IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MAHMOAD ABDAH, *et al.* Plaintiffs, v. UNITED STATES OF AMERICA, *et al.*, Defendants.	)	Civil Action No. 04-CV-1254 (HHK)

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

INTRODUCTION

Respondents hereby oppose petitioners' Emergency Motion for Order Allowing Counsel to Show Petitioners Video Messages from their Families, which seeks an emergency order from the Court requiring military authorities to allow petitioners' counsel to show petitioners video messages from their families during counsel's upcoming visit to Guantanamo Bay. Petitioners offer no legitimate legal authority for such a novel request. Nor do they point to any provision of the November 8, 2004 Amended Protective Order and Procedures for Counsel Access to Detainees at the United States Naval Base in Guantanamo Bay, Cuba, 344 F. Supp. 2d 174 (D.D.C. 2004) ("Revised Procedures for Counsel Access") (attached as Exhibit A to petitioners' motion), that would require respondents to show petitioners video messages from their families. In fact, petitioners concede that the Revised Procedures for Counsel Access do not require respondents to show petitioners the video messages at issue in this motion.

In apparent recognition of the insufficient legal basis for the motion, petitioners

disingenuously attempt to portray their request as a measure designed to "counteract[] Respondents' efforts to undermine Petitioners' trust and confidence in counsel." See Petrs' Mot. at 2. Remarkably, however, petitioners concede that such allegations are "not dispositive for purposes of this motion." Id. Indeed, as explained below, the veracity of their claims regarding respondents' interference with the attorney-client relationship are dubious, at best, given the hearsay and self-serving nature of petitioners' counsel's declarations.

In any event, petitioners' counsel's allegations are irrelevant and without merit. Not only are petitioners' allegations in conflict with well-established government policy, but respondents have worked diligently to facilitate various forms of communication between petitioners' counsel and petitioners, including legal mail and letters from petitioners' families. To that end, respondents have repeatedly informed petitioners' counsel that they may submit family communications to petitioners in letter form, subject to appropriate review pursuant to the terms of the Revised Procedures for Counsel Access. Unsatisfied with this medium of communication, and without regard to the burdens imposed by video communications, petitioners now seek – on an unfounded "emergency" basis no less – to have this Court order respondents to show petitioners video messages from their families that have no relevance to the legal issues presented in this case.[1] As explained below, there is no legal or factual basis for such a request.

---

[1] Petitioners offer no legitimate reason why this motion should be treated on an "emergency" basis. Whatever purported emergency exists can only be attributed to petitioners' counsel's decision to schedule their upcoming visit to GTMO before resolution of their motion. Petitioners are responsible for this so-called emergency and now unreasonably burden both the Court and respondents by demanding a response and resolution of their motion before their scheduled visit on June 16, 2005. Had respondents known of petitioners' counsel's intent to file the motion, arrangements could have been made with petitioners' counsel to reschedule their visit to a later date, thereby providing both the Court and the parties sufficient time to address the issues. But respondents' counsel was not even given the courtesy to discuss the motion (or its

Accordingly, petitioners' motion should be denied.

ARGUMENT

1. Video Messages from Petitioners' Families Are Not Authorized Under The Revised Procedures for Counsel Access.

Under the applicable, Court-approved counsel access procedures in this case, habeas counsel are permitted privileged legal mail and correspondence with petitioners. See Revised Procedures for Counsel Access § IV. Personal correspondence between petitioners and their families, however, is subject to standard procedures applicable to detainee mail, which involve review of incoming and outgoing mail by military authorities at Guantanamo Bay ("GTMO"). 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."

In this case, the video messages at issue are not authorized for release as "communications introducing counsel" under section V of the Revised Procedures for Counsel Access. Notably, petitioners concede this very point in their motion. See Petrs' Exhibit C ("[W]e understand that they do no fall within the purview of section V.A."). Section V was

---

timing) with petitioners' counsel because petitioners' counsel failed to confer with respondents' counsel as required by Civil Rule 7(m) ("A party shall include in its motion a statement that the required discussion occurred, and a statement as to whether the motion is opposed.").

