IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MOAZZAM BEGG, *et al.*	)	
	)	
Petitioners,	)	
	)	
v.	)	**CASE NO. 1:04-CV-01137 (RMC)**
	)	
GEORGE W. BUSH, *et al.*	)	
	)	
Respondents.	)	
	)	

MOTION FOR AN ORDER REQUIRING PARTIES TO ABIDE BY PROPOSED PROCEDURES FOR COUNSEL ACCESS AND REQUEST FOR EXPEDITION

Petitioners Moazzam Begg ("Petitioner Begg") and Feroz Ali Abbasi ("Petitioner Abbasi") (collectively "Detained Petitioners"), respectfully move for an order requiring the parties to abide by the proposed "Procedures for Counsel Access," Exhibit A. The grounds for said motion are contained in the accompanying memorandum of points and authorities.

Respectfully submitted,

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Dated: October 22, 2004.

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PETITIONERS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THEIR MOTION FOR AN ORDER REQUIRING PARTIES TO ABIDE BY PROPOSED PROCEDURES FOR COUNSEL ACCESS AND REQUEST FOR EXPEDITION

Petitioners Moazzam Begg ("Petitioner Begg") and Feroz Abbasi ("Petitioner Abbasi") (collectively "Petitioners"), through their undersigned counsel, hereby submit the present motion, pursuant to Fed. R. Civ. P. 7, for an order requiring the parties to abide by the proposed "Procedures for Counsel Access" ("Petitioners' Procedures for Counsel Access"), attached as Exhibit A.

INTRODUCTION

Petitioners Moazzam Begg and Feroz Ali Abbasi, citizens of the United Kingdom designated as "enemy combatants" by the President of the United States pursuant to the Executive's Military Order of November 13, 2001,[1] are being held in complete isolation in military custody at Guantánamo Bay Naval Base without basis, without charge, and without adequate access to counsel, by color and authority of the Executive, and in violation of the Constitution, laws and treaties of the United States as well as customary international law. Petitioners have filed a petition for writ of habeas corpus, in further of their right to seek relief in United States federal court from their unlawful detention. *See Rasul, et al. v. Bush, et al.*, 124 S.Ct. 2686, 2698 n.15 (June 28, 2004). Petitioners also have a right to

[1] Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57833 (Nov. 13, 2001).

unhindered access to retained counsel for purposes of developing and pursuing their habeas petition in this Court. *See Al Odah, et al. v. United States, et al.*, Civ. Action No. 02-0828 (CKK, October 20, 2004) (mem. op.), at 6 (holding that "Petitioners are entitled to be represented by counsel pursuant to the federal habeas statute, 28 U.S.C. § 2241, the Criminal Justice Act, 18 U.S.C. § 3006A, and the All Writs Act, 28 U.S.C. § 1651," and expressly declining to reach the question of a constitutional right to counsel). Because the government's restrictions upon Petitioners' access to counsel threaten to eviscerate the attorney-client relationship and cannot be justified by recourse to national security concerns, Petitioners seek an order requiring the parties to abide by the Petitioners' Procedures for Counsel Access, *see* Exhibit A. These procedures memorialize the temporary counsel access measures currently in place in this case as well as the framework for counsel access set forth by the *Al Odah* Court in its October 20, 2004 memorandum opinion.[2]

BACKGROUND

On June 28, 2004, the United States Supreme Court held unequivocally that "[a]liens held at the [Guantánamo] base, no less than American citizens, are entitled to invoke the federal courts' authority under" the habeas statute to test the lawfulness of their detention. *Rasul v. Bush*, 124 S.Ct. 2686, 2696 (June 28, 2004) (emphasis added). Promptly after that decision was announced, Petitioners Moazzam Begg and Feroz Abbasi, through their Next Friends, filed the present habeas petition alleging that their detention violates, *inter alia*, Article I of and the Fifth Amendment to the United States Constitution, the Administrative Procedures Act, United States military regulations, the Third and Fourth Geneva Conventions, the International Covenant on Civil and Political Rights, and the American Declaration on the Rights and Duties of Man. Since that time, habeas counsel has been seeking access to Petitioners that would allow effective representation on their behalf. On October 20,

[2] Pursuant to L.Cv.R. 7(m), counsel for Petitioners have conferred by telephone with counsel for Respondents and Respondents "are not in a position to express a position on [Petitioners'] motion at this time."

