

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

MAHMOAD ABDAH, *et al.*,

Yasein Khasem Mohammad Esmail  
(ISN 522),

Uthman Abdul Rahim Mohammed  
Uthman (ISN 27),

*Petitioners,*

v.

BARACK H. OBAMA, *et al.*,

*Respondents.*

Civil Action No. 04-cv-1254 (RCL)

**RESPONDENTS' MOTION TO REFER THE COUNSEL-ACCESS ISSUE FOR  
DECISION BY A SINGLE DISTRICT JUDGE AND TO HOLD IN ABEYANCE  
FORMER PETITIONERS ESMAIL'S AND UTHMAN'S MOTIONS FOR  
ORDER CONCERNING THE PROTECTIVE ORDER**

Yasein Khasem Mohammad Esmail (ISN 522) and Uthman Abdul Rahim Mohammed Uthman (ISN 27) (the "Movants"), two Guantanamo Bay detainees, have had their habeas petitions fully adjudicated and denied, judgments that are now final and unappealable. Nevertheless, these two detainees have filed motions, purportedly before Magistrate Judge Kay, seeking rulings that they are entitled to continued, court-ordered counsel access under the Protective Order that governs this case notwithstanding (1) that they have no case pending, and (2) that the Government is willing to provide them continued counsel access under the terms of the attached memorandum of understanding. *See* Dkt. No. 1001 (Jul. 9, 2012) ("Esmail Mot.") and Dkt. No. 1002 (Jul. 18, 2012) (together, "Motions for Counsel Access").

In essence, the Movants seek permanent injunctive relief guaranteeing their counsel continued access to a military detention facility on foreign soil, and access to classified information, notwithstanding the termination of their habeas cases. As the Government has explained in response to similar requests by petitioners in other cases, *see, e.g., Al-Mudafari v. Obama*, No. 05-cv-2185, Dkt. No. 284 (D.D.C. June 22, 2012), the counsel-access issue raised by the Motions for Counsel Access is of potentially global importance to the Guantanamo Bay detainee litigation. Four other Guantanamo Bay habeas petitioners have also moved for continued counsel access under the terms of the habeas Protective Order following dismissal of their habeas cases.<sup>1</sup> The issue of counsel access following voluntary dismissal of a detainee's habeas petition has been raised between the parties (and in some instances, with the Court) in at least 20 other cases. Respondents, therefore, expect the counsel-access issue to arise in the great majority of the remaining Guantanamo Bay habeas cases, both pending and terminated, presenting common issues of law.

The counsel-access issue should therefore be decided on a coordinated basis by a single judge of this Court. Consolidation before a single judge for a decision on behalf of the entire Court would avoid duplication of effort, avoid the potential for inconsistent decisions by individual judges, and bring about a more efficient and speedy resolution to this important issue. In keeping with the "first-filed" principle applied in situations of this kind, the issue should be referred to Chief Judge Lamberth as the presiding judge in

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<sup>1</sup> *Mudafari v. Obama*, 05-CV-2185 (RCL), Dkt. No. 268 (D.D.C. Oct. 28, 2011); *Al-Mithali v. Obama*, 05-CV-2186 (ESH), Dkt. No. 276 (D.D.C. Jan. 6, 2012); *Ghanem v. Obama*, 05-CV-1638 (CKK), Dkt. No. 261 (D.D.C. Jul. 13, 2012); *Al-Baidany v. Obama*, 05-CV-2380 (CKK), Dkt. No. 229 (Jul. 20, 2012).

the action in which the first of the detainees' motions for continued counsel access was filed. *See Al-Mudafari, supra*, Dkt. No. 268 (D.D.C. Oct. 28, 2011).

