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' OPPOSITION TO PETITIONERS' MOTION FOR WRIT OF INJUNCTION

Respondents hereby oppose petitioners' Motion for Writ of Injunction and state as follows:

Petitioners' motion raises four distinct, and, as explained below, unfounded accusations relating to alleged interference with petitioners' counsel's ability to communicate with petitioners and their attorney-client relationship. First, petitioners' allege that military interrogators have deliberately sought to interfere with the attorney-client relationship by informing petitioners during interrogations that petitioners' counsel are not trustworthy and by punishing petitioners in retaliation for public statements made by petitioners' counsel. Second, petitioners' counsel contend that the government has sought to weaken petitioners' confidence in their counsel by refusing requests to show petitioners video DVD messages from their families. Third, petitioners' counsel argue that the government has refused to provide effective means to communicate with petitioners prior to their Administrative Review Board ("ARB") hearings.

Fourth, petitioners' counsel complain that the government improperly refused to authorize petitioners' counsel's most recent request to visit Guantanamo Bay ("GTMO") until petitioners' counsel offered appropriate explanations of three incidents that arose during their prior visits to GTMO. As a remedy for these alleged violations, petitioners ask the Court to issue broad, multi-faceted injunctive relief: (1) an order prohibiting military personnel from "mak[ing] or tak[ing] actions that undermine the attorney-client relationship between counsel and the Kuwaiti Detainees"; (2) an order requiring respondents to permit counsel to show eleven family DVDs that petitions' counsel brought to GTMO in February 2005; (3) an order requiring respondents to allow petitioners' counsel to have monthly telephone calls with petitioners; and (4) an order preventing respondents from "unilaterally suspending the process of, or denying, counsel requests to visit the Kuwaiti Detainees." See Petrs' Proposed Order.

As explained below, the accusations in petitioners' motion are unfounded. The factual basis for each of the allegations is either entirely without merit or reflects appropriate actions by respondents that have not interfered with petitioners' counsel's relationship with petitioners.

Contrary to petitioners' counsel's accusations, respondents have done anything but interfere with any relationship between petitioners and petitioners' counsel. Petitioners' counsel are now on their sixth visit to GTMO;[1] this number of visits far exceeds those of other counsel in habeas cases. Time and time again, respondents and their counsel have worked with petitioners' counsel to facilitate various forms of communications between counsel and petitioners, even in the face of counsel's frequently unreasonable demands. Accordingly, petitioners' motion should

[1] Petitioners' counsel have made five trips to GTMO to interview petitioners: December 26-29, 2004, January 9-13, 2005; January 27-31, 2005; February 13-18, 2005; March 14-18, 2005. A sixth visit is already underway for May 9-13, 2005.

be denied.

BACKGROUND

1. Military Interrogators' Communications With Petitioners.

The mission of the detention facility at GTMO involves humane detention of the detainees, and consistent with that mission, and with the President's directive to the military to treat detainees humanely, mistreatment or abuse of detainees is not permitted. See Declaration of Col. John A. Hadjis ¶ 2 (attached as Exhibit 1) (originally submitted in O.K. v. Bush, Case No. 04-1136 (JDB)); see also Memorandum for the Vice President, the Secretary of State, the Secretary of Defense, et al., from President George W. Bush Re: Humane Treatment of al Qaeda and Taliban Detainees ¶ 2 (Feb. 7, 2002) (available at http://www.library.law.pace.edu/research/020207_bushmemo.pdf). To that end, the Department of Defense does not permit interrogators or other personnel to interfere with the relationship between any detainee and his lawyer. See Declaration of Esteban Rodriguez ¶ 2 (attached as Exhibit 2). This includes a prohibition on impersonating a lawyer, on making disparaging comments about the lawyer, and on retaliating against a detainee for having met with a lawyer or being involved in habeas corpus litigation. Id. Furthermore, detainees are not granted or denied privileges, disciplined, or otherwise discriminated against on account of their involvement with habeas litigation or counsel. See Hadjis Declaration ¶ 5.

Consistent with this policy, inquiry was made in response to the accusations contained in petitioners' motion that interrogators were interfering in counsel's relationship with petitioners. As explained in the accompanying declaration by the Director of GTMO's Joint Intelligence Group, petitioners' allegations that interrogators have attempted to sour or interfere with any

relationship between habeas counsel and petitioners are false. See Rodriguez Declaration ¶¶ 1-6. Contrary to the accusations of petitioners' counsel, the female interrogator assigned to petitioner Faziz Al Kandari has never made disparaging comments about petitioners' counsel during conversations with Mr. Al Kandari, nor has she ever done anything to interfere in the relationship between Mr. Al Kandari and his counsel. Id. ¶ 3. This same interrogator also has been the only interrogator assigned to petitioner Saad Al-Azmi since petitioners' counsel began visiting GTMO late in 2004. Id. Contrary to the implication in petitioners' counsel's declaration, see Wilner Declaration ¶ 16, she has never made disparaging comments about petitioners' counsel during conversations with Mr. Al-Azmi, nor has she ever done anything to interfere in the relationship between Mr. Al-Azmi and his counsel. See Rodriguez Declaration ¶ 3.

Similarly, the only interrogator assigned to petitioner Fouad Mahmoud Al Rabiah since petitioners' counsel begin visiting GTMO has never made disparaging comments about petitioners' counsel, nor has this interrogator ever done anything to interfere in the relationship between Mr. Al Rabiah and his counsel. Id. ¶ 4.

2. Petitioners' Counsel's Requests To Show DVDs to Petitioners.

On three occasions, petitioners' counsel have requested permission to show, as part of visits with petitioners at GTMO, video messages from petitioners' families and friends that have been recorded in Arabic on Digital Video Discs ("DVDs"). Under the applicable, Court-approved counsel access procedures in this case, habeas counsel are permitted privileged legal mail and correspondence with petitioners. See November 8, 2004 Amended Protective Order and Procedures for Counsel Access to Detainees at the United States Naval Base in Guantanamo Bay, Cuba, § IV, 344 F. Supp. 2d 174 (D.D.C. 2004) ("Revised Procedures for Counsel Access")

(attached as Exhibits B & J to Petitioners' Motion). Personal correspondence between detainees and their families, however, is subject to GTMO's standard mail procedures involving review of incoming and outgoing mail by military authorities. See id. § IV.A.5. Habeas counsel are not permitted to serve as a conduit of such non-legal mail in contravention of the standard mail review procedures, see id. § IV.B.5, except that under section V of the Revised Procedures for Counsel Access, the Commander, JTF-GTMO, "shall not unreasonably 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."[2]

In anticipation of their first visit to GTMO, which was originally scheduled for December 5-9, 2004, petitioners' counsel requested permission to show petitioners one DVD containing a video message spoken in Arabic by all the families and friends of the twelve original petitioners in this case.[3] See Declaration of Andrew Warden ¶ 2 (attached as Exhibit 3). In light of the significant burdens involved with a security review of video messages, government counsel requested that petitioners' counsel submit the DVD and an English translation several weeks in advance of their visit in order to provide personnel at GTMO sufficient time to review the DVD and to make an informed release decision. Id. ¶ 3. These burdens include transporting the DVD

[2] Habeas counsel also may bring "legal mail, writing utensils and paper into any meeting with a detainee" without prior review. See Revised Procedures for Counsel Access § V.A.

