IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE: GUANTANAMO BAY DETAINE CONTINUED ACCESS TO COUNSEL	)	Misc. No. 12-0398 (RCL)

RESPONDENT'S COMBINED OPPOSITION TO MOTIONS BY DETAINEES AL-MUDAFARI, AL-MITHALI, GHANEM, AL-BAIDANY, ESMAIL, AND UTHMAN FOR CONTINUED COUNSEL ACCESS PURSUANT TO THE PROTECTIVE ORDER

Date: August 6, 2012

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INTRODUCTION

Petitioners Abdu Al-Qader Hussain Al-Mudafari (ISN 40), Hayal Aziz Ahmed Al-Mithali (ISN 840), Mohammed Rajeb Abu Ghanem (ISN 44), and Zakaria Al-Baidany (ISN 1017), aliens detained at the U.S. naval base at Guantanamo Bay, Cuba, have moved for voluntary dismissal of their habeas petitions without prejudice, conditioned, however, on orders from this Court mandating that they be granted continued, privileged access to their counsel under the same terms and conditions as provided for under the Protective Order that governs their cases. In the alternative, but to the same effect, Petitioners Al-Mudafari and Al-Mithali seek indefinite stays of their cases so that the Protective Order and its provisions for mandatory counsel access will remain in place.

Yasein Khasem Mohammad Esmail (ISN 522) and Uthman Abdul Rahim Mohammed Uthman (ISN 27) are also aliens detained at Guantanamo Bay, but whose habeas petitions have been fully and finally adjudicated and denied. They have similarly filed motions seeking rulings that they are entitled to continued, court-ordered counsel access under the Protective Order that governed their cases, notwithstanding that they no longer have pending habeas petitions.

The Government consents to the Petitioners' requests to dismiss their pending cases without prejudice, but objects to the requests made by all six detainees (hereinafter, the "Movants") for court-ordered counsel access in the absence of pending habeas litigation. The Government is voluntarily providing detainees in appropriate cases, including the detainees here, with continued counsel access following dismissal of their habeas cases, to the extent provided, and on the terms set forth, in the attached memorandum of understanding (MOU). Pursuant to the terms of the MOU, the Movants can continue to meet with and otherwise communicate with their counsel in essentially the same ways as are provided for by the Protective Order. Movants

thus retain under the MOU the access to their counsel needed to prepare any future habeas challenge. There is thus no basis for this Court to issue what is in effect a permanent injunction that would require the Executive Branch, in the absence of active or impending habeas litigation, to grant Movants' counsel ongoing rights of access to the military detention facility at Guantanamo Bay, and of access to classified national security information.

Movants' contention to the contrary is based on a series of mischaracterizations of the Government's position and the MOU. The Government does not contend, for example, that the right to habeas review recognized in Boumediene v. Bush, 553 U.S. 723 (2008), is extinguished once a detainee's initial habeas petition is dismissed, or even denied. Detainees retain the right, in appropriate circumstances, to file successive petitions. Likewise, the Government does not contend here that detainees whose petitions have been dismissed or denied have no entitlement thereafter to the assistance of counsel, or must fend for themselves in court if they file new habeas cases. Indeed, for purposes of deciding the motions at bar, the Court may assume otherwise – that detainees seeking to challenge the lawfulness of their detention, whether for the first time, or thereafter, are entitled to the assistance of counsel. Finally, the Government does not require detainees, as a condition of access under the MOU, to waive whatever right to counsel they may have under federal law. The express terms of the MOU make that clear.

The dispute thus before the Court, though important, is quite narrow. The only question presented is whether detainees who have neither current nor impending habeas petitions are entitled to permanent injunctive relief enforcing their asserted rights to counsel, without showing that those rights to counsel have been violated, or that, as a result, they have been or will be denied the meaningful habeas review guaranteed by Boumediene. The answer to that question is "no." Movants have met none of the pre-requisites that at a minimum would have to be satisfied

for an award of such extraordinary equitable relief, particularly when they can obtain counsel access under the Government's MOU.

First, under the circumstances presented the Movants cannot succeed in demonstrating infringement of a right to counsel that could entitle them to the relief they seek. Movants have the option of maintaining privileged access to their counsel under the terms of the MOU, which sets forth the terms on which the Government will voluntarily afford detainees in appropriate cases (see infra at 3) continued privileged communication with their habeas counsel upon termination of their habeas cases. Detainees who request continued access and whose counsel agree to and meet the terms of the MOU would be permitted to visit with their counsel at Guantanamo Bay, exchange privileged legal mail with counsel, and speak to counsel by telephone on essentially the same terms as provided for in the Protective Order. Under the MOU, counsel may, on request and with the approval of relevant government agencies, also obtain access to classified information in the files of their clients' former habeas cases. Counsel access under the MOU thus provides Movants the wherewithal to revive their habeas cases should they ever decide to do so.

But, where Movants are not currently seeking to exercise their right to habeas review, and where it is speculative that they will seek to do so in the future, they cannot show that a lack of access to counsel has impeded their efforts to mount new legal challenges to their detention, and thus they have no legal basis under Boumediene or otherwise on which to demand a court order granting their counsel continued rights of access to the Guantanamo Bay Naval Base, or of access to classified information. That is especially so where the relief they seek would be indefinite court-ordered supervision of the Executive's control over a military post, and control of access to classified information, functions assigned by the Constitution and statute to the

Executive Branch. Movants thus have not succeeded in demonstrating a violation of the asserted right to counsel that is essential to an award of such permanent injunctive relief.

Second, Movants have not shown that they will suffer irreparable harm in the absence of the relief they request. It remains a matter of speculation at this time whether the Movants will again seek habeas review. But even if they might later do so, there remain a variety of means, other than court-ordered counsel access in the meantime, by which they can retain the ability to renew their habeas cases. As noted, the Government's MOU itself provides such access. And, even without the MOU, the Movants' cases could be reinstated by various means – for example, by submitting requests to the Court for appointment of counsel to bring new habeas cases on their behalf (as dozens of petitioners have done). Under either scenario, once Movants' cases were re-filed appropriate arrangements could be made, as they routinely have been in the past, for the confidential attorney-client communications and counsel access to classified information needed to litigate the new cases. Because Movants thus cannot make the required showing of irreparable harm, their request for permanent injunctive relief must be denied.

The Court should also deny the alternative relief sought by Petitioners Al-Mudafari and Al-Mithali—indefinite stays of their cases during which the Protective Order would remain in force. This so-called alternative is merely an attempt to sidestep the requirements for mandatory injunctive relief while achieving the same result. The Court should not allow these (or scores of other cases) to languish on its docket for no reason except as a pretext for continued court-ordered counsel access, especially where detainees such as the Movants now have the option of maintaining privileged contact with their counsel under the terms of the Government's MOU.

BACKGROUND

A. Procedural History of the Movants' Habeas Cases

1. Al-Mudafari

Al-Mudafari's case began in November 2005 when his brother, acting as next friend, authorized counsel to file a habeas corpus petition on Al-Mudafari's behalf. See No. 05-2185, Dkt. Nos. 1, 91. For nearly the next six years, Al-Mudafari refused to meet with his counsel. See id., Dkt. Nos. 173, 206, 265. Al-Mudafari finally agreed to meet with his counsel in September 2011 to discuss "key strategic decisions," in his case. Id., Dkt. No. 265 at 1. Following that meeting, counsel informed the Court that Al-Mudafari had directed them to file his Motion for Voluntary Dismissal Without Prejudice and for Continued Access Pursuant to the Protective Order (id., Dkt. No. 268) ("Al-Mudafari Mot."), which is now pending. Id. at 2, 3.

2. Al-Mithali

Al-Mithali's case also began in November 2005 as a putative next-friend action authorized by his brother. See No. 05-2186, Dkt. No. 1. Following submission of the Government's amended factual return and statement of material facts, id., Dkt. Nos. 92, 115, and completion of considerable discovery, the case was stayed at Al-Mithali's request in March 2009 pending inter-agency review of his detention under Executive Order No. 13492, 74 Fed. Reg. 4897 (Jan. 22, 2009). See id., Dkt. Nos. 164, 165. In January 2010 the stay was lifted, at Al-Mithali's request, and reinstated, again at Al-Mithali's request, after the Government filed its amended statement of material facts. Id., Dkt. Nos. 206, 209, 264, 265. The case remained stayed until January 6, 2012, when Al-Mithali filed his Motion for Voluntary Dismissal Without Prejudice and for Continued Access Pursuant to the Protective Order ("Al-Mithali Mot."). See id., Dkt. Nos. 274, 276; Minute Order (Jul. 6, 2011).

3. Ghanem

Ghanem filed his habeas petition in August 2005. Civ. No. 05-1638, Dkt. No. 1. After the completion of discovery, and just as the parties were scheduled to make their pre-trial filings, see id., Minute Order (Jun. 3, 2010), "Petitioner [Ghanem] informed [his counsel] that he d[id] not wish to proceed with his Petition at th[at] time." See id., Minute Order (Jun. 4, 2010). For nearly a year and a half thereafter, Ghanem maintained that "he did not want [his] counsel to file any papers in [his habeas] case," see id., Dkt. Nos. 245, 248, 255, until he informed the Court in November 2011 that he no longer wishes to pursue his habeas case, see id., Dkt. No. 257 at 1. On July 13, 2012, he filed his pending Motion to Dismiss Without Prejudice and For Continued Access to Counsel Pursuant to the Protective Order, id., Dkt. No. 261.

