NOTE

HINGING ON HABEAS? THE GUANTANAMO MEMORANDUM OF UNDERSTANDING AND THE DETAINEES' CONTINUED RIGHT TO COUNSEL

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I. INTRODUCTION

Eleven years ago, in the wake of the terrorist attacks of September 11, 2001, the first detainees[1] captured in the Global War on

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[1] The United States Government intentionally refers to people captured and imprisoned at Guantanamo as "detainees" instead of "prisoners" to avoid the implication that those being held could benefit from the prisoner of war status under the Geneva Conventions. *See* Brendan M. Driscoll, Note, *The Guantanamo Protective Order*, 30 FORDHAM INT'L L.J. 873, 873 n.1 (2007) (citing Joseph Margulies, *Guantanamo and the Abuse of Presidential Power* 255 n.3 (2006), and Stephen Grey, *Ghost Plane: The True Story of the CIA Torture Program* (2006)); s*ee also* Draft of a Memorandum from Alberto R. Gonzales to the President (Jan. 25, 2002) *available at* http://www.torturingdemocracy.org/documents/20020125.pdf (finding there are "reasonable grounds," which includes *inter alia*, preserving flexibility, to conclude that

Terrorism arrived at the U.S. Naval base at Guantanamo Bay, Cuba ("Guantanamo").[2] Nine days after their arrival, attorneys filed the initial legal challenge to the detention of detainees at Guantanamo in the form of a petition for habeas corpus.[3] Today, of the 799 men who have been held at Guantanamo,[4] 166 remain.[5] Throughout the past decade, not a single detainee has been fully tried or convicted of any crime.[6] Despite this, the United States Government (the "USG") has taken multiple measures to deny detainees the ability to challenge their indefinite detentions.[7] Most recently, the USG changed long-standing rules over attorney-client relations at Guantanamo by charging the executive branch, not the judicial branch, with protecting habeas petitioners' right to access their counsel.[8]

The new rules issued by the Department of Justice (the "DOJ") in May 2012, restrict lawyers' access to detainees who no longer have a

al Qaeda and Taliban detainees are not prisoners of war under the Geneva Convention III on the Treatment of Prisoners of War (GPW)); Memorandum from the U.S. President to the Vice President, the Sec'y of State, the Sec'y of Defense, the Att'y Gen., Chief of Staff to the President, Dir. of Cent. Intelligence, Ass't to the President for Nat'l Sec. Affairs, and Chairman of the Joint Chiefs of Staff on Humane Treatment of al Qaeda and Taliban Detainees (Feb. 7, 2002), *available at* http://www.torturingdemocracy.org/documents/20020207-2.pdf (declaring the GPW does not apply to Taliban or al Qaeda detainees).

[2] Steve Vogel, *U.S. Takes Hooded, Shackled Detainees to Cuba*, WASH. POST, Jan. 11, 2002, at A10.

[3] *See* Driscoll, *supra* note 1, at 873 n.2 (citing *Coalition of Clergy v. Bush*, 189 F. Supp. 2d 1036 (C.D. Cal. 2002) (dismissing petition for want of standing and jurisdiction), *aff'd* 310 F.3d 1153 (9th Cir. 2002)).

[4] Jane Sutton & Josh Meyer, *Insight: At Guantanamo Tribunals, Don't Mention the "T" Word*, REUTERS (Aug. 20, 2012), http://www.reuters.com/assets/print?aid=USBRE87J03U20120820.

[5] *Guantanamo by the Numbers*, HUMAN RIGHTS FIRST, http://www.humanrightsfirst.org/wp-content/uploads/pdf/USLS-Fact-Sheet-Gitmo-Numbers.pdf (last updated Oct. 3, 2012).

[6] *See In re* Guantanamo Bay Detainee Continued Access to Counsel, No. 12-398, 2012 U.S. Dist. LEXIS 126833, at *24 (D.D.C. Sept. 6, 2012).

[7] *Id.*

[8] *See* Mike Scarcella, *DOJ Pushes Changes in Attorney-Client Relationships at Gitmo*, NAT'L L.J. (Aug. 7, 2012) [hereinafter *DOJ Pushes Changes*], http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202566524069.

habeas corpus petition before the court.[9] In this context, habeas corpus petitions seek a legal and factual explanation for the detainees' detention, or alternatively, release from Guantanamo.[10] While habeas corpus petitions make up the majority of suits filed by Guantanamo detainees,[11] currently a number of detainees at Guantanamo do not have active habeas petitions.[12] Under the new rules, enforced through an attorney signed Memorandum of Understanding (the "MOU")[13] that replaced a 2008 Protective Order,[14] the Navy base Commander at Guantanamo ("Commander") would have sole veto power over attorney access, as well as access to classified material.[15] The military, not the courts, are given "the final and unreviewable discretion" for settling any arising disputes.[16] The effect of the new rules is to remove attorney-client access from the court's discretion and, instead, entrust the military to determine when attorneys may visit detainees, what information may be gathered, and how it may be used.[17] In *In re* Guantanamo Bay Detainee Continued

[9] Baher Azmy, *Obama Backtracks on Guantanamo*, WASH. POST, Aug. 17, 2012, at A19 [hereinafter *Obama Backtracks on Guantanamo*].

[10] *See* BLACK'S LAW DICTIONARY 778 (9th ed. 2009) (defining "habeas corpus" as "[a] writ employed to bring a person before a court, most frequently to ensure that the person's imprisonment or detention is not illegal").

[11] Driscoll, *supra* note 1, at 888.

[12] *See* Respondents' Motion to Refer the Counsel-Access Issue for Decision by a Single District Court Judge and to Hold in Abeyance Former Petitioners Esmail's and Uthman's Motions for Order Concerning the Protective Order at 2, Abdah v. Obama, No. 04-CV-01254 (RCL) (D.D.C. July 26, 2012) (referencing over 20 cases where the issue of continued counsel access has been raised after detainees' habeas cases have been dismissed).

[13] *See* Motion Concerning the Protective Order Entered by Judge Hogan on Sept. 11, 2008 at 9, Abdah v. Obama, No. 04-1254 (D.D.C. July 9, 2012), *available at* http://www.lawfareblog.com/wp-content/uploads/2012/07/Motion-re-Protective-Order-Esmail-July-9-2012-ALL-AS-FILED.pdf.

[14] *In re* Guantanamo Bay Detainee Litig., 577 F. Supp. 2d 143 (D.D.C. 2008).

[15] Bill Mears, *Military Limiting Guantanamo Detainee Access to Lawyers*, CNN SECURITY CLEARANCE (Aug. 7, 2012, 6:23 PM), http://security.blogs.cnn.com/2012/08/07/military-limiting-guantanamo-detainee-access-to-lawyers/?hpt=hp_tl.

[16] Jack King, *New Attack on Counsel Access at GTMO To Be Heard Friday*, NAT'L ASS'N OF CRIM. DEF. LAWS. (Aug. 17, 2012), http://www.nacdl.org/NewsReleases.aspx?id=24936.

[17] *Obama Backtracks on Guantanamo*, *supra* note 9.

Access to Counsel, the District Court for the District of Columbia struck down these rules as an "illegitimate exercise of Executive power."[18]

This Note analyzes the MOU through the court case of *In re* Guantanamo Bay Detainee Continued Access to Counsel.[19] This Note aims to facilitate broader public awareness of a narrow issue that underlies the fundamental problem at Guantanamo - indefinite detention without charge or trial. To do this, this Note will demonstrate that the USG unconstitutionally attempted to restrict detainees' access to legal representation. Part I provides a brief background on the unique posture of Guantanamo and the development of the detainees' rights to be heard in federal court. Tracing the detainees' rights to counsel pre-MOU, Part I closes with a discussion of the 2008 Protective Order which governed all attorney-client relations at Guantanamo just prior to the MOU. Part II considers the MOU in detail. This section examines the language of the MOU, how it differs from the Protective Order, what these differences mean for attorney-client relations at Guantanamo, and the arguments of its proponents and critics. Part III of this Note details the District Court for the District of Columbia's analysis of the MOU and its holding in *In re* Guantanamo Bay Detainee Continued Access to Counsel. Finally, Part IV of this Note argues the District Court's ruling was legally correct and sound for public policy purposes.

