





# U.S. NAVAL CRIMINAL INVESTIGATIVE SERVICE

INVESTIGATIVE ACTION

17JUN06

CONTROL: 10JUN06-MPGT-0031-7HNA

V/AL ZAHRANI, YASSER TALAL/CIVILIAN  
M/W/FNSA/N//26DEC83/SAUDI ARABIA

## RESULTS OF RE-CREATION OF DEATH SCENES

1. On 14JUN06, Reporting Agent and Participating Agents ROGISH and HANSEN re-created the death scenes of V/AL ZAHRANI, V/AL TABI, and V/AHMED, located at Camp Delta, Camp One, Alpha Block, Cell Numbers A-8, A-12, and A-5, respectively. Using the death scene photographs from 10JUN06, the scenes were re-created for the purpose of documenting visibility conditions. Participating Agent (b)(7)(C) then recorded the conditions of Alpha Block using a Sony Digital Handycam DCR-PC101. This occurred from approximately 2150-2218 on 14JUN06. The bank of fluorescent lights outside of cells A-1 through A-24 was turned off, which replicated the lighting conditions on the evening of 09-10JUN06. The videotape is attached as enclosure (A).

2. In addition to the videotape, the scenes were photographically documented using a Nikon D2X digital camera on 15JUN06 from approximately 2124-2152. Photographs were taken by (b)(3):10 USC USN, who is assigned to Combat Camera, J-3, Joint Task Force, Naval Station Guantanamo Bay, Cuba. Photographs were exposed using ambient light only. As above, the fluorescent lights outside of cells A-1 through A-24 were turned off. The photographs of cells A-8, A-12, and A-5 are attached as enclosures (B) through (D).

3. Note that the victims' cells were documented in the order in which they were discovered by the Joint Detention Group guard force: cell A-8 belonging to V/AL ZAHRANI, cell A-12 belonging to V/AL TABI, and cell A-5 belonging to V/AHMED.

## ENCLOSURES

- (A) Videotape of Alpha Block/14JUN06
- (B) Photographs of Cell A-8/15JUN06
- (C) Photographs of Cell A-12/15JUN06
- (D) Photographs of Cell A-5/15JUN06

(b)(3):10 USC §130b,(b)(6),(b)(7)(C)

OFFICE: NCISHQ Washington, DC

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(b)(7)(C)

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EXHIBIT (113)

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1392



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Page(s) 1393 - 1421 Enclosures (B) - (D)

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# U.S. NAVAL CRIMINAL INVESTIGATIVE SERVICE

INVESTIGATIVE ACTION

19JUN06

CONTROL: 10JUN06-MPGT-0031-7HNA

V/AL ZHRANI, YASSER TALAL/CIV  
M/W/FNSA/N//26DEC83/SAUDI ARABIA  
SUPP: DETAINEE BEING HELD AT JTF-GTMO

Packaging and shipment of evidence obtained from detainee cells

1. On 19JUN06, agents assigned to NCISRA Guantanamo Bay, Cuba packaged the documents seized from the detainees being held at Delta Camp, Joint Task Force, Guantanamo Bay, Cuba. The documents were packaged in 34 boxes and one bag. The combined weight was 1065 pounds.

REPORTED BY: (b)(7)(C)  
OFFICE: NCISRA GUANTANAMO BAY, CUBA

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1422

# U.S. NAVAL CRIMINAL INVESTIGATIVE SERVICE

REPORT OF INVESTIGATION (CHANGE)

17JUN06

DEATH (II)

CONTROL: 10JUN06-MPGT-0031-7HNA

V/AL ZAHRANI, YASSER TALAL/CIV  
 M/W/FNSA/N//26DEC83/SAUDI ARABIA  
 SUPP: DETAINEE BEING HELD AT JTF-GTMO

V/AL TABI, MANA SHAMAN ALLABARD/CIV  
 M/W/FNSA/N//01JAN76/SAUDI ARABIA  
 SUPP: DETAINEE BEING HELD AT JTF-GTMO

V/AHMED, ALI ABDULLA H/CIV  
 M/W/FNYM/N//01AUG79/YEMEN  
 SUPP: DETAINEE BEING HELD AT JTF-GTMO

COMMAND/JOINT TASK FORCE GUANTANAMO BAY, CUBA/31886

MADE AT/MPGT/GUANTANAMO BAY CUBA/ (b)(7)(C) SPECIAL AGENT

### REFERENCE(S)

- (A) NCISRU GUANTANAMO BAY, CUBA ROI(OPEN)/11JUN06
- (B) NCIS CASE FILE: V/AL TABI, MANA SHAMAN ALLABARD/CIV  
CCN: 10JUN06-MPGT-0032-7HNA
- (C) NCIS CASE FILE: V/AHMED, ALI ABDULLA H/CIV  
CCN: 10JUN06-MPGT-0033-7HNA

### NARRATIVE

1. Subsequent to the transmission of reference (A), (B) and (C) it was determined by NCISHQ that it would be better to have only one investigation for the three deaths that occurred at Joint Task Force Guantanamo Bay, Cuba (JTF-GTMO), Detention Facility. NCISHQ directed references (B) and (C) be closed and the victims from those investigations be added as additional victims to reference (A).

### ACTION

DIST: Note addition of two additional victim titles. ✓

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1423



# U.S. NAVAL CRIMINAL INVESTIGATIVE SERVICE

REPORT OF INVESTIGATION (ACTION)

15JUN06

DEATH (II)

CONTROL: 10JUN06-MPGT-0031-7HNA

V/AL ZAHRANI, YASSER TALAL/CIV  
M/W/FNSA/N//26DEC83/SAUDI ARABIA  
SUPP: DETAINEE BEING HELD AT JTF-GTMO

COMMAND/JOINT TASK FORCE GUANTANAMO BAY, CUBA/31886

MADE AT/0023/NCISHQ WASHINGTON DC (b)(7)(C) SPECIAL AGENT

### REFERENCE(S)

- (A) NCISRA GUANTANAMO BAY ROI (OPEN)/11JUN06
- (B) NCIS 1, Chapter 25-10, Special Interest "SI" Investigations

### NARRATIVE

1. Subsequent to the submission of Reference (A), this case has been designated "Special Interest" (SI) by NCISHQ.

### ACTION

MPGT: As per guidance provided in Reference (B), reporting requirements are increased in frequency as significant information is developed. Weekly contact is to be made with the SI desk officer, (b)(3):10 USC §130b (b)(6) (b)(7)(C) for status updates.

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1424

# U.S. NAVAL CRIMINAL INVESTIGATIVE SERVICE

REPORT OF INVESTIGATION (OPEN)

11JUN06

DEATH (II)

CONTROL: 10JUN06-MPGT-0031-7HNA

V/AL ZAHRANI, YASSER TALAL/CIV  
M/W/FNSA/N//26DEC83/SAUDI ARABIA  
SUPP: DETAINEE BEING HELD AT JTF-GTMO

COMMAND/JOINT TASK FORCE GUANTANAMO BAY, CUBA/31886

MADE AT/MPGT/GUANTANAMO BAY CUBA, (b)(7)(C) SPECIAL AGENT

## NARRATIVE

1. This is a reactive investigation initiated to determine cause and manner of death of V/AL ZAHRANI.

2. Investigative was initiated on 10Jun06, subsequent to the receipt of information from the Joint Task Force Guantanamo Bay, Cuba (JTF-GTMO) Staff Judge Advocate (SJA) of the death of V/AL ZAHRANI, a detainee, within JTF-GTMO Camp Delta. V/AL ZAHRANI was found hanging inside his cell, within Alpha Block, Camp Delta, at approximately 0039, on 10Jun06, by Joint Detention Group (JDG) personnel. V/AL ZAHRANI was cut down by JDG personnel, placed on a backboard and transported to the Detention (DET) Clinic inside Camp Delta. DET Clinic medical personnel assessed V/AL ZAHRANI and initiated Cardio Pulmonary Resuscitation (CPR). A Naval Hospital Guantanamo Bay, Cuba (NAVHOSP GTMO) ambulance responded to the DET Clinic and transported V/AL ZAHRANI to the NAVHOSP. Upon initiation CPR continued until V/AL ZAHRANI was pronounced dead at 0150. During a search of the person of V/AL ZAHRANI, a note written in Arabic was discovered. All movement of V/AL ZAHRANI from the death scene occurred prior to NCIS arrival on scene. Investigation continues.

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Subject to certain space limitations, it will remain in the detainee's cell for his review and use.

- [REDACTED]
- All communications (written and oral) from a detainee to his lawyer are treated as presumptively SECRET/NOFORN and must be handled accordingly by the counsel. This is to prevent the inadvertent disclosure of classified material by the habeas counsel. If the counsel want to handle the material in any other way, the counsel will submit the material to a "Privilege Team" for a classification review. (Like the Filter Team, the Privilege Team is restricted from disclosing the contents of these communications, except in some limited circumstances.)
- [REDACTED]

The habeas litigation has included a variety of counsel challenges to the conditions of detention, medical care problems, oppositions to transfers from Guantanamo and a variety of "collateral" matters.

Guidance on determining whether a document is covered by the attorney-client privilege is found at Appendix F.

### III. General Instructions

In its authorization, the court cautioned the Filter Team to remember that the team must perform its task with the following restrictions:

- The Filter Team must keep meticulous records and maintain a chain of custody for every document reviewed. [REDACTED]
- [REDACTED] If disputes later arise as to how individual documents were treated, the Filter Team's records must clearly show who had access to the document, what determinations were made regarding its content, and to whom the document was given.
- The Filter Team must not disclose the contents of any attorney-client privileged materials to any individuals outside the Filter Team except for information pertaining to future

events that threaten national security or involve imminent violence. Such information may be disclosed only to the Department of Justice Filter Litigation Team.

The Department of Justice Filter Litigation Team (FLT) will be responsible for handling all attorney-client privileged materials that threaten national security or involve imminent violence. It is essential that the Filter Team only disclose such materials to the FLT. The Filter Team's point of contact at the FLT will be \_\_\_\_\_ should only be contacted as follows:

<INSERT CONTACT INSTRUCTIONS HERE>

Each member of the Filter Team will be assigned a unique identification number. When indicating in the team's records who reviewed a document, never use the Filter Team member's actual name. Always use the Filter Team members' ID number. This precaution is necessary to protect the privacy of the Filter Team members.

Each member of the Filter Team, after reading these instructions and prior to reviewing any documents, must sign the statement on the final page of this packet.

#### IV. Document Review Instructions

1. Remove the paper items from the bag.
2. Apply Bates numbers to documents. The Bates-numbers should be applied to every page in a document on which any writings, markings, drawings, or other text appears. Apply the Bates-numbers in a location as close to the bottom right hand corner of the page as possible, without obstructing the content of the document.
3. Document review forms must be filled out for each individual document. If a document includes one or more attachments, such as a letter from an attorney to a detainee that includes a newspaper article, treat the letter and the article as a single document. Blank document review forms will be provided and an example form appears in the appendix of these instructions.
4. Examine the document. Examine the Document Review Form for each document. In completing the form, you should indicate the type of information contained in the document. Information available but not disclosed is also indicated.



**5. Three questions must be answered for each document:**

- a. Does the document contain information pertaining to future events that threaten national security or involve imminent violence?

If so, alert the Filter Litigation Team immediately.

- b. Is the document relevant to the NCIS investigation?
- c. Is the document potentially protected by the attorney-client privilege?

Documents are potentially protected by attorney-client privilege if they are correspondence or other written material in the possession of a detainee that appears to have been provided to that detainee by his attorney or created by the detainee to provide to or communicate with his attorney.

Any materials created by the detainee that appear to be intended for his attorney will be processed as if they are attorney-client material. This may include hand-written notes on documents that would not be considered attorney-client privileged without the notes. Some documents prepared by the detainee will be written on paper that has been stamped with a marking indicating that the document is attorney-client privileged, even though the contents of the document would not be considered attorney-client privileged if it appeared on paper without the stamp. Such documents at the outset should be considered to be attorney-client material unless determined otherwise by further evaluation. See Appendix F for further guidance regarding the determination of attorney-client privilege.

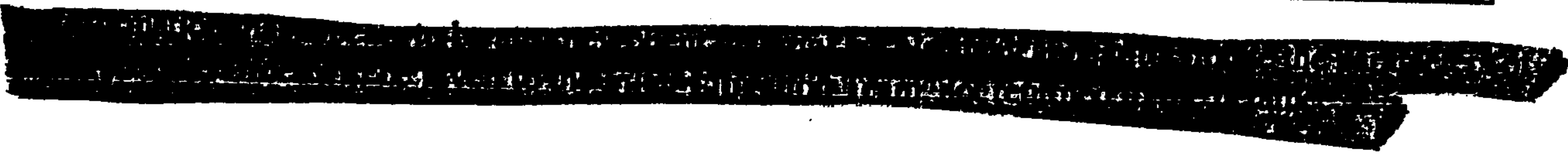
Some material may appear to be attorney-client material but also may appear to violate the parameters of the Protective Order. If the information is also deemed to be relevant to the investigation, the Filter Team should inform the Filter Litigation Team of this apparent violation when forwarding the document. If the information is deemed to not be relevant to the investigation, the material should be forwarded to the Filter Litigation Team.

**NOTE:** When it is unclear whether or not a document should be considered attorney-client material, the document should be presumed to be privileged.

6. For all documents that do not contain information relating to future acts of imminent violence or that threaten national security, sort the documents into four categories as noted below:

- a. **Category 1:** Documents that are relevant to the NCIS investigation *AND* are also attorney-client privileged.
- b. **Category 2:** Documents that are not relevant to the NCIS investigation but are attorney-client privileged.
- c. **Category 3:** Documents that are relevant to the NCIS investigation and are not attorney-client privileged.
- d. **Category 4:** Documents that are not relevant to the NCIS investigation and are not attorney-client privileged.

		Is the document relevant to the NCIS investigation?	
		Yes	No
Is the document protected by the Attorney-client privilege?	Yes	<b>Category 1</b> Relevant & Privileged (Contact Filter Litigation Team)	<b>Category 2*</b> Irrelevant & Privileged (Return to Detainee)
	No	<b>Category 3</b> Relevant & Not Privileged (Provide to NCIS)	<b>Category 4</b> Irrelevant & Not Privileged (Return to JTF-GTMO)



7. Indicate the Category into which the document was placed on the document review form and place the document with the other documents placed in the same Category.

8. The document review form has an additional place for the Filter Team member to indicate any other information, notes, or comments that are deemed relevant. The reviewer should indicate any contact that he/she has with individuals outside the Filter Team in regard to the document here. For instance, the reviewer might contact a member of NCIS to ask a clarifying question without revealing the content of a document. This contact must be indicated on the document review form.

*Handwritten initials/signature*



9. Once all of the documents from a single detainee have been reviewed, secure all of the documents in each Category with a rubber band or other fastener as appropriate and place them in accordion redwell folders in preparation for transfer.

All of the document review forms should be arranged in the order of the Bates-numbers of the documents to which they pertain. Secure the forms with a fastener and placed the forms in their own redwell folder.

10. Either retain the documents or transfer the documents to the DOJ Filter Litigation Team, to NCIS, to the detainee, or to JTF-GTMO based on the Category, as required.<sup>1</sup>

**Category 1:** The Filter Team will retain the Category 1 documents until it receives specific written instructions regarding their disclosure from the Department of Justice Filter Litigation Team (FLT).

The Filter Team must contact the FLT regarding all documents in Category 1, and may only disclose the documents or their contents to the FLT. The FLT will contact detainee's counsel for consent to disclosure of the documents to NCIS and/or will submit a filing under seal to the Court Security Officer (CSO) requesting permission for the documents to be disclosed to NCIS.

No disclosure of Category 1 documents may be made by the Filter Team prior to receiving documented consent of detainee's counsel or court approval.

- b. **Category 2:** If the information does not appear to violate the parameters of the Protective Order, the filter team must return all documents in Category 2 directly to the detainee. The documents should not be disclosed to JTF-GTMO command or to NCIS.

If it appears that the information violates the parameters of the Protective Order, the document must be forwarded to the Filter Litigation Team. The documents should not be disclosed to JTF-GTMO command or to NCIS.

- c. **Category 3:** The filter team should disclose all documents in Category 3 directly to NCIS. When NCIS has completed its investigation, the documents should be returned to JTF-GTMO for redistribution to the detainees to whom the documents belong, as appropriate.

- d. **Category 4:** The filter team should return all documents in Category 4 directly to JTF-GTMO. JTF-GTMO should return the documents to the detainees to whom the documents belong, as appropriate.

