

PROTECTED INFORMATION – FILED UNDER SEAL

[ORAL ARGUMENT TO BE HELD ON OCTOBER 8, 2009]

No. 09-5236

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

DJAMEL AMEZIANE,
Petitioner-Appellee,

v.

BARACK OBAMA, et al.,
Respondents-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

APPELLANTS' APPENDIX

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CERTIFICATE OF SERVICE

APPEAL, CLOSED, GITMO, HABEAS, STAYED, TYPE-G
U.S. District Court
District of Columbia (Washington, DC)
CIVIL DOCKET FOR CASE #: 1:05-cv-00392-UNA

AMEZIANE v. BUSH et al
 Assigned to: Unassigned
 Case in other court: USCA, 05-05243
 08-05248
 08-05511
 09-05236

Date Filed: 02/24/2005
 Date Terminated: 05/28/2009
 Jury Demand: None
 Nature of Suit: 530 Habeas Corpus
 (General)
 Jurisdiction: U.S. Government Defendant

Cause: 28:2241 Petition for Writ of Habeas Corpus (federa

Date Filed	#	Docket Text
02/24/2005	<u>1</u>	PETITION for Writ of Habeas Corpus (Filing fee \$ 5.) filed by JAMEL AMEZIANE. (Attachments: # <u>1</u> Certificate of Service)(cp,) (Entered: 03/02/2005)
02/24/2005		SUMMONS Not Issued as to GEORGE W. BUSH, DONALD RUMSFELD, JAY HOOD, BRICE GYURISKO (cp,) (Entered: 03/02/2005)
02/25/2005	<u>2</u>	NOTICE OF RELATED CASE by JAMEL AMEZIANE. Case related to Case No. 04cv2046. (cp,) (Entered: 03/02/2005)
03/04/2005		Case reassigned to Judge Ellen S. Huvelle. Judge Colleen Kollar-Kotelly no longer assigned to the case. (cp,) (Entered: 03/04/2005)
03/07/2005	<u>3</u>	MOTION for Protective Order by JAMEL AMEZIANE. (Attachments: # <u>1</u> Exhibit Exhibits 1-3 to Motion for Entry of Protective Order)(Rachlin, Robert) (Entered: 03/07/2005)
03/07/2005	<u>4</u>	ENTERED IN ERROR.....MOTION for Protective Order by JAMEL AMEZIANE. (Attachments: # <u>1</u> Exhibit Exhibits 1-3 to Motion for Protective Order)(Rachlin, Robert) Modified on 3/9/2005 (jf,). (Entered: 03/07/2005)
03/09/2005		NOTICE OF CORRECTED DOCKET ENTRY. Document No. 4 was entered in error and terminated as a duplicate of pleading No. 3. (jf,) (Entered: 03/09/2005)
03/10/2005	<u>5</u>	ORDER re <u>1</u> Petition for Writ of Habeas Corpus filed by JAMEL AMEZIANE. Respondents shall, by April 1, 2005, show cause why this writ should not be granted. Signed by Judge Ellen S. Huvelle on 3/10/05. (BL,) (Entered: 03/10/2005)
03/10/2005		Set/Reset Deadlines: Response to Show Cause due by 4/1/2005. (gdf) (Entered: 03/15/2005)
03/11/2005	<u>6</u>	MOTION to Stay Pending Related Appeals and For Continued Coordination by GEORGE W. BUSH, DONALD RUMSFELD, JAY HOOD, BRICE GYURISKO. (Attachments: # <u>1</u> Exhibit A# <u>2</u> Exhibit B# <u>3</u> Exhibit C# <u>4</u> Text of Proposed Order)(Henry, Terry) (Entered: 03/11/2005)
03/15/2005	<u>7</u>	MOTION for Preliminary Injunction by JAMEL AMEZIANE. (Attachments: # <u>1</u> Memorandum in Support of Motion for Preliminary Injunction# <u>2</u> Exhibit E-mail# <u>3</u> Exhibit E-mail# <u>4</u> Exhibit NY Times Article# <u>5</u> Exhibit Order by Judge Collyer in Related Case# <u>6</u> Exhibit Opinion by Judge Collyer in Related Case# <u>7</u> Exhibit State Department Report: Algeria# <u>8</u> Exhibit Delcaration of Matthew C. Waxman# <u>9</u> Text of Proposed Order)(Rachlin, Robert) (Entered: 03/15/2005)
03/18/2005	<u>8</u>	Memorandum in opposition to motion re <u>6</u> filed by JAMEL AMEZIANE. (Attachments: # <u>1</u> Exhibit Original Petition# <u>2</u> Exhibit NY Times Article# <u>3</u> Exhibit Judge Green Stay Order# <u>4</u> Exhibit Algeria Report (ignore cover sheet filed with previous motion)# <u>5</u> Exhibit Extract from Army Regulations)(Rachlin, Robert) (Entered: 03/18/2005)
03/21/2005	<u>9</u>	Memorandum in opposition to motion re <u>7</u> preliminary injunction filed by GEORGE W. BUSH, DONALD RUMSFELD, JAY HOOD, BRICE GYURISKO. < 1 >

