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Hand Delivery

The Honorable Joyce Hens Green
United States District Court
Room 2315
333 Constitution Avenue, N.W.
Washington, DC 20001

Re: *Al Odah v. U.S.*, 1:02-CV-00828 (CKK); *Mamdouh Habib et al. v. Bush et al.*, 1:02-CV-1130 (CKK); *Murat Kurnaz, et al. v. George Bush, et al.*, 1:04-CV-1135 (ESH); *O.K., et al., v. Bush, et al.*, 1:04-CV-1136 (JDB); *Moazzam Begg, et al. v. Bush, et al.*, 1:04-CV-01137 (RMC); *Mourad Benchellali, et al. v. Bush et al.*, 1:04-CV-1142 (RJL); *Jamil El-Banna, et al. v. Bush, et al.*, 1:04-CV-01144 (RWR); *Abdah, et al. v. Bush, et al.*, 1:04-CV-01254 (HHK); *Lakhdar Boumediene, et al. v. Bush, et al.*, 1:04-CV-01166 (RJL); *Suhail Abdu Anam, et al. v. Bush, et al.*; 1:04-CV-1194 (HHK); *Isa Ali Abdulla Almurbati, et al. v. Bush et al.*, 1:04-CV-1227 (RBW)

Dear Judge Green:

We are writing to ask Your Honor to schedule a meeting during the week of September 20, 2004, to discuss actions by the Government that are preventing the above-named cases from moving forward and thwarting our ability to represent our clients.

On August 17, 2004, the Calendar and Case Management Committee issued an Order authorizing coordinated management of the Guantanamo *habeas* petitions with respect to "common" procedural and substantive issues. The Committee plainly meant to streamline and expedite the litigation of the Guantanamo cases. Unfortunately, the Order has had the opposite effect. The Government, which does not accept the mandate of *Rasul v. Bush*, 124 S. Ct. 2686 (2004), is using the Order as an instrument of delay and to avoid judicial oversight.

Activity in the individual cases has essentially stopped, and attempts by Petitioners' counsel to obtain judicial action on important matters arising in specific cases has been stymied. As a result, more than two years after the first the *habeas* petitions began to be filed (and nearly three years after our clients were seized and imprisoned), the judges of this Court have not yet even begun to "consider in the first instance the merits of petitioners' claims." *Rasul*, 124 S. Ct. at 2699. A number of issues require immediate attention for that process to happen.

1. Counsel Access Procedures

The Court's attention is urgently needed to define the conditions under which detainees will have access to counsel. The Government so far has attempted to impose conditions that are onerous and have proven to be unworkable. Numerous problems have arisen with the Procedures for Counsel Access ("Access Procedures), which a number of Petitioners have objected to; those objections are fully briefed and argued before Judge Kollar-Kotelly and are still pending. Moreover, the Government has advised the undersigned that it is unilaterally rewriting various provisions of the Access Procedures that it issued to govern attorney-client communications, attorney work product, and counsel visits. The resulting uncertainty about what Access Procedures apply has impeded our ability to represent our clients.

These revisions follow the first visit to Guantanamo by counsel and the first attempts by counsel in many cases to communicate with Petitioners. During that visit it became clear that the Access Procedures put in place by DOJ would not work. Accordingly, counsel and DOD attorneys on-site agreed to more workable procedures to govern attorney-client communications and attorney work product. Those DOD attorneys were familiar with the limitations of the Guantanamo facilities and any legitimate security concerns of the United States. These procedures worked, but the Department of Justice has refused to allow them to be used going forward or to negotiate new procedures in consultation with Petitioners' counsel.

Because the Government is currently subjecting Petitioners to interrogations, interviews, and Combatant Status Review Tribunal proceedings in the absence of counsel, counsel and Petitioners urgently seek clarification by the Court of the procedures for attorney-client communications. In addition, should the Court determine that the Government's Privilege Teams are appropriate, counsel also seek written assurance that documents and information provided to the Teams will not be shared with government attorneys, military officials, or other officials involved in supporting the efforts of the United States Government with respect to any domestic or international litigations (*e.g.*, criminal prosecutions, provision of evidence in extradition proceedings). Counsel also requests that the Court direct the Government produce to Petitioners and the Court a copy of any procedures or instructions given to the Privilege Team.

2. Counsel's Ability to Communicate with Petitioners

Although the Government maintains that Petitioners are free to write to counsel, the Government has failed to inform Petitioners of this right or to provide Petitioners with the means to contact counsel, and, in some cases, has failed to deliver correspondence to Petitioners from counsel instructing their clients to communicate with them by letter. With one exception, the Government has prevented all recent communication with Petitioners from being transmitted and is thereby directly interfering with counsels' ability to provide legal advice to Petitioners. The Government has also failed to deliver letters from family members that introduce counsel to Petitioners.

For example, under Paragraph VI of the Access Procedures, correspondence written in English was to be reviewed and delivered to the client in five days. On September 1, 2004, the Government received one-page letters written in English advising three Petitioners not to

participate in the Combatant Status Review Tribunal process and not to communicate with the "Personal Representatives" assigned to "assist" them because those personnel are, in fact, investigators for the Tribunal. Those letters have yet to be approved by the newly created DOD Privilege Team and have not been delivered to Petitioners. In the meantime, CSRT proceedings continue to go forward. In other cases, the Access Procedures require counsel to translate correspondence written in Arabic into English. Counsel have submitted correspondence in both English and Arabic for delivery to Petitioners, but as of September 15 – long after the Government had become aware that Arabic translation would be required – the Privilege Team had not engaged an Arabic translator to review such correspondence. Because written attorney-client communications are the primary means of advising and consulting with Petitioners, the Government's failure to provide correspondence to Petitioners in a timely fashion must be rectified.