<sup>1</sup> Note that the NCIS agent members of the Filter Team will be responsible for the physical handling of the documents as part of mailing them to the appropriate receiving authority.

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11. Once the documents have been transferred out of the possession of the Filter Team, indicate on each document review form to whom the document was transferred and the date of transfer.

**Appendices:**

- A. Declarations of Special Agent Carol Kiskhardt and Admiral Harry Harris**
- B. List of detainees whose materials can be reviewed**
- C. Judge Robertson's Opinion regarding the review**
- D. Habeas litigation fact sheet**
- E. Habeas case protective order**
- F. Guidance regarding attorney-client determination**



**EXHIBIT A**

NCIS

ENCLOSURE (A) 12


DECLARATION

Pursuant to 28 U.S.C. § 1746, I, Harry B. Harris, hereby declare:

1. I am a Rear Admiral in the United States Navy, with 28 years of active duty service. I currently serve as Commander, Joint Task Force-Guantanamo, Guantanamo Bay, Cuba (JTF-GTMO). I have served in that position since March 2006. JTF-GTMO conducts detention and interrogation operations in support of the Global War on Terrorism, coordinates and implements detainee screening operations and supports law enforcement and war crimes investigations. Our detention mission is conducted in a humane manner intended to protect the security of both detainees and JTF personnel at GTMO. In my capacity as Commander, I am responsible for all aspects of JTF-GTMO operations. The information contained in this declaration is based on my personal knowledge or information supplied to me in my official capacity.
2. After the detainee suicides of 10 June 2006, the Naval Criminal Investigative Service (NCIS) began an investigation of the circumstances of the suicides at the U.S. Naval Base at Guantanamo Bay, Cuba. The NCIS is the primary criminal investigation service of the Department of the Navy; it investigates all deaths associated in any way with the Navy. Since JTF-GTMO is a tenant activity on Naval Station Guantanamo Bay, Cuba, the established Standard Operating Procedure calls for NCIS to investigate any detainee death. NCIS is an independent entity, completely outside the chain of command of JTF-GTMO. The NCIS sent an investigatory team to JTF-GTMO on 10 June 2006. The purpose of the investigation was to determine the manner and cause of death of the three detainees.



3. As Commander, JTF-GTMO, I was periodically updated on the status of the investigation to ensure force protection aspects of the case were brought to my attention. I was advised that NCIS had obtained information which suggested the suicides may have been part of a larger plan or pact for more suicides that day or in the immediate future.
4. After being briefed on these developments in the NCIS investigation, I was convinced of the need for a broad investigation into all of the relevant facts and circumstances surrounding the three suicides on 9/10 June 2006. On 22 June 2006, I specifically requested that NCIS include within their investigation, (1) whether the suicides on 9/10 June 2006 were related to a plot by detainees to commit suicide, or were otherwise encouraged, ordered, or assisted by other detainees or third persons; and (2) whether there exists any evidence of past, ongoing or future plots for detainees to commit suicide. The basis for my request was to ensure the safe and humane care and treatment of the enemy combatants detained at Guantanamo, as well as the safety of all personnel who enter and work in the detention facilities under my responsibility. I declare under penalty of perjury under the laws of the United States of America that, to the best of my knowledge, information, and belief, the foregoing is true, accurate, and correct.

  
HARRY B. HARRIS, JR.  
REAR ADMIRAL, U.S. NAVY

**EXHIBIT B**

NCIS

ENCLOSURE (B) 75



**DECLARATION OF CAROL KISTHARDT**

Pursuant to 28 U.S.C. § 1746, I, Carol Kisthardt, hereby declare:

1. I am the Special Agent in Charge, Southeast Field Office, Naval Criminal Investigative Service ("NCIS"). I have served in this position since May 2004. In this capacity I supervise all NCIS investigations within the jurisdiction of the Southeast Field Office, which includes Georgia, Florida (less the Pan Handle), the Caribbean (to include the U.S. Naval Base at Guantanamo Bay, Cuba), as well as South and Central America. The following declaration, which is based on my personal knowledge or information supplied to me in my official capacity, pertains to the investigation that was initiated at my direction into the deaths of three detainees at the U.S. Naval Base at Guantanamo Bay, Cuba.
2. After the detainee suicides of 10 June 2006, the Naval Criminal Investigative Service (NCIS) initiated an investigation into the circumstances of the suicides at the U.S. Naval Base at Guantanamo Bay, Cuba. The NCIS is the primary criminal investigation service of the Department of the Navy and is responsible for investigating unattended deaths on U.S. Naval installations. The Navy has primary jurisdiction over Guantanamo Bay, Cuba.
3. On 10 June 2006, NCIS found what appeared to be handwritten suicide notes on the deceased detainees' persons. NCIS conducted searches of the detainees' cells and discovered a handwritten note hidden in the mesh wall of one of the deceased detainee's cell which, when translated, was found to be related to the suicides. That note was written in Arabic on notepaper that had been stamped "Attorney Client Privilege," on the back of the paper, and after translation was found to have been written by someone using a name different from the name of the detainee who lived in the cell. NCIS investigators

then searched other occupied cells in the cellblock for additional evidence surrounding the deaths of the three detainees and/or additional planned suicides. The NCIS team searched for, among other items, handwritten notes that could be relevant to the three suicides, including anything that would reflect a suicide plan or pact. Notes were subsequently found in the cell of a detainee other than the three suicide victims. These notes were written in Arabic, and after translation, were considered to be relevant to the investigation and potentially authored by at least two of the deceased detainees. These notes were handwritten, many of them on stationery stamped "Attorney-Client Communication", "Privileged and Confidential", and "Attorney-Detainee Materials", in both English and Arabic.

4. The discovery of these notes led NCIS to expand the scope of the search to include handwritten materials in all enemy combatant detainees' cells throughout the Guantanamo detention facility beginning on 14 June 2006. The purpose of the expanded search was to pursue logical investigative leads concerning the deaths of the three detainees and to determine whether other suicides were planned or likely to be planned. On 14 June 2006, the NCIS team recovered personal items and papers, including legal material and other correspondence. The NCIS collected the written materials, not for immediate review by the investigative team, but for review at a later time due to the large volume of materials that was recovered and the need for translators. Approximately 1100 pounds of materials/documents were recovered during the searches. The materials collected from each detainee's cell and effects were separately bagged for eventual sorting and review.

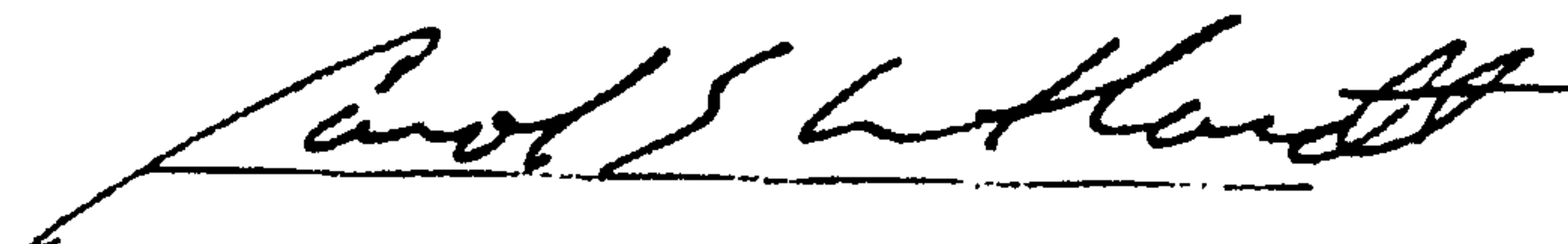
5. On 18 June 2006, NCIS personnel began sorting materials from bags pertaining to eleven detainees. This process involved separating Attorney Client Privileged information from non-privileged information, and conducting a preliminary scan of non-



privileged information for items that could be of evidentiary value. Several items were discovered that were deemed relevant to the investigation, including one that contained instructions on tying knots. In addition, in the materials recovered from one detainee's cell was an original JTF-GTMO generated email that appeared to contain classified or sensitive information regarding cell locations of detainees as well as details concerning camp operational matters. While examining other materials from the same detainee to determine whether there were other potentially classified U.S. Government documents, the NCIS investigators discovered three envelopes that were marked as attorney-client privileged information. I looked at the contents of the three envelopes and determined that one of them contained a document with a "Secret" stamp lined out and marked "Unclassified" by an unknown individual. A second envelope contained a typed document stamped "FOUO." The third envelope contained documents that did not bear any classification or special handling markings. Neither I nor any other member of the NCIS review team read any of the documents in the three envelopes. I then suspended further examination of the materials due to the volume of materials, the apparent multitude of foreign languages within the materials, and the need for guidance regarding the handling of purported attorney-client material.

I hereby declare under the penalties of perjury that the foregoing is true and correct to the best of my knowledge, information, and belief.

DATED: 7/5/06



Carol Kisthardt

**EXHIBIT C**

NCIS

ENCLOSURE (c7)9



**DECLARATION OF CAROL KISTHARDT**

Pursuant to 28 U.S.C. § 1746, I, Carol Kisthardt, hereby declare:

1. I am the Special Agent in Charge, Southeast Field Office, Naval Criminal Investigative Service ("NCIS"). I have served in this position since May 2004. In this capacity I supervise all NCIS investigations within the jurisdiction of the Southeast Field Office, which includes the U.S. Naval Base at Guantanamo Bay, Cuba. This declaration is provided to supplement, and correct certain information in, my prior 7 July 2006 declaration. The information provided in this declaration is based on my personal knowledge or information supplied to me in my official capacity.
2. As noted in my prior declaration on or about 14 June 2006, the Naval Criminal Investigative Service (NCIS) team involved in investigating the 10 June 2006 detainee suicides at the U.S. Naval Base at Guantanamo Bay, Cuba, recovered personal items and papers, including legal material and other correspondence, of enemy combatant detainees in the Guantanamo detention facility. Approximately 1100 pounds of materials/documents were recovered during the searches.
3. The materials collected from each detainee's cell and effects were separately bagged for eventual sorting and review. As material was recovered, it was placed into either clear, plastic, resealable bags (approximately 12 x 12 inches in size) or into paper bags and labeled with information identifying the detainee (for example, the detainee's ISN, camp, cell block, cell number). These bags were then placed in large, brown paper bags (approximately the size of grocery bags, 21 x 12 x 6.75 in inches). The bags were safeguarded by NCIS during the collection process by being placed in a locked van at the detention facility. The bags were then transported by NCIS personnel to NCIS office spaces on the Base and afterward placed in cardboard boxes that were sealed with tape.

The building is alarmed.

The NCIS office spaces within the building have their own controlled entry security system. The boxes were thereafter placed into and are now stored in a locked and alarmed NCIS evidence room inside the NCIS office spaces. Only NCIS personnel are permitted access to the evidence room, through designated evidence custodians.

4. As noted in my 7 July 2006 declaration, on 18 June 2006, NCIS personnel began sorting a number of bags of collected materials. My prior declaration erroneously stated, however, that "materials from bags pertaining to eleven detainees" were sorted. In fact, however, materials from eleven of the paper bags containing detainee-specific bags of materials were sorted. These eleven bags were taken from the larger total number of paper bags containing the collected materials. This error in my prior declaration resulted from an inadvertent oversight with respect to the wording of my prior declaration.

5. The nature of the sorting process of the eleven large paper bags of materials involved separating any documents or envelopes containing documents that appeared even remotely to be possible Attorney Client Privileged information from information that gave no indication of being privileged, and conducting a preliminary scan of non-privileged information for items that could be of evidentiary value. Items were discovered that are described in my prior declaration. As noted in my prior declaration, however, while examining other materials from the detainee who had possession of the JTF-GTMO generated e-mail discovered, the NCIS investigators participating in the sorting found three envelopes that were marked as attorney-client privileged information. I looked at the contents of the three envelopes as described in my prior declaration, though neither I nor any other member of the NCIS review team read any of the documents in the three envelopes. Also during the sorting process, some of the non-privileged information could not be assessed because it was written in languages for

which translators were not present on the review team. As noted in my prior declaration, after this initial attempt at sorting of materials, I suspended any further examination of the collected materials, including those that were part of the initial sorting, due to the overall volume of materials, the apparent multitude of foreign languages within the materials, and the need for guidance regarding the handling of purported attorney-client material. No further review of the documents contained within the bags of collected materials has taken place.

5. I estimate that the eleven large paper bags contained detainee-specific bags from approximately 155 detainees total. The large paper bags were selected for sorting because they appeared to be among the lightest and least full of all the large paper bags; I estimate that the bags constituted approximately 10% by weight of the approximately 1100 pounds of materials collected, or roughly 110 pounds.

I hereby declare under the penalties of perjury that the foregoing is true and correct to the best of my knowledge, information, and belief.

DATED: 11 AUG 06

  
Carol Kisthardt



## Filter Team Procedure

### I. Background

Various documents were seized from detainees by the Naval Criminal Investigative Service (NCIS) as part of an investigation into the apparently coordinated suicides of three detainees at Guantanamo Bay in June 2006. The investigation includes a determination of whether any other detainees or third parties were involved in encouraging, assisting or planning these or future suicide attempts by detainees. (See Declarations of Special Agent Carol Kisthardt and Admiral Harry Harris, at Appendix A).

Ultimately, NCIS seized all materials from the cells of many detainees. The 1,100 pounds of collected material includes paperwork and some of this paperwork is attorney-client privileged material (which includes communications between counsel and client as well as work product prepared by a detainee or counsel as part of the litigation). Before reviewing the paperwork (and thus reviewing attorney-client material), the government sought authorization from the federal court for its proposed review process.

The attorney-client privilege is a fundamental and important right in the American legal system. The United States District Court recognized, however, that the need to maintain safety and security within a wartime detention facility is also important. For this reason, the District Court judges overseeing some of the habeas cases have now authorized the government to review the seized documents that may be protected by the attorney-client privilege. Because other judges have not yet authorized the review for their cases, the materials of the detainees in those habeas cases should not be reviewed at this time. ~~A list of the detainees whose material can not be reviewed is found in~~  
~~Appendix B.~~

This review, however, must be conducted with procedures that safeguard the attorney-client privilege. (See Appendix C for the District Court opinion).

### II. Attorney Involvement with Detainees at Guantanamo

A variety of civilian and military attorneys have been provided access to detainees at Guantanamo over the past several years. Those attorneys have been meeting and communicating in writing with detainees through a "legal mail" process.

Starting in December 2003, military defense lawyers have been appointed to represent 10 detainees who have been charged with war crimes under the military commission process. (A list of the detainees who have commission cases pending and their attorneys has been provided to the Filter Litigation Team).

Starting in August 2004, civilian attorneys who represent detainees in federal habeas corpus proceedings have been permitted access to their clients at Guantanamo. (See Appendix D for a fact sheet regarding the history of the habeas corpus litigation. A list of the detainees who have habeas cases pending and their attorneys has been provided to the Filter Litigation Team). The attorneys' access to these detainees is governed by a Protective Order entered by the federal judges overseeing the habeas cases. (See Appendix E).

Although the members of the Filter Team must read and be familiar with the Amended Protective Order governing the habeas cases, the following information is highlighted:

- In order to have access to detainees at Guantanamo, all counsel (that terms includes attorneys, paralegals, translators, support staff, etc) must have a valid SECRET security clearance.
- Once the Protective Order has been entered in a habeas case, cleared counsel are permitted to correspond with their client through the "legal mail" process. The materials sent through this process are considered privileged and thus are not reviewed by the Department of Defense.

• ~~Legal mail is defined as written communication between a detainee and his or her counsel. It includes all documents, letters, and other materials that are sent through the legal mail process. The materials sent through this process are considered privileged and thus are not reviewed by the Department of Defense.~~

- The "legal mail" process cannot be used to send "correspondence or messages from a detainee to individuals other than his counsel (including family/friends or other attorneys)." Furthermore, "written ~~communications between a detainee and his or her counsel shall not include any information that is not necessary for the detainee's legal representation. This includes, but is not limited to, information that is classified, unclassified, or otherwise restricted by law, regulation, or policy. The legal mail process is not to be used to send information to the media or other individuals outside of the legal mail process.~~"

- When counsel send legal mail to their clients, the only inspection of the materials is for a search for physical contraband (weapons, drugs, etc). Once that inspection is completed, the envelope is marked "Legal Mail approved by Privilege Team" and it is delivered to the detainee at Guantanamo. When (and after) the "legal mail" is delivered to a detainee, it is not reviewed by government personnel.







events that threaten national security or involve imminent violence. Such information may be disclosed only to the Department of Justice Filter Litigation Team.