		1:05-cv-00392-UNA) Notice (Other), Notice (Other), Order,, Set Deadlines, (Folio, Joseph) (Entered: 10/27/2008)
10/27/2008	95	OPPOSITION to Petitioner's Motion for Temporary Restraining Order and Preliminary Injunction filed by Respondents GEORGE W. BUSH, DONALD RUMSFELD, et al. (FILED UNDER SEAL) (jeb,) (Entered: 10/29/2008)
10/27/2008	96	OPPOSITION to Petitioner's Motion to seal filed by Respondents GEORGE W. BUSH, DONALD RUMSFELD, et al. (FILED UNDER SEAL) (jeb,) (Entered: 10/29/2008)
10/27/2008	97	CROSS MOTION to confirm by Respondents GEORGE W. BUSH, DONALD RUMSFELD, et al. (FILED UNDER SEAL) (jeb,) (Entered: 10/29/2008)
10/28/2008		MINUTE ORDER: The Court directs counsel in these consolidated cases to the Court's Minute Order of October 2, 2008, which directed counsel to the Court's previous orders that require all filings, with the exception of notices of appearance, be filed in the applicable civil case and in 08-mc-442 and directed counsel to Local Civil Rule 7(c), which reads: "Each motion and opposition shall be accompanied by a proposed order." Further, the Court directs counsel to Local Civil Rule 7(m), which reads: "Before filing any nondispositive motion in a civil action, counsel shall discuss the anticipated motion with opposing counsel, either in person or by telephone, in a good faith effort to determine whether there is any opposition to the relief sought and, if there is opposition, to narrow the areas of disagreement.... A party shall include in its motion a statement that the required discussion occurred, and a statement as to whether the motion is opposed." Finally, the Court cautions counsel that failure to follow the Court's orders and local rules may result in the Court denying motions and striking filings. Signed by Judge Thomas F. Hogan on 10/28/08. (lctfh1) (Entered: 10/28/2008)
10/29/2008	106	ORDER (FILED UNDER SEAL). Signed by Judge Thomas F. Hogan on 10/28/08. (jeb,) (Entered: 11/07/2008)
10/30/2008	98	NOTICE of Filing by DJAMEL AMEZIANE, GUANTANAMO BAY DETAINEE LITIGATION (Dixon, J.) (Entered: 10/30/2008)
10/30/2008	99	Memorandum in opposition to re (106 in 1:05-cv-01504-RMC, 141 in 1:05-cv-01704-RMU, 36 in 1:08-cv-01101-JDB, 98 in 1:05-cv-01505-RMC, 123 in 1:05-cv-02479-HHK, 628 in 1:05-cv-02386-RBW, 71 in 1:05-cv-01971-RMC, 81 in 1:06-cv-01767-RMU, 128 in 1:05-cv-01220-RMU, 316 in 1:04-cv-01254-HHK, 24 in 1:06-cv-01688-RMC, 123 in 1:05-cv-01353-RMC, 5 in 1:08-cv-01628-PLF, 89 in 1:05-cv-01607-RMU, 69 in 1:05-cv-02385-RMU, 104 in 1:05-cv-01555-JR, 26 in 1:08-cv-01227-ESH, 135 in 1:05-cv-00270-JR, 48 in 1:05-cv-01623-RWR, 83 in 1:05-cv-02371-RCL, 68 in 1:06-cv-01684-GK, 87 in 1:05-cv-02379-JR, 86 in 1:05-cv-00526-RMU, 186 in 1:05-cv-01509-RMU, 64 in 1:05-cv-00998-RMU, 80 in 1:05-cv-00748-RMC, 87 in 1:06-cv-01690-RBW, 39 in 1:08-cv-00987-JDB, 47 in 1:08-cv-01310-RMU, 80 in 1:05-cv-02199-HHK, 109 in 1:05-cv-00492-JR, 66 in 1:05-cv-01457-GK, 97 in 1:05-cv-01506-RMC, 148 in 1:05-cv-01048-RMU, 82 in 1:05-cv-01347-GK, 62 in 1:05-cv-01639-RBW, 102 in 1:05-cv-01602-RMU, 86 in 1:05-cv-00392-ESH, 48 in 1:05-cv-02477-RMU, 151 in 1:05-cv-00520-RMU, 57 in 1:06-cv-01758-RMC, 143 in 1:05-cv-01429-RMU, 723 in 1:08-mc-00442-TFH, 70 in 1:05-cv-02088-RWR, 91 in 1:05-cv-02380-CKK, 41 in 1:08-cv-01153-HHK, 64 in 1:05-cv-01458-ESH-AK, 83 in 1:05-cv-01497-RCL, 68 in 1:05-cv-00883-RBW, 22 in 1:08-cv-01221-CKK, 78 in 1:05-cv-00994-JDB, 96 in 1:05-cv-02185-JR, 86 in 1:05-cv-02186-ESH, 37 in 1:06-cv-01759-JDB, 37 in 1:08-cv-01185-HHK, 177 in 1:05-cv-00280-GK) MOTION to Dismiss "Improper" Respondents filed by PETITIONERS. (Kadidal, Shayana) Modified on 10/31/2008 (jf,). (Entered: 10/30/2008)
10/31/2008	100	NOTICE of Proposed Order regarding Respondents' Motion to Dismiss Improper Respondents by GUANTANAMO BAY DETAINEE LITIGATION re (886 in 1:08-mc-00442-TFH) Memorandum in Opposition,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,, (Kadidal, Shayana) (Entered: 10/31/2008)

		<p>GUL, HAMOUD ABDULLAH HAMOUD HASSAN AL WADY, SALEM AHMED HADI, MAHMMOUD OMAR MOHAMMED BIN ATEF, KAHLID SAAD MOHAMMED, MAHBUB RAHMAN, MOHAMMAD RAHMAN, SAMI AL HAJJ, MONSOOR MUHAMMED ALI QATTAA, SHAKHRUKH HAMIDUVA, ADINA HAMIDOVA, FNU HAFIZULLAH, MUIEEN ADEEN JAMAL ADEEN ABD AL F. ABD AL SATTAR, SHAWKI AWAD BALZUHAIR, YAKUBI, AHMED YASLAM SAID KUMAN, SHARIFULLAH, SUBHANULLAH, SAMI AL HAJJ, ABDULAH ALHAMIRI, ABDUL GHAFFAR, ADEL NOORI, ZAYN AL ABIDIN MUHAMMAD HUSAYN, MOHAMMED ABDULMALIK, SALIM JUMA KHAMISI, HASSAN ABDUL SAID, SAMI AL HAJJ, KHAIRULLA KHAIRKHWI, SAMI AL HAJJ, MULLAH NORULLAH NOORI, SAMI AL HAJJ, MUHAMMAD AHMAD ABDALLAH AL ANSI, SAMI AL HAJJ, ABDUL RAHMAN UMIR AL QYATI, SAAD MASIR MUKBL AL AZANI, AMMAR AL-BALUCHI, MOHAMMED NAZIR BIN LEP, ABU RAWDA, ABDUL RAZAK ALI, MOHAMMED ABDULLAH TAHA MATTAN, SHARGOWI LNU, ABDURAHMAN LNU, AHMED OMAR, EDRESS LNU, MOHAMMED AHMED SLAM AL-KHATEEB, MANSOUR K. A. KAMEL, ABDULAZIZ SAYER OWAIN AL SHAMMARI, SAYER O. Z. AL SHAMMARI, ABDULLAH SALEH ALI AL AJMI, MESFER SALEH ALI AL AJMI, MOHAMMED FUNAITEL AL DIHANI, MUBARA F. S. M. AL DAIHANI, FAYIZ MOHAMMED AHMED AL KANDARI, MOHAMMAD A. J. M. H. AL KANDARI, FWAD MAHMOUD AL RABIAH, MONZER M. H. A. AL RABIEAH, ADIL ZAMIL ABDULL MOHSSIN AL ZAMIL, WALID Z. A. AL ZAMEL, FAWZI KHALID ABDULLAH FAHAD AL ODAH, KHALED A.F. AL ODAH, NASSER NIJER NASER AL MUTAIRI, ABDULLAH KAMAL ABDULLAH KAMAL AL KANDARI, SAAD MADAI SAAD HAWASH AL-AZMI, HAMAD MADAI SAAD, OMAR RAJAB AMIN, MOHAMMAD R.M.R. AMEEN, NAYEF N. N. B. J. AL MUTAIRI, KHALID ABDULLAH MISHAL AL MUTAIRI, MESHAL A. M. TH AL MUTAIRI (Ryan, Peter) (Entered: 05/22/2009)</p>
05/26/2009		<p>MINUTE ORDER granting in part Petitioners' Consent Motion to Extend Briefing Deadlines (Dkt. No. 1772, 08-mc-0442). Petitioners may file one consolidated opposition to the government's Motion for Reconsideration by Friday, May 29, 2009. The government may file a reply brief by Friday, June 5, 2009. The hearing date is reset from June 8, 2009 to June 9, 2009, at 4:00 p.m. Signed by Judge Thomas F. Hogan on 5/26/09. (lctfh1) (Entered: 05/26/2009)</p>
05/27/2009		<p>MINUTE ORDER. For the reasons stated during the May 20, 2009 conference call, the Court issues a stay in the above-captioned case and orders that the case shall be administratively closed pending further Order of the Court. The Court vacates the June 16, 2009 status conference and denies as moot <u>203</u> the government's Motion for Reconsideration of Orders Regarding Discovery from the Guantanamo Review Task Force, <u>204</u> the government's Motion for Order re Consolidated Order Regarding Task Force Discovery, and <u>206</u> the government's Motion for Extension of Time to File an Updated Certification in Response to the Court's April 30, 2009 Order. Signed by Judge Ellen S. Huvelle on 05/27/2009. (lcesh1) (Entered: 05/27/2009)</p>
05/28/2009		<p>MINUTE ORDER terminating <u>86</u> Motion to Dismiss; terminating <u>138</u> Motion for Order; terminating <u>177</u> Motion to Amend/Correct. Signed by Judge Ellen S. Huvelle on 05/28/2009. (lcesh1) (Entered: 05/28/2009)</p>
05/29/2009	<u>211</u>	<p>MOTION to Strike , and in Opposition to, Respondents' Motion for Reconsideration of Orders Regarding Discovery from the Guantanamo Review Task Force by OMAR KHADR, FATMAH ELSAMNAH, FALEN GHEREBI, BISHER NASER ALI ALMARWALH, HUISSSEN NASER ALI ALMARWALH, MASAAB OMAR AL-MADHWANI, ALI OMAR MADHWANI, ABDULKHALIQ AL-BAIDHANI, KHALID AL-BAIDHANI, ALI AHMED MOHAMMED AL RAZEHI, ABDULLAH AHMED MOHAMMED AL RAZEHI, SUHAIL ABDO ANAM, SAEED AHMED AL-SARIM, SAMIR AHMED AL-SARIM, IMAD ABDULLAH HASSAN, AMRO ABDULLAH HASSAN, JALAL SALIM BIN AMER, FAEZ BIN AMER, ALI YAHYA MAHDI, MOHAMED YAHYA MAHDI, ATAG ALI ABDOH, MOHAMED ABDO ANAM, KHALID AHMED KASSIM, FADHLE AHMED KASSIM, FAHMI ABDULLAH AHMED, KMAL ABDULLAH AHMED, ABDUALAZIZ ABDOH AL SWIDI, ADNAN ABDOH ALSWIDI, AL</p>