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 detainees they purport to represent, counsel are required to submit to the government an "Acknowledgment of Representation" form signed by the detainee 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 containing video messages, which establish that habeas counsel are working with the detainees' families. Indeed, in this case, petitioners' counsel received permission to bring petitioners introductory letters from petitioners' families during counsel's first visit to GTMO on November 15-21, 2004. See Petrs' Exhibit B, Declaration of Marc Falkoff ¶ 5 (stating that petitioners' counsel were permitted to bring written letters from family members to petitioners).

Now, however, petitioners' counsel are well past the point of introducing themselves to petitioners. Petitioners' counsel have conducted multiple interviews with petitioners at GTMO on four separate occasions.[2] Additionally, every petitioner in this case has signed the required

[2] Petitioners' counsel have made four trips to GTMO to interview petitioners: November 15-21, 2004; December 18-24, 2004; January 22-28, 2005; and April 7-12, 2005. A fifth visit is presently scheduled for June 16-21, 2005.

"Acknowledgment of Representation" form, or its equivalent, indicating that they want petitioners' counsel to represent them in habeas litigation. Thus, petitioners' counsel are no longer in the process of introducing themselves, as petitioners have already provided counsel with their consent to pursue habeas litigation. Moreover, petitioners' counsel's own description of the videos indicate that they are not intended to introduce counsel to the detainees. Petitioners' counsel describe the videos primarily as messages from "wives, children siblings and other relative" that convey "love and support" for petitioners, and "report on significant family events such as births, marriages and deaths." See Falkoff Declaration ¶ 12; see also Petrs' Exhibit C (stating that the videos discuss "greetings, health of family members, events like wedding or funerals"). These videos are simply home movies relaying various messages and news items about family and friends unrelated to the underlying litigation. The fact that "some of the videos" do not even mention petitioners' counsel only reinforces their non-introductory nature. See Falkoff Declaration ¶ 12.

Conceding, as they must, that the videos are not authorized under section V of the Revised Procedures for Counsel Access, petitioners nevertheless ask the Court – without any legitimate supporting legal basis – to order respondents to show petitioners the family videos. The Protective Order and Revised Procedures for Counsel Access, however, 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 petitioners' families wish to communicate

with petitioners about family events they may send written correspondence to petitioners in accordance with separate procedures that exist for such purposes. See id. § IV.A.5; IV.B.5 (explaining process to send and receive family mail). Indeed, detainees routinely send and receive non-legal mail in the manner set forth for non-legal correspondence. See Declaration of Wade Brown ¶ 3 (14,000 pieces of mail processed from September 2004 through February 2005) (attached as Exhibit 1) (originally submitted in John Does 1-570 v. Bush, Case No. 05-CV-313 (CKK) (dkt. no. 10)). Contrary to petitioners' allegations, respondents have worked to facilitate delivery of written communications between petitioners and their families.[3] See Petrs' Exhibit E (explaining procedure by which petitioners' families may send letters GTMO); Falkoff Declaration ¶ 5. Respondents have taken no action to prohibit petitioners' families from conveying written information to petitioners, subject to appropriate security review of the information prior to delivery, in accordance with the standard procedures approved for such communications.

