[ORAL ARGUMENT NOT SCHEDULED]

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

HAJI BISMULLAH, et al.,
Petitioners,
v.

DONALD H. RUMSFELD,
Secretary of Defense,
Respondent.

No. 06-1197

MOTION FOR ENTRY OF PROTECTIVE ORDER

This petition for review was filed against Secretary of Defense Donald H. Rumsfeld pursuant to the Detainee Treatment Act of 2005, Pub. L. No. 109-148, tit. X, §§ 1001-1006, 119 Stat. 2680, 2739 (DTA). The petition was not filed by a detainee, but rather by Haji Mohammad Wali, who states he is the brother and "next friend" of Haji Bismullah, an enemy combatant being held at the U.S. Naval Base at Guantanamo Bay, Cuba. The petition seeks review of the determination made by a military Combatant Status Review Tribunal (CSRT) that Bismullah is an enemy combatant. The record of the CSRT includes within it classified material. Counsel for the next friend petitioner has sought access to that classified material and permission to visit and communicate with Bismullah at a secure military base outside the United States during a time of active armed combat. The Government cannot properly facilitate such counsel access, communication and visits absent adequate protective measures that ensure classified material is properly handled and adequately

address the unique security needs presented by visiting a secure military base and communicating with an alien detained by the military as an enemy combatant during a time of war. Accordingly, this motion seeks entry of an appropriate protective order that will govern counsel's access to and communications with the enemy combatant detainee, as well as access to and handling of classified and protected material, in this and future DTA cases. The Government's proposed order accompanies this motion.

STATEMENT

A. The CSRTs were established by written orders of the Deputy Secretary of Defense and the Secretary of the Navy "to determine, in a fact-based proceeding, whether the individuals detained * * * [at] Guantanamo * * * are properly classified as enemy combatants and to permit each detainee the opportunity to contest such designation." Deputy Sec. England Memo. at 1 (Pet. Exh. 3). A CSRT is composed of "three neutral commissioned officers" who were not involved in the apprehension or interrogation of the detainee, CSRT Process, Encl. 1, § C(1) (Pet. Exh. 3). During the CSRT proceeding, the detainee may "present evidence" and testimony. *Id.*, Enc. 1, § H(7). In addition to his own testimony, the detainee may present relevant "testimony of witnesses who are reasonably available," as well as relevant documents and written statements. *Id.,* § F(6), H(7).

B. The Detainee Treatment Act of 2005 establishes a judicial review mechanism for final decisions rendered by a CSRT. The statute confers on this Court

"exclusive jurisdiction to determine the validity of any final decision of a [CSRT] that an alien is properly detained as an enemy combatant." Pub. L. No. 109-148, § 1105(e)(2)(A). This Court's review is "limited to the consideration of * * * whether the status determination of the [CSRT] with regard to such alien was consistent with the standards and procedures specified by the Secretary of Defense for [CSRTs] (including the requirement that the conclusion of the Tribunal be supported by a preponderance of the evidence and allowing a rebuttable presumption in favor of the Government's evidence)." *Id.,* § 1105(e)(2)(C)(i). This Court may also consider, "to the extent the Constitution and laws of the United States are applicable, whether the use of such standards and procedures to make the determination is consistent with the Constitution and laws of the United States." *Id.*, § 1105(e)(2)(C)(ii).[1]

C. Bismullah was captured in Afghanistan in 2003 and has been detained as an enemy combatant since that time. In a hearing held on November 30, 2004, a CSRT examined his status and determined that he is an enemy combatant. In June 2006, Haji Mohammad Wali filed a petition for review in this Court under the DTA. Wali states that he is Bismullah's brother, and is acting as his "next friend." Pet. at 6-7. Counsel for the next friend petitioner has sought access to the CSRT record,

