**UNITED STATES DISTRICT COURT**
**DISTRICT OF COLUMBIA**

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| **MOHAMMED ABDULLAH TAHA MATTAN** *(ABDAL RAZAK ALI)*<br><br>**Petitioners,**<br><br>**vs.**<br><br>**BARACK OBAMA, *et al*,**<br><br>**Respondents.** | **No: 09- 745 (RCL)** |

**PETITIONER ABDAL RAZAK ALI'S REPLY TO MOTION FOR RECUSAL**

Now comes the Petitioner, Abdal Razak Ali, through his Counsel, and respectfully Replies to the Governments Opposition to his Motion seeking recusal, as follows:

**DUTY TO CONFER**

In its opposition to Petitioner's Motion, the Government asserts that the present Motion to Recuse should be decided on reasons other than the actual merits of the Motion. Accordingly, the Government asks this Court to deny the present Motion because of Counsel's purported failure to give the Government prior notice that such a motion would be filed pursuant to this district's "meet and confer" rule, Local Rule 7

(m). The Government points to the fact that Counsel filed a discovery motion (which is unrelated to the present motion for recusal) *last year* and did not have a discovery conference prior to filing that motion as somehow a basis to deny the present motion for completely different and unrelated relief. Counsel acknowledges her earlier error and respectfully apologizes to this Court for any inconvenience to the Court that may have been caused from her inadvertent failure to engage in a discovery conference before filing the prior unrelated motion this past fall. Counsel realizes that she should have checked with this Court's clerk at that time to ascertain the procedure in discovery motions in this Court's Guantanamo cases, but Counsel was mistakenly relying on the procedure set by Judge Bates, in a Guantanamo case on behalf of Counsel's other client and did not realize that the procedure Judge Bates set up was not utilized by all of the judges (Judge Bates required Counsel to file her discovery requests directly with the Court without a discovery conference (05-2378, Docket 155)).

In point of fact, Counsel is certainly aware of the meet and confer requirement in this Court; indeed, Counsel has now engaged in a number of lengthy discovery conferences with the Government over the past four weeks and is preparing to fly to Washington, to file a Discovery Motion in this case later this week. Counsel notes that at no time in the course of these lengthy discovery discussions with the Government over these past four weeks, nor indeed at any time prior to the filing of its opposition to the present Motion had the Government ever disclosed that at least one of its attorneys assigned to this very case had an *ex parte* discussion with this Court regarding the scope

of the Government's discovery obligations in this case. In any event, the inadvertent error of Counsel in not having a discovery conference with respect to an earlier motion is of absolutely no relevance to issues of *recusal* and should certainly not be used as grounds to deny the present Motion to Recuse filed by Petitioner.[1]

Remarkably, the Government chides Counsel for not meeting and conferring with it about Petitioner's recusal motion while at the same time admitting that one of its employees, a staff attorney for the United States Department of Defense, deliberately engaged in *ex parte* communications with this Court in this very case (and with absolutely no notice to Counsel about those discussions until exactly *one minute* prior to

[1] The Government contends that Local Rule 7 (m) required Counsel to have first "met and conferred" with the Government's attorneys prior to bringing the present recusal motion. The Government cites no case law providing for such a requirement with respect to recusal motions, which are, arguably not within the intended category of "non-dispositive" motions. Furthermore, even if such a conference were required in a recusal motion, as a policy matter, there would be little or no purpose in counsel even having such a discussion, because even if both counsel agreed that recusal was appropriate, that issue would still remain uniquely within the discretion of the Judge. However, after receiving the Government's opposition papers in which the Government admits that a Department of Defense attorney working on this case had improper *ex parte* communications with this Court but asserts that notwithstanding such improper communications that this recusal motion should still be denied because of the purported failure to meet and confer, Counsel immediately sent an email to all three of the Department of Justice (DOJ)staff attorneys on this case to set up a meet and confer conference. Counsel conducted a telephone conference in compliance with the "meet and confer requirement" on the evening of February 23rd, 2010 with DOJ staff attorneys Nancy Safavi and Jim Gilligan. Counsel asked the DOJ attorneys what they would have liked to discuss in a "meet and confer" with respect to the issue of recusal and was told by attorney Gilligan that they "would have" told Counsel that they did not believe that the statements by this Court rose to a level to be seeking recusal. Counsel asked if they would have had anything in addition to confer about other than the fact that they disagreed with Petitioner's legal position and attorney Jim Gilligan said "No…its all water under the bridge now anyway. " Under the circumstances, Counsel respectfully submits that any purported non-compliance with local rule 7(m) has been cured.