		AWAD BALZUHAIR, YAKUBI, AHMED YASLAM SAID KUMAN, SHARIFULLAH, SUBHANULLAH, SAMI AL HAJJ, ABDULAH ALHAMIRI, ABDUL GHAFAR, ADEL NOORI, ZAYN AL ABIDIN MUHAMMAD HUSAYN, MOHAMMED ABDULMALIK, SALIM JUMA KHAMISI, HASSAN ABDUL SAID, SAMI AL HAJJ, ISMAIL MOHAMED, ALI MOHAMED, KHAIRULLA KHAIRKHWA, SAMI AL HAJJ, MULLAH NORULLAH NOORI, SAMI AL HAJJ, MUHAMMAD AHMAD ABDALLAH AL ANSI, SAMI AL HAJJ, ABDUL RAHMAN UMIR AL QYATI, SAAD MASIR MUKBL AL AZANI, AMMAR AL-BALUCHI, MOHAMMED NAZIR BIN LEP, NADIR OMAR ABDULLAH BIN SA'ADO ALS'AARY (Attachments: # <u>1</u> Memorandum in Support, # <u>2</u> Text of Proposed Order)(Breckinridge, Alexander) (Entered: 05/29/2009)
06/01/2009	<u>212</u>	MEMORANDUM OPINION. Signed by Judge Thomas F. Hogan on 6/1/09. (lctfh1) (Entered: 06/01/2009)
06/01/2009	<u>213</u>	ORDER denying without prejudice government's Motion to Confirm Designation of Unclassified Factual Returns as "Protected." Signed by Judge Thomas F. Hogan on 6/1/09. (lctfh1) (Entered: 06/01/2009)
06/05/2009	<u>214</u>	REPLY to opposition to motion re (105 in 1:08-cv-01238-RWR) MOTION for Reconsideration, (106 in 1:08-cv-01238-RWR) MOTION for Order <i>Regarding Discovery From The Guantanamo Review Task Force</i> filed by BRICE GYURISKO, NELSON J. CANNON, BARACK OBAMA, MICHAEL BUMGARNER, HARRY B. HARRIS, JR, WADE F. DAVIS, DAVID M. THOMAS, JR, BRUCE VARGO, ROBERT GATES. (Henry, Terry) (Entered: 06/05/2009)
06/10/2009	<u>215</u>	ORDER denying without prejudice government's Motion for Reconsideration of Orders Regarding Discovery from the Guantanamo Review Task Force. Signed by Judge Thomas F. Hogan on 6/10/09. (lctfh1) (Entered: 06/10/2009)
06/11/2009	<u>216</u>	MOTION by DJAMEL AMEZIANE (Dixon, J.) Modified to change docket entry on 6/12/2009 (jf,). (Entered: 06/11/2009)
06/15/2009	<u>217</u>	NOTICE of Filing under Seal by GEORGE W. BUSH, BARACK OBAMA, ROBERT M. GATES (Berman, Julia) (Entered: 06/15/2009)
06/17/2009	<u>218</u>	SEALED ORDER (This document is SEALED and only available to authorized persons.)(zkk) (Entered: 06/19/2009)
06/19/2009	<u>219</u>	NOTICE of Filing by DJAMEL AMEZIANE, GUANTANAMO BAY DETAINEE LITIGATION re (217 in 1:05-cv-00392-UNA) Notice (Other), (216 in 1:05-cv-00392-UNA) MOTION (Dixon, J.) (Entered: 06/19/2009)
06/23/2009	<u>220</u>	NOTICE of Filing Under Seal by GEORGE W. BUSH, DONALD RUMSFELD, JAY HOOD, BRICE GYURISKO (Barish, Daniel) (Entered: 06/23/2009)
06/24/2009	<u>221</u>	NOTICE of Filing Under Seal by GEORGE W. BUSH, DONALD RUMSFELD, JAY HOOD, BRICE GYURISKO (Barish, Daniel) (Entered: 06/24/2009)
06/24/2009	<u>222</u>	SEALED DOCUMENT re <u>221</u> NOTICE of Filing Under Seal filed by GEORGE W. BUSH, DONALD RUMSFELD, JAY HOOD, BRICE GYURISKO.(This document is SEALED and only available to authorized persons.)(zjf) . (Entered: 06/25/2009)
06/25/2009		MINUTE ORDER. A motion hearing is set for June 30, 2009 at 2:15 PM in Courtroom 14 before Judge Ellen S. Huvelle. The proceeding will be closed to the public. Signed by Judge Ellen S. Huvelle on 06/25/2009. (lcesh1) (Entered: 06/25/2009)
06/30/2009	<u>223</u>	SEALED ORDER (This document is SEALED and only available to authorized persons.)(jeb,) (Entered: 06/30/2009)
07/01/2009		Minute Entry for proceedings held before Judge Ellen S. Huvelle: SEALED Motion hearing held on 7/1/2009. (Court Reporter Lisa Griffith) (gdf) (Entered: 07/01/2009)
07/07/2009	<u>224</u>	NOTICE OF APPEAL by GEORGE W. BUSH, DONALD RUMSFELD, JAY HOOD, BRICE GYURISKO. Fee Status: No Fee Paid. Parties have been notified. (Holyoak, Dalin) (Entered: 07/07/2009)

