IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MAHMOAD ABDAH, *et al.,*	)	
Petitioners,	)	
v.	)	**Civil Action No. 04-1254 (RCL) (AK)**
	)	**(Magistrate Judge Kay)**
BARACK H. OBAMA, ***et al.,***	)	
Respondents.	)	

MOTION CONCERNING THE PROTECTIVE ORDER ENTERED BY JUDGE HOGAN ON SEPTEMBER 11, 2008

This motion is filed with Magistrate Judge Alan Kay pursuant to an Order entered by Judge Kessler on November 2, 2005, in this action and in numerous other Guantánamo habeas actions. *See* Doc. 166. That order provides that "all Motions pertaining to interpretation or construction of any protective order which has been entered" in the relevant Guantánamo habeas cases, including this case, as well as "all disputes pertaining to logistical issues, such as communications with or visits to clients and counsel," "shall be referred" to Magistrate Judge Kay. *Id.* at 44, 45.

The undersigned represent numerous Guantánamo detainees. For nearly eight years, their access to and communications with their clients have been governed by two protective orders—first, by an order issued by Judge Joyce Hens Green in November 2004, and second, by a similar order issued by Judge Thomas F. Hogan on September 11, 2008 ("Protective Order").

On April 8, 2010, Judge Henry H. Kennedy denied the petition for habeas corpus of our client Yasein Khasem Mohammad Esmail (ISN 522). *Abdah v. Obama*, 709 F. Supp. 2d

25 (D.D.C. 2010). On April 8, 2011, the D.C. Circuit affirmed the denial. *Esmail v. Obama*, 639 F.3d 1075 (D.C. Cir. 2011). Counsel last met with Esmail, under the Protective Order, on July 21, 2011.

When counsel most recently sought to meet with Esmail, in May 2012, the Government took the position that Esmail no longer had the right to meet with counsel, on the asserted ground that his habeas case had been "terminated." The Government took the position that counsel may not visit Esmail unless counsel signed a Memorandum of Understanding ("MOU"). The MOU would replace the system of access to counsel provided by Judge Hogan's Protective Order, which is subject to judicial supervision, with a system purporting to give the Commander, Joint Task Force–Guantanamo ("JTF"), absolute, unreviewable control over such access. Rather than accede, counsel refused to sign the MOU and, accordingly, were not permitted to meet with Esmail.

This motion seeks a ruling that Judge Hogan's Protective Order continues to apply to Esmail, that the Government may not condition Esmail's access to counsel on counsel's submission to the new MOU, and that the Government's refusal to permit Esmail to have access to counsel under Judge Hogan's Protective Order is a violation of that Order.

BACKGROUND

In January 2002, the first detainees arrived at Guantánamo. The first detainee habeas corpus cases were filed in the spring of 2002. On June 28, 2004, in *Rasul v. Bush*, 542 U.S. 466 (2004), the Supreme Court held that the federal courts have jurisdiction to hear Guantánamo detainees' habeas corpus challenges to the legality of their detention.

On August 17, 2004, the Calendar and Case Management Committee of the District Court designated Judge Joyce Hens Green "to coordinate and manage all proceedings in these

matters and to the extent necessary, rule on [common] procedural and substantive issues." Doc. 9 at 1. In November 2004, Judge Green issued a protective order that included procedures for counsel access. *See* Doc. 60.

The Government moved to dismiss the Guantánamo habeas cases. In January 2005, Judge Richard J. Leon, who had not transferred his cases to Judge Green, granted the Government's motion to dismiss his cases. Judge Green, ruling in the other cases, denied the Government's motion to dismiss. The cases were stayed pending appeal. While the cases were on appeal, counsel continued to be permitted access to and communications with their clients subject to the Protective Order entered by Judge Green.

On June 12, 2008, the Supreme Court held in *Boumediene v. Bush*, 553 U.S. 723 (2008), that the constitutional privilege of the writ of habeas corpus extends to Guantánamo and permits the detainees to seek habeas relief. In light of *Boumediene*, the stay of the habeas cases was lifted.