2004, Judge Kollar-Kotelly ruled in *Al Odah* that the plaintiffs-petitioners in that case are entitled to unmonitored and unreviewed written and personal access to their counsel. Petitioners in the present case now seek an order requiring the parties to abide by the attached Procedures for Counsel Access, Exhibit A, which implement the *Al Odah* ruling.

Counsel for Petitioners Begg and Abbasi have attempted repeatedly to negotiate with the government to secure sufficient counsel access as would allow the effective representation of Petitioners. In response to an inquiry, the Respondents informed Petitioners' counsel on August 4, 2004, that the attorney-client communications in this case would be governed by the restrictions set forth in the "Procedures for Counsel Access to the Detainees at the US Naval Base in Guantanamo Bay, Cuba," ["Government's Procedures for Counsel Access"], filed by the government in *Al Odah et al. v. United States*, Civ. Action No. 02-CV-0828 (CKK) (July 30, 2004), attached as Exhibit B. The government specifically maintained that all written or personal contact between Petitioners and their counsel would be subject to habeas counsel's agreement to comply with the Government's Procedures for Counsel Access. Meanwhile, Petitioners Begg and Abbasi had been held in complete isolation in Camp Echo for over a year, and numerous public reports indicated that they were suffering from physical and psychological health problems as a result of their torture and abuse.[3] Because counsel were extremely concerned about Petitioners' condition, Gitanjali Gutierrez, Esq., one of Petitioners' attorneys, agreed to comply with these Procedures in order to correspond and meet with Petitioners, while reserving the right to object to the restrictions imposed by the Government's Procedures for Counsel Access.

On August 13, 2004, the government informed counsel that, based upon the Department of Defense's security assessment of Petitioners, no monitoring of counsel visits and communications pursuant to Sections IV and V of the Government's Procedures for Counsel Access was necessary.

[3] *See, e.g.*,Vikram Dodd and Michael White, "No Rights, No Charges, No Lawyers ... Life Beyond The Law At Guantanamo Bay," The Guardian, Feb. 20, 2004; Amnesty International, "Guantánamo Bay: A Human Rights Scandal," AI

The DOD also determined, however, that the provisions for classification review of written materials, under Sections VI and VII, were necessary "to ensure the proper handling of classified materials." *See* Exhibit C, Letter from Andrew Warden to Gitanjali S. Gutierrez, August 13, 2004. The Court in *Al Odah*, however, has squarely ruled that the "classification review" of attorney or client notes or attorney-client legal mail "impermissibly burden the attorney-client relationship and abrogate the attendant attorney-client privilege." Mem. Op., *Al Odah*, at 24. Petitioners now request that this ruling -- that attorney and client notes generated during this and any subsequent meetings, as well as Petitioners' legal mail, is safeguarded from prior or subsequent "privilege team" review of its contents -- be promptly applied to this case.

Even if this Court were to revisit the question decided in *Al Odah*, the circumstances of this case make clear that the Government's Procedures for Counsel Access are impermissible, unworkable, and unjustifiable. The governments' earlier effort to impose privilege team review upon all of Petitioners' written attorney-client communication resulted in continuing breaches of privilege, as described below. In addition, the government has refused to provide Petitioners with assurances that they will not be interrogated concerning the content of their attorney-client communications. In response to this interference with the attorney-client relationship, habeas counsel insisted that attorney-client communications with Petitioners Begg and Abbasi be structured in a manner that creates a "closed universe" between counsel holding valid security clearances and the Petitioners, a framework nearly identical to that set forth by the Court in *Al Odah*.[4] Eventually the parties reached a temporary arrangement implementing this framework in substantial part.[5] Counsel for Petitioners attempted unsuccessfully to negotiate with the government to reach an agreement on permanent counsel access

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Index: ACT 60/017/2004 (Sept. 2004).

[4] The government acknowledged as much when it refused to permanently adopt the temporary counsel access arrangement in *Begg* on the grounds that it was "similar to the proposal on counsel access suggested by the petitioners in *Al Odah*," which was subsequently adopted by the Court.

[5] Under the parties temporary arrangement, only counsel's legal mail to Petitioners is subject to privilege team review. All other written and oral communications, as well as attorney and client meetings notes, are safeguarded from any such

procedures that will adequately preserve the attorney-client relationship without compromising national security. While the government is not yet prepared to apply the ruling in *Al Odah* to any other habeas petitioners, the Court in *Al Odah* was unequivocal. Any further delay in Petitioners' confidential access to counsel is unwarranted.

Accordingly, Petitioners move for an order requiring parties to abide by the Petitioners' Procedures for Counsel Access, *see* Exhibit B.