Further complicating matters and adding to the delay, the Government is preventing counsel from contacting members of the Privilege Team directly to discuss the timing of attorney-client communications or even to confirm receipt of correspondence. To date, counsel are unable to communicate with the Privilege Team by telephone, facsimile, or email, and all inquiries concerning attorney-client correspondence must be directed to a single post office box where it may sit for days until picked up by a member of the Privilege Team. These restrictions, failures, and delays are unreasonable and have compromised Petitioners' ability to access the federal courts and secure the rights recognized by the Supreme Court in *Rasul*.

3. Client Retainer Letters, Follow-Up Visits, and the Number of Attorneys Allowed to Meet With Clients and Receive Security Clearance

The importance of the attorney-client-correspondence discussed above is critical because the Government is requiring counsel meeting with Petitioners in Guantanamo to secure retainer letters from clients after the first attorney client meeting – *or risk not being permitted to return*. As this Court and the parties recognized during the August 27, 2004 scheduling conference, establishing a working relationship with clients who have been exposed to lengthy and brutal conditions of detention may take time. Despite this recognition, the Government has asserted to Judge Kollar-Kotelly that the Government may preclude counsel from arranging subsequent visits if a retainer letter is not secured after the first visit. The Government's position is wholly inconsistent with *Rasul*. It is vital that either this Court or the individual judges in the individual actions resolve the retainer letter requirement promptly, because counsel are scheduled to travel to Guantanamo as soon as the week of September 27, 2004. We respectfully request that this requirement be modified before any further counsel visits.

Petitioners also need immediate clarification that they are entitled to meet with their attorneys more than once. On Friday, August 27, 2004, in the scheduling conference before the Court, the Government raised for the first time the possibility that it might seek to limit counsel to a single visit to Guantanamo, even if counsel was successful in obtaining a retainer letter on the first visit. Several attempts were made after the conference to resolve the issue without success. On Monday, August 30, 2004, a DOD spokesperson informed a reporter for the *Washington Post* that the Government had never threatened to limit trips to Guantanamo, that

DOD had always assumed that multiple trips would be required, and that this information had come directly from DOJ attorneys working on the case. This information is contrary to statements made to Petitioners' counsel and should be resolved on the record.

Finally, the government has taken the position that only one attorney will be allowed to meet with a Petitioner at a time. This restriction would prevent counsel from having one attorney ask questions while another takes notes, preventing counsel from efficiently using the time allotted for meeting with the client. This issue was among the counsel access issues that were briefed before Judge Kollar-Kottelly but have not yet been resolved. The Government also is impeding Petitioners' access to counsel by refusing to provide applications for security clearance to many of the attorneys who need and have requested them.

4. Non-Compliance by Government With Previous Orders Issued By Members of the Court

During the August 27, 2004 scheduling conference, the government informed the Court and the parties that factual returns for the individual Petitioners would begin to be distributed within two weeks. To date, only *one* of the undersigned Petitioners has received a factual return. This return was only filed after the individual judge in that case, in consultation with Your Honor, issued an order to show cause. The Government's factual return failed to provide any of the classified information purportedly relied upon by the Tribunal in reaching its decision that Petitioner was an enemy combatant, even though counsel for that case has interim security clearance.

In addition, numerous counsel have received security clearances and are attempting to make arrangements to travel to Guantanamo. The Government's delay in disclosing the factual bases for the Petitioners' detention is directly affecting counsel's ability to prosecute these cases, to engage in productive attorney-client meetings, and, in some cases, to prevent improper repatriation. As stated, several judges ordered the government to respond to the Petitions. There is no reason to continue to hold those orders in abeyance, particularly in light of the fact that the Government has provided a return in *O.K. v. Bush*, 1:04-CV-1136 (JDB). Counsel in *Jamil El-Banna v. Bush*, 1:04-CV-01144 (RWR), is scheduled to travel to Guantanamo on September 26, 2004. Judge Roberts ordered the Government to respond to the Petition filed in that case on August 20, 2004, more than one month ago; the Government has not done so.

5. The Need for a Protective Order

In several instances the Government has conditioned production of information on the entry of a Protective Order. In doing so, it has failed to indicate what terms would be acceptable, and no discussions or negotiations have taken place. Petitioners ask that the Government prepare a draft order and circulate it to Your Honor and Petitioners and negotiate the terms in good faith, so that this issue may be removed as an obstacle to the cases going forward.

The Government is attempting to place a wall between counsel and Petitioners in defiance of *Rasul*. This Court must put a stop to the Government's tactics. Some of the Petitioners have been imprisoned in U.S. custody for almost three years – virtually

incommunicado, thousands of miles from their homes and families, without access to counsel or an impartial tribunal. This Court must intervene and establish procedures that are commensurate with the American system of justice and the Supreme Court's mandate.

Respectfully submitted,

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