07/07/2009	<u>225</u>	NOTICE of filing under seal by GEORGE W. BUSH, DONALD RUMSFELD, JAY HOOD, BRICE GYURISKO (Holyoak, Dalin) (Entered: 07/07/2009)
07/07/2009		MINUTE ORDER. A hearing on respondents' July 7, 2009 sealed motion is set for July 7, 2009 at 2:30 PM in Courtroom 14 before Judge Ellen S. Huvelle. Signed by Judge Ellen S. Huvelle on 07/07/2009. (lcsh1) (Entered: 07/07/2009)
07/07/2009	<u>226</u>	SEALED DOCUMENT re <u>225</u> filed by GEORGE W. BUSH, DONALD RUMSFELD, JAY HOOD, BRICE GYURISKO.(This document is SEALED and only available to authorized persons.)(zjf,) (Entered: 07/08/2009)
07/07/2009	<u>230</u>	ORDER of USCA as to <u>224</u> Notice of Appeal filed by BRICE GYURISKO, JAY HOOD, DONALD RUMSFELD, GEORGE W. BUSH; That the District Court's Order filed under sealed on 6/30/09 be stayed pending further order of the court. The appellee hand deliver and hand-file a response to the motion for stay by 12:00 noon, Friday July 10, 2009 and appellants hand-deliver and hand-file any reply by 4:00 p.m. on Monday July 13, 2009. USCA Case Number 09-5236. (hsj,) (Entered: 07/09/2009)
07/07/2009		Minute Entry for proceedings held before Judge Ellen S. Huvelle: Sealed Status Conference held on 7/7/2009. (Court Reporter Bryan Wayne) (gdf) (Entered: 07/17/2009)
07/08/2009		Transmission of Notice of Appeal and Docket Sheet to US Court of Appeals re <u>224</u> Notice of Appeal (zjf,) (Entered: 07/08/2009)
07/08/2009	<u>227</u>	SEALED MEMORANDUM OPINION AND ORDER (This document is SEALED and only available to authorized persons)(zgdf) (Entered: 07/08/2009)
07/08/2009	<u>228</u>	SEALED DOCUMENT filed by DJAMEL AMEZIANE.(This document is SEALED and only available to authorized persons.)(zjf,) (Entered: 07/08/2009)
07/08/2009	<u>229</u>	NOTICE of Filing Under Seal by DJAMEL AMEZIANE re <u>228</u> Sealed Document (Kebriaei, Pardiss) (Entered: 07/08/2009)
07/09/2009		USCA Case Number 09-5236 for <u>224</u> Notice of Appeal filed by BRICE GYURISKO, JAY HOOD, DONALD RUMSFELD, GEORGE W. BUSH. (jf,) (Entered: 07/09/2009)
07/10/2009	<u>231</u>	MEMORANDUM OPINION. Signed by Judge Thomas F. Hogan on 7/10/09. (lctfh1) (Entered: 07/10/2009)
07/10/2009	<u>232</u>	ORDER granting in part and denying in part government's Motion to Amend the September 11, 2008 Protective Order and Counsel Access Procedures and the January 9, 2009 Amended TS/SCI Protective Order and Counsel Access Procedures. Signed by Judge Thomas F. Hogan on 7/10/09. (lctfh1) (Entered: 07/10/2009)
07/10/2009	<u>233</u>	NOTICE Of Filing Of Protected Information by BARACK OBAMA (Warden, Andrew) (Entered: 07/10/2009)
07/10/2009	<u>234</u>	SEALED MOTION filed by GEORGE W. BUSH, DONALD RUMSFELD, JAY HOOD, BRICE GYURISKO, DONALD RUMSFELD, MIKE BUMGARNER, JAY HOOD, BARACK OBAMA. (This document is SEALED and only available to authorized persons.)(ztr) (Entered: 07/13/2009)
07/16/2009	<u>235</u>	ORDER of USCA as to <u>224</u> Notice of Appeal filed by BRICE GYURISKO, JAY HOOD, DONALD RUMSFELD, GEORGE W. BUSH;The motion be granted and the District Court's Order filed under seal on 6/30/09 be stayed pending further order of the Court. USCA Case Number 09-5236. (hsj,) (Entered: 07/17/2009)
07/20/2009	<u>236</u>	SEALED ORDER (This document is SEALED and only available to authorized persons.)(zlin,) (Entered: 07/20/2009)
07/29/2009	<u>237</u>	NOTICE of filing of declassified public return for Petitioner Djamel Ameziane (ISN 310) by GEORGE W. BUSH, DONALD RUMSFELD, JAY HOOD, BRICE GYURISKO (Attachments: # <u>1</u> Appendix Narrative, # <u>2</u> Appendix Exhibits, # <u>3</u> Appendix Exhibits, # <u>4</u> Appendix Exhibits)(Holyoak, Dalin) (Entered: 07/29/2009)

07/31/2009	<u>238</u>	NOTICE of Filing by DJAMEL AMEZIANE, FARHI SAEED BIN MOHAMMED, MOTAI SAIB, NABIL, AHMED BEN BACHA, ABDUL AZIZ NAJI, GUANTANAMO BAY DETAINEE LITIGATION re (1829 in 1:08-mc-00442-TFH) Sealed Order (Dixon, J.) (Entered: 07/31/2009)
08/03/2009	<u>239</u>	NOTICE OF WITHDRAWAL OF APPEARANCE as to DONALD RUMSFELD, BARACK OBAMA, JAY HOOD, NELSON J. CANNON, GEORGE WALKER BUSH, DONALD H. RUMSFELD, GEORGE W. BUSH, JR, DONALD RUMSFELD, JAY HOOD, NELSON J. CANNON, GEORGE W. BUSH, JR, DONALD H. RUMSFELD, JAY HOOD, DONALD RUMSFELD, JAY HOOD, NELSON J. CANNON, DONALD RUMSFELD, JAY HOOD, NELSON J. CANNON, J. HOOD, NELSON J. CANNON, GEORGE W. BUSH, JAY HOOD, BRICE A. GYURISKO, JAY HOOD, BRICE GYURISKO, NELSON J. CANNON, NELSON J. CANNON, BRICE GYURISKO, BRICE GYURISKO, BRICE GYURISKO, MIKE BUMGARNER, BARACK OBAMA, JAY HOOD, MIKE BUMGARNER, JAY HOOD, BRICE GYURISKO, GEORGE W. BUSH, MIKE BUMGARNER, JAY HOOD, MIKE BUMGARNER, MICHAEL I. BUMGARNER, MIKE BUMGARNER, BARACK H. OBAMA, DONALD RUMSFELD, BRICE GYURISKO, BRICE GYURISKO, JAY HOOD, MIKE BUMGARNER, BARACK H. OBAMA, MICHAEL I. BUMGARNER, BARACK OBAMA, JAY HOOD, MIKE BUMGARNER, JAY HOOD, MIKE BUMGARNER, JAY HOOD, MIKE BUMGARNER, MIKE BUMGARNER, JAY HOOD, MIKE BUMGARNER, JAY HOOD, MIKE BUMGARNER, JAY HOOD, GEORGE W. BUSH, DONALD RUMSFELD, JAY HOOD, MIKE BUMGARNER, MICHAEL BUMGARNER, MICHAEL BUMGARNER, GEORGE W. BUSH, JAY HOOD, MICHAEL BUMGARNER, MIKE BUMGARNER, JAY HOOD, MIKE BUMGARNER, MIKE BUMGARNER, BARACK OBAMA, HARRY B. HARRIS, JR, WADE F. DAVIS, HARRY B. HARRIS, JR, WADE F. DAVIS, ROBERT M. GATES, DAVID M. THOMAS, JR, BRUCE VARGO, GEORGE WALKER BUSH, ROBERT M. GATES, DAVID M. THOMAS, JR, BRUCE VARGO, UNITED STATES OF AMERICA, GEORGE W. BUSH, DONALD H. RUMSFELD, RICHARD B. MYERS, RICK BACCUS, TERRY CARRICO. Attorney Paul Edward Ahern terminated. (Ahern, Paul) (Entered: 08/03/2009)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE:

GUANTANAMO BAY
DETAINEE LITIGATION

Misc. No. 08-0442 (TFH)

Civil Action Nos.