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[1] This petition was filed after the enactment of the DTA. Accordingly, this case will remain in this Court regardless of the decision in *Al Odah v. United States*, Nos. 05-5064, 05-5095 through 05-5116, and *Boumediene v. Bush*, 05-5062 & 05-5063, regarding the applicability of the Act to pending cases.

including the classified CSRT material, and has sought to visit Bismullah and communicate with him at the secure U.S. military base at Guantanamo Bay, Cuba.[2]

ARGUMENT

Counsel for the next friend petitioner has sought access to classified material and permission to visit and communicate with Bismullah at a secure military base outside the United States during a time of active armed combat. The Government cannot properly facilitate such counsel access and visits in this, and the numerous anticipated DTA cases, absent protective measures that adequately ensure that classified material is properly handled and address the unique security needs presented by civilian visits to a secure military base and civilian communication with an alien detained by the military as an enemy combatant during a time of war. Such measures should be implemented through the proposed protective order (attached hereto). The proposed order will provide properly cleared counsel, who have agreed to comply with its terms, and who have been properly authorized by the detainee, access to the CSRT record, including classified material in the record. The proposed protective order establishes workable procedures to allow counsel to obtain authorization from the detainee. It provides rules to govern communication between

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[2] In addition, counsel have sought unprecedented access to materials that is not part of the CSRT record. That request, which the Government has vigorously opposed, is not at issue here.

counsel and the detainee, counsel visits to Guantanamo, and the handling of classified and protected material. To that end, the protective order will set up a Department of Defense Privilege Team to review written communications between the detainee and counsel to protect national security, while still maintaining the confidentiality of attorney-client communications.

These proposed rules and procedures go well beyond what is required by the DTA or by the Due Process Clause in this context. The proposed procedures also go well beyond anything that is normally provided to enemy combatants in wartime. The Government is proposing these extraordinary steps to assist this Court in carrying out its review function by facilitating meaningful participation by counsel to the detainees while still protecting national security.

I. Counsel Access and Communications with Detainee and Counsel Access to and Handling of Classified and Protected Material Should Be Governed According to the Provisions of the Proposed Protective Order.

Prior to the enactment of the DTA, enemy combatants seeking judicial review of their detention filed petitions for habeas corpus under 28 U.S.C. § 2241. *See Rasul v. Bush*, 542 U.S. 466 (2004). Those habeas cases were at one time coordinated for the resolution of common procedural issues. One such common issue involved the issuance of a protective order governing access by counsel to classified material in the CSRT records and contact between counsel and detainees. Such an order was entered in the district court in November 2004. *In re Guantanamo Bay Detainee*

Cases, 344 F. Supp. 2d 174 (D.D.C. 2004).

That protective order is similar in many respects to the order proposed here: both envision a regime whereby the United States will provide security clearances and access to the vast majority of the classified information in CSRT records to counsel for the detainee at issue; both set forth procedures to govern counsel access to detainees at Guantanamo and communications between counsel and represented detainees. Experience with the district court order, however, has led to disputes over how provisions work, unanticipated consequences, and unworkable or unwise provisions. The proposed order in this matter seeks to remedy those problems.

A. The proposed order provides a legal mail system, which counsel, with necessary clearances and authorization by the detainee, may use to communicate with the detainee, and rules governing access to a detainee at the military base. Under the district court protective order regime, legal mail provided to a detainee was subject to review only for physical contraband. As explained in the attached Declaration of Commander Patrick M. McCarthy, under that regime, the legal mail and lawyer visit regime has been used to provide information to the enemy combatant detainees that presents security issues at the base and that exceed the legitimate purposes for which counsel access is provided. *See* McCarthy Dec. ¶¶ 3-10. As the declaration details, detainees have been informed of recent terrorists attacks in Iraq, London and Israel. *Id.*, ¶¶ 5, 9. Further, a book was provided to a detainee detailing, among other things,

information about the investigations of abuse at Abu Ghraib prison. *Id.*, ¶ 4. Such material presents a serious threat to the security of the camp. *Ibid.* There have been numerous other instances of passing improper information to and from detainees. *Id.*, ¶ 10. Security has also been breached by the photographing of access badges worn by Guantanamo military staff. The photographs were then posted on the internet, raising very serious security concerns. *Id.*, ¶ 7. In this and in many other instances, these issues have not been uncovered until after the potential compromise of base security has occurred. *Id.*, ¶ 3.