4. Al-Baidany

Petitioner Zakaria al-Baidany (ISN 1017) filed his habeas petition on December 12, 2005, and the Government filed its factual return on October 30, 2008. Civ. No. 05-2380, Dkt. Nos. 2, 94. Thereafter the parties moved to stay the proceedings eleven times over a period of more than two years. See id., Dkt. Nos. 142, 152, 169, 173, 177, 178, 185, 192, 194, 195, 198. After the stay lifted, see id., Dkt. No. 204, the Government moved to amend the factual return, in February 2012, id., Dkt. No. 217, and completed its production of exculpatory evidence in April 2012, see id., Dkt. No. 225. In June 2012, Al-Baidany's counsel notified Government counsel that he would be seeking voluntary dismissal of his habeas petition without prejudice, see id., Minute Order (June 14, 2012), and on July 20, 2012, filed his pending Motion for Voluntary Dismissal Without Prejudice and for Continued Access Pursuant to the Protective Order, id., Dkt. No. 229.

5. Esmail

Movant Esmail filed his habeas petition in July 2004. On April 8, 2010, after a full merits hearing, the Court denied Esmail's petition. Abdah v. Obama, 709 F. Supp. 2d 25 (D.D.C. 2010). On April 8, 2011, the Court of Appeals affirmed. Esmail v. Obama, 639 F.3d 1075 (D.C. Cir. 2011). Esmail did not seek further review, and the judgment denying his habeas petition is final. On July 9, 2012, after the Government advised his counsel that, due to the termination of his case, counsel could not visit Esmail at Guantanamo Bay without executing and complying with the requirements of the counsel-access MOU, Esmail filed his pending Motion Concerning the Protective Order Entered by Judge Hogan. See No. 04-1254, Dkt. No. 1001.

6. Uthman

Movant Uthman also filed his habeas corpus petition in July 2004, which the Court granted on April 21, 2010. Abdah v. Obama, 708 F. Supp. 2d 9 (D.D.C. 2010). On March 29, 2010, the D.C. Circuit reversed and remanded with instruction to deny the petition, Uthman v. Obama, 637 F.3d 400 (D.C. Cir.), whereupon (following the denial of Uthman's petition for rehearing *en banc*), the Court issued an order denying Uthman's petition. Abdah v. Obama, 2011 WL 1642462 (D.D.C. April 29, 2011). On June 11, 2012, the Supreme Court denied Uthman's petition for a writ of certiorari. Uthman v. Obama, No. 11-413, --- S. Ct. ---, 80 U.S.L.W. 3678 (U.S. June 11, 2012). Uthman did not seek rehearing. Therefore, the judgment denying Uthman's habeas petition, like Esmail's, is also final. On July 18, 2012, Uthman, like Esmail, filed a so-called Motion Concerning the Protective Order Entered by Judge Hogan, "incorporating and adopting" Esmail's motion by reference, after his counsel, too, was advised by the Government that he could not visit Uthman at Guantanamo Bay without first executing

the counsel-access MOU. See No. 04-1254, Dkt. No. 1002. (Esmail's motion is referred to herein in its own right, and as incorporated in Uthman's motion, as the "Esmail/Uthman Mot.")

B. Relief Requested by the Movants

Petitioners Al-Mudafari, Al-Mithali, Ghanem, and Al-Baidany, in addition to moving for voluntary dismissal of their habeas petitions without prejudice, request "continued access to and [privileged] communications between [themselves] and [their counsel" pursuant to the Protective Order and Procedures for Counsel Access to Detainees at the United States Naval Base in Guantanamo Bay, Cuba (the "Protective Order") (e.g., No. 05-2185, Dkt. No. 86). Al-Mudafari Al-Mithali, Ghanem, and Al-Baidany Mots. at 1 & proposed orders. In the alternative, Al-Mudafari and Al-Mithali request indefinite stays of their cases, expressly "so that the Protective Order remains in effect and [their] access to counsel is maintained." Al-Mudafari and Al-Mithali Mots. at 4-5. All four Petitioners argue that access to counsel is necessary to vindicate their right to challenge their detentions through habeas corpus actions. Al-Mudafari, Al-Mithali, and Ghanem Mots. at 3; Al-Baidany Mot. at 2. Al-Mudafari, Al-Mithali, and Ghanem further argue (as do Esmail and Uthman) that continued counsel access is needed to participate in any review of their detentions conducted under Executive Order 13,567. Al-Mudafari, Al-Mithali, and Ghanem Mots. at 3; see Esmail/Uthman Mot. at 8.

Somewhat differently than the other Movants, but to the same desired effect, Esmail and Uthman seek a ruling from the Court that the Protective Order "continues to apply" – regardless of the fact that the judgments denying their habeas petitions are now final – and therefore that they are legally entitled to continued privileged contact and communications with their counsel under the Protective Order's terms. Esmail/Uthman Mot. at 2. That position is echoed to some extent by Petitioners Ghanem and Al-Baidany. Ghanem Mot. at 6; Al-Baidany Mot. at 5.

C. The Habeas Litigation Protective Order

On September 11, 2008, Judge Hogan, acting as coordinating judge, issued the Protective Order governing the Guantanamo Bay habeas litigation, including the Movants' cases. By its terms the Protective Order is limited in purpose and scope. Section I, styled "Protective Order," establishes the conditions under which counsel may obtain access to classified national security information "in connection with these matters." Protective Order, ¶ I.A.1. Section II, styled the "Procedures for Counsel Access to Detainees at the U.S. Naval Base in Guantanamo Bay, Cuba," establishes procedures governing counsel access to detainees "for purposes of litigating these [habeas] cases," id., ¶ II.A.1.

So long as counsel for a petitioner comply with the terms and conditions of the Protective Order, they are permitted thereunder to review and make use of classified (and "protected") information disclosed in their client's habeas case, and in "related cases" brought by other detainees, during the pendency of the litigation. See id., ¶¶ I.D.16-17, I.E.34-35. The Protective Order contains various restrictions on counsel's handling and disclosure of classified and protected information, see generally id., §§ I.D., I.E, and expressly provides that its prohibitions against unauthorized disclosure of classified or protected information survive termination of a detainee's habeas case. See id., ¶¶ I.D.31, I.E.41, I.G.52.

Section II of the Protective Order, the Procedures for Counsel Access, sets forth terms and conditions under which habeas counsel are permitted to meet with their detainee-clients in a privileged setting at Guantanamo Bay, id., ¶¶ II.C.11, II.E.14-15, II.F.16-18, to conduct privileged conversations by telephone, id., ¶¶ II.H.25-27, and to communicate with them by privileged "legal mail," id., ¶¶ II.D.12-13. Correspondence between a detainee and persons other than his "counsel" is processed under the Guantanamo Bay Naval Base's standard operating

procedures for detainee non-legal mail. Id. ¶ II.F.18. In contrast to the Protective Order's provisions governing counsel's disclosure of classified and protected information, nothing in the Protective Order states that its provisions for counsel's access to a detainee continue in force or effect after termination of the detainee's case.

D. The Government's Memorandum of Understanding Governing Continued Counsel Access Following Termination of a Detainee's Habeas Case

Although the Government opposes court-ordered counsel access for detainees who no longer have pending habeas cases, the Government will voluntarily provide detainees with continued access to their counsel, upon termination of their habeas actions, on the terms provided in the attached Memorandum of Understanding Governing Continued Contact Between Counsel/Translator and Detainee Following Termination of the Detainee's Habeas Case ("Counsel Access MOU," or "MOU") (Exh. A, hereto).[1] Under the MOU, detainees whose habeas petitions have been dismissed or denied can maintain access to counsel for purposes "of obtaining [their] transfer or release from detention" at Guantanamo Bay "through potential habeas corpus or other litigation in United States federal courts or through discussions with the United States Government." Id., ¶ 4.[2]

[1] To date the Government has identified only a single category of cases in which it would not consider counsel access under the MOU appropriate: those in which counsel have not provided the required verification of their authority to represent a detainee, see Protective Order, ¶ II.C.10, or in which circumstances (such as a detainee's persistent refusal to meet with counsel) call counsel's continued authorization to represent the detainee into substantial question. Access cannot be predicated on "continued" legal representation of a detainee, see Counsel Access MOU, ¶ 4, where the detainee has not authorized counsel to represent him in the first instance.

[2] Access is "not authorized for … assisting or representing th[e] detainee in connection with military commission proceedings or Periodic Review Board proceedings under Executive Order 13,567," as "access for these purposes [will] be governed by a separate set of procedures." Counsel Access MOU, ¶ 4.

To obtain continued access under the MOU, a detainee must "authorize[ ] [counsel's] continued legal advice and representation following the dismissal of [his] habeas case." Counsel Access MOU, ¶ 4 & n.1. The detainee's counsel must also have "previously agreed to comply with the terms of the … Protective Order" entered in the detainee's case, including the continuing obligations thereunder, id., ¶ 3; see id., ¶ 2, and retain "a valid, current United States security clearance," id., ¶ 8(e). If these conditions are met, once counsel executes the MOU and the Commander at Guantanamo Bay countersigns it, counsel may exchange correspondence with the detainee, meet with the detainee at Guantanamo Bay, and conduct telephone calls with the detainee, all according to the same procedures and requirements for these means of communication set forth in the Protective Order, except as expressly noted otherwise in the MOU. Id., ¶ 8. While counsel, absent an explicit "need to know" determination, will no longer have access to classified documents obtained or created by counsel in connection with the detainee's prior habeas case, the MOU makes clear that they "can request access to this information by submitting the justification for such access" to the Department of Defense Office of General Counsel, which "will then consult with the pertinent classification authorities within DoD and other agencies for a need-to-know determination." Id., ¶ 8(b).[3]

The MOU expressly provides that "continued access to or communication with the detainee, and/or access to classified or protected information, pursuant to the MOU, is subject to

[3] Although not stated in the MOU itself, the Government has advised petitioners' counsel that, for various reasons related to logistics and security, it anticipates limiting the number of attorneys who may have continued access to a detainee under the MOU to two. Similarly, the Government also anticipates limiting the number of translators for each detainee to one. The Government recognizes, however, that the practice among many detainees' counsel is to use alternate translators if their preferred translator is unavailable for a scheduled counsel phone call or visit. If in the future a detainee's designated post-habeas translator is unavailable for a call or visit that counsel wishes to schedule, the Government will consider at that time a request for authorization of an alternate post-habeas translator.

the authority and discretion of the Commander, Joint Task Force-Guantanamo," and that "[f]ailure to comply with the terms of th[e] MOU may result in suspension or termination of [counsel's] access to the U.S. Naval Base at Guantanamo Bay, denial of access to the detainee-client, or suspension/revocation of [counsel's] security clearance." Id., ¶ 6. "Any disputes regarding the applicability, interpretation, enforcement, compliance with or violations of th[e] MOU shall be resolved in the final and unreviewable discretion" of the Commanders at GTMO and at SOUTHCOM. Id., ¶ 8(f). The MOU also makes clear that it "is not intended to, and does not, create any right or benefit … enforceable at law or in equity by any detainee [or] counsel." Id., ¶ 9.