On July 2, 2008, Judge Thomas F. Hogan issued an order stating that the District Court had designated him to "coordinate and manage proceedings in all cases involving" Guantánamo detainees. Doc. 242 at 1-2. On September 11, 2008, Judge Hogan issued a new Protective Order, which superseded the one issued by Judge Green. The Order was entered in this docket (*see* Doc. 283) and in numerous other Guantánamo cases. The Order contains detailed procedures, similar to those in Judge Green's Protective Order, which "shall govern counsel access" to the Guantánamo detainees. Protective Order, Doc. 283, ¶ II.A.1; *see also id*. ¶¶ II.B-II.J.

Since Judge Green issued her Protective Order in November 2004, undersigned counsel have made dozens of visits to Guantánamo to meet with their clients, including

Esmail, under access procedures governed first by her Protective Order and later by Judge Hogan's Protective Order.

On May 10, 2012, pursuant to the Protective Order, undersigned counsel (Mr. Remes) submitted a request to meet with Esmail (and other clients) during a trip to Guantánamo starting on May 16. The Joint Task Force–Guantanamo approved Mr. Remes' proposed schedule on May 14. On May 18, however, the Government informed counsel, through an email from Jim Gilligan, Assistant Director of the Civil Division, that Esmail's "case has been terminated," and thus "your request for a meeting with him cannot be granted except pursuant to and in accordance with the terms of the enclosed Memorandum of Understanding Governing Continued Contact Between Counsel/Translator and Detainee Following Termination of the Detainee's Habeas Case (MOU)." (A copy of the email, with the MOU, is attached as Exhibit A.) The Government thus refused to permit Esmail and his counsel to meet pursuant to the Protective Order. Counsel refused to sign the MOU because it is inconsistent with Judge Hogan's Protective Order and because its provisions are onerous and restrictive.

The MOU gives the Commander of the Joint Task Force–Guantanamo absolute authority over access to counsel. Every aspect of such access is governed by his unreviewable discretion, including whether clients may meet with their counsel at all:

> ¶ 6: [C]ontinued access to or communication with the detainee, and/or access to classified or protected information, pursuant to this MOU, is subject to the authority and discretion of the Commander, Joint Task Force–Guantanamo.
>
> ¶ 8(f): Any disputes regarding the applicability, interpretation, enforcement, compliance with or violations of this MOU shall be resolved in the final and unreviewable discretion of the Commander, Joint Task Force–Guantanamo, in coordination with the Commander, U.S. Southern Command.

The MOU also contains numerous highly restrictive provisions. For example, it prohibits counsel from having access to classified information obtained or generated in the course of representing the client in his "terminated" habeas action, including counsel's own work product (MOU ¶ 8(b)); it prohibits counsel from using information obtained in the course of representing one client in the case of another client (*id.* ¶¶ 4, 8(a)(1)), or sharing information obtained in the course of representing a client with counsel for other detainees (*id.* ¶ 8(a)(10)); it restricts the means by which counsel may endeavor to seek their clients' release (*id.* ¶¶ 4, 8(a)(2)), and the use that counsel may make of information obtained under the MOU (*id.* ¶¶ 4, 8(a)(1)). And counsel are required to agree that virtually everything else at the Guantánamo base "will take priority over access and processes governed by this MOU." *Id.* ¶ 8(c).

ARGUMENT

The only argument offered by the Government for refusing to allow Esmail access to counsel pursuant to the Protective Order is that his "habeas case has been terminated." *See* Ex. A. The argument is meritless.

The Protective Order by its terms applies to "attorneys 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." Protective Order, Doc. 283, ¶ I.B.11. Esmail's rights to seek such relief were not extinguished simply because his initial request for the habeas writ was denied. As long as he is detained, he retains the right to pursue any available legal avenues to obtain his release. This includes the right to file a new or amended habeas petition, or to file a motion under Rule 60 of the Federal Rules of Civil Procedure to reopen any orders entered in his case.

