**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

ISA ALI ABDULLA ALMURBATI, *ET AL.*, **Petitioners,** **v.** **GEORGE WALKER BUSH, *ET AL.*,** **Respondents.**	**Civil Action No. 04-1227 (RBW)**

REPLY MEMORANDUM OF LAW IN SUPPORT OF MOTION TO COMPEL

INTRODUCTION

Respondents inexplicably and unjustifiably sent classified and privileged client interview notes via regular mail in violation of the Access Procedures and Department of Defense regulations.[1] As a result, the notes have been lost and Respondents are unable to make any meaningful efforts to locate them. Instead of accepting responsibility for their breach of security protocols, Respondents blame the Postal Service and opine that the notes, which have been missing for months, may not truly be lost. Respondents' Opposition to Motion to Compel ("Opposition") at 4, 6. Relying largely on such feeble arguments, Respondents make the brash claim that equity precludes them from bearing the costs of their negligence. In fact, the *only* equitable result would be requiring the government to reimburse the *Almurbati* Petitioners for the additional expenses that will be incurred due to Respondents' actions.

[1] Perhaps in an effort to diminish the seriousness of their conduct, Respondents refer to the lost notes as "potentially" classified. Respondents' Opposition to Motion to Compel at 4, fn. 1. In fact, the Access Procedures provide that the notes are "classified material... ." Access Procedures, Section VI (A).

In their discussion of equity, Respondents also make mention of "remedial measures" they claim to have implemented at Guantanamo Bay. As will be explained, these measures are irrelevant to the instant motion because they do not redress in any fashion the harm suffered by the *Almurbati* Petitioners. Further, these measures are so trivial or ineffective as implemented that they hardly can be described as remedial.

Also as will be discussed, the doctrine of sovereign immunity does not bar the Court from exercising its authority to order the entirely appropriate and modest relief sought by the instant motion.

DISCUSSION

I. There Is no Equitable Basis to Shield the Government from the Consequences of its Negligence

Respondents make a variety of half-hearted arguments as to why it would be inequitable for the Court to order them to reimburse counsel for the *Almurbati* Petitioners for the actual costs that counsel will incur in making a return visit to re-interview Mr. Almurbati.

First, Respondents state that the lost notes "could arrive at any time" and that, if the notes did arrive, the instant motion would be moot. Opposition at 6. The notion that "it is not a foregone conclusion that the Postal Service will never deliver the package," Opposition at 6, is cold comfort for Mr. Almurbati, whose counsel presently are unable to conduct an appropriate factual investigation. *See* Memorandum of Law in Support of Motion to Compel at 7.[2] Further, taking Respondents' theory to its logical conclusion, absent conclusive evidence that the notes are definitively lost or destroyed, there would be no basis to bring the instant motion.

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[2] Respondents write that "counsel's assertion, in effect, that a return trip is necessary because they can remember nothing from their multi-day interview of Mr. Almurbati sufficient to permit any factual investigation of petitioner's claims . . . seems unlikely." Opposition at 6. This statement is misleading and inapposite. In fact, counsel for the *Almurbati* Petitioners noted correctly that it would be impossible to recreate the approximately 20 pages of notes that were taken during four interviews with Mr. Almurbati and that, as such, it is not possible to conduct the proper factual investigation that could have been undertaken had the notes not been lost. Memorandum in Support of Motion to Compel at 7, fn. 3.

Considering that neither Respondents nor anyone else has the slightest idea where the notes are, it is virtually inconceivable that such evidence will be forthcoming. Clearly, this does not bar relief.

Second, Respondents argue that a return visit for the purpose of re-interviewing Mr. Almurbati is not necessary because counsel for the *Almurbati* Petitioners might request a second trip to visit all of their clients at some point in the future. Opposition at 6-7. The argument that an immediate return visit is not necessary is inconsistent with Respondents' letter of December 17, 2004, which offered to "immediately . . . arrange a return visit to GTMO . . . to meet with Mr. Almurbati,"[3] and is inconsistent with Respondents' papers, which speak of arranging a return visit on a "priority basis." Opposition at 5.

Further, this argument is baseless on its face. Counsel for the *Almurbati* Petitioners have not requested a general return visit and do not intend to do so until completing factual investigation activities that will make a return visit optimally productive. Counsel should not be forced to schedule this visit prematurely in order to re-interview Mr. Almurbati; equally, it would be entirely prejudicial to delay re-interviewing Mr. Almurbati until the circumstances are right for a general return visit. It is especially ironic for the government to argue that counsel should wait for a general return visit, considering that the government has repeatedly refused to promise the Court that all requests for return visits will be honored.

Third, Respondents argue that "it cannot be established that it was the actions of the DoD . . . that caused the package of notes to be misrouted or misplaced by the Postal Service." Opposition at 7. They also write, "It is simply not known at this stage whether sending the sixth package by certified mail, as should have been done, would have prevented the loss of the

[3] This letter is attached to the Declaration of Joshua Colangelo-Bryan, which accompanied Petitioners' opening memorandum.

package." Raising these quasi-existential questions – while showing the limits to which Respondents will go to avoid responsibility – is utterly misplaced. Respondents violated the Access Procedures and the Department of Defense regulations that they insisted be binding on the parties in this action. Because of this violation, Respondents have no means of tracking the lost classified and privileged notes as they would have been able to do had they properly mailed the notes. In light of this, it is preposterous to suggest that counsel for the *Almurbati* Petitioners have to prove what would have happened if Respondents had actually followed the procedures they are required to follow.

