IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SAIFULLAH PARACHA, *et al.*,	
Petitioner,	
v.	Civil Action No. 04-CV-2022 (PLF) (AK)
GEORGE W. BUSH, President of the United States, *et al.*,	
Respondents.	

RESPONDENTS' OPPOSITION TO PETITIONER'S MOTION TO REVIEW AND RELEASE CONFIDENTIAL ATTORNEY-DETAINEE CORRESPONDENCE

Respondents hereby oppose petitioner's motion to compel the Privilege Team to review and release confidential attorney-detainee correspondence (dkt. no. 95).[1]

Petitioner's motion seeks an order compelling the Privilege Team to conduct classification review of two separate documents: (1) a one-page letter written by petitioner to his wife; and (2) a document prepared by counsel for use during an in-person visit with petitioner that petitioner edited such that document now contains various messages to petitioner's family members, including petitioner's wife and nephew. No basis exists for such an order. Not only does the Court lack jurisdiction by virtue of the Detainee Treatment Act of 2005, which vests exclusive jurisdiction over this action in the D.C. Circuit, but the actions of the Privilege Team

[1] The instant opposition is submitted on behalf of respondents in the interest of proper administration of the protective order and counsel access regime governing the Guantanamo detainee habeas cases. To the extent a submission from the Department of Defense Privilege Team directly would assist the Court in its consideration of petitioner's motion, the Court should authorize the Special Litigation Team, which represents the Privilege Team in other cases and is subject to the same nondisclosure constraints as the Privilege Team itself, to appear on behalf of the Privilege Team in this matter and defend its action, as appropriate.

challenged by petitioner are fully justified and consistent with the governing protective order and counsel access regime. Indeed, the instant motion is petitioner's second motion in recent months challenging the authority of the Privilege Team to refuse review materials that are clearly outside the scope of permissible privileged legal mail under the governing counsel access regime. See Petitioner's Motion For Release of Attorney-Detainee Correspondence (dkt. no. 88) (motion challenging Privilege Team's refusal to review various letters addressed to members of Congress and non-government organizations).

Contrary to petitioner's contentions, the Privilege Team is under no legal obligation to perform a classification review of every document presented to it by habeas counsel. The privileged "legal mail" channels created by the governing counsel access procedures are reserved for certain communications between properly represented habeas petitioners and their counsel delineated by the access procedures. Thus, the Privilege Team has the authority under the access procedures to refuse to conduct classification review of materials that do not fall within the proper confines of the legal mail channels. Furthermore, the Privilege Team correctly refused to review the two documents at issue in petitioner's motion because they are unquestionably non-privileged communications intended for persons other than his counsel. The counsel access regime in the Guantanamo habeas litigation clearly prohibits detainees from using privileged legal mail and counsel visits as a means to facilitate non-privileged communications to persons other than their counsel. For these reasons, petitioner's motion to compel 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. The Protective Order and supplemental orders were entered in this case on December 16, 2004 (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 the 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 detainee, subject to various requirements and restrictions in recognition of the unique wartime setting of these cases and detentions. *See* Access Procedures § III (listing requirements for access to and communications with detainees). Because all communications to and from the wartime detainees at Guantanamo 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" between counsel and the detainee that counsel properly represents. Access Procedures §§ I, II. 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 the privileged mail system for non-legal mail or for communications to or from others besides their counsel. The Access Procedures contemplate and require that such communications be routed through the normal mail process at Guantanamo Bay, which includes content screening for national security, intelligence, and physical and personnel security[2] purposes. *See id.* § IV.B.4. The Access Procedures explain in clear terms that "non-legal mail, including written communications to persons other than counsel" must be processed through standard mail procedures. *Id.* Further, the Access

[2] This would include information concerning the Guantanamo Bay facility and its personnel.

Procedures provide that in the event a detainee provides counsel with non-legal materials during a counsel visit, such as messages "to individuals other than his counsel (including family/friends or other attorneys)," counsel "shall" return the non-legal material to military personnel at Guantanamo for processing according to standard operating procedures for detainee non-legal mail. *Id.* § VI.C; see also § IV.A.5 (same requirement for non-legal mail sent to counsel by a detainee).