[3] This case originally involved twelve petitioners, however, Nasser Nijer Naser Al Mutairi was released from United States custody in January 2005. Respondents have since moved to dismiss this petitioner from the case. See Notice of Transfer of Petitioner Nasser Nijer Naser Al Mutairi and Motion to Dismiss His Petition for Writ of Habeas Corpus (dkt. no. 184).

from Washington, D.C., to GTMO for review, verifying the translation of the DVD from Arabic to English, and substantive review of the audio and video images on the DVD by intelligence and security personnel. See Declaration of Tony De Alicante ¶ 4 (attached as Exhibit 4). Petitioners' counsel, however, never submitted the DVD in advance of their visit and then abruptly cancelled their visit less than 48 hours prior to their scheduled departure, stating that they had not received the DVD from petitioners' families. See Warden Declaration ¶ 4.

Petitioners' counsel next rescheduled their first visit to GTMO for December 26-29, 2004. Petitioners' counsel again expressed their intent to show petitioners the aforementioned DVD and provided government counsel with a copy of the DVD and an English transcript on December 15, 2004. Id. ¶ 5. To expedite delivery of the DVD to GTMO for review, government counsel spent several hours working with petitioners' counsel, their paralegal, and technology personnel at the Department of Justice to digitize the DVD into a format that could be sent to GTMO via e-mail.[4] Id ¶ 6. Additionally, GTMO made arrangements to procure a portable DVD player for petitioners' counsel's use to enable petitioners' counsel to play the DVD separately to each petitioner during their individual interviews. On December 21, 2004, following review of the DVD pursuant to section V of the Revised Counsel Access Procedures, GTMO approved the DVD for release to petitioners. Petitioners' counsel ultimately showed the DVD to petitioners during their visit.

Petitioners' counsel's second visit to GTMO occurred on January 9-13, 2005. Prior to this visit, petitioners' counsel requested permission to show 11 petitioners individually prepared

[4] Ultimately, conversion of the DVDs to digital media files proved too difficult to send via e-mail, thus original copies of the DVDs were sent to GTMO for review. See Warden Declaration ¶ 6.

DVDs containing a message from each respective petitioner's family and friends. Id. ¶ 7. Despite government counsel's previous directive to submit the DVDs and English transcripts well in advance of their visit, petitioners' counsel never submitted them to government counsel for transmission to GTMO. Id. Instead, petitioners' counsel's interpreter delivered the DVDs to personnel at GTMO when he arrived at the base on Saturday, January 8, 2005, one day prior to petitioners' counsel's scheduled visit. Id. Notwithstanding the untimeliness of petitioners' counsel's submission, GTMO personnel conducted an expedited review and determined that all 11 DVDs were suitable for showing to petitioners. Consequently, petitioners' counsel were permitted to show the 11 DVDs to petitioners during their January 9-13, 2005 visit.

Petitioners' counsel's third request to show petitioners DVD messages from their families occurred during their fourth visit to GTMO, which took place on February 13-18, 2005.[5] Once again, petitioners' counsel failed to submit the DVDs sufficiently in advance of their arrival at GTMO to permit review. On this occasion, petitioners' counsel submitted copies of 11 DVDs and English translations to government counsel on the afternoon of February 11, 2005, two days before their scheduled arrival at GTMO. Id. ¶ 8. Because of their late submission, petitioners' counsel were informed that GTMO personnel might not be in a position to make a release decision during counsel's visit. Id. & e-mail from Andrew Warden to Neil Koslowe, Feb. 11, 2005 (attached as Exhibit A to Warden Declaration). Petitioners' counsel acknowledged that they understood the situation and expressed their appreciation for respondents' cooperation. Id. & e-mail from Neil Koslowe to Andrew Warden, Feb. 11, 2005 (attached as Exhibit B to Warden

[5] Petitioner's counsel's third visit to GTMO occurred on January 27-31, 2005. Petitioners' counsel did not request to show DVDs during this visit.

Declaration).

Because of the logistical difficulty of transporting 11 DVDs from Washington, D.C., to GTMO prior to petitioners' counsel's scheduled visit, government counsel advised petitioners' counsel to deliver the DVDs to GTMO personnel when they arrived at the base. Id. Petitioners' counsel ultimately delivered the DVDs to GTMO personnel on February 14, 2005. See De Alicante Declaration ¶ 3. Thereafter, GTMO personnel began their review of the DVDs to determine whether they were acceptable for release pursuant to section V of the Revised Procedures for Counsel Access.[6] See id. Petitioners' counsel inquired as to the status of the DVDs each day of their visit and GTMO personnel consistently informed them that review was ongoing. See id. at ¶ 6. At the conclusion of petitioners' counsel's visit on Thursday, February 17, 2005, GTMO personnel informed petitioners' counsel that the DVDs were still undergoing review and that a final release decision had not been made. See id. Although petitioners' counsel stated that they intended to show the DVDs to petitioners on their next visit to GTMO in March 2005, GTMO personnel, contrary to the accusations of petitioners' counsel, see Petrs' Mot. at 4-5, never advised petitioners' counsel that the DVDs had or would be approved for release in time for their next visit. See De Alicante Declaration ¶ 6. Similarly, contrary to petitioners' counsel's accusations, see Petrs' Mot. at 4-5, 10, GTMO personnel did not know that

[6] The GTMO personnel involved in translating and reviewing the DVDs are already engaged in full-time duties supporting the mission of JTF-GTMO, including screening mail. At any one time there may be upwards of 1,000 letters, as well as other items for detainees undergoing review. All mail items submitted for detainees are processed on a first-come basis so as not to give special treatment to one detainee over another. When petitioners' counsel delivered the DVDs to GTMO personnel, there were 1,081 pieces of mail to be reviewed. GTMO personnel made an effort to review the DVDs during petitioners' counsel's visit even though the review cut into the normal processing time for mail for other detainees. See De Alicante Declaration ¶ 5.

petitioners' counsel had promised to show petitioners the DVDs, nor were GTMO personnel aware of any representations petitioners' counsel made to petitioners' during their privileged conversations. See id. at ¶ 8. GTMO personnel advised petitioners' counsel to submit future requests to show DVDs in advance of counsel's arrival at GTMO (e.g., three weeks) so the necessary review and redactions could be completed prior to counsel's visit. See id. at ¶ 6.