The Department of Justice Filter Litigation Team (FLT) will be responsible for handling all attorney-client privileged materials that threaten national security or involve imminent violence. It is essential that the Filter Team only disclose such materials to the FLT. The Filter Team's point of contact at the FLT will be \_\_\_\_\_ should only be contacted as follows:

<INSERT CONTACT INSTRUCTIONS HERE>

Each member of the Filter Team will be assigned a unique identification number. When indicating in the team's records who reviewed a document, never use the Filter Team member's actual name. Always use the Filter Team members' ID number. This precaution is necessary to protect the privacy of the Filter Team members.

Each member of the Filter Team, after reading these instructions and prior to reviewing any documents, must sign the statement on the final page of this packet.

#### IV. Document Review Instructions

1. Remove the paper items from the bag.
2. Apply Bates number to each document. The Bates-numbers should be applied to every page in a document on which any writings, markings, drawings, or other text appears. Apply the Bates-numbers in a location as close to the bottom right hand corner of the page as possible, without obstructing the content of the document.
3. Document review form must be filled out for each individual document. If a document includes one or more attachments, such as a letter from an attorney to a detainee that includes a newspaper article, treat the letter and the article as a single document. Blank document review forms will be provided and an example form appears in the appendix of these instructions.
4. Examine the document. Complete Document Review Form for each document. In completing the form, describe the document's content as accurately as possible. If the document contains information that is not available but must not disclose the communication contained in the document.

NCIS

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**5. Three questions must be answered for each document:**

- a. Does the document contain information pertaining to future events that threaten national security or involve imminent violence?**

**If so, alter the Filter Litigation Team immediately.**

- b. Is the document relevant to the NCIS investigation?**

- c. Is the document potentially protected by the attorney-client privilege?**

**Documents are potentially protected by attorney-client privilege if they are correspondence or other written material in the possession of a detainee that appears to have been provided to that detainee by his attorney or created by the detainee to provide to or communicate with his attorney.**

**Any materials created by the detainee that appear to be intended for his attorney will be processed as if they are attorney-client material. This may include hand-written notes on documents that would not be considered attorney-client privileged without the notes. Some documents prepared by the detainee will be written on paper that has been stamped with a marking indicating that the document is attorney-client privileged, even though the contents of the document would not be considered attorney-client privileged if it appeared on paper without the stamp. Such documents at the outset should be considered to be attorney-client material unless determined otherwise by further evaluation. See Appendix F for further guidance regarding the determination of attorney-client privilege.**

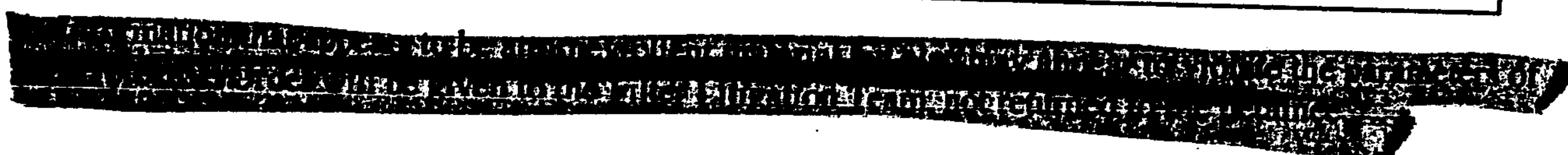
**Some material may appear to be attorney-client material but also may appear to violate the parameters of the Protective Order. If the information is also deemed to be relevant to the investigation, the Filter Team should inform the Filter Litigation Team of this apparent violation when forwarding the document. If the information is deemed to not be relevant to the investigation, the material should be forwarded to the Filter Litigation Team.**

**NOTE: When it is unclear whether or not a document should be considered attorney-client material, the document should be presumed to be privileged.**

6. For all documents that do not contain information relating to future acts of imminent violence or that threaten national security, sort the documents into four categories as noted below:

- a. **Category 1:** Documents that are relevant to the NCIS investigation *AND* are also attorney-client privileged.
- b. **Category 2:** Documents that are not relevant to the NCIS investigation but are attorney-client privileged.
- c. **Category 3:** Documents that are relevant to the NCIS investigation and are not attorney-client privileged.
- d. **Category 4:** Documents that are not relevant to the NCIS investigation and are not attorney-client privileged.

		Is the document relevant to the NCIS investigation?	
		Yes	No
Is the document protected by the Attorney-client privilege?	Yes	<b>Category 1</b> Relevant & Privileged (Contact Filter Litigation Team)	<b>Category 2*</b> Irrelevant & Privileged (Return to Detainee)
	No	<b>Category 3</b> Relevant & Not Privileged (Provide to NCIS)	<b>Category 4</b> Irrelevant & Not Privileged (Return to JTF-GTMO)



7. Indicate the Category into which the document was placed on the document review form and place the document with the other documents placed in the same Category.

8. The document review form has an additional place for the Filter Team member to indicate any other information, notes, or comments that are deemed relevant. The reviewer should indicate any contact that he/she has with individuals outside the Filter Team in regard to the document here. For instance, the reviewer might contact a member of NCIS to ask a clarifying question without revealing the content of a document. This contact must be indicated on the document review form.



9. Once all of the documents from a single detainee have been reviewed, secure all of the documents in each Category with a rubber band or other fastener as appropriate and place them in accordion redwell folders in preparation for transfer.

All of the document review forms should be arranged in the order of the Bates-numbers of the documents to which they pertain. Secure the forms with a fastener and placed the forms in their own redwell folder.

10. Either retain the documents or transfer the documents to the DOJ Filter Litigation Team, to NCIS, to the detainee, or to JTF-GTMO based on the Category, as required.<sup>1</sup>

**Category 1:**

The Filter Team will retain the Category 1 documents until it receives specific written instructions regarding their disclosure from the Department of Justice Filter Litigation Team (FLT).

The Filter Team must contact the FLT regarding all documents in Category 1, and may only disclose the documents or their contents to the FLT. The FLT will contact detainee's counsel for consent to disclosure of the documents to NCIS and/or will submit a filing under seal to the Court Security Officer (CSO) requesting permission for the documents to be disclosed to NCIS.

No disclosure of Category 1 documents may be made by the Filter Team prior to receiving documented consent of detainee's counsel or court approval.

- b. **Category 2:** If the information does not appear to violate the parameters of the Protective Order, the filter team must return all documents in Category 2 directly to the detainee. The documents should not be disclosed to JTF-GTMO command or to NCIS.

If it appears that the information violates the parameters of the Protective Order, the document must be forwarded to the Filter Litigation Team. The documents should not be disclosed to JTF-GTMO command or to NCIS.

**Category 3:**

The filter team should disclose all documents in Category 3 directly to NCIS. When NCIS has completed its investigation, the documents should be returned to JTF-GTMO for redistribution to the detainees to whom the documents belong, as appropriate.

- d. **Category 4:** The filter team should return all documents in Category 4 directly to JTF-GTMO. JTF-GTMO should return the documents to the detainees to whom the documents belong, as appropriate.

<sup>1</sup> Note that the NCIS agent members of the Filter Team will be responsible for the physical handling of the documents as part of mailing them to the appropriate receiving authority.

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11. Once the documents have been transferred out of the possession of the Filter Team, indicate on each document review form to whom the document was transferred and the date of transfer.

**Appendices:**

- A. Declarations of Special Agent Carol Kiskhardt and Admiral Harry Harris**
- B. List of detainees whose materials can be reviewed**
- C. Judge Robertson's Opinion regarding the review**
- D. Habeas litigation fact sheet**
- E. Habeas case protective order**
- F. Guidance regarding attorney-client determination**

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

Khadar v. Bush : Civil Action No. 04-1136 (JDB)  
Anam v. Bush : Civil Action No. 04-1194 (HHK)  
Abdah v. Bush : Civil Action No. 04-1254 (HHK)  
Al Qosi v. Bush : Civil Action No. 04-1937 (PLF)  
Paracha v. Bush : Civil Action No. 04-2022 (PLF)  
Deghayes v. Bush : Civil Action No. 04-2215 (RMC)  
Mustapha v. Bush : Civil Action No. 05-0022 (JR)  
Al Mohammed v. Bush : Civil Action No. 05-0247 (HHK)  
El-Mashad v. Bush : Civil Action No. 05-0270 (JR)  
Al-Wazan v. Bush : Civil Action No. 05-0329 (PLF)  
Al-Anazi v. Bush : Civil Action No. 05-0345 (JDB)  
Batarfi v. Bush : Civil Action No. 05-0409 (EGS)  
Qayed v. Bush : Civil Action No. 05-0454 (RMU)  
Al-Shihry v. Bush : Civil Action No. 05-0490 (PLF)  
Aziz v. Bush : Civil Action No. 05-0492 (JR)  
Al-Oshan v. Bush : Civil Action No. 05-0520 (RMU)  
Tumani v. Bush : Civil Action No. 05-0526 (RMU)  
Salahi v. Bush : Civil Action No. 05-0569 (JR)  
Errachidi v. Bush : Civil Action No. 05-0640 (EGS)  
Aboassy v. Bush : Civil Action No. 05-0748 (RMC)  
Habashi v. Bush : Civil Action No. 05-0765 (EGS)  
Khiali-Gul v. Bush : Civil Action No. 05-0877 (JR)  
Muhibullah v. Bush : Civil Action No. 05-0884 (RMC)

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Wahab v. Bush : Civil Action No. 05-0886 (EGS)  
Gul v. Bush : Civil Action No. 05-0888 (CKK)  
Sohail v. Bush : Civil Action No. 05-0993 (RMU)  
Tohirjanovich v. Bush : Civil Action No. 05-0994 (JDB)  
Al Karim v. Bush : Civil Action No. 05-0998 (RMU)  
Sarajuddin v. Bush : Civil Action No. 05-1000 (PLF)  
Mohammed v. Bush : Civil Action No. 05-1002 (EGS)  
Mangut v. Bush : Civil Action No. 05-1008 (JDB)  
Hamad v. Bush : Civil Action No. 05-1009 (JDB)  
Zuhoor v. Bush : Civil Action No. 05-1011 (JR)  
Al-Hela v. Bush : Civil Action No. 05-1048 (RMU)  
Mousovi v. Bush : Civil Action No. 05-1124 (RMC)  
Khalifh v. Bush : Civil Action No. 05-1189 (JR)  
Zalita v. Bush : Civil Action No. 05-1220 (RMU)  
Ahmed v. Bush : Civil Action No. 05-1234 (EGS)  
Ghalib v. Bush : Civil Action No. 05-1238 (CKK)  
Bukhari v. Bush : Civil Action No. 05-1241 (RMC)  
Saib v. Bush : Civil Action No. 05-1353 (RMC)  
Hatim v. Bush : Civil Action No. 05-1429 (RMU)  
Al-Subaiy v. Bush : Civil Action No. 05-1453 (RMU)  
Sadkhan v. Bush : Civil Action No. 05-1487 (RMC)  
Faizullah v. Bush : Civil Action No. 05-1489 (RMU)  
Faraj v. Bush : Civil Action No. 05-1490 (PLF)  
Khan v. Bush : Civil Action No. 05-1491 (JR)

Kiyemba v. Bush : Civil Action No. 05-1509 (RMU)  
Idris v. Bush : Civil Action No. 05-1555 (JR)  
Rabbani v. Bush : Civil Action No. 05-1607 (RMU)  
Almerfedi v. Bush : Civil Action No. 05-1645 (PLF)  
Kabir (Sadar Doe) v. Bush : Civil Action No. 05-1704 (JR)  
Al-Rubaish v. Bush : Civil Action No. 05-1714 (RWR)  
Al-Qahtani v. Bush : Civil Action No. 05-1971 (RMC)  
Alkhemisi v. Bush : Civil Action No. 05-1983 (RMU)  
Gamil v. Bush : Civil Action No. 05-2010 (JR)  
Al-Shabany v. Rumsfeld : Civil Action No. 05-2029 (JDB)  
Mohammed Othman v. Bush : Civil Action No. 05-2088 (RWR)  
Al-Mudafari v. Bush : Civil Action No. 05-2185 (JR)  
Alhag v. Bush : Civil Action No. 05-2199 (HHK)  
Al-Shimrani v. Bush : Civil Action No. 05-2249 (RMC)  
Al Sharbi v. Bush : Civil Action No. 05-2348 (EGS)  
Zadran v. Bush : Civil Action No. 05-2367 (RWR)  
Alsaaei v. Bush : Civil Action No. 05-2369 (RWR)  
Razakah v. Bush : Civil Action No. 05-2370 (EGS)  
Al-Ghizzawi v. Bush : Civil Action No. 05-2378 (JDB)  
Awad v. Bush : Civil Action No. 05-2379 (JR)  
Al Halmandy v. Bush : Civil Action No. 05-2385 (RMU)  
Al Salami v. Bush : Civil Action No. 05-2452 (PLF)  
Hussein v. Bush : Civil Action No. 05-2467 (PLF)  
Al-Delebany v. Bush : Civil Action No. 05-2477 (RMU)

Al-Harbi v. Bush : Civil Action No. 05-2479 (HHK)

MEMORANDUM ORDER

In each of the Guantanamo Bay habeas cases pending in this Court, the government has moved for approval of its plan for reviewing documents seized from detainees as part of an investigation of three apparently coordinated suicides in June 2006. The plan calls for the use of a "Filter Team," walled off from government investigators and prosecutors, that would review the seized materials and set aside anything arguably protected by the attorney-client privilege. The motion is strongly opposed by the petitioner detainees, many of whom have cross-moved for the return of documents that have been impounded, or for contempt sanctions, or both. After considering the briefs of the parties and reviewing the transcript of a lengthy hearing on the same motion before Judge Richard Leon in August 2006, I have decided to grant the government's motion. This ruling will be without prejudice to petitioners' cross-motions, which will be taken up and decided at a later time. The reasons for my decision are set forth below. My order will apply in each of the above-captioned cases.<sup>1</sup>

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<sup>1</sup>In the Guantanamo habeas cases assigned to them, Judges Friedman, Urbina, Sullivan, Kennedy, Kollar-Kotelly, Roberts, Bates and Collyer have transferred the government's motion to me for decision.



### BACKGROUND

In most of the Guantanamo habeas cases, communications between detainees and their counsel are governed by a protective order.<sup>1</sup> The protective order facilitates counsel's access to their detainee clients with an eye to protecting national security interests. Am. Prot. Order ¶ 2. It sets forth procedures for all contact between detainees and their counsel, as well as rules governing counsel's exposure to classified information. An implicit premise of the protective order is that communication between detainees and their counsel enjoys the protection of the attorney-client privilege. See Am. Prot. Order ¶ 28 (noting that the presence of security officials "shall not operate as a waiver of, limit, or otherwise render inapplicable, the attorney-client privilege or work product protections.").

Annexed to the protective order are Revised Procedures for Counsel Access. These procedures address the logistics of counsel visits and attorney-client mail in greater detail. Again, the attorney-client privilege is referenced only indirectly, such as in the definition of legal mail. See Am.

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<sup>1</sup>Amended Protective Order & Procedures for Counsel Access to Detainees at the U.S. Naval Base in Guantanamo Bay, Cuba ("Am. Prot. Order"), originally entered by Judge Joyce Hens Green in fourteen of the Guantanamo detainee cases. See Hamdan v. Rumsfeld, 04cv1519, Am. Prot. Order (Dkt. No. 58); Order (Dkt. No. 68). The Amended Protective Order has since been entered in the cases of most other habeas petitioners. See, e.g., Khalifah et al v. Bush et al, 05cv1189, Order (Dkt. No. 8).

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Prot. Order Ex. A.II.E. (legal mail includes "privileged documents"). Legal mail sent by counsel to detainees is to be opened by a "Privilege Team" that searches the mail for prohibited physical contraband. Compliant mail is to be forwarded to military personnel in sealed and marked envelopes; GTMO personnel are then to deliver these envelopes to the recipient detainee without opening them. Am. Prot. Order Ex. A. IV.A.3-4. The Revised Procedures also include rules for material that is taken in and out of legal meetings, classification review of information communicated by detainees to counsel, provision of paper for the drafting of legal mail by detainees, and the circumstances under which phone calls between detainees and counsel may be permitted.