the Government's filing of its opposition to Petitioners motion on the night of February 22, 2010). It would appear that the Government's position is based on a misapplication of the "meet and confer" requirement in an effort to deflect attention away from its own blatant misconduct in engaging in *ex parte* communications with this Court, failing to disclose those improper communications for over two months, and then having the temerity to actually assert that portions of that *ex parte* communication are privileged and cannot be disclosed to Counsel, even in the context of determining whether or not this Court should recuse itself! In this context it should not be surprising that the Government refused in its opposition to even admit that it and this Court have a duty not to engage in such *ex parte* communications. (See, E.G. Canon 3 (a) (4) Code of Conduct for United States Judges and the ABA Code of Judicial Conduct, Canon 2.9 A (1).)

## THE GOVERNMENT'S ADMISSION REGARDING *EX PARTE* COMMUNICATIONS WITH THIS COURT REGARDING DISCOVERY IN THIS CASE

The Government's present admission *two months after* its attorney's *ex parte* discussions with this Court regarding discovery in this case on or about December 17, 2009, is nothing short of astonishing. As mentioned above Counsel has been engaged in ongoing discovery discussions with the Government for almost a month and not once did the Government disclose the fact that its own staff had engaged in *ex parte* discussions with this Court regarding its discovery obligations in this very case (a case where the Government has amended the Factual Return on at least four occasions) and

that at the conclusion of that *ex parte* discussion the Court *invited both sides* to attend a status conference to clear up any lingering issues related to the Government's interagency obligations to search for and provide exculpatory material after amending the Returns. (That invitation was never extended to Counsel by either the Government or this Court.)

Needless to say the yet to be named Government attorney who held *ex parte* discovery discussions with the Court in December engaged in improper conduct. If the Government's description of this Court's conduct is accurate, so did this Court. It is also clear from the Government's opposition that other attorneys assigned to this case knew of the *ex parte* discussion between the Government's attorney and the Court, deliberately chose to keep that information secret from Counsel and now the Government has the temerity to attempt to hide the full extent of the improper discussions on the basis of privilege. Suffice it to say, there can be no privilege in an improper *ex parte* discussion between the Court and Government attorneys. But apparently this is the Government's position. Having taken the position that it was entitled to seek advice from this Court on discovery matters, without the knowledge or presence of Counsel, the Government should immediately consent to the present motion. It is inconceivable that Petitioner can have a fair hearing especially when one considers the fact that the Court is privy to information provided by the Government that Petitioner cannot rebut or address because he does not even know what it is.

It is still unclear at this point whether other Government attorneys in this case knew in advance that their colleague and co-counsel was going to attempt to conduct an *ex parte* discussion with this Court, in which case they should all be immediately referred for professional discipline, or whether they only learned of it after the fact, which is bad enough as they waited to disclose the ethical violations until the very last minute of the filing deadline for responding to the present motion to disclose it. Counsel has no doubt that she will learn those facts eventually in the investigations that will ensue.

What is clear presently however, is that the Government's attorney who attended the American Bar Association breakfast on December 17th 2009 attended with the specific intent to talk to this Court about discovery issues in this case and an Order entered by this Court on July 2, 2009. What is also troubling is that it is absolutely clear from what has occurred here that Counsel would not have been told of this serious ethical violation, by either the Government or this Court, had she had not filed a Motion for Recusal based on what she believes to be inappropriate public remarks made by this Court.

As set forth above Counsel first learned of the *ex parte* discussion on the morning of February 23rd, 2010 when she received a letter by email (attached as Exhibit A) sent from one of the Department of Justice attorneys with a time-stamp indicating it was sent at 10:00pm on February 22nd, 2010. One minute later, at 10:01pm, the Government filed its Response to the Recusal Motion disclosing those same facts.

Remarkably the Government relegated the startling admission of its improper *ex parte* discussion in this case to a footnote. The Government then attempts to excuse its employees unethical conduct by claiming that the scope of discovery "*in this case* [was] *unaffected by the conversation*." In light of the posture of this case where the Government has amended the Factual Return *at least four times*, this statement not only defies credulity but it is also patently absurd.

Clearly we can deduce from the Governments summary of this conversation that the intergovernmental agencies were in a dispute over exactly what exculpatory material had to be turned over in this case after each amendment. Given the Government's characterization of this Court's response to those questions, arguably giving the green light for the Government to reduce its obligation to search for exculpatory information, it must be required that the complete details of the *ex parte* conversation itself be disclosure by both this Court and the Government.