Petitioners' counsel's next visit to GTMO took place on March 14-18, 2005. Several days prior to their departure, petitioners' counsel inquired whether GTMO had completed review of the 11 DVDs submitted during their February visit. See Warden Declaration ¶ 9 & March 9, 2005 letter from Neil Koslowe (attached as Exhibit C to Warden Declaration). In response, petitioners' counsel were informed that only the DVD for petitioner Khalid Abdullah Mishal Al Mutairi was approved for release under section V of the Revised Procedures for Counsel Access.[7] See id. & March 11, 2005 letter from Terry Henry (attached as Exhibit C to Petitioners' Motion) The remaining DVDs intended for the 10 other detainees were not approved for release. See id. The basis for this decision was explained to petitioners' counsel by letter dated March 11, 2005:

> As you are aware, this is the third set of DVDs you have submitted to show the detainees. The first two sets were approved by GTMO pursuant to § V.A of the *Revised Procedures for Counsel Access to Detainees At the U.S. Naval Base in Guantanamo Bay, Cuba*. This section provides that the Commander JTF-GTMO "shall not unreasonably withhold approval for counsel to bring into a meeting with a detainee letters, tapes, or other communications introducing counsel to the detainee." These DVDs were shown during your initial visits to GTMO in order for you to introduce yourself to the detainees and inform them that you have been

[7] Although the DVD was approved for release, it was not shown to Mr. Al Mutairi because he refuses to meet with petitioners' counsel. See Declaration of Tony De Alicante ¶ 2 (originally submitted in Does 1-570 v. Bush, 05-CV-312 (CKK)) (attached as Exhibit 5). Mr. Al Mutairi also refuses to accept legal mail from petitioners' counsel. Id.

> retained by their family members to pursue litigation on their behalf. Presently, all the detainees in your case, except Mr. Al-Mutairi, have signed an "Acknowledgment of Representation" form, or its equivalent, indicating that they want to be represented by you in this litigation. See Revised Procedures for Counsel Access § III.C.2. (requiring counsel to submit evidence of authority to represent the detainee no later than ten days after the conclusion of a second visit with the detainee). In light of this fact, and the fact that your upcoming visit is now your fifth to GTMO, this most recent set of DVDs no longer serves the purpose of "introducing counsel." Indeed, five of the DVDs do not even mention lawyers. Moreover, the DVDs are simply home movies conveying messages from family members and friends that are not approved for any other GTMO detainees.

See id.; De Alicante Declaration ¶ 7. This decision was based on application of section V of the Revised Procedures for Counsel Access. See De Alicante Declaration ¶ 7.

3. Petitioners' Counsel's Requests For Emergency Communication With Petitioners Regarding ARB Hearings.

Consistent with United States policy not to detain enemy combatants at GTMO any longer than necessary, the Department of Defense ("DoD") established ARBs to determine at least annually whether a detainee previously determined to be an enemy combatant by a Combat Status Review Tribunals continues to pose a threat to the United States or its allies in the ongoing conflict against al Qaeda and its affiliates and supporters, and whether there are other factors impacting whether the enemy combatant detainee should continue to be detained by the United States. See Memorandum Implementing Administrative Review of the Detention of Enemy Combatants (Sept. 14, 2004) (attached as Exhibit 6) (hereinafter "ARB Procedures"). After a non-adversarial hearing and consideration of relevant and reasonably available information, the ARB recommends whether each enemy combatant should be released, transferred, or further detained.[8] See id. at 2. To facilitate and manage operation of the ARB procedures, DoD

[8] To assist the detainees in preparing for and presenting information to the ARB, each detainee is appointed an Assisting Military Officer (AMO). Because the ARB proceedings are

established the Office for the Administrative Review of the Detention of Enemy Combatants ("OARDEC"). See id.

To fulfill its charge of presenting the ARB with appropriate information about the GTMO detainees, OARDEC reached out to habeas counsel and requested that they submit information bearing on whether the petitioners they represent are a continuing threat to the United States or its allies. On December 6, 2004, government counsel informed all habeas counsel that they could submit such materials to OARDEC on or before January 1, 2005. See Declaration of Terry Henry ¶ 2 (attached as Exhibit 7) & e-mail from Terry Henry, December 6, 2004 (attached as Exhibit A to Henry Declaration). On December 28, 2004, OARDEC extended the filing deadline until February 1, 2005. See Henry Declaration ¶ 3 & e-mail from Teresa McPalmer, December 28, 2004 (attached as Exhibit B to Henry Declaration). Thus, since December 2004, petitioners' counsel in this case have been on notice that ARB proceedings for petitioners would occur anytime thereafter.[9]

Since receiving notice regarding the timing of the ARBs, petitioners' counsel in this case have visited GTMO on four separate occasions – January 9-13, 2005; January 27-31, 2005; February 13-18, 2005; and March 14-18, 2005 – during which time they have prepared petitioners for their ARB hearings. Evidence of this preparation is reflected in a December 30,

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non-adversarial in nature, the AMO is not an advocate for or against the continued detention of the detainee. The AMO must be a member of the military services, but cannot be a Judge Advocate or a Chaplin. Although habeas counsel may submit information to the ARB, they are prohibited from serving as AMOs. See ARB Procedures, Enclosure 3, § 2.C.

[9] Indeed, petitioners' counsel were expressly told that ARB hearing for two petitioners in this case were scheduled for the first week of January 2005. See e-mail from Terry Henry, December 6, 2004 (attached as Exhibit A to Henry Declaration).

2004 e-mail from petitioners' counsel, which states that petitioners' counsel intended to address ARB issues with petitioners during their next scheduled visit to GTMO. See Warden Declaration ¶ 13 & e-mail from Neil Koslowe, December 30, 2004 (attached as Exhibit E to Warden Declaration).

Against this backdrop, petitioners' counsel conducted their most recent visit to GTMO on March 14-18, 2005. After concluding their meetings with petitioners, petitioners' counsel called government counsel on Thursday, March 17, 2005 at approximately 6:30 p.m. to request an extension of their stay at GTMO for several days because they had been advised (erroneously) by the Government of Kuwait that petitioners' ARB hearings were scheduled for the week of March 28, 2005. See Warden Declaration ¶ 10. Government counsel explained that such a request could not be granted on such short notice for various logistical reasons.[10] See id. Petitioners' counsel next demanded: (1) a return visit to GTMO during the week of March 21, 2005 to advise petitioners about the ARBs; or (2) telephone access to petitioners during the week of March 21; or (3) expedited means to transmit letters that would be received by petitioners during the week of March 21. See id. & e-mail from Neil Koslowe, March 20, 2005 (attached as Exhibit D to Petitioners' Motion). The request for a follow-up visit to GTMO during the week of March 21 was denied because the logistics of coordinating country and theater clearances,[11]

[10] Petitioners' counsel were scheduled to depart the next morning, Friday, March 18, 2005 at 10:30 a.m.