ARGUMENT

I. THIS COURT SHOULD APPLY THE OPINION IN *AL ODAH* TO ENFORCE PETITIONERS' RIGHT TO CONFIDENTIAL ACCESS TO COUNSEL TO DEVELOP AND PURSUE THEIR LEGAL CLAIMS.

Habeas petitioners in Guantánamo have a right of access to their retained counsel to develop and pursue their pending habeas claims challenging the lawfulness of their detention. In *Hamdi*, a related case of a U.S. citizen previously held as an enemy combatant in the United States Navy Brig in South Carolina, the Court affirmed that the Petitioner "unquestionably has the right to access to counsel in connection with the proceedings on remand." *Hamdi v. Rumsfeld*, 124 S.Ct. 2633, 2652 (2004) (plurality opinion); *see id*. at 2660 (concurring opinion of Justice Souter). In *Rasul*, the United States Supreme Court held unequivocally that "[a]liens held at the [Guantánamo] base, no less than American citizens, are entitled to invoke the federal courts' authority under" the habeas statute to test the lawfulness of their detention." *Rasul v. Bush*, 124 S.Ct. 2686, 2696 (June 28, 2004) (emphasis added). Accordingly, Petitioners have the same right to access counsel as that held by U.S. citizens under, at the very least, the All Writs Act, 28 U.S.C. § 1651(a) and the habeas corpus statute. *See Al Odah*, Mem. Op., at 6.

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disclosure.

In *Al Odah* the Court soundly rejected the government's claims that national security concerns justified the substantial intrusions upon the attorney-client relationship created by privilege team review: "After considering the Government's proposed procedures in light of their impact on the attorney-client relationship, the Court finds that the Government's proposed procedures inappropriately burden that relationship, and that national security considerations can be addressed in other ways." *Al Odah*, Mem. Op., at 13. The Court left no doubt that the government cannot justify restrictions upon Petitioners' access to counsel:

> The Court find that the Government's position is both thinly supported and fails to fully consider the nature of the attorney-client privilege. The Government has not presented the Court with law sufficient to sustain their proposed inroads into Petitioners' relationship with their attorneys. The privilege that attaches to communications between counsel and client has long held an exceptional place in the legal system in the United States. The Supreme Court has stated that
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> > [t]he attorney-client privilege is the oldest of the privileges for confidential communications known to the common law. Its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interest in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client.
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> *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981) (internal citation omitted).
>
> Indeed, the "privilege 'is founded upon necessity, in the interests of administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure.'" *Id*. (quoting *Hunt v. Blackburn*, 128 U.S. 464, 470 (1888)). The privacy of communications between attorney and client is crucial to this relationship.

Al Odah, Mem. Op., at 16-17. The Court specifically stated that the government's proposal to engage in classification review "flies in the face of the foundational principles of the attorney-client privilege. *Id*. at 18.

In response to this opinion in *Al Odah*, the government has stated that it desires "time to review the opinion before deciding whether to appeal,"[6] and will not consent to providing Petitioners immediate confidential access to counsel. To be sure, the government may attempt to persuade the Court of Appeals to take the extraordinary step of granting an interlocutory appeal for every ruling issued in the habeas petitions related to the detention of individuals in Guantanamo. But these tactics should not distract the Court from the central fact that Petitioners have been held virtually *incommunicado* without adequate access to counsel or family for more than 1,000 days, much of it spent in complete isolation, while the government has yet to even attempt to fully justify its continuing deprivation of their liberty. The Petitioners have no access to phones, to a timely mail system,[7] or to any other means of communication with the outside world. Ant their right to bring and develop their claims in the federal courts in the United States would be infringed, if not rendered completely meaningless, without the corresponding right to access retained counsel. Petitioners' confidential access to counsel to develop their habeas petition is long overdue.

II. PETITIONERS HAVE A RIGHT TO CONFIDENTIAL AND TIMELY ATTORNEY-CLIENT COMMUNICATION

Even if this Court chooses to revisit the decision in *Al Odah* that Petitioners are entitled to confidential access to counsel, the restrictions that have been imposed upon Petitioners Begg and Abbasi are impermissible, unworkable, and unnecessary.

First, Petitioners have a right to confidential access to counsel. The attorney-client privilege is "the oldest of the privileges for confidential communications" in the common law and "goes back to the reign of Elizabeth I."[8] It is well-settled that the fundamental purpose of the attorney client privilege is to "encourage full and frank communication between attorneys and their clients and

[6] Carol D. Leonnig, *U.S. Loses Ruling on Monitoring of Detainees*, Wash. Post., Oct. 21, 2004, at A4.