Also in recognition of the unique, wartime setting of these cases and detentions, including that 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." *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).

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."[3] *Id*. § 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. Materials properly subject to Privilege Team review and marked by the Privilege Team as classified may only be handled in a secure fashion and within the secure facility; of course, materials determined to be unclassified are not subject to such treatment. *See* Protective Order ¶ 26; *id*. ¶¶ 20-24.

On July 18, 2006, petitioner filed a motion to compel the Privilege Team to issue a classification decision with respect to two separate documents: (1) a one-page letter written by petitioner to his wife; and (2) a document prepared by counsel for use during an in-person visit with petitioner that petitioner edited such that document now contains various messages to petitioner's family members, including petitioner's wife and nephew. According to the motion, petitioner's counsel received both documents directly from petitioner during in-person meetings at Guantanamo in June 2006. Following petitioner's counsel's visit, counsel submitted the two documents, as well as approximately fifty-five (55) other pages of notes that counsel wrote during his visit, to the Privilege Team for classification review. On or about July 10, 2006, petitioner's counsel received a one-page memorandum from the Privilege Team explaining that the two documents at issue in this motion would not be reviewed because "they include

---

[3] The Team may also include translators meeting the same qualification. *See* Access Procedures § II.D.

messages to family including spouse and others." *See* Petitioner's Motion, Exhibit A (Memorandum from Privilege Team). As a basis for this decision, the Privilege Team cited section VI.C of the Access Procedures, which was quoted in full in the Privilege Team's memorandum:

> Correspondence or messages from a detainee to individuals other than his counsel (including family/friends or other attorneys) shall not be handled through this process. If 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.

Id.

As explained below, petitioner's motion to compel should be denied based on the Detainee Treatment Act of 2005 and petitioner's erroneous understanding of the Privilege Team's authority under the Protective Order and Access Procedures.

ARGUMENT

I. The Court Lacks Jurisdiction To Order Relief And, At A Minimum, The Court's Stay Of Proceedings Should Remain In Effect With Respect To Petitioner's Request For Relief.

On December 30, 2006, 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 28 U.S.C. § 2241 to eliminate court jurisdiction to consider *habeas* petitions and other claims by aliens held as enemy combatants at Guantanamo Bay, *id.* § 1005(e)(1), and to create an exclusive review mechanism in the D.C. Circuit to address the validity of the detention of such aliens and final decisions of any military commissions, *id.* § 1005(e)(1), (e)(2), (e)(3). Section 1005(e)(2) of the Act states that the D.C. 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. While the Supreme Court in *Hamdan* held that § 1005(e)(1) did not apply to habeas petitions pending prior to the enactment of the Act, it reserved the question of whether the exclusive review provisions of the Act did apply to cases pending prior to enactment. *See Hamdan v. Rumsfeld*, 548 U.S. ---, 126 S. Ct. 2749, 2762-69 (U.S. June 29, 2006). While the petitioner in *Hamdan* escaped the Act by virtue of the fact that his challenge did not involve a final decision of a military commission within the exclusive jurisdiction of the Court of Appeals under § 1005(e)(3), the Court stated that "[t]here may be habeas cases that were pending in the lower courts at the time the DTA was enacted that do qualify as challenges to 'final decision[s]' within the meaning of subsection (e)(2) or (e)(3) [the exclusive review in CTA sections]. We express no view about whether the DTA would require transfer of such an action to the District of Columbia Circuit." *Hamdan*, 126 S. Ct. at 2769 n.14. The case at bar is just such a case, *i.e.,* a challenge to petitioner's designation as an enemy combatant through a Combatant Status Review Tribunal,[4] and given the Act's investment of exclusive review in the Court of Appeals, the District Court lacks jurisdiction over the cases. *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); cf. id. at 77 ("By lodging review of agency action in the Court of Appeals, Congress manifested an intent that the appellate court exercise sole jurisdiction over the class of claims covered by the statutory grant of review power."). In any event, the effect of the *Hamdan*