By the same token the MOU, as recently clarified by the Government in response to concerns expressed by the petitioners' bar, also provides that "[n]othing in this MOU is intended, or should be construed, as a waiver of any legal right that any detainee, counsel, or any other party may have, including but not limited to any right to counsel, or right of access to counsel, that a detainee may possess." Counsel Access MOU, ¶ 10. To date, counsel representing five detainees (Mohammed Al-Adahi (ISN 33), Fawzi Khalid Abdullah Fahad Al-Odah (ISN 232), Suleiman Awadh bin Aqil Al-Nahdi (ISN 511), Faez Mohammed Ahmed Al-Kandari (ISN 552), and Fahmi Salem Said Al-Assani (ISN 554)) have executed the MOU.

ARGUMENT

Pursuant to the MOU, counsel for a detainee without a pending habeas petition may exchange privileged correspondence with the detainee, meet with the detainee at Guantanamo Bay, and conduct telephone calls with the detainee, all according to the same procedures and requirements for these means of communication set forth in the Protective Order, except as expressly noted otherwise in the MOU. Counsel Access MOU, ¶ 8. Moreover, although, absent

a need to know, Counsel will not have access to classified documents obtained or created by counsel in connection with the detainee's prior habeas case, counsel can request access to such documents for use in the habeas case. And although the MOU does not itself create rights enforceable in court, nothing in the MOU waives any right to counsel the detainee may have under federal law, and nothing in the MOU prevents the detainee from refiling any habeas petition that has been dismissed without prejudice, or from filing a successive petition to the extent permitted under federal law.

Despite the fact that the Government has extended counsel access to the Movants voluntarily (with counsel access to classified information on a need-to-know basis), the Movants seek broader relief. Movants are thus seeking an order, presumably enforceable by resort to the contempt power of the Court, compelling the Government to allow their counsel entry upon (and other forms of access to) the military detention facility at Guantanamo Bay, and access to classified information, irrespective of any determination by responsible national security officials that counsel has a need to know such information.[4] In form and effect, then, even if not by name, Movants are seeking permanent injunctive relief entitling them to various forms of counsel access at Guantanamo Bay, and access by their counsel to classified information. See United States v. E-Gold, Ltd., 521 F.3d 411, 414-15 (D.C. Cir. 2008) (although not so styled the district court's order was nevertheless an injunction because it was directed to a party, enforceable by contempt, and designed to provide at least some form of relief); see also Nken v. Holder, 556 U.S. 418, 428 (2009) ("an injunction is a judicial process or mandate … directed at someone, [that] governs that party's conduct") (internal quotation marks and citation omitted).

[4] See Executive Order 13,526, § 4.1(a)(3), 75 Fed. Reg. 707, 720 (Dec. 29, 2009) (requiring as a condition of access to classified information that an individual have a need to know the information to carry out a legitimate governmental function).

"An injunction is a drastic and extraordinary remedy, which should not be granted as a matter of course." Monsanto v. Geertson Seed Farms, 130 S. Ct. 2743, 2761 (2010). Parties seeking permanent injunctive relief must show both a valid legal claim to the relief requested, Winter v. Natural Res. Def. Council, 555 U.S. 7, 32-33 (2008) ("[t]he standard … for a permanent injunction … [requires] actual success [on the merits].") (citation omitted), and irreparable harm of the sort that merits equitable relief, specifically: (1) that [they] will suffer irreparable injury if denied equitable relief; (2) that remedies available at law, such as monetary damages, would be inadequate; (3) that, considering the balance of hardships between the parties, an equitable remedy is warranted; and (4) that the public interest would not be disserved by a permanent injunction. See eBay Inc. v. MercExchange, LLC, 547 U.S. 388, 391 (2006); O'Shea v. Littleton, 414 U.S. 488, 499 (1974).

The Movants cannot carry this burden under the circumstances presented. First, absent a showing that for want of adequate counsel access they have been impeded in presenting new habeas claims to the Court, Movants cannot demonstrate an infringement of their asserted right to assistance of counsel, much less one that would justify court-ordered, indefinite counsel access to a military base, or to classified information, in the absence of current or impending habeas litigation. Second, Movants cannot demonstrate that injunctions compelling counsel access are necessary to shield them from imminent irreparable harm. Especially considering the availability of voluntary counsel access under the Government's Counsel Access MOU, and the alternative means available to Movants to file new habeas cases if they so desire, any need they may have for court-ordered counsel access for the purpose of bringing hypothetical habeas cases in the future is speculative at best.

I. IN THE ABSENCE OF CURRENT OR IMPENDING HABEAS LITIGATION, MOVANTS CANNOT SHOW INTERFERENCE WITH A RIGHT TO COUNSEL THAT HAS IMPEDED THEIR FILING NEW HABEAS CLAIMS.

Movants seek to frame this dispute as involving an attempt by the Government to deny counsel access to detainees who are asserting a right to habeas corpus under Boumediene. That misstates the issue before the Court. Instead, the question is whether detainees without active or impending habeas petitions, and who have access to counsel under the Government's MOU, are entitled to court-ordered counsel access without a showing that a lack of adequate access to counsel has impeded their ability to present new habeas petitions to the Court. The Court should answer that question in the negative.

A. The MOU Provides a Framework for Maintaining Counsel Access for Detainees Without Current Habeas Cases.

The MOU establishes a framework for maintaining access to counsel for detainees without pending habeas petitions on essentially the same terms as the Protective Order. Indeed, the MOU's procedures for counsel access are largely identical to the procedures in the Protective Order that the Movants hail as "time-tested and workable." Esmail Mot. at 9. Paragraph 8(a) of the MOU incorporates by reference the Protective Order's provisions for each of the three mainstays of counsel access that detainees have enjoyed at least since Boumediene: (1) correspondence between counsel and detainee; (2) telephonic access to the detainee; and (3) counsel visits with the detainee at Guantanamo Bay. See MOU ¶ 8(a) (incorporating by reference Protective Order ¶¶ I.D.21–45, II.C.11, II.D.12–13, II.E.14–18, II.G.19–24, II.H.25–27, II.I.28–31, II.J.32–38 with modifications specified in MOU ¶¶ 8(a)(1)–(11)).

Although counsel for five detainees have have already executed the MOU, see supra at 12, several of the Movants nonetheless argue that it would impair, threaten, or even deny altogether their right of access to counsel. See, e.g., Ghanem Mot. at 8-9; Al-Baidany Mot. at 3.

The MOU does none of these things, however. Movants' objections to the MOU ignore its essential similarities to the Protective Order, mischaracterize the differences, and fail, in the end, to show how any provision of the MOU has impaired their presentation of new habeas claims. Moreover, should Movants later conclude that the MOU operates in practice in a way that interferes with an asserted right to counsel, or right to habeas review under Boumediene, there will be a time and place then to litigate that issue, and nothing in the MOU provides otherwise.

Movants first take issue with two related provisions of the MOU: paragraph 6, pursuant to which counsel "acknowledges that continued 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" (emphasis added); and paragraph 8(f), which provides that "[a]ny disputes regarding the applicability, interpretation, enforcement, compliance with or violations of th[e] MOU shall be resolved in the final and unreviewable discretion of the Commander," at Guantanamo Bay.

Al-Baidany broadly contends that by virtue of these provisions the MOU "effectively waives a detainee's right of access to counsel by subjecting the right to the discretion of the [base] Commander." Al-Baidany Mot. at 4. That is not the case. Paragraphs 6 and 8(f) make clear that nothing in the MOU is intended to supersede the Commander's inherent authority and discretion to regulate access to the base as needed to maintain the good order, safety, and security of the facility. But they are not intended as "waiver[s]" of any legal rights to counsel that detainees may otherwise possess separate and apart from the MOU itself. For example, under the express terms of paragraph 6, the "access" that remains subject to the Commander's discretion is the access made available "pursuant to the MOU."

Any conceivable doubt about that reading of the MOU is now dispelled, moreover, by paragraph (10), which provides:

> Nothing in this MOU is intended, or should be construed, as a waiver of any legal right that any detainee [or] counsel…may have, including but not limited to any right to counsel, or right of access to counsel, that a detainee may possess.

By its own terms, therefore, the MOU does not constitute a waiver of any legal right of counsel access. Detainees whose counsel execute the MOU remain legally entitled to petition this Court for still greater access if the terms of access provided under the MOU prove inadequate to vindicate their right to habeas review in the future.[5]

Movants also take issue with three provisions of the MOU, paragraphs 8(a)(1), 8(a)(10), and 8(b), that concern not detainees' access to counsel, but counsel's access to and use of classified and protected information following termination of a detainee's habeas case. According to Movants, these provisions "hinder[ ] counsel's ability to provide legal advice" that a detainee requires to challenge his ongoing detention, Ghanem Mot. at 8-9; Al-Baidany Mot. at 4-5, but that complaint is without foundation.