[7] Letters sent through the regular detainee mail system in Guantánamo typically take six months to reach the recipient.

[8] 8 Wigmore, Evidence § 2290 (McNaughton rev. 1961).

thereby promote broader public interest in the observance of law and the administrative of justice." *Swidler & Berlin v. Untied States*, 524 U.S. 399, 403 (1998); *In re Lindsey*, 148 F.3d 1100, 1103 (D.C. 1998); *see also Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). The military's review of Petitioners' written communications pursuant to the Governments' Procedures for Counsel Access prevents such "full and frank" communication.[9] As Irwin Schwartz, President of the National Association of Criminal Defense Lawyers (NACDL) has pointed out, under the Model Code of Professional Responsibility,[10] a lawyer "may not talk to [his or her] client at all about something confidential if there's a third party listening. So if there's a possibility that a third party is listening and [the lawyer] can't talk to [his or her] client, he's stripped of his right to legal representation."[11] Similarly, in *Weatherford v. Bursey*, 438 U.S. 545 (1997), the Supreme Court warned of the chilling effect that would result from government monitoring of attorney-client communications: "One threat to the effective assistance of counsel posed by government inspection of attorney-client communications lies in the inhibition of free exchanges between defendant and counsel because of fear of being overheard." *Id*. at 554.

Here, the government's proposal to have military officials "review" all of Petitioners' attorney-client correspondence would inhibit the open communication essential for effective representation, particularly because the circumstances of Petitioners' detention force Petitioners to rely disproportionately on written communications with their counsel. It is for that reason that in *Hamdi* the Court expressly observed that individuals designated as enemy combatants are entitled to "unmonitored" access to counsel. *Hamdi*, 124 S.Ct. at 2652 (O'Conner, J., plurality opinion).

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[9] *See also Weatherford v. Bursey*, 429 U.S. 545, 554 n.4 (1997) (acknowledging that the right to effective assistance of counsel is threatened by a reasonable "fear that the government is monitoring [attorney-client] communications through electronic eavesdropping").

[10] Model Code of Prof'l Responsibility EC 4-1, 4-2, 4-4 (1981); Model Rules of Prof'l Conduct R. 1.6.

[11] Weekend All Things Considered (NPR Radio Broadcast, Dec. 8, 2001).

In any event, it is well-established that the government cannot impose restrictions upon a client's access to counsel in the absence of a showing that such restrictions are both necessary to serve important governmental interests and are narrowly tailored to serve those interests. *See, e.g., Geders v. United States*, 425 U.S. 80 (1976) (finding the government's restrictions on counsel access to be invalid because "[t]here are a variety of ways to further the purpose served by sequestration without placing a sustained barrier to communication between a defendant and his lawyer"); *see also Upjohn*, 449 U.S. at 402 (1981) (holding that intrusions "forcing an attorney to disclose notes and memoranda of witnesses' oral arguments" cannot be justified even "on showing of substantial need and inability to obtain the equivalent without undue hardship").

Unlike the determination for three of the plaintiff-petitioners in *Al Odah*, the government here has expressly stated that it found no reason to monitor Petitioners' oral communications with their attorneys. The United States military has repeatedly evaluated the risk of any security threat associated with Petitioners meeting with counsel, and has unequivocally concluded that no monitoring of the attorney-client communication is necessary to protect national security interests. First, on July 23, 2003, the United States and the United Kingdom announced a diplomatic agreement that "the circumstances of [Moazzam Begg and Feroz Abbasi] are such that they would not warrant monitoring of conversations between them and their defense counsels."[12] And again, prior to habeas counsel's visit in August 2004, the Department of Defense reassessed any risk created by attorney-client communications, and found that no monitoring of the attorney-client meetings was required. *See* Exhibit C, Letter from Andrew Warden to Gitanjali S. Gutierrez, August 13, 1004. Additionally, counsel have been granted secret security clearance and have been fully briefed as to their obligations under federal law and regulations when handling classified information.

[12] Dept' of Defense Statement on British Detainee Meetings, News Release, July 23, 2004, *available at* http://www.defenselink.mil/releases/2003/nr20030723-0222.html.

