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IN THE UNITED STATES DISTRICT COURT FOR THE

DISTRICT OF COLUMBIA

SAIFULLAH PARACHA,

Petitioner,

v.

Case No. 04cv020222-PLF
ORAL ARGUMENT IS REQUESTED

Hon. GEORGE W. BUSH,

et al.,

Respondents.

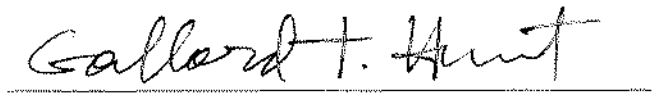
PETITIONER'S MOTION TO VACATE ORDER ENTERED DECEMBER 16, 2004, APPLYING PROTECTIVE ORDER

The order entered in this case on December 16, 2004, docket number 13, was entered without notice to petitioner and should be vacated, without prejudice to the later imposition of some suitably framed protective order if and when respondents make a motion showing a need for one in this case.

The order is also unjustified as a matter of law for the reasons argued in the Points and Authorities in support of this motion to vacate.

Respondents will oppose this motion.

Respectfully submitted, January 18, 2005



GAILLARD T. HUNT
Attorney for Petitioner
(D.C. Bar No. 89375)
1409 Gleason Street
Silver Spring, Maryland 20902
(Not admitted in Maryland)
301-530-2807
gthunt@mdo.net
(Fax: 301-564-6059)

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I. GENERAL PRINCIPLES.

The law has long recognized several privileges that may or may not become relevant in this case, depending on how the litigation progresses, what justifications respondents offer for petitioner's confinement, and what evidence they offer in support thereof.

A. Military secrets.

Military secrets have classically been held privileged. In *U.S. v. Reynolds*, 345 U.S. 1 (1953) the trial court, considering the tort claims of the families of three civilians killed in the crash of an Air Force plane, penalized the government for refusing to

produce the accident investigation report. The Supreme Court vacated and remanded because the Secretary of the Air Force had properly invoked the privilege for military secrets. The Secretary's letter explaining that the plane had been testing secret electronic equipment, and that release of the investigation report would reveal military secrets, was sufficient to invoke the privilege. The Court called the privilege for military secrets "a privilege which is well established in the law," citing numerous cases. 345 U.S., at 7, and footnote 11. It cautioned that the privilege "is not to be lightly invoked," citing John Marshall's comments in the Aaron Burr trial, I Robertson's Reports 186. 345 U.S at 7. This privilege is recognized in the Freedom of Information Act 5 USC 552(b)(1), in Military Rules of Evidence 505 and 506, and implicitly by Federal Rules of Evidence 501.

The Supreme Court made it clear in *Reynolds* that the privilege is not absolute but requires a discrete inquiry by the courts into the relevancy of the secret, its necessity to a party's case, etc. Here we have not even the first representation that the government will want to treat anything about Paracha as secret. Military secrets are generally tactical and short-lived. By their nature they are wasting assets. Petitioner Paracha, to the best of our knowledge seized unarmed in the Bangkok airport as he got off an uneventful civilian flight on July 5, 2003, is unlikely to have known anything of military value. If he did, it is highly improbable that it is still true or useful.

If the privilege is invoked, and all compromises have been explored and rejected, and then the government is still not willing to release its reasons for holding Paracha, he must go free. *U.S. v. Dobr*, 21 CMR 451 (Army Board of Review, 1956) set aside a soldier's conviction for AWOL because the defense had been ordered at his court martial

not to discuss his honorable service in military intelligence, beyond giving the fact that he had served and the dates. And *U.S.. v. Reynolds*, 345 US. 1 (1953), at 12, cited *Andolschek* (below) and said that in criminal cases, "since the Government which prosecutes an accused also has the duty to see that justice is done, it is unconscionable to allow it to undertake prosecution and then invoke its governmental privileges to deprive the accused of anything which might be material to his defense.

B. State Secrets.

State secrets are those that the executive determines would be harmful to the foreign relations of the United States. The broadness of this concept signals its danger. Congress, the courts, the press, and the public have struggled since World War II against the tendency of executive officials to slap the secrecy stamp on any item of the public business that might be in any way embarrassing. See Senators Trent Lott (R., Miss) and Ron Wyden (D., Ore.), "Hiding the Truth in a Cloud of Black Ink", *New York Times*, August 26, 2004, quoting Chairman Thomas H. Kean of the 9/11 Commission as saying that three-quarters of the papers they examined were unnecessarily classified.

At least one authority, Brian Z. Tamanaha, "A Critical Review of the Classified Information Procedures Act," 13 *American Journal of Criminal Law* 277 (Summer 1986), believes that the state secrets privilege is absolute, where properly asserted and allowed by the court. But he means that state secrets are privileged from forced disclosure. They do not confer a privilege on the secret-keepers to by-pass due process and to lock people up on the basis of the secret evidence they will not reveal. Id., 315-324, quoting Judge Learned Hand twice:

> . . . so far as they directly touch the criminal dealings, the prosecution necessarily ends any confidential character the documents may possess: it must be conducted in the open, and will lay bare their subject matter.
>
> *U.S. v. Andolschek*, 142 F.2d 503, 506 (2d Cir., 1944).

> It is, however one thing to allow the privileged person to suppress the evidence, and *toto coelo*, another thing to allow him to fill a gap in his own evidence by recourse to what he suppresses.
>
> *U.S. v. Coplon*, 185 F.2d 629, 638 (2d Cir., 1950).

C. Informer's privilege.

Wigmore says that the government's privilege not to reveal the identity of an informer, "is well established, and its soundness cannot be questioned." 8 Wigmore, Evidence, sec. 2374, citing cases as far back as *U.S. v. Moses*, 27 Fed. Cas. 5 (No. 15825) (C.C.E.D. Pa., 1827) and *In re Quarles and Butler*, 158 U.S. 532 (1894). The privilege rests on the need to encourage people to come forward with information, and Wigmore lists several limitations "inherit in its logic and its policy." One is that only the informant's identity is privileged, not the contents of his communication. And the privilege disappears if the informer appears as a witness, if the informer's identity is admitted or already known, or where the informer was a "material witness" to the facts in dispute. "The plainest case is that in which the state uses the informer's information in a prosecution." Then the informer's identity must be revealed. Wigmore, Evidence, sec. 2374.