In order to address these inadequacies and continue the counsel visits and communications with the enemy combatants during wartime at the secure military base, it is necessary to clarify and limit the scope of what is deemed "legal mail," and it is also necessary to have a privilege review team, which can maintain attorney-client privileges, ensuring that no inappropriate material or information is being communicated to the detainee. The proposed order achieves these ends. The proposed protective order provides that all written communications to an enemy combatant detainee (and from the detainee to counsel, to the extent counsel request such review) are subject to privilege team review. That review, however, will be performed consistent with the attorney-client privilege by insuring that the privilege team cannot share information with the Government except in carefully limited circumstances where communications relate to imminent acts of violence or could

harm the national security. Where there are disputes over whether certain types of the materials constitute appropriate legal mail, such disputes can be raised with the Court by petitioner's counsel or the privilege team in a privileged fashion. The order also makes clear that violation of the rules set out in the order will, *inter alia*, permit the Commander of the Joint Task Force at the Guantamo Naval Base (JTF-GTMO) to bar access to the base and the legal mail system.

B. The protective order in the district court also did not adequately address the procedures to govern initiation of a suit by a detainee. Many habeas cases have been filed by purported "next friends" of detainees; counsel for those "next friends" then sought to visit the detainee on multiple occasions in an attempt to obtain representation authorization. These visits were sought even though detainees had been clearly notified (in their native language) of their ability to file a habeas suit and had chosen not to file one or other questions of the standing of the purported "next friend" were raised. Counsel continued to act "on behalf of" detainees even in situations where detainees had refused to meet with counsel or authorize counsel to represent them. The system that developed under the prior protective order – a system that was driven by attorneys and purported "next friends" rather than by the detainees – has proved unworkable or inappropriate in many respects, including being inconsistent with jurisdictional principles.

The proposed protective order addresses these problems by setting forth clear

procedures for petitions filed by a detainee and by a next friend petitioner. For example, when a petition for review is filed by a "next friend," and the government does not object, counsel will be allowed to visit the detainee in order to ask the detainee to sign a form granting counsel authorization to represent the detainee and access his CSRT records. Once the detainee signs the form, counsel will be allowed access both to the legal mail system described herein and to visit the detainee at Guantanamo Bay, Cuba a maximum of three additional times to assist in the preparation of his action under the DTA, including all stages of review in the court of appeals. If the detainee does not sign the form, however, no further visits will be afforded, counsel will not be afforded access to the legal mail system, and counsel will not be granted access to the classified CSRT material.

C. A security clearance is just one of the conditions that must exist before a person may have access to classified information. As the Commander-in-Chief, the President has "authority to classify and control access to information bearing on national security." *Department of Navy* v. *Egan*, 484 U.S. 518, 527 (1988). And the President, by Executive Order, has established a scheme to protect classified information. Under the rules set up by the President, information may be disclosed only to a person with a clearance *and* only if that person has "a need-to-know the information." Exec. Order 12,958, as amended by Exec. Order 13,292, § 4.1(a), 68 Fed. Reg. 15,315 (Mar. 25, 2003).

The well-settled "need-to-know" concept means that the person seeking access has been determined by an "authorized holder" of the classified information at issue to "require[ ] access to [that] specific classified information in order to perform or assist in a lawful and authorized governmental function." Executive Order 12,958, § 6.1(z). This definition focuses on the *Government's* needs in a particular case, not whether the information is needed by a private party in litigation. *See United States v. Pollard*, 416 F.3d 48, 62 (D.C. Cir. 2005) (Rogers, J., concurring in part and dissenting in part) ("to come within the 'need-to-know' standard, Pollard's counsel must require access to assist the President's [clemency] determination and not simply to assist his client, which, by contrast, would be in the nature of a private act").