Accordingly, the sole issue presented by this motion is whether Petitioners are entitled to confidential and unmonitored written communication with their retained counsel and to safeguarded attorney or client meeting notes. Because the government cannot assert any valid justification for reviewing all written communications or distinguishing this communication from oral discussions, privilege team review and redaction of Petitioners' confidential attorney-client communications is impermissible unless and until counsel submits information to the privilege team for classification review for purposes of disclosure.

Not only are the restrictions struck down in *Al Odah* impermissible on their face, but as applied, they have also resulted in numerous interferences with the attorney-client relationship during the brief period of time during which they have been in force in this matter. Notwithstanding that, in the Respondents' briefs' filed in *Al Odah*, the government claimed that under their Procedures for Counsel Access "attorney-detainee communications remain uncompromised," Respondents' Reply Memorandum in Further Support of Response to Complaint [Respondents' Reply], *Al Odah, et al. v. Bush, et al.*, Civ. Action No. 02-CV-0828 (CKK) (Aug. 9, 2004), at 3, and that "because the privilege team will be walled-off from future proceedings involving the petitioners, there can be no legitimate concern that attorney-detainee communications will be 'chilled,'" *id.* at 16, this case demonstrates that the Government's Procedures for Counsel Access are insufficient to prevent breaches of attorney-client privilege, have resulted in needless and significant delays in attorney-client communications, and are unnecessary to adequately safeguard national security interests. Thus, counsel have received a number of privileged letters from Petitioners that have been delivered pursuant to procedures inconsistent with the guidelines for attorney-client mail outlined in the Government's Procedures for Counsel Access. *See* Exhibit D, Affidavit of Gitanjali S. Gutierrez ["Gutierrez Affidavit"], at ¶ 13. For example, prior to his visit with counsel, Petitioner Begg sent two privileged letters to his habeas attorneys in the first week of August 2004. *Id.* at ¶14. These letters were sent by DOD officials at Guantánamo to the privilege team, and then sent from the privilege team to habeas counsel. *Id.* Both letters were properly

determined to be unclassified. *Id.* Despite their unclassified status, however, and the requirement under the Governments' Procedures for Counsel Access that mail be delivered within five (5) business days, *see* Exhibit B, at § VI.D.a, the letters dated July 12, 2004 and August 6, 2004, were not delivered until on or around August 26, 2004 and August 20, 2004, respectively. Gutierrez Affidavit, at ¶ 17. These delays have hindered counsel's ability to advocate for the Petitioners. The July 12, 2004 letter, for example, contained serious allegations of torture and abuse that counsel was unable to confront until receiving the unclassified letter nearly six weeks after it was given to the government. Gutierrez Affidavit, at Attachment B.

Similarly, the first week of August 2004, Petitioner Abbasi also sent four privileged letters to counsel at Gibbons, Del Deo, Dolan, Griffinger & Vecchione, P.C. *Id*. at ¶ 16. Although the letters were clearly addressed to Petitioner Abbasi's legal counsel, and contained various legal grievances, every privileged attorney-client letter was read by the government (instead of being sent to the privilege team), copied and entered into the regular detainee mail database at Guantánamo, and held for delivery upon habeas counsel's arrival. *Id*. Nonetheless. counsel for Petitioner Abbasi still did not receive these privileged letters from the government until the second and third day of her visit on September 1 and 2, 2004, nearly a month after Petitioner Abbasi mailed them. *Id*.

With respect to attorney notes and work product, the "privilege team" procedures have also resulted in the disclosure of privileged information to counsel for the government. Thus, the privilege team disclosed to counsel for the government the subject-matter of the first attorney work-product memo submitted by any habeas counsel. Specifically, counsel in this case submitted two memos containing privileged and confidential work product and attorney-client communications for review by the privilege team. *Id*. at ¶ 18. The first of these memos, submitted on September 3, 2004, was a one-page memo handwritten in English containing a single piece of classified information. *Id*. at ¶ 19. The classification determination nonetheless took over two weeks to complete. *Id*. When the government called to inform habeas counsel of the classification determination, the government revealed that the

privilege team member had explained that the information was classified because of its specific subject matter and had described to government counsel the subject matter of the attorney memo. *Id*. at ¶ 20.

The second privileged memo submitted to the privilege team by counsel in this case was sent via the Department of Justice Court Security Office on September 23, 2004. *Id*. at ¶ 21. Although counsel has repeatedly inquired as to when the classification determination will be completed on the second memo, as of today, counsel for the government have been unable to provide a date by which this will occur. *Id.* As a result of this delay, during meetings with the Foreign and Commonwealth Office (FCO) Minister of the United Kingdom, on September 29, 2004, counsel for Petitioner was unable to answer many of the Minister's questions concerning the Petitioners' condition. *Id*. at ¶ 22. Further, while the FCO Minister was able to speak freely about statements Petitioners had made to her staff, counsel was unable to confirm, contradict, or clarify the FCO Minister's representation of Petitioners' statements to counsel because that information is still pending classification review. *Id*.

