IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FAWZI KHALID ABDULLAH FAHAD AL ODAH, *et al.*, **Plaintiffs-petitioners,**	)	
v.	)	**No. CV 02-0828 (CKK)**
UNITED STATES OF AMERICA, *et al.*, **Defendants-respondents.**	)	

MEMORANDUM IN SUPPORT OF EMERGENCY MOTION FOR INJUNCTION

Petitioners Fayiz Mohammed Ahmed Al Kandari ("Al Kandari") and Fouad Mahmoud Al Rabiah ("Al Rabiah") (collectively, "Petitioners"), by counsel, submit this memorandum in support of their motion for an injunction prohibiting the Office of the Chief Prosecutor of Military Commissions and its alter-ego, the Criminal Investigation Task Force ("CITF"), or anyone else acting on behalf or at the direction of the Office of the Chief Prosecutor of Military Commissions, from having any communications with the Petitioners, without the consent of the Petitioners' counsel, relating to matters alleged to be grounds for their confinement, including any matters for which military commission charges may be brought. The Petitioners further move for such other relief as may be appropriate to effectuate the remedy sought herein.

The Chief Prosecutor of Military Commissions, Colonel Lawrence Morris, has asserted to counsel for the Petitioners that he and his staff are entitled to communicate directly with the Petitioners without their attorneys' consent. Since then, an agent of the CITF has visited Al Kandari, without prior notice to or permission from Al Kandari's counsel, and attempted to engage him in discussion concerning potential military commission charges relating to

allegations forming the government's asserted grounds for his detention. Such communication, apparently performed under the direction of Colonel Morris's office, violates Rule 4.2 of the Army Rules of Professional Conduct for Lawyers, AR 27-26, other applicable service regulations, and state rules of professional conduct. To allow such unethical attempts by government attorneys to take advantage of the Petitioners without the knowledge or consent of their own attorneys would cause irreparable injury to the Petitioners' relationship with their attorneys and to their rights in the habeas corpus proceedings before this Court.

Petitioners bring this motion on an emergency basis because their extreme isolation and the severe restrictions imposed on their attorneys' communications with them leave Petitioners vulnerable to further unethical communications by government prosecutors that could prejudice Petitioners' position in their pending habeas cases, as well as in any military commissions that might be brought, without the ability for Petitioners to seek timely protection or advice from their attorneys. As described above, at least one such improper communication has already occurred, and more may have occurred since the last time that the Petitioners were able to meet with their counsel.

Statement of Facts

The Petitioners are two of the four Kuwaiti nationals who have been detained by the U.S. military in Guantanamo for approximately the past six years. Attorneys David J. Cynamon and Matthew J. MacLean were engaged to represent Petitioners in May 2006 with respect to the government's allegations that they are unlawful enemy combatants, including the government's allegations that they have committed offenses under the laws of war. Both attorneys have traveled to Guantanamo on multiple occasions to meet with the Petitioners, and have received authorization to represent each of them. The Petitioners' attorneys have also filed petitions for

review under the Detainee Treatment Act of 2005 in the D.C. Circuit on behalf of each of the Petitioners, challenging the Combatant Status Review Tribunal ("CSRT") determinations that they are properly detained as enemy combatants.

On January 12, 2008, the President of the United States publicly announced during a visit to Kuwait that the U.S. government is in the process of charging two of the four Kuwaiti detainees with war crimes under the Military Commissions Act of 2006 ("MCA"). *See* Diana Elias, "Bush says 2 Kuwaitis at Guantanamo prison will be charged", Associated Press Worldstream, January 12, 2008. The President did not state which of the four Petitioners were being charged, but counsel for the Petitioners later learned through government sources that the two detainees to be charged are Al Kandari and Al Rabiah.

Following the President's announcement, counsel for the Petitioners consulted with the Petitioners' next friends in Kuwait, and traveled to Guantanamo to discuss the impending charges with the Petitioners. Neither the Petitioners nor their next friends expressed any doubt that the scope of the attorneys' representation of the Petitioners extended to the government's war crime allegations, which are necessarily contained within the government's allegations that the Petitioners are enemy combatants.