[11] As explained in the Revised Procedures for Counsel Access, country and theater clearances – authorizations that permit habeas counsel to travel to GTMO – require at least 20 days lead time to process. See Revised Procedures for Counsel Access § III.D.4.

lodging, escorts, transportation, and detainee movements[12] were not feasible given the time demands imposed by petitioners' counsel. See Warden Declaration ¶ 10 & e-mail from Andrew Warden, March 21, 2004 (attached as Exhibit E to Petitioners' Motion); Revised Procedures for Counsel Access § III.D (explaining that "[r]equests for visits made inside of 20 days will not normally be granted" due to various logistical details needed to arrange counsel visits). For similar logistical reasons and due to the absence of "special circumstances," the request for expedited telephone access to petitioners was denied. See Warden Declaration ¶ 10; Revised Procedures for Counsel Access § VIII ("Requests for telephone access will not normally be approved. Such requests may be considered on a case-by-case basis due to special circumstances and must be submitted to Commander, JTF."). Finally, petitioners' counsel's demand to create a unique expedited mail system to communicate with petitioners regarding their ARBs was denied. See Warden Declaration ¶ 10.

4. Respondents' Protests Regarding Potential Security Issues That Arose During Prior Visits By Petitioners' Counsel To GTMO.

On March 31, 2004, government counsel wrote petitioners' counsel to inquire about three incidents that raised security concerns during petitioners' counsel's prior visits to GTMO. See Letter from Terry Henry, March 31, 2004 (attached as Exhibit F to Petitioners' Motion). First, during their February 13-18, 2005 visit, GTMO personnel seized from one of petitioners' counsel a detailed, hand-drawn map of the detention facility that included the locations of buildings and

[12] In order to facilitate counsel visits, petitioners are moved from the detention areas to meeting facilities in a separate area of GTMO known as "Camp Echo," in connection with a visit by counsel. Each movement requires a number of logistical and security measures, including orders from military supervisors to move the detainee, arrangements for vehicular transport, and arrangements for multiple guards and support personnel for the movement of the detainee, and his personal belongings, as well as for delivery of meals.

the position of guard stations. See id. Second, in the course of observing and responding to a gathering of detainees in one of the detention camps, military personnel at GTMO observed and then confiscated from a petitioner various non-legal documents containing biographies, photographs, and news articles about petitioners taken from an internet web site entitled "Project Kuwaiti Freedom."[13] See id. These non-legal documents were provided to the detainees by petitioners' counsel during their meetings with petitioners even though petitioners' counsel did not receive advance authorization from the Commander, JTF-GTMO to bring the documents into their meetings with petitioners. See id.; Revised Procedures for Counsel Access § V.A. ("Counsel shall bring only legal mail . . . into any meeting with a detainee unless counsel has received prior approval from the Commander, JTF-GTMO."). Further, the documents appeared to contravene provisions in the Revised Procedures for Counsel Access prohibiting habeas counsel from sharing with detainees any communications concerning "the status of other detainees, not directly related to counsel's representation." Id. § V.B. Third, respondents expressed concern that petitioners' counsel may have been attempting to facilitate the delivery of non-legal mail between petitioners and their families, in contravention of the Revised Procedures for Counsel Access. See Letter from Terry Henry, March 31, 2004; Revised Procedures for Counsel Access §§ IV-V. These concerns were based on the fact that GTMO received through the Court Security Officers a large package of letters written by petitioners in Arabic to their families that appeared to have been improperly submitted by petitioners' counsel to the privilege team, thereby suggesting that petitioners' counsel intended to pass these letters on to petitioners' families had classification review been completed. See Letter from Terry Henry, March 31,

[13] See Project Kuwaiti Freedom, at http://www.kuwaitifreedom.org.

2004.

In light of the potential security issues raised by these incidents, and the reflection of the matters upon counsel's apparent willingness to disregard both the letter and spirit of the Court-approved counsel access procedures in this case, respondents requested that petitioners' counsel provide appropriate explanations and/or assurances regarding these matters before respondents would potentially enable further incidents by scheduling future visits to GTMO.[14] See id. Petitioners' counsel answered by letter on April 4, 2004, providing their view of the incidents in question, but not acknowledging any problem with the incidents as far as they were concerned. See Letter from Neil Koslowe, April 4, 2004 (attached as Exhibit G to Petitioners' Motion). In response, government counsel again requested that petitioners' counsel provide the requested assurances that they would abide by the terms of the Revised Counsel Access Procedures. See Letter from Terry Henry, April 8, 2004 (attached as Exhibit H to Petitioners' Motion). Following this exchange of letters, counsel for both parties discussed these issues via telephone on April 11, 2005. See Henry Declaration ¶ 4. During the course of this call, government counsel reiterated the government's position and shared that the government only sought assurances that incidents of the kind reflected in the March 31, 2005 correspondence would not be repeated and that counsel would comply with the applicable counsel access procedures. See id. Petitioners' counsel provided government counsel with assurances in that regard. See id. In light of this discussion, as well as petitioners' counsel's subsequent representation that they are "committed fully to complying with" the Revised Procedures for Counsel Access, see e-mail from Neil

[14] On March 25, 2005, petitioners' counsel requested a visit to GTMO for May 2-5, 2005. Logistical arrangements and preparation for this visit were suspended pending resolution of the issues raised in respondents' letter.

Koslowe, April 11, 1005 (attached as Exhibit I to Petitioners' Motion), the government agreed to make arrangements for petitioners' counsel to visit GTMO in May.[15] See Henry Declaration ¶ 4; Warden Declaration ¶ 12 & e-mail from Andrew Warden, April 13, 2005 (attached as Exhibit D to Warden Declaration). Presently, petitioners' counsel are scheduled to visit GTMO from May 9-13, 2005.

ARGUMENT

As the foregoing facts indicate, respondents have not taken any action to interfere in the attorney-client relationship between petitioners' counsel and petitioners. Indeed, respondents have cooperated multiples times in multiple ways to facilitate that relationship. Petitioners' counsel ask the Court to enjoin respondents from making remarks or taking actions that undermine the attorney-client relationship, but the sworn declaration submitted in response to these allegations establish that no such actions have occurred, and that United States policy expressly prohibits such interference between habeas counsel and petitioners. Moreover, respondents have consistently assisted petitioners' counsel by providing them with access to petitioners, even in the face of petitioners' counsel's frequently unreasonable demands. For example, respondents have made arrangements for petitioners' counsel to visit GTMO on six separate occasions, more than any other group of habeas counsel. Respondents also have worked diligently to facilitate various forms of communication between petitioners' counsel and petitioners, including legal mail and DVD messages from petitioners' families. In short,

[15] Thus, contrary to petitioners' counsel's characterization, see Petrs' Mot. at 8, the government did not "relent" regarding their position because petitioners' counsel threatened to raise the visit scheduling issue with the Court. Rather, the government determined that petitioners' counsel's assurances were sufficient to proceed with another counsel visit.