In addition, the Government's use of the phrase "in this case" (that the scope of discovery "*in this case* [was] *unaffected by the conversation*.") also begs the question as to which other cases that the Government might have before this Court that may or may not have been improperly tainted or affected by virtue of the information gleaned by the Government in that entirely improper *ex parte* conversation). Equally specious is the Government's bald and unsupported argument that somehow only *ex parte* discussions that show "favoritism or antagonism" would support an order of recusal, particularly where the Government takes the unbelievable position that it need not disclose the full

extent of the *ex parte* communication. Indeed, this argument is simply wrong; see, *In Re Kempthorne,* 449 F3d 1265, 1269-70 (D.C. Cir. 2006) (special master who had *ex parte* communications should have recused himself.) (See also, *In Re Phillip A. Brooks* 383 F.3d 1036 (DC Circuit, 2004); *United States of America v. Sidney D. Furst* 886 F.2d 558, (3d Circuit, 1989);

The following is an outline of what the Government claims, in footnote 2, transpired between a Government attorney in this case and this Court. It is important to note that the full discussion between the Court and the Government's attorney is not reflected in the Government's statement (only the Government's own water downed version, is presented, and that only in summary form) and that the Government refuses to disclose part of the discussion on the basis that it believes it can somehow assert a privilege in its *ex parte* communications with this Court. Of course if that preposterous position were true then such a privileged relationship between the Court and the Government would show both favoritism (to the Government) and antagonism (to Petitioner) and the present motion should be granted on that basis alone:

- On December 17, 2009 an attorney for the government who is working on this case approached this Court, introduced herself as a Department of Defense Attorney working on this case and asked this Court if she could ask what she described as "*general, procedural questions regarding discovery.*"
- That the attorney working for the Government on this case asked this Court to let her know if her *ex- parte* conversation and questions were inappropriate for discussion.
- That this Court did not stop the attorney or otherwise advise the attorney that it was inappropriate to have an *ex parte* discussion with a Government attorney on this case.

- The Governments attorney asked this Court at least three questions.
- The attorney apparently asked this Court something about whether the Government's discovery obligations in the habeas cases requires Respondents to search for and produce exculpatory evidence related to the contents of declarations provided by subject matter experts.
- This Court provided an *ex parte* response to the Governments question which the Government has paraphrased with the answer "no."
- The Governments attorney then referred to an Order entered in this case on July 2, 2009 and asked this Court something along the lines of "is there anything *unique* about this Court's July 2nd, 2009 Order" regarding the disclosure of exculpatory evidence that requires Respondents to search for exculpatory evidence when amending a factual return with an expert declaration (and to provide a certification to the court attesting to that fact). A copy of that July 2nd, Order is attached as exhibit B.
- Again this Court apparently provided an *ex parte* response to the Governments attorney and the Government has paraphrased the Court's response as "no."
- The attorney for the Government apparently then went on to discuss a matter with this Court that the Government is attempting to claim is a "privileged" conversation. (Apparently the Government believes it can voluntarily disclose privileged matters in an *ex parte* conversation with the judge in its case in a room full of people without that disclosure being deemed a waiver of the privilege and further, without disclosing the content of that communication in the context of opposing Petitioner's recusal motion.)
- Following that last discussion (and again Counsel is not privy as to what the Governments attorney said and what this Court told that attorney in response) this Court told the governments attorney that if she was still *confused* "the parties" should feel free to schedule a status conference to clarify the issue. (Apparently the Court provided enough guidance to the Governments attorney so that she was no longer confused because this Court's invitation was never extended to Counsel.)
- The Government makes the absurd argument that the *ex parte* advice provided by this Court (which they will not discuss because of a privilege the Government asserts it has with this Court) did not affect the scope of discovery disclosures <u>in this case</u>.
- The Government concludes that since this Court *offered the Government* the opportunity to further discuss what the Government claims is a privileged matter, in a status conference, (but apparently only if the Government sought further guidance) that this somehow shows that the

*ex parte* discussions –some of which are not even disclosed--do not show favoritism or antagonism and therefore these *ex parte* discussions raise no question of disqualification. (This conclusion of course ignores the fact that the Government never extended this Court's invitation to Counsel to discuss the matter, continues to withhold all details of the part of the *ex parte* discussion in regards to the Governments interagency agency discovery obligations, and is maintaining that it can engage in *ex parte* discussion over the scope of discovery that are "privileged" conversations with this Court.)