Mr. MacLean, one of the Petitioners' attorneys, contacted Colonel Morris, the Chief Prosecutor for Military Commissions. In a telephone conversation on January 24, 2008, the Chief Prosecutor confirmed that his office had placed two of the four Kuwaiti detainees on "hold" for consideration of charges, but he stated that he did not know if he was authorized to tell Mr. MacLean which two were on "hold." He told Mr. MacLean that he would find out what more he was authorized to say, and would contact him in the following week. Colonel Morris

also invited Mr. MacLean to call again if he did not call back first. Declaration of Matthew MacLean ("MacLean Dec.") at ¶ 7.

Colonel Morris did not call Mr. MacLean the following week. Over the next two weeks, Mr. MacLean left several telephone messages for him, but none was returned. Finally, on February 21, 2008, Mr. MacLean sent Colonel Morris an e-mail requesting to speak to somebody in his office about the two Petitioners. *Id.* at Ex. 1.

Respondent Morris wrote back saying, "We remain in the prep stages of charging the two we discussed." When Mr. MacLean requested to know what the Petitioners were being charged with, Respondent Morris replied, "war crimes / offenses delineated in Military Commissions Act of 06." *Id.* Mr. MacLean pointed out that the reply did not answer the question, and he reiterated his request to speak with somebody familiar with the cases. Respondent Morris replied with an e-mail denying that Mr. MacLean was the Petitioners' counsel "for commissions purposes." *Id.*

Mr. MacLean wrote back, repeating that he was counsel for the Petitioners, and reminding the Chief Prosecutor that, "pursuant to AR 27-26, Rule 4.2 and other applicable rules of professional conduct, neither you nor any person acting under your direction or control may have any communication with the Kuwaiti detainees without my consent." *Id.* The Chief Prosecutor replied, "Not so. Government can certainly have communications with your client on commissions-related issues independent of your representation of them, which are strictly for habeas/DTA purposes." *Id.*

On the basis of Colonel Morris's assertion that he and has staff have the right to communicate directly with the Petitioners about their cases without the consent of their attorneys, the Petitioners filed an Emergency Petition for Writ of Mandamus in the U.S. Court of

Military Commission Review, a court set up by the Department of Defense under the MCA. Because that court has only appellate jurisdiction over military commission judgments, the court denied the petition for lack of jurisdiction. *Al Odah v. Morris*, Rulings on Motion for Writ of Mandemus [sic] and to Attach Declaration, CMCR Case No. 08-001 (C.M.C.R. Mar. 21, 2008), attached hereto.

On his last trip to Guantanamo on June 9-11, 2008, Mr. Cynamon met with Al Kandari, who told him that just after Mr. Cynamon had met with him in early May, he was visited by a young woman who identified herself as being with the CITF. Declaration of David Cynamon ("Cynamon Dec.") at ¶ 2. She told Al Kandari that she had been on the airplane with his attorneys, but had not spoken to them. *Id.* She then told him that he was going to be charged before a military commission. *Id.* He asked why he would be charged, and she responded that it was all "political". *Id.* He asked her what the charges would be, and she said that it related to an incident that occurred in Kuwait in 2002 (after Al Kandari was already detained in Guantanamo). *Id.*

The agent's description of the charge against Al Kandari contains more detail concerning the charge than the Petitioners' attorneys have been able to get through repeated efforts to discuss this case with the Chief Prosecutor of Military Commissions. *Id.* at ¶ 3. Based on the government agent's identification of herself as a member of the CITF and her specific description of a certain military commission charge being brought by the Office of Military Commissions, it is apparent that she was acting at the direction and on the behalf of the Office of Military Commissions, and should be regarded as an alter-ego of the military commission prosecutors. The subject of the communication was undeniably within the scope of Al Kandari's attorney-client relationship with his habeas attorneys, as the event described by the agent as the

basis for the charge coincides with the government's allegation in paragraph 2.b. of the Unclassified Summary of Basis for Tribunal Decision, filed with this Court as part of the government's factual return to Al Kandari's habeas corpus petition.