II. BACKGROUND

A. *Historical Legal Background*

In response to the terrorist attacks of September 11, 2001, Congress enacted the Authorization of Use of Military Force ("AUMF") permitting the President of the United States to "use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or

[18] *In re* Guantanamo Bay Detainee Continued Access to Counsel, No. 12-398, 2012 U.S. Dist. LEXIS 126833, at *74 (D.D.C. Sept. 6, 2012).
[19] *Id.* at *18-24.

persons" in order to prevent future acts of terrorism.[20] With this authority, the United States military detained many suspected al Qaeda and Taliban fighters at Guantanamo absent criminal charges.[21] In 2004, a plurality of the Supreme Court upheld the President's authority to detain such individuals, when augmented by congressional authorization through the AUMF as "necessary and appropriate."[22] The same year, the Supreme Court rejected the USG's argument that federal courts had no jurisdiction to hear detainee habeas petitions,[23] the first of which were filed in 2002.[24] In its initial attempt to overturn the Supreme Court's ruling, Congress amended the federal habeas statute,[25] with the Detainee Treatment Act of 2005 ("DTA").[26] The DTA deprived the courts jurisdiction over habeas petitions brought by Guantanamo detainees.[27] But the Supreme Court in *Hamdan v. Rumsfeld* held the DTA not applicable to petitioners with cases pending when the statute was enacted.[28] Congress again countered by passing the Military Commissions Act of 2006 ("MCA").[29] Section 7 of the MCA stripped

[20] Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224 (2001) (codified at 50 U.S.C. § 1541 (2006)).

[21] Tung Yin, *President Obama's First Two Years: A Legal Reflection: "Anything but Bush?": The Obama Administration and Guantanamo Bay*, 34 HARV. J.L. & PUB. POL'Y 453, 456 (2011).

[22] *Id.* at 456 (citing Hamdi v. Rumsfeld, 542 U.S. 507 (2004)).

[23] Rasul v. Bush, 542 U.S. 466, 484 (2004). *See Obama Backtracks on Guantanamo*, *supra* note 9 (discussing the implications of *Rasul* and crediting the case with laying the groundwork for the discovery of abuse inflicted upon detainees and their unwarranted detention with reports that more than 600 of the 800 Muslim men once held at Guantanamo have been released since *Rasul*).

[24] Jennifer L. Milko, *Separation of Powers and Guantanamo Detainees: Defining the Proper Roles of the Executive and Judiciary in Habeas Cases and the Need for Supreme Guidance*, 50 DUQ. L. REV. 173, 177 (2012) [hereinafter *SOP and Guantanamo Detainees*] (explaining that the first habeas corpus petitions filed in 2002 were initially dismissed for lack of jurisdiction until the Supreme Court confirmed the district courts had jurisidiction Boumediene v. Bush, 553 U.S. 723, 734 (2008)).

[25] 28 US.C. § 2241 (2000).

[26] Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2739 (codified as amended in scattered sections of 10, 28, and 42 U.S.C.).

[27] *SOP and Guantanamo Detainees*, *supra* note 24, at 177.

[28] Hamdan v. Rumsfeld, 548 U.S. 557, 576-77 (2006).

[29] Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (2006) (codified in part at 28 U.S.C. § 2241).

jurisdiction from all Guantanamo cases relating to detention, transfer, or other statuses.[30]

In the landmark case of *Boumediene v. Bush*,[31] the Supreme Court invalidated §7 of the MCA.[32] Recognizing that the MCA took away the power of the federal courts to hear habeas petitions, the Court concluded the privilege of the Suspension Clause [33] extended to Guantanamo, and any denials of habeas corpus must comply with the Suspension Clause.[34] The purpose of the privilege of habeas corpus, as the Court discussed, was to provide the detainee with "a meaningful opportunity to demonstrate that he is being held pursuant to the erroneous application or interpretation of relevant law."[35] Upon review of the history of the writ of habeas corpus and the DTA's review processes, the Supreme Court found that § 7 of the MCA was an insufficient substitute for habeas corpus.[36] Therefore, the Court held § 7 of the MCA was an unconstitutional suspension of the privilege of the writ of habeas corpus for Guantanamo detainees. [37] Thus, the *Boumediene* decision reopened the courts to Guantanamo detainees and expressly granted detainees the constitutional right to petition for habeas relief.[38]

B. *Guantanamo Detainees Have a Right To Counsel*

1. Framework for Detainee Counsel-Access

In *Hamdi v. Rumsfeld*, the Supreme Court held a Guantanamo detainee "unquestionably has the right to access counsel in connection

[30] *SOP and Guantanamo Detainees*, *supra* note 24, at 178.

[31] Boumediene v. Bush, 553 U.S. 723 (2008).

[32] *Id.* at 739.

[33] The Suspension Clause provides: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." U.S. CONST. art. I, § 9, cl. 2.

[34] *Boumediene* 553 U.S. at 771.

[35] *Id.* at 779 (internal quotation marks omitted).

[36] *SOP and Guantanamo Detainees*, *supra* note 24, at 179 (citing *Boumediene*, 553 U.S. at 792).

[37] *Id.* (citing *Boumediene*, 553 U.S. at 792).

[38] *Id.*; *see also Obama Backtracks on Guantanamo*, *supra* note 9.

with the proceedings."[39] In *Al Odah v. United States*, the District Court for the District of Columbia rejected the USG's argument that the petitioners, three Kuwaiti nationals detained at Guantanamo, have no right to counsel under the Constitution, treaties, or statutes.[40] Absent such a right, any attorney-client relationship is at the USG's "pleasure and discretion."[41] Citing the federal habeas statute,[42] the Criminal Justice Act, [43] and the All Writs Act, [44] the court held that detainees at Guantanamo are entitled to representation by counsel.[45] The court also held that the USG is not permitted to unilaterally rescind the attorney-client relationship and its accompanying attorney-client privilege covering communications.[46]

While detainees have the right to counsel, courts continue to weigh the USG's interest in restricting access to certain information about the detainees, the base, and other aspects of the Global War on Terrorism against the detainees' attorneys' need to access some of the same information to effectively represent their clients.[47] To deal with these oft-conflicting interests, the federal district courts of the District of Columbia have generally employed protective orders[48] to govern the access and use of confidential information by attorneys.[49]

The first proposed framework for detainee counsel-access appeared in *Al Odah v. United States* where the court recognized its

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[39] Hamdi v. Rumsfeld, 542 U.S. 507, 539 (2004).

[40] Al Odah v. United States, 346 F. Supp. 2d 1, 5 (D.D.C. 2004).

[41] *Id.*

[42] 28 U.S.C. § 2241 (2006).

[43] Criminal Justice Act, 18 U.S.C. § 3006A (2006).

[44] All Writs Act, 28 U.S.C. § 1651 (2006).

[45] *Al Odah*, 346 F. Supp. 2d at 5.

[46] *Id.*

[47] *See* Driscoll, *supra* note 1, at 874.

[48] BLACK'S LAW DICTIONARY 1343 (9th ed. 2009) (defining a "protective order" as "[a] court order prohibiting or restricting a party from engaging in conduct (esp. a legal procedure such as discovery) that unduly annoys or burdens the opposing party or a third-party witness").