Possibly the whole case against petitioner Paracha rests on an informant. If so, the confrontation clause of the sixth amendment is clear: The government must bring forth enough evidence to justify holding petitioner, even at the cost of compromising one of its sources, or it must let petitioner go free. Of all sources of incriminating evidence,

informers are the most liable to bias and exaggeration. If untested by confrontation and the full rigors of litigation, informers can cause enormous miscarriages of justice.

In any event, all these privileges are affirmative privileges against revealing information. They must be pleaded and the party pleading them must bring forth the facts supporting the privilege. On December 16, 2004, when the protective order was applied to this case, no party had even suggested that any privileged or secret information will be involved. The order should be vacated, without prejudice to dealing with any privileges that may be properly invoked later.

II. THE CLASSIFIED INFORMATION PROCEDURES ACT.

In the late 1970s Congress became concerned about the "graymail" problem, the situation where a criminal defendant has, or claims to have, classified information and threatens to reveal it if his prosecution continues. After much deliberation, the Classified Information Procedures Act was passed. 18 USC Appendix 3. The CIPA requires that defendants give notice if they intend to introduce classified information. It also modified the classical "best evidence" rule and the hearsay rules to allow the courts to limit defendants to sanitized versions of their defense evidence, in cases where that would be adequate. But the legislative history is replete with evidence that Congress was determined not to allow abuses, and not to start down the path to Star Chamber proceedings or the abuses of totalitarian regimes, and the Act is clear that if the defendant's right to a free and fair inquiry into his guilt or innocence cannot be granted because of government secrecy, the defendant goes free.

The CIPA mandated that the Chief Justice promulgate a rule enabling courts to handle classified information, and Chief Justice Burger did so on February 12, 1981. "Security Procedures Established Pursuant to Pub. L. 96-456, 94 Stat. 2025, by the Chief Justice of the United States for the Protection of Classified Information," is a note following 18 USCA Appendix 3, section 9.

III. OTHER PROCEDURES FOR SECRECY.

The CIPA and the Chief Justice's "Security Procedures" apply only in criminal cases. *Bowers v. United States Department of Justice*, 690 F.Supp. 1483 (W.D.N.C., 1987). The parallel process in Freedom of Information Act cases is the *in camera* inspection provided for in the Act. 5 USC 552(a)(4)(B). The mechanics of storing classified documents may well be the same, but the purposes and procedures of the two laws differ. Under FOIA, the plaintiff has a presumptive right to see any government record, but the government may produce certification that it is properly and necessarily classified, and usually the case ends there. The *in camera* inspection is only needed if the court is not satisfied with the government's certification, and is no substitute for publicly debatable reasons. " . . . *[I]n camera* review is generally disfavored. It is ' "not a substitute" for the government's obligation to justify its withholding in publicly available documents.' " (Citations omitted.) *PHE, Inc. v. Department of Justice*, 983 F.2d 248 (D.C. Cir., 1993).

Thus by 9/11/2001 the judicial branch was experienced and skilled in protecting both the classical privileges of military secrets, state secrets, and informer's privilege, and also material covered by executive branch classification schemes.

But each step in derogation of the tradition of openness had been taken with reluctance, and had been taken with due regard to the rights of litigants, especially litigants facing loss of liberty. "Judicial proceedings are supposed to be open, . . . in order to enable the proceedings to be monitored by the public." *Doe v. City of Chicago*, 360 F.3d 667 (7th Cir., 2004), citing *Doe v. Blue Cross-Blue Shield United of Wisconsin*, 112 F.3d 869 (7th Cir., 1997). In *U.S. v. Microsoft Corporation*, 56 F.3d 1448, at 1463-65 (D.C. Cir., 1995) the D.C. Circuit disapproved of allowing an amicus brief from a group calling itself "the Doe Companies" and proceeding anonymously because they feared retribution from Microsoft.

The protective order applied herein goes far beyond the traditional privileges. It strips petitioner Paracha of rights essential to him -- and to the court, if this court is to reach a reasoned judgment on the facts of this particular case.

IV. THE OTHER GUANTANAMO CASES.

From late 2001 till June 28, 2004, the government took the position that its confinement of several hundred persons at Guantanamo and other overseas military bases was extraterritorial under *Johnson v. Eisentrager*, 339 U.S. 763 (1950), and would be handled entirely within the executive branch. It took the position that the confinements should never be subjected to any inquiry by the judiciary. In the broad shelter of this doctrine the executive practiced torture 1/, concealed prisoners from the Red Cross 2/,

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1 "In late 2002, more than a year before a whistle-blower slipped military investigators the graphic photographs that would set off the Abu Ghraib prison abuse scandal, an F.B.I. agent at the American detention center in Guantánamo Bay, Cuba, sent a colleague an e-mail message complaining about the military's 'coercive tactics' with detainees, documents released yesterday show." Kate Zernike, "Newly Released Reports Show

imprisoned an undetermined number of foreign nationals, and may be responsible for some extra-judicial executions 3/ of prisoners.

The Supreme Court decided *Rasul v. Bush*, 542 U.S. , 124 S. Ct. 2686 (2004), on June 28, 2004, and since then the government has been faced with the jurisdiction of this court over habeas actions by the prisoners at Guantanamo, but it is sticking with the substantive side of its pre-*Rasul* doctrine. The government contents that *Rasul* conferred only a right to sue, but recognized no rights that could be enforced in that suit. The government especially contends that the right to sue implies no right to the assistance of counsel in bringing the suit. This doctrine is set forth in the government filing in *Al-Odah v. U.S.*, 02cv0828-CKK, dated July 30, 2004.

As a result of the government's position (although in this case without the benefit of a government motion spelling out that position), counsel in the Guantanamo cases have been hedged in with a bewildering array of restrictions. So far they involve at least two formal court protective orders and two quite different Department of Defense procedures.

Early Concern on Prison Abuse," *New York Times*, January 6, 2005; Nine court martials for prisoner abuse were held from early 2003 to the middle of 2004, "Marines Found Guilty of Abusing Iraqis, Files Show," *New York Times*, December 15, 2004, A-18; "Military Court Hears Abu Ghraib Testimony; Witness in Graner Case Says Higher-Ups Condoned Abuse," *The Washington Post*, January 11, 2005, A-3.

2 "Rumsfeld Admits He Told Jailers to Keep Detainee in Iraq Out of Red Cross View," New York Times, June 18, 2004, A-10; Statement of Antonella Notari of the ICRC in Geneva, AP dispatch, July 13, 2004, The Washington Post, July 14, 2004, A-13; "Army Says CIA Hid More Iraquis than It Claimed," New York Times, September 10, 2004, A-1.