Nothing in the Protective Order provides that its access provisions lapse simply because a detainee's initial request for habeas relief is denied. Rather, in setting forth the procedures for counsel access, the Order defines "counsel" as "attorneys . . . 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." *Id.* ¶ II.B.4. That precisely describes the continuing role of Esmail's counsel. Esmail wants counsel to pursue all available legal avenues to secure his release, and counsel seek to meet with Esmail as part of ongoing consultations as to the legal steps available for that purpose. The Protective Order applies to those consultations. It cannot be abrogated by the Government.

Moreover, the Protective Order provides that habeas counsel with security clearances can share classified information among themselves, because they are "presumed to have a 'need to know' information both in their own cases and in related cases pending before this Court." *Id.* ¶ I.D.28. This permits habeas counsel to have some of the information-sharing advantages among various cases that the Government lawyers have (and frequently use), and these advantages are important given the factual overlap among various Guantánamo habeas cases.[1] If counsel's access to Esmail or to other detainee-clients is denied, these information-sharing provisions would be impaired. (Indeed, the MOU prohibits information-sharing as one of the conditions for counsel access under the MOU. *See* MOU ¶ 8(a)(10).) The Protective Order must continue to apply to all of the detainees who brought habeas petitions, whether or not their initial requests for relief have been denied, in order to preserve the

[1] The Order states that it "shall govern counsel access . . . for purposes of litigating these cases." Protective Order, Doc. 283, ¶ II.A.1. This recognizes that the Guantánamo cases should be viewed collectively.

efficacy of the information-sharing provisions of the Order.[2] The habeas cases have not all been terminated, and there is no imminent prospect that they all will be. For example, this action (*i.e.*, No. 04-1254)—the action which includes Esmail as a named party—remains an active case.

For Guantánamo detainees to have a "meaningful" opportunity to challenge their ongoing detention, as promised by *Boumediene*, 553 U.S. at 779, 783, they must have an ongoing ability to consult with counsel. Esmail has no education concerning legal matters, he speaks no English, and he is locked in a prison in Cuba, with no access concerning legal matters to anyone other than counsel. *See Al-Joudi v. Bush*, 406 F. Supp. 2d 13, 22 (D.D.C. 2005) ("Petitioners are from foreign countries, most, if not all, have been detained for close to four years, do not speak English, and are in all likelihood totally unfamiliar with the United States legal system."); *Al Odah v. United States*, 346 F. Supp. 2d 1, 8 (D.D.C. 2004) ("To say that Petitioners' ability to investigate the circumstances surrounding their capture and detention is 'seriously impaired' is an understatement." (quoting *Battle v. Armontrout*, 902 F.2d 701, 702 (8th Cir. 1990))). If Esmail is not allowed to have a full and fair opportunity to meet with counsel in a confidential privileged setting, then his continuing right to challenge his detention becomes a nullity. A detainee's right of access to the courts means "nothing" without meaningful access to counsel. *Al-Joudi*, 406 F. Supp. 2d at 22.

The unfairness of the Government's position is starkly apparent when compared to the treatment of other prisoners who have been given *more* process than that afforded to

[2] *See* also Protective Order, Doc. 283, ¶ I.D.33 (classified document destruction requirement is triggered upon "final resolution of these cases, including all appeals," *not* upon denial of a single detainee's request for relief); *id.* ¶ I.E.45 (protected document destruction requirement is triggered upon "the resolution of these actions, and the termination of any appeals therefrom," *not* upon denial of a single detainee's request for relief).