[49] Driscoll, *supra* note 1, at 874, 874 n.4 (explaining that petitions for habeas corpus by Guantanamo detainees have generally been filed in the U.S. District Court for the District of Columbia).

power "to fashion procedures by analogy to existing procedures, in aid of the Court's jurisdiction and in order to develop a factual record as necessary for the Court to make a decision on the merits of" detainee habeas claims.[50] The USG then moved for a Protective Order "to prevent the unauthorized disclosure or dissemination of classified national security information."[51]

Following the ruling in *Al Odah*, U.S. District Judge Joyce Hens Green coordinated and managed all Guantanamo proceedings and rules on common procedural and substantive issues.[52] With the exception of cases before Judge Richard J. Leon, all then-pending Guantanamo cases were transferred to Judge Green.[53]

2. The 2004 Protective Order: Setting the Stage, The Original Protective Order Governing Attorney-Client Relations at Guantanamo Bay

Since 2004, protective orders, issued by the U.S. District Court for the District of Columbia, guide an attorney's access to not only confidential information but also their clients.[54] On November 8, 2004, U.S. District Judge Joyce Hens Green issued a framework (the "Green Protective Order") for detainee counsel-access in order "to prevent the unauthorized disclosure or dissemination of classified national security information."[55] This order implements a set of procedures originally proposed by the Department of Defense (the "DoD").[56] The Green

[50] *Al Odah*, 346 F. Supp. 2d at *6.

[51] *In re* Guantanamo Detainee Cases, 344 F. Supp. 2d 174, 175 (D.D.C. 2004).

[52] *In re* Guantanamo Bay Detainee Continued Access to Counsel, No. 12-398, 2012 U.S. Dist. LEXIS 126833, at *27 (D.D.C. Sept. 6, 2012).

[53] *Id.*

[54] Zoe Tillman, *Lawyers for Gitmo Detainees Argue Against New Attorney-Client Rules*, BLT: THE BLOG OF LEGALTIMES (Aug. 17, 2012, 2:06 PM), http://legaltimes.typepad.com/blt/2012/08/lawyers-for-gitmo-detainees-argue-against-new-attorney-client-rules.html.

[55] *In re* Guantanamo Detainee Cases, 344 F. Supp. 2d at 175. The formal title of the Green Protective Order is: "Amended Protective Order and Procedures for Counsel Access to Detainees at the United States Naval Base in Guantanamo Bay, Cuba." *Id.*

[56] Driscoll, *supra* note 1, at 892 n.85 (explaining the Department of Defense's "Revised Procedures for Counsel Access to Prisoners at the U.S. Naval Base in Guantanamo Bay,

Protective Order was subsequently used in the vast majority of Guantanamo habeas cases before the District Court for the District of Columbia.[57]

The procedures enumerated in the Green Protective Order govern attorney access to clients, the logistics of attorney visits to Guantanamo, and correspondence between the attorney and the detainee.[58] Among its provisions, the Green Protective Order requires a detainee's attorney to possess a security clearance, conditions attorney access to clients and material upon a signed agreement binding them to the security provisions set forth in the order, and provides for access to classified information only at a secure facility established and managed by court appointed military personnel.[59]

Generally, the Green Protective Order is considered a success, as it efficiently balanced the goals of "protecting the legitimate and important national security interests of the United States while ensuring that attorneys representing detainee[s] are permitted effective access to their clients."[60] The Green Protective Order was enforced without objection for four years.[61]

3. The 2008 Protective Order: The Status Quo Prior to the MOU

Following the 2008 *Boumediene* decision, the District Court for the District of Columbia again appointed a single judge to rule on common procedural issues in order to maintain judicial consistency and

Cuba" modified an earlier set of procedures, the "Procedures for Counsel Access to Prisoners at the U.S. Naval Base in Guantanamo Bay, Cuba," that had been submitted to the court in another detainee matter).

[57] Adem v. Bush, 425 F. Supp. 2d 7, 19 (D.D.C. 2006).

[58] Driscoll, *supra* note 1, at 892.

[59] *Id.* at 893.

[60] *Id.* at 910 n.179 (internal citations omitted). Officials of the USG have also declared the Green Protective Order a success. *See supra* (internal citations omitted) (noting Commander McCarty characterized the Green Protective Order as generally successful).

[61] *In re* Guantanamo Bay Detainee Continued Access to Counsel, No. 12-398, 2012 U.S. Dist. LEXIS 126833, at *27 (D.D.C. Sept. 6, 2012).

facilitate an efficient resolution of Guantanamo habeas cases.[62] This time, Judge Thomas F. Hogan was designated "to coordinate and manage proceedings in all cases involving petitioners presently detained at Guantanamo Bay, Cuba."[63] This means all pending habeas cases and subsequent cases filed, with the exception of cases before Judge Richard Leon and *Hamdan v. Bush*, were transferred to Judge Hogan's docket.[64] Judge Hogan issued his own Protective Order (the "Hogan Protective Order") containing procedures for counsel access to detainees and to classified information.[65] This order is substantially similar to the Green Protective Order.[66] The Hogan Protective Order superseded the Green Protective Order and the District Court for the District of Columbia eventually adopted the Hogan Protective Order in all Guantanamo habeas cases.[67] For purposes of this paper, the relevant provisions of the order shall be consolidated and discussed in the following three parts: (a) counsel access to classified and protected information and documents; (b) access by counsel to Guantanamo detainees; and (c) penalties imposed for violating the protective order.

a. Requirements for Counsel Access to Classified and Protected Information

The Hogan Protective Order sets out procedures that detainees and their respective counsel[68] must follow in order to receive access to

[62] *Id.* at *27-28 (citing *In re* Guantanamo Bay Detainee Litig., Misc. No. 08-442 (TFH), Order [1] at 1-2, July 2, 2012).

[63] *Id.* at *28.

[64] *Id.* at *27-28.

[65] *In re* Guantanamo Bay Detainee Litig., 577 F. Supp. 2d 143 (D.D.C. 2008).

[66] *In re* Guantanamo Bay Detainee Continued Access to Counsel, No. 12-398, 2012 U.S. Dist. LEXIS 126833, at *28.

[67] Benjamin Wittes, *On Continued Counsel Access at Gitmo and the Government's Filing*, LAWFARE BLOG (July 27, 2012, 8:06 AM), http://www.lawfareblog.com/2012/07/on-continued-counsel-access-at-gitmo-and-the-governments-filing/.

[68] *See In re* Guantanamo Bay Detainee Litig., 577 F. Supp. 2d at 147 ("[P]etitioners' counsel includes attorneys . . . representing the petitioner in habeas corpus or other litigation in federal court in the United States, as well as co-counsel, interpreters/translators, paralegals, investigators and all other personnel or support staff employed or engaged to assist in the litigation.").

classified[69] or protected[70] national security information.[71] According to the Hogan Protective Order, without authorization from the USG, attorneys for the detainees shall not have access to any classified or protected information unless the attorney has received the necessary security clearance *and* signed the Memorandum of Understanding,[72] binding the attorney by the terms and conditions of the protective order.[73]

The Hogan Protective Order entrusts Court Security Officers ("CSO"), designated by the District Court for the District of Columbia, to protect against the unauthorized disclosure of any classified documents or information.[74] The CSO is responsible for governing the "secure area," the only location classified information shall be stored, maintained and used.[75] All documents prepared by detainees or their attorney that contain or may contain classified information, including notes and

[69] *See Id.* at 147, 146-48 (defining "classified information" to include any document or information designated by any Executive Branch agency as classified in the interest of national security pursuant to an Executive Order, any document or information currently or formerly in the possession of a private parry that was derived from USG classified information, verbal or non-documentary classified information known to petitioners or their counsel, or any document and information the petitioner or petitioner's counsel was notified of containing classified information). All classified documents or information remain classified until declassified by the agency or department that issued the original classified status. *Id.* at 147.

