

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

_____)	
SAIFULLAH PARACHA,)	
)	
Petitioner,)	
)	
v.)	Civil Action No. 04-CV-2022 (PLF)
)	
GEORGE W. BUSH,)	
President of the United States,)	
<i>et al.</i> ,)	
)	
Respondents.)	
_____)	

**RESPONDENTS' OPPOSITION TO PETITIONER'S MOTION FOR RELEASE OF
ATTORNEY-DETAINEE CORRESPONDENCE**

Respondents, through undersigned counsel, hereby oppose petitioner's motion for release of attorney-detainee correspondence. Petitioner's motion seeks an order (1) superseding section IV.A.6. of the Revised Procedures and modifying the protective order to provide that no communication from petitioner need be treated as classified or reviewed for possible classification; or (2) requiring the production of the documents at issue to this Court in camera, so this Court, rather than the Privilege Team, can review the documents and decide whether they are classified; or (3) requiring the Privilege Team to inspect the documents and pass them on to counsel within five business days with an indication whether any classified or restricted matter was found; or (4) requiring respondents, and the Department of Justice and the Department of Defense, to show cause within five business days why the documents contain classified, sensitive, or restricted information, and why the Court should not release the documents to counsel. See Petitioner's Motion for Release of Attorney-Detainee Correspondence

(“Petitioner’s Motion”) at 4-5. As explained below, no basis exists for any of the orders requested by petitioner.

The Court not only lacks jurisdiction to grant relief by virtue of the Detainee Treatment Act of 2005, which withdraws court jurisdiction over habeas and other claims by Guantanamo detainees, but the actions of the Privilege Team challenged by petitioner are fully justified and consistent with the governing Protective Order and counsel access regime. As further explained below, petitioner’s counsel requests for relief essentially seek to circumvent applicable requirements in the Protective Order that any non-legal correspondence from a detainee to individuals other than counsel be sent and processed through non-legal mail channels where they are properly subject to security and intelligence screening. Thus, the Privilege Team properly refused to conduct a classification review of the non-legal correspondence from the detainee to persons other than counsel that are the subject of petitioner’s motion. For these reasons, petitioner’s motion to release should be denied.

BACKGROUND

On November 8, 2004, Senior Judge Joyce Hens Green, in the context of the then-pending and coordinated Guantanamo Bay detainee habeas cases, entered an Amended Protective Order and Procedures for Counsel Access to Detainees at the United States Naval Base in Guantanamo Bay, Cuba (“Protective Order”), followed shortly thereafter by certain supplementary orders clarifying and detailing certain matters involving the Protective Order. See In re Guantanamo Detainee Cases, 344 F. Supp. 2d 174 (D.D.C. Nov. 8, 2004); Order Supplementing and Amending Filing Procedures Contained in November 8, 2004 Amended Protective Order in In re Guantanamo Detainee Cases, No. 02-CV-0299, et al. (D.D.C. Dec. 13,

2004); Order Addressing Designation Procedures for “Protected Information” in In re Guantanamo Detainee Cases, No. 02-CV-0299, et al. (D.D.C. Nov. 10, 2004). The Protective Order was entered by Judge Green after the parties had engaged in lengthy negotiations, after certain issues had been litigated, and after Judge Green considered a proposed protective order and counsel access procedures and made her own revisions to them. On December 16, 2004, the Court applied to this case the Amended Protective Order and Procedures for Counsel Access to Detainees that had been entered in the coordinated Guantanamo Bay detainee cases (dkt. no. 13).

The Protective Order, inter alia, establishes a regime for the protection, handling, and control of classified and otherwise protected information in light of the unique circumstances of these Guantanamo habeas cases, which involve individuals detained as enemy combatants in an overseas military detention facility during wartime. The Revised Procedures for Counsel Access to Detainees at the U.S. Naval Base in Guantanamo Bay, Cuba, (“Access Procedures”), which are annexed to the Protective Order as Exhibit A, in turn, set certain terms, conditions, and limitations for habeas counsel’s access to properly represented detainees, including procedures and requirements with respect to information and papers delivered by counsel to detainees, as well as obtained by counsel from detainees, “for purposes of litigating the cases in which this Order is issued.” See Access Procedures § I.