As an initial matter, Movants mischaracterize the nature of these provisions. Contrary to Movants' arguments, paragraph 8(b) of the MOU would not automatically "prohibit" counsel from having access to classified information obtained or generated in the course of representing a detainee in his terminated habeas action. See Esmail/Uthman Mot. at 5; see also Al-Baidany Mot. at 4. Paragraph 8(b) states plainly that "[c]ounsel can request access to this information by

[5] The foregoing answers, too, the contention of Movant Ghanem that the discretionary nature of the access provided by the MOU contravenes the conclusion reached in Al Odah v. United States, 346 F. Supp. 2d 1 (D.D.C. 2004), that "Petitioners' access to attorneys is not a matter of Government discretion." Ghanem Mot. at 8 (quoting id. at 10); see also Al-Baidany Mot. at 4 (same); cf. Esmail Mot. at 4. It contravenes no right to counsel that detainees may have to stipulate that the MOU – the instrument through which the Government is now voluntarily providing access – creates no new rights that detainees did not already possess, rights they may continue to assert if they conclude that greater counsel access is necessary.

submitting the justification for such access" to the Department of Defense, which "will then consult with the pertinent classification authorities…for a need-to-know determination."

Nor would paragraphs 8(a)(1) and 8(a)(10) absolutely "prohibit" counsel from using information obtained in the course of representing one client for purposes of another, or sharing information obtained in the course of representing a client with counsel for other detainees. See Esmail/Uthman Mot. at 5; see also Al-Baidany Mot. at 4;Ghanem Mot. at 8–9. In each of these situations, too, counsel can request the authorization needed to make particular uses or disclosures of information that they have determined to be in their clients' interests. See Counsel Access MOU ¶ 8(a)(1) (providing that counsel may only use information received pursuant to the MOU for the continued legal representation of the detainee-client, "except by written permission of the Department of Defense or the appropriate classification authority"); *id.* ¶ 8(a)(10) (noting that disclosures of classified information to persons other than co-counsel for the same detainee may be "specifically authorized by the appropriate government personnel").

Furthermore, these provisions of the MOU are not unlike similar restrictions that can be found in the Protective Order. The Memorandum of Understanding accompanying the Protective Order, see Protective Order ¶ I.D.16(b), provides that counsel may not use classified information in any way "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," whose access provisions effectively limit counsel's use or disclosure of classified information to litigation of their clients' habeas cases. See generally Protective Order, § I.D. Therefore, that the MOU "restricts counsel in how they make use of information obtained under the MOU," Ghanem Mot. at 9, distinguishes it little, if at all, from the Protective Order.

Similarly, under paragraph I.D.28 of the Protective Order for Habeas Cases Involving Top Secret/Sensitive Compartmented Information, counsel for high-value detainees may not "disclose the contents of classified documents or information to any person, including counsel in related cases brought by Guantanamo Bay detainees," except that counsel "may seek, on a case-by-case basis, authorization from appropriate officials to disclose classified information to appropriately cleared counsel." Under this regime, counsel representing high-value detainees have requested and received permission to share classified information in specific instances. Counsel for detainees whose habeas petitions have been dismissed or denied, who should have diminished need to share and discuss classified information with counsel for other detainees, could similarly request permission to share classified information as the need in fact arises.[6]

Most fundamentally, however, Movants have made no showing that any of these provisions of the MOU has denied them, or is soon likely to deny them, access to counsel that they require in order to file new habeas cases, especially considering the MOU's provisions for continued confidential communications between detainees and their counsel. Owing at least in part to the prematurity of their demands for injunctive relief, Movants can point to no occasion on which a request of theirs under the MOU to meet, speak, or correspond with their counsel has been denied. They point to no occasion on which their counsel requested access to classified information in the files of their terminated habeas cases, or to discuss newly learned information with counsel for other detainees, but were denied permission to do so. A fortiori, they cannot

[6] While paragraph I.D.28 of the Protective Order, in contrast to the MOU, provides automatically for sharing of classified information among petitioners' counsel in related cases, that provision is expressly based on a presumption that "counsel for petitioners in these cases …have a 'need to know' information both in their own cases and in related cases pending before this Court." The MOU reasonably contemplates that, absent an active habeas case involving the preparation of pleadings, briefs, or discovery requests, a detainee's counsel ordinarily would not have the same need to share and discuss classified information with counsel for other detainees.

show that any efforts of theirs to file new habeas cases have been frustrated as a result.[7] Hence, Movants' dissatisfaction with the as-yet untested terms of the MOU provides no justification for awarding extraordinary injunctive relief that would overrule the judgment of responsible national security officials that the MOU's limits on the use and disclosure of classified information are necessary and appropriate in the interests of national security. See Holy Land Found. for Relief & Dev. v. Ashcroft, 333 F.3d 156, 164 (D.C. Cir 2003) (emphasizing "the primacy of the Executive in controlling and exercising responsibility over access to classified information"); Fitzgibbon v. CIA, 911 F.2d 755, 766 (D.C. Cir. 1990) (impermissible for court to "perform[] its own calculus as to whether or not harm to … national security … would result from disclosure" of national security information).

B. The Movants' Right Under Boumediene To Challenge the Lawfulness of Their Detention Does Not Entitle Them to Court-Ordered Counsel Access Where They Have No Active Habeas Cases and Cannot Show a Lack of Adequate Assistance of Counsel That Has Impeded Their Presentation of New Habeas Claims.

1. Movants cannot invoke the remedial powers of the courts absent actual or imminent interference with their ability to file new habeas claims.

Petitioners Al-Mudafari, Al-Mithali, Ghanem, and Al-Baidany state that they "ha[ve] a right to challenge [their] detention through … habeas corpus action[s]," Al-Mudafari Mot. at 3, citing Boumediene v. Bush, 553 U.S. 723, 771 (2008), and a corresponding "right to counsel," id., citing Hamdi v. Rumsfeld, 542 U.S. 507, 539 (2004) (plurality), that can only "have meaning" if they are assured "privileged communications with [their] counsel … pursuant to the

[7] As Al-Baidany notes, for reasons of logistics and security Respondents anticipate that under the MOU they will limit the number of attorneys who may assist in the representation of a detainee to two, and the number of translators (presumptively) to one. Al-Baidany Mot. At 5; see supra at 11 n.3. But Al-Baidany likewise has not shown how this limitation is imminently likely to impede efforts of his to file a renewed habeas action. The detainees who are represented in these cases by just one or two counsel are many in number.

Protective Order," id. at 4. See also Al-Mithali Mot. at 3-4; Ghanem Mot. at 3-4; Al-Baidany Mot. at 2. There is no question that Boumediene provides Guantanamo detainees a right to bring habeas corpus actions "to challenge the legality of their detention," 553 U.S. at 771, and that "the habeas court must have sufficient authority to conduct a meaningful review of both the cause for detention and the Executive's power to detain." Id. at 783 (emphasis added). But nothing in Boumediene suggests that access under the terms of the Protective Order rather than the terms of the MOU is required, especially for detainees without pending habeas petitions. And, as noted above, nothing in the difference between the Protective Order and the MOU suggests any likely interference with the rights identified in Boumediene.[8]

Moreover, the reliance on Boumediene by Al-Mudafari, Al-Mithali, Ghanem, and Al-Baidany is particularly misplaced, because those Movants do not now seek to challenge the lawfulness of their detention, but instead want to dismiss their cases. See supra at 5-7. To be sure, there remains the possibility that those Movants might wish to renew their habeas cases in the future to challenge their continued detention. Contrary to the position ascribed to the Government by Petitioner Ghanem, however, the Government does not question the right of Guantanamo detainees whose habeas cases have been dismissed or denied to file successive petitions in appropriate circumstances. See Ghanem Mot. at 5-6. (Indeed, the Government has consented to the dismissal of Petitioners' cases without prejudice.) Nor does the Government

[8] As the full passage that Petitioners cite from Hamdi makes plain, the Court was not drawing a legal conclusion or identifying (without analysis) new rights for habeas petitioners, but merely observing that Hamdi had, in fact, been granted access to counsel for purposes of future proceedings, and therefore gave "[n]o further consideration" to the issue at that time. 542 U.S. at 539. In any event, any analysis of the rights of Hamdi, "a United States citizen [detained] on United States soil," id. at 509, cannot be dispositive of the rights of aliens held outside U.S. sovereign territory. Cf. United States v. Verdugo-Urquidez, 494 U.S. 259, 268-71 (1990). Moreover, as discussed above, upon dismissal of Petitioners' cases there will remain no further proceedings, as there were in Hamdi, to which a right of access to counsel could attach.

question that the assistance of counsel can be instrumental to proper decision-making about whether and when to file a new habeas petition, and can be indispensable, thereafter, to the effective presentation of a detainee's new case if filed. Indeed, the very point of the access provided for under the Government's MOU, as stated in the MOU itself, is to facilitate counsel's continued legal advice to and representation of detainees following dismissal of their habeas cases, for the purpose of potential habeas litigation in the future, or other efforts to obtain detainees' release. Counsel Access MOU, ¶ 4. And in the event a detainee filed a successive petition, privileged access to his counsel could thereupon be provided for pursuant to a protective order entered in the new case. At present, however, where the only clear intention of Petitioners Al-Mudafari, Al-Mithali, Ghanem, and Al-Baidany is to dismiss their cases, the possibility that Movants will seek to file renewed petitions, and that they will be frustrated in the attempt due to a lack of sufficient counsel access, is too remote and hypothetical to support their attempt to invoke the Court's equitable powers

As a result, those Movants cannot premise requests for continued counsel access on the idea that counsel access is necessary to uphold the very right to meaningful habeas review that they have chosen not to assert. Whatever the scope and implications of the right to meaningful habeas review recognized in Boumediene, it simply does not extend authority to impose the extraordinary obligations requested here on behalf of detainees who have decided, at least for the time being, to refrain from exercising that right.