In all events the counsel-access issue should not be referred to a magistrate judge, as the Movants request, whether in the Movants' cases or any others, because doing so would actually disserve the interests of judicial economy and delay resolution of the issue. Although styled in the instant cases as requests for rulings that the Protective Order "continues to apply," *see* Esmail Mot. at 2, the various motions for continued counsel access now pending before this Court in essence seek permanent injunctive relief, and so, as provided by 28 U.S.C. § 636(b)(1) and Local Rules 72.2 and 72.3, can only be referred to magistrate judges for proposed findings and recommendations. Any district judges who referred this issue would still have to review the magistrate judges' recommendation *de novo* in light of any objections raised thereto by the dissatisfied parties, objections that are very likely given the nature of this issue. *See* 28 U.S.C. § 636(b)(1); LCvR 72.3(c). Consequently, referring the counsel-access issue to a magistrate judge would only prolong its resolution.

Therefore, Respondents respectfully move the Court for the following forms of relief. First, pursuant to Fed. R. Civ. P. 42(a) and Local Rule 40.5(e), Respondents request that the instant Motions for Counsel Access be referred to a single district judge for a coordinated ruling on the counsel-access issue that will govern in these and all other Guantanamo Bay habeas cases. Second, Respondents request that the Court hold further briefing and consideration of the Motions for Counsel Access in abeyance pending resolution of whether the Court will decide the counsel-access issue on a coordinated basis. Alternatively, if the Court declines to coordinate resolution of the counsel-access

issue, Respondents request that the Motions for Counsel Access be decided by the Court, rather than a magistrate judge. Finally, Respondents respectfully request that they be granted an extension of time, until two weeks after a decision denying referral for coordination of the counsel-access motions, to file their opposition to the Motions for Counsel Access. For the reasons stated below, Respondents' requests should be granted.<sup>2</sup>

### **BACKGROUND**

#### **A. Termination of Movants' Habeas Cases**

On April 8, 2010, Judge Henry H. Kennedy denied Movant Esmail's petition for habeas corpus. *Abdah v. Obama*, 709 F. Supp. 2d 25 (D.D.C. 2010). On April 8, 2011, the D.C. Circuit affirmed Judge Kennedy's denial of the writ. *Esmail v. Obama*, 639 F.3d 1075 (D.C. Cir. 2011). Subsequently, though extended once at Esmail's request, the deadline for filing a petition for a writ of certiorari to the Supreme Court passed without any filing. Therefore, the Court's judgment denying Esmail's habeas petition is final.

On April 21, 2010, Judge Kennedy granted Uthman's petition for habeas corpus. *Abdah v. Obama*, 708 F. Supp. 2d 9 (D.D.C. 2010). On March 29, 2010, the D.C. Circuit reversed the Court's decision and remanded with instruction to deny the petition.

*Uthman v. Obama*, 637 F.3d 400 (D.C. Cir.), reh' g *en banc* denied (May 31, 2011). Accordingly, the Court issued an order denying Uthman's petition on April 29, 2011. *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

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<sup>2</sup> Pursuant to Local Rule 7m, counsel for Respondents conferred with counsel for Movants, who indicated Movants oppose this motion.

rehearing of this denial within the prescribed 25 days, *see* Sup. Ct. R. 44, therefore, the denial of Uthman’s habeas petition, like Esmail’s, is also final.

**B. The 2008 Protective Order and the Counsel-Access Memorandum of Understanding**

The Protective Order and Procedures for Counsel Access to Detainees at the United States Naval Base in Guantanamo Bay, issued by Judge Hogan as coordinating judge and eventually adopted by the Court in all Guantanamo Bay habeas cases, *see* Dkt. No. 283 (the “2008 Protective Order”), is by its terms limited in purpose and scope. It establishes the conditions under which counsel may obtain access to classified national security information “in connection with these matters,” 2008 Protective Order, ¶ I.A.1, and procedures that govern counsel access to detainees “for purposes of litigating these [habeas] cases,” *id.* ¶ II.A.1. Although several provisions of the 2008 Protective Order—in particular, those prohibiting unauthorized disclosure of classified or protected information by petitioners’ counsel—expressly survive termination of a detainee’s habeas case, *see id.*, ¶ I.G.52, nothing in the 2008 Protective Order provides for continued counsel access to the Guantanamo Bay Naval Station, or to classified information, following termination of the case for which that access was granted.