[70] *See id.* at 151 (designating "protected information" to include any document or information the District Court for the District of Columbia deems either *sua sponte*, upon the request of the USG and the consent of the petitioner's counsel formalized through a court order, or a grant of the USG's request over an objection by detainee's counsel by court order, not suitable for public filing).

[71] *Id.* at 145.

[72] *Id.* at 148 ("[T]he MOU is a condition precedent to a petitioner's counsel having access to, or continued access to, or continued access to, classified information for the purposes of these proceedings."); *see id.* at 164-65 (Exhibit A: Memorandum of Understanding Regarding Access to Classified National Security Information).

[73] *Id.* at 148, 151.

[74] *In re* Guantanamo Bay Detainee Litig., 577 F. Supp. 2d at 147 ("'Unauthorized disclosure of classified information' means any knowing, willful, or negligent action that could reasonably be expected to result in a communication or physical transfer of classified information to an unauthorized recipient.").

[75] *Id.* ("'Secure area' means a physical facility accredited or approved for the storage, handling, and control of classified information.").

memoranda, must stay in the secure area unless the CSO declassifies them in their entirety.[76] Attorneys may remove classified documents from the secure area only after receiving authorization by the CSO.[77]

In addition to limiting the location of classified and protected information, the Hogan Protective Order curtails discussion of the materials.[78] Attorneys must obtain CSO authorization before discussing classified information outside of the secure area, over the phone, or through electronic mail.[79] Attorneys for detainees who satisfy the necessary prerequisites may share and discuss, among themselves, classified or protected information on a need to know basis, "to the extent necessary for the effective representation of their clients."[80] However, attorneys may not make any public or private statements disclosing any classified or protected information.[81] Attorneys cannot even discuss classified information with their clients unless their clients provided the information to the attorneys.[82]

b. Requirements for Counsel Access to, and Communications with, Detainees

The DOJ controls whether attorneys may meet with a detainee.[83] Attorneys must submit a request to the DOJ in advance—typically no less than 20 days before the visit—and once access is granted, no more than two attorneys plus one interpreter/translator may meet with a detainee at one time unless otherwise approved by the Commander prior to the visit.[84] In order for attorneys to communicate and meet with detainees, the attorneys must agree, in writing, to comply fully with the Hogan Protective Order and they must hold a valid United States security

[76] *Id.* at 148-49.
[77] *Id.* at 148.
[78] *Id.* at 149.
[79] *Id.*
[80] *In re* Guantanamo Bay Detainee Litig., 577 F. Supp. 2d at 149-52.
[81] *Id.* at 150, 152.
[82] *Id.*
[83] *Id.* at 158.
[84] *Id.*

clearance at the Secret level or higher.[85] Attorneys must also provide the DoD with evidence that the detainee authorizes their assistance.[86]

In addition to the extensive requirements above, the Hogan Protective Order specifies additional procedures for correspondence between attorneys and detainees.[87] It establishes a "privilege team"[88] of DoD officials to review and confirm the legal mail status of incoming materials.[89] Correspondence not falling within the definition of legal mail, such as letters from the detainees' families, must be sent through the U.S. Postal Service, and may not be included with legal mail.[90]

Any information an attorney learns from a detainee is classified information, unless and until it is submitted to the privilege team and the privilege team or federal courts determine it to be otherwise.[91] Additionally, an attorney cannot communicate with his or her client by telephone unless the conversation is approved by the Commander- a permission that is not often granted.[92]

c. Penalties for Unauthorized Disclosure of Classified and/or Protected Information or Documents

The Hogan Protective Order aims to prevent the unauthorized disclosure of classified or protected documents or information to anyone who is not authorized to receive them.[93] Violators may be punished

[85] *Id.* at 157; *see id.* at 165 (Exhibit B: Acknowledgement).

[86] Attorneys must provide the DoD with a Notification of Representation form no later than ten days after the conclusion of a second visit with a detainee. *In re* Guantanamo Bay Detainee Litig., 577 F. Supp. 2d at 157.

[87] *Id.* at 158-59.

[88] *Id.* at 156 ("'Privilege team' means a team comprised of one or more DoD attorneys and one or more intelligence or law enforcement personnel who have not taken part in, and, in the future, will not take part in, any domestic or foreign court, military commission, or combatant status tribunal proceedings involving the detainee.").

[89] *Id.* (defining "legal mail" as legal documents and other letters related to the counsel's representation of that detainee).

[90] *See id.* at 159.

[91] *See id.* at 159, 163.

[92] *In re* Guantanamo Bay Detainee Litig., 577 F. Supp. 2d at 163.

[93] *Id.* at 156.

regardless of whether the unauthorized disclosure was made directly or indirectly, through retention, or negligence.[94] Violations of the terms of the Hogan Protective Order are to be brought before the District Court for the District of Columbia immediately under a potential Contempt of the Court charge.[95] Since an unauthorized disclosure of classified information violates United States criminal laws, criminal proceedings may ensue.[96] If violations do occur, the attorney's access to classified and privileged information is terminated.[97] These repercussions aim to protect the national security interests of the United States, its government personnel, and its facilities.[98]

III. THE MOU

In May 2012, the DOJ began issuing new rules governing attorney-client relations at Guantanamo.[99] Pursuant to the latest policies, the USG required attorneys for detainees whose habeas petitions had been dismissed or denied on the merits, to sign the MOU that will supersede the Hogan Protective Order.[100] While the USG asserted its new MOU provided "essentially the same"[101] provisions for counsel-access as the Hogan Protective Order, attorneys for the detainees, and one federal court, found sections of the MOU to significantly and adversely modify the prior protective order.[102] Attorneys could no longer

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[94] *Id.* at 155-56.

[95] *Id.* at 155.

[96] *Id.*

[97] *Id.*

[98] *In re* Guantanamo Bay Detainee Litig., 577 F. Supp. 2d at 155.

[99] Baher Azmy, *Obama Turns Back the Clock on Guantanamo*, WASH. POST, Aug. 16, 2012, at A19.

[100] *See* Stephen I. Vladeck, Response, *Access to Counsel, Res Judicata, and the Future of Habeas at Guantanamo*, 161 U. PA. L. REV. PENNUMBRA 78, 88 (2012); *see also* Mike Scarcella, *Justice Department Drops Challenge of Gitmo Lawyer Rules*, NAT'L L.J. (Dec. 17, 2012) [hereinafter *Justice Department Drops Challenge of Gitmo Lawyer Rules*], http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202581856395.

[101] *In re* Guantanamo Bay Detaine[e] Continued Access to Counsel, Misc. No. 12-0398 (RCL), 2012 WL 3193560 at 15 (D.D.C. Aug. 7, 2012).

[102] *See In re* Guantanamo Bay Detainee Continued Access to Counsel, No. 12-398, 2012 U.S. Dist. LEXIS 126833, at *30 (D.D.C. Sept. 6, 2012).

meet with their clients nor access classified or protected information pursuant to the terms of the Hogan Protective Order.[103]

Under the Hogan Protective Order, the "need to know" for attorneys is presumed, and attorneys are allowed to view classified information from their own case and related cases.[104] The Hogan Protective Order also expressly permits attorneys to discuss relevant information, including classified information with each other "to the extent necessary for the effective representation of their clients."[105] Additionally, the Hogan Order safeguards an attorney's continued access to certain classified information, including the attorney's work-product.[106]

Conversely, the MOU countermands the Hogan Protective Order by eliminating the "need to know" presumption and privilege.[107] Instead, an attorney is denied access to all classified documents or information, including their own work product that they had previously obtained or created regarding a detainee's habeas petition.[108] The attorney must petition the USG and justify a satisfactory need to use the previously obtained or created classified materials before the attorney is granted access to it.[109] Under the MOU, the DoD Office of the General Counsel, in consultation with the pertinent classification authorities within the DoD and other agencies, will make these new "need to know" determinations.[110] Additionally, the MOU no longer allowed attorneys to share information amongst themselves regarding their detainee's action

[103] *See generally In re* Guantanamo Bay Detaine[e] Continued Access to Counsel, 2012 WL 3193560.