The Court of Appeals' decision in Al Odah v. United States, 559 F.3d 539 (D.C. Cir. 2009), is instructive. There the district court ordered that classified information contained in the Government's factual returns be made available to the petitioners' counsel, on the ground that the information in question was "relevant to the merits of [the habeas] litigation." 559 F.3d at

543. The Court of Appeals vacated the district court's order. Observing that the "touchstone" of a court's authority under Boumediene is vindicating a detainee's right to "meaningful review" of the grounds for his detention, the Court of Appeals held that before imposing or enforcing obligations on the Government with respect to the disclosure of classified information to a petitioner's counsel, a court must find, inter alia, that counsel's access to the information is necessary to facilitate the "meaningful review" required by Boumediene. Id. at 544-45. If, as in Al Odah, a detainee's counsel cannot claim access to classified information – even in the context of an active habeas case – where counsel's access is not necessary to facilitate meaningful habeas review, then it follows a fortiori that counsel access to classified information (or, for that matter, to a military base) cannot be justified under circumstances where habeas review is not sought at all. See also Al Bihani v. Obama, 590 F.3d 866, 875 (D.C. Cir. 2010) (concept of "meaningful review" informs procedural protections to which a habeas petitioner is entitled).

Indeed, even in the domestic prison context, access to counsel is not a "freestanding" right. Bridges v. Gilbert, 557 F.3d 541, 553 (7th Cir. 2009). Rather, it is "only [a] means for ensuring a reasonably adequate opportunity to present claimed violations of fundamental constitutional rights to the courts." Lewis v. Casey, 518 U.S. 343, 351 (1996) (internal quotation marks and citation omitted); see also Christopher v. Harbury, 536 U.S. 403, 414-15 (2002) ("the very point" of the right of access to the courts "is to provide some effective vindication for a separate and distinct right to seek judicial relief for some wrong"). Accordingly, the Supreme Court explained in Casey that to show a violation of the right of access to the courts, an inmate must demonstrate "actual injury," that a lack of adequate legal assistance had "hindered his efforts to pursue a legal claim." 518 U.S. at 351; Willman v. Mich. Dep't of Corr., No. 98-1454, 1999 WL 397923, at *2 (6th Cir. June 2, 1999) (rejecting denial-of-access claim where

restriction on visiting hours of prisoner's counsel did not hinder presentation of his habeas corpus claim). See also Johnson v. Hamilton, 452 F.3d 967, 973-74 (8th Cir. 2006); Boivin v. Black, 225 F.3d 36, 43 n.5 (1st Cir. 2000).

Here, the Movants have not shown that the prospect of their deciding to file new habeas cases, or of "official interference with [their] presentation of [habeas] claims to the courts," Casey, 518 U.S. at 349, is sufficiently "imminent," id., to constitute a "real and immediate" threat of harm permitting invocation of the Court's equitable powers. City of Los Angeles v. Lyons, 461 U.S. 95, 102-05 (1983). To the contrary, the only intention that any of the Movants have manifested at this time is to forgo habeas review, not to pursue it, thus relegating the idea of future habeas cases to the realm of conjecture.[9]

Even if the Movants sought at this time to present new habeas cases, they could not demonstrate the "actual harm" required. Casey, 518 U.S. at 349. Continued access to counsel is available to the Movants through the Government's MOU, providing essentially the same means of access – counsel visits, privileged legal mail, and telephone calls – made available under the Protective Order. Counsel Access MOU, ¶ 8. Even if Movants chose not to take advantage of the MOU, they and their counsel would still have a number of means at their disposal to re-file

[9] Although Boumediene stressed that "[h]abeas corpus proceedings need not resemble a criminal trial," 553 U.S. at 783, it is worthy of observation here that the Sixth Amendment right to counsel attaches "only at or after the initiation of adversary judicial proceedings against the defendant." United States v. Gouveia, 467 U.S. 180, 187-88 (1984) (citations omitted). The Sixth Amendment is not intended to "protect[ ] the integrity of the attorney-client relationship," as such, before a prosecution commences, Moran v. Burbine, 475 U.S. 412, 428-30 (1986), and "[u]ntil adversary judicial proceedings have been initiated, the mere 'fortuity' that a person happens to have retained counsel does not give that person a Sixth Amendment right to consult with that counsel." Rogala v. Dist. of Columbia, 161 F.3d 44, 55 (D.C. Cir. 1998). By the same token the Movants, who can claim no greater right to the assistance of counsel than a criminal defendant, are not entitled to privileged access to attorneys simply because they have attorneys, absent the initiation or at least the contemplated purpose of initiating "adversary judicial proceedings" requiring the assistance of counsel, i.e., a renewed habeas case.

their habeas petitions, after which necessary arrangements for privileged counsel access could be made. For instance, the Movants could send letters to the Court requesting initiation of habeas cases, or submit the form that the Government makes available to Guantanamo detainees for that very purpose. See, e.g., Suleiman v. Obama, No. 10-cv-1411 (RMC), Dkt. Nos. 1, 2; cf. Casey, 518 U.S. at 352 (observing that "two of the more significant inmate-initiated cases in recent years" began with "court-provided" forms). This method of initiating habeas litigation has also been used successfully by numerous Guantanamo detainees, with the full cooperation of the Government, which provides these forms to detainees on request and then forwards the completed forms to the Court.

Similarly, Movants could send requests for new cases to their counsel through ordinary "non-legal mail" channels made available to Guantanamo detainees. See Protective Order, ¶ II.D.13.d. Although for reasons of security detainees' non-legal mail is subject to review by military personnel at Guantanamo Bay, see id., a simple request to counsel to file a new habeas case, no more requires a confidential communication than did any of the similar requests that detainees have previously submitted directly to the Court. The Movants' suggestion that their right to habeas review in the future "cannot be assured" except by perpetuating the mandatory counsel-access provisions of the Protective Order, e.g., Al-Mudafari and Al-Mithali Mots. at 3-4, is contrary to the long experience of this Court in scores of Guantanamo habeas cases.

In short, Movants are not seeking a remedy for "past or imminent official interference" with their ability to present habeas claims to the Court. Casey, 518 U.S. at 349. Rather, the Movants are asking the Court to intervene in the operations of a military detention facility, and to compel disclosures of classified information, as they consider preferable to facilitate their future

presentation of hypothetical habeas claims they may or may not ever seek to file. As held in Casey, that is not an end for which the power of a federal court may be invoked.

2. Neither *Al Odah,* nor the additional decisions by this Court on which Movants rely, entitle them to mandatory counsel access under the circumstances presented here.

In support of their position that they continue to be entitled to court-ordered counsel access under the Protective Order, several of the Movants cite prior decisions of this Court for the proposition that "the right of Guantanamo detainees to have meaningful counsel has been repeatedly upheld." Ghanem Mot. at 3-5; Esmail/Uthman Mot. at 8; see also Al-Baidany Mot. at 3. As stated above, the Government does not contest here that Guantanamo detainees who exercise their right to meaningful habeas review under Boumediene are entitled to the assistance of counsel. But even accepting that principle, it lends no support to the Movants' position here, as they are not currently seeking habeas review.

Principal among the decisions cited by Movants is Al Odah v. United States, 346 F. Supp. 2d 1 (D.D.C. 2004). See, e.g., Ghanem Mot. at 3-4. Al Odah concerned a challenge by three petitioners to procedures the Government intended to implement at Guantanamo Bay that would have regulated access to their attorneys. 346 F. Supp. 2d at 2. The Court defined the threshold question presented at the outset of its opinion: "whether the detainees are entitled to counsel as they pursue their claims." Id. (emphasis added); see also id. at 3 (the inquiry is "whether the detainees are entitled to the assistance of attorneys in this process," i.e., "pursu[ing] their [habeas] claims in federal court").

Relying on authority deriving from the federal habeas statute, 28 U.S.C. § 2241 (as then enacted), and the All Writs Act, 28 U.S.C. § 1651, the Court concluded that the three detainees were "entitled to counsel[] in order to properly litigate the habeas petitions presently before the

Court." Al Odah, 346 F. Supp. 2d at 7-8 (emphasis added); see also id. at 6 (basing decision on necessity of counsel access "for the Court to make a decision on the merits of Petitioners' habeas claims"). Likewise, the crux of the additional decisions cited by Movants is that Guantanamo detainees must have the assistance of counsel in order to litigate pending habeas claims effectively in Court.[10] Thus, what may be less than clear from the Movants' briefs, but is clear on the face of the Court's decisions, is that the right to counsel that has been "repeatedly" recognized by the Court is a right that arises incident to the litigation of a pending habeas petition.

Movants here, however, are no longer in the position of detainees litigating pending habeas petitions, either because they now seek to dismiss their petitions, or because the merits of their petitions have already been fully and finally adjudicated. Therefore, the cases cited by Movants simply do not support the proposition they are entitled to permanent injunctive relief, guaranteeing them certain terms of counsel access, without any showing of a lack of adequate counsel access that has impeded efforts of theirs to obtain meaningful habeas review. And this remains especially so when the Government has already offered Movants access to their counsel on essentially the same terms as the Protective Order.

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[10] See Al-Oshan v. Obama, 753 F. Supp. 2d 1, 6 (D.D.C. 2010) (granting hunger-striking petitioner's motion for an independent medical examination to ensure his ability to consult meaningfully with his counsel and his "ability to … participate in this [habeas] litigation") (emphasis added); Tumani v. Obama, 598 F. Supp. 2d 67, 71 (D.D.C. 2009) (ordering production of petitioner's medical records because they were needed to "determin[e] whether the petitioner is capable of assisting [counsel] in the preparation of his habeas case") (emphasis added); Zuhair v. Bush, 592 F. Supp. 2d 16, 17 (D.D.C. 2008) (appointing an independent medical expert "in order to ensure that Petitioner has meaningful access to counsel … in order to represent his claims to this Court") (emphasis added); Adem v. Bush, 425 F. Supp. 2d 7, 18-19 (relying on Al Odah for conclusion that the Supreme Court's decision in Rasul gave the petitioner a right to counsel "to challenge his potentially indefinite detention"); Al-Joudi v. Bush, 406 F. Supp. 2d 13, 21 (D.D.C. 2005) (finding, in the context of an emergency motion for counsel access to hunger-striking petitioners, that counsel access is necessary "in order that the Court might fully consider Petitioners' challenge to their detention") (emphasis added) (quoting Al Odah).