Because of the likelihood that military commission prosecutors and their agents will continue to contact the Petitioners directly concerning the government's allegations without counsel's consent, and because of the isolation and practical inability of Petitioners to communicate with their counsel except during counsel's visits to Guantanamo, counsel for the Petitioners bring this emergency motion.

Argument

I. This Court Has Authority Over Counsel for the Parties

This Court has jurisdiction over Petitioners' habeas corpus case under 28 U.S.C. § 2241. *Boumediene v. Bush*, ___ U.S. ___, No. 06-1195 (June 12, 2008). That jurisdiction, of course, encompasses the authority to enforce the ethical rules governing attorneys for the parties to the case. *See* LcvR 83.2. In this case, controlling authorities leave no doubt that, without the consent of counsel for the Petitioners, military prosecutors and their agents[1] may not communicate with the Petitioners on matters within the scope of counsel's representations, including matters concerning military commission charges.

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[1] The military prosecutors are under the control of at least one respondent in this case, the Secretary of Defense, and should therefore be regarded as attorneys of a party in this matter, despite the fact that they have not formally entered their appearances in the habeas corpus case. As described below, the military prosecutors cannot circumvent their ethical obligations by delegating the ex parte communications to their investigators, like the CITF agent here, who attempted to engage Al Kandari in discussions of a subject matter encompassed within this habeas case.

II. The Chief Prosecutor Is Prohibited from Communicating with Represented Parties.

Rule 4.2 of the Army Rules of Professional Responsibility for Lawyers, AR 27-26 (1992), sets forth the "no-contact" rule, prohibiting attorneys from communicating with represented parties in a matter.[2] The rule provides:

> In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the same matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

The no-contact rule "operates in a criminal matter to protect a represented party against harmful admissions and waivers of privilege that may result from interference with the client-lawyer relationship." American Bar Association ("ABA"), Standing Committee on Ethics and Professional Responsibility, Formal Op. 95-396 (1995) ("ABA Formal Op. 95-396"). In the military context, the U.S. Court of Appeals for the Armed Forces has determined that Rule 4.2 is applicable to prosecutors in courts-martial under the Uniform Code of Military Justice. *United States v. Meek*, 44 M.J. 1, 8 n. 7 (1995); *see also United States v. Evans*, 39 M.J. 613, 615 (A.C.M.R. 1994).

The government, however, apparently takes the position that Rule 4.2 has no application to military commission prosecutors prior to referral of charges to a military commission, even though the Petitioners have pending habeas corpus petitions pertaining to the same allegations. The contention is without support. For one thing, the Comment to Rule 4.2 specifically

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[2] As a judge advocate in the U.S. Army, Colonel Morris is governed by Rule 4.2 of the Army Rules of Professional Conduct for Lawyers, AR 27-26 (1992). The Air Force and Navy both have Rules of Professional Conduct containing rules substantially identical to Rule 4.2 of the Army Rules. *See* Air Force Rules of Professional Conduct, Rule 4.2 (2005); U.S. Navy, JAG Inst. 5803.1B, Rules of Professional Conduct, Rule 4.2 (Feb. 11, 2000). The Coast Guard applies the ABA Model Rules of Professional Conduct "[a]s far as practicable and when not inconsistent with law." Coast Guard Military Justice Manual, COMDTINST M5810.1D Art. 6.C.1 (Aug. 17, 2000). Moreover, military attorneys are subject to the rules of professional conduct of their state bars. The District of Columbia and all fifty states have adopted no-contact rules substantially equivalent to Rule 4.2 of the Model Rules of Professional Conduct. *See* Bruce Green, A Prosecutor's Communications with Defendants: What Are the Limits?, 24 Crim. L. Bull. 283, 284 (1988).