petitioners' fantastic conspiracy theory that respondents have engaged in a calculated policy of interfering with the attorney-client relationship has absolutely no legitimate basis. Accordingly, petitioners' multi-faceted request for injunctive relief should be denied.[16]

1. Military Interrogators Have Not Taken Any Action To Undermine The Attorney-Client Relationship.

Petitioners' contention that military interrogators have "embarked on a deliberate campaign to abrogate" the attorney-client relationship, see Petrs' Mot. at 1, is without merit. To the contrary, United States policy expressly prohibits interrogators or other personnel from interfering with the relationship between a detainee and his lawyer. See Hadjis Declaration ¶ 2. This policy includes a prohibition on impersonating a lawyer, on making disparaging comments about the lawyer, and on retaliating against a detainee for having met with a lawyer or being involved in habeas corpus litigation. See Rodriguez Declaration ¶ 2. Furthermore, detainees are not granted or denied privileges, disciplined, or otherwise discriminated against on account of their involvement with habeas litigation or counsel. See Hadjis Declaration ¶ 5.

For all their bluster about a "concerted campaign implemented on a variety of occasions by different military interrogators," see Petrs' Mot at 3, petitioners' motion is remarkably short on factual substance. The motion identifies only two of eleven petitioners who have been

[16] The only legal authority petitioners offer to support their multiple, requested injunctions is the All Writs Act, 28 U.S.C. § 1651(a). The All Writs Act, however, only "empowers federal courts to fashion extraordinary remedies when the need arises." Pennsylvania Bureau of Correction v. U.S. Marshals Service, 474 U.S. 34, 43 (1985). It does not provide the authority to issue "ad hoc writs," id., nor is it a "blank check which district courts may use whenever they deem it advisable." See In re Agent Orange Product Liability Litigation, 996 F.2d 1425, 1431 (2d Cir. 1993). As explained herein, there is no factual support for such an "extraordinary remedy" in this case. Reynolds Metals Co. v. F.E.R.C., 777 F.2d 760, 762 (D.C. Cir. 1985).

subjected to the alleged government "campaign" to interfere with the attorney-client relationship, each determined by their Combatant Status Review Tribunal to be an enemy combatant trained by and associated with al Qaeda.[17] With respect to these two petitioners, the facts establish that no interference with the attorney-client relationship has occurred. First, the female interrogator assigned to petitioner Faziz Al Kandari – whom petitioners' identify as "Megan" – has never made disparaging comments about petitioners' counsel during her conversations with Mr. Al Kandari, nor has she ever done anything to interfere in the relationship between Mr. Al Kandari and his counsel.[18] See Rodriguez Declaration ¶ 3. Second, the only interrogator assigned to petitioner Fouad Mahmoud Al Rabiah since petitioners' counsel begin visiting GTMO has never made disparaging comments about petitioners' counsel. Id. ¶ 4. Nor has this interrogator ever done anything to interfere in the relationship between Mr. Al Rabiah and his counsel. Id. Put simply, there is no sufficient factual basis for petitioners' claims.

In addition to insufficient factual support, petitioners also lack an appropriate legal basis for the relief sought in their motion. Petitioners incorrectly rely on a line of cases involving United States citizens charged with criminal offenses in domestic courts for the proposition that any government action that undermines the attorney-client relationship violates the right to counsel. See Petrs' Mot. at 9. The principal case petitioners cite for this proposition – United States v. Glover, 596 F.2d 857, 863 (9th Cir. 1979) – states precisely the opposite: "Not all

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[17] See Respondents' Factual Return for Fayiz Mohammed Ahmed Al Kandari (dkt. no. 124); Respondents' Factual Return for Fouad Mahmoud Al Rabiah (dkt. no. 108).

[18] Contrary to the implication of petitioners' counsel's declaration, see Wilner Declaration ¶ 16, this interrogator also has never made disparaging comments about petitioners' counsel during conversations with petitioner Saad Al-Azmi, nor has she ever done anything to interfere in the relationship between Mr. Al-Azmi and his counsel. See Rodriguez Declaration ¶ 3.

police action that arguably could be called an interference with the attorney-client relationship is violative of the . . . right to counsel." See, e.g., Weatherford v. Bursey, 429 U.S. 545 (1977) (showing of prejudice a required element to Sixth Amendment claim). Moreover, the legal basis for the claims in Glover, as well as the other cases cited by petitioners – United States v. Irwin, 612 F.2d 1182 (9th Cir. 1980); Commonwealth v. Manning, 367 N.E.2d 635 (Mass. 1977) – is the Sixth Amendment right to counsel. Petitioners, however, have no Sixth Amendment right to counsel because they are neither United States citizens nor are they being detained as part of the criminal justice system. See In re Guantanamo Detainee Cases, 355 F. Supp. 2d 443, 480 (D.D.C. 2005); see also Khalid v. Bush, 355 F. Supp. 2d 311 (D.D.C. 2005) (Leon, J.).

Furthermore, the injunctive relief requested by petitioners is intractably overbroad. Federal Rule of Civil Procedure 65(d) provides in pertinent part: "Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; [and] shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained . . . ." Fed. R. Civ. P. 65(d). The D.C. Circuit has characterized the foregoing standard as "exacting." Common Cause v. Nuclear Regulatory Comm'n, 674 F.2d 921, 926-27 (D.C. Cir. 1982). Petitioners, however, seek to have respondents enjoined from "mak[ing] remarks or tak[ing] actions that undermine the attorney-client relationship between counsel and the Kuwaiti Detainees." See Petrs' Proposed Order.

The proposed injunction clearly and obviously fails Rule 65(d)'s definiteness standard. That provision "was designed to prevent uncertainty and confusion on the part of those faced with injunctive orders, and to avoid the possible founding of a contempt citation on a decree too vague to be understood." Schmidt v. Lessard, 414 U.S. 473, 476 (1974); see also Int'l

Longshoremen's Ass'n, Local 1291 v. Phila. Marine Trade Ass'n, 389 U.S. 64, 76 (1967) ("The judicial contempt power is a potent weapon. When it is founded upon a decree too vague to be understood, it can be a deadly one. Congress responded to that danger by requiring that a federal court frame its orders so that those who must obey them will know what the court intends to require and what it means to forbid."). The problem with embodying petitioners' requested standard in an injunction punishable by contempt, however, is that the phrase "mak[ing] remarks or tak[ing] actions that undermine the attorney-client relationship" is susceptible of varying interpretations and is little more than an invitation for petitioners' counsel to seek contempt whenever they feel mistreated in any way.[19] See Common Cause 674 F.2d at 926-27 (rejecting an injunction against "closing future meetings of a similar nature" to a specific past meeting because the language, "of a similar nature," was insufficiently definite); see also id. at 926 n.11 (collecting cases striking down injunctions that likewise failed to describe prohibited conduct with sufficient clarity and detail).