The proposed protective order clarifies that the Executive's authority to determine "need-to-know" and to limit dissemination of classified information to those with a need-to-know remains in force in this context. In order to limit dissemination of classified information to those with a clear "need-to-know," the order precludes the sharing of classified material between private counsel for different petitioners who are involved in different detainee cases.[3] The order also clarifies that a "need-to-know" determination must be made with respect to each piece

[3] The need-to-know inquiry is meant to consider the risk of disclosure to additional persons, even when those persons possess a security clearance. *See Northrop Corp. v. McDonnell Douglas Corp.*, 751 F.2d 395, 401-02 (D.C. Cir. 1984); *see also CIA v. Sims*, 471 U.S. 159, 175 (1985).

of classified CSRT record information before it is provided to petitioner's counsel. While the district court protective order regime limited access to information that counsel needed to know, a dispute has arisen over whether that "need-to-know" standard may be simply presumed en masse with respect to all material in the CSRT record. That dispute is currently pending in this Court. *Al Odah v. United States*, Nos. 05-5117 through 05-5127. Certain types of information have been redacted from CSRT records provided to counsel in some habeas cases – for example, information pertaining to individuals *other than* the detainee or especially sensitive source-identifying information.[4] The proposed protective order is revised to make plain that the Executive Branch must make a "need-to-know" determination with respect to all classified information within the CSRT record.

D. Finally, the proposed protective order also includes several minor, but important, changes from the order currently in place in the district court. It clarifies the definition of "protected information" (*i.e.*, sensitive information that is not classified, *e.g.*, the names of JTF-GTMO personnel)[5] and authorizes the privilege

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[4] Bismullah's CSRT classified record contains no such information that would be redacted. Future cases, however, may include such information. Moreover, as noted above, petitioners' counsel is seeking material beyond the CSRT record, which we have opposed, that may contain classified information.

[5] Under the proposed order "protected information" may be transported and handled by counsel outside of a secure facility, but may not be publicly disclosed without leave of this Court or specific authorization of the Government. The courts

team to designate information as protected. The proposed protective order, like the district court order, presumes that any communications emanating from the detainee or created during a visit to Guantanamo are classified and are to be maintained in a secure facility; counsel for a detainee may request a review of those materials by the privilege team so that unclassified materials may be removed from the secure facility and protected information can be identified. The proposed order makes slight changes to this review process by affording the privilege team sufficient time to conduct that review and by requiring counsel to provide a legible, translated copy of any materials for which review is sought.

II. The Government's Proposal is Fully Consistent With the Detainee Treatment Act and Due Process Requirements.

Under the proposal just described, the Government will provide counsel the classified portions of the CSRT record and access to the detainees under procedures designed to protect national security. This proposal for counsel participation is more than is required by the DTA or the Due Process Clause. Nonetheless, the Government is in no way conceding that the detainees, who are aliens held as enemy combatants outside the United States during an ongoing armed conflict, have a right

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also have recognized, even outside the specific context of classified information, the critical importance of protecting other sensitive information in the ongoing hostilities against the al Qaeda terrorist network. *See, e.g.*, *Center for National Security Studies v. Department of Justice*, 331 F.3d 918, 928 (D.C. Cir. 2003).

to counsel or that their counsel have a legal right to view classified materials.