In general, the Government's Procedures for Counsel Access have failed to provide sufficient independent oversight of the privilege team process. Although counsel was initially permitted to communicate directly with the privilege team member reviewing documents in this case, the government has since prohibited any communications between the privilege team and habeas counsel, leading to the risk of disclosure of privileged work-product because DOJ counsel is involved in communicating classification determinations for privileged information. In addition, the government has not identified for either habeas counsel or the Court, the names or qualifications of the particular privilege team members currently reviewing documents in this case.[13] Thus, counsel is unable to ascertain whether the privilege team members are acting neutrally and not involved in litigation or

[13] The government states only that, in general, the privilege team "is composed of one or more DoD attorneys and one or more intelligence or law enforcement personnel who have not taken part in, and in the future, will not take part in, any court, military commission or combatant status tribunal proceedings concerning the detainee." Governments' Procedures for Counsel Access, § II.D.

proceedings involving the Petitioner, although it is clear that the privilege team acts under the direction and auspices of Department of Justice.

After the hearing in *Al Odah* concerning the permissibility of the government's restrictions on counsel access, the government filed a "Notice of Supplemental Counsel Access Procedures," that explained changes to its original Counsel Access Procedures. While the government claims that these Supplemental Access Procedures merely "clarify" its previously submitted Procedures for Counsel Access, the Supplemental Procedures significantly expand the intrusions upon the attorney-client relationship wrought by the privilege team. For example, the government expanded the privilege team's role from making classification determinations to censoring attorney-client communications for certain information the privilege team found was "not reasonably related" to counsel's representation. Yet, these supplemental procedures do not provide for review of the privilege team's determinations as to what information constitutes privileged material, what information "reasonably relates to counsel's representation" of Petitioners, or what information "reasonably could be expected to result in immediate and substantial harm to the national security." Exhibit E, § III.B.2. Thus, neither Petitioners not counsel, not for that matter the Court, has the ability to challenge or review the determination to pierce one of the most significant evidentiary privileges in our jurisprudence. Moreover, this lack of judicial review may lead to a lack of uniformity in the determinations. Accordingly, should any petitioner's communications be subject to routine privilege team review, it will be impossible for Petitioner and counsel to know in advance which portions of their reviewed communications the privilege team deems "nonprivileged information" that is subject to further disclosure or irrelevant information subject to redaction. *See, e.g.*, Exhibit E, § II.A. As the United States Supreme Court stated in *Upjohn*

> if the purpose of the attorney-client privilege is to be served, the attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege, or one which purports to be certain but results in widely varying applications . . ., is little better than no privilege at all.

Upjohn, 499 U.S. at 393.[14]

Finally, the government has been unwilling to assure counsel that government interrogators will respect the confidentiality of Petitioners' attorney-client communications, further threatening to eviscerate counsel's ability to provide effective representation. After the attorney visit to Guantánamo, counsel sought written assurances that neither Petitioner would be interrogated concerning the content of the attorney-client meetings and that such questions would be properly directed to habeas counsel. *Id.* at ¶ 23. The Government responded that "neither counsel for the Department of Defense or the Department of Justice in these habeas cases are in a position to provide assurances as to the content or timing of future interrogations of an Guantanamo Bay detainee; counsel and officials connected with the habeas cases do not control or attempt to influence the military's ongoing intelligence gathering and law enforcement missions with respect to Guantanamo Bay detainees." *Id* Accordingly, the government cannot assure the Petitioners that military, law enforcement or other government officials will not interrogate or question them concerning the content of privileged attorney-client communications.