3 Some prisoners have died of blunt force trauma, but responsibility has yet to be determined. "Yesterday, the Army acknowledged that 20 investigations were under way into prisoner assaults and deaths in Iraq and Afghanistan." Stephanie Hanes, *Baltimore Sun*, May 5, 2004.

The two Department of Defense procedures are titled, "Procedures for Counsel Access to Detainees at the US Naval Base in Guantanamo Bay, Cuba," and "Revised Procedures for Counsel Access to Detainees at the U.S. Naval Base in Guantanamo Bay, Cuba". The first, hereafter "Procedures", is Exhibit A to the government filing in *Al-Odah v. U.S.*, 02cv0828-CKK, dated July 30, 2004, the filing arguing that these petitioners have no right to counsel at all. The other, the "Revised Procedures", is Exhibit A to Judge Green's protective order of November 5, 2004, amended November 8, 2004, entered in several Guantanamo dockets. Neither procedure bears a date, at least not in the versions in the court records.

There are many differences, both substantial and small, between the two DoD procedures, and also many ambiguities and internal contradictions in each of the procedures. "Revised Procedures" in many ways retreats from some of the rigors of "Procedures," possibly as the authorities realized that some of the original language was overkill and unnecessary hypercaution. Appendix A hereunder reviews some of the differences of less immediate importance.

But two differences between the two DoD procedures are too pressing to be relegated to an appendix:

VI.A. and XI. of "Procedures" and IV.A.6. and IX.B. of "Revised Procedures" contain a radical change. "Procedures" contemplates that communication between counsel and a detainee will be examined by the privilege team to determine its classification level. "Revised Procedures" declares that information learned from a detainee will go directly to counsel, but must be treated as classified until it is submitted to the privilege team and declared not to be classified. This shifts an enormous burden to

counsel, who can do nothing with any information learned from a detainee except keep it locked in his own head, or reveal it to the privilege team and hope it will be declassified.

Section VI. of "Procedures" explicitly provides that the privilege team is to review mail from an attorney to a detainee, setting deadlines for how many business days this may take (5 if in English, 10 for other languages, 30 if a code is suspected). The corresponding section in "Revised Procedures" (Section IV., because of the omission of IV. and V. as found in "Procedures") shortens this time to two business days, "assuming no physical contraband is present". Clearly the mail is still opened and examined for contraband, and there being nothing said to the contrary, the privilege team will presumably review it at will.

Counsel is aware of two formal court orders in Guantanamo cases which adopt these procedures and thereby abrogate petitioners' right to counsel and compromise any hope the courts may have of accurately determining the facts in these cases: 1) that of Hon. Colleen Kollar-Kotelly dated October 20, 2004, entered in *Al-Odah v. U.S.*, 02cv0828-CKK, concerning representation for only Al-Kandari, Al-Odah, and Al-Mutairi, three Kuwaiti nationals; and 2) the somewhat different order of Hon. Joyce Hens Green issued in amended form November 8, 2004 (and supplemented by a clarification concerning filing and docketing procedures, dated December 13, 2004), issued initially in 14 Guantanamo docket numbers, starting with 02cv0299-CKK (and including 02cv0828-CKK, *Al-Odah*, covering the petitioners therein not covered by Judge Kollar-Kotelly's order). It is this second order, the November 8, 2004, order of Judge Green, which was imposed upon this case, the Paracha case, on December 16, 2004, without notice.

This order expressly adopts all the terms of the "Revised Procedures," reserving the right to override specific provisions. Paragraph 6.

Paragraph 7. undertakes to order the privilege team not to disclose information (except from court filings) except as provided by "Section X of Exhibit A." Exhibit A is the "Revised Procedures", in which Section X. deals only with physical security and contraband. Presumably Section X. of the earlier "Procedures" is intended. If Section X. of the earlier "Procedures" is the standard of disclosure, it is not clear why we need a privilege team at all, or why the attorney-client communications should not simply be monitored directly by the military and intelligence personnel, because Section X. of "Procedures" simply ignores the problem of attorney-client privilege, and provides only the very specific, and largely irrelevant, assurance that members of the privilege team will not themselves be involved in proceedings involving this particular prisoner.

Paragraphs 8. through 15. are legal boilerplate seeking to define, or expand the definitions of, such terms as "document", etc., to embrace all possible situations.

Paragraph 20. through 26. contemplate that the government will set up, at government expense, a secure area, or office, and petitioners' counsel will work there and only there when they work with classified information.

Paragraph 27. makes clear that petitioners in the Guantanamo cases are not to have the benefit of even the most cursory investigative services ordinarily provided by counsel. This paragraph forbids counsel to "discuss classified information" anywhere outside the secure area or office, or on the telephone or on email. Thus counsel if forbidden to undertake the simplest routine inquiry to the prisoner's friends or family as to whether they know of any evidence impeaching or ameliorating the government's case.

Paragraph 29. reiterates this (with an exception for the three Kuwaitis covered in Judge Kollar-Kotelly's order in 02cv0828-CKK, discussed below).

Paragraph 30. provides a possible exception to the otherwise blanket denial of communication of sensitive information from the lawyer to the client. An attorney may submit to the privilege review team the information he or she wishes to reveal to the client. The privilege review team is not authorized to weight the sensitivity of the evidence against the client's need for it. Instead the privilege review team is to send the information, along with the news that it is of interest to the given prisoner, to the "appropriate government agency."

Paragraph 31. is a blanket gag order against the use of classified information in any court proceeding. It differs radically from the procedures outlined in the CIPA by allowing no summaries of classified evidence, no stipulations, and none of the other compromises mandated by that law.

Paragraphs 35. through 45. reiterate much of the above limitations, with some modifications, for the category known as "protected information." This is, in effect, information that was not classified legitimately under the applicable Executive Orders but was given an informal classification for purposes of this litigation.

Meanwhile, Judge Kollar-Kotelly issued her memorandum opinion in *Al-Odah v. U.S.*, 02cv0828-CKK, dated October 20, 2004. This opinion is chronologically before Judge Green's protective order of November 8, 2004, but internal evidence shows Judge Kollar-Kotelly was well aware that the substance of Judge Green's order was already in effect, either under the court's authority or the authority of the DoD procedures. That is, Judge Kollar-Kotelly begins by addressing the problem of "real-time monitoring," the

abrogation of any pretence of attorney-client confidentiality, and she says the military is no longer attempting to monitor communications of most of the Guantanamo petitioners, only of the three covered in the memorandum opinion. (They were Al-Kanari, Al-Odah, and Al-Mutairi.) Nevertheless, when Judge Kollar-Kotelly refers to the procedures in "Exhibit A", she means the earlier "Procedures" attached as Exhibit A to the government's July 30, 2004, filing, not the "Revised Procedures" attached as Exhibit A to Judge Green's order soon to be issued on November 6 or 8, 2004.