anticipates that the rule applies even in the absence of a formal proceeding: "This Rule also covers any person, whether or not a party to the formal proceeding, who is represented by counsel concerning the matter in question." The courts have followed the Comment, and for good reason. "The timing of an indictment's return lies substantially within the control of the prosecutor. Therefore, were we to construe the [no-contact rule] as dependent upon indictment, a government attorney could manipulate grand jury proceedings to avoid its encumbrances." *United States v. Hammad*, 858 F.2d 834, 839 (2nd Cir. 1988). *See also* ABA Formal Op. 95-396 at 9. Similarly, the Chief Prosecutor should not be permitted to evade the no-contact rule simply by delaying the bringing of formal charges. This is particularly true in this case, where the President of the United States, the CITF agent, and other government officials have informed the Petitioners or their attorneys or next friends that the Petitioners will be charged. Moreover, the Petitioners are in confinement and have already received CSRTs, proceedings with potential jurisdictional significance in a military commission, and have brought this habeas corpus action challenging the basis for their confinement. *See* 10 U.S.C. § 948d(c); *United States v. Khadr*, CMCR 07-001, at 8-9 (Sept. 24, 2007).

Every federal circuit to have addressed the issue has concluded that the no-contact rule prohibits a prosecutor or his agents from communicating with a person in custody whom he knows to be represented in the matter by an attorney. *See, e.g., United States v. Killain*, 639 F.2d 206, 210 (5th Cir. 1981); *United States v. Durham*, 475 F.2d 208, 211 (7th Cir. 1973); *United States v. Thomas*, 474 F.2d 110, 112 (10th Cir. 1973). As the Petitioners are confined in Guantanamo, and are represented particularly with respect to the government's allegations underlying their confinement, Rule 4.2 prevents Respondent Morris and his staff or agents from

having any communications with them concerning military commission charges or the underlying allegations.[3]

The ABA also has concluded that the no-contact rule applies to prosecutors, even before formal charges have been brought. Interpreting Rule 4.2 of the Model Rules of Professional Conduct, the ABA has determined that although "legitimate investigative techniques" such as use of informants in a non-custodial setting may be permitted, a prosecutor or his alter-ego is prohibited from contact with a represented client even before the bringing of formal charges. ABA Formal Op. 95-396 at 7-8. "ABA Formal Opinions are not binding authority … [but] it must be recognized that opinions as to the meaning of the Rules that are promulgated by the group responsible for drafting those Rules -- a group that devotes itself entirely to issues of professional responsibility -- should be viewed as persuasive." *Mustang Enters. v. Plug-In Storage Sys.*, 874 F. Supp. 881, 888 n. 7 (N.D. Ill. 1995).[4] ABA Formal Op. 95-396 has been

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[3] Even in the non-custodial setting, courts have held that the no-contact rule prohibits a prosecutor or his "alter-ego" from communicating with a party who has retained counsel in the matter. *See Hammad*, 858 F.2d at 839; *Harris v. Talao*, 222 F.3d 1133, 1139 (9th Cir. 2000); *Minnesota v. Miller*, 600 N.W.2d 457, 467 (Minn. 1999). The circuits are split on this point, with some courts ruling that pre-indictment, non-custodial communications by prosecutors are not covered by the no-contact rule. *Compare Hammad*, 858 F.2d at 839 (no-contact rule prohibits pre-indictment communications) *with United States v. Balter*, 91 F.3d 427, 436 (3rd Cir. 1996) (no-contact rule does not prevent non-custodial, pre-indictment contact by government investigator). The U.S. Court of Appeals for the D.C. Circuit, however, appears to be in accord with the line of cases holding that the no-contact rule prohibits a prosecutor from communicating with a represented party, pre-indictment, even in a non-custodial setting. *See United States v. Lemonakis*, 485 F.2d 941, 955-56 (D.C. Cir. 1973) (no-contact rule "would prohibit an investigator's acting as the prosecuting attorney's alter ego …") (quoting *United States v. Massiah*, 307 F.2d 62, 66 (2nd Cir. 1962), *rev'd on other grounds*, 377 U.S. 201 (1964)). In any event, these cases are inapplicable because Petitioners are in custody.