C. Once Movants' Habeas Petitions Have Been Dismissed or Reduced to Judgment, the Habeas Protective Order Itself Provides No Basis for Continued, Court-Ordered Counsel Access.

For their part, Movants Esmail and Uthman do not base their request for continued, court-ordered counsel access on rights derived from Boumediene; rather, they take the position that the Protective Order itself "continues to apply" notwithstanding that their habeas claims have been reduced to judgment. Esmail/Uthman Mot. at 2. See also Ghanem Mot. at 6; Al-Baidany Mot. at 5. The express terms of the Protective Order, however, provide otherwise.

In a section headed "Applicability," the Protective Order states that its counsel-access procedures "shall govern counsel access to all detainees" at Guantanamo Bay "for purposes of litigating these [habeas] cases." Protective Order ¶ II.A.1. Similarly, the Protective Order explains, in a section headed "Overview and Applicability," that its provisions regarding access to classified and protected information apply to individuals "who, in connection with these matters, receive access to classified national security information." Id., ¶ I.A.1 (emphasis added). Thus, the Protective Order's counsel-access procedures do not "govern" here, because Movants, whose habeas petitions are now the subjects of final and unappealable judgments, or motions for voluntary dismissal, are not seeking access to counsel "for purposes of litigating the[ir habea]s cases," or counsel's access to classified information "in connection with these [habeas] matters."

Movants' efforts to avoid this straightforward conclusion are unavailing. They first argue that the Protective Order's reach should be determined, not by the express provisions defining its applicability, but by its definitions of "counsel." For purposes of the Protective Order's counsel-access procedures, "counsel" is defined as "attorneys employed or retained by or on behalf of a detainee for purposes of representing the detainee in" this Court. Protective Order, ¶ II.B.4.

Under the provisions governing access to classified and protected information, "petitioners' counsel" is defined as "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." Id., ¶ I.B.11. According to Movants, because their counsel intend to "pursue all available legal avenues to secure" their release, Esmail/Uthman Mot. at 6, including "litigation [in] federal court," Al-Baidany Mot. at 5, it follows that the Protective Order "continues to apply." Id.; see also Ghanem Mot. at 6. That argument cannot withstand analysis, however. The Protective Order's scope is not determined by its definitions of counsel; rather, the definitions of counsel are themselves part and parcel of the Order's counsel-access provisions whose applicability is defined by paragraphs I.A1 and II.A.1. Therefore, the definitions of counsel do not apply once a detainee's petition is dismissed or denied and his counsel no longer represent him for "purposes of litigating [these] habeas cases." The chance that Movants might decide to initiate new proceedings of one kind or another at an unspecified later date does not qualify their attorneys as "counsel" entitled to access under the Protective Order's terms.

Movants observe that "[n]othing in the Protective Order provides that its access provisions lapse simply because a detainee's initial request for habeas relief" is dismissed or denied. Esmail/Uthman Mot. at 6; Ghanem Mot. at 6. That is true, but it is also the case that nothing in the Protective Order provides that its access provisions endure once a detainee's habeas case has terminated, and that is fatal to Movants' position. The counsel access procedures are contained in "a carefully crafted Protective Order, painstakingly negotiated by both Petitioners and Respondents and approved by the Court," with slight modifications, "to balance national security concerns with detainees' right to counsel." See Adem v. Bush, 425 F. Supp. 2d 7, 22 (D.D.C. 2006) (Kay, M.J.) (construing earlier incarnation of the Protective Order). This

careful crafting is reflected in the Protective Order's express designation of the provisions that continue to have effect after termination of a detainee's habeas case. For example, by their own terms the prohibitions against unauthorized public or private statements by counsel disclosing classified or protected information continue to apply during "any period subsequent to the conclusion of [the habeas] proceedings." Protective Order ¶¶ I.D.31, I.E.41. Paragraph I.G.52 states unequivocally that "[t]he termination of [a detainee's] proceedings shall not relieve any person or party provided classified information or protected information of his, her, or its obligations under th[e] Protective Order" regarding the use, handling, and disclosure of that information.

Under the maxim *expressio unius est exclusio alterius,* the fact that the Protective Order's access provisions lack any similar language expressly indicating that they will continue to govern counsel's access to a detainee after the detainee's case has terminated is compelling evidence that they are not intended do so. See, e.g., NextWave Pers. Commc'ns., Inc. v. FCC, 254 F.3d 130, 152 (D.C. Cir. 2001) (where a statute prohibiting certain actions provides for several exceptions, "basic principles of statutory interpretation" preclude granting an exception not expressly listed in the act); 5 Corbin on Contracts § 24.28 (describing the maxim *expression unius est exclusio alterius*) ("If the parties in their contract have…specifically enumerated several items of a larger class, a reasonable inference is that they did not intend to include other, similar items not listed"); cf. Adem, 425 F. Supp. 2d at 21 (applying principles of contract interpretation and statutory construction to interpretation of earlier version of the Protective Order). This is especially true considering that interpreting the counsel-access provisions as lacking continuing effect after termination of a habeas case is consistent with their stated purpose: to "govern counsel access…for purposes of litigating these [habeas] cases." Protective

Order, ¶ II.A.1. Once that purpose has been served, as in the cases at bar, there is no further need or justification under the Protective Order for its counsel-access provisions to remain in effect.

If Movants wish to maintain contact with their attorneys to pursue other available legal avenues of obtaining their release, then under the MOU they may do so. If in the future Movants actually file new habeas petitions or initiate other litigation to obtain their release, new protective orders can be entered as needed to govern counsel's access in connection with those proceedings. In the meantime, however, the Protective Order provides no legal basis for an award of permanent injunctive relief enshrining its counsel-access provisions in perpetuity.

D. Executive Order 13,567 Creates No Legally Enforceable Rights on Which To Base Injunctive Relief.

All Movants save Al-Baidany also contend that Executive Order 13,567 confers "a right to counsel" during Periodic Review Board (PRB) proceedings that "can only be assured pursuant to the Protective Order." Al-Mudafari, Al-Mithali, and Ghanem Mots. at 3-4; Esmail/Uthman Mot. at 8. But there is no justification for invoking the power of the Court to mandate a counsel-access regime for an Executive branch process that does not implicate habeas rights, does not involve the judiciary, and whose purpose is not to address the legality of detention. As provided by section 1023(b)(1) of the National Defense Authorization Act for Fiscal Year 2012, Pub. L. 112-81 (the "NDAA"), the PRB process addresses only whether detainees should continue to be held as a matter of Executive discretion based on the threat they pose. Moreover, neither the Executive Order nor section 1023 confers a judicially enforceable "right to counsel," nor enforceable "rights" of any kind. Thus, Movants' request would inappropriately inject the Court into fashioning for the Executive Branch a counsel-access regime that the Executive Order contemplates will be developed by the Department of Defense.

Executive Order 13,567, 76 Fed. Reg. 13,277 (Mar. 7, 2011), establishes an internal Executive Branch review process for certain individuals held at Guantanamo Bay to ensure periodically that continued detention of each detainee subject to review is necessary to protect against a continuing significant threat to the security of the United States. See Exec. Order 13,567, §§ 1(b), 2; NDAA § 1023(b)(1). The review is to be conducted by a Periodic Review Board ("PRB") to determine on the basis of information provided by the Department of Defense and other relevant Government agencies, and any "relevant and material" information submitted by or on behalf of the detainee, whether continued custody of the detainee is necessary under that standard. See Id., §§ 3(a), (d), 9(d). Under guidelines to be issued by the Secretary of Defense, each detainee for whom a review is conducted is to be "assisted in proceedings before the PRB by a Government-provided personal representative," and "may [also] be assisted in proceedings before the PRB by private counsel, at no expense to the Government." Id. at § 3(a)(2). The Order states plainly, however, that the review process "does not address the legality of any detainee's law of war detention." Id., § 8. Rather, the review is undertaken "to make a discretionary determination," NDAA, § 1023(b)(1), and is "not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party." Exec. Order 13,567, § 10(c).

Consequently, Executive Order 13,567 does not provide detainees who undergo PRB review with a judicially enforceable right to counsel, or any justification for asking the Court to impose a counsel-access regime on the PRB process other than the one developed, per the Order's direction, by the Secretary of Defense. As a general matter, executive orders are viewed as management tools for implementing the President's policies, not as legally binding documents that may be enforced against the Executive Branch. See In re Surface Mining Regulation Litig.,

627 F.2d 1346, 1357 (D.C. Cir. 1980); see also Chai v. Carroll, 48 F.3d 1331, 1338-39 (4th Cir. 1995); Facchiano Constr. Co. v. U.S. Dep't of Labor, 987 F.2d 206, 210 (3dCir. 1993); Indep. Meat Packers Ass'n v. Butz, 526 F.2d 228, 236 (8th Cir. 1975). An executive order is enforceable by a litigant "only if it was intended to create a private cause of action." Chai, 48 F.3d at 1339. On the other hand where, as here, an Executive Order explicitly disclaims the creation of any rights or rights of action, courts have regularly held that the order is not enforceable. See, e.g., id.; Air Transp. Ass'n of Am. v. FAA, 169 F.3d 1, 8-9 (D.C. Cir. 1999).