Most of Judge Kollar-Kotelly's memorandum opinion is a well-reasoned and ringing affirmation of the right to counsel, and the obligation of counsel to do what counsel normally do: investigate the leads their clients offer them and find evidence to submit to the court. Because of the limited questions before the court at the time, footnote 3 of the opinion reserves most of the issues of counsel access to be resolved at a later date. Nevertheless, the logic of the opinion leaves little room for most of the limitations and abrogations of the right to counsel found in the DoD procedures. "The Court finds 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." October 20, 2004, mem. op., page 6. She did not reach the Constitutional aspects of the right to counsel, but looked at the habeas statute and the cases thereunder saying the courts should provide counsel if a petitioner would not have an adequate ability to investigate as well as to present the facts of his case, and to argue the law. Here, "To say that Petitioners' ability to investigate the circumstances surrounding their capture and detention is 'seriously impaired' is an understatement. The circumstances of their confinement render their ability to investigate

nonexistent. Furthermore, it is simply impossible to expect Petitioners to grapple with the complexities of a foreign legal system and present their claims to this Court without legal representation." Id., 12. Indeed, the court's ability to live up to its own obligations "would be stymied were Petitioners to proceed unrepresented by counsel." Id., 12.

Having found a statutory right to counsel, not a Constitutional right that might be undermined by the government's theory that Guantanamo prisoners have no Constitutional rights, the court then asked whether the procedures proposed by the government were consistent with the employment of counsel in these cases. She declared that they were not: "The Government's proposal that it monitor these meetings and conduct a classification review of meeting notes flies in the face of the foundational principle of the attorney-client privilege." Id., 18.

The logic of the court's reasoning would have gone on to sweep away all or most of the procedures proposed by the government, but at an oral argument held on August 16, 2004, the counsel for the three petitioners immediately before the court proposed a compromise: They suggested that if they could meet with their petitioners without anyone listening in, they would voluntarily treat everything they learned as though it were classified. They further suggested that if they needed to reveal anything they had learned from their petitioners they would first seek permission of the privilege team. This is the scheme the court consented to.

This scheme may have made sense for those particular petitioners. If counsel were sure that the prisoner would have no defense requiring investigation, and no claims that would have to be checked out by inquiry among uncleared persons, and among aliens, then the requirement to consider the prisoner's story classified would be

administratively burdensome, because counsel could not handle notes freely, but it might have no material impact. But in any case with factual disputes, corroboration becomes important, and a prisoner's story that cannot be discussed, and discussed freely with persons one would not ordinarily trust, is useless. Probably counsel for these three prisoners had good reason to consent to treat their information as classified, and were not simply showing an excess spirit of compromise, but they had no authority to speak for any other Guantanamo prisoners.

V. STATUS OF THIS CASE.

A petition for habeas corpus was filed herein on November 17, 2004. It was assigned to Hon. Paul L. Friedman. On December 3, 2004, Judge Friedman ordered the case sent to Hon. Joyce Hens Green "for coordination and management," with the other Guantanamo cases, as soon as he had disposed of a pending motion, petitioner's motion for a preliminary injunction to prevent his possible transfer away from the court's jurisdiction. On December 7 Judge Friedman denied that motion. On December 10 petitioner file an amended petition to add petitioner's wife as his "next friend."

The next activity was Judge Green's order of December 16, 2004, applying to this case the amended protective order dated November 6, 2004. There had been no motion for such an order in this case. Cf. FRCP Rule 7(b)(1): "An application to the court for an order shall be by motion . . . ". Indeed, there had been no filing from the government in this case at all except the opposition to the motion for a preliminary injunction, which did not touch on the subject of secrecy or sensitive information, and said little about this petitioner except to admit he is at Guantanamo.

On December 21, 2004 Judge Green issued an order that the respondents file a factual response by January 18, 2005, and extended to that same date petitioner's time to object to the order of December 16, 2004. This motion to vacate is that objection, timely filed.

VI. SPECIFIC OBJECTIONS.

The above orders and procedures cannot be shrugged off as empty formalities. The government has brought massive charges against translators and others who have had contact with Guantanamo prisoners -- including a chaplain who was a West Point graduate -- which have turned out to have had little or no foundation. Senior Airman Ahmad I. Al-Halabi faced the death penalty for espionage but in the end got only a bad conduct discharge for technical violations of classified document procedures. *Air Force Times*, October 4, 2004. In reporting that translator Ahmed Fathy Mehalba will soon be released on a plea bargain after espionage charges fell apart, *The Washington Post* said:

> Army Capt. James Yee, a Muslim chaplain, was cleared in March of charges that he had committed espionage and sedition, and was found guilty only of minor administrative charges of adultery and storing pornography on a government computer. And in September, the Army dropped charges against Reserve Col. Jackie Duane Farr, an intelligence officer who was accused of trying to remove classified documents.
>
> *The Washington Post*, "Interpreter Pleads Guilty to Taking Data", January 11, 2005, A-6.

See also "Imploding Terror Cases", *Los Angeles Times*, September 28, 2004.

This is not an atmosphere of professional bonhomie in which one may take the procedures with a grain of salt and assume they will be given relaxed interpretations tempered with common sense. Reserving his right to object to specifics of these orders

and other government practices as they may come up, and to object to secrecy continuingly in this litigation, petitioner now respectfully emphasizes his objections on the following points:

A. Requiring clearance for defense counsel.

The requirement that counsel have an executive branch security clearance before they see certain filings and evidence in these cases is either a useless, but costly, interference with the independence of the judiciary, or it is an impermissible abridgement of the right to counsel.

