[ARGUMENTS SCHEDULED FOR MAY 15, 2007]

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

HAJI BISMULLAH, et al., Petitioners, v. ROBERT M. GATES, Secretary of Defense, Respondent.	No. 06-1197
HUZAIFA PARHAT, et al. Petitioners, v. ROBERT M. GATES, Secretary of Defense, Respondent.	No. 06-1397

MOTION FOR LEAVE TO SUBMIT REVISION TO GOVERNMENT'S PROPOSED PROTECTIVE ORDER

The respondent hereby seeks leave to file the amendments described below to the Government's proposed protective order.

Nearly nine months ago, the respondent proposed a protective order to govern actions filed in this Court under the Detainee Treatment Act. A protective order is necessary to address the national security concerns that necessarily arise in litigation addressing the detention of enemy combatants and the use of classified information in connection with enemy combatant determinations. In that proposal, the respondent

sought changes from the district court habeas protective order to address concerns relating to the secure, safe, and efficient operation of the military facility at Guantanamo Bay as well as other national security concerns.

At the same time, the respondent has been willing to reevaluate the military's needs to ensure that the proposed procedures for this litigation are not more stringent than necessary. Harris Decl., ¶ 2 (attached as Exhibit A). Recently, the respondent has determined that one of the proposed procedures is no longer necessary – specifically, the procedure setting a threshold limit on the number of counsel visits to a represented detainee at Guantanamo Bay. *Ibid.* Accordingly, the respondent now proposes revised language to implement that change by removing the visit threshold. The Department of Defense has also reviewed the other provisions of the Government's proposed protective order and has concluded that such other provisions "remain warranted and appropriate in light of the operations" of the Department of Defense at Guantanamo. *Id.*, ¶ 3.

1. The respondent seeks to amend paragraphs 9.C. and 10.C of the proposed protective order by deleting the limit of three in-person visits to Guantanamo for counsel.

The habeas district court protective order did not specifically address the number of visits counsel could make to a represented detainee, but instead provided that "[c]ounsel for the detainees and counsel for the respondents shall cooperate to

the fullest extent possible to reach a reasonable agreement on the number of counsel visits allowed," and that, if detainee counsel "believe that the government is unreasonably limiting the number of visits with a detainee, counsel may petition the Court at the appropriate time for relief." App. 53. The Government's proposed protective order for DTA suits, in contrast, would have provided attorneys three visits without making any showing of need to this Court or the Government. *See* App. 100, 102.

After further consideration of this issue by the Department of Defense, the respondent is no longer seeking to incorporate a three-visit threshold for the number of counsel visits. Based on a current evaluation of resources and needs at Guantanamo, the respondent has determined that this provision is no longer warranted.

As before, counsel visits to Guantanamo could still be subject to delay or cancellation based upon the security and military resource needs at the base, as explained in paragraph 12 of the proposed order (and as was also true under the district court habeas regime supported by petitioners). We note, however, that in the district court the Government and detainee counsel were generally able to resolve concerns regarding delay and resource limitations with respect to in-person visits without necessitating court involvement; we fully expect that situation to continue under a new order.

2. The revised language of Sections 9.C and 10.C being proposed by the Government is as follows. (A redline version showing how this revised language is different from the Government's original proposal is attached as Exhibit B. A copy of the proposed protective order, as revised, is attached as Exhibit C.)

Revised Section 9.C:

> Once counsel has established an attorney-client relationship with detainee, and provided sufficient evidence thereof, under the terms set forth above, counsel will be allowed both access to the legal mail system described herein and to visit the detainee at Guantanamo Bay, Cuba to assist in the preparation of this action under the Detainee Treatment Act.

Revised Section 10.C:

> If the detainee signs Exhibit D, counsel will be allowed access both to the legal mail system described herein and to visit the detainee at Guantanamo Bay, Cuba, to assist in the preparation of this action under the Detainee Treatment Act. If the detainee does not sign Exhibit D, then no further visits will be afforded, counsel will not be afforded access to the legal mail system, and counsel's access to the CSRT record will be limited to the unclassified material.

3. The Defense Department confirms that the remaining provisions of the proposed protective order continue to be "warranted and appropriate in light of the operations" of the Department of Defense at Guantanamo. Harris Decl. ¶ 3.

CONCLUSION

For the foregoing reasons, the Government seeks leave to submit a revision to the Government's proposed protective order.

Respectfully submitted,

PETER D. KEISLER
Assistant Attorney General

JONATHAN F. COHN
Deputy Assistant Attorney General

DOUGLAS N. LETTER
Terrorism Litigation Counsel

ROBERT M. LOEB
(202) 514-4332

AUGUST E. FLENTJE
(202) 514-1278
Attorneys, Appellate Staff
Civil Division, Room 7268
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530

MAY 2007

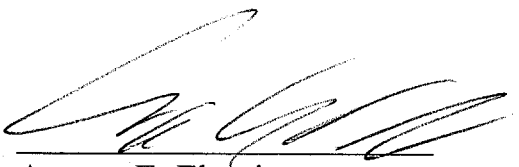
CERTIFICATE OF SERVICE

I hereby certify that on May 11, 2007, I caused copies of the foregoing "MOTION FOR LEAVE TO SUBMIT REVISION TO GOVERNMENT'S PROPOSED PROTECTIVE ORDER" to be served upon counsel of record by causing copies to be sent by Fed Ex overnight delivery and by e-mail transmission to:

Jeffery I. Lang
Jennifer R. Cowan
Debevoise & Plimpton
919 Third Avenue
New York, New York 10022

Sabin Willett
Bingham McCutchen LLP
150 Federal Street
Boston, MA 02110-1726

Susan Baker Manning
2020 K Street, N.W.
Washington DC 20006-1806



August E. Flentje