[104] *In re* Guantanamo Bay Detainee Litig., 577 F. Supp. 2d 143, 149-52 (D.D.C. 2008).

[105] *Id.* at 150.

[106] *See id.* at 148-49.

[107] *See In re* Guantanamo Bay Detaine[e] Continued Access to Counsel, 2012 WL 3193560, at 10; *see also* Exhibit A, *In re* Guantanamo Bay Detaine[e] Continued Access to Counsel, Misc. No. 12-0398 (RCL), Doc. No. 12-1 ¶ 8(b) (Aug. 7, 2012).

[108] *See In re* Guantanamo Bay Detaine[e] Continued Access to Counsel, Misc. No. 12-0398 (RCL), Doc. No. 12-1 ¶ 8(b).

[109] *Id.*

[110] *Id.*

unless specifically authorized to do so by the "appropriate government personnel."[111]

While the District Court for the District of Columbia is empowered to enforce the Hogan Protective Order,[112] the MOU delegated "[a]ny disputes regarding the applicability, interpretation, enforcement, compliance with or violations of" the MOU to the "final and unreviewable discretion" of the Commander.[113] The Commander is also given complete "authority and discretion" over attorneys' continued access to classified or protected information as well as access to or communication with detainees.[114]

Although the MOU is binding on attorneys who have represented detainees under the Hogan Protective Order, the new MOU contained no provisions for the substitution of attorneys nor for the addition of new attorneys.[115] In fact, the USG advised detainees' attorneys that "[a]lthough not stated in the MOU itself, the Government . . . 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" with the potential to change an unavailable post-habeas translator with the USG's blessing.[116]

Further, under the Hogan Protective Order, the USG may not unreasonably withhold approval for matters within its discretion.[117] No such standard appears in the MOU. Additionally, the MOU declared that the "operational needs and logistical constraints" at Guantanamo, as well as the "requirements for ongoing military commissions, Periodic

[111] *Id.* ¶ 8(a)(10).

[112] *In re* Guantanamo Bay Detainee Continued Access to Counsel, No. 12-398, 2012 U.S. Dist. LEXIS 126833, at *30 (D.D.C. Sept. 6, 2012).

[113] *See* Exhibit A, *In re* Guantanamo Bay Detaine[e] Continued Access to Counsel, Misc. No. 12-0398 (RCL), Doc. No. 12-1 ¶ 8(f).

[114] *See id.* at ¶ 6.

[115] *See id.* at ¶ 3.

[116] *In re* Guantanamo Bay Detaine[e] Continued Access to Counsel, Misc. No. 12-0398 (RCL), 2012 WL 3193560 at 11 n.3 (D.D.C. Aug. 7, 2012).

[117] *See* Exhibit A, *In re* Guantanamo Bay Detaine[e] Continued Access to Counsel, Misc. No. 12-0398 (RCL), Doc. No. 12-1 ¶ 8(c).

Review Boards, and habeas litigation" will take priority over attorney access.[118]

A. *The DOJ's Defense of the MOU*

James J. Gilligan, Assistant Director of the DOJ's Civil Division's Federal Programs Branch, wrote in court filings that the "Government does not contend [that detainees without habeas petitions before the court] have no entitlement thereafter to the assistance of counsel, or must fend for themselves in court if they file new habeas cases."[119] The DOJ proffered that detainees retain the right, in certain circumstances, to file successive habeas corpus petitions.[120] Mr. Gilligan further pointed out that detainees may maintain privileged and confidential communication with counsel pursuant to the MOU, which, he added, six attorneys for detainees had already signed.[121]

The USG argued that the executive branch is responsible for overseeing counsel access to detainees when a detainee does not have an active or an impending habeas petition, or where a renewed petition is "speculative."[122] When these situations are present, the DOJ contended that a ruling in favor of the detainees would violate the separation of powers principle because it would strip the executive branch of its authority to control access to military posts and classified information.[123] The USG also objected to a ruling in favor of the detainees because the court would then issue "what is in effect a permanent injunction" against the MOU.[124] A permanent injunction would result in the executive branch granting private counsel access to a military detention facility and access to classified national security information.[125] The USG further

[118] *In re* Guantanamo Bay Detainee Litig. 577 F. Supp. 2d 143, 149-52 (D.D.C. 2008).
[119] *DOJ Pushes Changes*, *supra* note 8.
[120] *Id.*
[121] *Id.*
[122] *In re* Guantanamo Bay Detaine[e] Continued Access to Counsel, Misc. No. 12-0398 (RCL), 2012 WL 3193560 at 3-4 (D.D.C. Aug. 7, 2012).
[123] *Id.* at 3; *see Justice Department Drops Challenge of Gitmo Lawyer Rules*, *supra* note 100.
[124] *See In re* Guantanamo Bay Detaine[e] Continued Access to Counsel, 2012 WL 3193560 at 3.
[125] *See id.*

argued that this issue was premature, and that unless and until the detainees demonstrate that the MOU has "impeded their ability to present new habeas petitions to the Court," which had not occurred in this case, the court had no power to address the counsel-access question.[126]

B. *Objections to the MOU*

Attorneys for the detainees argued that their clients were entitled to continued court-ordered counsel access in accord with the Hogan Protective Order for as long as their clients are detained at Guantanamo, regardless of the detainees' habeas status.[127] Attorneys for the detainees were perplexed as to why the USG was replacing the time-tested and workable provisions of the Hogan Protective Order with the MOU.[128] They argued that the MOU impeded on their clients' right to access counsel, and therefore, their clients' right to access the courts.[129]

Detainees' attorneys maintained that the MOU's provisions that depart from the Hogan Protective Order were "onerous and restrictive."[130] They were vehemently opposed to the provisions that gave the Commander absolute authority over attorney access to clients and classified material and that prioritized base operational issues over attorney-access.[131] Attorneys for the detainees took issue with the MOU's grant of "final and unreviewable discretion"[132] to the

[126] *Id.* at 15.

[127] Motion Concerning the Protective Order Entered by Judge Hogan on Sept. 11, 2008, Abdah v. Obama, No. 04-1254 (D.D.C. July 9, 2012), *available at* http://www.lawfareblog.com/wp-content/uploads/2012/07/Motion-re-Protective-Order-Esmail-July-9-2012-ALL-AS-FILED.pdf.

[128] *See id.* at 9 (indicating hundreds, if not thousands, of attorney-client visits have successfully taken place pursuant to the Hogan Protective Order); *see also DOJ Pushes Changes*, *supra* note 8.

[129] *See* Motion Concerning the Protective Order Entered by Judge Hogan on Sept. 11, 2008, *supra* note 126, at 7; *see also* Vladeck, *supra* note 100, at 78, 88.

[130] Motion Concerning the Protective Order Entered by Judge Hogan on Sept. 11, 2008, *supra* note 126, at 4.

[131] *See* Mears, *supra* note 15; King, *supra* note 16.

[132] Frederic J. Frommer, *Judge Skeptical of New Policy on Gitmo Access*, ASSOCIATED PRESS (Aug. 17, 2012, 2:26 PM), http://bigstory.ap.org/article/judge-skeptical-new-policy-gitmo-access.