Brian Z. Tamanaha, "A Critical Review of the Classified Information Procedures Act," 13 *American Journal of Criminal Law* 277 (Summer 1986), at 287-290, cogently criticizes this requirement. An earlier version of the CIPA which was not adopted, HR 4745, 96th Congress, 2d Session, suggested seven terms to be included in protective orders, one of which was security clearances "for persons having a need to examine the information in connection with the preparation of the defense." During hearings, Representative Morgan Murphy asked whether this would not suggest more government control over the defense than would be proper. Graymail Legislation hearings, Subcommittee on Legislation, Committee on Intelligence, 96th Congress, 1st Session, page 49 (1979). The provision was not adopted. As Professor Tamanaha says, "The greatest danger of this de facto clearance requirement is that it gives the Department of Justice the ability to control who will work on classified maters for the defense. [Footnote omitted, citing the comment of Rep. Murphy] . . . The potential for abuse in this situation is troubling regardless of whether the prosecution does in fact deliberately use this power to its advantage . . . ".

In any event, when Chief Justice Burger promulgated rules under the CIPA (above, II.), he adopted the seven terms proposed in HR 4745, but limited the security clearance requirement to court employees. Tamanaha, *supra*, note 57. It is not clear how the requirement is back as a burden on counsel.

The supervisory power of the judiciary over members of the bar is too well-established to require citation. The courts impose strict standards on lawyers, plus standards of loyalty to their clients and confidentiality not required of the general public. We do not know what other criteria the security clearance may impose, inconsistent with these standards or additional to them, but the judiciary should not allow the executive branch to interfere with the judiciary's policing of its own licensed officers.

The practical burden of the clearance is not trivial. The undersigned in this case spent over seven hours filling out the form, which requires addresses of all residences and addresses, names, and phone numbers of all employers, going back for ten years, and much other information, plus blanket waivers of medical confidentiality and releases of credit records. Counsel must also be fingerprinted, which took in this case three visits to various police stations, and $20 and about a half hour once a cooperative police officer was found. It is not know how many, if any, members of the bar have been denied clearances.

B. Executive branch inquiry into the source of fees.

Paragraph III.C.4. of both "Procedures" and "Revised Procedures" require counsel to certify to the best of his or her knowledge, after reasonable inquiry, that funds received "are not funded directly or indirectly by persons or entities the counsel believes are

connected to terrorism or the product of terrorist activities . . .". This goes far beyond any legal prohibition against dealings with suspect organizations, impermissibly limits the right to counsel, and, with the requirement of "reasonable inquiry" and belief that there is no direct or indirect flow of money, is dangerously vague. Should expenses be offered by a family, organization, or individual from one of the detainees' home countries, there is no way counsel can make this certification that will not expose him or her to the very real threat of prosecution based on the government's superior knowledge of who is "connected to terrorism" in those far-off societies.

ABA Model Rule 1.8(f) cited in paragraph III.C.4. does not deal with terrorist organizations, nor any other criminal organization. The Model Rule addresses the common situation where a criminal defense lawyer is paid by someone other than the defendant. Often this is the defendant's family, but sometimes it may be persons associated with the criminal activity. In either event, the ethical obligations are the same: Counsel must have the informed consent of the client, must avoid any suggestion that the loyalty and unstinting efforts owed the client will be compromised or diverted, and must be sure all confidences of the client are preserved. D.C. Bar Rules 1.8(e) and 5.4(c) lay down the same requirements.

This common situation was discussed in *Wood v. Georgia*, 450 U.S. 261, 101 S.Ct. 1097 (1981). The various opinions make it clear there is no blanket rule against receiving third-party compensation for a criminal defense, however shady the source. The legitimacy of such arrangements is "heavily dependent upon the particular facts at issue." John M. Burkoff, *Criminal Defense Ethics 2d* (West, 2003) 6:18, "Third Party Employers".

If the government knows of any counsel who may be influenced by a fee from a terrorist organization, that problem can be dealt with by motion. The question has not come up in this case, as no one has to date given the undersigned so much as a nickel or a rupee, clean or dirty. In the unlikely event that anyone does, it should be dealt with by a strict application of D.C. Bar Rule 1.8(e) and 5.4(c), and the principles of ABA Model Rule 1.8(f), and any other applicable rules or statutes.

C. Discouraging of telephone access to prisoners.

VIII.A. of both procedures says that telephone access will not normally be allowed. Originally telephone conversations were monitored and recorded. Apparently the government has retreated from that rule. But the statement that telephone conversations are discouraged is still in the "Revised Procedures."

Nothing could show more clearly the general overall thrust of these rules: The government does not concede the right to counsel, so limitations will be piled thereon as much as the court will allow. Telephone is the common, ordinary, inexpensive, convenient way people communicate over long distances these days. Even if the conversations were monitored, there would be many times -- on the preliminary question of retaining counsel and filing the suit, for instance -- when counsel and a properly cautioned prisoner might communicate with profit over a phone line.

D. Restrictions on what counsel may tell a prisoner.

IX.D. of "Revised Procedures" provides, "Counsel may not divulge classified information not learned from the detainee to the detainee." This, in conjunction with the

power of the privilege team to classify any and all information, gives the privilege team complete control over all of counsel's advice and questions to the prisoner.

The law is clear that the ability of counsel and a prisoner to confer is the essence of the right to counsel, and denial of it is per se wrong. *Geders v. U.S.* 425 U.S. 80 (1976) reversed a conviction because counsel was ordered not to confer with a defendant during an overnight recess; *Mudd v. U.S.*, 798 F.2d 1509 (D.C. Cir., 1989) held that such restrictions require reversal without a showing of specific harm; *U.S. v Santos*, 201 F.3d 953 (7th Cir., 2000); "The sixth amendment to the Constitution does not allow an attorney to be walled off from his client when acting in defense of his client's liberty," Mikva, C.J., *Eniola v. U.S.*, 893 F.2d 383 (D.C. Cir., 1990), remanding because defense counsel were prohibited from telling their clients that a potential witness was a police informant. In the notorious Scottsboro case, counsel was appointed on the day the trial began, and the Supreme Court in reversing observed: "In any event, the circumstance lends emphasis to the conclusion that, during perhaps the most critical period of the proceedings against these defendants, that is to say, from the time of their arraignment until the beginning of their trial, when consultation, thoroughgoing investigation and preparation were vitally important, the defendants did not have the aid of counsel in any real sense, although they were as much entitled to such aid during that period as at the trial itself." *Powell v. Alabama*, 287 U.S. 45, 57 (1932).

V.B. of "Revised Procedures" prohibits counsel from telling any detainee about "any ongoing or completed military, intelligence, security, or law enforcement operations, investigations, or arrests, or the results of such activities, by any nation or agency or current political events in any country that are not directly related to counsel's

representation of that detainee". The final phrase would seem to modify only "current political events," so the ban is only on discussion of political events not relevant to representation. (How that is to be interpreted is unknowable. Is the recent U.S. presidential election unrelated? The upcoming election in Iraq?) The ban on discussion of the other matters includes those related to representation. It is hard to imagine any discussion that would not come under this ban, as the subject of counsel's representation, the prisoner's confinement, is the result of ongoing or completed, military, intelligence, etc., etc., activities.