2. Neither the All Writs Act Nor Any Other Source of Law Justifies The Relief Petitioners Seek.

In light of the fact that petitioners' families are permitted to communicate with petitioners via written communications, petitioners' motion is essentially an objection to respondents' policy with respect to non-legal mail that allows for submission of written correspondence instead of video correspondence. Petitioners, unsurprisingly, cite no legal authority, even from the

[3] In a recently filed case brought by petitioners' counsel, Al-Hela el al. v. Bush et al., Civil Action No. 05-CV-1048 (RMU), respondents agreed to review a video message from the petitioners' family pursuant to section V of the Revised Procedures for Counsel Access. See Petrs' Exhibit D ("Because Al-Hela is a new petitioner and you have not had any meetings with him, GTMO will review the DVD and, if approved for release, permit you to show the DVD to Mr. Al-Hela.").

domestic prison context, for the proposition that the government must show prisoners non-legal video messages from their families because written correspondence is somehow an insufficient medium. More importantly, petitioners offer no authority to support their claim that it is somehow unlawful for respondents to distinguish between written and video communications with respect to non-legal family messages; nor can they, as such a distinction is well-grounded. See infra § 3.

Lacking any relevant legal authority for their motion, petitioners fall back on the All Writs Act, 28 U.S.C. § 1651(a), which provides that federal courts "may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." Petitioners, however, fail to explain how the relief requested in this motion is "necessary or appropriate to effectuate and prevent the frustration of orders [the Court] has previously issued in its exercise of jurisdiction otherwise obtained." United States v. New York Tel. Co., 434 U.S. 159, 172 (1977); see Clinton v. Goldsmith, 526 U.S. 529, 534-35 (1999) ("While the All Writs Act authorizes employment of extraordinary writs, it confines the authority to the issuance of process 'in aid of' the issuing court's jurisdiction"). Indeed, an order requiring respondents to show petitioners video messages from their families is neither necessary or appropriate in aid of the Court's jurisdiction, nor necessary to protect its authority to issue the writ of habeas corpus. There has been absolutely no showing that this Court will somehow be deprived of its jurisdiction over this case if petitioners do not receive video messages from their families. Nor can the order petitioners seek be said to be "agreeable to the usages and principles of law," 28 U.S.C. § 1651(a), given that petitioners do not cite any case in which any order remotely resembling the one sought here has been entered, and that such an order would constitute an

intrusion of unprecedented proportions into the Executive's internal detention operations regarding non-privileged correspondence, contrary to well-established precedent.[4] Cf. Thornburgh v. Abbott, 490 U.S. 401, 408 (1989) ("Acknowledging the expertise of [prison] officials and that the judiciary is 'ill equipped' to deal with the difficult and delicate problems of prison management, this Court has afforded considerable deference to the determinations of prison administrators who, in the interest of security, regulate the relations between prisoners and the outside world."); Bell v. Wolfish, 441 U.S. 520, 562 (1979) (warning that federal courts should not become "enmeshed in the minutiae of prison operations").

3. Respondents' Policy Of Not Releasing Video Messages From Family Members To Detainees Except In Accordance With The Revised Procedures for Counsel Access is Not Arbitrary Nor Does It Undermine the Attorney-Client Relationship Between Petitioners and their Counsel.

Having no legal basis for their motion, petitioners are left to contend that respondents'

---

[4] In another Guantanamo detainee habeas case, O.K. v. Bush, 344 F. Supp. 2d 44 (D.D.C. 2004) (Bates, J.), the petitioner in that case relied on the All Writs Act to support an emergency motion to compel the government to allow an independent medical evaluation and to produce medical records. The court denied the motion, particularly rejecting petitioners' reliance on the All Writs Act as a source of substantive legal authority to grant the requested relief:

> As to the first point, petitioners' emergency motion is not based on any claim of an actual violation of legal rights. They do not maintain that any of the legal claims set out in their habeas petition support the relief they seek in this motion, and they do not attempt to base their request for relief in any other legal right or entitlement. Instead, they seem to propose that the Court has some free-floating responsibility to ensure the general welfare of petitioner pursuant to its powers under the All Writs' Act and its inherent judicial and habeas authority. The principles discussed above essentially foreclose that result in this context: The Court is exceptionally reluctant to monitor the medical care of detainees in the absence of a colorable assertion of some substantive violation of a legal right.

