2. In any event, petitioners overstate the interference with attorney-detainee communications that might be caused by the Procedures. For all but three of the detainees, the principal condition imposed will be classification review. Such a review will not involve contemporaneous observation or audio recording of communications between detainees and their attorneys. It will merely involve review of written material by a privilege team to ensure proper classification of that information and, where appropriate, proper handling and storage in accordance with government requirements. Such review is essential for two reasons. First, it is necessary to ensure the proper identification *and* treatment of national security information, especially given the large number of private counsel from around the country that will be involved, most with little or no experience in identifying or handling such information. Second, it will avoid the logistical impossibility and unnecessary costs of requiring that these numerous and inexperienced counsel treat *all* information and *all* notes and correspondence from the many

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Bach, 504 F.2d at 1102; Adams, 488 F.2d at 631; Goodwin, 462 F.2d at 1244.

[4] In any event, there can be no question but that, as detailed in the declaration from Guantanamo Bay's Acting Commander, the limitations imposed here satisfy whatever more rigorous standard petitioners might seek to apply here.

detainees involved as classified, which would require massive amounts of resources to provide secure storage and computer resources and sealed court filings on an unprecedented scale. By allowing a privilege team to determine what written materials are classified, and then requiring secured handling only for the classified material, it may be possible to avoid much of the logistical burden that would otherwise be imposed on the parties and the courts. Moreover, because that privilege team will be walled-off from future proceedings involving the petitioners, there can be no legitimate concern that attorney-detainee communications will be "chilled."

Likewise, the petitioners' challenges to monitoring fall short. First, contrary to petitioners' suggestions, the type of monitoring to be imposed here is not unique. See Resps.' Br. 24-25. Indeed, a regulation of the Bureau of Prisons specifically allows monitoring of attorney-inmate communications in cases where there is reasonable suspicion that an attorney might be used to facilitate acts of terrorism. See 28 C.F.R. § 501.3(d) ("In any case where the Attorney General specifically so orders, based on information from the head of a federal law enforcement or intelligence agency that reasonable suspicion exists to believe that a particular inmate may use communications with attorneys or their agents to further or facilitate acts of terrorism, the Director, Bureau of Prisons, shall . . . provide appropriate procedures for the monitoring or review of communications between that inmate and attorneys . . . .").

Moreover, it is well-established that communications with an attorney for the purpose of furthering an act of crime are not protected by attorney-client privilege. United States v. Zolin, 491 U.S. 554, 562 (1989) (attorney-client privilege "'ceas[es] to operate at a certain point, namely, where the desired advice refers *not to prior wrongdoing*, but to *future wrongdoing*.'" (citation omitted) (emphasis original)); Clark v. United States, 289 U.S. 1, 15 (1933) ("The

privilege takes flight if the relation is abused. A client who consults an attorney for advice that will serve him in the commission of a fraud will have no help from the law."). Here, given that the three detainees subject to monitoring would potentially use any unmonitored communication with counsel to attempt to "further terrorist operations or otherwise disclose information that will cause immediate and substantial harm" to the United States, see Resps.' Br., Ex. B ¶ 17, there can be no blanket determination – as petitioners demand – that all conversations between the detainees and their counsel would be protected by attorney-client privilege.

Regardless, petitioners' concerns with the degree of interference imposed by monitoring are exaggerated. The communications between counsel and the detainees will be monitored by a privilege team that is clearly segregated from proceedings involving petitioners. See Resps.' Br., Ex. A §§ X.A., X.D. Moreover, the communications are not to be disclosed as a matter of course, but will only to be disclosed to the Commander at Guantanamo Bay for further action when the communications contain "information that reasonably could be expected to result in immediate and substantial harm to the national security." Id. §§ X.A.-B. And even such disclosed communications "will not be disclosed to any Government personnel involved in court, military commission, or enemy combatant status proceedings involving the detainee." Id. § X.D. Again, therefore, any concern that attorney-detainee communications will be unnecessarily "chilled" by real-time monitoring is not well-founded.