In light of these breaches and interferences with the attorney-client privilege, Petitioners were able to reach temporary accommodations with the government concerning specific counsel access procedures applicable to this case, described in detail *infra* at 17-21. Most significantly, the temporary procedures permit the Petitioners to send correspondence, via the Department of Justice Court Security Office (CSO), directly to habeas counsel who possess valid current national security clearance without first subjecting the correspondence to privilege team review or redaction. The correspondence from Petitioners' is handled, stored, and transported as classified material to ensure that classified or

[14] Counsel's representation of Petitioners Begg and Abbasi involves the present habeas petition and diplomatic efforts to repatriate Petitioners as well as representation in other litigation in which petitioners could potentially be called as material witnesses. Vigorous representation of Petitioners involves pursuing leads that may, at first glance, not appear "reasonably related" to counsel's representation, but the undersigned shudder to imagine that such strategic litigation decisions will be made by the privilege team without counsel ever having access to the information in the first instance.

sensitive information is not disseminated to unauthorized individuals. In light of these accommodations, "temporary" though they were, claims by the government that the Department of Defense had "carefully crafted the Procedures in light of the national security concerns implicated in this unique context, as well as DOD's on-the-ground assessment of the practicalities of accommodating potentially dozens, if not hundreds, of lawyers representing hundreds of detainees" seem disingenuous indeed: these "carefully crafted" procedures were, in fact, quickly abandoned by the government once the breaches of attorney-client privilege were brought to light. The Petitioners' Procedures for Counsel Access create a closed universe in which counsel and Petitioners may communicate in an unhindered and timely manner to facilitate the legal representation to which Petitioners are entitled. At the same time, these procedures, to which the government has substantially consented to on a temporary basis, also preserve the current mechanism for identifying and safeguarding any classified information to protect national security interest. Accordingly, this Court should adopt the ruling in *Al Odah* and grant Petitioners' motion to apply the Procedures for Counsel Access, attached as Exhibit A, in this matter.

III. THE PETITIONERS' PROCEDURES FOR COUNSEL ACCESS ARE NECESSARY TO SAFEGUARD THEIR RIGHT TO COUNSEL

The attached Petitioners Procedures for Counsel Access memorialize, in part, the temporary counsel access procedures that are currently being applied to Petitioners and their counsel, and reflect the practical application of the framework proposed by the Court in *Al Odah*. Pursuant to the Petitioners' Procedures for Counsel Access, a closed-universe is created between counsel and client in which they may communicate in an open and timely manner without censorship or breaches of privilege. No information shall be disseminated from either Petitioner or security-cleared habeas counsel without that information being first submitted to the government for timely review and approval.

Under this closed-universe structure, Petitioners may send outgoing legal mail (i.e., mail sent from the Petitioner to his counsel) as classified documents directly to habeas counsel via the Department of Justice Court Security Office, or the secure work site for habeas counsel once it is established. The Petitioners' outgoing legal mail is transported, handled, and stored in compliance with the federal regulations applicable to classified materials. Counsel shall not disseminate any information contained in Petitioners' outgoing legal mail, unless and until counsel first submits the information to the DOD privilege team for classification review and for a determination of the applicable security measures that must accompany any dissemination. Counsel also acknowledge that the letters from Petitioners are deemed classified unless and until otherwise determined by the privilege team. This agreement preserves the attorney-client privilege without compromising the need to protect national security.

Reflecting the temporary agreement reached with the government, the Petitioners Procedures for Counsel Access also provide that the same measures apply to any written materials generated by counsel and/or the Petitioner during the client meetings. As a practical matter, this relieves the privilege team from expending their limited time and resources reviewing written materials that will never be disseminated. It also allows habeas counsel to maintain control over what information is submitted to the privilege team for purposes of dissemination to, for example, foreign consulting counsel, rather than forcing counsel to disclose all interview notes and attorney work product. As a practical matter, these measures were implemented successfully during counsel's first meetings with Petitioners.

With respect to incoming legal mail (i.e., mail sent from counsel to client), the Petitioners' Procedures for Counsel Access permit habeas counsel to send written communications directly to the appropriate JTF-Guantanamo section for delivery to the Petitioners without undergoing prior privilege team review. Such procedures are necessary to ensure that incoming counsel communications are not shared with intelligence officials involved in other cases in which either client may be sought as a

witness. Moreover, unhindered communications are necessary to build and maintain a relationship of trust with Petitioners.

Any dissemination of these attorney-client communications by Petitioners is also highly controlled in a manner that prevents the release of any information that could potentially harm national security. It is counsel's understanding from the JTF-Guantanamo Staff Judge Advocate's Office that Petitioners' only means of communicating with anyone outside Guantánamo is through the regular mail system for detainees and that every letter sent by the detainees is subject to multiple levels of intelligence and security review before being mailed.