02-cv-0828, 04-cv-1136, 04-cv-1164, 04-cv-1194, 04-cv-1254,
04-cv-1937, 04-cv-2022, 04-cv-2035, 04-cv-2046, 04-cv-2215,
05-cv-0023, 05-cv-0247, 05-cv-0270, 05-cv-0280, 05-cv-0329,
05-cv-0359, 05-cv-0392, 05-cv-0492, 05-cv-0520, 05-cv-0526,
05-cv-0569, 05-cv-0634, 05-cv-0748, 05-cv-0763, 05-cv-0764,
05-cv-0877, 05-cv-0883, 05-cv-0889, 05-cv-0892, 05-cv-0993,
05-cv-0994, 05-cv-0998, 05-cv-0999, 05-cv-1048, 05-cv-1189,
05-cv-1220, 05-cv-1244, 05-cv-1347, 05-cv-1353, 05-cv-1429,
05-cv-1457, 05-cv-1458, 05-cv-1487, 05-cv-1490, 05-cv-1497,
05-cv-1504, 05-cv-1505, 05-cv-1506, 05-cv-1509, 05-cv-1555,
05-cv-1592, 05-cv-1601, 05-cv-1602, 05-cv-1607, 05-cv-1623,
05-cv-1638, 05-cv-1639, 05-cv-1645, 05-cv-1646, 05-cv-1678,
05-cv-1704, 05-cv-1971, 05-cv-1983, 05-cv-2010, 05-cv-2088,
05-cv-2104, 05-cv-2185, 05-cv-2186, 05-cv-2199, 05-cv-2249,
05-cv-2349, 05-cv-2367, 05-cv-2370, 05-cv-2371, 05-cv-2378,
05-cv-2379, 05-cv-2380, 05-cv-2381, 05-cv-2384, 05-cv-2385,
05-cv-2386, 05-cv-2387, 05-cv-2398, 05-cv-2444, 05-cv-2479,
06-cv-0618, 06-cv-1668, 06-cv-1684, 06-cv-1758, 06-cv-1759,
06-cv-1761, 06-cv-1765, 06-cv-1766, 06-cv-1767, 07-cv-1710,
07-cv-2337, 07-cv-2338, 08-cv-0987, 08-cv-1101, 08-cv-1104,
08-cv-1153, 08-cv-1185, 08-cv-1221, 08-cv-1223, 08-cv-1224,
08-cv-1227, 08-cv-1228, 08-cv-1229, 08-cv-1230, 08-cv-1231,
08-cv-1232, 08-cv-1233, 08-cv-1235, 08-cv-1236, 08-cv-1237,
08-cv-1238, 08-cv-1310, 08-cv-1440

PROTECTIVE ORDER
AND

PROCEDURES FOR COUNSEL ACCESS TO DETAINEES AT THE UNITED STATES
NAVAL BASE IN GUANTANAMO BAY, CUBA

Upon consideration of the parties' positions espoused at the status conference held on July 8, 2008, the parties' submissions, and the record in these coordinated matters, the Court finds that the above-captioned cases involve national security information or documents, the storage, handling, and control of which require special security precautions and access to which requires a security clearance and a "need to know." These cases might also involve

other protected information or documents, the storage, handling, and control of which might require special precautions in order to protect the security of the United States and other significant interests. Accordingly, to protect the national security, and for good cause shown, the Court

ORDERS that, in place of the Amended Protective Order and Procedures for Counsel Access to Detainees at the United States Naval Base in Guantanamo Bay, Cuba, first issued on November 8, 2004, 344 F. Supp. 2d 174 (D.D.C. 2004), as supplemented by the Order Addressing Designation Procedures for Protected Information, first issued on November 10, 2004, and the Order Supplementing and Amending Filing Procedures Contained in the November 8, 2004, Amended Protective Order, first issued on December 13, 2004, the following Protective Order and Procedures for Counsel Access to Detainees at the United States Naval Base in Guantanamo Bay, Cuba, apply in these coordinated matters:

I. PROTECTIVE ORDER

A. Overview and Applicability

1. This Protective Order establishes procedures that must be followed by petitioners and their respective counsel, all other counsel involved in these matters, interpreters/translators for the parties, personnel or support staff employed or engaged to assist in these matters, and all other individuals who, in connection with these matters, receive access to classified national security information or documents or other protected information, including the privilege team as defined in the Procedures for Counsel Access to Detainees at the United States Naval Base in Guantanamo Bay, Cuba ("Procedures for Counsel Access"), *see infra* Section II.B.6.
2. The procedures set forth in this Protective Order apply to all aspects of these matters and may be modified by further order of the Court upon its own motion or upon application by any party. The Court retains continuing jurisdiction to enforce or modify the terms of this Protective Order.
3. Nothing in this Protective Order precludes the government's use of classified information as otherwise authorized by law outside of these matters.

4. As appropriate and needed, petitioners' counsel is responsible for advising their employees, petitioners, and others of this Protective Order's contents.
5. Petitioners' counsel are bound by the terms and conditions set forth in the Procedures For Counsel Access, *see infra* Section II. To the extent such terms and conditions place limitations on petitioners' counsel in their access to and interaction with petitioners or handling of information, this Protective Order specifically incorporates by reference all terms and conditions established in the procedures contained in the Procedures for Counsel Access. Any violation of those terms and conditions will also be deemed a violation of this Protective Order.
6. The privilege team shall not disclose to any person any information provided by petitioners' counsel or petitioners, other than information provided in a filing with the Court, unless such information, if it were monitored information, could be disclosed under the Procedures for Counsel Access. Any such disclosure shall be consistent with the provisions of the Procedures for Counsel Access.

B. Definitions

7. As used in this Protective Order, the words "documents" and "information" include, but are not limited to, all written or printed matter of any kind, formal or informal, including originals, conforming copies and non-conforming copies, whether different from the original by reason of notation made on such copies or otherwise, and further include, but are not limited to:
 - a. papers, correspondence, memoranda, notes, letters, reports, summaries, photographs, maps, charts, graphs, interoffice and intra-office communications, notations of any sort concerning conversations, meetings, or other communications, bulletins, teletypes, telegrams, facsimiles, invoices, worksheets, and drafts, alterations, modifications, changes, and amendments of any kind to the foregoing;
 - b. graphic or oral records or representations of any kind, including, but not limited to, photographs, charts, graphs, microfiche, microfilm, videotapes, sound recordings of any kind, and motion pictures;
 - c. electronic, mechanical or electric records of any kind, including, but not limited to, tapes, cassettes, disks, recordings, electronic mail, films, typewriter ribbons, word processing or other computer tapes or disks, and all manner of electronic data processing storage; and
 - d. information acquired orally.
8. The terms "classified national security information and/or documents," "classified information" and "classified documents" mean:

- a. any classified document or information that was classified by any Executive Branch agency in the interests of national security or pursuant to Executive Order, including Executive Order 12958, as amended, or its predecessor Orders, as "CONFIDENTIAL," "SECRET," or "TOP SECRET," or additionally controlled as "SENSITIVE COMPARTMENTED INFORMATION (SCI)," or any classified information contained in such document;
 - b. any document or information, regardless of its physical form or characteristics, now or formerly in the possession of a private party that was derived from United States government information that was classified, regardless of whether such document or information has subsequently been classified by the government pursuant to Executive Order, including Executive Order 12958, as amended, or its predecessor Orders, as "CONFIDENTIAL," "SECRET," or "TOP SECRET," or additionally controlled as "SENSITIVE COMPARTMENTED INFORMATION (SCI)";
 - c. verbal or non-documentary classified information known to petitioners or petitioners' counsel; or
 - d. any document and information as to which petitioners or petitioners' counsel were notified orally or in writing that such document or information contains classified information.
9. All classified documents, and information contained therein, shall remain classified unless the documents bear a clear indication that they were declassified by the agency or department that is the original classification authority of the document or the information contained therein (hereinafter, "original classification authority").
10. The terms "protected information and/or documents," "protected information," and "protected documents" mean any document or information the Court deems, either *sua sponte* or upon designation pursuant to paragraph 34 of this Protective Order, not suitable for public filing.
11. As used in this Protective Order, the term "petitioners' counsel" includes attorneys employed or retained by or on behalf of a petitioner for purposes of representing the petitioner in habeas corpus or other litigation in federal court 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. Access to classified information by all persons mentioned in the foregoing sentence is governed by Section I.D of this Protective Order, and access to protected information by all persons mentioned in the foregoing sentence is governed by Section I.E of this Protective Order.

12. "Access to classified information" or "access to protected information" means having access to, reviewing, reading, learning, or otherwise coming to know in any manner any classified information or protected information.
13. "Secure area" means a physical facility accredited or approved for the storage, handling, and control of classified information.
14. "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.

C. Designation of Court Security Officer

15. The Court designates Christine E. Gunning as Court Security Officer for these cases, and Jennifer H. Campbell, Miguel A. Ferrer, Daniel O. Hartenstine, Erin H. Hogarty, Nathaniel A. Johnson, Joan B. Kennedy, Michael P. Macisso, Maura P. Peterson, and Barbara J. Russell as Alternate Court Security Officers (collectively, "CSO") for the purpose of providing security arrangements necessary to protect against unauthorized disclosure of any classified documents or information to be made available in connection with these cases. Petitioners' counsel shall seek guidance from the CSO with regard to appropriate storage, handling, transmittal, and use of classified documents or information.

D. Access to Classified Information and Documents

16. Without authorization from the government, no petitioner or petitioner's counsel shall have access to any classified information involved in these cases unless that person has done the following:
 - a. received the necessary security clearance as determined by the Department of Justice Security Officer; and
 - b. signed the Memorandum of Understanding ("MOU"), attached hereto as Exhibit A, agreeing to comply with the terms of this Protective Order.
17. Petitioners' counsel to be provided access to classified information shall execute the MOU appended to this Protective Order, and shall file executed originals of the MOU with the Court and submit copies to the CSO and government counsel. Such execution, filing, and submission of the MOU is a condition precedent to a petitioner's counsel having access to, or continued access to, classified information for the purposes of these proceedings.
18. The substitution, departure, or removal of any petitioners' counsel from these cases for any reason shall not release that person from the provisions of this Protective Order or the MOU executed in connection with this Protective

Order.

19. The government shall arrange for one appropriately approved secure area for petitioners' counsel's use. The secure area shall contain a working area supplied with secure office equipment reasonably necessary for preparing petitioners' cases. The government shall bear expenses for the secure area and its equipment.
20. The CSO shall establish procedures to ensure that the secure area is accessible to petitioners' counsel during normal business hours and at other times on reasonable request as approved by the CSO. The CSO shall establish procedures to ensure the secure area is maintained and operated in the most efficient manner consistent with the protection of classified information. The CSO or CSO designee may place reasonable and necessary restrictions on the schedule of use of the secure area in order to accommodate appropriate access to all petitioners' counsel in these and other proceedings.
21. All classified information the government provides to petitioners' counsel, and all classified information petitioners' counsel otherwise possesses or maintains, shall be stored, maintained, and used only in the secure area.
22. No documents containing classified information may be removed from the secure area unless authorized by the CSO or CSO designee supervising the area.
23. Consistent with other provisions of this Protective Order, petitioners' counsel shall have access to the classified information made available to them in the secure area and shall be allowed to take notes and prepare documents with respect to those materials.
24. Petitioners' counsel shall not copy or reproduce any classified information in any form, except with the CSO's approval or in accordance with the procedures established by the CSO for the operation of the secure area.
25. All documents prepared by petitioners or petitioners' counsel that contain or may contain classified information—including, without limitation, notes taken or memoranda prepared by counsel and pleadings or other documents intended for filing with the Court—shall be transcribed, recorded, typed, duplicated, copied, or otherwise prepared only by persons possessing an appropriate approval for access to classified information. Such activities shall take place in the secure area on approved word processing equipment and in accordance with the procedures approved by the CSO. All such documents and any associated materials containing classified information—such as notes, memoranda, drafts, copies, typewriter ribbons, magnetic recordings, and exhibits—shall be maintained in the secure area unless and until the CSO advises that those documents or associated materials are unclassified in their entirety. None of these materials shall be disclosed to government counsel unless authorized by

the Court, by petitioners' counsel, or as otherwise provided in this Protective Order.

26. Petitioners' counsel may discuss classified information within the secure area or another area authorized by the CSO only. Petitioners' counsel shall not discuss classified information over any standard commercial telephone instrument or office intercommunication system and shall not transmit or discuss classified information in electronic mail communications of any kind.
27. The CSO or CSO designee shall not reveal to any person the content of any conversations he or she hears by or among petitioners' counsel, nor reveal the nature of documents being reviewed by them or the work generated by them, except as necessary to report violations of this Protective Order to the Court or to carry out their duties pursuant to this Protective Order. Additionally, the presence of the CSO or CSO designee shall not be construed to waive, limit, or otherwise render inapplicable the attorney-client privilege or work product protections.
28. Petitioners' counsel shall not disclose the contents of any classified documents or information to any person, including counsel in related cases brought by Guantanamo Bay detainees in this or other courts, except those persons authorized by this Protective Order, the Court, and counsel for the government with the appropriate clearances and the need to know that information. Except as otherwise specifically provided by Judge Colleen Kollar-Kotelly in her well-reasoned opinion addressing counsel access procedures regarding petitioners Mohammed Ahmed al Kandari, Fawzi Khalid Abdullah Fahad al Odah, and Khalid Abdullah Mishal al Mutairi in *Al Odah v. United States*, 02-cv-0828, docket # 117, counsel for petitioners in these cases are presumed to have a "need to know" information both in their own cases and in related cases pending before this Court. Therefore, and except as provided with respect to the three petitioners in *Al Odah* mentioned above, counsel for all petitioners in these cases who satisfy all necessary prerequisites and follow all procedures set forth herein may share and discuss among themselves classified information to the extent necessary for the effective representation of their clients. Government counsel may challenge the "need to know" presumption on a case-by-case basis for good cause shown.
29. Petitioners' counsel shall not disclose to a petitioner-detainee classified information not provided by that petitioner-detainee. Should a petitioner's counsel desire to disclose classified information not provided by a petitioner-detainee to that petitioner-detainee, that petitioner's counsel will provide in writing to the privilege review team, *see infra* Section II.G, a request for release clearly stating the classified information they seek to release. The privilege review team will forward a petitioner's counsel's release request to the appropriate government agency authorized to declassify the classified information for a determination. The privilege review team will inform

petitioner's counsel of the determination once it is made.