3. Petitioners further challenge the Procedures on the ground that counsel for certain other detainees have been allowed to meet with their clients without being subjected to a classification review or real-time monitoring. Indeed, petitioners suggest that these detainees,

who were criminally charged and face military commission proceedings, present an even greater security threat than the petitioners here.

Petitioners' arguments miss the mark. The fact that a particular individual has been criminally charged hardly means that he or she is more of a threat to national security or possesses more sensitive information than individuals who have not been so charged. To the contrary, individuals who continue to be detained as enemy combatants in order to allow further intelligence-gathering by military officials and to prevent re-entry into continuing hostilities may well possess *more* sensitive information and be *more* dangerous than others whom the military is ready to prosecute. Indeed, the potential adverse effect on an on-going, potentially fruitful interrogation of detainee is a factor that a military prosecutor may consider in exercising his or her discretion whether to file formal charges.

In any event, it is simply not the case that DoD has not taken precautions with respect to protection of classified information and amelioration of national security threats during the commission proceedings. To begin with, in each commission proceeding, a military officer attuned to the need to identify and safeguard national security information serves as defense counsel along with, at defendant's option, outside civil defense counsel. See Declaration of Lt. Col. Jon L. Hall (attached hereto as Exhibit C) ¶ 3. Any civil defense counsel must obtain a "secret" level clearance and comply with rules and instructions of the commission proceeding. Id. Both military and civilian defense counsel are obligated to protect classified and national security information. Id. ¶ 4. Moreover, military counsel have received specific training with respect to identifying and handling protected information. Id. ¶ 5. Because military defense counsel are present for all meetings with detainees, they are able to identify, and ensure proper

handling and safeguarding of, any sensitive or classified information communicated to counsel. Id. Military counsel may also seek advice of a military security officer with respect to identification and handling of sensitive or classified information. Id. ¶ 4. Thus, although the commission proceedings do not involve classification review by a privilege team, the presence in all defense meetings of trained military defense counsel who can identify and ensure proper handling of classified information alleviates any concern in this area.

Furthermore, contrary to petitioners' assertions, monitoring is, in fact, available with respect to attorney-client communications in the context of the military commissions. Earlier this year, DoD established a specific policy for monitoring of communications between attorneys and detainees facing military commission proceedings. See Exhibit D attached hereto.

Regardless, even if DoD had not yet implemented a standard set of procedures regarding counsel at a time when there were only a handful of detainees requesting counsel access, this would hardly undermine the government's need to protect classified information and guard against national security threats during the current and coming wave of counsel requests in the habeas context.[5]

[5] Petitioners attempt analogies to the prosecutions of mob bosses and other "extremely dangerous persons," as well as to spies Robert Hanssen and Aldrich Ames. But those situations are hardly analogous. In the current national security situation, in particular the on-going war on terrorism prompted by the September 11th attacks, the potential harm from disclosure of sensitive information or communication of messages between detained persons and their comrades elsewhere has been exponentially magnified. Moreover, respondents here are not simply managing potential threats in a few isolated cases against particular individuals, but rather must ameliorate national security concerns posed in dozens, if not hundreds, of cases brought by persons detained during the war against terror. The Procedures appropriately address these concerns.

4. Petitioners insist that alternate procedures they propose would accomplish the government's interest in protecting national security while allowing counsel to engage in confidential communications with the detainees. In particular, they propose that, in addition to obtaining security clearances, their counsel would agree not to disclose any information received from petitioners without first seeking the government's authorization or court approval.

This proposed procedure is insufficient and unworkable. As an initial matter, while the grant of "secret" level clearance no doubt provides some evidence that counsel may be trusted to handle sensitive information, given the vital national security concerns presented here, the military need not rely on the granted security clearance alone or counsel's additional assurance that they will not disclose any information without approval. Indeed, the United States is presently prosecuting an attorney for facilitating communications between her client, an imprisoned terrorist, and outsiders in direct violation of her affirmation to abide by special administrative measures prohibiting her from doing so. See United States v. Sattar, 314 F. Supp. 2d 279 (S.D.N.Y. 2004). Respondents here have no reason to question counsel's trustworthiness. But the military may properly exercise its judgment and decline to entrust the safety of U.S. citizens to private attorneys with little or no experience in identifying and properly handling the type of national security information that is likely to implicated here, notwithstanding the mere grant of a security clearance and an additional verbal or written assurance, where other lawful procedures (e.g., classification review) will better ensure national security.