Commander, instead of the courts, for settling any disputes that arise.[133] As one attorney commented, "[the USG is] essentially saying, 'trust us' . . . but there's no well of trust here."[134]

Attorneys for the detainees were opposed to the MOU's "numerous highly restrictive provisions" including, for example, the prohibitions on attorney access to their own work product in the event their client's habeas action is terminated, prohibitions against sharing information from different cases and between attorneys, and the prohibition against the presumption in favor of an attorney's "need to know."[135] Because of these provisions, attorneys for the detainees argued that the Hogan Protective Order must continue to apply to all detainees, regardless of their habeas status, in order to preserve the efficiencies and equities created through information-sharing.[136]

Rejecting the USG's claim that the detainees have not shown harm, William Livingston ("Livingston"), an attorney for two detainees at Guantanamo who were affected by the MOU, argued that his clients were already harmed when his team could not meet with them after refusing to sign the MOU.[137] Livingston expressed a fear amongst detainees' attorneys that the MOU would "open the door for future restrictions on access," and, as a consequence, future harm.[138] This fear was predicated on the language of the MOU and the USG's indication it may limit each detainee without a case pending to a maximum of two attorneys.[139] Livingston pointed out there is nothing in the MOU to prevent the USG from restricting representation to one lawyer or to prevent the USG from imposing other restrictions after the MOU is

[133] *See* Mears, *supra* note 15; King, *supra* note 16.

[134] Tillman, *supra* note 54 (quoting William Livingston, partner at Covington & Burling and counsel for two Guantanamo detainees).

[135] Motion Concerning the Protective Order Entered by Judge Hogan on Sept. 11, 2008 at 5-7, Abdah v. Obama, No. 04-1254 (D.D.C. July 9, 2012), *available at* http://www.lawfareblog.com/wp-content/uploads/2012/07/Motion-re-Protective-Order-Esmail-July-9-2012-ALL-AS-FILED.pdf.

[136] *See id.*

[137] Tillman, *supra* note 54.

[138] *Id.*

[139] *Id.*

signed.[140] Expressing the sentiment amongst attorneys representing detainees at Guantanamo, Livingston said, "The MOU guarantees nothing. . . . Why should we agree to such a thing?"[141] Attorneys for the detainees asked the court to rule that the USG violated the Hogan Protective Order by requiring attorneys to sign the MOU and that the court rule the Hogan Protective Order applies to all cases, regardless of a detainees' habeas status.[142]

IV. THE MOU IS UNCONSTITUTIONAL

On September 6, 2012, the United States District Court for the District of Columbia issued its opinion striking down the MOU and the USG's attempt to supersede the court's authority as an "illegitimate exercise of Executive power."[143] The court concomitantly upheld the governance of the Hogan Protective Order over detainee-counsel access "so long as detainees can bring habeas petitions before the Court."[144] The decision effectually gave the federal courts continued jurisdiction over current and future habeas petitions filed by Guantanamo detainees.[145]

Endorsing the mantra "if it ain't broke, don't fix it," Judge Lamberth focused on the fact that for eight years two protective orders under judicial oversight had, in his opinion, safely and effectively governed attorney-client relations at Guantanamo.[146] During these eight years, the USG never expressed an opposition to those orders nor did the USG bring any violations of those orders to the court's attention.[147]

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[140] *See id.*

[141] Frommer, *supra* note 132.

[142] *See* Motion Concerning the Protective Order Entered by Judge Hogan on Sept. 11, 2008 at 9, Abdah v. Obama, No. 04-1254 (D.D.C. July 9, 2012), *available at* http://www.lawfareblog.com/wp-content/uploads/2012/07/Motion-re-Protective-Order-Esmail-July-9-2012-ALL-AS-FILED.pdf.

[143] *In re* Guantanamo Bay Detainee Continued Access to Counsel, No. 12-398, 2012 U.S. Dist. LEXIS 126833, at *74 (D.D.C. Sept. 6, 2012).

[144] *Id.* at *47, *74.

[145] Vladeck, *supra* note 100, at 81.

[146] *In re* Guantanamo Bay Detainee Continued Access to Counsel, 2012 U.S. Dist. LEXIS 126833 at *27, *29.

[147] *See id.* at *29.

The court took issue with many of the MOU's departures from the Hogan Protective Order.[148] For example, the court expressed concern about the MOU's lack of a reasonableness standard to prevent the USG from unilaterally and arbitrarily refusing to grant attorneys permission to access their client and protected materials.[149] The court observed that since the MOU is not operational until countersigned by the Commander, the Commander may deny a detainee access to counsel without being held accountable by refusing to countersign the MOU.[150] On a similar note, the court was apprehensive about the Commander's ability to prioritize the operational needs and logistical constraints of the base over counsel's need to access his or her client or information. The court said this provision "is particularly troubling as it places a detainee's access to counsel, and thus the detainee's constitutional right to access the courts, in a subordinate position to whatever the military commander of Guantanamo sees as a logistical constraint."[151] Further, the court was concerned about the MOU's provision that strips counsel of the "need to know" designations and instead requires counsel to justify their need to access any previously obtained or created classified documents to the satisfaction of specified government agents. The court had reservations that this requirement might lead to "lengthy, needless and possibly oppressive delays," all the while requiring counsel to disclose "some analysis and strategy to their adversary merely to obtain their past work-product."[152]

The court relied on the history of the Writ of Habeas Corpus to establish that the Judiciary, not the Executive, is responsible for "call[ing] the jailer to account," and therefore, ensuring detainees have access to the courts in a way that is "adequate, effective, and meaningful."[153]

The Court held that detainees with and without habeas petitions before the court have the same need to access counsel, and therefore the

[148] *See id.* at *29-33.
[149] *Id.* at *31.
[150] *See In re* Guantanamo Bay Detainee Litig., 577 F. Supp. 2d 143, 158 (D.D.C. 2008).
[151] *In re* Guantanamo Bay Detainee Continued Access to Counsel, 2012 U.S. Dist. LEXIS 126833 at *33.
[152] *Id.* at *31.
[153] *Id.* at *34-35, *40.

USG's unsubstantiated interest in a proposed two tiered regime that imposes different rules for detainees with and without active petitions could not be upheld.[154]

While it is uncontested that courts generally do not interfere with the oversight of prisons by the executive branch, the court disagreed that the executive branch should be free from judicial oversight in the determination of counsel-access to detainees.[155] The court aptly pointed out that even the USG concedes that Guantanamo is not a corrections facility.[156] The court indicated that even if Guantanamo was one, "it does not follow that the judiciary has secondary responsibility for ensuring [detainees] have adequate access to the courts."[157] In fact, the Supreme Court has expressly ruled against policies that threaten the ability of detainees to challenge their detention effectively.[158] In a 1996 case, the Supreme Court held that although the executive branch "may have the responsibility for regulating its facilities, the Court is charged with ensuring that [detainees] are 'provided with the tools . . . to challenge the conditions of their confinement.'"[159] This is especially true for detainees being held at Guantanamo.[160]

The court also rejected the USG's argument that the court was interfering with the Executive's power to control classified information.[161] In its justification for why the USG's argument does not pass the "smell test," the court reiterated the fact that the Hogan Protective Order was effectively in force for four years without

[154] *Id.* at *39-40.

[155] *Id.*

[156] *Id.* at *40-41.

[157] *In re* Guantanamo Bay Detainee Continued Access to Counsel, 2012 U.S. Dist. LEXIS 126833 at *40.