Nevertheless, the Government has determined, as a matter of discretion in appropriate cases, to provide detainees with continued access to their habeas counsel 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).<sup>3</sup>

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<sup>3</sup> The version of the MOU attached hereto is different in one respect from the version Respondents’ previously made available to Movants’ counsel and filed with the Court earlier in other cases. The revised

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 2008 Protective Order. The Government has informed Movants' counsel that, because their habeas cases have been terminated, to continue privileged communications with and access to Movants at Guantanamo Bay, counsel must execute the MOU and comply with the conditions set forth therein, prompting Movants to file the Motions for Counsel Access.<sup>4</sup>

### ARGUMENT

**I. THE COUNSEL-ACCESS ISSUE RAISED BY MOVANTS SHOULD BE DECIDED ON A COORDINATED BASIS BY A SINGLE DISTRICT JUDGE, AND SHOULD NOT BE REFERRED IN THESE OR ANY OTHER CASES TO A MAGISTRATE JUDGE.**

Where two or more actions before a court “involve a common question of law or fact,” Federal Rule of Civil Procedure 42(a) permits the court to “join for hearing or trial *any or all* matters at issue in the actions,” or “to issue any other orders to avoid unnecessary cost or delay.” Fed. R. Civ. P. 42(a)(1), (3) (emphasis added). Similarly, Local Rule 40.5(e) provides that “two or more cases assigned to different judges [may]

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version includes an additional paragraph, ¶ 10, clarifying (as the Government had always intended) that nothing in the MOU constitutes a waiver of any legal right to counsel that a detainee may have separate and apart from the MOU itself. The attached version of the MOU was provided to Movants' counsel on July 25, 2012.

<sup>4</sup> It is the Government's understanding that Movants' counsel has requested to meet with both Movant Esmail and Movant Uthman on August 30, 2012, the last day of a 10-day trip to Guantanamo Bay during which he also wishes to meet with 12 other detainees who *do* have pending habeas cases. The Government has proposed to Movants' counsel that he can sign the MOU subject to an express understanding between the parties (1) that his agreement to be bound by the terms of the MOU is for the sole purpose of this single visit with Movants; (2) that his agreement to be bound by the terms of the MOU for this purpose shall expire upon completion of the visit; and (3) that his acknowledgment and affirmation of the MOU for this purpose do not serve as an endorsement of the MOU, and are without prejudice to Movants' ability to seek legally to challenge or modify the MOU in the future. If counsel enters into the MOU and provides it to GTMO by August 18 and if another counsel has not in the meantime requested these meeting slots, this arrangement will allow his trip to Guantanamo Bay to proceed without imposing unnecessary urgency on the Court's consideration of the important issues raised by the Motions for Relief.

be referred *for a specific purpose* to one judge in order to avoid a duplication of judicial effort.” LCvR 40.5(e) (emphasis added). *See also Saleh v. Titan Corp.*, 436 F. Supp. 2d 55, 60 (D.D.C. 2006) (consolidating cases for discovery purposes only). The primary purposes of such consolidation are to conserve judicial resources and to avoid the risk of inconsistent rulings on common factual and legal issues. *See Judicial Watch, Inc. v. U.S. Dep’t of Energy*, 207 F.R.D. 8, 9 (D.D.C. 2002); *Mylan Pharmaceuticals, Inc. v. Henney*, 94 F. Supp. 2d 36, 43 (D.D.C. 2000); *see also Johnston v. Celotex Corp.*, 899 F.2d 1281, 1285 (2d Cir. 1990). Consolidation also helps to “relieve[] the parties and the [c]ourt of the burden of duplicative pleadings and [c]ourt orders.” *New York v. Microsoft Corp.*, 209 F. Supp. 2d 132, 148 (D.D.C. 2002).