A. Respondents' Remedial Measures Are Irrelevant and Meaningless

Respondents argue, in part, that they should escape the consequences of their actions because they have implemented "remedial measures." Opposition at 4. However, Respondents fail to explain how these prospective remedial measures will cure the harm that the *Almurbati* Petitioners have suffered already and continue to suffer. Indeed, Respondents offer no response at all regarding the fact that the loss of the notes will adversely affect counsel's relationship with Mr. Almurbati, has had hugely adverse effects with respect to factual investigation efforts, and has created the possibility that privileged notes will be viewed outside the attorney-client relationship. Of course, no response is offered because the fact of these harms is irrefutable and these harms cannot be cured by any remedial measures. For these reasons, the measures have no bearing on the instant motion.

Further, the so-called remedial measures themselves are of virtually no value. First, Respondents promise to seal all attorney notes in the attorney's presence and record the number of pages in each envelope and the number of envelopes sent to the Court Security Officer. Opposition at 4. These steps are so minimal that they hardly warrant being described as

measures. Further, counsel for the *Almurbati* Petitioners took these very steps, but obviously to no avail.

Second, Respondents promise to send all notes via certified mail. Opposition at 4. Considering that Respondents are obligated to send notes via certified or registered mail pursuant to the Access Procedures, this measure cannot be described as remedial. Indeed, if sending notes via certified mail represents a change in general practice, it would appear that Respondents may have committed additional violations of the Access Procedures with notes taken by other counsel.

Third, Respondents state that they have made a secure fax machine available to counsel at Guantanamo Bay, which will allow counsel to ensure that copies of their notes are transmitted to the secure facility. Opposition at 4-5. While this would appear to offer an improvement, reports from those who have attempted to use the machine suggest that the machine transmits pages so slowly as to make its use impracticable.

In sum, the government's argument that equity protects them from bearing responsibility for the tangible costs (just costs – not fees) of their negligence turns the notion of equity on its head. Indeed, it would be entirely inequitable to force counsel for the *Almurbati* Petitioners – who have been in full compliance with the Access Procedures – to incur any additional expenses for a return visit necessitated only by the government's negligence.

II. Sovereign Immunity Does not Preclude the Court from Exercising its Authority to Order the Government to Reimburse Counsel for the *Almurbati* Petitioners

Respondents do not dispute that courts have inherent power to impose sanctions in appropriate circumstances, but attempt to argue that this authority does not allow for the imposition of sanctions here because of sovereign immunity. Opposition at 10.

In making this argument, Respondents ignore many cases in which courts have ordered the government to make monetary payments for litigation misconduct. *See, e.g., United States v. Gavilian Joint Community College*, 849 F.2d 1246, 1251 (9th Cir. 1988) (imposition of Rule 11 sanctions against government not precluded by sovereign immunity); *United States v. Nat'l Med. Enter., Inc.*, 792 F.2d 906, 910-11 (9th Cir. 1986) (affirming imposition of monetary sanctions against government); *WAHAD v. Federal Bureau of Investigation*, 813 F. Supp. 224, 228 (S.D.N.Y. 1993) (ordering government to reimburse plaintiff for photocopying expenses and attorneys' fees incurred in attempting to obtain sanctions or compliance with court order).

Indeed, even if the government does not engage in willful or contumacious behavior, but is merely negligent, the court may impose sanctions. *See, e.g., Chilcutt v. United States*, 4 F.3d 1313, 1322 (5th Cir. 1993) ("this Court has never held that willful or contumacious conduct is a prerequisite to sanctions which are less harsh than a dismissal or default judgment"); *United States v. Sumitomo Marine & Fire Ins. Co.*, 617 F.2d 1365, 1370 (9th Cir. 1980) (affirming sanctions where government's failure to comply with court-ordered discovery may have resulted from understaffing); *Schanen v. United States Dep't of Justice*, 798 F.2d 348, 350 (9th Cir. 1986) (directing district court to order government to reimburse plaintiffs for costs and attorneys' fees incurred through proceedings necessary because of government's lack of diligence).

These cases establish that this Court has the authority to order Respondents to bear the costs occasioned by Respondents' failure to follow the Access Procedures. This is especially so because the instant motion does not seek punitive sanctions, but simply the reimbursement of modest expenses to be incurred. As such, Respondents' attempt to avoid responsibility on the basis of sovereign immunity is entirely unavailing.

CONCLUSION

Respondents violated the Access Procedures entered by the Court at Respondents' urging when they sent classified and privileged notes via regular mail. As a result, Respondents have no means to locate the lost notes and counsel for the *Almurbati* Petitioners must return to Guantanamo Bay to re-interview Mr. Almurbati. Thus, equity requires that Respondents remedy some of the damage resulting from the government's negligence by reimbursing counsel for all reasonable costs associated with the return visit. For this and each of the reasons stated herein and in the *Almurbati* Petitioners' opening memorandum, the *Almurbati* Petitioners respectfully request that the instant motion be granted.

Dated: Washington, D.C.
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Respectfully submitted,

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