**SUMMARY**

The record of the *ex parte* discussions in this case reflects that following the Court's *ex parte* communication with the Government's attorney in December 2009 regarding the scope of inter-agency discovery obligations in this case with respect to the search for, and production of, exculpatory evidence, (1) this Court did not inform Petitioner's Counsel that the *ex parte* communication had occurred, (2) this Court did not suggest that the matters at issue should be addressed in a status conference, and (3) this Court did not afford Petitioner's counsel any opportunity to respond to the questions posed by the Government's attorney or the "off-the-cuff" responses given by this Court. This is particularly damaging to Petitioner as the Government has Amended his Return on at least four separate occasions. The *ex parte* discussion appears to have alluded to a difference in opinion between the agencies as to what exculpatory documents the agencies are required to search for with each amendment. Apparently, if the Governments characterization is to be believed this Court responded to the Governments attorney by telling her that the Government had no obligation to search

for and produce exculpatory evidence related to contents of declarations by subject matter experts and furthermore this Court apparently downplayed its Court's July 2nd Order requiring the search for exculpatory evidence when amending a factual return and requiring the Government to file a certificate as to the production of exculpatory evidence within 14 days of each Amended Return. Propositions that can best be described as "controversial." The fact that this Court would, in an *ex parte* conversation with the Government, clarify and apparently reduce the substantive obligations of the Government in regards to its duties to search for exculpatory evidence without so much as notice to Counsel and/or an opportunity for Counsel to respond, is beyond the pale. If the Government's characterization is to be believed, then this Court's failure to disclose and remedy this *ex parte* communication is flatly inconsistent with the provisions of the ABA's Model Code of Judicial Conduct, Canon 2.9 A(1), dealing with the topic of *ex parte* communications, and provides another separate ground for recusal based on the further appearance of impartiality created by this Court's conduct.

**ARGUMENT**

1. Pursuant to 28 U.S.C. 455(a) and (b)(1), the Judicial Code of Conduct Canon 3 A. (1), (4) and (6) and the ABA Code of Judicial Conduct, Canon 2.9 A (1) Petitioner continues to respectfully move for an order of recusal by this Court:

    - Section 28 U.S.C. 455 (a) states that "Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality *might reasonably be questioned*." (*emphasis added*)
    - Section 28 U.S.C. 455 (b) states " He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

- Judicial code of conduct Canon 3 provides in relevant part:

A. Adjudicative Responsibilities.

(1) A judge should be faithful to and maintain professional competence in the law, and should not be swayed by partisan interests, public clamor, or fear of criticism.

(4) A judge should accord to every person who is legally interested in a proceeding, or the person's lawyer, full right to be heard according to law, and, except as authorized by law, neither initiate nor consider *ex parte* communications on the merits, or procedures affecting the merits, of a pending or impending proceeding. A judge may, however, obtain the advice of a disinterested expert on the law applicable to a proceeding before the judge if the judge gives notice to the parties of the person consulted and the substance of the advice, and affords the parties reasonable opportunity to respond. A judge may, with consent of the parties, confer separately with the parties and their counsel in an effort to mediate or settle pending matters.

(6) A judge should avoid public comment on the merits of a pending or impending action, requiring similar restraint by court personnel subject to the judge's direction and control. This proscription does not extend to public statements made in the course of the judge's official duties, to the explanation of court procedures, or to a scholarly presentation made for purposes of legal education.

- RULE 2.9: *Ex Parte Communications*

(A) A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties or their lawyers, concerning a pending* or impending matter,* except as follows:

(1) When circumstances require it, ex parte communication for scheduling, administrative, or emergency purposes, which does not address substantive matters, is permitted, provided:

(a) the judge reasonably believes that no party will gain a procedural, substantive, or tactical advantage as a result of the ex parte communication; and

(b) the judge makes provision promptly to notify all other parties of the substance of the ex parte communication, and gives the parties an opportunity to respond.

2. As the Supreme Court has explained, but the Government ignores, the relevant test for recusal is objective, and not dependent on the judge's intentions or actually evincing bias "but its appearance." *Liteky* v. *United States*, 510 U.S. 540, 548 (1994). "This inquiry is an objective one, made from the perspective of a reasonable observer who is informed of all the surrounding facts and circumstances." *Microsoft Corp. v. United States*, 530 U.S. 1301, 1302 (2000). Thus, the inquiry to be made is "whether a reasonable person perceives a significant risk that the judge will resolve the case on a basis other than the merits." *Hook v. McDade,* 89 F.3d 350, 354 (7th Cir.1996) (citation omitted).
3. Even with the Government's hiding at least one important aspect of the *ex parte* communications on the basis of some privilege that the Government thinks it has with this Court, the Governments one sided summary of the *ex parte* discussion between the Government and this Court clearly shows that this discussion was not based on "general procedural" questions. The two questions we know of show that the Governments attorney discussed with this Court specific questions concerning the scope of the Government's obligation to search for and produce exculpatory evidence "related to the contents of declarations provided by subject matter experts" and, perhaps more importantly, "when amending a factual return with an expert declaration." This was a substantive *ex parte* communication in a case where

the Factual Return was amended four times. This conversation never should have occurred, and once it occurred this Court and the Government were required, at an absolute minimum, to immediately notify Petitioner's Counsel of the communication and provide Petitioner's Counsel with an opportunity to be heard on the important discovery issues apparently being decided by this Court in a private meeting with the Government's attorney following an ABA breakfast meeting.