In exercise of the Court’s sound discretion under these rules, the question whether Guantanamo Bay detainees are entitled to court-ordered counsel access following the termination of their habeas cases should be referred to a single district judge to whom authority is given to issue a decision, on behalf of the Court as a whole, that will govern in all Guantanamo habeas cases subject to the 2008 habeas Protective Order. Similar motions for court-ordered counsel access pursuant to the protective order have now been filed in these and four other cases. *See Al-Mudafari (ISN 40) v. Obama*, 05-CV-2185 (RCL), Dkt. No. 268 (D.D.C. Oct. 28, 2011); *Al-Mithali (ISN 840) v. Obama*, 05-CV-2186 (ESH), Dkt. No. 276 (D.D.C. Jan. 6, 2012); *Abu Ghanem v. Obama (ISN 44)*, 05-CV-1638 (CKK), Dkt. No. 261 (D.D.C. June 22, 2012); *Al-Baidany (ISN 1017) v. Obama*, 05-CV-2380 (CKK), Dkt. No. 229 (D.D.C. Jul. 20, 2012). The availability of continued counsel-access following voluntary dismissal without prejudice has been raised between petitioners and Respondents in more than 20 other cases. Referring the counsel-

access issue to a single district judge for coordinated disposition will “save time and effort for the [C]ourt and the [parties] by resolving [the] issue in one proceeding” instead of many, *Hanson v. Dist. of Columbia*, 257 F.R.D. 19, 22 (D.D.C. 2009), and expedite decision of an issue whose resolution the parties are awaiting in numerous actions.

A matter of such widespread significance to the future course of the Guantanamo Bay cases should not be decided on a piecemeal basis. Case-by-case adjudication of the counsel-access issue in potentially scores of pending and terminated actions would require the Court to deploy resources redundantly in an effort to manage highly duplicative litigation of the identical legal issue, and likewise squander the resources of the parties. *See* 8 J. Moore, *Moore’s Federal Practice* § 42.10[4][c], [d] (3d ed. 2008). Of still greater concern, separately litigating the issue in one case after another could lead to inconsistent results, unnecessary appeals, and, as a result, indefinite delay in resolving not only the counsel-access issue itself, but also the many cases now poised on its outcome. A coordinated ruling by a single judge, pursuant to Rule 42(a) and Local Rule 40.5(e), will bring about the more timely and definitive resolution of the counsel-access issue that the circumstances of this litigation now require.

Application by analogy of the “first filed” rule leads to the conclusion that the counsel-access issue should be referred to Chief Judge Lamberth as the judge sitting not only in the Movants’ cases, but also in the case in which the first motion seeking continuing court-ordered counsel access was filed. *See Al-Mudafari, supra*, Dkt. No. 268 (filed Oct. 28, 2011). *Cf.* LCvR 40.5(c)(2) (providing that related cases, upon being consolidated, shall be assigned “to the judge having the earlier case”). This is akin to the approach recently adopted by the Court in *Al-Mithali*, when Judge Huvelle referred by

consent to Chief Judge Lamberth Al-Mithali's motion for voluntary dismissal and continued counsel access. *Al-Mithali, supra*, Minute Order Referring Motion (Jul. 17, 2012). The Court should follow the same course in Movants' cases and in all other Guantanamo Bay habeas cases governed by the 2008 Protective Order.

Whether or not the Court refers the counsel-access issue for a coordinated ruling, the Court should not refer the issue for consideration by a magistrate judge, in the instant cases or any others. Under the circumstances presented here, referral to a magistrate judge will not promote but will actually disserve the interests of judicial economy and efficiency that such referral is supposed to advance.

Although the Motions for Counsel Access in the instant cases are styled by Movants as requests to enforce the 2008 Protective Order, the motions for continued counsel access now pending in various cases before this Court actually seek court orders—permanent injunctions—allowing continued access to military facilities and classified information by counsel acting on behalf of detainees who have no pending habeas cases. But, pursuant to the Magistrates Act, a district court judge may not refer “motion[s] for injunctive relief” to a magistrate judge “to hear and determine.” *See* 28 U.S.C. § 636(b)(1)(A). Rather, at most, a district court judge may only refer such matters to a magistrate judge for proposed findings of fact and recommendations for disposition under 28 U.S.C. § 636(b)(1)(B), as reflected in Local Rule 72.3. *Compare* LCvR 72.2(a) (“a magistrate judge may hear and determine any pretrial motion or matter *other than those specified in LCvR 72.3*”) (emphasis added) *with* LCvR 72.3(a)(2) (listing “motions for injunctive relief” among the motions referable to a magistrate judge for report and recommendation). The district judge would still have to make his or her own