In addition, petitioners' alternate proposal disregards the logistical concerns presented by the present and anticipated habeas petitions by Guantanamo detainees. As explained in Respondents' Motion for Joint Case Management Conference, Entry of Coordination Order, and

Request for Expedition, at least 13 habeas cases have been filed on behalf of approximately 60 detainees at Guantanamo Bay. Given that there are approximately 600 detainees, many more such cases – and many more requests for counsel such as those presented here – are to be expected. Thus, in developing the procedures for counsel access, DoD could ill-afford individualized procedures for particular cases, including for detainees in this case. Rather, DoD devised the Procedures for Counsel Access to Detainees at the US Naval Base in Guantanamo Bay, Cuba with any eye to the various concerns – logistical and otherwise – of accommodating anticipated requests for access by counsel for dozens, if not hundreds, of detainees.

Petitioners in this case may be content to agree that their counsel will not disclose any communication with the detainees here to anyone without permission of the government; but petitioners in other cases may not so agree. Even if DoD believed that petitioners' proposed arrangement adequately protected national security interests (which it does not), the logistical concerns associated with affording petitioners in this case a different set of procedures for access to counsel than might be afforded to petitioners in other cases – and thus opening the door to specifically tailored agreements for access in every pending and anticipated habeas cases – makes petitioners' proposal untenable.

Moreover, it would be just as impractical if, instead of allowing counsel in different cases different types of access, DoD implemented petitioners' proposal with respect to all counsel and all cases. Under the proposal, counsel would essentially treat all information as classified. But classified information must be stored and used in appropriate facilities and cannot be placed or manipulated on computers that do not comply with government procedures regarding handling of classified information. See Exec. Order No. 12,958 § 4.2, 60 Fed. Reg. at 19836; see also, e.g.,

DOJ Security Program Operating Manual, Ch. 6,8. If counsel and detainees in potentially hundreds of cases decide to treat *all* information conveyed between them as classified, Guantanamo Bay, a military base miles from the United States with limited staff and facilities, simply will not have the resources to support the appropriate storage, protection, and usage of that information, cf. Ex. C ¶ 7; indeed, petitioners' proposal would transform the Guantanamo Bay Naval Base into an on-site legal office accommodating the full work and work-product of dozens, if not, hundreds of attorneys. By contrast, the Procedures allow for ready segregation of unclassified information, which attorneys may take with them back to their offices in the United States for use there, from classified information, which must be specially handled.

DoD here has promulgated a set of procedures that ensure adequate access to counsel (even though no such access is required) on a uniform basis in a manner that comports with and appreciates the logistical concerns of accommodating requests for counsel at an off-shore naval base. DoD need not and cannot further customize procedures for counsel access to suit the needs of each individual detainee and his counsel absent a relevant national security concern.

Petitioners' remaining challenges require only cursory attention.

5. Petitioners argue that counsel should not be required to obtain an Acknowledgment of Representation after an initial meeting with detainees because counsel might be unable to "win the detainees' trust in a single meeting." Pets.' Br. at 21. But petitioners, of course, merely speculate that counsel would be unable to establish representation with the detainees, and, in any event, nothing requires respondents to accommodate repeated meetings between counsel and detainees who reject their representation. Moreover, subject to a

classification review, counsel may bring to the detainees appropriate letters of introduction from detainees' families and other indicia of their trustworthiness.