Even a letter introducing counsel to the detainee -- presumably a letter from the detainee's family, friends, or home government explaining the reasons for retaining counsel -- is subject to censorship under an ill-defined security test in V.A. of "Revised Procedures".

E. Restrictions on what a prisoner may tell counsel, or on what counsel may do with information learned from the prisone:

XI. of "Procedures" said, "Counsel may not divulge classified information provided by the detainee or related to his case to anyone except United States government personnel with the requisite security clearance and need to know, using a secure means of communication." (Emphasis in the original.) It was the right of the DoD privilege team to classify all the information the prisoner supplied, as soon as possible after he supplied it. IX.D. of "Revised Procedures" says, "Counsel may not otherwise divulge classified information related to a detainee's case to anyone except those with the requisite security clearance and need to know using a secure means of communication." The only difference in the two procedures is that under IX.B. of "Revised Procedures", "Counsel is

required to treat all information learned from a detainee, including any oral and written communications with a detainee, as classified information, unless and until the information is submitted to the privilege team and determined to be otherwise." Similar language appears at IV.A.6.

Thus the privilege team has absolute control over counsel's preparation of the case.

Under the Executive Order, national security information becomes classified by a positive act of an executive branch official. Only information about atomic weapons is "born classified." Under the Atomic Energy Act of 1946, 42 USC 2014(y), 2274, 2275, 2277, all information about atomic weapons is restricted by law until the proper authority declares it harmless and unclassified. The protective orders here abandon the usual approach and attempt to create a new category of information "born classified", anything learned from a Guantanamo prisoner.

Nothing could strike more vigorously at the right to counsel than this. If the client's side of the story were classified, the lawyer would be forbidden to investigate in search of supporting evidence. To find a ruling on such an unusual restriction, we must go back to the mammoth multi-year investigation and trial the government maintained against IBM. There, as part of his effort to keep the trial under control, the Chief Judge of the Southern District of New York put restrictions on the defense's interviews with witnesses. While overruling these orders by the extraordinary remedy of mandamus, the Second Circuit reaffirmed some basics about the function of counsel in our system:

> A lawyer talks to a witness to ascertain what, if any, information the witness may have relevant to his theory of the case, and to explore the witness' knowledge, memory and opinion -- frequently in light of information counsel may have developed from other sources. This is part of an attorney's so-called work product. [Footnote omitted.]

IBM v. Edelstein, 526 F.2d 37 (2D Cir., 1975).

The court cited *Hickman v. Taylor*, 329 U.S. 495 (1947), the leading case establishing that the liberal discovery provisions of the Federal Rules do not abolish the adversarial system, and an attorney's work product belongs to the side it was gathered for, and is not available to the opponent:

> Historically, a lawyer is an officer of the court and is bound to work for the advancement of justice while faithfully protecting the rightful interests of his clients. In performing his various duties, however, it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel.
>
> *Hickman v. Taylor*, 329 U.S. 495 (1947).

More recently, the Second Circuit was faced with a disciplinary reprimand which had been imposed on a defense attorney who had interviewed his client's potential co-defendant without permission of the co-defendant's lawyer. "We are not prepared to hold that a defense attorney engaging in critical pre-trial investigation, which might produce valuable sources of impeachment material or, better, direct evidence of his or her client's innocence, is committing professional misconduct. That attorney is providing the effective defense and the zealous representation required by the Sixth Amendment and DR 7-101, respectively." *Grievance Committee v. Simels*, 48 F.3d 640 (2d Cir., 1995). The procedures imposed by the order November 8, 2004, mandate neglect that would be ineffective assistance of counsel in any other context. *Bigelow v. Williams*, 367 F.3d 562 (6th Cir., 2004).

The criminal case of *U.S. v. Katrina Leung*, 2003cr00434, was dismissed by the Central District of California on January 6, 2005, because the prosecution had included in the plea-bargain agreement of Ms. Leung's co-defendant a clause prohibiting him from discussing the case with Ms. Leung or her lawyer. Citing the cases holding that

interference with the defense's ability to gather evidence and to talk to potential witnesses is prosecutorial misconduct, the court dismissed the indictment. The effect of the classification rules here would be a much grosser limitation on petitioner's ability to prepare his case.

And if the information is learned from a prisoner, it is by definition information already in the possession of persons the government does not trust. The burden of treating it as non-secret is minimal. It is in the public domain, and therefore not to be withheld under any of the FOIA exemptions, much more so than information that may have once been revealed in the course of a trial, as in *Cottone v. Reno*, 193 F.3d 550 (D.C.Cir., 1999). *Afshar v. Department of State*, 702 F.2d 1125 (D.C.Cir., 1983); *Niagara Mohawk Power v. Department of Energy*, 169 F. 3d 16 (D.C.Cir., 1999).

F. Abrogation of attorney-client confidentiality and failure to screen off or isolate the privilege teams.

Lawyers have become adept in recent years at erecting "Chinese Walls," or screening procedures, to prevent information from spreading from some member of a law firm to other colleagues. This became necessary because the size of some firms makes it difficult to avoid conflicting loyalties, so internal barriers are needed to screen members of the firm from one another. The "Privilege Team" set up to review communications between the Guantanamo prisoners and their lawyers, however, is not screened from other government lawyers in this manner, and therefore violates the attorney-client privilege and denies the right to counsel.

Smith v. Whatcott, 757 F.2d 1098 (10th Cir., 1985), struck the appellate briefs filed by a certain firm because it was discovered that one of the firm's lawyers had

previously represented its adversary. No matter that the firm filed affidavits saying the "no information has actually been disclosed nor access to either file permitted," by the contaminated lawyer. Id., 1101. Because no formal screening mechanisms had been in place, the disqualification followed automatically. See also *LaSalle National Bank v. County of Lake*, 703 F.2d 252 (7th Cir., 1983); *Corrugated Container Anti-Trust Litigation*, 659 F.2d 1341 (5th Cir., 1981); and other cases cited in *Whatcott*. In *In re Trust America Service Corp.*, 175 B.R. 413 (M.D. Fla., Bankruptcy, 1994) compensation was denied to Coopers & Lybrand because although they did set up screening barriers between two offices working on antagonistic purposes, they over-looked their Orlando office, where people working for opposing sides were not formally screened from one another.