2. Respondents Have Permitted Petitioners' Counsel To Show Petitioners DVD Messages That Introduce Counsel.

Petitioners' allegations that respondents have interfered in the attorney-client relationship is also refuted by the fact that respondents have gone to extraordinary lengths to arrange for petitioners to view DVD messages from their families that introduce counsel. As discussed above, see supra 4-10, respondents initially were in the process of making arrangements for

[19] The proposed prospective injunctive relief is also problematic because a series of historical allegations manifestly does not establish an entitlement to forward-looking equitable relief, in the absence of some certainty that the conduct will be repeated. See City of Los Angeles v. Lyons, 461 U.S. 95, 105, 110 (1982) (holding that there is no actual case or controversy for equitable relief absent a "real and immediate threat of again being" treated "illegally").

petitioners' counsel to show petitioners a DVD from their families during their first visit to GTMO, but petitioners' counsel abruptly cancelled their visit less than 48 hours prior to their scheduled departure, stating that they had not received the DVD from petitioners' families. Thus, any alleged "interference" with the attorney-client relationship during this scheduled visit rests solely with petitioners' counsel, not respondents.

Once petitioners' counsel's initial visit to GTMO was rescheduled, respondents worked to accelerate delivery of the DVD to GTMO, including attempting to digitize the DVDs (albeit unsuccessfully) so it could be sent via electronic means. Respondents also procured a portable DVD player to enable petitioners' counsel to play the DVD separately to each petitioner during their individual interviews. Respondents then conducted an expedited review of the DVD and approved it for release to petitioners six days after it was submitted for review.

Respondents took similar steps in connection with petitioners' counsel's request to show a second set of DVDs during their next visit to GTMO on January 9-13, 2004. This request, however, was complicated by the fact that – contrary to respondents' express directions – petitioners' counsel failed to submit the DVDs sufficiently in advance of their visit. Instead, petitioners' counsel's interpreter delivered the DVDs to personnel at GTMO, one day prior to petitioners' counsel's scheduled visit. Notwithstanding the unreasonableness of petitioners' request that GTMO personnel review 11 Arabic DVDs in only a few days, GTMO personnel completed the review and approved the DVDs for release to petitioners during petitioners' counsel's scheduled visit.

Although respondents approved two sets of family DVDs for release, petitioners now complain that respondents have undermined the attorney-client relationship by "disabling counsel

from keeping their promises to display" a third set of family DVDs to petitioners. See Petrs' Mot. at 10. Again, whatever promises were made to petitioners by counsel were counsel's own doing; respondents did not promise petitioners' counsel that the DVDs would be approved for viewing by petitioners.

In fact, 10 of the 11 DVDs were not authorized for release as "communications introducing counsel" under the Revised Procedures for Counsel Access. Section V of the Revised Procedures for Counsel Access provides that the Commander, JTF-GTMO, "shall not unreasonably 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." This provision was included in the Revised Procedures for Counsel Access to permit habeas counsel during their initial visits to GTMO to bring the detainees various non-legal materials that introduce counsel to the detainees, and to facilitate the initiation of an attorney-client relationship between counsel and petitioners. To ensure that counsel are in fact authorized to act on behalf of the petitioner-detainees they purport to represent, counsel are required to submit to the government an "Acknowledgment of Representation" form (attached as Exhibit 8) after their second visit with a detainee. See Revised Procedures for Counsel Access § III.C.2 ("Counsel shall provide evidence of his or her authority to represent the detainee as soon as practicable and in any event no later than ten (10) days after the conclusion of a second visit with the detainee). Because the detainees had not met habeas counsel prior to their initial meetings, habeas counsel in many of the GTMO cases have sought and received permission from GTMO to bring the detainees various introductory materials from

the detainees' families, such as letters, pictures, and DVDs, which establish that habeas counsel are working with the detainees' families. Consistent with this general policy, petitioners' counsel in this case received authorization to show petitioners two different sets of DVD messages that introduced counsel to petitioners during their first and second visits to GTMO.

Petitioners' counsel's third request to show DVDs to petitioners came prior to their fourth visit to GTMO. As explained above, petitioners' counsel failed to submit the DVDs sufficiently in advance of their visit to permit personnel at GTMO to conduct a timely review of the materials. However, once review of the DVDs was completed prior to petitioners' counsel's fifth visit, the Commander, JTF-GTMO, determined that only one of the 11 DVDs served the purpose of "introducing counsel to the detainee." At the time petitioners' counsel submitted the third set of DVDs for review, petitioners' counsel had conducted multiple interviews with petitioners on four separate occasions and all petitioners except one – Khalid Abdullah Mishal Al Mutairi – had signed the required "Acknowledgment of Representation" form, or its equivalent, indicating that they wanted petitioners' counsel to represent them in habeas litigation.[20] Thus, petitioners' counsel were no longer in the process of introducing themselves, as petitioners had already provided counsel with their consent to pursue habeas litigation. Indeed, the substance of the DVDs revealed that they were not intended to introduce counsel to the detainee. The DVDs were simply home movies relaying various messages and news items about family and friends

[20] Although one DVD was approved for release to Mr. Al Mutairi, that DVD was never shown because Mr. Al Mutairi refuses to meet with petitioners' counsel during their visits. To date, Mr. Al Mutairi has not signed an Acknowledgment of Representation form, or its equivalent. In late February 2005, GTMO personnel attempted to deliver legal mail to Mr. Al Mutairi, but he refused to accept it and informed GTMO personnel that he does not want an attorney. See Declaration of Tony De Alicante ¶ 2 (originally submitted in Does 1-570 v. Bush, 05-CV-312 (CKK)) (attached as Exhibit 5).

completely unrelated to the litigation. Five of the DVDs did not even mention petitioners' counsel at all – a fact petitioners do not contest.[21]

Remarkably, petitioners make no attempt to argue that the DVDs were intended to introduce counsel to the detainees. Instead, petitioners rely on the fanciful notion that respondents' refusal to approve the DVDs for release was part of a concerted effort to "abrogate the attorney-client relationship," "humiliate counsel," and show petitioners that "counsel were powerless and unable to keep their promises." See Petrs' Mot. at 5. This conspiracy theory has no basis in fact. The decision not to release the DVDs was based on a straightforward application of the Revised Procedures for Counsel Access. Personnel at GTMO did not know that petitioners' counsel had promised to show the DVDs to petitioners, or that petitioners would be "extremely disappointed" if they could not see the DVDs. See Petrs' Mot. at 4; De Alicante Declaration ¶ 8. Furthermore, the nefarious interference that petitioners seek to attribute to respondents is refuted by the fact that respondents have cooperated with petitioners' counsel on prior occasions to allow them to show two different sets of DVDs to petitioners.