[4] *See also Midwest Motor Sports, Inc. v. Arctic Cat Sales, Inc.*, 144 F. Supp. 2d 1147, 1159 (D.S.D. 2001), *aff'd* 347 F.3d 693 (8th Cir. 2003) ("Although the American Bar Association's Formal Opinions do not carry precedential weight, courts look to them for guidance in interpreting the Model Rules"); *Am. Home Assur. Co. v. Unauthorized Practice of Law Comm.*, 121 S.W.3d 831, 837 (Tex. Ct. App. 2003) ("[F]ormal opinions of the ABA's Committee on Ethics and Professional Responsibility are persuasive authority unless the [local] Rule differs from the Model Rule in a material respect").

cited with approval by multiple federal and state courts.[5] This Court likewise should apply Rule 4.2 and the ABA's formal opinion to conduct by military commission prosecutors.

Any suggestion that military commission charges are outside the scope of the attorneys' representation of the Petitioners also should be rejected. The Petitioners' case in this Court challenges, among other things, the government's allegations that the Petitioners are "enemy combatants." Under the MCA, the government's allegations are a necessary factual predicate for a military commission's jurisdiction (*see* 10 U.S.C. § 948d). To the extent those allegations establish that the Petitioners' alleged conduct was "associated with armed conflict," they are also an element to every single substantive crime under the MCA (other than perjury or obstruction of justice in a military commission). *See* Manual for Military Commissions, Part IV ¶¶ 6(1) through (29). There is no charge that could be brought in a military commission against the Petitioners that would not already be at issue in their habeas corpus case pending before this Court. *Cf. United States v. Bowman*, 277 F. Supp. 2d 1239, 1243, vacated on other grounds, 2003 U.S. Dist. LEXIS 24817 (N.D. Ala. 2003) (holding that Rule 4.2 applies to a prosecutor's contact, pre-indictment, with a party who is represented in an "identical matter in a contemporaneous civil proceeding").

Moreover, under the MCA, the Petitioners' entitlement to retain civilian counsel at no expense to the government is a matter of right, not of grace, and there is no limitation on their right to retain counsel prior to referral of charges. *See* 10 U.S.C. § 949c(b)(3). The Petitioners' attorneys indisputably meet the qualifications to be civilian defense counsel under Rule for Military Commissions 502(d)(3), and in fact have both been admitted to the Bar of the U.S.

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[5] *See, e.g., Midwest Motor Sports v. Arctic Cat Sales, Inc.*, 347 F.3d 693, 698 (8th Cir. 2003); *United States v. Bowman*, 277 F. Supp. 2d 1239, 1242, *vacated on other grounds*, 2003 U.S. Dist. LEXIS 24817 (N.D. Ala. 2003); *In re Pyle*, 91 P.3d 1222, 1228 (Kan. 2004); *Pleasant Mgmt., LLC v. Carrasco*, 870 A.2d 443, 446 (R.I. 2005).

Court for Military Commission Review. The scope of their representation of the Petitioners is determined between the lawyer and the client, and is not subject to the approval or the control of the Chief Prosecutor.[6]

III. The Government's Violation of the No-Contact Rule Undermines the Court's Exercise of Its Habeas Corpus Jurisdiction, and Will Irreparably Harm Petitioners.

As shown above, the purpose of the no-contact rule is to prevent an attorney from interfering with his opponent's attorney-client relationship. *See* ABA Formal Op. 95-396 at 4. Particularly in a case such as this one, where Petitioners cannot conceivably proceed without the participation of their attorneys (*see*, *e.g.*, Amended Protective Order, restricting access to classified information to attorneys with security clearances), the exercise of this Court's habeas corpus jurisdiction is reliant upon attorneys who are able to maintain productive relationships with the Petitioners. Therefore, prohibition of the government's abusive practices falls well within the power of this Court to control the conduct of attorneys for the parties before it. Through conversations with Petitioners' counsel, the Chief Prosecutor has made clear that attorneys in his office will not comply with their obligations under Rule 4.2 without a court order.