determination, “accept[ing], reject[ing], or modify[ing] ... the ... recommendation[ ] made by the magistrate judge,” before the requested injunctive relief could be granted or denied. 28 U.S.C. § 636(b)(1). Moreover, the magistrate judge’s proposed findings and recommendations would have to be reviewed *de novo* by the district judge to the extent they are objected to by the parties. *Id.*; LCvR 72.3(c). And, as there are no disputed facts at issue in these motions requiring evidentiary hearings or detailed fact-finding, referral to a magistrate judge promises little in the way of countervailing efficiencies.

Consequently, consideration of detainees’ requests for court-ordered counsel access by a magistrate judge pursuant to § 636(b)(1)(B) and Local Rule 72.3 would only result in a greater expenditure of judicial resources, duplication of the parties’ efforts, and delayed resolution of the issue. The nature of the counsel-access issue makes it very likely that the parties dissatisfied with a magistrate judge’s proposed findings and recommendations would file objections to them. As reflected in their oppositions to the motions for continued counsel access filed in other cases, *see, e.g., Al-Mudafari*, Dkt. No. 280 (Apr. 30, 2012), Respondents vigorously oppose permanent injunctive relief requiring the Government to provide detainees’ counsel access to a U.S. military detention facility, and access to classified national security information, under circumstances where the detainees do not have pending habeas cases. The number of detainees who have moved for or have otherwise expressed interest in court-ordered counsel access following denial or dismissal of their habeas petitions speaks to the importance of the issue to detainees and the likelihood that they would object to a magistrate judge’s recommendation to deny the injunctive relief they seek.

Hence, the most likely outcome of referring detainees' pending motions for continued counsel access to a magistrate judge is that his or her recommended disposition of the issue would have to be reviewed *de novo* by each of the district judges from whom the issue was referred. In each case in which a detainee has moved for continued counsel access, the parties would re-brief any and all issues on which the magistrate judge made an adverse finding or recommendation, and the district judge would be required to review each such finding and recommendation as if he or she had taken the matter under advisement in the first instance. Even in the entirely unlikely event that the magistrate judge's recommendation drew no objection whatsoever, each individual district judge would have to make his or her own determination to adopt or reject the magistrate judge's recommendation before the requested injunctive relief could be awarded or denied. All told, the inevitable results of referring the counsel-access issue to a magistrate judge, whether in the Movants' cases or any others, would be duplication of effort by the parties and the Court, and delay in the resolution of the issue.<sup>5</sup> Detainees' requests to refer the counsel-access issue to a magistrate judge should therefore be rejected in favor of a coordinated ruling by a single district court judge.

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<sup>5</sup> The result would essentially be the same even if detainees' requests for continuing court-ordered counsel access were not in the nature of motions for injunctive relief, and could be referred for decision to a magistrate judge under 28 U.S.C. § 636(b)(1)(A) and Local Rule 72.2. Under § 636(b)(1) and Rule 72.2(b), a decision by the magistrate judge to grant or deny the injunctions that detainees seek could (and in all likelihood would) be appealed to the individual district judges presiding over the detainees' cases. The magistrate judge's factual findings (if any) would be subject to clearly erroneous review, and his or her legal conclusions—such as whether detainees are entitled to mandatory counsel access in the absence of a pending habeas case—would be reviewable *de novo*. See 28 U.S.C. § 636(b)(1)(A); LCvR 72.2(c); *American Ctr. for Civil Justice v. Ambush*, 794 F. Supp. 2d 123, 129 (D.D.C. 2011).