In the end, there is simply no factual basis for petitioners' counsel's allegations that respondents refused to release DVDs for the purpose of interfering with the attorney-client relationship. The DVDs were not for the purpose of introducing counsel, as provided by the

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[21] The Protective Order and Revised Procedures for Counsel Access were not created as a mechanism for habeas counsel to serve as couriers of non-privileged family mail to petitioners. See Revised Procedures for Counsel Access § V ("Counsel shall bring only legal mail, writing utensils and paper into any meeting with a detainee unless counsel has received prior approval from the Commander, JTF-GTMO."); § VI.C (prohibiting counsel from delivering non-legal correspondence to detainees' family and friends). If detainees' families wish to send correspondence to the detainees, separate procedures exist for such communication. See id. § IV.A.5.

Revised Procedures for Counsel Access, and accordingly, they were not allowed to be shown. Any "promises" petitioners' counsel were unable to keep with respect to delivering family messages (improperly) to petitioners was of petitioners' counsel's own making. For these reasons, the Court should deny petitioners' counsel's request to order respondents to show the DVDs to petitioners.

3. Petitioners Have Not Been Denied The Opportunity To Consult With Counsel Regarding The ARBs.

Petitioners also incorrectly contend that respondents have denied them effective means of communicating with counsel about their ARB hearings. As a threshold matter, petitioners' complaints regarding access to counsel to prepare for the ARB hearings are not properly before this Court, nor are they a proper subject for this litigation.[22] There is no right to counsel in the ARB process. See In re Guantanamo Detainee Cases, 355 F. Supp. 2d 443, 480 (D.D.C. 2005) (rejecting Sixth Amendment right to counsel claim); see also Khalid v. Bush, 355 F. Supp. 2d 311, 323 (D.D.C. 2005) (Leon, J.) (rejecting constitutional claims). More broadly, the Executive's decision to continue detention of those detainees properly detained as enemy combatants, and the ARB process used to arrive at that decision – including weighing national

[22] Petitioners erroneously attempt to characterize their motion for writ of injunction as one to enforce the Court's October 20, 2004 Order. See Al Odah v. United States, 346 F. Supp. 2d 1 (D.D.C. 2004). Petitioners, however, can point to nothing in the October 20 Order that comes close to addressing the matters on which they seek relief. For instance, the October 20 Order did not discuss the legal standards for interrogations, releasing video messages from petitioners' families, and scheduling visits and telephone communications to discuss the ARB procedures. The Court's October 20 Order focused solely on whether petitioners, i.e., three of them, had a right to counsel and a corresponding right to unmonitored meetings with counsel, only in the context of habeas proceedings in court. See id. at 2, 4-5. The October 20 Order did not discuss the assistance of counsel with respect to the ARB proceedings, nor did it bestow petitioners with an absolute right to counsel in all future non-habeas proceedings.

security concerns, threat risks, and resource considerations – are non-justiciable issues. See, e.g., Peoples Mojahedin Organization of Iran v. U.S. Dept't of State, 182 F.3d 17, 23 (D.C. Cir. 1999) (determination by Secretary of State that "the terrorist activity of the organization threatens the security of United States nationals or the national security of the United States" was "non-justiciable").

In any event, petitioners' counsel's complaints regarding inadequate access to petitioners to prepare for the ARBs hearings have no factual merit. As discussed above, petitioners' counsel have been on notice since December 2004 that ARB proceedings for most of the petitioners would occur anytime after February 1, 2005. Since receiving this notice, petitioners' counsel have visited GTMO on four separate occasions, during which time they have had the opportunity to prepare petitioners for their ARB hearings, and have engaged in preparations with petitioners.[23] See Warden Declaration ¶ 13 & December 30, 2004 e-mail from Neil Koslowe.[24] Additionally, petitioners' counsel have the opportunity submit information to the ARB regarding whether petitioners are a continuing threat to the United States or its allies. See Henry Declaration ¶ 3 & December 28, 2004 e-mail from CDR Teresa McPalmer. Petitioners' counsel therefore have had multiple opportunities to prepare petitioners for the ARB hearings, as well as

[23] Petitioners' counsel also have had the opportunity to send petitioners privileged legal mail pursuant to the legal mail procedures in the Revised Procedures for Counsel Access.

[24] This e-mail reflects another instance in which respondents have helped to facilitate communication between petitioners and their counsel. Approximately one week before petitioners' counsel's second visit to GTMO, scheduled for January 7-14, 2004, petitioners' counsel requested permission to add an additional lawyer and translator to the trip. Although this request was submitted well inside of the required time by the Revised Procedures for Counsel, thereby creating various logistical issues for GTMO personnel, respondents were able to accommodate petitioners' counsel's request on short notice. See Warden Declaration ¶ 13.

to present information to the ARB concerning the advisability of petitioners' continued detention. Thus, counsel has had access and opportunity to engage in preparation for ARB proceedings.

Notwithstanding these facts, petitioners complain that respondents have prevented petitioners' counsel from providing timely legal advice about their ARB hearings. Petitioners' complaint rests solely on one incident, which began when petitioners' counsel made a series unreasonable demands beginning on March 17, 2005 for immediate access to petitioners on the basis of erroneous information from the Government of Kuwait that petitioners' ARBs were scheduled to begin the week of March 21, 2005. As explained above, see supra 10-13, these demands simply could not be accommodated in the short time period insisted on by petitioners' counsel. First, arranging an extension of petitioners' counsel's visit as well as an immediate return visit to GTMO was not logistically feasible in light of the numerous issues that must be coordinated before visits may go forward, including country and theater clearances, lodging, escorts, transportation, and detainee movements. For these very reasons, the Revised Procedures for Counsel Access expressly provide that "[r]equests for visits made inside of 20 days will not normally be granted." See Revised Procedures for Counsel Access § III.D.4.

Second, the request for telephone access could not be accommodated on such short notice for similar logistical reasons, including moving the detainees to an appropriately secure facility with a secure classified information international telephone line.[25] Additionally, telephone access

[25] In many ways the logistics of arranging a telephone conversation between the detainees and habeas counsel is even more burdensome than a direct counsel visit because the detainee would have to be moved to an unsecure location (e.g., an office in an administration building) where a secure classified information international telephone line is available. The "appropriate security procedures" required to complete such a movement of the detainee and ensure force protection to GTMO personnel far exceed the typical movement of the detainee from the detention area to Camp Echo. See Revised Procedures for Counsel Access § VIII ("Any

to petitioners was not warranted under the standards set forth in Revised Procedures for Counsel Access because of the absence of "special circumstances." See id. § VIII ("Requests for telephone access will not normally be approved. Such requests may be considered on a case-by-case basis due to special circumstances and must be submitted to Commander, JTF."). In this case, petitioners' counsel had been on notice for several months regarding the possibility of ARB proceedings; thus, there was no compelling reason or emergency to justify special arrangements for telephone access.