The Access Procedures permit privileged counsel visits and privileged “legal mail” between counsel and a represented petitioner, subject to various requirements and restrictions in recognition of the unique, wartime setting of these cases and detentions. For example, because information possessed by detainees could have national security or physical and personnel security implications warranting potential treatment of the information as classified information,

the Access Procedures require that communications from detainees and information learned from them be treated as presumptively classified. See Access Procedures §§ III.A., IV.A.6., VI. Such information, including letters and materials reflecting communications to counsel from a represented detainee, may only be handled in a secure fashion and within the secure facility established for such purposes. See Protective Order ¶ 26; id. ¶¶ 20-24. Counsel, however, may submit such materials to the DoD Privilege Team for a “determination of its appropriate security classification.”¹ See Access Procedures § VII.; see also id. § IV.A.6. (counsel required to treat information learned from a detainee, “including any oral and written communications with a detainee,” as classified pending review by Privilege Team). Materials properly marked by the Privilege Team as classified may only be handled in a secure fashion and within the secure facility, see Protective Order ¶ 26; id. ¶¶ 20-24; of course, materials determined to be unclassified and not otherwise protected² are not subject to such handling.

¹ As set forth in the Access Procedures, the Privilege Team is “[a] team comprised 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 domestic or foreign court, military commission or combatant status tribunal proceedings involving the detainee.” Access Procedures § II.D. Absent Court authorization or the consent of counsel submitting the information to the Privilege Team, the Privilege Team cannot disclose to anyone information learned from their review activities, except that the Privilege Team may disclose information indicating an “immediate and substantial harm to national security” or “imminent acts of violence” to officials with a role in responding to such potential harms or violence. See id. § VII. A., D.-F.

² Unclassified information determined to be “protected information” must be treated as confidential and under seal, though not classified, in order to protect government security interests or other significant government interests. See Protective Order ¶¶ 1, 11, 35-45; Order Addressing Designation Procedures for “Protected Information” in In re Guantanamo Detainee Cases, No. 02-CV-0299, et al. (D.D.C. Nov. 10, 2004).

Because all communications to and from the wartime detainees at Guantanamo such as petitioner are normally and appropriately subject to security and intelligence screening by the military, the special, privileged legal communications channels created under the Access Procedures are available only for “legal mail” sent solely “for purposes of litigating the cases in which th[e] Order is issued.” Access Procedures §§ I, II.E. Privileged “legal mail” is, by definition, limited to:

Letters written between counsel and a detainee that are related to the counsel’s representation of the detainee, as well as privileged documents and publicly filed legal documents relating to that representation.

Id. § II.E. Detainees, however, are not permitted to use this privileged mail system for non-legal mail, including communications with others besides their counsel; the Access Procedures contemplate and require that non-legal communications be routed through the normal mail process at Guantanamo Bay, which includes content screening for national security, intelligence, and physical and personnel security³ purposes. Specifically, the Access Procedures provide that non-legal mail communications from detainees to persons other than counsel to be sent through normal, non-privileged mail channels. See id. § IV.B.4.-5.; id. § IV.B.5. (“in the event any non-legal correspondence or messages from a detainee to individuals other than counsel . . . are sent to counsel as, or included with, legal mail, counsel shall return the documents to military personnel at GTMO for processing according to the standard operating procedures for detainee non-legal mail”) (emphasis added). See also id. § IV.A.5. (counsel may not use legal mail channels as conduit for non-legal mail to detainees; non-legal mail subject to review by

³ This would include information concerning the Guantanamo Bay facility and its personnel.

military); *id.* § VI.C. (“Correspondence or messages from a detainee to individuals other than his counsel” to be processed as non-legal mail; “[i]f a detainee provides these communications to his counsel during a visit, counsel shall give those communications to military personnel at Guantanamo so they can be processed under the standard operating procedures for detainee non-legal mail”).

On May 24, 2006, petitioner filed his motion for release of attorney-detainee correspondence. Respondents’ opposition both discusses the general legal issues raised in petitioner’s motion regarding the scope of the Privilege Team’s authority under the Protective Order and Access Procedures and petitioner’s arguments regarding the relief he seeks with respect to particular documents submitted to the Privilege Team for classification review. As explained below, petitioner’s motion for release should be denied based on the Detainee Treatment Act of 2005 and petitioner’s erroneous understanding of the Protective Order and Access Procedures.