A. The Detainee Treatment Act Does Not Require Counsel Access to Classified Information or the Detainee.

Counsel access to classified material is not compelled by the DTA. When this Court performs its familiar role of reviewing the decision of an administrative body, it has the "inherent authority to review classified material *ex parte*, *in camera* as part of its judicial review function." *Jifry v. FAA*, 370 F.3d 1174, 1182 (D.C. Cir. 2004). Because this Court can perform that function *ex parte*, there is no need for counsel access to the classified material that is in the CSRT record. Instead, this Court has explained that when review of classified information is at issue, "'[w]e anticipate that in camera review of affidavits, followed if necessary by further judicial inquiry, *will be the norm*.'" *Stillman v. C.I.A.*, 319 F.3d 546, 548 (D.C. Cir. 2003) (emphasis added). The proposed protective order, however, will grant counsel, with proper clearances and authorization, even more access to classified material than this Court has held to be the norm – counsel will have access to the documents in the CSRT record containing classified material without first making a showing of necessity.

The DTA also does not compel unlimited access by counsel to the enemy combatant held at the secure Guantanamo military base. Because review under the DTA is on the record of the CSRT, counsel does not have a need to engage in factual development or unlimited consultation with the detainee. We understand, however,

that some consultation may be useful in preparing the detainee's DTA case and could assist this Court in its record review function. Thus, the proposed order allows such consultation. The proposal allows counsel, upon obtaining authorization from the detainee, access to a legal mail system and allows limited visits between counsel and the detainee. At the same time, communications with the detainee – by counsel or anyone – have a serious potential to damage the nation's security, including security at the military base. The proposed procedures will allow counsel to communicate with their clients in confidence under procedures that will allow such communications consistent with security needs. Nothing in the DTA requires factual development or access beyond that proposed here.

In regard to the proposed review of written communications and other materials sent from counsel to the enemy combatant detainee by the privilege team, it must be remembered that there is no right to counsel in this context and there is no tradition of attorney-client privilege in regard to civilian communications to aliens held outside the United States as an enemy during a time of ongoing armed conflict. Thus, it would be improper to recognize the same type of attorney-client privilege in this context, as would obtain in other contexts. *See United States v. Golberger & Dubin, P.C.*, 935 F.2d 501, 504 (2d Cir. 1991) (the attorney-client privilege "is based in policy, rather than in the Constitution, and therefore cannot stand in the face of countervailing law or strong public policy and should be strictly confined within the

narrowest possible limits underlying its purpose"). Nonetheless, the proposed protective order affords substantial protection to attorney-client communications. Under the proposed order, the privilege team cannot share information with the Government except in carefully limited circumstances where communications relate to imminent acts of violence or could harm the national security. Where a dispute arises over whether certain types of the materials constitute appropriate legal mail such disputes can be resolved by this Court in a privileged manner. While maintaining necessary security, this system will afford counsel with more than sufficient access and communication with the detainee in order assist this Court in performing its review function under the DTA.

B. The Proposed Protective Order Is Consistent With Due Process.

1. An alien enemy combatant, captured and held abroad during an ongoing armed conflict, has no constitutional right of access to classified information or to counsel. Each of these antecedent legal points is currently pending in this Court in *Al-Odah* and *Boumediene*, and a decision on the process appropriate in this case is closely bound up in the resolution of those appeals. Nonetheless, the process proposed here is fully consistent with the Due Process Clause, if it applies here, and with existing law and history.

Historically, a captured enemy combatant was entitled to *no* process to

challenge his status. More recently, the process granted to aliens captured on a foreign battlefield was no more than that reflected in Article 5 of the Geneva Convention and Army Regulation 190-8, which affords detainees neither a right to counsel nor access to classified information. *See* Army Reg. 190-8, § 1-6.e(3) & (5).

In *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), the Court addressed the process due a United States citizen held as an enemy combatant in the United States. A plurality reasoned that the only process due was "notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker." *Id.* at 533. *Hamdi* involved a citizen held within the United States and afforded no prior formal military process akin to that provided under Army Regulation 190-8 or under the CSRTs. Even in that context, the Supreme Court stressed that any "factfinding process" through habeas corpus must be "both prudent and incremental." *Id.* at 539. Here, on the other hand, the detainee is an alien held outside the United States; the detainee received an extensive formal process, far beyond that afforded under Army Regulation 190-8, through the CSRT process; and the DTA now grants the detainee with appellate review of the CSRT decision based upon the CSRT record. Nonetheless, despite all these differences cutting in favor of *less* judicial process, the procedures proposed here afford even more process than that envisioned by the *Hamdi* plurality.