The earlier "Procedures" contained the rather tepid assurance that, "Except as provided herein, the privilege team shall not disseminate information derived from monitored communications." Procedures, IV.F. It is not clear whether this language applied only to information from monitored visits, as its placement in section IV. suggested, or also to monitored mail and other information the privilege team might come across. Similar language is now in section VII of "Revised Procedures," titled, "Classification Determination of Detainee Communications."

In any event, the exceptions vitiate the assurance. VII.D. of "Revised Procedures" requires the privilege team to look for "any information that reasonably could be expected to result in immediate and substantial harm to the national security" and report it promptly to the Commander, JTF-Guantanamo. Given the government's rationale for holding these prisoners, this is a rather broad mandate. The next paragraph, VII.E. of

"Procedures", requires reporting of information relating to "imminent acts of violence". As discussed below, the D.C. Bar Rules exempt from attorney-client confidence information about future acts which may result in "death or substantial bodily harm," but they do so at the discretion of the attorney, not a DoD team. More importantly, VII.A. of the "Revised Procedures" makes it clear that the privilege team is supposed to collect and disseminate intelligence for use in regard to prisoners other than the one from whom the intelligence comes. This makes official the kind of misconduct that resulted in excluding evidence in *U.S. v. Haynes*, 216 F.3d 789 (9th Cir., 2000), where a disloyal investigator handed over evidence he had gathered for a defendant to the government. "The right to effective assistance of counsel is infringed when a government informant attends a confidential attorney-client meeting and relays information about defense strategy to the prosecution for use against the defendant at trial. [Citations.]" *Greater Newburyport Clamshell Alliance v. PSC*, 838 F.2d 13, 20 (1st Cir., 1988).

This collection of information on other prisoners, is a gross perversion of the adversarial system and the right to counsel. The government has had unlimited access to the Guantanamo prisoners, in some cases for three years. The government has vast resources to put together "pieces of the puzzle" gleaned from separate sources. In aid of these habeas corpus inquiries it is necessary that counsel for each prisoner focus on the evidence about that individual -- do we really know that he was at place X at time Y, what evidence do we have about his motivations, etc., etc. If in so doing counsel must supply the privilege team with more pieces of the puzzle to be used against the prisoner's associates, and with no assurance they will not feed back into this prisoner's case, then

counsel is not working for the prisoner at all but is working for the government. *U.S. v. Marshank*, 777 F. Supp. 1507 (N.D. Calif., 1991).

Should it be shown that a privilege team is needed, and it has not been shown in Paracha's case, it would be easy enough to construct one and to properly screen it. First and foremost, it must consist of employees of a neutral agency, preferably of the court itself. It should be physically located away from the military and intelligence agencies, and away from the Department of Justice lawyers working on these cases. With a possible exception for emergency situations, there is no reason the privilege team should be allowed to pass any information on to anyone without the explicit permission of the Court.

G. Destruction of records.

Paragraphs 34. and 45. of the Protective Order require destruction of many documents within a certain number of days after the final conclusion of these cases.

To the extent these documents are the property of counsel, this part of the order is a taking without compensation and interferes with the prudent practice of law. To the extent the documents have been filed in the litigation, it violates 44 USC 3301 et seq., requiring permission of the Archivist of the United States for destruction of Federal records. "The procedures prescribed by this chapter are exclusive, and records of the United States Government may not be alienated or destroyed except under this chapter." 44 USC 3314.

These cases are an important part of the American response to 9/11 and interest in them is not going to go away. Blanket destruction of the written records would be an act of historical vandalism.

The above terms, and the protective orders and the DoD procedures generally, add up to a denial of the assistance of counsel both to the prisoners, incapacitated by long confinement and in most cases by language barriers, and to the court, facing possibly hundreds of tight factual adjudications. The reasoning and authorities cited in Judge Kollar-Kotelly's memorandum order of October 20, 2004, in *Al-Odah*, 02cv0828-CKK, correctly show that petitioners have statutory rights to counsel, and the court under the All Writs Act has the right to ask counsel to prepare and present petitioners' cases.

The restrictions on the availability and use of information also amount to a denial of due process and a violation of the confrontation clause. The protective orders and the DoD procedures must be vacated, without prejudice to whatever specific protections may be needed as the cases develop.

VII. POSSIBLE ACCEPTABLE PROTECTIVE ORDERS.

Judge Kollar-Kotelly concluded her October 20, 2004, memorandum opinion with observations about the rules of legal ethics which exclude plans or threats of future crimes or acts of violence from normal attorney-client confidence. The ethical obligation not to further criminal conspiracies would be a much more effective starting point for a protective order than these confused and overreaching DoD orders. Such a protective order might be justified, upon a proper showing, but it must protect the petitioners' right to present his case with the assistance of counsel, and the court's right to have the facts competently presented.

A. Information about future crimes.

D.C. Bar Rule 1.6(c)(1) allows a lawyer to reveal confidences and secrets of his client to the extent reasonably necessary to prevent "a criminal act that the lawyer reasonably believes is likely to result in death or substantial bodily harm absent disclosure of the client's secrets or confidences by the lawyer." Certainly any information about terrorist plots would come within this definition. Since this right to reveal is permissive and not mandatory, perhaps counsel should sign a promise to reveal anything learned about plans for future acts of terror. If the clients were informed of this promise, it would reinforce their focus on exonerating their past conduct and warn them not to try to use members of the bar to further any future or ongoing schemes. Cf. D.C. Bar Ethics Opinion 282, June 17, 1998, saying that a lawyer employing a social worker should warn the client that social workers are obliged to report suspected cases of child abuse.

B. Assistance to criminal conduct.

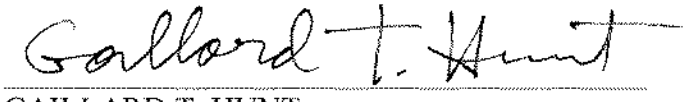
D.C. Bar Rule 1.2, provides both "(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social, or moral views or activities" and "(e) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, . . .". In furtherance of this rule, counsel might agree not to transmit messages in foreign languages, and perhaps not to transmit any messages except in paraphrase, to prevent the possibility of codes.

If counsel were allowed unmonitored access under these rules, and this litigation were allowed to proceed as we usually proceed, even when dealing with the most dangerous members of our society and with nefarious criminal networks, the net result

will be more information available to the government than before, and much more than they are ever going to get by monitoring communications with prisoners who know they are being monitored. And the court will know that the information presented to it has had the benefit of professional investigation as well as adversarial presentation.