**II. NEITHER THE 2005 CALENDAR COMMITTEE ORDER NOR THE COURT'S PRACTICE THEREUNDER SUPPORT REFERRALS TO A MAGISTRATE JUDGE IN THIS INSTANCE.**

The sole basis on which Movants justify their purported filing of the Motions for Counsel Access with Magistrate Judge Kay—the 2005 Calendar Committee Order, Dkt. No. 166—is unsound for two reasons. First, the Order does not apply to interpretation of the 2008 Protective Order. Second, even if the 2005 Calendar Committee Order remained applicable, a motion for court-ordered counsel access is not the type of matter that, under the terms of the Order, would be referred to a magistrate judge.<sup>6</sup>

**A. Neither The 2005 Calendar Committee Order Nor The Court's Practice Thereunder Support Referrals To A Magistrate Judge In This Instance.**

In pertinent part, the 2005 Calendar Committee Order states that (1) “all Motions pertaining to interpretation or construction of any protective order which *has been entered* in any of the above-cited cases, shall be referred to Magistrate Judge Alan Kay pursuant to LCvR 72.2(a),” and (2) “all disputes pertaining to logistical issues, such as communications with or visits to clients and counsel, shall be referred to Magistrate Judge Kay to facilitate discussion and resolution by the parties as promptly as possible.” 2005 Calendar Committee Order (*emphasis added*). Thus, on its own terms, the 2005 Calendar Committee Order does not apply to the counsel-access issue because its stated purpose was to refer disputes concerning the application or interpretation of the

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<sup>6</sup> Three other detainees who have moved for continued counsel access following termination of their habeas cases have each moved to refer consideration of these motions to Magistrate Judge Kay, citing the 2005 Calendar Order and Local Rule 72.2(a). In addition they have each asked the Court to stay consideration of their requests for counsel access until after ruling on their requests for referral. *See Mudafari*, 05-CV-2185 (RCL), Dkt. No. 283; *Al-Mithali*, 05-CV-2186 (ESH), Dkt. No. 283 (D.D.C. Jun. 5, 2012); *Ghanem*, 05-CV-1638 (CKK), Dkt. No. 262. The Government has filed or will file oppositions to those motions to refer. On July 17, 2012, Judge Huvelle denied the referral motion in *Al-Mithali*; as noted above, she instead transferred the case to this Court. 05-CV-2186 (ESH), Minute Order Denying Petitioner's Motion to Refer (Jul. 17, 2012).

protective orders entered beforehand by the Court to Magistrate Judge Kay. Further, on its face, it does not purport to refer to Judge Kay disputes arising from any future protective orders.

Moreover, the course of events in the Guantanamo habeas litigation further demonstrates the limited applicability of the order. Following the Supreme Court's decision in *Boumediene v. Bush*, 553 U.S. 723 (2008), the Movants' habeas cases and most others pending at that time were referred to Judge Hogan "for coordination and management," *see* Dkt. No. 246 (Jul. 10, 2008), and Judge Hogan issued the Protective Order, which ultimately was adopted in all pending cases, to govern the post-*Boumediene* Guantanamo habeas litigation, *see* Dkt. No. 283 (Sep. 11, 2008). In fact, the 2008 Protective Order expressly superseded the pre-*Boumediene* protective orders entered by the Court in 2004. *See* 2008 Protective Order at 2 (ordering that, "in the place of [the 2004 protective orders], the following Protective Order and Procedures for Counsel Access to Detainees at the United States Naval Base in Guantanamo Bay, Cuba, apply in these coordinated matters"). Notably, since that time, the Court's Calendar Committee has not entered another standing order referring disputes under the 2008 Protective Order to a magistrate judge.