2. The rulings of the Supreme Court and this Court have recognized the

Government's compelling interest in protecting national security and classified information that is vital to that security. *See Haig v. Agee*, 453 U.S. 280, 307 (1981) ("It is 'obvious and unarguable' that no governmental interest is more compelling than the security of the Nation."); *Snepp v. United States,* 444 U.S. 507, 509 n.3 (1980) (*per curiam*) (recognizing Government's "compelling interest in protecting both the secrecy of information important to our national security and the appearance of confidentiality so essential to the effective operation of our foreign intelligence service"); *Egan*, 484 U.S. at 52.

Because of this compelling interest, this Court has rejected due process challenges to agency action even when private parties and their counsel have been denied all access to classified information in the record. *See Jifry*, 370 F.3d at 1184; *People's Mojahedin Org. v. Dep't of State*, 327 F.3d 1238, 1242 (D.C. Cir. 2003); *Holy Land Foundation v. Ashcroft*, 333 F.3d 156, 164 (D.C. Cir. 2003).

The proposed protective order is easily constitutional under these principles. In conducting review of administrative records containing classified material, this Court has repeatedly held it adequate to review all classified material *ex parte*, *in camera*. Here, on the other hand, the Government is endeavoring to provide security clearances to counsel, as appropriate; allow counsel, upon obtaining authorization from the detainee, access to the classified information in the CSRT records under the terms of the protective order; and allow limited visits between counsel and the

detainee. These procedures easily satisfy whatever the Due Process Clause might require in this context.

3. As we have explained, the Government proposal is fully consistent with the Due Process Clause and the DTA. Moreover, the proposed order allows this Court to perform its review, while avoiding the difficult constitutional and separation-of-powers questions that would arise if a court attempted to require disclosure of national security information. *See Stillman*, 319 F.3d at 548. Ultimately, ordering the release of information or access to enemy combatants would violate core separation-of-powers principles. *See Egan*, 484 U.S. at 527 ("authority to classify and *control access to information* bearing on national security * * * flows primarily from [Article II's] constitutional investment of power in the President and exists quite apart from any explicit congressional grant") (emphasis added); *Holy Land*, 333 F.3d at 164 (recognizing "the primacy of the Executive in controlling and exercising responsibility over access to classified information").

A court lacks the expertise to weigh the harm to national security that would be created by disclosure of materials or access to an enemy combatant. *Egan*, 484 U.S. at 529. These concerns are particularly acute with respect to access to the detained enemy combatants held on a secure military base abroad during time of war. *See Hamdi*, 542 U.S. at 531 (plurality op.). The proposed protective order balances these concerns with a genuine effort to allow meaningful participation by the

detainees' counsel. In this context, where there is no constitutional right to counsel, the essential point of counsel access is to assist this Court in its review of the CSRT record under the terms of the DTA. The access to the detainee and record afforded to counsel by this proposed order are more than sufficient to fulfill that purpose, while also protecting vital security needs.

C. The Procedures For Handling Counsel Access to Detainees When Suits Are Filed are Proper.

The proposed order mandates that in order to be afforded more than one visit to an enemy combatant at the secure military base, and access to the privileged legal mail system and the classified CSRT materials, the detainee must sign an appropriate authorization, approving the attorney's representation of his interests in this Court and granting the attorney permission to access the CSRT record. The proposed order affords counsel the opportunity to obtain such authorization. The requirement of detainee authorization is consistent with the established principle that a competent client, even if in custody, has a right to choose his own representative when appearing in court. *See First Defense Legal Aid v. City of Chicago*, 319 F.3d 967, 969 (7th Cir. 2003) ("persons in custody must select counsel for themselves; volunteers and friends may not form an attorney-client relation on behalf of persons in custody"). Given the inherent security risks permitting civilian access to alien enemy combatants at a secure military base during a time of war, and to classified information regarding

those enemy combatants, it is proper to limit such access to those whom the detainee authorizes to represent his interests.