30. Except as otherwise provided herein, no petitioners or petitioners' counsel shall disclose or cause to be disclosed any information known or believed to be classified in connection with any hearing or proceeding in these cases.
31. Except as otherwise stated in this paragraph, and to ensure the security of the United States of America, at no time, including any period subsequent to the conclusion of these proceedings, shall petitioners' counsel make any public or private statements disclosing any classified information or documents accessed pursuant to this Protective Order, including the fact that any such information or documents are classified. In the event that classified information enters the public domain, however, counsel is not precluded from making private or public statements about the information already in the public domain, but only to the extent that the information is in fact in the public domain. Counsel may not make any public or private statements revealing personal knowledge from non-public sources regarding the classified or protected status of the information or disclosing that counsel had personal access to classified or protected information confirming, contradicting, or otherwise relating to the information already in the public domain. In an abundance of caution and to help ensure clarity on this matter, the Court emphasizes that counsel shall not be the source of any classified or protected information entering the public domain. As stated in more detail in paragraph 51 of this Protective Order, failure to comply with these rules may result in the revocation of counsel's security clearance as well as civil and criminal liability.
32. The foregoing does not prohibit a petitioner's counsel from citing or repeating information in the public domain that petitioner's counsel does not know to be classified information or a classified document or derived from classified information or a classified document.
33. All documents containing classified information prepared, possessed or maintained by, or provided to, petitioners' counsel—except filings submitted to the Court and served on government counsel—shall remain at all times in the CSO's control for the duration of these cases. Upon final resolution of these cases, including all appeals, the CSO shall destroy all such documents.

E. Designation Procedures for and Access to Protected Information and Documents

34. Should government counsel in these consolidated cases wish to have the Court deem any document or information "protected," government counsel shall disclose the information to qualified counsel for petitioners—i.e., counsel who have satisfied the necessary prerequisites of this Protective Order for the viewing of protected information—and attempt to reach an agreement about the designation of the information prior to filing a motion with the Court. Petitioners' counsel shall treat such disclosed information as protected unless

and until the Court rules that the information should not be designated as protected.

35. Without authorization from the government or the Court, protected information shall not be disclosed or distributed to any person or entity other than the following:
 - a. petitioners' counsel, provided such individuals signed the Acknowledgment, attached hereto as Exhibit B, attesting to the fact that they read this Protective Order and agree to be bound by its terms; and
 - b. the Court and its support personnel.
36. The execution of the Acknowledgment is a condition precedent to a petitioner's counsel having access to, or continued access to, protected information for the purposes of these proceedings. A copy of each executed Acknowledgment shall be kept by counsel making the disclosure until thirty days after the termination of this action, including appeals.
37. The substitution, departure, or removal of petitioners' counsel from these cases for any reason shall not release that person from the provisions of this Protective Order or the Acknowledgment executed in connection with this Protective Order.
38. Petitioners' counsel shall not disclose the contents of any protected documents or information to any person, including counsel in related cases brought by Guantanamo Bay detainees in this or other courts, except as authorized by this Protective Order, the Court, or government counsel. Except as otherwise specifically provided by Judge Colleen Kollar-Kotelly with respect to counsel for petitioners Mohammed Ahmed al Kandari, Fawzi Khalid Abdullah Fahad al Odah, and Khalid Abdullah Mishal al Mutairi in *Al Odah v. United States*, 02-cv-0828, petitioners' counsel in these coordinated cases may share protected information with each other but only to the extent that counsel have appropriate security clearances and comply with all other procedures set forth in this Protective Order. Petitioners' counsel shall maintain all protected information and documents received through this proceeding in a confidential manner.
39. Petitioners' counsel shall not disclose protected information not provided by a petitioner-detainee to that petitioner-detainee without prior concurrence of government counsel or express permission of the Court.
40. Except as otherwise provided herein, no petitioner or petitioner's counsel shall disclose or cause to be disclosed any information known or believed to be protected in connection with any hearing or proceeding in these cases.
41. At no time, including any period subsequent to the conclusion of these

proceedings, will petitioners' counsel make any public or private statements disclosing any protected information or documents accessed pursuant to this Protective Order, including the fact that any such information or documents are protected.

42. Protected information shall be used only for purposes directly related to these cases and not for any other litigation or proceeding, except by leave of the Court. Photocopies of documents containing such information shall be made only to the extent necessary to facilitate the permitted use hereunder.
43. Nothing in this Protective Order shall prevent the government from using for any purpose protected information it provides a party. Nothing in this Protective Order shall entitle another party to protected information.
44. Supplying protected information to another party does not waive privilege with respect to any person or use outside that permitted by this Protective Order.
45. Within sixty days of the resolution of these actions, and the termination of any appeals therefrom, all protected documents or information, and any copies thereof, shall be promptly destroyed, provided that the party to whom protected information is disclosed certifies in writing that all designated documents and materials have been destroyed, and further provided that government counsel may retain one complete set of any such materials that were presented in any form to the Court. Any such retained materials shall be placed in an envelope or envelopes marked "Protected Information Subject to Protective Order." In any subsequent or collateral proceeding, a party may seek discovery of such materials from the government, without prejudice to the government's right to oppose such discovery or its ability to dispose of the materials pursuant to its general document retention policies.

F. Procedures for Filing Documents

46. Unclassified Filing by Petitioners. Pending further order of the Court, any pleading or other document filed by petitioners that petitioners' counsel does not believe contains classified information and has no reason to believe contains classified information is authorized for direct filing in the CM/ECF system consistent with the regular electronic filing practices of this Court. *See* LCvR 5.4. Presumptively classified information that petitioners' counsel learned from a petitioner, *see infra* Section II.D.12.f and Section II.I.29, but has not been determined to be unclassified, shall not be filed in the CM/ECF system. Presumptively classified information shall be filed pursuant to the procedures specified in paragraph 47 of this Protective Order.
47. Classified Filings by Petitioners. Any pleading or other document filed by petitioners that petitioners' counsel know, have reason to believe, or are uncertain whether it contains classified information, shall be filed, along with

three copies, under seal with the CSO by 4:00 p.m. Such document must be marked with the appropriate classification marking (e.g., "SECRET"). The time of physical submission to the CSO shall be considered the date and time of filing. At the time of making a submission to the CSO, petitioners' counsel shall file on the public record in the CM/ECF system a "Notice of Filing," notifying the Court that the submission was made to the CSO and specifying in general terms the nature of the filing without disclosing any potentially classified information.

- a. Upon receipt, the CSO will deliver to the Court and government counsel any pleading or other document petitioners filed that may contain classified information. The CSO will forward the document to the appropriate government agencies and departments for their determination as to whether the pleading or other document contains classified information. To facilitate this review, petitioners' counsel shall identify each paragraph of a document that counsel believe may contain classified information by marking each paragraph with an appropriate classification marking or otherwise specifically identifying such paragraphs. If, following review by the appropriate government agencies and departments, it is determined that the pleading or other document contains classified information, the CSO must ensure that the document is marked with the appropriate classification marking and that the document remains under seal. The CSO will work with the appropriate government agencies or departments to prepare a redacted version of the pleading or other document appropriate for filing on the public record. Counsel shall then file the redacted version of the document in the CM/ECF system with a notation in the upper right hand corner of the first page stating "REDACTED VERSION FOR PUBLIC FILING CLEARED BY CSO." The docket entry description in the CM/ECF system for the document suitable for public viewing shall make specific reference to the earlier docket entry notifying the Court that the document was submitted to the CSO for review.
- b. In the event an entire document is deemed classified, petitioners' counsel shall file notice in the CM/ECF system listing the caption of the case, a version of the title of the document that does not disclose classified or protected information, and a brief statement that the CSO informed counsel that the entire document is classified. The docket entry description in the CM/ECF system for the document suitable for public viewing shall make specific reference to the earlier docket entry notifying the Court that the document was submitted to the CSO for review.
- c. If it is determined that the pleading or other document does not contain classified information, counsel shall file the full submission in the CM/ECF system and make specific reference to the earlier docket entry

notifying the Court that the document was submitted to the CSO for review. The docket entry description shall also state that the CSO approved public filing of the document. The underlying document filed in the CM/ECF system shall contain a notation in the upper right hand corner of the first page stating "PREVIOUSLY FILED WITH CSO AND CLEARED FOR PUBLIC FILING."