The practice of the district judges on this Court since the *Boumediene* decision confirms that the 2005 Calendar Committee Order no longer applies in this litigation. For example, in March 2009, Respondents filed a motion in all Guantanamo Bay habeas cases, including this case, to amend certain provisions of the 2008 Protective Order related to disclosure of a detainee's own statements memorialized in government intelligence reports. *See* Dkt. No. 554. This motion was not referred to Magistrate Judge

Kay for decision pursuant to the 2005 Calendar Committee Order. Instead, the matter was decided by Judge Hogan, who issued an opinion and order governing the issue in all pending Guantanamo Bay habeas cases. *Id.* The handling of this matter by Judge Hogan, and not Magistrate Judge Kay, confirms the inapplicability of the 2005 Calendar Committee Order post-*Boumediene*.<sup>7</sup>

Given its inapplicability, Movants' reliance upon the 2005 Calendar Committee Order as a basis for referring the counsel-access issue to Judge Kay is simply misplaced.

**B. Even If The 2005 Calendar Committee Order Remained Applicable, By Its Own Terms, The Order Applies Only To Disputes Arising Under Existing Injunctions; It Does Not Purport To Give A Magistrate Judge Authority To Decide Motions For New Injunctive Relief.**

Even if it applied to the 2008 Protective Order, the plain terms of the 2005 Calendar Committee Order make clear that it does not apply to a detainee's motion for court-ordered counsel access after the termination of his case. The 2005 Calendar Committee Order instructs that "all Motions *pertaining to interpretation or construction of any protective order* which has been entered in any of the above-cited cases, shall be referred to Magistrate Judge Alan Kay pursuant to LCvR 72.2(a)." 2005 Calendar Committee Order at ¶ 1 (*emphasis added*). The order also provides for the referral of "all disputes *pertaining to logistical issues*, such as communications with or visits to clients and counsel." *Id.* at ¶ 2 (*emphasis added*). Here, the Movants' requests for court-ordered access in effect seek permanent injunctions providing their counsel with access to a U.S. military base and to classified national security information, notwithstanding the denial of

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<sup>7</sup> In contrast to the Court's post-*Boumediene* practice, in 2006 the Court referred to Magistrate Judge Kay for mediation—but not decision—a motion to amend the 2004 Protective Order filed by several Uighur detainees. See *Kiyemba v. Obama*, 05-CV-1509 (RMU) (Jan. 27, 2006) (Minute Order establishing mediation conference before Magistrate Judge Kay to address motion to amend).

the Movants' habeas petitions and their exhaustion of all appeals. This simply is not an issue "pertaining to the interpretation or construction of a[] protective order" or "pertaining to [a] logistical issue" arising under an existing protective order, especially when the very litigation for which the Protective Order's counsel-access procedures were adopted, 2008 Protective Order ¶ II.A.1, has ended.

The Court's prior practice confirms this reading of the 2005 Calendar Committee Order. Respondents are not aware of any Guantanamo habeas case in which a magistrate judge has entered or even recommended entry of an injunction governing detainees' access to their counsel or their counsel's access to classified information. To the contrary, orders of that kind have uniformly been entered by the district judges of this Court. *See, e.g.*, Dkt. No. 56 (order entering the 2004 Protective Orders developed by District Judge Joyce Hens Green); Dkt. No. 283 (TFH) (2008 Protective Order); Dkt. No. 329, as amended by Dkt. No. 370 (TFH) (2008 Case Management Order). Similarly, Judge Hogan, as coordinating judge, addressed in the first instance the consolidated question of whether detainees who have already been released or transferred from Guantanamo Bay have standing to continue litigating their habeas cases. *In re Petitioners Seeking Habeas Corpus Relief in Relation to Prior Detentions at Guantanamo Bay*, 700 F. Supp. 2d 119 (D.D.C. 2010), *aff'd sub nom. Gul v. Obama*, 652 F.3d 12 (D.C. Cir. 2011). All of these precedents counsel in favor of a district judge addressing in the first instance Movants' requests for permanent injunctive relief.

Therefore, even if the 2005 Calendar Committee Order continued to apply, neither the plain terms of that order nor the past practice of this Court provides support for Movants' filing their counsel-access motions with Magistrate Judge Kay. Rather, in

the interests of judicial economy and the expeditious resolution of the pending counsel-access issue, the requests by Movants and other detainees for continued, court-ordered counsel access following denial or dismissal of their habeas petitions should be referred to a single district judge, for global resolution in all cases governed by the 2008 Protective Order.