ARGUMENT

I. The Court Lacks Jurisdiction To Order Relief.

On December 30, 2005, the Detainee Treatment Act of 2005, Pub. L. No. 109-148, tit. X, 119 Stat. 2680 (“the Act”), became law. The Act, among other things, amends the federal habeas corpus statute to remove court jurisdiction to hear or consider applications for writs of habeas corpus and other actions brought in this Court by or on behalf of aliens detained at Guantanamo. Section 1005(e)(1) of the Act amends 28 U.S.C. § 2241 to provide that “no court, justice, or judge shall have jurisdiction” to consider either (1) habeas petitions filed by aliens detained by the Department of Defense at Guantanamo, or (2) any other action relating to any

aspect of the detention of such aliens. In addition, the Act creates an exclusive review mechanism in the D.C. Circuit to address the validity of the detention of such aliens held as enemy combatants; § 1005(e)(2) of the Act states that the United States Court of Appeals for the District of Columbia Circuit “shall have exclusive jurisdiction to determine the validity of any final decision of a Combatant Status Review Tribunal that an alien is properly detained as an enemy combatant,” and it further specifies the scope and intensiveness of that review. Section 1005(e)(1), which eliminates the jurisdiction of the courts to consider habeas and other actions brought by Guantanamo detainees, was made immediately effective without any reservation for pending cases, while § 1005(e)(2), which establishes the exclusive review mechanism in the D.C. Circuit, was made expressly applicable to pending claims. *Id.* § 1005(h). In light of the new, statutory withdrawal of this Court’s jurisdiction and the creation of an exclusive review mechanism in the D.C. Circuit, petitioner’s request for relief should be denied. Indeed, because the Act vests “exclusive” jurisdiction in the D.C. Circuit “to determine the validity of any final decision of a Combatant Status Review Tribunal that an alien is properly detained as an enemy combatant,” *id.* § 1005(e)(1), it would be inappropriate for the Court to order relief in the interim that might infringe upon the Court of Appeals’ exclusive jurisdiction. See Telecommunications Research and Action Center v. FCC, 750 F.2d 70, 75, 78-79 (D.C. Cir. 1984) (request for relief in district court that might affect Court of Appeals’ future, exclusive jurisdiction is subject to the exclusive review of the Court of Appeals).

It has been our understanding that it was the sense of the Court to await anticipated guidance from the D.C. Circuit regarding the effect of the Act⁴ before deciding any pending motions, with Magistrate Judge Kay being available to assist the parties in the negotiation and resolution of important matters raised during this interim period, where appropriate. In such circumstances, a stay of all proceedings in this case, including with respect to petitioner's request for relief, would be appropriate pending the resolution of the effect of the Act. But the Court cannot and should not proceed to consider granting petitioner's request for relief, which seeks, *inter alia*, to have the Court limit the Privilege Team's authority to review information under the Protective Order and Access Procedures, without first determining whether the Court has jurisdiction under the Detainee Treatment Act. *See, e.g., Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 94-95 (1998) ("The requirement that jurisdiction be established as a threshold matter "spring[s] from the nature and limits of the judicial power of the United States" and is "inflexible and without exception.") (quoting *Mansfield, C. & L.M.R. Co. v. Swan*, 111 U.S. 379, 382 (1884)).

The nature of the relief requested in petitioner's motion does not warrant departure from such an approach, particularly given the misguided nature of petitioner's complaints regarding the Privilege Team's actions and, moreover, the fact that petitioner seeks relief to satisfy conceptual grievances regarding the scope of the Privilege Team's authority. For these reasons, petitioner will not suffer any immediate or irreparable harm should the Court decide to await a decision from D.C. Circuit regarding the effect of the Act before considering the present motion.

⁴ The effect of the Act was addressed in supplemental briefing in the Guantanamo detainee appeals pending before the D.C. Circuit. Oral argument occurred on March 22, 2006.

II. The Privilege Team Has Authority Under the Protective Order and Access Procedures To Decline Classification Review Of Non-Legal Mail Materials And Other Information Intended For Purposes Other Than The Habeas Litigation.

Even aside from the question of jurisdiction, petitioner's request for release of attorney-detainee correspondence, which challenges the Privilege Team's authority to decline classification review of non-legal materials and other information intended for purposes other than the habeas litigation, lacks merit. See Petitioner's Motion at 4-5. Petitioner challenges both the Privilege Team's authority to decline classification review in general and with regard to the documents at issue in the instant case.