On June 10, 2006, three Guantanamo detainees were discovered dead in their cells. Respt's Mot. For Procedures Related to Review of Certain Detainee Materials & Req. For Expedited Briefing at 3 ("Respt's Mot."). News reports suggest that the three detainees hanged themselves using torn bed sheets. Id.<sup>2</sup> The triple suicides were the most recent and extreme incidents in a string of detainee security violations at the Guantanamo Bay facility. On May 18, 2006, several detainees in a

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<sup>2</sup>Citations to the parties' pleadings incorporate the sources relied upon therein. Oddly, but perhaps to shield the names of witnesses having first-hand knowledge, the government's citations supporting the fact of the suicides are to media accounts.

communal housing facility ambushed and assaulted Guantanamo guards with makeshift weapons; on the same day, two Guantanamo Bay detainees overdosed on medications provided by the facility. Id. at 4. Guantanamo personnel have since uncovered systematic, unauthorized stockpiling of medications by detainees. Id.

The NCIS began investigating the apparent suicides immediately.<sup>3</sup> Declaration of Special Agent in Charge Carol Kisthardt ¶ 3 ("Kisthardt Decl."). Investigators started searching the cells of the deceased detainees. Id. They found what appeared to be handwritten suicide notes on the bodies of the three detainees. Id. Another handwritten note related to the suicides was discovered in a mesh wall of one of the deceased detainees' cells. Id. The note discovered in the wall was "written in Arabic on notepaper that had been stamped 'Attorney Client Privilege,'" and the name used by the author differed from the name of the deceased detainee who had lived in the cell.<sup>4</sup> Id.

Investigators then broadened their search to include other occupied cells in the same cellblock. Id. While searching

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<sup>3</sup>Since "the U.S. Navy has primary jurisdiction over Guantanamo Bay," the NCIS is responsible for criminal investigations into all deaths occurring at the Guantanamo Bay facility. Respt's Mot. at 4.

<sup>4</sup>Before discovering possible abuses of the legal mail system, JTF-GTMO authorities allowed habeas counsel to provide detainees with paper for drafting legal mail. Respt's Mot. at 5.



the cellblock, investigators discovered handwritten notes they believed to be relevant, "potentially authored by at least two of the deceased detainees," in the cell of a detainee other than the three suicide victims. According to Special Agent Kisthardt, many of these notes were written on stationery stamped with indicia of privilege: "Attorney-Client Communication," "Privileged and Confidential," etc. Id.

After discovering three notes on the bodies of the deceased, one suicide-related note in the cell one of the deceased, and a number of relevant notes in a fourth cell on the same cellblock, the NCIS decided to "expand the scope of the search." Id. ¶ 4. According to Special Agent Kisthardt, the purpose of the expanded search was to "pursue logical investigative leads concerning the deaths of the three detainees and to determine whether other suicides were planned or likely to be planned." Id. The expansion of the search was quite dramatic: NCIS investigators seized all materials from the cells of all detainees in the entire Guantanamo facility.<sup>5</sup> The materials collected weighed 1,100 pounds and included "personal

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<sup>5</sup>While this was unquestionably a massive search and seizure, it is not clear whether the seizure involved "all materials in all enemy combatant detainees' cells," as described in the government's motion, or "all handwritten materials in all enemy combatant detainees' cells" (emphasis added) as described in the affidavit of Carol Kisthardt. Compare Kisthardt Decl. ¶ 4 with Respt's Mot. at 6.

items and papers, including legal material and other correspondence." Id.

NCIS investigators sorted the seized materials and placed them into small bags labeled with detainee-identifying information such as inmate number, camp, cell block, and cell number. Supp. Dec. Carol Kisthardt ¶ 3 ("Kisthardt Supp. Decl."). These small bags were then put into grocery-sized paper bags. Id. Eventually the larger bags were taken to NCIS offices and placed in sealed cardboard boxes in a secure setting. Id. On June 18, 2006, NCIS investigators began sorting through the bags. Id. at ¶ 4.

The scope of the initial sort is the subject of some controversy. On July 7, 2006, the government represented that "materials from bags pertaining to eleven detainees" were sorted. Kisthardt Decl. ¶ 5. Over a month later, the government filed a Supplemental Memorandum correcting this assertion. In fact, the detainee-specific bags of "approximately 155 detainees" were searched. Kisthardt Supp. Decl. ¶ 5. Investigators had not searched the materials of eleven detainees, as originally claimed, but had searched eleven bags containing material belonging to 155 detainees. Id.

Materials contained in the first eleven grocery bags were sorted as follows: materials "that appeared even remotely to be possible Attorney Client Privileged information" were placed

in one pile, and materials with no indicia of privilege were placed in a second pile. Kisthardt Supp. Decl. ¶ 5. Materials deemed non-privileged were scanned for potential relevance to the suicide investigation. Id. Among the materials in this category, investigators discovered two items they considered relevant: a document containing information on tying knots, and, from a different cell, a "JTF-GTMO generated email that appeared to contain classified or sensitive information regarding cell locations of detainees as well as details concerning camp operational matters." Kisthardt Decl. ¶ 5. While searching through other materials taken from the cell in which the JTF-GTMO generated email had been found, NCIS found three envelopes marked attorney-client privileged. Id. Special Agent Kisthardt opened these envelopes and "looked at" but did not read the contents. Id. One contained a document with a "Secret" stamp crossed out and "Unclassified" written in its place, a second contained a document marked "FOUO" (presumably, for official use only), and a third contained documents without notable markings. Id. It was at this point that NCIS - faced with difficulties such as the multitude of languages represented in the documents, the large volume of materials, and the need for guidance in handling privileged materials - suspended further examination of the impounded materials. Id.



The government's own account of NCIS's activities paint a picture of an investigation that has been scattershot and disorganized. Not only did the government provide inconsistent accounts of what types of materials were impounded and the scope of its initial examination of those impounded materials, but it was more than a month before the government advised the court of its dramatic underestimate of the initial document review. Agent Kisthardt's attribution of this error to an "inadvertent oversight with respect to the wording of [the] prior declaration," Kisthardt Supp. Decl. ¶ 4, does not inspire confidence. Nor does Agent Kisthardt's explanation of how investigators chose the first eleven bags to sort: they were chosen because they "appeared to be among the lightest and least full." Id. ¶ 5. The petitioners' allegations of illogical, inconsistent, and perhaps improper activities on the part of NCIS up to this point are for another day, however. The question of whether and how NCIS may proceed from this point forward with its review of the 1,100 pounds of seized material is more pressing.

The government asks the Court to "establish procedures authorizing the review of impounded materials" that may be potentially subject to the attorney-client privilege and proposes the procedures it has in mind. Respt's Mot. at 1. A "Filter Team" would review and sort the impounded materials for relevance and for privilege. The Filter Team would have the same

qualifications required of the Privilege Team, Access Procedures §§ II.D, and would include Department of Defense attorneys or Navy JAG attorneys and "other personnel and translators who have not and will not take part in litigation or other proceedings involving detainees, and who will operate under appropriate non-disclosure obligations." Respt's Mot. at 1-2.

The Filter Team would sort through the impounded materials with the following mandates: (1) material found to be irrelevant to the NCIS investigation will be returned to the detainee "if privileged attorney-client communication, or, otherwise, to JTF-Guantanamo for appropriate action;" (2) material found to be non-privileged and potentially relevant will be turned over to NCIS investigators; (3) material found to be at least arguably privileged and potentially relevant will be presented to the court and to detainee's counsel: such material will not be disclosed to anyone else without consent of counsel or court authorization. Respt's Mot. at 10-11. Like the Privilege Team created by the Access Procedures, the Filter Team would be permitted to disclose immediately any information regarding "an immediate and substantial harm to national security" or "imminent acts of violence" to officials involved in responding to such violence. See Access Procedures §§ VII. A., D.-F.

#### JURISDICTION

Judge Leon's decision in Boumediene v. Bush, No. 04-1166, 2006 WL 2468077 (D.D.C. Aug. 28, 2006), was that, in those of his cases that are pending on appeal, he lacked jurisdiction to act; in cases in which the protective order was never entered, he had no basis on which to act; and, in cases that have been stayed pending the outcome of the overarching jurisdictional issues on appeal, prudential deference counseled against his exercise of jurisdiction. Id. at \*1.

The jurisdictional picture is admittedly cloudy. The Court of Appeals has several cases before it addressing the rights of detainees at Guantanamo. See, e.g., In re Guantanamo Detainee Cases, 355 F. Supp. 2d 443 (D.D.C. 2005), Khalid v. Bush, 355 F. Supp 2d 311 (D.D.C. 2005). Among the questions currently pending on appeal is the scope of the jurisdiction-stripping provisions of the Detainee Treatment Act of 2005 ("DTA"), signed into law on December 30, 2005, Pub.L. 109-148, 119 Stat. 2739, in light of the Supreme Court's decision in Hamdan v. Rumsfeld, 126 S. Ct. 2749 (2006).

The DTA, among other things, amended 28 U.S.C. § 2241 to eliminate federal court jurisdiction over the habeas petitions of Guantanamo detainees, DTA § 1005(e)(1), and vested exclusive jurisdiction in the Court of Appeals for the D.C. Circuit to review "final decision[s]" of military commissions or the combatant status review tribunals. Id. § 1005(e)(2), (3).



Following the enactment of the DTA, the government argued in the Court of Appeals that this court no longer had jurisdiction over any habeas claims filed by Guantanamo detainees. Detainees' counsel argued that the DTA's jurisdictional provisions do not apply to habeas petitions that were pending prior to the DTA's enactment. In June 2006, before the Court of Appeals could decide the issue, the Supreme Court handed down its Hamdan decision, holding, among other things, that section 1005(e)(1) of the DTA did not strip federal courts of all jurisdiction over habeas petitions pending prior to the DTA's enactment, at least not pending habeas cases, like Hamdan's, that do not challenge "final decision[s]" of military commissions or the combatant status review tribunals. Hamdan, 126 S. Ct. at 2769. However, the Court did not decide whether the DTA vested exclusive jurisdiction in the Court of Appeals over habeas cases pending before the enactment of the DTA that do challenge "final decision[s]" of military commissions or the combatant status review tribunals. Id. at 2769, n.14. Until this question is resolved, the jurisdiction of this court over pending habeas claims remains unclear.

Although the government has consistently challenged district court jurisdiction in the Guantanamo cases since the enactment of the DTA, it is the government that has come with these motions, seeking guidance "as a prophylactic matter." Mot.

Hr'g Tr. at 10, Aug. 16, 2006. The government's motion does not assert that the district court lacks jurisdiction to rule. Instead, it asserts that its request for a ruling is "without prejudice" to its jurisdictional position. Respt's Mot. at 2, n.3. Moreover, although the filing of an appeal is "an event of jurisdictional significance," Griggs v. Provident Consumer Discount Co., 459 U.S. 56, 58 (1982), district courts retain jurisdiction in appealed cases to deal with ancillary matters that do not impinge upon the subject of the appeal. "The filing of a notice of appeal...divests the district court of its control over those aspects of the case involved in the appeal." Id. (emphasis added). District courts retain jurisdiction over aspects of the case that are not involved in the appeal. See, e.g., United States v. Queen, 433 F.3d 1076, 1078 (8th Cir. 2006); Securities Industry Ass'n v. Board of Governors of Federal Reserve System, 628 F.Supp. 1438, 1440 n.1 (D.D.C. 1986) (district courts retain jurisdiction to issue orders regarding injunctions). See also 20 James Wm. Moore, Moore's Federal Practice, § 303.32[2][c] (3d ed.2006). The government's request to review detainee material is unrelated to the question of which court has jurisdiction to review the merits of petitioners' challenges to their detention.

The "prudential deference" rationale of Judge Leon's decision is acknowledged with respect, but my idea of prudence is

to give the government the guidance it seeks. If jurisdiction has been improperly asserted, the Court of Appeals will correct the error. If I do have jurisdiction, both sides will be better off having received judicial guidance sooner rather than later.

**ATTORNEY-CLIENT PRIVILEGE**

The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law. Upjohn Co. v. United States, 449 U.S. 383, 389 (1981); Hunt v. Blackburn, 128 U.S. 464, 470 (1888). The privilege exists to encourage "full and frank communication between attorneys and their clients." Upjohn, 449 U.S. at 389. The Supreme Court has long recognized that the privilege is "founded upon the necessity, in the interests and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure." Hunt, 128 U.S. at 470.

The privilege has been associated with the constitutional right of prisoners to have access to the courts, Bounds v. Smith, 430 U.S. 817 (1977); Lewis v. Casey, 518 U.S. 343 (1996), including the right of a prisoner to communicate privately with his attorney. Mann v. Reynolds, 46 F.3d 1055, 1061 (10th Cir. 1995) (invalidating prison policy preventing contact visits between inmates and attorneys because prison

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"policies will not be upheld if they unnecessarily abridge the defendant's meaningful access to his attorney and the courts. The opportunity to communicate privately with an attorney is an important part of that meaningful access." (quoting Ching v. Lewis, 895 F.2d 608, 609 (9th Cir.1990)); Bach v. Illinois, 504 F.2d 1100, 1102 (7th Cir.1974) ("An inmate's need for confidentiality in his communications with attorneys through whom he is attempting to redress his grievances is particularly important. We think that contact with an attorney and the opportunity to communicate privately is a vital ingredient to the effective assistance of counsel and access to the courts."); Adams v. Carlson, 488 F.2d 619, 631 (7th Cir. 1973) (recognizing "that the effective protection of access to counsel requires that the traditional privacy of the lawyer-client relationship be implemented in the prison context."); Goff v. Nix, 113 F.3d 887, 892 (8th Cir. 1997) ("The taking of an inmate's legal papers can be a constitutional violation when it infringes his right of access to the courts. The taking of legal papers will often (though perhaps not always) interfere with an inmate's right of access to the courts."); Davis v. Goord, 320 F.3d 346, 351 (2d Cir. 2003) ("Interference with legal mail implicates a prison inmate's rights to access to the courts and free speech as guaranteed by the First and Fourteenth Amendments to the U.S. Constitution.").

The question of whether non-citizen detainees at Guantanamo have any constitutional protections, and, if so, what they are, is also now before the Court of Appeals. See Khalid v. Bush, 355 F. Supp. 2d 311, 323 (D.D.C. 2005) (appeal pending); In re Guantanamo Detainee Cases, 355 F. Supp. 2d 443, 464 (D.D.C. 2005) (appeal pending). Even if these petitioners have no constitutional protections, however, the attorney-client privilege is of paramount importance for the promotion of "broader public interests in the observance of law and administration of justice." Swidler & Berlin v. United States, 524 U.S. 399, 403 (1998), quoting Upjohn, 449 U.S. at 389. The government indeed does not deny that petitioners have a right to counsel, or that the privilege is applicable at Guantanamo, nor has it challenged Judge Kollar-Kotelly's holding that it "is not entitled to unilaterally impose procedures that abrogate the attorney-client relationship and its concomitant attorney-client privilege covering communications between them." United States v. Al Odah, 346 F. Supp.2d 1, 5 (2004). The question, then, is not whether the attorney-client privilege exists at Guantanamo, but whether it is violated (or, using the petitioners' word, "abrogated") by the government's proposed procedures for reviewing detainee materials.

The scope of the attorney-client privilege is "guided by 'the principles of the common law . . . as interpreted by the

courts . . . in the light of reason and experience.'" Swidler at 403, citing Fed. Rule Evid. 501, Funk v. United States, 290 U.S. 371 (1933). Traditionally, the privilege applies to confidential communications between the client and his or her attorney made in order to obtain legal advice. Fisher v. United States, 425 U.S. 391, 403 (1976); 3 Jack B. Weinstein & Margaret A. Berger, Weinstein's Federal Evidence, § 503.10 (Joseph M. McLaughlin, ed., Matthew Bender 2d ed. 1997). The privilege covers much more than "any sort of admission of criminal wrongdoing," and includes "matters which the client would not wish divulged," Swidler at 408. There is no balancing test to define its contours. Id. at 409.