CONCLUSION

For the foregoing reasons, this Court should enter a protective order in the form attached governing access to classified information, and communication between counsel in this case and the detainee.

Respectfully submitted,

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AUGUST 2006

CERTIFICATE OF SERVICE

I hereby certify that on August 25, 2006, I caused copies of the foregoing "MOTION FOR ENTRY OF PROTECTIVE ORDER," with attachments, to be served upon counsel of record by causing copies to be sent by FedEx delivery and by e-mail transmission to:

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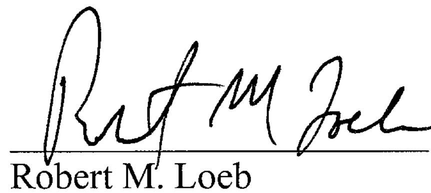


Robert M. Loeb

ADDENDUM A

Declaration of Commander Patrick M. McCarthy

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

HAJI BISMULLAH, et al., Petitioners,	)	
v.	)	No. 06-1197
DONALD RUMSFELD, Secretary of Defense Respondent	)	

Pursuant to 28 U.S.C. §1746, I, Patrick M. McCarthy, hereby declare that to the best of my knowledge, information, and belief, the following is true, accurate, and correct:

1. I am a Commander in the United States Navy with over eighteen (18) years of active duty service. I currently serve as the Staff Judge Advocate, Joint Task Force – Guantanamo, Guantanamo Bay, Cuba (JTF-GTMO). I am responsible for all legal advice and the completion of all legal responsibilities on behalf of JTF-GTMO. I have served in this position since May 2, 2006. Unless otherwise noted, the statements contained in this declaration are based upon my personal knowledge or information supplied to me in my official capacity.

2. My responsibilities include facilitating habeas corpus counsel access to their clients who are detained by JTF-GTMO and compliance by such counsel with JTF-GTMO security procedures and force protection safeguards, including those prescribed by the Amended Protective Order and Procedures for Counsel Access to Detainees at the United States Naval Base in Guantanamo Bay, Cuba (Protective Order), which was attached as

an appendix in *In Re Guantanamo Bay Detainee Cases,* 344 F. Supp. 2d 174 (D.D.C. Nov. 8, 2004). While, in many respects, the process outlined by the Protective Order has been successful in protecting the legitimate and important national security interests of the United States while ensuring that attorneys representing detainees are permitted effective access to their clients, there nevertheless have been situations threatening the safety and security of both JTF-GTMO personnel and detainees as a result of inadequacies in the Protective Order.

3. All attorneys sign and agree to comply fully with the Protective Order prior to coming to JTF-GTMO and are briefed repeatedly about the relevant JTF-GTMO security rules and procedures. These rules and procedures ensure the security of JTF-GTMO staff, as well as the health and well-being of detainees and their attorneys. Some provisions of the current Protective Order, however, are vague or do not fully address a particular situation. These "gaps" have led to situations, of which JTF-GTMO has become aware after the fact, which potentially compromised the security of the camp.

4. Many of the problems we have encountered in the past are a result of legal mail being reviewed only for physical contraband and not for content contraband. This has resulted in non-legal documents and information being sent or delivered through the legal mail processes provided for in the Protective Order to detainees without the proper and typical security review conducted by JTF-GTMO on all non-legal mail. For instance, on or about January 24, 2006, a detainee was observed by guards and heard to be reading from "The Torture Papers: The Road to Abu Ghraib," which was labeled "legal" by hand on

the page edges. The book had not been submitted for a security review as non-legal mail. The book contained a number of documents related to investigations into the military operations of the United States in Iraq, to include information related to the investigations at Abu Ghraib. JTF-GTMO confiscated the book, as it was a serious threat to the security of the camp. Such materials could incite detainees to violence, leading to a destabilization of the camp.