---

[4] *See* Respondents' Opposition to Petitioner's Motion To Vacate The Stay And To Grant Petitioner's Motion For Summary Judgment (dkt. No. 96).

decision on this Court's jurisdiction is pending before the Court of Appeals and is the subject of supplemental briefing to be completed by August 15, 2006. In light of the fact that the effect of the Act on cases such as this remains pending before the Court of Appeals, at a minimum a stay of all proceedings in these cases, including with respect to petitioner's request's for relief in this motion, is appropriate pending the resolution of the effect of the Act. For these reasons, petitioner's request for relief should be denied.

II. The Privilege Team Has Authority Under The Protective Order And Access Procedures To Decline Classification Review Of Materials Not Properly Sent Through Privileged Legal Mail Channels.

Even aside from the question of jurisdiction, the Privilege Team has the authority pursuant to the Protective Order and Access Procedures to refuse to perform classification review of documents that fall outside of the privileged counsel access regime. Petitioner's apparent argument that the Privilege Team must perform classification review of every document submitted by habeas counsel, without exception, *see* Petitioner's Motion at 3, lacks merit. Petitioner effectively seeks extraordinarily broad relief that would effectively require the Privilege Team to perform classification review of every document or piece of information submitted by habeas counsel, regardless of its content, its relevance to the pending habeas litigation, its place within the governing counsel access regime, or the source or manner by which it was obtained. Such an overreaching order, which would allow petitioner to make public through his counsel any and all information he desires, is not warranted by the Protective Order or the Access Procedures.

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 several limitations on the privileged communications system that has been established for habeas counsel and petitioners. *See, e.g.*, Access Procedures §§ I, II.E (privileged communications limited to legal mail for purposes of litigation habeas cases). Of particular relevance to the present motion is section VI.C of the Access Procedures, which provides that in the event a detainee provides counsel with non-legal materials during a counsel visit, such as messages "to individuals other than his counsel (including family/friends or other attorneys)," counsel "shall" return the non-legal material to military personnel at Guantanamo for processing according to standard operating procedures for detainee non-legal mail. In light of these limitations in the Access Procedures, the Privilege Team unquestionably has the authority to refuse to perform a classification review of non-legal communications submitted for review by counsel. Indeed, it would be an abuse by counsel and petitioners of the privileged legal mail channels created "for purposes of litigating the [habeas] cases" to permit detainees to use those channels for communications, especially where, as here, counsel seek Privilege Team review of such communications in order to make them public without the content and screening to which such non-privileged communications outside Guantanamo would normally be subject. To require otherwise, and order the Privilege Team to conduct classification review of every document submitted by habeas counsel regardless of content, could ultimately blur the well-established distinction in the Access Procedures between proper legal and non-legal mail. Indeed, detainees would have little incentive to send non-legal mail or communications to others besides counsel (such as family and friends) 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.

III. The Privilege Team Correctly Refused To Conduct Classification Review Of The Two Documents Submitted For Review By Petitioner's Counsel.

With respect to the two documents at issue in petitioner's motion, the Privilege Team correctly refused to review the documents because they are non-privileged communications that were submitted for review in violation of section VI.C. of the Access Procedures. The first document at issue – a letter from petitioner to his wife – is undoubtedly a non-privileged communication that falls squarely within the terms of section VI.C. *See* Petitioner's Motion, Exhibit B (letter). The letter is written by petitioner to his wife and instructs her to take certain action on his behalf. *Id.* The letter is most certainly a message "from a detainee to individuals other than his counsel (including family/friends or other attorneys)." Access Procedures VI.C. Consequently, upon receipt, petitioners's counsel was required to give the document to Guantanamo personnel for processing in accordance with the non-legal mail procedures. *Id.* ("counsel shall give those communication to military personnel"). By failing to follow this procedure, it is petitioner's counsel – not the Privilege Team – that violated the Access Procedures.[5]

The same conclusion applies with respect to the messages from petitioner to his family contained in second document at issue. Petitioner's motion describes the document as one prepared by counsel for use during an in-person visit with petitioner that now contains various