The Petitioners' Procedures for Counsel Access also impose reasonable time limits for the privilege team to complete classification review of any information submitted by habeas counsel. To date, the classification review has not been completed in a timely manner, resulting in concrete prejudice to the Petitioners. For example, as previously discussed, when habeas counsel recently met with the Foreign and Commonwealth Office (FCO) Minister in the United Kingdom to discuss the repatriation of Petitioners and their current conditions, the FCO Minister was able to speak freely about the information Petitioners had shared with her staff during brief consular meetings that were observed by a United States representative. Understandably, the information both Petitioners were able to share under these conditions could have been different than what was discussed in a confidential meeting with habeas counsel. Nonetheless, during the meeting with the FCO Minister, habeas counsel was unable to respond to the FCO Minister's representations of the Petitioners' statements because the information was still pending classification review, after having been submitted on September 23, 2004. To date, the classification process still has not been completed on this information. While counsel for petitioners may still rely on classified information for purposes of litigation, counsel's representation of petitioners also involves ongoing diplomatic efforts to have Petitioners repatriated as well as consultation with foreign counsel, and receiving classification determinations in a timely manner is essential to counsel's effective representation in this regard.

Finally, the Petitioners' Procedures for Counsel Access require government counsel as well as petitioners' counsel to abide by its provisions, *see* Exhibit A, III.B.5 - 6; establish timeframes for the delivery and acceptance of legal mail to and from clients, *see id*. at IV.A.2 & B.2; require the government to make an *ex parte* submission under seal of the instructions provided to the privilege team for judicial verification that those instructions adequately preserve the attorney-client relationship, *id*. at VII.A; prohibit the privilege team from disclosing information to government personnel involved in any proceeding involving the client as a party, witness, or in any other capacity, *id*. at VII.B; and distinguish the restrictions placed on any potential telephonic access by counsel from that of family members or others, *id*. at VIII. The Petitioners' Procedures for Counsel Access also preserve the legitimate restrictions placed upon counsel access for purposes of national or base security. *See id*. at III (requiring security clearances and other verifications of counsel's qualifications for counsel access); IV.A.4, 5 and V.B (requiring counsel to treat all client communications as classified unless and until reviewed by the privilege team, and prohibiting disclosure of certain information not reasonably related to counsel's representations); VII. (providing procedures for classification review for information counsel seeks to disseminate). Petitioners proposal is a reasonable accommodation of the concerns of both the government and the Petitioners. *See Al Odah*, Mem. Op., at 6 (finding that in light of the Petitioners' right to counsel, "the Court determines that the Government is not entitled to unilaterally impose procedures that abrogate the attorney-client relationship and its concomitant attorney-client privilege covering communications between them").

Petitioners note that their procedures do not address issues that are currently under review by Judge Green with respect to the government's proposed protective order for the habeas petitions, specifically whether counsel may disclose classified information to their client that that government relies upon as a basis for the client's detention as well as the permissible scope of counsel's use of any unclassified information involved in these cases. Thus, the Petitioners' Procedures for Counsel Access

may be promptly applied in this case pending Judge Green's decision on the issues raised by the proposed protective order.

Accordingly, Petitioners seek an order memorializing the counsel access framework approved in *Al Odah*, in which the attorney-client communications of Petitioners are structured in a manner that creates a "closed universe" between habeas counsel holding valid current security clearances and the Petitioners. Any dissemination outside this secure attorney-client relationship would require either privilege team review and a classification determination in the case of dissemination by counsel, or the regular detainee mail security screening process in the case of dissemination by Petitioners. This also prevents the privilege team from unnecessarily expending time and resources reviewing unclassified documents, or information that will never be disclosed outside of the attorney-client relationship.

The government insisted repeatedly in their briefs and oral arguments in *Al Odah* that it would threatened national security to allow habeas counsel and petitioners to communicate in a "closed universe," of direct communication without a privilege team reviewing correspondence, even if counsel is prohibited from disseminating nonclassified information absent government review and approval. This is, however, precisely how the Department of Defense and Department of Justice have agreed to permit Petitioners Begg and Abbasi to communicate with habeas counsel who possess valid current security clearances. It is not, therefore, necessary to national security to have the privilege team review or redact communications between habeas counsel and Petitioners. Accordingly, this Court should order that the parties abide by the Petitioners' Procedures for Counsel Access.

CONCLUSION

For the foregoing reasons, this Court should apply the decision of *Al Odah* to this habeas petition and grant Petitioners' motion to implement the Procedures for Counsel Access, attached as Exhibit A, to govern Petitioners' access to habeas counsel.

Respectfully submitted,

___/s/_____

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Dated: October 22, 2004.