General challenge to the Privilege Team's authority. Petitioner challenges the Privilege Team's authority generally by seeking an extraordinarily broad order superseding "section IV.A.6. of the Revised Procedures and modifying the protective order to provide that no communication from petitioner, an alien and putative enemy combatant, need be treated as classified or reviewed for possible classification." Petitioner's Motion at 4. This proposed order would essentially do away with the Privilege Team, eviscerate the Protective Order, and allow petitioner to make public through his counsel any and all information he desires, regardless of its content, its relevance to the pending habeas litigation, or the source or manner by which it was obtained. Petitioner's motion is the latest in a line of motions seeking to radically modify or vacate the Protective Order that has been entered in almost all of the Guantanamo habeas cases. Respondents, however, have previously demonstrated the need for the Protective Order in this case, and the Court has upheld its application in the case.⁵ Since this issue has been extensively

⁵ After the Court entered the Protective Order in the instant case, petitioner moved to vacate that Order. See Petitioner's Motion to Vacate Order Entered December 16, 2004, Applying Protective Order (dkt. no. 20). The Court denied the motion. See Order of March 23,

briefed and ruled on by this Court and this Court has stayed this case, the Court should deny petitioner's motion.

Specific challenges to the Privilege Team's action in this matter. Petitioner also complains that the Privilege Team has not undertaken a classification review of the documents he has submitted. At issue are a large number of letters to individuals other than counsel that petitioner has drafted. Counsel claims that the Privilege Team refused to review two packages, the first consisting of 24 pages and the second of approximately 77 pages. Petitioner's Motion at 3. Petitioner's motion, the points and authorities in support of the motion, the attached memoranda from the Privilege Team, and the Attachments A-C submitted with the motion, establish that, with the exception of a three-page note written by petitioner to counsel (which was reviewed by the Privilege Team) and a note written by counsel to the Privilege Team, the materials consisted of non-legal documents: letters from petitioner to numerous public officials in the United States and abroad.⁶ Petitioner's counsel admits that these documents "may appear on the face to be petitions to various public officials, including Senators and members of

2005 (dkt. no. 49). Petitioner fails even to acknowledge the fact that the Court's March 23, 2005 Order also stayed all proceedings in this case, with the exception "of any motion for emergency relief," pending resolution of all appeals in In re Guantanamo Detainee Cases, 355 F. Supp. 2d 443 (D.D.C. 2005), and Khalid v. Bush, 355 F. Supp. 2d 311 (D.D.C. 2005). Petitioner has since filed numerous appeals.

⁶ The Privilege Team's first memorandum shows that in one package only three pages were "addressed to counsel and 21 pages [were] addressed to the Secretary General of the United Nations, Fidel Castro, the Pakistani government, the Organization of Islamic Countries and the Thai Ambassador to the United States." See 1st May 3, 2006 Privilege Team Memorandum attached to Petitioner's Motion. The other package was composed of "a series of letter [sic] addressed to US Senators and Congressmen." See 2nd May 3, 2006 Privilege Team Memorandum attached to Petitioner's Motion.

Congress,” and refers to them as “letters.” Id. at 2-3. Petitioner’s counsel also admits that “the larger package is mostly repetitious copies of [a] one page [letter]. . . [and] [t]he other package is largely repetitive as well.” Points and Authorities in Support of Petitioner’s Motion for Release of Attorney-Detainee Correspondence at 9.

Petitioner’s counsel primarily complains about alleged backlogs and censoring of detainee non-legal mail and indicates that the letters were sent by petitioner to his counsel for that reason. See Petitioner’s Memorandum at 7-8. He requests that the Court either review the documents at issue itself; force the Privilege Team to review them; or require respondents to show cause why the documents contain classified, sensitive, or restricted information, and why the Court should not release the documents to counsel. Petitioner’s Motion at 4-5. It thus appears that counsel seek classification review so that the letters, if unclassified, can be used by counsel as he desires, including, presumably sending them to their intended recipients. Indeed, petitioner’s cover note to the letters, included as the initial pages of Attachment A to petitioner’s motion, clearly indicates that petitioner desires his counsel to forward the letters to the intended recipients.⁷ Counsel, therefore, appears to be seeking to circumvent the requirements of the Access Procedures that non-legal mail from petitioner to others besides his counsel be sent

⁷ Petitioner asserts in his motion that the materials submitted to the Privilege Team are included as attachments to petitioner’s motion, but do not include petitioner’s cover note to counsel, which was reviewed by the Privilege Team and marked “unclassified.” See Petitioner’s Motion at 4. The copy of the motion’s attachments received by respondents’ counsel, however, contained petitioner’s cover note. Respondents’ counsel conferred with petitioner’s counsel who stated that the inclusion of the cover note in the copy of the attachments provided to respondents’ counsel was not inadvertent and that respondents may cite to the note in the briefing on the motion.

through standard mail channels at Guantanamo, where they are subject to content screening for national security, intelligence, and physical and personnel security purposes.