Id. at 62. The above language is particularly relevant to the present motion. Indeed, if All Writs Act does not warrant judicial intervention into a detainee's medical condition, it most certainly does not warrant such intervention with respect to video messages from family members.

policy of not allowing petitioners to view video messages from their families, except in accordance with the section 5 of the Revised Procedures for Counsel Access, which is inapplicable, is "arbitrary." See Petrs' Mot. at 4. Petitioners do not explain how or why a showing of arbitrariness is the equivalent of unlawfulness, thereby warranting judicial intervention in this matter, but to the extent petitioners believe the distinction respondents have drawn between written communications and video communications is arbitrary, they are mistaken. There are reasonable and legitimate reasons why respondents permit detainees' families to communicate with detainees in writing, but not video or DVD.

As a threshold matter, personnel at GTMO screen and review incoming non-legal written correspondence from detainees' families. The need for such review in this setting, where the petitioners are being detained as enemy combatants in the interest of national security during ongoing hostilities, cannot be disputed. In addition to concerns for institutional security at GTMO (e.g., contraband, threats), the prospect that enemy combatants could be attempting to communicate with fellow supporters about information that could negatively impact national security warrants comprehensive and exacting review of all incoming and outgoing non-privileged communications.[5]

Although personnel at GTMO have undertaken to screen and review non-legal written correspondence from detainees' families, their burden would increase exponentially if they were

[5] Even in the domestic prison context, prison officials are entitled to monitor and inspect non-privileged, non-legal mail. See, e.g., Wolff v. McDonnell, 418 U.S. 539, 576-77 (1974); Smith v. Boyd, 945 F.2d 1041, 1043 (8th Cir. 1991); Gaines v. Lane, 790 F.2d 1299, 1304 (7th Cir. 1986); Deutsch v. U.S. Dept. of Justice, 881 F. Supp. 49, 54 (D.D.C. 1995).

required to process video messages.[6] In contrast to reading and reviewing written correspondence, the burdens associated with review of video messages include understanding and verifying the translation the audio messages, which may be of varying quality and involve foreign-language speakers of different dialects. See Declaration of Tony De Alicante ¶ 4 (attached as Exhibit 2) (originally submitted in Al Odah v. Bush, Case No. 02-CV-828 (CKK) (dkt. no. 236)). Additionally, unlike written communications, military personnel would be required to review the video's images to determine if there are any persons or images that are not permitted to be shared with petitioners. See id. This task would be extremely complicated in cases of group videos consisting of multiple, purported "family" members who may be unknown to military sources, where codes and signs could be easily masked. Further, in the event objectionable content is found on video messages, images and audio cannot not simply be redacted with a black marker. Instead, personnel at GTMO would have to isolate the offending image or audio message, and redact it using specialized video editing software and computers. Once such review and redaction was complete, the video could not be given to the detainee during normal mail delivery like written correspondence. Rather, personnel at GTMO would have to procure some type of audio/visual device (e.g., television, video cassette player, DVD player) and then make arrangements to show the video message on this device to the detainee either in his cell, assuming some type of battery powered audio/video portable device could be arranged, or in some other location at GTMO, which could involve moving the detainee and

[6] Of course, any order requiring respondents to review and process video messages for petitioners in a manner not otherwise falling within the terms of the Counsel Access Procedures would likely result in requests and motions for similar treatment by all other habeas petitioners. The potential influx of such requests would greatly magnify and multiply the burdens on the personnel at GTMO.

making proper security arrangements for viewing the video in an otherwise unsecure location. In contrast to review of written materials, the burdens associated with video communications are tangible and substantial. Consequently, the Court should "accord substantial deference" to respondents' policy regarding non-legal video messages from petitioners' families, especially when petitioners have not identified any legitimate legal right to the video communications in the first instance.[7] See Overton v. Bazzetta, 539 U.S. 126, 132 (2003).