The prospect of further interference with the Petitioners' attorney-client relationship is particularly acute; the Petitioners have been detained in near isolation for over six years under circumstances that make an attorney-client relationship extremely difficult at best. As a result of the remote location of the place of detention and the government's restrictive procedures for allowing attorney visits, it is difficult for attorneys to see their clients without significant advance

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[6] Petitioners' attorneys both practice in the District of Columbia, and the scope of their representation is governed by Rule 1.2 of the District of Columbia Rules of Professional Conduct. The Comment to Rule 1.2 provides, "Both lawyer and client have authority and responsibility in the objectives and means of representation. The client has ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations."

preparation and notice. Moreover, other potential means of attorney-client communication are nonexistent or heavily burdened. There is no telephone or e-mail contact, and mail is slow, unreliable and subject to review and censorship by government personnel.

The Petitioners' access to their attorneys is governed by the Amended Protective Order in this case. Prior to each visit, attorneys are required to get approval from the Department of Justice for the timing of the visit, and are required to obtain country and theater clearances, which require at least twenty days to process. Amended Protective Order, Ex. A at ¶ III.D.4. It ordinarily takes a full day of travel to reach Guantanamo, and a full day of travel to return. For all of these reasons, attorney visits to Petitioners are necessarily relatively infrequent.

All legal correspondence between the Petitioners and their attorneys is subject to search by a government "privilege team." *See id.* at ¶ IV.A.3. Although the privilege team is required to review mail and forward to the Petitioners within two days (*see id.*), this rarely happens within the required timeframe. All letters from the detainees and all information learned from the detainees in meetings are presumptively classified. *See id.* at ¶ VII.A. Counsel must submit all such communications and information for a classification review by the privilege team before they can be treated in any unclassified manner. This classification review further burdens counsel's ability to act and communicate on behalf of Petitioners. Until such a classification review is complete, all letters from the Petitioners and attorney notes from meetings may only be stored or viewed in a classified facility. *See id.* at ¶ IX.B.

Government agents have affirmatively attempted to undermine the Petitioners' relationships with their attorneys. For example, an interrogator told Al Kandari, "[D]on't trust your lawyers. … [D]id you know your lawyers are Jews?" Declaration of Thomas Wilner ("Wilner Dec.") at ¶ 7, attached as Ex. 2 to the MacLean Dec. Another interrogator told Al

Rabiah, "How could you trust Jews? Throughout history, Jews have betrayed Muslims. Don't you think your lawyers, who are Jews, will betray you?" *Id.* at ¶ 11. On another occasion, Al Rabiah's interrogator asked him, "What will other Arabs and Muslims think of you Kuwaitis when they know the only help you can get is from Jews?" *Id.* at ¶ 14. Al Rabiah's interrogator also warned him that if he consented to be represented by an attorney, he would be kept in Guantanamo forever. *See id.* at ¶ 9.

In other instances, interrogators have impersonated attorneys. *See* Joseph Margulies, Guantanamo and the Abuse of Presidential Power at 204 (Simon & Schuster 2006). Interrogators have also told detainees that their attorneys are homosexual. *See* David Luban, Lawfare and Legal Ethics in Guantanamo, 60 Stanford L. Rev. __ (forthcoming) (available at http://www.law.georgetown.edu/internationalhrcolloquium/documents/Luban-Guantanamopaper.doc). As word of events such as these spread through the prison population, the barriers to establishing trust with clients rise even higher.

Unfortunately, tactics of interference and intimidation have been employed even by attorneys in the government. In a radio broadcast on January 11, 2007, then-Deputy Assistant Secretary of Defense for Detainee Affairs Charles "Cully" Stimson, a licensed attorney, called for a corporate boycott of law firms representing Guantanamo detainees. The first firm he listed was the law firm of the Petitioners' attorneys:

> [Y]ou know what, it's shocking. The major law firms in this country -- Pillsbury Winthrop, … all the rest of them -- are out there representing detainees, and I think, quite honestly, when corporate CEOs see that those firms are representing the very terrorists who hit their bottom line back in 2001, those CEOs are going to make those law firms choose between representing terrorists or representing reputable firms ….