The privilege has limits, however. It protects "only those disclosures necessary to obtain informed legal advice which might not have been made absent the privilege," Fisher v. United States, 425 U.S. 391 (1976), and it "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." United States v. Goldberger & Dubin, P.C., 935 F.2d 501, 504 (2d Cir. 1991). Moreover, the privilege is subject to exceptions. The privilege does not apply to communications made in furtherance of committing a crime. United States v. Zolin, 491 U.S. 554, 562-63 (1989); Weinstein's Federal Evidence, § 503.31. It is also subject to a testamentary exception, under



which disclosure of otherwise privileged communications may be permitted after the client's death in order to settle disputes about the client's intent for his estate. Swidler, 524 U.S. at 405; Glover v. Patten, 165 U.S. 394, 406-408 (1897).<sup>1</sup>

The hearing before Judge Leon illuminated the kinds of documents currently in the possession of NCIS that may indeed be privileged. Mot. Hr'g Tr. at 66-68, Aug. 16, 2006.<sup>2</sup> Communications from attorneys to detainees are likely to be typed and easily identifiable as such. Harder to identify will be papers that are, or are intended to be, communications from detainees to their attorneys. These are likely to be handwritten in a language other than English. Some of them may bear the names and addresses of counsel, but others may be notes or journals, made for the purpose of communicating information to their attorneys. Id. Such documents would be difficult for

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<sup>1</sup>At least three other exceptions have been recognized. The privilege is inapplicable to communications relevant to a breach of duty between an attorney and client, to communications regarding an attested document to which the attorney is an attesting witness, and to communications relevant to a matter of common interest between joint clients, when offered in an action between the clients. See generally Weinstein's Federal Evidence, § 503.21, § 503.33-503.34.

<sup>2</sup>I believe it appropriate to take judicial notice of the proceedings before Judge Leon. Scheduling and conducting another hearing on ground he has already covered would consume time and resources unnecessarily.

anyone but the detainee and his lawyer to identify as a privileged communication, if indeed they are privileged.<sup>3</sup>

**PARTICULARIZED SHOWING VS. LEGITIMATE PENOLOGICAL INTEREST**

Petitioners' first objection to the government's proposed procedures is that the government has not made a specific, individualized showing that there is a sufficiently compelling justification for invading the privilege. Petitioners have cited no direct authority for the specific, individualized showing they say is required. They support their point only by analogy to cases addressing the crime-fraud exception to the attorney-client privilege. See, e.g., Pet. Opp. to Respt's Mot. at 15-16 (No. 04-1254 Dkt. No. 177) ("Pet. Opp.").

The crime-fraud cases are inapposite. They may become important at a later stage, if the filter team uncovers evidence that would support in camera review, see Zolin, 491 U.S. at 572, or the invocation of the crime-fraud exception. At this point, however, the correct question is whether the government has demonstrated a "legitimate penological interest" in seizing and

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<sup>3</sup>A question recently answered in the negative by the Second Circuit is whether notes intended for an attorney are privileged if their content has not yet been communicated to the attorney. The privilege requires an attorney-client communication. "A rule that recognizes a privilege for any writing made with an eye toward legal representation would be too broad...an outline of what a client wishes to discuss with counsel—and which is subsequently discussed with one's counsel—would seem to fit squarely within our understanding of the scope of the privilege." U.S. v. DeFonte, 441 F.3d 92, 94 (2d Cir. 2006) (emphasis added).

reviewing documents that may contain privilege, using procedures that may be expected to result in some inadvertent exposure of privileged material. Turner v. Safley, 482 U.S. 78, 89 (1987).

Courts have long deferred to actions of prison officials that are "reasonably related to legitimate penological interests." Kimberlin v. U.S. Dept. of Justice, 318 F.3d 228, 233 (D.C. Cir. 2003); Turner, 482 U.S. at 89; see also Overton v. Bazzetta, 593 U.S. 126 (2003) (courts owe "substantial deference to the professional judgment of prison administrators."). If and to the extent that constitutional protections are implicated by the government's proposed filter team review, a Turner-like analysis is instructive.

Most of the Turner test does not fit the context of these cases, but the "most important element" - a "valid, rational connection to the legitimate governmental interest put forward to justify it" - certainly does. Kimberlin, 318 F.3d at 233, quoting Amatel v. Reno, 156 F.3d 192, 196 (D.C. Cir. 1998), citing Turner, 482 U.S. at 89-90, (internal quotations omitted). The occasion of several closely-spaced incidents culminating in orchestrated suicides in a detainee population believed to be secretive and violent provoked a command decision to search every cell for documentary evidence of a widespread conspiratorial effort. The governmental interest, of course, is in discovering any plot and interdicting future incidents. The connection is



rational. This court will not second-guess the command decision.

The remaining elements of the Turner test have to do with identifying alternative means of exercising the "circumscribed right" and balancing the loss or diminution of that right against the cost to the prison of accommodating that right. Amatel v. Reno, 156 F.3d 192, 196 (D.C. Cir. 1998), citing Turner, 482 U.S. at 90. The "right" in this case - if the Turner test applies at all - would be the right of access to the courts. At worst, that right is burdened, or its exercise chilled, by the seizure and review of documents. Accommodating alternative means of exercising that right, by allowing petitioners' counsel or a special master to conduct an initial review of the impounded materials, would be logistically complex and - given the exigencies of the NCIS investigation - unacceptably time-consuming. For these reasons, I find that the proposed procedures are reasonably related to the legitimate penological interest in investigating the detainee suicides and thwarting future prison disruption.

#### **OBJECTIONS TO THE FILTER TEAM**

Petitioners next point out that "taint teams" are judicially disfavored. They cite and rely on Judge Koeltl's opinion and order in United States v. Stewart, 2002 WL 1300059 (S.D.N.Y. June 11, 2002), rejecting a government proposal for a

"privilege team" after considering the views of "at least three courts" that "opined, in retrospect, that the use of other methods of review would be better." The Stewart case involved a warrant to search materials in a law office, the possibility that privilege team lawyers would encounter privileged materials from their own (different) cases, and a relatively small volume of documents. Judge Koeltl did not conclude that a privilege team can never be an appropriate method for screening documents that may be privileged. His problem in that case, like the problem in these cases, was to fit the method of review to the situation. His solution -- to appoint a special master to do the job -- made sense in the context of the case before him.

The Sixth Circuit was more pointed in its recent opinion in In re Grand Jury Subpoenas 04-124-03 and 04-124-05, Nos. 05-2274/2275, \_\_ F.3d \_\_, 2006 WL 1915386, (6th Cir. 2006). Reviewing examples of both inadvertent and malicious violations of taint team non-disclosure rules and inaccuracies in privilege determinations, the court concluded that taint teams "pose a serious risk to holders of privilege." Id. at 10. In that case, targets of a grand jury fraud investigation were allowed to conduct a privilege review of documents before turning them over in response to a subpoena. At the outset of its discussion, however, the Sixth Circuit acknowledged that taint teams are typically used in "exigent circumstances" when the "potentially-

privileged documents are already in the government's possession" -- words that did not describe the case before it, but that do provide a reasonably accurate thumbnail sketch of the cases now before me. Id.

Petitioners are undoubtedly correct in arguing that the government's Filter Team will not be able to recognize privileged, possibly privileged, and non-privileged materials with complete accuracy. See Mot. Hr'g Tr. at 66-68. Consider the (likely abundant) example of notes handwritten in many languages. Even if these notes are all translated into English, it is unlikely to be evident whether they were made in preparation for a meeting with counsel, or actually communicated to counsel,<sup>4</sup> or memorialize a prior conversation with counsel. Even the most cautious of Filter Team attorneys is likely to make mistakes when faced with documents bearing no indicia of privilege.

No practical and effective alternative to the Filter Team has been proposed, however. The exigency of the NCIS investigation, the volume of materials, and the logistical problems of dealing with documents located at Guantanamo Bay (where counsel are from all over the United States mainland) all add up to a situation unlike that of any case that has been cited to me. Neither review by special masters nor pre-screening by

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<sup>4</sup>See US v. DeFonte, supra.



counsel for the detainees could be accomplished in a reasonable amount of time.<sup>5</sup>

#### CHILLING EFFECT

Petitioners contend that the proposed Filter Team review will chill attorney-client communications. Pet. Opp. at 14. The challenges facing the development of attorney-client relationships between counsel and Guantanamo detainees are acknowledged. Counsel who have undertaken such representation are performing a very significant public service, for which the Court and the entire legal community is grateful. The chilling effect point is duly noted. Some chill seems likely; the depth is debatable. It cannot be allowed, however, to trump the

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<sup>5</sup>There is no reason to think that a special master would be any more successful than a filter team at identifying privileged documents bearing no obvious privilege markings. Special masters are usually appointed when the materials for review "are not voluminous," and therefore are less useful in cases involving significant problems with time, manpower and multiple languages. United States v. Stewart, 2002 WL 1300059 (S.D.N.Y. June 11, 2002); Black v. United States, 172 F.R.D. 511 (S.D. Fla. 1997) (noting that when a Special Master was appointed to sort documents in a previous case, the initial review remained incomplete over two years after the seizure).

I have conducted no evidentiary hearing to assess the costs, complexity, and delays that would flow from choosing one of the alternative proposed by petitioners, and the subject was not explored in any detail in the hearings before Judge Leon. The government's cautionary concerns about the volume of material to be reviewed, the number of languages involved, and the prospect of delay, see, e.g., No. 04-1254, Dkt. No. 182 at 23-25, seem self-evidently to be well founded.

government's investigative requirements in this sensitive situation.

#### OBLIGATIONS OF THE FILTER TEAM

The government's motion will be granted in the language proposed by the government,<sup>6</sup> without filigree, but the government is cautioned that meticulous records must be kept regarding each document seized and reviewed, including records reflecting copies made of such documents, their distribution and use, and chains of custody. If privileged materials are inadvertently or improperly disclosed, Kastigar-like hearings, cf. Kastigar v. United States, 406 U.S. 441 (1972), may eventually be required. Note that, in this Circuit, while the inadvertent disclosure of attorney-client privileged material constitutes a complete waiver of the privilege, court-compelled disclosure does not. In re: Sealed Case, 877 F.2d 976, 980 (D.C. Cir. 1989). Note further that the existing protective order preserves the privilege in certain circumstances that would otherwise trigger a waiver, presumably in recognition of detainees' lack of control over their legal communications, Am. Prot. Order ¶ 28. To facilitate any later proceedings on petitioners' cross-motions, all documents that have already been disclosed to NCIS investigators should be marked and segregated.

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<sup>6</sup>In each of the cases assigned to me, the government's companion motion to expedite briefing will be marked as moot by the Clerk.

For the reasons set forth above, Respondents' Motion for Procedures Related to Review of Certain Detainee Materials is hereby **granted**, and it is

**ORDERED**

1. Respondents are hereby authorized to review any attorney-client communications between a Guantanamo Bay detainee and his counsel contained within the documents and materials pertaining to the detainee that have been impounded in connection with the investigation of the Naval Criminal Investigative Service related to detainee suicides of June 10, 2006. Such review shall be conducted by a Filter Team composed of Department of Defense attorneys, intelligence, or law enforcement personnel and translators 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 or administrative review board proceedings brought by or against the detainees.
2. A Filter Litigation Team is also hereby authorized. The Filter Litigation Team shall be composed of one or more Department of Justice attorneys who shall not take part or be involved in litigating the merits of the Guantanamo Bay detainee habeas cases or other cases brought by or against the detainees.
3. The Filter Team may disclose such attorney-client communications to the Filter Litigation Team.



4. The Filter Team and the Filter Litigation Team shall not disclose such attorney-client communications other than to the Court, except as permitted by counsel involved in the communication or by the Court. The Filter Team and the Filter Litigation Team, however, may disclose information pertaining to future events that threaten national security or involve imminent violence to the Commander, Joint Task Force-Guantanamo.

5. Filings made by the Filter Litigation Team containing or disclosing information not subject to disclosure under this Order shall be made under seal through the Court Security Officers ("CSOs") assigned to these cases. Such filings shall contain a conspicuous notation in substantially the following form, "Filed Under Seal - Contains Privileged Information." The CSOs shall not serve such filings on counsel for respondents, except as authorized by petitioners' counsel or the Court.

JAMES ROBERTSON  
United States District Judge

## Petitions for Habeas Corpus Brought by Guantanamo Detainees

### Background

- As of late June 2006, over 300 detainees at Guantanamo have petitions for habeas corpus pending in federal district court in Washington, D.C.<sup>1</sup>
  - The United States district courts are the trial courts of the federal court system. Within limits set by Congress and the Constitution, the district courts have jurisdiction to hear nearly all categories of federal cases, including both civil and criminal matters. There are 94 federal judicial districts, including at least one district in each state, the District of Columbia and Puerto Rico.
  - Most of the 15 district court judges have multiple habeas cases pending before them. There are over 200 cases pending (some include multiple detainees) and each case has at least one civilian counsel<sup>2</sup> who represents the detainee(s) in that case. Litigation in these cases has been stayed, pending a decision by the Court of Appeals (see below).
- Two cases have also been filed in the Court of Appeals for the District of Columbia Circuit, under the auspices of the Detainee Treatment Act. (See below).

### History of Guantanamo Habeas Cases

- By asking for this writ, the detainees are challenging the legal propriety of their custody.<sup>3</sup> A writ of habeas corpus is the procedure by which a federal court inquires into someone's detention and (potentially) issues an order directing government authorities to release the petitioner.
  - Habeas corpus petitions can be brought under the US Constitution and/or under the habeas corpus statute.<sup>4</sup>
- In June 2004, the Supreme Court held in *Rasul v. Bush* that the federal habeas statute permitted district courts to hear cases brought by detainees at Guantanamo.

<sup>1</sup> These petitions have been filed by detainees, as well as by "next friends" of the detainees (to include family members and fellow detainees). "Next friends" can file habeas petitions if the next friend has, among other things, a "significant relationship" to the petitioner. The government has moved to dismiss some of the next friend petitions brought by fellow detainees who clearly do not have a significant relationship to the detainee in question. Some of the judges have ruled against the government in these cases.

<sup>2</sup> The counsel all have US citizenship. Although foreign counsel are not explicitly prohibited from serving as counsel, it is unlikely many will meet the requirements imposed on counsel in these cases. They are required to apply for and receive a security clearance before they are allowed to communicate with detainees. Also, the lawyers must be admitted to practice in federal court in the District of Columbia and be licensed as attorneys in the United States. Foreign attorneys typically do not meet the licensing and admission criteria, nor do they qualify for US security clearances. Foreign counsel may unofficially assist the US counsel, as long as they are not provided access to classified information.

<sup>3</sup> Some detainees are also challenging the propriety of our military commission procedures. A separate fact sheet discusses that litigation.

<sup>4</sup> The habeas statute (28 U.S.C. § 2241) can be found at [http://www.access.gpo.gov/uscode/title28/partvi\\_chapter153.html](http://www.access.gpo.gov/uscode/title28/partvi_chapter153.html)



- The Court concluded that although the United States did not exercise “ultimate sovereignty” over Guantanamo, it does exercise “complete jurisdiction and control” over it by the express terms of its agreements with Cuba. Given that, the Court concluded that the habeas statute applies to individuals detained at Guantanamo.
- Following *Rasul*, the government filed “factual returns” in federal court.<sup>5</sup> A factual return for a detainee indicates the factual bases for his detention as an enemy combatant and consists of the record of his Combatant Status Review Tribunal (CSRT).<sup>6</sup>
- The government then moved to dismiss the habeas petitions on legal grounds, contending:
  - The President has the inherent authority to capture and detain enemy combatants in a time of war, as well as having Congress’ specific authorization to do so through the Authorization for the Use of Military Force.
  - The Constitution does not apply to detainees at Guantanamo and, even if it does, the CSRT procedures meet constitutional requirements of due process.
  - The detainees failed to state a claim under the Alien Tort Statute, international law and Army regulations.

#### Court Review of our Combatant Status Review Tribunals

- There is a dispute about whether the Supreme Court’s opinion also stands for the proposition that detainees have constitutional rights, due to some arguably ambiguous language. This has led to conflicting rulings by two district court judges who reviewed the CSRT procedures in January 2005.<sup>7</sup>
  - Judge Leon concluded that “There is no basis in the Constitution, or in history, for according aliens captured by the military outside the United States and classified as enemy combatants ‘due process’ rights under the Constitution, based on the mere fact that they are confined—for operational and security reasons—on foreign property that has been leased by the United States.” He then dismissed the habeas petitions pending before him.<sup>8</sup>

<sup>5</sup> Some judges have not yet required the government to file factual returns, due to the pending litigation regarding the propriety of our CSRT procedures. For those cases where we have filed factual returns, unclassified versions are filed on the court’s public website, while classified versions are made available to the judges and counsel for the detainees. An account is necessary to access the court’s public website. See <http://www.dcd.uscourts.gov/ecf.html>.

<sup>6</sup> All detainees held by the Department of Defense at Guantanamo had a CSRT proceeding between August 2004 and January 2005. A total of 558 CSRTs were held. These CSRTs are designed to provide the detainees with notice of the basis for their detention as enemy combatants and a forum to contest their status. The Deputy Secretary of Defense’s order establishing the CSRTs and a summary of the overall process can be found at <http://www.defenselink.mil/releases/2004/nr20040707-0992.html>. The extensive procedures for the CSRTs can be found at <http://www.defenselink.mil/releases/2004/nr20040730-1072.html> and in a separate fact sheet.