The government is fond of the observation that the Constitution is not a suicide pact, 4/ and indeed it is not. But the Constitution, and the laws, do recognize that we have more to fear from allowing the government to protect the national security absolutely from every possibility, however remote or purely hypothetical, than we do from granting a fundamental human right and ordinary decency, the right to consult with counsel, to people who have been held virtually incommunicado for up to three years.

Respectfully submitted, January 18, 2005



GAILLARD T. HUNT
Attorney for Petitioner
(D.C. Bar No. 89375)
1409 Gleason Street
Silver Spring, Maryland 20902
(Not admitted in Maryland)
301-530-2807
gthunt@mdo.net
(Fax: 301-564-6059)

4 Justice Jackson, dissenting, *Terminiello v. Chicago*, 337 U.S. 1, 37 (1949).

Table of cases and other authorities

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APPENDIX A

SOME DIFFERENCES BETWEEN THE "PROCEDURES FOR COUNSEL ACCESS TO DETAINEES AT THE US NAVAL BASE IN GUANTANAMO BAY, CUBA," AND THE "REVISED PROCEDURES . . . "

"Procedures", is Exhibit A to the government filing in Al-Odah v. U.S., 02cv0828-CKK, dated July 30, 2004. The "Revised Procedures", is Exhibit A to Judge Green's protective order of November 5, 2004, amended November 8, 2004, entered in several Guantanamo dockets. Neither procedure is dated.

"Procedures" governs access to all detainees at Guantanamo "for purposes of habeas corpus or other litigation in federal courts". "Revise Procedures" governs only access "for purposes of litigating the cases in which this Order is issued," and recognizes the right of the U.S. District Court to allow exceptions. Paragraph I.

"Procedures" says that nothing in the procedures implies an acknowledgement of an attorney-detainee relationship. "Revised Procedures" omits this reservation. Paragraph II.B.

"Procedures" covers attorneys for litigants in all Federal courts, "Revised Procedures" only for litigants in the U.S.D.C. for the District of Columbia. Paragraph II.B.

The phrase "domestic or foreign" has been inserted to broaden the forums in which the members of the privilege team may not take part against the prisoner whose material they have reviewed. II.D.

A definition of "Legal Mail" has been added, restricting the term to letters "related to the counsel's representation of the detainee". II.E.

"Procedures" required that counsel pay the cost of their own investigation and clearance. II.A.3. This is omitted from "Revised Procedures."

A request to meet with a prisoner under "Procedures" went to the Commander or Acting Commander, JTF-Guantanamo, but in "Revised Procedures" goes to the Department of Justice. III.D.1.

In addition to one lawyer and one translator at a meeting allowed by "Procedures," "Revised Procedures" allows another lawyer or a legal assistant (unless the Commander allows more). III.D.2.

"Revised Procedures" adds requirements for country and theatre clearances, which apparently may take 20 days and may not be requested till counsel has a security clearance and a confirmed flight date. "Revised Procedures," III.D.4. (Government

counsel have suggested that the actual operation of this paragraph may be less restrictive than it appears on its face.)

Sections IV., "Decision to Monitor Counsel Visits And Communications," and V. "Monitoring of Counsel Visits And Communications," are omitted from "Revised Procedures," but some of the restrictions therein may be in other sections of "Revised Procedures."

Staples and paperclips are now forbidden in attorney mail. "Revised Procedures," IV. (One would like to hear the rationale for this. Perhaps it is not as petty and paranoid as it seems.)

By section VIII. the two documents are back in numerical step again, and both deal with telephone access to prisoners. "Procedures" provide that such telephone conversations will be monitored, "Revised Procedures" says that telephone conversations with persons other than counsel will be monitored, VIII.C., but not telephone conversations with counsel, VIII.B.

Section IX.B. of "Procedures" provided that the privilege team would not retain copies of monitored materials, except those threatening immediate harm. This did not inhibit the dissemination of monitored materials to other officials authorized to receive them. Nevertheless, there is no such non-retention policy in the "Revised Procedures".

Section XII. of "Procedures" and section X. of "Revised procedures" deal with physical security at Guantanamo. X.B. on the face of it says no one may have money, stamps, cigarettes, or writing instruments anywhere at Guantanamo. X.C. prohibits laptops, apparently anywhere at Guantanamo. X.G. provides for physical search of counsel and translators for contraband as they are leaving meetings with detainees.

IN THE UNITED STATES DISTRICT COURT FOR THE

DISTRICT OF COLUMBIA

SAIFULLAH PARACHA,

Petitioner,

v. Case No. 04cv020222-PLF

Hon. GEORGE W. BUSH,

et al.,

Respondents.

CERTIFICATE UNDER LCvR 7.1(m)

I hereby certify that I conferred with Lisa Olson, Esq., attorney for respondents, in an attempt to narrow the issues raised by the within motion. Respondents will oppose the motion.

Gaillard T. Hunt

January 18, 2005

GAILLARD T. HUNT
Attorney for Petitioner
(D.C. Bar No. 89375)
1409 Gleason Street
Silver Spring, Maryland 20902
(Not admitted in Maryland)
301-530-2807
gthunt@mdo.net
(Fax: 301-564-6059)

A PROPOSED ORDER FOLLOWS:

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SAIFULLAH PARACHA,

Petitioner,

v. Case No. 04cv020222-PLF

Hon. GEORGE W. BUSH,

et al.,

Respondents.

ORDER VACATING PROTECTIVE ORDER

The order entered herein December 16, 2004, applying previous protective orders and procedures to this case, is hereby vacated, without prejudice to whatever protective orders and procedures may in the future become necessary.

IT IS SO ORDERED.

_____ _____

Date Joyce Hens Green
United States District Judge

Notify counsel:

GAILLARD T. HUNT, Esq.
Attorney for Petitioner
(D.C. Bar No. 89375)
8909 Grant Street
Bethesda, Maryland 20817
(Not admitted in Maryland)
301-530-2807
gthunt@mdo.net
(Fax: 301-564-6059)

LISA A. OLSON, ESQ.
ANDREW I. WARDEN, Esq.
Attorneys for Respondents
U.S.Department of Justice
Civil Division, Federal Programs Branch
Room 7144
20 Massachusetts Avenue NW
Washington, D.C. 20530
Tel: 202-514-4107
Fax: 202-616-8470