Executive Order 13,567 thus does not endow detainees with an enforceable right to counsel that authorizes a court to compel access by their counsel to a military detention facility located outside U.S. borders, or to classified national security information. For its part, section 1023 makes no reference whatsoever to assistance of counsel, much less establish a right to counsel. For these reasons as well, Movants' request for injunctive relief must be denied.

II. JUDICIAL RESTRAINT IS PARTICULARLY WARRANTED HERE IN LIGHT OF THE EXTRAORDINARY NATURE OF THE RELIEF SOUGHT.

Because Movants, who may enjoy continued access to counsel under the MOU, cannot demonstrate a lack of adequate assistance of counsel that has impeded their access to the Court, there is no basis for the relief Movants seek. But Movants' lack of any entitlement to relief is reinforced by longstanding principles that judicial counsel restraint here. Out of respect for the separation of powers established by the Constitution, "'[c]ourts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs.'" Munaf v. Geren, 553 U.S. 674, 689(2008) (quoting Dep't of Navy v. Egan, 484 U.S. 518, 530 (1988)); accord Haig v. Agee, 453 U.S. 280, 292 (1981) ("Matters intimately related to . . . national security are rarely proper subjects for judicial intervention. Here, the injunctions requested by the Movants would unjustifiably intrude upon the authority of the Executive in at least two ways.

First, by directing the Government to permit Movants' counsel to enter upon and to engage in confidential oral and written communications with Movants at a military installation – the Guantanamo Bay Naval Base – for purposes and on terms and conditions defined by the Court, the injunctions Movants seek would interfere with the Executive's longstanding authority to determine who shall and shall not be granted access to a military base in order to ensure the good order, security, and safety of the base. The power to decide who may enter upon the premises of a military installation, and who shall be excluded therefrom, is committed to the base commander, an allocation of power that is grounded in history and constitutional authority. "The control of access to a military base is clearly within the constitutional powers granted to both Congress and the President," Cafeteria & Rest. Workers Union, Local 473 v. McElroy, 367 U.S. 886, 890 (1961), and the power in turn delegated to a commanding officer "summarily to exclude civilians from the area of his command" is "historically unquestioned," Greer v. Spock, 424 U.S. 828, 838 (1976) (citation omitted), "traditionally … unfettered," and expressly conferred by law, Cafeteria Workers, 367 U.S. at 890-92. See 32 C.F.R. §§700.810, 700.802; see also Serrano Medina v. United States, 709 F.2d 104, 109 (1st Cir. 1983) (remarking that the Executive's "power to exclude civilians summarily [from military bases] has been acknowledged by almost every court to consider the matter").

As the Supreme Court observed in Cafeteria Workers:

> The power of a military commandant over a reservation is necessarily extensive and practically exclusive, forbidding entrance and controlling residence as the public interest may demand . . . It is well settled that a [p]ost [c]ommander can . . . in his discretion, exclude private persons and property therefrom, or admit them under such restrictions as he may prescribe in the interest of good order and military discipline.

367 U.S. at 893 (internal quotation marks and citations omitted).

Injunctions requiring that Movants' counsel be permitted to enter the Guantanamo Bay detention facility, whether "in person or through the written word," Thornburgh v. Abbott, 490 U.S. 401, 407 (1989) (discussing "potentially significant implications for the order and security of [a] prison" of "seemingly innocuous" interactions between inmates and outsiders), and to engage there in confidential oral and written communications with them, would represent a significant incursion upon the Executive's control over access to a military base. Given the terms on which the MOU provides for counsel access, Movants can offer no justification for judicial supervision of the operation of a military detention facility under the circumstances presented here.

Second, by asking for court-ordered counsel access under the terms of the Protective Order, the Movants also request, in effect, injunctions requiring that their counsel be guaranteed continued access not only to classified information concerning their soon-to-be-dismissed or now terminated habeas cases, but also to information regarding the facilities and security procedures followed at Guantanamo Bay, and to such other classified information as Movants might divulge to them in the future. See Protective Order, ¶¶ I.D.16-17, II.C.11, II.D.12.f, II.I.29, II.J.32-38. Thus Movants' requests also disregard the Executive's equally well established authority to determine who shall and shall not be granted access to classified information.

Under the Constitution's separation of powers, and statutory law, the Executive Branch is responsible for controlling access to classified information, owing in great measure to the Executive's superior institutional capabilities and constitutional responsibilities in matters concerning the protection of national security. See Dep't of the Navy v. Egan, 484 U.S. 518, 527 (1988) (for reasons "too obvious to call for enlarged discussion … the protection of classified information must be committed to the broad discretion of the agency responsible, and this must

include broad discretion to determine who may have access to it") (internal quotations omitted); CIA v. Sims, 471 U.S. 159, 180 (1985) ("it is the responsibility of [the Executive], not that of the judiciary, to weigh the variety of complex and subtle factors in determining whether [to disclose sensitive information]"); Ctr. for Nat'l Sec. Studies v. U.S. Dep't of Justice, 331 F.3d 918, 928 (D.C. Cir. 2003.)

The Executive's interest "in withholding national security information from unauthorized persons" is a "'compelling'" one, Egan, 484 U.S. at 527 (quoting Snepp v. United States, 444 U.S. 507, 509 n.3 (1980)); accord Weaver v. U.S. Info. Agency, 87 F.3d 1429, 1442 (D.C. Cir. 1996), and so it is that "no one has a 'right'" of access to classified information. See Egan, 484 U.S. at 528. The decision whether to grant an individual access to classified information requires a determination that doing so is consistent with the interests of national security, a "[p]redictive judgment . . . [that] must be made by [Executive Branch officials] with the necessary expertise in protecting classified information." Id. at 529. "[I]t is not reasonably possible for an outside nonexpert body" such as a court "to review the substance of such a judgment . . . [or] determine what constitutes an acceptable margin of error in assessing the potential risk." Id.

Here, the Government agreed to provide Movants' counsel with access to classified information for the sole purpose of litigating (and solely for the duration of) their habeas cases. See Protective Order, ¶¶ I.A.1, II.B.1; see also id. ¶¶ I.B.11, II.B.4. And the MOU provides a process for continued access, when necessary and appropriate for the habeas litigation. In light of the MOU and the Constitution's commitment of control over classified information to the Executive, the court-ordered counsel access to classified national security information, of indefinite duration, that Movants seek to impose here cannot be justified.

III. MOVANTS HAVE NOT MADE THE SHOWING OF IRREPARABLE HARM REQUIRED FOR AN AWARD OF PERMANENT INJUNCTIVE RELIEF.

To obtain the permanent injunctive relief they request, Movants must also show that they would suffer irreparable injury if the relief were withheld. See Monsanto, 130 S. Ct at 2756-57; id. at 2759-60. "'The basis for injunctive relief in the federal courts has always been irreparable harm and inadequacy of legal remedies.'" Wis.Gas Co. v. F.E.R.C., 758 F.2d 669, 674 (D.C. Cir. 1985) (quoting Sampson v. Murray, 415 U.S. 61, 88 (1974)). The harm must be "both certain and great[,] . . . not theoretical"; "the injury complained of [must be] of such imminence that there is a clear and present need for equitable relief . . . ." Id. (internal quotation marks, ellipses and citations omitted). Speculative injury will not support an award of permanent injunctive relief. See Comm. in Solidarity With the People of El Salvador v. Sessions ("CISPES"), 929 F.2d 742, 745-46 (D.C. Cir. 1991). The required demonstration of harm "cannot be met where there is no showing of any real or immediate threat that the [moving party] will be wronged . . . ." Lyons, 461 U.S. at 111.

Given that the right to which Movants are entitled is the right to meaningful habeas review guaranteed by Boumediene, 553 U.S. at 732, and not a freestanding right to counsel, see supra at 23, the harm Movants must demonstrate is the hindrance of efforts they have made, or will attempt to make, to present new habeas cases to the Court. See Casey, 518 U.S. at 351. Movants do not show that the prospect of such harm is certain and great. Wisconsin Gas, 758 F.2d at 674. Rather, the idea that they would hindered in their efforts to file new habeas cases in the future unless the Court grants them an injunction is "purely hypothetical." Id. at 674-75.

First, Movants ask the Court to speculate that they will seek to renew their habeas cases in the future, without any showing as to whether or when they would actually do so. This possibility cannot be characterized as certain, and it certainly cannot be considered imminent,

given that the only current intentions exhibited by the four Petitioners is to dismiss rather than press their habeas claims, and that Movants Esmail and Uthman have articulated no current plans to file new habeas cases. See generally Esmail/Uthman Mot.; CISPES, 929 F.2d at 745 (plaintiffs were not entitled to injunction requiring disposal of agency records on theory that agency's retention of records would decrease plaintiffs' chances of obtaining future government employment when "no plaintiff expressed any desire to engage in government employment").

But even if the Movants currently harbored intentions to re-file their habeas cases, or their counsel had determined that it was advisable at this time to do so, they could not make the requisite showing of irreparable harm. There are various means available by which the Movants might in future re-file their cases absent court-ordered counsel access in the meantime. As discussed above, Movants have the option of maintaining access to their counsel under the Government's MOU in essentially the same ways as are now (or were) available to them under the Protective Order. By means of the privileged channels of communication made available under the MOU, counsel can advise their clients, or the Movants can instruct their counsel, to commence new habeas actions on their behalf at such time as either counsel or the Movants determine to be desirable. Movants could also write or submit form requests to the Court asking that new cases be filed on their behalf; likewise, they could write directly to their counsel through non-legal mail channels making the same simply stated request.

For its part the Government, since well before the watershed decision in Boumediene, has consistently taken action to facilitate detainees' access to the Court, such as by making pre-printed forms available to detainees who wish to request representation, and then forwarding

them when ready to the Court.[11] Given the Government's long track record of cooperation in detainees' efforts to file habeas petitions, Movants cannot credibly maintain, and it would be speculative, at best, to assume, that any future attempts they might make to file renewed habeas cases would meet with frustration if they are denied the injunctive relief they seek.