<sup>7</sup> Technically, the two opinions by Judge Green and Judge Leon that are discussed below cover only 13 of the 200+ habeas cases pending in district court. However, litigation in the other cases has been stayed pending the Court of Appeals resolution of the issues raised in those conflicting opinions.

<sup>8</sup> His complete opinion can be found at <http://www.dcd.uscourts.gov/opinions/2005/Leon/2004-CV-1142-7:40:40-3-2-2005-a.pdf>.



- Several weeks later, Judge Green reached a different conclusion.<sup>9</sup> She held that the detainees are entitled to due process under the Fifth Amendment to the Constitution<sup>10</sup> and that our CSRT procedures were constitutionally deficient in two respects.
  - In all cases, the process is fundamentally unfair because it relies on classified information not disclosed to the detainee.
    - If the government chooses to not disclose classified information to detainees, it must permit a counsel to have access to that information and to advocate on behalf of the detainee at his hearing.
  - In some cases, the process is also problematic because the CSRT may have relied on statements possibly obtained through “torture or other coercion” and because the CSRT process uses a “vague and overly broad” definition of “enemy combatant” that appears to permit the unlawful detention of some detainees.
- These cases were consolidated and appealed to the U.S. Court of Appeals for the District of Columbia Circuit.<sup>11</sup> The cases were argued on September 8, 2005 and a decision is pending.<sup>12</sup>

#### Recently Enacted Legislation and its Effect on the Litigation

- On December 30, 2005, the President signed into law the “Detainee Treatment Act of 2005.”<sup>13</sup> Among other things, the law amended the federal habeas statute to eliminate the jurisdiction of the district courts over habeas cases brought by Guantanamo detainees.
  - The Act states that “no court, justice or judge shall have jurisdiction to hear or consider” any habeas claim filed by an alien detainee held by the Department of Defense at Guantanamo or any other claim (e.g., a tort claim) regarding his detention there if:
    - The detainee is in military custody, or

<sup>9</sup> Her complete opinion can be found at <http://www.dcd.uscourts.gov/opinions/2005/Green/2002-CV-299~8:57:59~3-2-2005-a.pdf>.

<sup>10</sup> She also held that Taliban detainees have valid habeas claims under the Geneva Convention.

<sup>11</sup> The 94 U.S. judicial districts are organized into 12 regional circuits, each of which has a United States court of appeals. A court of appeals hears appeals from the district courts located within its circuit, as well as appeals from decisions of federal administrative agencies.

<sup>12</sup> Technically, the opinions issued by Judges Green and Leon only covered the habeas cases pending before them when they heard argument in the case. However, due to the pending Court of Appeals decision, the other district court judges have issued stays in their cases until that decision is issued.

<sup>13</sup> This was passed as part of the National Defense Authorization Act for Fiscal Year 2006 and the “Department of Defense Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico and Pandemic Influenza Act of 2006.” The complete Act can be found at <http://thomas.loc.gov/cgi-bin/query/F?c109:3:./temp/~c109rMxKrF:e1097237>.

- The detainee is found to be an enemy combatant through the new review process created by the Detainee Treatment Act.
- The “new review process” in the Act provides that the Court of Appeals will have “exclusive jurisdiction” to review the validity of any final CSRT determination regarding the enemy combatant status of a detainee.
- The law specifically permits the Court of Appeals to resolve the legal issues presented in the Green-Leon appeal: whether the detainees have constitutional due process or other federal right, and, if so, whether the CSRT process comports with those rights.
- In response to this legislation, the U.S. Supreme Court ordered supplemental briefing on addressing the effect of the Detainee Treatment Act on its pending decision and heard oral argument on March 28, 2006 as part of the *Hamdan* litigation regarding military commissions. On June 28, 2006, the Supreme Court ruled, among other things, that aspects of the Detainee Treatment Act did not apply retroactively to cases involving challenges to the military commission process.
- As part of the Green-Leon appeal, the Court of Appeals had also ordered supplemental briefing on the Detainee Treatment Act and heard oral argument on March 22, 2006. Its ruling on this issue (and the other issues in the case) can be issued at any time.
- In the meantime, two cases have been filed as original cases with the Court of Appeals. They are recently-filed cases on behalf of detainees who had never previously filed habeas cases and thus are filed with the Court of Appeals, as required by the Detainee Treatment Act.

#### **Collateral Litigation Filed by Detainees**

- As part of their habeas cases, some detainees have filed motions on issues relating to their medical treatment, interrogations, the physical conditions of their detention and other collateral issues.
  - Many of these motions include factual assertions made by detainees and/or their counsel that are untrue.
- In most cases, the federal judges have either denied these motions or have declined to rule at all. Given the uncertainty of whether the detainee legislation has removed their jurisdiction over these cases, the district court judges are unlikely to make any substantive rulings until that issue is resolved by the Court of Appeals.



**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

*In re Guantanamo Detainee Cases*

Civil Action Nos.  
02-CV-0299 (CKK), 02-CV-0828 (CKK),  
02-CV-1130 (CKK), 04-CV-1135 (ESH),  
04-CV-1136 (JDB), 04-CV-1137 (RMC),  
04-CV-1142 (RJL), 04-CV-1144 (RWR),  
04-CV-1164 (RBW), 04-CV-1166 (RJL),  
04-CV-1194 (HHK), 04-CV-1227 (RBW),  
04-CV-1254 (HHK), 04-CV-1519 (JR)

**AMENDED PROTECTIVE ORDER AND PROCEDURES FOR COUNSEL ACCESS  
TO DETAINEES AT THE UNITED STATES NAVAL BASE  
IN GUANTANAMO BAY, CUBA**

This matter comes before the Court upon Respondents' Motion for Protective Order to prevent the unauthorized disclosure or dissemination of classified national security information and other protected information that may be reviewed by, made available to, or are otherwise in the possession of, the petitioners and/or petitioners' counsel in these coordinated cases. Pursuant to the general supervisory authority of the Court, in order to protect the national security, and for good cause shown,

**IT IS ORDERED:**

1. The Court finds that these cases involve classified national security information or documents, the storage, handling and control of which require special security precautions, and access to which requires a security clearance and a "need to know." These cases may also involve other protected information or documents, the storage, handling and control of which may require special precautions in order to protect the security of United States government personnel and facilities, and other significant government interests.

2. The purpose of this Protective Order is to establish the procedures that must be followed by all petitioners' counsel, their respective petitioner(s), all other counsel involved in



these cases, translators for the parties, and all other individuals who receive access to classified national security information or documents, or other protected information or documents, in connection with these cases, including the privilege team as defined in Exhibit A.

3. The procedures set forth in this Protective Order will apply to all aspects of these cases, and may be modified by further order of the Court *sua sponte* or upon application by any party. The Court will retain continuing jurisdiction to enforce or modify the terms of this Order.

4. Nothing in this Order is intended to or does preclude the use of classified information by the government as otherwise authorized by law outside of these actions.

5. Petitioners' counsel shall be responsible for advising their employees, the petitioners, and others of the contents of this Protective Order, as appropriate or needed.

6. Petitioners' counsel are bound by the terms and conditions set forth in the "Revised Procedures For Counsel Access To Detainees At the U.S. Naval Base In Guantanamo Bay, Cuba," and the procedures for handling mail and documents brought into and out of counsel meetings, attached hereto as Exhibit A. This Protective Order specifically incorporates by reference all terms and conditions established in the procedures contained in Exhibit A to the extent they place limitations on petitioners' counsel in their access to and interaction with petitioners or handling of information. Any violation of the terms and conditions of those procedures will also be deemed a violation of this Protective Order. This paragraph does not apply with respect to provisions in the procedures contained in Exhibit A that are or have been overridden by the Court.

7. The privilege team shall not disclose to any person any information provided by counsel for a petitioner or by a petitioner, other than information provided in a filing with the Court, unless such information, if it were monitored information, could be disclosed under Section X of Exhibit A. Such disclosure shall be consistent with the provisions of Section X of Exhibit A.

### Definitions

8. As used herein, the words "documents" or "information" shall include, but are not limited to, all written or printed matter of any kind, formal or informal, including originals, conforming copies and non-conforming copies (whether different from the original by reason of notation made on such copies or otherwise), and further include, but are not limited to:

a. papers, correspondence, memoranda, notes, letters, reports, summaries, photographs, maps, charts, graphs, interoffice and intra-office communications, notations of any sort concerning conversations, meetings, or other communications, bulletins, teletypes, telegrams, telefacsimiles, invoices, worksheets, and drafts, alterations, modifications, changes and amendments of any kind to the foregoing;

b. graphic or oral records or representations of any kind, including, but not limited to, photographs, charts, graphs, microfiche, microfilm, videotapes, sound recordings of any kind, and motion pictures;

c. electronic, mechanical or electric records of any kind, including, but not limited to, tapes, cassettes, disks, recordings, electronic mail, films, typewriter ribbons, word processing or other computer tapes or disks, and all manner of electronic data processing storage; and

d. information acquired orally.

9. The terms "classified national security information and/or documents," "classified information" and "classified documents" refer to:

a. any classified document or information that has been classified by any Executive Branch agency in the interests of national security or pursuant to Executive Order, including Executive Order 12958, as amended, or its predecessor Orders as "CONFIDENTIAL," "SECRET," or "TOP SECRET," or additionally controlled as "SENSITIVE

COMPARTMENTED INFORMATION (SCI),” or any classified information contained in such document;

b. any document or information, regardless of its physical form or characteristics, now or formerly in the possession of a private party that has been derived from United States government information that was classified, regardless of whether such document or information has subsequently been classified by the government pursuant to Executive Order, including Executive Order 12958, as amended, or its predecessor Orders as “CONFIDENTIAL,” “SECRET,” or “TOP SECRET,” or additionally controlled as “SENSITIVE COMPARTMENTED INFORMATION (SCI)”;

c. verbal or non-documentary classified information known to the petitioner or petitioners’ counsel; or

d. any document and information as to which the petitioner or petitioners’ counsel have been notified orally or in writing that such documents or information contains classified information.

10. All classified documents, and information contained therein, shall remain classified unless the documents bear a clear indication that they have been declassified by the agency or department that is the original classification authority of the document or the information contained therein (hereinafter, the “original classification authority”).

11. The terms “protected information and/or documents,” “protected information” and “protected documents” refer to any document or information deemed by the Court, either upon application by counsel or *sua sponte*, as worthy of special treatment as if the document or information were classified, even if the document or information has not been formally deemed to be classified.

12. For purposes of this Protective Order, “petitioners’ counsel” shall be defined to include an attorney who is employed or retained by or on behalf of a petitioner for purposes of



representing the petitioner in habeas corpus or other litigation in federal court in the United States, as well as co-counsel, interpreters, translators, paralegals, investigators and all other personnel or support staff employed or engaged to assist in the litigation.

13. "Access to classified information" or "access to protected information" shall mean having access to, reviewing, reading, learning, or otherwise coming to know in any manner any classified information or protected information.

14. "Secure area" shall mean a physical facility accredited or approved for the storage, handling, and control of classified information.

15. "Unauthorized disclosure of classified information" shall mean any knowing, willful or negligent action that could reasonably be expected to result in a communication or physical transfer of classified information to an unauthorized recipient.

Designation of Court Security Officer

16. The Court designates Christine E. Gunning as Court Security Officer for these cases, and Joan B. Kendrall, Michael P. Macisso, James P. Londergan, Mary M. Cradlin, Daniel O. Hartenstine, John P. Molinard, Jennifer Campbell, and Barbara J. Russell as Alternate Court Security Officers, for the purpose of providing security arrangements necessary to protect from unauthorized disclosure of any classified documents or information, or protected documents or information, to be made available in connection with these cases. Petitioners' counsel shall seek guidance from the Court Security Officer with regard to appropriate storage, handling, transmittal, and use of classified documents or information.

Access to Classified Information and Documents

17. Without authorization from the government, no petitioner or petitioners' counsel shall have access to any classified information involved in these cases unless that person shall first have:

- a. made a written submission to the Court Security Officer precisely stating the reasons why counsel has a need to know the classified information requested; and
- b. received the necessary security clearance as determined by the Department of Justice Security Officer; and
- c. signed the Memorandum of Understanding ("MOU"), attached hereto as Exhibit B, agreeing to comply with the terms of this Protective Order.

The written submissions that are made by counsel to the Court Security Officer stating the reasons why counsel has a need to know the classified information requested shall be kept confidential by the Court Security Officer and shall not be disclosed to any other counsel or party to these cases unless the Court specifically orders such disclosure.

18. Petitioners' counsel to be provided access to classified information shall execute the MOU appended to this Protective Order, and shall file executed originals with the Court and submit copies to the Court Security Officer and counsel for the government. The execution and submission of the MOU is a condition precedent for petitioners' counsel to have access to, or continued access to, classified information for the purposes of this proceeding.

19. The substitution, departure, or removal of petitioners' counsel from these cases for any reason shall not release that person from the provisions of this Protective Order or the MOU executed in connection with this Order.

20. The government shall arrange for one appropriately approved secure area for the use of petitioners' counsel. The secure area shall contain a working area that will be supplied with secure office equipment reasonable and necessary to the preparation of the petitioners' case. Expenses for the secure area and its equipment shall be borne by the government.

21. The Court Security Officer shall establish procedures to ensure that the secure area is accessible to the petitioners' counsel during normal business hours and at other times on reasonable request as approved by the Court Security Officer. The Court Security Officer shall establish procedures to ensure that the secure area may be maintained and operated in the most efficient manner consistent with the protection of classified information. The Court Security Officer or Court Security Officer designee may place reasonable and necessary restrictions on the schedule of use of the secure area in order to accommodate appropriate access to all petitioners' counsel in this and other proceedings.

22. All classified information provided by the government to counsel for petitioners, and all classified information otherwise possessed or maintained by petitioners' counsel, shall be stored, maintained, and used only in the secure area.

23. No documents containing classified information may be removed from the secure area unless authorized by the Court Security Officer or Court Security Officer designee supervising the area.

24. Consistent with other provisions of this Protective Order, petitioners' counsel shall have access to the classified information made available to them in the secure area, and shall be allowed to take notes and prepare documents with respect to those materials.

25. Petitioners' counsel shall not copy or reproduce any classified information in any form, except with the approval of the Court Security Officer or in accordance with the procedures established by the Court Security Officer for the operation of the secure area.



26. All documents prepared by petitioners or petitioners' counsel that do or may contain classified information (including without limitation, notes taken or memoranda prepared by counsel and pleadings or other documents intended for filing with the Court) shall be transcribed, recorded, typed, duplicated, copied, or otherwise prepared only by persons who have received an appropriate approval for access to classified information. Such activities shall take place in the secure area on approved word processing equipment and in accordance with the procedures approved by the Court Security Officer. All such documents and any associated materials containing classified information (such as notes, memoranda, drafts, copies, typewriter ribbons, magnetic recordings, exhibits) shall be maintained in the secure area unless and until the Court Security Officer advises that those documents or associated materials are unclassified in their entirety. None of these materials shall be disclosed to counsel for the government unless authorized by the Court, by petitioners' counsel or as otherwise provided in this Protective Order.

27. Petitioners' counsel shall discuss classified information only within the secure area or in another area authorized by the Court Security Officer, shall not discuss classified information over any standard commercial telephone instrument or office intercommunication system, and shall not transmit or discuss classified information in electronic mail communications of any kind.

28. The Court Security Officer or Court Security Officer designee shall not reveal to any person the content of any conversations she or he may hear by or among petitioners' counsel, nor reveal the nature of documents being reviewed by them, or the work generated by them, except as necessary to report violations of this Protective Order to the Court or to carry out their duties pursuant to this Order. In addition, the presence of the Court Security Officer or Court Security Officer designee shall not operate as a waiver of, limit, or otherwise render inapplicable, the attorney-client privilege or work product protections.