See Luban, *supra*, at 1.

The military commission system is infected with such intimidating tactics as well. For example, Colonel Morris's predecessor as Chief Prosecutor, Colonel Morris Davis, publicly stated that a detainee's military defense counsel could be prosecuted under Article 88 of the UCMJ for saying that the military commissions were unfair and intentionally rigged. *See* Raymond Bonner, "Terror Case Prosecutor Assails Defense Lawyer", New York Times, Mar. 5, 2007. Ironically, Colonel Davis later resigned as Chief Prosecutor after concluding that "full, fair and open trials were not possible under the current system." *See* Morris Davis, "AWOL Military Justice", L.A. Times, Dec. 10, 2007.

But the Chief Prosecutor's assertion of authority to communicate directly with the Petitioners without their counsel's consent is perhaps more troubling than any of the examples of interference cited above. He and his prosecution staff, including the CITF, have far easier access to the Petitioners than the Petitioners' own attorneys have, and they have the opportunity to drive a wedge directly between the Petitioners and their attorneys under circumstances completely outside their attorneys' control. Taking advantage of the Petitioners' confinement, isolation and lack of familiarity with U.S. military commissions, government lawyers could extract admissions or waivers of rights in their habeas corpus cases that would effectively strip the Petitioners of the habeas rights they won in *Boumediene v. Bush*, 553 U.S. __, No. 06-1195 (June 12, 2008) (Slip Op.).

Once the damage is done, it will be virtually impossible to undo. Even if this Court were to exclude improperly obtained evidence, it could not restore damage to the Petitioners' relationship with their counsel. The Petitioners have been detained in Guantanamo for six years with essentially no contact with friends, family members, or others in their lives whose judgment they trusted before their imprisonment in Guantanamo. Building trust is one of the biggest and

most important challenges faced by attorneys in these cases. That trust must be protected zealously.

The prejudice resulting from the Chief Prosecutor's refusal to comply with Rule 4.2 is demonstrated by the recent visit of a CITF agent with Petitioner Al Kandari. The agent was aware that Al Kandari was represented by counsel. Indeed, she told Al Kandari that she was on the airplane with his counsel on her trip to Guantanamo, but she never identified herself to his counsel. She then spoke to Al Kandari about the substance of the potential charges against him, including charges that are encompassed within the his CSRT findings. Yet because Al Kandari has no practical means of communicating with his counsel between visits, he could not inform his attorneys of this visit until a month after it occurred. And, as of the filing of this motion, Petitioners' attorneys do not know whether additional visits by CITF agents or military attorneys have occurred with Al Kandari or any of the other Petitioners, and will not know until their next trip to Guantanamo.

To prevent the irreparable harm to the Petitioners' ability to participate effectively through their lawyers in this habeas corpus case that will otherwise continue to occur, this Court should immediately issue an injunction prohibiting any contact with the petitioners by government lawyers or their agents, including CITF, relating to potential military commission charges or allegations underlying the government's basis for the Petitioners' detention.

Conclusion

For the foregoing reasons the Petitioners respectfully request this Court to issue an injunction prohibiting government lawyers, or anyone else acting at their direction or on their behalf, from communicating with the Petitioners about the military commission charges or the

underlying allegations without the consent of Petitioners' counsel while this habeas corpus case is pending.

July 1, 2008

Respectfully submitted,

/s/

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Certificate of Service

I certify that on July 1, 2008, I caused the foregoing to be served by hand delivery on the Court Security Office for clearance and filing. It is my understanding that the Court Security Office will effect service on the Respondents. Once I have been notified that the document has been cleared for public filing, I will arrange on the following attorneys via electronic filing:

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