5. Similarly, in July 2005, a detainee at the Detention Hospital was awaiting routine dental care and was overheard by a linguist in conversation with another detainee, reporting that his habeas attorney told him about various acts of war and terrorism in Iraq, provided him a report on the London bombing which included Al Zawahiri's efforts to take credit for the bombing, and told him about other acts of violence in Syria and Iraq. The discussion of such incendiary information constitutes a threat to the security of the camp. The report referenced above was not submitted for approval through the non-legal mail processes. In a similar vein, on or about March 31, 2006, another attorney gave his detainee client a copy of a speech given at an Amnesty International Conference without sending it through the non-legal mail review processes. The detainee then voluntarily approached JTF-GTMO military personnel, asking them to translate the speech. The speech contained inflammatory information regarding current political events, as it contained information about ongoing efforts in the war on terror. Such information threatens the security of the camp, as it could incite violence among the detainees.

6. On or about February 18, 2005, a group of detainees, some of them co-clients of the same law firm, were found in a communal location in Camp IV reading through a series of documents containing biographies and photos of various detainees. The documents also included news articles relating to general detention issues at Guantanamo Bay. None of these documents was submitted for review through the non-legal mail processes.

7. JTF-GTMO does not allow media access to detainees for security reasons. However, on more than one occasion counsel has used access to Guantanamo Bay and to the detainees as a means of obtaining information for the purpose of passing it on to the media. Following their visit with detainee clients at the end of August 2005, one law firm's attorneys posted pictures of their JTF-GTMO access badges and a picture of a U.S. Coast Guard port security boat on the website of a New York commercial radio station (WNYC) at http://wnyc.org/news/articles/52983. On the website, the radio station stated that a microphone and cameras were given to the lawyers in order to obtain or complete reports on their representation of detainees. It is not known whether these attorneys took other photographs or made other recordings during their visit to Guantanamo Bay. No pictures taken by attorneys were cleared to leave the base. As a result of these actions, the JTF-GTMO security manager was required to change the badging required for escorted personnel.

8. On March 3, 2006, British Broadcasting Corporation (BBC) News posted on its website an article both in written and audio form using information provided by a detainee regarding his treatment at Guantanamo Bay. The article represented that the

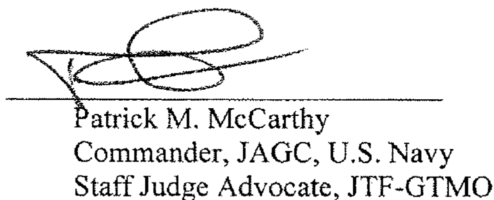
detainee's attorney took questions from a BBC reporter with him to his meeting with the detainee in order to ask the detainee those questions. Thereafter, the attorney provided the answers to the BBC reporter to use while writing the article. Using counsel meetings to, in effect, conduct interviews for media outlets, whether directly or indirectly, is inconsistent with the purpose of counsel access at Guantanamo Bay. The questions posed to the detainee were not submitted through the non-legal mail processes for review.

9. Most recently, after meeting with his attorney on August 15, 2006, a block guard overheard a detainee discussing recent developments in the conflict between Hezbollah and Israel. Providing such information to a detainee threatens the security of the camp.

10. The above-mentioned examples are only a sampling of the problems we have experienced at Guantanamo Bay under the Protective Order.

I declare under penalty of perjury pursuant to the laws of the United States that the foregoing is true and correct, to the best of my knowledge, information and belief.

Dated: August 25, 2006



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Staff Judge Advocate, JTF-GTMO

ADDENDUM B

Proposed Protective Order