29. Petitioners' counsel shall not disclose the contents of any classified documents or information to any person, including counsel in related cases brought by Guantanamo Bay detainees in this or other courts, except those authorized pursuant to this Protective Order, the Court, and counsel for the government with the appropriate clearances and the need to know that information. Except as otherwise specifically provided by Judge Colleen Kollar-Kotelly in her well-reasoned opinion addressing counsel access procedures regarding petitioners Mohammed Ahmed al Kandari, Fawzi Khalid Abdullah Fahad al Odah, and Khalid Abdullah Mishal al Mutairi in Al Odah v. United States, 02-CV-0828 (CKK), counsel for petitioners in these cases are presumed to have a "need to know" information both in their own cases and in related cases pending before this Court. Therefore, and except as provided with respect to the three petitioners in Al Odah mentioned above, counsel for all petitioners in these cases who have satisfied all necessary prerequisites and follow all procedures set forth herein may share and discuss among themselves classified information to the extent necessary for the effective representation of their clients. Counsel for respondents may challenge the "need to know" presumption on a case-by-case basis for good cause shown.

30. Petitioners' counsel shall not disclose classified information not provided by petitioner-detainee to that petitioner-detainee. Should petitioners' counsel desire to disclose classified information not provided by petitioner-detainee to that petitioner-detainee, petitioners' counsel will provide in writing to the privilege review team (See Exhibit A) a request for release clearly stating the classified information they seek to release. The privilege review team will forward the petitioner counsel's request to the appropriate government agency authorized to declassify the classified information for a determination. The privilege review team will inform petitioners' counsel of the determination once it is made.

31. No petitioner or counsel for petitioner shall disclose or cause to be disclosed any information known or believed to be classified in connection with any hearing or proceeding in these cases except as otherwise provided herein.

32. Except as otherwise stated in this paragraph and to ensure the security of the United States of America, at no time, including any period subsequent to the conclusion of the proceedings, shall petitioners' counsel make any public or private statements disclosing any classified information or documents accessed pursuant to this Protective Order, including the fact that any such information or documents are classified. In the event that classified information enters the public domain, however, counsel is not precluded from making private or public statements about the information already in the public domain, but only to the extent that the information is in fact in the public domain. Counsel may not make any public or private statements revealing personal knowledge from non-public sources regarding the classified or protected status of the information or disclosing that counsel had personal access to classified or protected information confirming, contradicting, or otherwise relating to the information already in the public domain. In an abundance of caution and to help ensure clarity on this matter, the Court emphasizes that counsel shall not be the source of any classified or protected information entering the public domain.

As stated in more detail in paragraph 49 below, failure to comply with these rules may result in the revocation of counsel's security clearance as well as civil and/or criminal liability.

33. The foregoing shall not prohibit petitioners' counsel from citing or repeating information in the public domain that petitioners' counsel does not know to be classified information or a classified document, or derived from classified information or a classified document.

34. All documents containing classified information prepared, possessed or maintained by, or provided to, petitioners' counsel (except filings submitted to the Court and



served on counsel for the government), shall remain at all times in the control of the Court Security Officer for the duration of these cases. Upon final resolution of these cases, including all appeals, all such documents shall be destroyed by the Court Security Officer.

**Access to Protected Information and Documents**

35. Without authorization from the government or the Court, protected information shall not be disclosed or distributed to any person or entity other than the following:

- a. petitioners' counsel, provided such individuals have signed the Acknowledgment, attached hereto as Exhibit C, attesting to the fact that they have read this Protective Order and agree to be bound by its terms; and
- b. the Court and its support personnel.

36. The execution of the Acknowledgment is a condition precedent for petitioners' counsel to have access to, or continued access to, protected information for the purposes of this proceeding. A copy of each executed Acknowledgment shall be kept by counsel making the disclosure until thirty (30) days after the termination of this action, including appeals.

37. The substitution, departure, or removal of petitioners' counsel from these cases for any reason shall not release that person from the provisions of this Protective Order or the Acknowledgment executed in connection with this Protective Order.

38. Petitioners' counsel shall not disclose the contents of any protected documents or information to any person, to include counsel in related cases brought by Guantanamo Bay detainees in this or other courts, except those authorized pursuant to this Protective Order, the Court, or counsel for the government. Except as otherwise specifically provided by Judge Colleen Kollar-Kotelly with respect to counsel for petitioners Mohammed Ahmed al Kandari, Fawzi Khalid Abdullah Fahad al Odah, and Khalid Abdullah Mishal al Mutairi in Al Odah v. United States, 02-CV-0828 (CKK), counsel for petitioners in these coordinated cases may share protected information with each other but only to the extent that counsel have appropriate

security clearances and that all other procedures set forth in this Protective Order are complied with. Petitioners' counsel shall maintain all protected information and documents received through this proceeding in a confidential manner.

39. Petitioners' counsel shall not disclose protected information not provided by petitioner-detainee to that petitioner-detainee without prior concurrence of counsel for the government or express permission of the Court.

40. No petitioner or counsel for petitioner shall disclose or cause to be disclosed any information known or believed to be protected in connection with any hearing or proceeding in these cases except as otherwise provided herein.

41. At no time, including any period subsequent to the conclusion of the proceedings, will petitioners' counsel make any public or private statements disclosing any protected information or documents accessed pursuant to this Protective Order, including the fact that any such information or documents are protected.

42. Protected information shall be used only for purposes directly related to these cases and not for any other litigation or proceeding, except by leave of the Court. Photocopies of documents containing such information shall be made only to the extent necessary to facilitate the permitted use hereunder.

43. Nothing in this Protective Order shall prevent the government from using for any purpose protected information it provides a party. Nothing in this Protective Order shall entitle another party to protected information.

44. Supplying protected information to another party does not waive privilege with respect to any person or use outside that permitted by this Protective Order.

45. Within sixty (60) days of the resolution of these actions, and the termination of any appeals therefrom, all protected documents or information, and any copies thereof, shall be promptly destroyed, provided that the party to whom protected information is disclosed certifies

in writing that all designated documents and materials have been destroyed, and further provided that counsel for the government may retain one complete set of any such materials that were presented in any form to the Court. Any such retained materials shall be placed in an envelope or envelopes marked "Protected Information Subject to Protective Order." In any subsequent or collateral proceeding, a party may seek discovery of such materials from the government, without prejudice to the government's right to oppose such discovery or its ability to dispose of the materials pursuant to its general document retention policies.

Procedures for Filing Documents

46. Until further order of this Court, any pleadings or other document filed by a petitioner shall be filed under seal with the Court through the Court Security Officer unless the petitioner has obtained from the Court Security Officer permission, specific to a particular, non-substantive pleading or document (e.g., motions for extensions of time, continuances, scheduling matters, etc.) not containing information that is or may be classified or protected, to file the pleading or document not under seal. The date and time of physical submission to the Court Security Officer shall be considered the date and time of filing with the Court. The Court Security Officer shall promptly examine the pleading or document and forward it to the appropriate agencies for their determination whether the pleading or document contains classified information. If it is determined that the pleading or document contains classified information, the Court Security Officer shall ensure that portion of the document, and only that portion, is marked with the appropriate classification marking and that the document remains under seal. If it is determined that the pleading or document contains protected information, the Court Security Officer shall ensure that portion of the document, and only that portion, remains under seal. Any document filed by petitioner that is determined not to contain classified information or protected information, and is not subject to any other restrictions on disclosure, shall immediately be unsealed by the Court Security Officer and placed in the public record. The Court Security



Officer shall immediately deliver under seal to the Court and counsel for the government any pleading or document to be filed by petitioners that contains classified information or protected information. The Court shall then direct the clerk to enter on the docket sheet the title of the pleading or document, the date it was filed, and the fact that it has been filed under seal with the Court Security Officer.

47. Any pleading or other document filed by the government containing classified information shall be filed under seal with the Court through the Court Security Officer. The date and time of physical submission to the Court Security Officer shall be considered the date and time of filing with the Court. The Court Security Officer shall serve a copy of any classified pleadings by the government upon the Petitioner at the secure facility.

48. Nothing herein shall require the government to disclose classified or protected information. Nor shall anything herein prohibit the government from submitting classified information or protected information to the Court *in camera* or *ex parte* in these proceedings, or entitle petitioners or petitioners' counsel access to such submissions or information. Except for good cause shown in the filing, the government shall provide counsel for the petitioner or petitioners with notice served on such counsel on the date of the filing.

#### Penalties for Unauthorized Disclosure

49. Any unauthorized disclosure of classified information may constitute violations of United States criminal laws. In addition, any violation of the terms of this Protective Order shall be immediately brought to the attention of the Court and may result in a charge of contempt of Court and possible referral for criminal prosecution. See e.g., Executive Order 12958, as amended. Any breach of this Protective Order may also result in the termination of access to classified information and protected information. Persons subject to this Protective Order are advised that direct or indirect unauthorized disclosure, retention, or negligent handling of classified documents or information could cause damage to the national security of the United

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States or may be used to the advantage of an adversary of the United States or against the interests of the United States. Persons subject to this Protective Order are also advised that direct or indirect unauthorized disclosure, retention, or negligent handling of protected documents or information could risk the security of United States government personnel and facilities, and other significant government interests. This Protective Order is to ensure that those authorized to receive classified information and protected information will not divulge this information to anyone who is not authorized to receive it, without prior written authorization from the original classification authority and in conformity with this Protective Order.

50. The termination of these proceedings shall not relieve any person or party provided classified information or protected information of his, her, or its obligations under this Protective Order.

**IT IS SO ORDERED.**

**November 8, 2004**

**/s/**  
**JOYCE HENS GREEN**  
**United States District Judge**

# Exhibit A



**REVISED PROCEDURES FOR COUNSEL ACCESS TO DETAINEES  
AT THE U.S. NAVAL BASE IN GUANTANAMO BAY, CUBA**

**I. Applicability**

Except as otherwise stated herein or by other Order issued in the United States District Court for the District of Columbia, the following procedures shall govern counsel access to all detainees in the control of the Department of Defense ("DoD") at the U.S. Naval Base in Guantanamo Bay, Cuba ("GTMO") by counsel for purposes of litigating the cases in which this Order is issued.

These procedures do not apply to counsel who are retained solely to assist in the defense of a detainee in a trial by military commission. Access by that counsel is covered by the Procedures for Monitoring Communications Between Detainees Subject to Trial by Military Commission and their Defense Counsel Pursuant to Military Commission Order No. 3.

**II. Definitions**

A. **Communications:** All forms of communication between counsel and a detainee, including oral, written, electronic, or by any other means.

B. **Counsel:** An attorney who is employed or retained by or on behalf of a detainee for purposes of representing the detainee in the United States District Court for the District of Columbia and who is admitted, either generally or pro hac vice, in this Court. Unless otherwise stated, "counsel" also includes co-counsel, interpreters, translators, paralegals, investigators and all other personnel or support staff employed or engaged to assist in the litigation.

C. **Detainee:** An individual detained by DoD as an alleged enemy combatant at the U.S. Naval Base in Guantanamo Bay, Cuba.

D. **Privilege Team:** 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. If required, the privilege team may include interpreters/translators, provided that such personnel meet these same criteria.

E. **Legal Mail:** 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.

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**III. Requirements for Access to and Communication with Detainees**

**A. Security Clearance:**

1. Counsel must hold a valid current United States security clearance at the Secret level or higher, or its equivalent (as determined by appropriate DoD intelligence personnel).
2. Counsel who possess a valid security clearance shall provide, in writing, the date of their background investigation, the date such clearance was granted, the level of the clearance, and the agency who granted the clearance. Access will be granted only after DoD verification of the security clearance.
3. Counsel who does not currently possess a Secret clearance will be required to submit to an application for clearance to the Department of Justice, Litigation Security Division.

**B. Acknowledgment of and Compliance with Access Procedures**

1. Before being granted access to the detainee, counsel will receive a copy of these procedures. To have access to the detainee, counsel must agree to comply fully with these procedures and must sign an affirmation acknowledging his/her agreement to comply with them.
2. This affirmation will not be considered an acknowledgment by counsel that the procedures are legally permissible. Even if counsel elects to challenge these procedures, counsel may not knowingly disobey an obligation imposed by these procedures.
3. The DoD expects that counsel, counsel's staff, and anyone acting on the behalf of the attorney will fully abide by the requirements of this document. Counsel is required to provide the DoD with signed affirmations from interpreters, translators, paralegals, investigators and all other personnel or support staff employed or engaged to assist in the litigation, upon utilization of those individuals by counsel in a manner that implicates these procedures.
4. Should counsel fail to comply with the procedures set forth in this document, access to or communication with the detainee will not be permitted.

**C. Verification of Representation**

1. Prior to being permitted access to the detainee, counsel must provide DoD with a *Notification of Representation*. This Notification must include the counsel's licensing information, business and email addresses and phone number, as well as



EXHIBIT A

the name of the detainee being represented by the counsel. Additionally, counsel shall provide evidence of his or her authority to represent the detainee.

2. Counsel shall provide evidence of his or her authority to represent the detainee as soon as practicable and in any event no later than ten (10) days after the conclusion of a second visit with the detainee. The Court recognizes that counsel may not be in a position to present such evidence after the initial meeting with a detainee. Counsel for detainees and counsel for respondents shall cooperate to the fullest extent possible to reach a reasonable agreement on the number of counsel visits allowed. Should counsel for a detainee believe that the government is unreasonably limiting the number of visits with a detainee, counsel may petition the Court at the appropriate time for relief.
3. If the counsel withdraws from representation of the detainee or if the representation is otherwise terminated, counsel is required to inform DoD immediately of that change in circumstances.
4. Counsel must provide DoD with a signed representation stating that to the best of counsel's knowledge after reasonable inquiry, the source of funds to pay counsel any fees or reimbursement of expenses are not funded directly or indirectly by persons or entities the counsel believes are connected to terrorism or the product of terrorist activities, including "Specially Designated Global Terrorists," identified pursuant to Exec. Order No. 13,224, 66 Fed. Reg. 49,079 (Sept. 23, 2001) or Exec. Order No. 12,947, 60 Fed. Reg. 5079 (Jan. 23, 1995), and (b) counsel has complied with ABA Model Rule 1.8(f).

D. Logistics of Counsel Visits

1. Counsel shall submit to the Department of Justice (DoJ) any request to meet with a detainee. This request shall specify date(s) of availability for the meeting, the desired duration of the meeting and the language that will be utilized during the meeting with the detainee. Reasonable efforts will be made to accommodate the counsel's request regarding the scheduling of a meeting. Once the request has been approved, DoJ will contact counsel with the date and duration of the meeting.
2. Legal visits shall take place in a room designated by JTF-Guantanamo. No more than two attorneys (or one attorney and one assistant) plus one interpreter/translator shall visit with a detainee at one time, unless approved in advance by the Commander, JTF-Guantanamo. Such approval shall not be unreasonably withheld.
3. Due to the mission and location of the US Naval Base at Guantanamo Bay, Cuba, certain logistical details will need to be coordinated by counsel prior to arrival. This includes arrangements for travel and lodging. Specific information regarding these issues will be provided by DoJ.

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4. In order to travel to GTMO, all counsel must have a country and theater clearance for that specific visit. In order to begin processing country and theater clearances, counsel must have confirmed flight information for travel to GTMO and a valid current United States security clearance at the Secret level or higher, or its equivalent (as determined by appropriate DoD intelligence personnel). Country and theater clearances require twenty (20) days to process. Accordingly, counsel shall provide DoD, through DoJ, with the required information no later than 20 days prior to the GTMO visit date, or as soon as a visit is scheduled. Requests for visits made inside of 20 days will not normally be granted.

### IV. Procedures for Correspondence Between Counsel and Detainee

#### A. Mail Sent by Counsel to Detainee ("Incoming Mail")

1. Counsel shall send incoming legal mail for a detainee to the privilege team at the appropriate address provided by government counsel. Each envelope or mailer shall be labeled with the name of the detainee and shall include a return address for counsel sending the materials. The outside of the envelope or mailer for incoming legal mail shall be labeled clearly with the following annotation: "Attorney-Detainee Materials-For Mail Delivery to Detainee."
2. Each page of legal mail shall be labeled "Attorney-Detainee Materials." No staples, paper clips or any non-paper items shall be included with the documents.
3. Upon receiving legal mail from counsel for delivery to the detainee, the privilege team shall open the envelope or mailer to search the contents for prohibited physical contraband. Within two (2) business days of receipt of legal mail, and assuming no physical contraband is present, the privilege team shall forward the mail to military personnel at GTMO in a sealed envelope marked "Legal Mail Approved by Privilege Team" and clearly indicating the identity of the detainee to which the legal mail is to be delivered. The privilege team shall return to the sender any incoming mail that does not comply with the terms of paragraphs IV.A.1., 2.
4. Within two (2) business days of receipt of legal mail from the privilege team, personnel at GTMO shall deliver the envelope or mailer marked by the privilege team as "Legal Mail Approved by the Privilege Team" to the detainee without opening the envelope or mailer. If counsel desires confirmation that the documents were delivered to the detainee, counsel is responsible for providing a stamped, self-addressed envelope for that purpose. The detainee shall be responsible for mailing any confirmation of delivery to counsel as outgoing legal mail. This method shall be the sole and exclusive means by which confirmation of delivery is provided to counsel.