6. Petitioners complain that it is unreasonable for DoD to limit participation in meetings to one attorney at a time. But counsel's mere desire to have "one attorney ask questions while another take notes," see Pets.' Br. at 21, is hardly the type of burden that warrants rejecting DoD's considered Procedures, which were designed in light of the logistical concerns presented by anticipated visits by counsel. Moreover, the Procedures specifically provide that attendance by more than one attorney may be approved in advance by the Commander, JTF-Guantanamo. See Resps.' Br., Ex. A § III.D.2.

7. Petitioners complain that they should not be required to pay the costs of obtaining government security clearances. But, in light of the fact that petitioners do not even have a right to counsel, much less a right to counsel at the expense of the government, petitioners hardly have grounds to complain that they must absorb the costs of the government's effort in conducting the intensive background checks necessary to process their counsel's security clearances.

8. Petitioners argue that attorney-detainee correspondence should not be reviewed by DoD. But, for the reasons set forth above and in respondents' opening brief, such review is legally permissible, not to mention necessary and appropriate, in light of the classified information that could potentially be transmitted – even inadvertently – in such correspondence and the national security concerns implicated in this setting.

9. Petitioners argue that counsel should be permitted to disclose unclassified information for purposes other than preparing for or conducting litigation involving a detainee. But the point of counsel's visits is to facilitate litigation by detainees. While counsel may wish

to disseminate information for non-litigation purposes, petitioners have not asserted any legal grounds for an entitlement to do so.

10. Petitioners complain that counsel have not been granted "top secret" clearances. Security clearances are based not only on eligibility, but also on need. See 28 C.F.R. § 17.44 (c) ("Eligibility for access to classified information shall be limited to classification levels for which there is a need for access. No person shall be granted eligibility higher than his or her need."); see also Exec. Order No. 12,958 § 4.2(a)(3), 60 Fed. Reg. at 19836. At this time, there does not appear to be any need for counsel to receive a "top secret" clearance. Monitoring would still be required for the three detainees and classification review for all of the detainees in this case, regardless of whether counsel had a "secret" or "top secret" clearance. See Resps.' Br., Ex. B ¶ 14. Should such a need for a "top secret" clearance arise in this case, either because of the need for access to particular information or otherwise, that clearance can be granted expeditiously because the requisite background checks will already have been conducted.

11. Petitioners assert that the government has unreasonably refused to grant Abdul Rahman R. al Haroun access to petitioners. But, as a letter from DoD's Acting Deputy General Counsel (Legal Counsel) explains, "as a non-U.S. citizen, Mr. al Haroun is not eligible to receive a United States security clearance or to be provided access to classified information." See Letter from Stewart F. Aly to David B. Salmons (attached hereto as Exhibit E); see also 32 C.F.R. § 154.16(c)(1); 32 C.F.R. § 154.6(a); 28 C.F.R. § 17.41(b). Although Kuwait has affirmed Mr. al Haroun's trustworthiness, the United States has not "entered into a security of military information agreement with the government of Kuwait, as it has with some nations, including the

government of Australia." [6] See Ex. E. Accordingly, "Mr. al Haroun's Kuwaiti clearance is not considered equivalent to a United States clearance." Id.

Petitioners' counsel have known from the first time they raised this issue with counsel for respondents in early July that it was unlikely that Mr. al Haroun would be granted access to the detainees, and that they would need to find a translator that would be eligible for a security clearance. To date, however, petitioners' counsel have not requested a security application for such a translator. And while respondents have indicated that they would be willing to provide the detainees with a letter or even a videotape introduction by Mr. al Haroun, subject to appropriate screening, no such introduction has yet been submitted.

CONCLUSION

For the foregoing reasons, and the reasons set forth in respondents' opening brief, petitioners have no constitutional or other right of access to counsel, and, in any event, counsel may have access to petitioners in accordance with reasonable procedures that accommodate attorney-detainee communications while protecting government interests. The petition for a writ of habeas corpus based on any right of access or the lack of access, or any other basis, must be rejected.

[6] For this reason, the petitioners' comparison between Mr. al Haroun and Mr. Hicks' counsel – an Australian with appropriate Australian security clearance who was granted access at Guantanamo Bay – is unavailing.

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Respectfully submitted,

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