Guantánamo detainees. Convicted felons in American prisons have access to prison libraries and can be visited by friends, family and lawyers. The felons must "be afforded access to the courts" and "must have a reasonable opportunity to seek and receive the assistance of attorneys." *Procunier v. Martinez*, 416 U.S. 396, 419 (1974). Inmates are entitled to the "tools" they "need in order to attack their sentences, directly or collaterally." *Lewis v. Casey*, 518 U.S. 343, 355 (1996). For Guantánamo detainees, like Esmail, who have never even been charged with a crime, much less convicted, access to counsel is absolutely essential. Not surprisingly, the right of Guantánamo detainees to have meaningful access to counsel has repeatedly been upheld. *See, e.g.*, *Al-Oshan v. Obama*, 753 F. Supp. 2d 1, 5 (D.D.C. 2010); *Tumani v. Obama*, 598 F. Supp. 2d 67, 69-70 (D.D.C. 2009); *Zuhair v. Bush*, 592 F. Supp. 2d 16, 17 (D.D.C. 2008); *Omar v. Harvey*, 514 F. Supp. 2d 74, 77 (D.D.C. 2007); *Adem v. Bush*, 425 F. Supp. 2d 7, 18-19 (D.D.C. 2006); *Al-Joudi*, 406 F. Supp. 2d at 22.

The MOU not only impairs and threatens meaningful access to counsel for habeas and federal court purposes; it also would hamstring counsel in helping clients to prepare for upcoming proceedings before the Periodic Review Board ("PRB"), which will assess whether detention should continue. These proceedings are mandated by Executive Order No. 13,567, 76 Fed. Reg. 13,277 (Mar. 7, 2011), which provides (§ 3(a)(2)) that the detainee "may be assisted in proceedings before the PRB by private counsel." The MOU, however, would appear to preclude counsel from communicating with the detainee to prepare for PRB proceedings or from using any information obtained pursuant to the MOU in PRB proceedings. *See, e.g.*, MOU ¶ 4. This is especially problematic because undersigned counsel expect to represent Esmail in any PRB proceedings. Moreover, the Executive Order recognizes (§ 8) that issues concerning the lawfulness of the detention may be triggered

during the PRB proceeding.[3] Accordingly, information from PRB proceedings may have relevance in future federal court proceedings seeking the detainee's release.

CONCLUSION

Protective Orders governing counsel access to Guantánamo detainees have been in place for eight years, and there have been at least hundreds and probably thousands of attorney-client visits pursuant to those orders. The proposed MOU would put the JTF Commander in a position to restrict the legal representation of Guantánamo detainees, even authorizing him to bar visits to the base or phone calls to the detainee. The Protective Order procedures are time-tested and workable. There is no valid justification for supplanting them now. The circumstances strongly suggest that the Government's purpose is to begin reconstructing the "legal black hole," *Adem*, 425 F. Supp. 2d at 11, of Guantánamo's early years.

Petitioner respectfully requests that the Court rule that the Government violated the Protective Order by seeking to require Esmail's counsel to sign the proposed MOU as a condition to having access to him. Petitioner also requests that the Court rule that the Protective Order continues to apply to this case and that it governs the terms of Esmail's access to counsel.[4]

[3] The attempt in the MOU to prevent counsel from using information in PRB proceedings that was obtained during a client visit under the MOU might violate the D.C. Bar Rules of Professional Conduct, because it would prevent the attorney from providing effective assistance to the client in a closely related matter.

[4] Counsel has conferred with Government counsel concerning this motion pursuant to Local Rule 7(m). The Government states that it opposes the motion.

Respectfully submitted,

/s/ *Brian E. Foster*____
S. William Livingston
D.C. Bar. No. 59055
Alan A. Pemberton
D.C. Bar. No. 367108
Brian E. Foster
D.C. Bar No. 988311
COVINGTON & BURLING LLP
1201 Pennsylvania Ave., N.W.
Washington, DC 20004-2401
(202) 662-6000 (phone)
(202) 662-6291 (fax)
wlivingston@cov.com
apemberton@cov.com
bfoster@cov.com

David H. Remes
D.C. Bar. No. 370372
APPEAL FOR JUSTICE
1106 Noyes Drive
Silver Spring, MD 20910
(202) 669-6508 (phone)
remesdh@gmail.com

Counsel for Yasein Khasem Mohammad Esmail

July 9, 2012