As explained above, consistent with the unique circumstances of these cases, which involve aliens detained during wartime in an overseas military detention facility, the Protective Order and Access Procedures impose two substantial limitations on the privileged communications system that has been established for habeas counsel and petitioners. First, the Access Procedures state at the outset that they govern counsel access solely “for purposes of litigating the cases in which the Order is issued.” See Access Procedures § I. Second, privileged communications are limited to “legal mail,” as defined by section II.E of the Access Procedures. Detainees are not permitted to use the privileged legal mail system for non-legal mail, including communications with others besides their counsel. The Access Procedures contemplate and require that non-legal communications be routed through the normal mail process at Guantanamo Bay, which includes content screening for security and intelligence purposes. See Access Procedures § IV.B.4.-5. (counsel may not use legal mail channels as conduit for non-legal mail; non-legal mail subject to review by military); see also id. § VI.C. (messages to others besides counsel to be processed as non-legal mail); § IV.A.5. (non-legal mail communications to detainees to be sent to detainee through normal, non-privileged mail channels). Indeed, the Access Procedures require that any non-legal messages or correspondence received by counsel through the privileged communications channels must be returned to military personnel at Guantanamo for processing in accordance with standard operating procedures for detainee non-legal mail. See id. §§ IV.B.5, VI.C. Thus, it would be an abuse by counsel and petitioner of the privileged legal mail channels created “for purposes of litigating the [habeas] cases” to permit

petitioner to exploit those channels and force a classification review of materials sent through them so that counsel could serve as a conduit for letters to United States or foreign leaders, politicians, and public officials. It is beyond dispute that patently obvious non-legal mail such as a letter from a detainee to a politician or other public official is not appropriate for review by the Privilege Team in such circumstances. To require otherwise, and order the Privilege Team to conduct a classification review of every document submitted by habeas counsel, could ultimately blur the well-established distinction in the Access Procedures between legal and non-legal mail. Indeed, detainees would have little incentive to send non-legal mail through non-legal channels given the knowledge that any document, whether non-legal or legal, presented to the Privilege Team would have to be reviewed and, if unclassified, could be distributed by counsel. The Privilege Team, accordingly, appropriately can refuse, as it has here, to review correspondence that is of a non-legal nature or that is intended for purposes other than prosecution of the habeas litigation.

To the extent petitioner's counsel argues that the letters at issue must be reviewed by the Privilege Team in order for counsel to advise petitioner regarding whether he should send the letters to their intended recipients, see Petitioner's Motion at 3, the argument must be rejected. Petitioner's counsel already has access to the materials in the Secure Facility; indeed, he obviously has already reviewed them extensively. Counsel likewise is free to communicate with petitioner, through privileged mail channels or a visit, regarding the advisability of sending petitioner's letters to the various public officials to which they are addressed. Counsel, therefore, is not constrained in his ability to advise petitioner.

CONCLUSION

For the reasons stated above, petitioner's motion for release of attorney-detainee correspondence should be denied. Petitioner's counsel can provide petitioner whatever advice he deems appropriate regarding the letters at issue. If the letters are to be sent to their intended recipients, however, counsel should follow the requirements of the Protective Order and return the letters to Guantanamo for processing in accordance with standard procedures for non-legal mail.⁸ See Access Procedures §§ IV.B.5, VI.C.

Dated: June 8, 2006

Respectfully submitted,

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⁸ Respondents have informed petitioners' counsel that petitioner's motion and memorandum may be publicly filed on the Court's ECF system. With respect to the attachments to petitioner's motion, respondents do not object to the public filing on the ECF system of the cover note from petitioner to counsel that the Privilege Team reviewed and marked "unclassified." See supra at 10. However, with respect to the remainder of the attachments to the motion, i.e., the correspondence from petitioner to other individuals who are not his counsel, those materials should be processed through non-legal mail channels at Guantanamo as required by the Access Procedures. Petitioner's counsel should not be permitted to circumvent those channels by demanding classification review of the materials either by the Privilege Team (as explained above) or by respondents for purposes of public filing, and potential subsequent distribution, of the materials. The materials should be maintained as presumptively classified and under seal or should be returned to Guantanamo for processing in accordance with standard procedures for non-legal mail.

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