**III. THE MOTIONS FOR COUNSEL ACCESS SHOULD BE HELD IN ABEYANCE PENDING THE COURT'S DECISION WHETHER TO RESOLVE THE COUNSEL-ACCESS QUESTION ON A COORDINATED BASIS.**

Further briefing and consideration of the Motions for Counsel Access should not proceed until the necessarily predicate issue concerning the proper procedure for resolution of the counsel-access issue is resolved. Of note, three other detainees who have moved for continued counsel access following termination of their habeas cases agree with Respondents that the issue should be resolved in a coordinated manner. They simply disagree as to who should hear the issue in the first instance. As noted above, p.12, all three of those detainees have moved to refer consideration of their motions to Magistrate Judge Kay and have further asked the presiding district judges to stay consideration of their requests for court-ordered counsel access until after ruling on their requests for referral. *See Mudafari*, 05-CV-2185 (RCL), Dkt. No. 283 at 1; *Al-Mithali*, 05-CV-2186 (ESH), Dkt. No. 283 at 1; *Ghanem*, 05-CV-1638 (CKK), Dkt. No. 262 at 1. Respondents agree with these detainees that the parties should not proceed with briefing of the counsel-access issue until it is clear how, and before whom, the issue will ultimately be resolved. Therefore, further briefing and consideration of the Motions for Counsel Access should be held in abeyance pending resolution of this motion to refer to refer the counsel access issue for decision by a single district judge.

**IV. ALTERNATIVELY, IF THE COUNSEL-ACCESS ISSUE IS NOT REFERRED FOR A COORDINATED RULING, IT SHOULD BE DECIDED IN THIS CASE BY THE PRESIDING JUDGE, AND, IN ANY EVENT, RESPONDENTS SHOULD BE GRANTED ADDITIONAL TIME TO FILE THEIR OPPOSITIONS.**

As demonstrated in Section I, referral to a magistrate judge will actually disserve the interests of judicial economy and efficiency that such referral is supposed to advance. Further, as discussed in Section II, the 2005 Calendar Committee Order provides no basis for referral of the counsel-access motions to Magistrate Judge Kay or any other Magistrate Judge. Therefore, should the Court decline to refer the counsel-access issue to a single district judge for a coordinated ruling, the Court itself should decide the Motions for Counsel Access. In that case, Respondents respectfully request that they be granted two weeks to oppose the Motions for Counsel Access from the time the Court issues a ruling denying the request for referral.

**CONCLUSION**

For these reasons, Respondents respectfully move the Court to refer, pursuant to Fed. R. Civ. P. 42(a) and Local Rule 40.5(e), the Motions for Counsel Access for a coordinated ruling on the counsel-access issue that will govern in these and all other Guantanamo Bay habeas cases. Respondents further request that the Court hold further briefing and consideration of the Motions for Counsel Access in abeyance pending resolution of whether the Court will decide motions raising the issue of counsel access on a coordinated basis. Alternatively, if the Court declines to coordinate consideration of the counsel-access issue, Respondents request that the Motions for Counsel Access be decided by the Court, rather than a magistrate judge. Finally, if the Court denies the motion for referral, Respondents request an extension of two weeks to oppose the Motions for Counsel Access after a decision denying referral for coordination.

Date: July 26, 2012

Respectfully submitted,

STUART F. DELERY  
Acting Assistant Attorney General

JOSEPH H. HUNT  
Director

JAMES GILLIGAN  
TERRY M. HENRY  
Assistant Branch Directors

*/s/ Robert J. Prince*  
ROBERT J. PRINCE  
RONALD WILTSIE  
ANDREW I. WARDEN  
Attorneys  
United States Department of Justice  
Civil Division, Federal Programs Branch  
20 Massachusetts Avenue, N.W.  
Washington, DC 20530  
Tel: (202) 305-3654  
Fax: (202) 616-8470  
robert.prince@usdoj.gov

*Attorneys for Respondents*