[158] *Id.* at *41 ("[The] state and its officers may not abridge or impair a prisoner's right to apply to a federal court for a writ of habeas corpus.") (quoting *Ex parte* Hull, 312 U.S. 546, 549 (1941)).

[159] *Id.* at *42 (citing Lewis v. Casey, 518 U.S. 343, 351 (1996)).

[160] *Id.* at *42.

[161] *Id.* at *73; *In re* Guantanamo Bay Detaine[e] Continued Access to Counsel, Misc. No. 12-0398 (RCL), 2012 WL 3193560 at 4 (D.D.C. Aug. 7, 2012).

incident.[162] Not a single complaint about a leak of classified information was brought before the court.[163] Because the MOU barely alters the classified and protected provisions of the Hogan Protective Order (the MOU only stripped counsel of their need to know status), the court concluded that the USG is satisfied with the classified and protected provisions of the Hogan Protective Order, and therefore, that a ruling in favor of the detainees did not challenge the USG's right to protect classified information.[164]

The court held that it is the Judiciary's responsibility to ensure detainees have access to habeas relief and not the Executive's, finding that the USG lacked legal authority to unilaterally impose new rules governing the detainees' continued access to counsel absent an active habeas action.[165] The court therefore declared the MOU "null *ab initio,*" meaning the MOU was void from the beginning.[166] The court repudiated the USG's argument that a ruling against the MOU and for the Hogan Protective order would translate into a permanent injunction.[167] As part of the court's dismissal of the USG's argument, the court emphasized that the Hogan Protective Order is only effective for as long as detainees are held at Guantanamo and are able to petition for habeas and other relief before the federal courts.[168]

The court also held that its review of the issue at hand is not premature as the USG promulgated.[169] The court cites *Lewis v. Casey*, a case that permits the use of past interference with detainees' presentation of claims in order to satisfy the actual harm requirement, to support its use of evidence of past abuses by the USG concerning attorney access to

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[162] *In re* Guantanamo Bay Detainee Continued Access to Counsel, No. 12-398, 2012 U.S. Dist. LEXIS 126833, at *73 (D.D.C. Sept. 6, 2012).

[163] *Id.*

[164] *Id.* at *73-74.

[165] *Id.* at *46-47.

[166] *Id.* at *47; BLACK'S LAW DICTIONARY 5, 1172 (9th ed. 2009) (defining "null" as "having no legal effect" and "*ab initio*" as "from the beginning").

[167] *See In re* Guantanamo Bay Detainee Continued Access to Counsel, 2012 U.S. Dist. LEXIS 126833, at *47-48.

[168] *Id.*

[169] *Id.* at *63-64; *In re* Guantanamo Bay Detaine[e] Continued Access to Counsel, Misc. No. 12-0398 (RCL), 2012 WL 3193560 at 16 (D.D.C. Aug. 7, 2012).

detainees.[170] These include issues pertaining to habeas representation and access to medical records.[171]

The court acknowledges it has an obligation:

> [T]o assure that those seeking to challenge their Executive detention by petitioning for habeas relief have adequate, effective and meaningful access to the courts. In the case of Guantanamo detainees, access to the courts means nothing without access to counsel . . . . The Court, whose duty it is to secure an individual's liberty from unauthorized and illegal Executive confinement, cannot now tell a [detainee] that he must beg leave of the Executive's grace before the Court will involve itself. This very notion offends separation-of-powers principles and our constitutional scheme.[172]

On December 6, 2012, the court struck down the MOU as "an illegitimate exercise of Executive Power," and upheld the Hogan Protective Order as the governing rules for attorney access to detainees as well as protected and classified information at Guantanamo whether a detainee has a habeas petition before the court or not.[173] On December 14, 2012, the deadline passed for the DOJ to file a statement of the issues to continue the case.[174] This effectively abandoned the USG's pursuit of the MOU.[175]

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[170] *In re* Guantanamo Bay Detainee Continued Access to Counsel, 2012 U.S. Dist. LEXIS 126833, at *47-48 (referencing Lewis v. Casey, 518 U.S. 343, 349 (1996)).

[171] *In re* Guantanamo Bay Detainee Continued Access to Counsel, No. 12-398, 2012 U.S. Dist. LEXIS 126833, at *64-70 (D.D.C. Sept. 6, 2012) (citing Adam v. Bush, 425 F. Supp. 2d 7, 9 (D.D.C. 2006); Tumani v. Obama, 598 F. Supp. 2d 67, 70 (D.D.C. 2009); Al-Joudi v. Bush, 406 F. Supp. 2d 15-17, 21-22 (D.D.C. 2005); and Husayn v. Gates, 588 F. Supp. 2d 7, 9 (D.D.C. 2008)).

[172] *Id.* at *74-75.

[173] *Id.*

[174] *See Justice Department Drops Challenge of Gitmo Lawyer Rules*, *supra* note 100.

[175] *Id.*

V. ANALYSIS

More than a decade after September 11, 2001, many detainees have had their day in court and have lost their habeas cases.[176] Those that no longer have a habeas case before the court are subject to the terms of the MOU as the only means of challenging their detention going forward. In addition to the legal basis for striking down the MOU as discussed in the court's opinion above, several policy considerations support the governance of continued access to counsel for detainees by the Hogan Protective Order and not the MOU. The Hogan Protective Order better promotes judicial expediency and efficiency, it better encourages and facilitates pro bono practice, and it is another step in the right direction to shatter the image of Guantanamo as a "legal black hole."

A. *The Hogan Protective Order Better Promotes Judicial Expediency and Efficiency*

The Hogan Protective Order aims to provide detainees with the requisite tools to prosecute habeas petitions before the courts. By leaving counsel-access to the unrestrained discretion of the Commander in the MOU, detainees may decide to circumvent the Commander all together by proceeding pro se.[177] Detainees proceeding pro se may cause major headaches for themselves and the courts as many detainees speak limited or no English, have no legal training, and have no means to be kept up to date with new legal and political developments. Incoherent, legally unsound, and ill-prepared pleadings slow down the judicial system and prevent cases from moving forward in an expedient and efficient way.

Even if a detainee successfully receives permission from the Commander for continued access to counsel, the MOU does not provide for attorney substitutions or replacements. This predicament might prove an inefficient use of the court's time if an attorney is unable to continue representing his or her client mid-trial and another member of

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[176] Clive Stafford Smith, *Guantanamo Bay: Statistics*, REPRIEVE (July 28, 2011), http://www.reprieve.org.uk/publiceducation/guantanamostats/ ("59 decided habeas cases: 38 prisoners granted habeas and 21 prisoners denied habeas.").

[177] BLACK'S LAW DICTIONARY 1341 (9th ed. 2009) (defining "pro se" as "[o]ne who represents oneself in a court proceeding without the assistance of a lawyer").

the team is not allowed to step in to continue the case with a seamless transition. Further, the USG has already indicated it may, in the future, limit the number of attorneys allowed to represent a detainee, adding to the likelihood that this dilemma could occur.

The MOU's prerequisite of Commander permission for continued access to counsel presents the scary notion that viable, judiciable cases may never be brought before the courts again because the Commander's decision is discretionary and unreviewable. As President Obama seeks to close the detention facilities at Guantanamo,[178] adjudicating claims for detainees seems one clear way to further that goal. The *Boumediene* decision reopened the courts to Guantanamo detainees and expressly granted detainees the constitutional right to petition for habeas relief.[179] The Hogan Protective Order, when compared to the MOU, is the most efficient and effective means for allowing detainees access to the courts, and an opportunity to navigate through the judicial system.