Movants observe that it would be "particularly difficult for a detainee to proceed pro se" in a federal habeas action, Al-Mudafari, Al-Mithali and Ghanem Mots. at 3-4; Al-Baidany Mot. at 2-3; Esmail/Uthman Mot. at 7, a proposition the Government does not dispute, but it is a non-sequitur. In each of the above scenarios the consistent practice, without objection from the Government, has been to enter the Court's September 11, 2008, Protective Order in a newly filed case, thus providing terms for the privileged means of communication between petitioner and counsel that are needed, once an authorized case has been filed, to litigate it effectively. Movants do not even attempt to demonstrate that these means of filing successive habeas petitions, and thereafter providing for privileged access to their counsel pursuant to a protective order, would fail to meet any future needs they might have for access to this Court.[12]

[11] To be sure, since the detainees at Guantanamo Bay have been afforded the right to habeas review, disputes have arisen from time to time between petitioners and the Government regarding the terms and conditions of the access to which their counsel is entitled in particular circumstances. In more than 200 cases litigated over the course of a decade, such differences were bound to arise at one time or another But the Government has not thwarted, or attempted to thwart, efforts by detainees to file habeas claims with the Court.

[12] Movants likewise have no basis on which to suggest that absent an injunction they will be denied assistance of counsel in any future PRB proceedings that might be available to them. See Pet'r's Mot. at 3-4. Executive Order 13,567 provides that Guantanamo detainees "may be assisted in proceedings before the PRB by private counsel, at no expense to the Government." Exec. Order 13,567, § 3(a)(2). Movants have demonstrated no grounds for concluding that the intervention of this Court is necessary to ensure that the President's instructions are carried out. Furthermore, contrary to the assertion made by Movants Esmail and Uthman, Esmail/Uthman Mot. at 8, the Counsel Access MOU does not preclude communications between them and their counsel regarding PRB proceedings in which they might be involved; it merely does not provide access for that purpose. As the MOU states, counsel access for purposes of a detainee's PRB review "shall be governed by a separate set of procedures." Counsel Access MOU, ¶ 4.

Movants Al-Mudafari and Al-Mithali argue that mandatory counsel access for themselves alone "would not substantially burden" the Government. Al-Mudafari and Al-Mithali Mots. at 4. Of course, where Movants have failed to demonstrate that they would suffer any harm whatever if no injunction were awarded, their request for injunctive relief must be denied on that basis alone, see, e.g., Monsanto, 130 S. Ct. at 2759-60; Nat'l Mining Ass'n v. Jackson, 768 F. Supp. 2d 34, 55(D.D.C. 2011), no matter how modestly they might view the burden that relief in their cases would impose on the Government. The Court should bear in mind, however, not only the injunctions that Movants are seeking for themselves, but the multiple injunctions that additional petitioners foreseeably would seek upon dismissal of their cases if relief were granted here. Whether in one case, or dozens, court-ordered counsel access in the absence of a pending habeas case would represent a constitutionally unjustified encroachment on the "historically unquestioned" and "traditionally … unfettered" authority of a military base commander to summarily exclude civilians therefrom, see Greer v. Spock, 424 U.S. at 838; Cafeteria Workers, 367 U.S. at 890-92, and on the Executive's constitutional prerogative and duty to determine who should and should not be granted access to classified information. Egan, 484 U.S. at 527-29; Sims, 471 U.S. at 180; see Snepp, 444 U.S. at 509 n.3 (noting the Government's "compelling interest" in withholding national security information from unauthorized persons).

Movants and their counsel may be genuinely concerned that preservation of counsel access as provided for under the Protective Order is necessary to ensure that they can again seek redress in this Court if they decide one day again to invoke their right to habeas review. But that fear is unfounded, particularly under circumstances where Movants can maintain such privileged contact with their counsel as may be necessary for purposes of re-filing their habeas cases by availing themselves of the Counsel Access MOU. "Injunctions . . . will not issue to prevent

injuries neither extant nor presently threatened, but only merely feared." CISPES, 929 F.2d at 745-46 (citation omitted); Wisconsin Gas, 758 F.2d at 674 ("[i]njunctive relief will not be granted against something merely feared as liable to occur at some indefinite time") (citations omitted); Clark v. Library of Cong., 750 F.2d 89, 94 n.5 (D.C. Cir. 1984); Cont'l Grp., Inc. v. Amoco Chem. Corp., 614 F.2d 351, 359 (3d Cir. 1980) ("(i)njunctions will not be issued merely to allay the fears and apprehensions or to soothe the anxieties of the parties")(citations omitted).

* * *

Under the Constitution's separation of powers, it is the role of the Executive Branch to manage operation of the military detention facilities at Guantanamo Bay to maintain the good order, safety, and security of the facility, and to protect the interests of national security, while at the same time respecting the rights of counsel access that detainees may possess. See Casey, 518 U.S. at 549. By means of its Counsel Access MOU, the Government has assumed responsibility for this task. Only if and when the Government's efforts fall short of this objective in such a way as to impede detainees' efforts to invoke the Great Writ's protection might it be the Court's role to fashion appropriate relief. See id. Because that day has not arrived, Movants' requests for permanent injunctive relief guaranteeing them continued access to counsel under the Protective Order must be denied.

IV. THE COURT SHOULD REJECT THE ALTERNATIVE REQUESTS BY PETITIONERS AL-MUDAFARI AND AL-MITHALI FOR INDEFINITE STAYS.

In the alternative, if the Court is not prepared to order continued counsel access following dismissal of their habeas claims, Petitioners Al-Mudafari and Al-Mithali move for indefinite stays of their cases. Al-Mudafari and Al-Mithali Mots. at 4-5. This is no alternative, however, in any meaningful sense of the word; in either event, the Government would remain subject to the mandatory counsel-access requirements of the Protective Order, without any genuine intent

on Petitioners' part to pursue habeas relief at this time. That is, in fact, Petitioners' stated objective: they admit that they are requesting an indefinite stay "so that the Protective Order remains in effect and Petitioner[s'] access to counsel is maintained." Id. at 4. This request turns the intent of the Protective Order on its head. The Protective Order was adopted to facilitate the litigation of detainees' habeas claims; the purpose of a habeas case is not to manufacture a jurisdictional pretext for unnecessarily mandating access to counsel. Under these circumstances, where Petitioners have identified no legitimate need for indefinite stays, and the terms of the stays would unjustifiably encroach upon the authority of the Executive Branch, Petitioners' alternative requests for indefinite stays must also be denied.

Although a district court has broad discretion to issue or deny stays in order to efficiently control the disposition of cases on its docket, a court abuses this discretion by issuing a stay "of indefinite duration in the absence of a pressing need." Belize Soc. Dev. Ltd. v. Gov't of Belize, 668 F.3d 724, 732 (D.C. Cir. 2012) (citation omitted). The party moving for such a stay "must make out a clear case of hardship or inequity in being required to go forward, if there is even a fair possibility that the stay for which he prays will work damage to some one else." Barton v. Dist. of Columbia, 209 F.R.D. 274, 278 (D.D.C. 2002) (quoting Dellinger v. Mitchell, 442 F.2d 782, 786 (D.C. Cir. 1971)). "Any protracted [stay] … would require not only a showing of 'need' … but would also require a balanced finding that such need overrides the injury" to the opposing party. Dellinger, 442 F.2d at 787.

Here, Petitioners have not shown a "pressing need" for indefinite stays, or "made out a clear case of hardship or inequity" if forced to litigate their cases. They acknowledge that the purpose of the desired stays is not to promote efficiency or their ability to litigate their claims effectively. Instead, the sole objective is to provide them with continued court-ordered access to

counsel. Yet they cannot have a need for mandatory counsel access, "pressing" or otherwise, at a time when they have no intention of litigating their habeas claims at all, and the Government is prepared to extend them access to their counsel voluntarily under the MOU.

On the other side of the scale, however, the Government would suffer significant injury if stays were granted and the Protective Order remained in place. As discussed herein, court-ordered counsel access under circumstances where the Government has voluntarily provided access, and where detainees are not exercising the right to habeas review, would result in an unwarranted incursion upon the constitutional authority of the Executive over access to a military detention facility, and to classified national security information. These injuries outstrip the putative "need" for stays asserted by Petitioners.

Rather than stay Al-Mudafari's and Al-Mithali's cases indefinitely, the Court should dismiss them without prejudice, and without court-ordered counsel access. This Court has done exactly that when faced with motions for indefinite stays by similarly situated detainees who, like Petitioners here, were unwilling or simply lacked sufficient interest to proceed with their cases. See, e.g., Suleiman v. Obama, No. 10-cv-1411 (RMC), Minute Order (D.D.C. Sept. 16, 2011) (granting Respondents' motion to dismiss for lack of direct authorization and denying petitioner's alternative request for an indefinite stay); Hakeemy v. Obama, No. 05-cv-429, 2010 WL 3339182, at *1 (D.D.C. Aug. 24, 2010) (denying request for indefinite stay where "counsel was unable to obtain petitioner's consent to proceed" and "the petitioner ha[d] shown no interest in challenging the lawfulness of his detention"). Following that course will still allow Petitioners to maintain privileged access to their counsel, pursuant to the MOU, ensuring that they can file successive petitions in the future should they choose again to pursue habeas relief.

CONCLUSION

The Government concurs with Petitioners Al-Mudafari, Al-Mithali, Ghanem, and Al-Baidany that their cases should be dismissed without prejudice. For the reasons stated above, however, the Court should deny the Movants' requests for permanent injunctions mandating continued counsel access under the Protective Order. The Court should also deny the alternative requests by Petitioners Al-Mudafari and Al-Mithali for indefinite stays of their cases.

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