EXHIBIT A

5. Written correspondence to a detainee not falling within the definition of legal mail shall be sent through the United States Postal Service to the appropriate address provided by government counsel. Non-legal mail includes, but is not limited to, letters from persons other than counsel, including family and friends of the detainee. These non-privileged communications will be reviewed by military personnel at GTMO under the standard operating procedures for detainee non-legal mail.
6. 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 by the privilege team or by this Court or another court. Accordingly, if a counsel's correspondence contains any summary or recitation of or reference to a communication with a detainee that has not been previously determined to be unclassified, the correspondence shall be prepared, marked, transported and handled as classified material as required by Executive Order 12958, DOD Regulation 5200.1-R and AI 26, OSD Information and Security Supplement to DOD Regulation 5200.1R.
7. Written and oral communications with a detainee, including all incoming legal mail, shall not include information relating to 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; or security procedures at GTMO (including names of U.S. Government personnel and the layout of camp facilities) or the status of other detainees, not directly related to counsel's representation.

**B. Mail Sent by Detainee to Counsel ("Outgoing Mail")**

1. Detainees will be provided with paper to prepare communications to counsel. In the presence of military personnel, the detainee will seal the written communication into an envelope and it will be annotated as "Attorney-Detainee Materials-For Mail Delivery To Counsel." Each envelope shall be labeled with the name of the detainee and the counsel. Envelopes annotated with the name of persons other than the detainee's counsel (including family/friends or other attorneys) shall be processed according to the standard operating procedures for detainee non-legal mail.
2. Military personnel will collect the outgoing legal mail within one (1) business day of being notified by the detainee that the communication is prepared for sealing and mailing.
3. After the outgoing legal mail is collected from the detainee, the envelope will be sealed into a larger envelope by military personnel at Guantanamo which will be marked as "Attorney-Detainee Materials-For Mail Delivery To Counsel" and will



## EXHIBIT A

be annotated with the name of the detainee and the counsel. The envelope will be sealed and mailed in the manner required for classified materials. Within two (2) business days of receipt from the detainee, the communication will be mailed to the appropriate address as provided by government counsel.

4. Detainees also are permitted to send non-legal mail, including written communications to persons other than counsel, through the United States Postal Service. These communications shall be reviewed by military personnel at Guantanamo under the standard operating procedures for detainee non-legal mail.
5. In the event any non-legal correspondence or messages from a detainee to individuals other than his counsel (including family/friends or other attorneys) 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.

### V. Materials Brought Into A Meeting With Detainee And Counsel

- A. Counsel shall bring only legal mail, writing utensils and paper into any meeting with a detainee unless counsel has received prior approval from the Commander, JTF-GTMO. The Commander shall not unreasonably withhold approval for counsel to bring into a meeting with a detainee letters, tapes, or other communications introducing counsel to the detainee, if the government has first reviewed the communication and determined that sharing the communication with the detainee would not threaten the security of the United States.
- B. Written and oral communications with a detainee, including all documents brought into a meeting with a detainee, shall not include information relating to 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; or security procedures at GTMO (including names of U.S. Government personnel and the layout of camp facilities) or the status of other detainees, not directly related to counsel's representation.

### VI. Materials Brought Out Of A Meeting With Detainee and Counsel

- A. Upon the completion of each meeting with a detainee or during any break in a meeting session, counsel will give the notes or documents used or produced during the meeting to a designated individual at Guantanamo. These materials will be sealed in the presence of counsel and will be handled as classified material as required by Executive Order 12958, DOD Regulation 5200.1-R and AI 26, OSD Information Security Supplement to DOD Regulation 5200.1R.
- B. Upon the completion of the counsel's visit to Guantanamo, the notes or documents used or produced during the visit shall be sealed in the presence of



## EXHIBIT A

counsel and placed in an envelope labeled as "Attorney-Detainee Meeting Documents-For Delivery to Counsel." The envelope shall be sealed into a larger envelope by military personnel at Guantanamo which shall be marked as "Attorney-Detainee Meeting Documents-For Mail Delivery To Counsel" and shall be annotated with the name of the detainee and the counsel. The envelope shall be sealed and mailed in the manner required for classified materials. Within two (2) business days following the completion of the counsel's visit to Guantanamo, the package shall be mailed to the appropriate address provided by government counsel.

- C. 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.

### VII. Classification Determination of Detainee Communications

- A. Counsel may submit information learned from a detainee to the privilege team for a determination of its appropriate security classification. Counsel shall memorialize the information submitted for classification review into a written memorandum outlining as specifically as possible the information for which counsel requests a classification determination. All documents submitted for classification review shall be prepared, handled and treated in the manner required for classified materials, as provided by as required by Executive Order 12958, DOD Regulation 5200.1-R and AI 26, OSD Information Security Supplement to DOD Regulation 5200.1R. No information derived from these submissions shall be disclosed outside the privilege team pursuant to these procedures until after the privilege team has reviewed it for security and intelligence purposes. Absent express consent given by the Court, or except as otherwise provided in this document, the submissions shall not be disclosed to any person involved in the interrogation of a detainee, and no such individual may make any use of those communications whatsoever, nor shall the submissions be disclosed to any Government personnel involved in any domestic or foreign court, military commission or combatant status tribunal proceedings involving the detainee.
- B. Counsel shall send all materials submitted for classification review to the appropriate address to be provided by government counsel. The outside of the envelope or mailer shall be clearly labeled "Attorney-Detainee Meeting Documents-For Classification Review By Privilege Team." Each envelope or mailer shall be annotated with the name of the detainee and the counsel. Each page of the document submitted for classification review shall be marked "Attorney-Detainee Materials" and "Classified." The envelope or mailer will be sealed and mailed in the manner required for classified materials.

## EXHIBIT A

- C. As soon as possible after conducting the classification review, the privilege team shall advise counsel of the classification levels of the information contained in the materials submitted for review. The privilege team shall forward its classification determination directly to counsel after a review and analysis period not to exceed, from the time of receipt by the privilege team:
1. Seven (7) business days for information that is written in the English language;
  2. Fourteen (14) business days for any information that includes writing in any language other than English, to allow for translations by the privilege team;
  3. Twenty (20) business days for any information where the privilege team has reason to believe that a code was used, to allow for further analysis.
- D. While conducting classification review, the privilege team shall promptly report any information that reasonably could be expected to result in immediate and substantial harm to the national security to the Commander, JTF-Guantanamo. In his discretion, the Commander, JTF-Guantanamo may disseminate the relevant portions of the information to law enforcement, military and intelligence officials as appropriate.
- E. If, at any time, the privilege team determines that information in the documents submitted for classification review relate to imminent acts of violence, the privilege team shall report the contents of those documents to Commander, JTF-Guantanamo. In his discretion, the Commander, JTF-Guantanamo may disseminate the relevant portions of the information to law enforcement, military and intelligence officials.
- F. The privilege team shall not disclose any information submitted by counsel for classification review outside the privilege team, except as provided by these procedures or as permitted by counsel submitting the information.

### VIII. Telephonic Access to Detainee

- A. Requests for telephonic access to the detainee by counsel or other persons will not normally be approved. Such requests may be considered on a case-by-case basis due to special circumstances and must be submitted to Commander, JTF-Guantanamo.
- B. Any telephonic access by counsel will be subject to appropriate security procedures, but shall not include contemporaneous monitoring or recording.
- C. Any telephonic access by persons other than counsel will be subject to appropriate security procedures, including contemporaneous monitoring and recording.



**EXHIBIT A**

**IX. Counsel's Handling And Dissemination Of Information From Detainee**

- A. Subject to the terms of any applicable protective order, counsel may disseminate the unclassified contents of the detainee's communications for purposes reasonably related to their representation of that detainee.**
- B. 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. All classified material must be handled, transported and stored in a secure manner, as provided by Executive Order 12958, DOD Regulation 5200.1-R and AI 26, OSD Information Security Supplement to DOD Regulation 5200.1R.**
- C. Counsel shall disclose to DoJ or Commander, JTF-Guantanamo any information learned from a detainee involving future events that threaten national security or involve imminent violence.**
- D. Counsel may not divulge classified information not learned from the detainee to the detainee. 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. Counsel for detainees in the coordinated cases pending in the United States District Court for the District of Columbia are presumed to have a "need to know" information in related cases pending before this Court. Counsel for respondents in those cases may challenge this presumption on a case-by-case basis for good cause shown.**

**X. JTF-Guantanamo Security Procedures**

- A. Counsel and translators/interpreters shall comply with the following security procedures and force protection safeguards applicable to the US Naval Base in Guantanamo Bay, Cuba, JTF-Guantanamo and the personnel assigned to or visiting these locations, as well as any supplemental procedures implemented by JTF-Guantanamo personnel.**
- B. Contraband is not permitted in JTF-Guantanamo and all visitors are subject to search upon arrival and departure. Examples of contraband include, but are not limited to, weapons, chemicals, drugs, and materials that may be used in an escape attempt. Contraband also includes money, stamps, cigarettes, writing instruments, etc. No items of any kind may be provided to the detainee without the advance approval of the Commander, JTF-Guantanamo.**
- C. Photography or recording of any type is prohibited without the prior approval of the Commander, JTF-Guantanamo. No electronic communication devices are permitted. All recording devices, cameras, pagers, cellular phones, PDAs, laptops, portable electronic devices and related equipment are prohibited in or near JTF-Guantanamo. Should any of these devices be inadvertently taken into a**



**EXHIBIT A**

prohibited area, the device must be surrendered to JTF-Guantanamo staff and purged of all information.

- D. Upon arrival at JTF-Guantanamo, security personnel will perform a contraband inspection of counsel and translators/interpreters using metal detectors as well as a physical inspection of counsel's bags and briefcases and, if determined necessary, a physical inspection of his/her person.
- E. Counsel shall not be permitted to interview or question members of the Joint Task Force about their duties or interactions with detainees without first obtaining permission from the Commander, Joint Task Force Guantanamo. Should permission be unreasonably denied, counsel may seek an Order from this Court granting permission for good cause shown.
- F. Counsel will meet with a detainee in conference facilities provided by GTMO. These facilities are subject to visual monitoring by closed circuit TV for safety and security reasons. (The only other method of visual observation available is for the door to remain open with military police sitting outside the door.). No oral communications between counsel and detainee will be heard.
- G. At the conclusion of a meeting with a detainee, counsel and translators/interpreters will again be inspected using a metal detector and, if deemed necessary, by physical inspection of their persons.

# Exhibit B

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

, et al. )  
 )  
 )  
 Petitioners, )  
 )  
 v. ) Civil Action No.  
 )  
 GEORGE W. BUSH, )  
 President of the United )  
 States, et al., )  
 )  
 Respondents. )

**MEMORANDUM OF UNDERSTANDING REGARDING ACCESS TO  
CLASSIFIED NATIONAL SECURITY INFORMATION**

Having familiarized myself with the applicable statutes, regulations, and orders related to, but not limited to, unauthorized disclosure of classified information, espionage and related offenses; The Intelligence Identities Protection Act, 50 U.S.C. § 421; 18 U.S.C. § 641; 50 U.S.C. § 783; 28 C.F.R. § 17 et seq.; and Executive Order 12958; I understand that I may be the recipient of information and documents that belong to the United States and concern the present and future security of the United States, and that such documents and information together with the methods and sources of collecting it are classified by the United States government. In consideration for the disclosure of classified information and documents:

(1) I agree that I shall never divulge, publish, or reveal either by word, conduct or any other means, such classified



**EXHIBIT B**

documents and information unless specifically authorized in writing to do so by an authorized representative of the United States government, or as expressly authorized by the Protective Order entered in the United States District Court for the District of Columbia in the case captioned \_\_\_\_\_ v. George W. Bush, No. \_\_\_\_\_.

(2) I agree that this Memorandum of Understanding and any other non-disclosure agreement signed by me will remain forever binding on me.

(3) I have received, read, and understand the Protective Order entered by the United States District Court for the District of Columbia in the case captioned \_\_\_\_\_ v. George W. Bush, No. \_\_\_\_\_, and I agree to comply with the provisions thereof.

\_\_\_\_\_

\_\_\_\_\_

Date

\_\_\_\_\_

\_\_\_\_\_

Date

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# Exhibit C

EXHIBIT C

ACKNOWLEDGMENT

The undersigned hereby acknowledges that he/she has read the Protective Order entered in the United States District Court for the District of Columbia in the case captioned \_\_\_\_\_ v. George W. Bush, No. \_\_\_\_\_, understands its terms, and agrees to be bound by each of those terms. Specifically, and without limitation, the undersigned agrees not to use or disclose any protected information or documents made available to him/her other than as provided by the Protective Order. The undersigned acknowledges that his/her duties under the Protective Order shall survive the termination of this case and are permanently binding, and that failure to comply with the terms of the Protective Order may result in the imposition of sanctions by the Court.

DATED: \_\_\_\_\_

BY: \_\_\_\_\_  
(type or print name)

SIGNED: \_\_\_\_\_



Documents are potentially protected by attorney-client privilege if they are correspondence or other written material in the possession of a detainee that facially appear to have been provided to that detainee by his attorney or created by the detainee to provide to his attorney.

Uncertainty as to the applicability of the attorney-client privilege should be resolved in favor of the privilege.

Relevant factors in determining whether a document is covered by the privilege may include:

**IF THE DOCUMENT APPEARS TO BE CORRESPONDENCE**

- Is the document on attorney letterhead?
- Is the document addressed to a licensed attorney or counsel for the detainee?
- Is the document signed by someone purporting to be a licensed attorney or counsel for the detainee?
- Is the document marked as an enclosure or an attachment to a document signed by or addressed to a licensed attorney?
- Is each page marked "Attorney-Detainee Materials" and outside envelopes marked "Legal Mail Approved by the Privilege Team?"

**IF THE DOCUMENT APPEARS TO BE CREATED BY THE DETAINEE**

- Does the document have a header or footer indicating that it was made for attorney use?
- Does the document reference the detainee's case number?
- Does the document reference the detainee's court date(s)?
- Does the document contain frequent use of legal terminology such as "witness," "judge," "evidence," or "testimony?"
- Does the document contain frequent references to legal tactics or procedures, such as continuances, appeals, examinations or pleadings?
- Does the document contain references to facts that indicate he is trying to describe a series of events to someone?
- Is the document marked as privileged? (Not conclusive either way, but requires closer analysis.)
- Does the document discuss conditions of the detainee's confinement and/or ability to access counsel?
- Does the document contain biographical information relevant to a habeas case?

- Does the document include questions that would be posed to an attorney, such as requests for case status updates and questions relating to legal procedure or legal terminology?
- Does the document request certain types of judicial or administrative relief?

**Filter Team Document Review Form**

Document number range: \_\_\_\_\_ to \_\_\_\_\_

Detainee ISN: \_\_\_\_\_

Filter Team Reviewer ID: \_\_\_\_\_

Date of Review: \_\_\_\_\_

Description of where document was found (cell, bag #): \_\_\_\_\_

Description of Document: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Check box if the document contains information pertaining to future events that threaten national security or involve imminent violence.

All other documents:

- Category:
- One: (Relevant to NCIS / Attorney-Client Privileged)
  - Two: (Not Relevant to NCIS / Attorney-Client Privileged)
  - Meets category two but violates parameters of Protective Order
  - Three: (Relevant to NCIS / Not Attorney-Client Privileged)
  - Four: (Not Relevant to NCIS / Not Attorney-Client Privileged)

Transferred to: \_\_\_\_\_ Date of Transfer: \_\_\_\_\_

Notes / Comments: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_



# FILTER TEAM BOXES PLACED IN PROTECTIVE STORAGE

<u>BOX</u>	<u>CATEGORY</u>	<u>WEIGHT (IN POUNDS)</u>
1	2	46
2	2	51
3	2	46
4	2	47
5	2	43
6	2	32
7	2	42
8	2	53
9	2	45
10	2	47
11	4	30
12	2	38
13	4	30
14	4	37
15	4	25
16	4	32
17	4	27
18	4	35
19	4	29
20	2	36
21	4	28
22	2	41
23	2	33
24	2	27
25	4	21
26	2	37
27	2	23
28	Restricted	39
29	Restricted	41
30	Restricted	9
31	1 (Filter Litigation)	12
32	Restricted	1