---

[5] The Access Procedures provide that in order to be permitted access to represented detainees, petitioner's counsel, *inter alia*, must "agree to comply fully" with the procedures and provide a written affirmation to that effect. Access Procedures § III.B.1. Moreover, consistent with the unique nature of these cases and the detentions, the Access Procedures specifically provide that "[s]hould counsel fail to comply with the procedures set forth in this document [*i.e.*, the Access Procedures], access to or communication with the detainee will not be permitted." *Id.* § III.B.4.

messages written by petitioner to various family members.[6] Notably, petitioner's counsel has not placed the entire disputed document before the Court, presumably because much of it may be subject to attorney-client and/or work-product privileges.[7] In any event, it is clear from the description of the document in petitioner's motion that petitioner has attempted to use the document as a means convey non-privileged messages to his family. *See* Petitioner's Motion at 2-3. Indeed, the document apparently contains detailed instructions to petitioner's wife and nephew regarding a variety of petitioner's affairs. *Id.* As explained above, petitioner may communicate with his family though the standard non-legal mail procedures available to all detainees at Guantanamo, but he cannot use the privileged counsel access regime as a means to bypass these procedures. *See* Access Procedures §§ IV.B.4., VI.C. By submitting the documents to the Privilege Team for review, counsel has not only violated the terms of section VI.C of the Access Procedures, but he has impermissibly attempted to force a review of that communication outside of the content and screening procedures normally applicable to such unprivileged communications.

Instead of classification review by the Privilege Team, the proper way to resolve classification and potential public release of the documents at issue is for petitioner's counsel to

---

[6] One of the messages concerns petitioner's son, who was recently sentenced to thirty (30) years in prison for providing material support to Al-Qaeda. *See Man Sentenced To 30 Years For Helping Al Qaeda Operative*, *at* http://www.cnn.com/2006/LAW/07/20/terror.trial.ap/index.html

[7] Respondents arguments in this section are drawn solely from the information provided in petitioner's motion. Further, undersigned counsel has not consulted with the Privilege Team about the document given nondisclosure constraints on the Privilege Team under the prohibition in the Protective Order and counsel access procedures regarding such contact.

return the letter and messages to petitioner's family to Guantanamo for review in accordance the clear terms of the Access Procedures.[8] *See* § VI.C. As petitioner's counsel concedes in the motion, the letter from petitioner to his wife is not privileged attorney-client material. *See* Petitioner's Motion at 2 ("Since there is nothing confidential in this note, it is attached hereto"). Similarly, petitioner's counsel voluntarily discloses in his motion the annotated statements to petitioner's family members on the other document. *Id.* at 2-3. Consequently, petitioner's counsel will suffer no cognizable harm by following the governing Access Procedures and returning the letter and messages for appropriate, non-privileged review by Guantanamo authorities.

CONCLUSION

For the reasons stated above, petitioner's motion to compel the Privilege Team to review and release confidential attorney-detainee correspondence should be denied.

Dated: August 3, 2006

Respectfully submitted,

PETER D. KEISLER
Assistant Attorney General

DOUGLAS N. LETTER
Terrorism Litigation Counsel

/s/ Andrew I. Warden
JOSEPH H. HUNT (D.C. Bar No. 431134)
VINCENT M. GARVEY (D.C. Bar No. 127191)
TERRY M. HENRY

[8] With respect to the second document, that is, the one described as a legal strategy letter annotated by petitioner with messages to family, petitioner's counsel could submit a copy of the document to Guantanamo authorities with any privileged information therein redacted, such that only the messages to petitioner's family are readable.

JAMES J. SCHWARTZ
PREEYA M. NORONHA
ROBERT J. KATERBERG
ANDREW I. WARDEN (IN Bar No. 23840-49)
NICHOLAS J. PATTERSON
EDWARD H. WHITE
MARC A. PEREZ
United States Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Ave., N.W.
Washington, DC 20530

Tel: (202) 514-4107
Fax: (202) 616-8470

Attorneys for Respondents