B. *The Hogan Protective Order Better Encourages and Facilitates Pro Bono Practice*

Adhering to the Hogan Protective Order already places many obstacles before attorneys representing detainees pro bono.[180] To mention just a few, attorneys for the detainees must obtain security clearances, prove permission from their client to represent them, only keep and discuss classified and protected materials and work product in a USG designated location, be given permission, which is rare, to speak

[178] Stephen Dinan, *Four Years After Obama's Signature Promise, Gitmo Is Still Open*, WASH. TIMES, (Jan. 20, 2013), http://www.washingtontimes.com/news/2013/jan/20/obamas-first-term-promise-close-gitmo-prison-still/.

[179] *See SOP and Guantanamo Detainees*, *supra* note 24 at 179; *Obama Backtracks on Guantanamo*, *supra* note 9.

[180] BLACK'S LAW DICTIONARY 1323 (9th ed. 2009) (explaining the word "pro bono" derives from Latin roots meaning "for the public good" or "[b]eing or involving uncompensated legal services performed esp[ecially] for the public good").

with their client over the phone, and clear the logistical arrangements for their visit with the USG well in advance of their arrival.[181]

Representing a detainee is incredibly time consuming and expensive. Over the course of a decade, many of these attorneys dedicate hundreds of hours of pro bono service representing a detainee and the costs of such representation are enormous. Attorneys are practically limited from flying down to Guantanamo for a few hours to meet with their client or access the protected area because only two flights fly in and out of Guantanamo.[182] Due to this, accessing a few key documents in the protected area can easily become a two-day affair. To accommodate the workload and offset the cost of performing this work pro bono, law firms often establish teams of attorneys to represent detainees so that attorneys may maintain their billable hours and their paying clients while representing the detainees. Additionally, a single lawyer or a team of lawyers often represents multiple detainees to streamline the work and the expense. Under the Hogan Protective Order, the team is not limited in number, nor is it restricted in substitutions or replacements. As long as each individual attorney or support staff complies with the Hogan Protective Order's provisions, including the requisite security clearance, they may assist in the representation. This allows attorneys more flexibility in their scheduling, as they may switch or take turns traveling to Guantanamo. This is not true under the MOU. As mentioned above, the USG indicates it may unilaterally amend the MOU to limit the number of attorneys representing any particular detainees to only two. The rigidity of the MOU makes an already difficult job practically impossible for attorneys who need to balance their pro bono practice with their other clients who pay the bills. Because the MOU does not provide any provisions for the substitution or addition of counsel, a detainee risks being left without any representation if their attorneys are unable to visit or need to remove themselves from the case due to health or other pressing matters.

[181] *In re* Guantanamo Bay Detainee Litig., 577 F. Supp. 2d 143, 148-49, 157-58, 163 (D.D.C. 2008).

[182] *In re* Guantanamo Bay Detainee Continued Access to Counsel, No. 12-398, 2012 U.S. Dist. LEXIS 126833, at *60-61 (D.D.C. Sept. 6, 2012).

For close to a decade, not a single violation of the Green or Hogan Protective Orders has come before the court. The MOU is more rigid than the Green and Hogan Protective Orders. Because the MOU did not allow for interchanging or adding attorneys, it placed a greater strain on those attorneys already representing detainees and acted as a deterrent to attorneys who would otherwise join ongoing cases. As the District Court for the District of Columbia so eloquently put it, "The Court would like to note that pro bono counsel in these cases have worked diligently to provide detainees with competent legal counsel. It would have been difficult and costly for the Court to manage its Guantanamo docket without the help of pro bono counsel."[183] The Hogan Protective Order best assures pro bono representation of the detainees can and will continue.

C. *The Hogan Protective Order Better Dispels the Image of Guantanamo as a "Legal Black Hole"*

The MOU's provision that the military, not the courts, are given the "final and unreviewable discretion" for settling any arising disputes is troubling because, as recent incidents indicate, the MOU is only the tip of the iceberg when it comes to USG abuses of counsel access to detainees.[184] A previous policy implemented by the USG at Guantanamo violated "both the letter and spirit of the attorney-client privilege" when letters from attorneys containing privileged attorney-client communications were intercepted and reviewed by the USG.[185] There were even reports that content from those letters were shared with the prosecution team.[186] Further, the District Court for the District of Columbia cites other abuses including issues pertaining to habeas representation and access to medical records.[187] Without judicial

[183] *Id.* at *61.

[184] *Id.* at *43, *47-48 (referencing Lewis v. Casey, 518 U.S. 343, 349 (1996)).

[185] Letter from Wm. T. (Bill) Robinson III, President, Am. Bar Ass'n, to Honorable Leon Panetta, Sec'y of Def. (Dec. 21, 2011), *available at* http://www.americanbar.org/content/dam/aba/uncategorized/2011/gao/2011dec21_guantanamoattcltpriv.authcheckdam.pdf.

[186] *Id.*

[187] *In re* Guantanamo Bay Detainee Continued Access to Counsel, No. 12-398, 2012 U.S. Dist. LEXIS 126833, at *64-70 (D.D.C. Sept. 6, 2012) (citing Adam v. Bush, 425 F. Supp. 2d 7, 9 (D.D.C. 2006); Tumani v. Obama, 598 F. Supp. 2d 67, 70 (D.D.C. 2009); Al-Joudi

oversight, the detention facilities at Guantanamo revert back to the image of a "legal black hole,"[188] which one journalist described as the impression of hypersecret, indefinite detention.[189] Judicial oversight, and not USG immunity, provides the vigilance necessary to prevent actions such as these from happening again.

Additionally, conditions and treatment of detainees at Guantanamo improved because of judicial oversight and attorney involvement.[190] Even after the USG decides their case cannot be prosecuted and that they should be transferred, many detainees remain at Guantanamo because the country they would be transferred to is deemed too dangerous.[191] Because of the work of human rights groups and the detainees' attorneys, most Guantanamo detainees are now permitted to eat, pray and exercise together.[192] The Hogan Protective Order provides a working balance of detainees' needs for unfettered access to counsel and the needs of the USG to protect classified and protected information and to ensure the safety of its people. The MOU dangerously tips the scales in favor of the USG, and brushes closely with the return of the "legal black hole."

For the policy reasons stated above, The Hogan Protective Order, not the MOU, should govern counsel-access for detainees regardless of their habeas status.

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v. Bush, 406 F. Supp. 2d 15-17, 21-22 (D.D.C. 2005); and Husayn v. Gates, 588 F. Supp. 2d 7, 9 (D.D.C. 2008)).

[188] *See Obama Backtracks on Guantanamo*, *supra* note 9.

[189] *See* Baher Azmy, Op-Ed., *Guantanamo's Cost Hangs Heavy for Obama*, TIMESUNION.COM (Jan. 10, 2012, 11:46 PM), http://www.timesunion.com/opinion/article/Guantanamo-s-cost-hangs-heavy-for-Obama-2461105.php.

[190] *See Obama Backtracks on Guantanamo*, *supra* note 9.

[191] *See* DEP'T OF JUSTICE ET AL., FINAL REPORT: GUANTANAMO REVIEW TASK FORCE ii (2010), *available at* http://www.justice.gov/ag/guantanamo-review-final-report.pdf.

[192] Jennifer Daskal, Op-Ed., *Don't Close Guantanamo*, N.Y. TIMES (Jan. 10, 2013), http://www.nytimes.com/2013/01/11/opinion/dont-close-guantanamo.html.

VI. CONCLUSION

A decade has passed since the first detainees arrived at Guantanamo. The need for judicial oversight is as strong now as it was then. For detainees who do not speak English, are not familiar with the United States judicial system, and have no means to learn of judicial and political changes, access to the courts is meaningless without access to counsel. The Hogan Protective Order provides access to counsel and therefore, the courts, regardless of a detainee's habeas status. The Hogan Protective Order is time-tested and effective and justly continues to govern a detainee's continued access to counsel.

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