Petitioners also unsuccessfully go to great lengths to argue that the video messages must be shown to petitioners to counteract a concerted effort to "undermine the attorney-client relationship between Petitioners and their counsel." See Petrs' Mot. at 4. As discussed above, however, petitioners readily admit that their allegations regarding interference with the attorney-client relationship are not dispositive for purposes of the relief sought in this motion. See id. at 2 (allegations that respondents have "hindered efforts by Petitioners families to communicate with petitioners are "not dispositive for purposes of this motion"); id. at 4 ("Petitioners' request that their counsel be allowed to show them family video messages does not depend on whether respondents have hindered family communications with the detainees or taken actions that undermine the attorney-client relationship."). Respondents agree that such allegations are irrelevant to the issue of whether there is a legal basis for petitioners to view video messages from their families. The relief sought in this motion concerns family mail, not alleged interference with the attorney-client relationship.

In any event, respondents vehemently disagree with petitioners' factual allegations. The

[7] The burden "is not on the State to prove the validity of prison regulations but on the prisoner to disprove it." Bazzetta, 539 U.S. at 132. Petitioners have failed to carry their burden in this case.

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 3) (originally submitted in O.K. v. Bush, Case No. 04-1136 (JDB) (dkt. no 155)); 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 4) (originally submitted in Al Odah v. Bush, Case No. 02-CV-828 (CKK) (dkt. no. 236)). 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; see also Brown Declaration ¶ 2 ("Detainees cannot lose mail privileges for any reason, including as part of disciplinary action or interrogation.").

In the face of sworn declarations from senior officials at GTMO, petitioners merely assert vague and generalized innuendo and allegations in hearsay-ridden declarations from counsel. See, e.g., Declaration of Joshua Colangelo-Byran ¶ 6 ("Mr. Al Dossari told me that other detainees have related to him statements that were made to them regarding attorneys."). Because

these allegations are irrelevant to the issue before the Court in this motion, any further response as to their factual veracity in this context is unnecessary.[8] Petitioners – by their own admission – recognize that their allegations have little to do with the legality of showing family video messages to petitioners; thus, these allegations provide no basis for the relief sought in this motion.

Finally, respondents' stated policy of not allowing petitioners video messages from family is appropriate, and petitioners' motion should be denied, because petitioners' requested relief would have the effect of creating special privileges for those GTMO detainees who have retained counsel and could assert motions to show family videos. There is no principled reason why detainees with counsel should be entitled to special treatment regarding non-legal family mail, especially when there is no legal basis for such treatment.

CONCLUSION

For the reasons stated above, petitioners' Emergency Motion for Order Allowing Counsel to Show Petitioners Video Messages from their Families should be denied.

Dated: June 10, 2005

Respectfully submitted,

PETER D. KEISLER
Assistant Attorney General

KENNETH L. WAINSTEIN
United States Attorney

[8] Respondents reserve the right, and request they be permitted, if necessary, to further oppose petitioners' allegations. Indeed, respondents have responded directly to, and vigorously contested, allegations regarding government interference with the attorney-client relationship when appropriate in other contexts. See e.g., Al Odah v. Bush, Civil Action No. 02-CV-0828 (CKK) (Respondents' Opposition to Petitioners' Motion for Writ of Injunction) (dkt. no. 236)

DAVID B. SALMONS
Assistant to the Solicitor General

DOUGLAS N. LETTER
Terrorism Litigation Counsel

/s/ Andrew I. Warden
JOSEPH H. HUNT (D.C. Bar No. 431134)
VINCENT M. GARVEY (D.C. Bar No. 127191)
TERRY M. HENRY
JAMES J. SCHWARTZ
PREEYA M. NORONHA
ROBERT J. KATERBERG
NICHOLAS J. PATTERSON
ANDREW I. WARDEN (IN Bar No. 23840-49)
EDWARD H. WHITE
Attorneys
United States Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Ave., N.W. Room 7144
Washington, DC 20530
Tel: (202) 514-4107
Fax: (202) 616-8470

Attorneys for Respondents