4. The record in this matter also reflects the conduct of this Court in apparently confirming for the Government in an *ex parte* discussion that the scope of the Government's discovery obligations did not extend as far as she, or someone in the Government, thought they might and gave the Government the apparent go-ahead to limit its search for exculpatory evidence, unbeknownst to Counsel and without giving Counsel the opportunity to even be heard on the issue.

5. The Government's arguments to the effect that (1) that this Court's remarks could only result in recusal if they showed reliance on an "extrajudicial source"(2) that Petitioner mischaracterized the Court's remarks or (3) that the Court's remarks must exhibit a deep seated favoritism, not only misstate the law and the facts herein, but are ostensibly nugatory at this point in light of (A) the Government's admission of a calculated *ex parte* contact by an interested Government attorney, (B) the Government's admission of its

deliberate and inexplicable withholding of that information for over two months and only disclosing it in response to a recusal motion, and most importantly, (C) the assertion that portions of that *ex parte* communication are "privileged" between the government and this Court. Given the totality of these circumstances, a reasonable observer would conclude objectively that there were grave doubts about this Court's impartiality and reason to be concerned about whether or not Petitioner could conceivably get a fair hearing from this Court, and under this totality, recusal is mandatory.

6. If Petitioner's original concerns did not convince the Court that it should recuse itself from this case, then the admissions by the Government that this Court engaged in an *ex parte* discussion with a Government attorney assigned to this case regarding this case, and that part of that discussion was so sensitive that the Government is attempting to claim some sort of privilege with the Court, should put to rest the fact that there is "an appearance" of bias on behalf of this Court as a "per se" matter. See, *In Re Kempthorne*, Supra.

7. Finally, Counsel cannot fully evaluate how the alleged "privileged communication" between this Court and the Government might affect this Court's decisions in this matter because Counsel does not know enough about the substance of that communication. However, Counsel does know that the nature of the conversations between this Court and the Government go to the very heart of discovery issues in this case. Perhaps even more

important is the fact that the secrecy surrounding the so called "privileged" communication makes it impossible for the public to evaluate the *ex parte* "privileged" communication between this Court and the Government, which tends to reduce the confidence of the public in the outcome of this case. The very purpose of Section 455 (a) is to promote confidence in the judiciary by avoiding even the appearance of impropriety whenever possible. Violations that cast doubt on the integrity of the judicial process may well give rise to a violation under Section 455(a). The D.C. Circuit held in *United States vs. Microsoft* 253 F.3d 34, 109-117 ( D.C. Cir. (2001)) that disqualification is mandatory for conduct that calls a judge's impartiality into question (citing to 28 U.S.C. § 455a *and In re School asbestos Litig*., 977 F2d 764, 783 (3rd Cir. 1992). Clearly, based on the facts admitted by the Government this Courts impartiality have been clearly and unequivocally called into question.

WHEREFORE, because the actions of this Court in announcing in a public setting its discomfort in its ability to handle cases like Petitioner's and also to rule fairly after a hearing on all of the evidence, this Court's apparent request seeking the intervention of the Congress of the United States to codify the law as it relates to "indefinite detention," this Courts *ex parte* communications with a Government attorney assigned to this case regarding the duties (or lack thereof) of the Government to search and provide for exculpatory evidence, the Government's withholding of further information about its *ex*

*parte* conversation based on its claim that is has a privileged relationship with this Court, and because the concerns raised herein go not only to the merits of this pending case but to the possible disposition in this case, this Court's impartiality has reasonably been called into question and requires that this Court disqualify itself in this case.

Respectfully submitted,

/s/ H. Candace Gorman

**CERTIFICATE OF SERVICE**

I, H. Candace Gorman, certify that I today caused a true and accurate copy of Petitioner's Reply Motion for Recusal to be served upon the following persons by service Through the ECF.

Nancy Safavi
U.S. Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Ave., NW, Room 7144
Washington, DC 20530

This 24th day of February, 2010.

/s/ H. Candace Gorman

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