Third, petitioners' counsel's demand for respondents to create a unique expedited mail system created numerous issues that could not be resolved in the time period demanded by petitioners, including transmitting mail in a privileged fashion to petitioners in accordance with the legal mail procedures outlined in the Revised Procedures for Counsel Access.[26] See id. at § IV. Moreover, there was no legal support for such a request under the Protective Order or the Revised Procedures for Counsel Access.

Beyond there being no factual basis for petitioners' counsel's complaints, the relief

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telephonic access by counsel will be subject to appropriate security procedures, but shall not include contemporaneous monitoring or recording."); see also supra note 12.

[26] Petitioners' counsel also complain that a letter written to petitioner Al Rabiah regarding the ARBs was sent to the security work facility for habeas counsel by their military escort, instead of being delivered to Mr. Al Rabiah directly, as requested by petitioners' counsel. See Petrs' Mot. at 6-7. Petitioners' counsel, however, have no grounds to complain about the treatment of their letter because it was properly handled pursuant to the legal mail procedures in the Revised Procedures for Counsel Access. Specifically, legal mail must be delivered to and reviewed for contraband by non-GTMO personnel, who according to the practices developed under the Revised Procedures for Counsel Access, are located in Washington, D.C. See Revised Procedures for Counsel Access § IV. The mail is then sent to GTMO in an appropriately sealed and marked envelope for direct delivery to the detainee. Id. As petitioners' counsel's own declaration explains, these procedures were followed in this instance. See Wilner Declaration ¶¶ 19-20.

petitioners seek is overbroad in the extreme. Petitioners request that the Court order "the government to allow counsel to have monthly telephonic communications with the Kuwaiti Detainees." See Petrs' Mem. at 12. But given that counsel make this argument from the perspective that the ARBs have already occurred, petitioners' counsel's complaints appear to be nothing more than a pretextual attempt to amend the Revised Procedures for Counsel Access addressing telephone access. These procedures were adopted by Judge Green at the parties' request after extensive negotiation. Thus, there is no warrant, especially on the inadequate factual showing put forth in this motion, to alter these provisions.[27]

4. Respondents Reasonably Reacted To And Protested Potential Security Issues Raised Created By Petitioners' Counsel During Prior Visits To GTMO.

Petitioners' counsel also have no legitimate basis to complain that respondents acted unreasonably or illegitimately in protesting three security-related incidents that arose in connection with trips by petitioners' counsel to GTMO earlier this year. Petitioners' counsel argue that respondents' counsel improperly declined, temporarily, to arrange for a sixth visit by counsel to GTMO pending resolution of the potential security issues created by petitioners' counsel in connection with their GTMO visits. As relief, petitioners' counsel seek an injunction prohibiting respondents from ever delaying or denying future requests by counsel to visit GTMO. This aspect of petitioners' motion, like the others, should be denied.

As explained supra at 13-16, underlying petitioners' counsel's complaint was a dispute over three serious potential security issues created by petitioners' counsel. One of petitioners'

[27] Any order requiring monthly telephone calls for petitioners undoubtedly would result in requests and motions for similar treatment by all other habeas petitioners. Furthermore, mandating monthly telephone calls for over 150 detainees would create an unimaginable burden on the personnel at GTMO.

counsel was caught during a visit, between detainee interviews, drawing a detailed map of the layout of one of the detention facilities at GTMO, an obviously suspect activity at any secure military facility. Further, in the course of responding to a gathering of detainees at one of the GTMO camps, military personnel discovered that the gathering involved non-legal materials supplied to at least one of the petitioners by petitioners' counsel in potential violation of the Revised Procedures for Counsel Access. In addition, petitioners' counsel delivered family mail to the privilege team for classification review, when the Revised Procedures for Counsel Access specifically prohibit counsel from acting as a conduit for such mail. Given the seriousness of these matters, respondents' counsel appropriately raised them with petitioners' counsel and reasonably insisted on some resolution – an adequate explanation of the incidents and/or assurances that they would not be repeated and that the protective order and counsel access procedures would be adhered to – prior to continuing with counsel visits (and thereby potentially enabling further problems). The actions of respondents' counsel can hardly be described as "pretextual."[28] See Petrs' Mot. at 12.

Whatever the dispute, there is no basis for the relief sought by petitioners' counsel, at this point at least, because the matter has been resolved (through counsel's assurances) and petitioners' counsel have been permitted their sixth trip to GTMO. (Indeed, petitioners' counsel are currently at GTMO.) Petitioners' counsel experienced no real prejudice as a result of the dispute and, to the extent petitioners' counsel's future actions comply with their assurances and

[28] Also, contrary to petitioners' counsel's characterization, see Petrs' Mot. at 8, respondents did not "relent" regarding their concerns because petitioners' counsel threatened to raise the visit scheduling issue with the Court. Rather, the government ultimately determined that petitioners' counsel had provided assurances sufficient to proceed with another counsel visit. See supra note 15.

do not create similar or other security concerns or potential violations of the counsel access procedures, the issues may never arise again. Thus, there is no warrant for Court intervention at this time.[29]

As to the abstract question of what a party in this case can or should do if a potential security issue or violation of the counsel access procedures arises, petitioners' counsel concede that respondents are fully justified in preventing counsel from taking action "that threaten[s] . . . security or the orderly operations" of GTMO. Petrs' Mot. at 12 n.1. On that basis alone, petitioners' request for an injunction can be denied; respondents did nothing more in this matter than act to prevent further opportunities for potential security problems pending a resolution of the issues created by petitioners' counsel's conduct. Indeed, respondents would have been derelict in their responsibilities not to act to prevent further potential harms pending a resolution of the matter.

At bottom, petitioners' argument is basically that respondents must seek Court intervention whenever a problem with counsel's compliance with the protective order or counsel access procedures is perceived and petitioners' counsel do not immediately concede the matter.[30] While such an approach may approximate the course frequently taken by petitioners' counsel in this case, it is neither conducive to the efficient resolution of disputes nor reflective of the

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[29] Related to the fact that no concrete dispute exists requiring Court action is that petitioners' counsel's requested injunctive relief is wildly overbroad. Petitioners' counsel ask the Court to "enjoin the government from unilaterally suspending the processing of, or denying, future counsel requests to visit" petitioners. See Petrs' Mot. at 12. Such relief seems little more than an invitation for petitioners' counsel to seek contempt whenever future visit requests are impacted by logistics or other matters petitioners' counsel do not find agreeable.

[30] Depending on the timing of visits to GTMO requested by counsel, such motions seeking Court intervention presumably would include ones seeking relief on an emergency basis.

realities of litigation, and it should not be ordered by the Court. Parties should seek Court intervention as a last resort. Petitioners' request for injunctive relief should be denied.

CONCLUSION

For the foregoing reasons, petitioners' Motion for Writ of Injunction should be denied.

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Respectfully submitted,

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