48. Classified Filings by Respondents.

- a. Any pleading or other document filed by respondents' counsel containing classified information shall be filed, along with three copies, under seal with the Court through the CSO by 4:00 p.m. The time of physical submission to the CSO shall be considered the date and time of filing. The CSO shall serve a copy of any classified pleading or document on petitioners' counsel at the secure facility. At the time of making a submission to the CSO, respondents shall file on the public record in the CM/ECF system a "Notice of Filing," notifying the Court that a submission was made to the CSO and specifying in general terms the nature of the filing without disclosing any potentially classified information. As soon as practicable following the original filing date, respondents' counsel shall file in the CM/ECF system a version of the pleading or document appropriate for filing on the public record, consistent with the procedures outlined in paragraphs 47.a-c of this Protective Order.
- b. Nothing herein requires the government to disclose classified information. Additionally, nothing herein prohibits the government from submitting classified information to the Court *in camera* or *ex parte* in these proceedings or entitles petitioners or petitioners' counsel access to such submissions or information. Except for good cause shown in the filing, the government shall provide petitioners' counsel or petitioners with notice served on petitioners' counsel on the date of the filing.

49. Protected Information Filing by Petitioners and Respondents.

- a. The presence, or potential presence, of protected information in any pleading or document that is governed by paragraph 47 or paragraph 48 of this Protective Order shall not affect the method of filing such pleading or document; it shall be governed by paragraph 47 or 48, as applicable. Any pleading or other document that does not contain classified information but that petitioners' counsel or respondents have reason to believe contains or petitioners' counsel is uncertain whether it contains protected information shall be filed under seal pursuant to Local Civil Rule 5.1(j). At the time of the submission of a filing containing protected but not classified information, the party shall file on the public

record in the CM/ECF system a "Notice of Filing," notifying the Court that a protected information submission was made and specifying in general terms the nature of the filing without disclosing any potentially protected information. As soon as practicable following the original filing date, counsel for the party submitting the protected information shall file in the CM/ECF system a version of the pleading or document appropriate for filing on the public record, consistent with the procedures outlined in paragraphs 47.a-c of this Protective Order.

- b. This Protective Order shall constitute authorization for petitioners and respondents to file protected information under seal. That is, no motion to seal is required at the time of submission of the pleading or document to the Clerk's Office. Procedures for designation of protected information shall be governed by paragraph 34 of this Protective Order.
- c. Nothing herein requires the government to disclose protected information. Additionally, nothing herein prohibits the government from submitting protected information to the Court *in camera* or *ex parte* in these proceedings or entitles petitioners or petitioners' counsel access to such submissions or information. Except for good cause shown in the filing, the government shall provide counsel for the petitioner or petitioners with notice served on counsel on the date of the filing.

50. Disclosure of Protected or Classified Information on the Public Record. In the event respondents believe that a party has disclosed classified or protected information on the public docket, respondents shall notify the CSO, who shall work with the Clerk's Office to remove the filing from the public docket. A copy of the filing shall then be lodged with the CSO and treated according to paragraphs 47.b or 47.c of this Protective Order. Nothing herein limits the government's authority to take necessary remedial action to ensure the protection of the classified or protected information.

G. Penalties for Unauthorized Disclosure

51. Any unauthorized disclosure of classified information may constitute violations of United States criminal laws. Additionally, any violation of the terms of this Protective Order shall be immediately brought to the attention of the Court and may result in a charge of contempt of Court and possible referral for criminal prosecution. *See, e.g.,* Executive Order 12958, as amended. Any breach of this Protective Order may also result in the termination of access to classified information and protected information. Persons subject to this Protective Order are advised that direct or indirect unauthorized disclosure, retention, or negligent handling of classified documents or information could cause damage to the national security of the United States or may be used to the advantage of an adversary of the United States or against the interests of the United States.

Persons subject to this Protective Order are also advised that direct or indirect unauthorized disclosure, retention, or negligent handling of protected documents or information could risk the security of United States government personnel and facilities and other significant government interests. This Protective Order is to ensure that those authorized to receive classified information and protected information will not divulge this information to anyone who is not authorized to receive it without prior written authorization from the original classification authority and in conformity with this Protective Order.

52. The termination of these proceedings shall not relieve any person or party provided classified information or protected information of his, her, or its obligations under this Protective Order.

II. PROCEDURES FOR COUNSEL ACCESS TO DETAINEES AT THE U.S. NAVAL BASE IN GUANTANAMO BAY, CUBA

A. Applicability

1. Except as otherwise stated in these Procedures for Counsel Access to Detainees at the U.S. Naval Base in Guantanamo Bay, Cuba ("Procedures"), or by other Order issued in the United States District Court for the District of Columbia, the following procedures shall govern counsel access to all detainees in the control of the Department of Defense ("DoD") at the U.S. Naval Base in Guantanamo Bay, Cuba ("GTMO"), for purposes of litigating these cases.
2. These Procedures do not apply to counsel who are retained solely to assist in a detainee's defense in a trial by military commission. Access by that counsel is covered by the Procedures for Monitoring Communications Between Detainees Subject to Trial by Military Commission and their Defense Counsel Pursuant to Military Commission Order No. 3.

B. Definitions

3. "Communications" means all forms of communication between counsel and a detainee, including oral, written, electronic, or by any other means.
4. As used in these Procedures, "counsel" means attorneys employed or retained by or on behalf of a detainee for purposes of representing the detainee in the United States District Court for the District of Columbia and admitted, either generally or pro hac vice, in this Court. Unless otherwise stated, "counsel" also includes co-counsel, interpreters/translators, paralegals, investigators, and all other personnel or support staff employed or engaged to assist in the litigation.
5. "Detainee" means an individual detained by DoD as an alleged enemy combatant at GTMO.
6. "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. If required, the privilege team may include interpreters/translators, provided that such personnel meet these same criteria.
7. "Legal mail" means letters written between a detainee's counsel and the detainee that are related to the counsel's representation of the detainee, as well as privileged documents and publicly filed legal documents relating to that representation. The Court is the final arbiter of whether documents fall within the definition of legal mail.

C. Requirements for Access to and Communications with Detainees

8. Security Clearance.

- a. Counsel must hold a valid, current United States security clearance at the Secret level or higher or its equivalent, as determined by appropriate DoD intelligence personnel.
- b. Counsel who possess a valid security clearance shall provide, in writing, the date of their background investigation, the date such clearance was granted, the level of the clearance, and the agency that granted the clearance. Access will be granted only after DoD verification of the security clearance.
- c. Counsel who do not currently possess a Secret clearance are required to submit an application for clearance to the Department of Justice, Litigation Security Division.

9. Acknowledgment of and Compliance with Access Procedures.

- a. Before being granted access to a detainee, counsel will receive a copy of these Procedures. To have access to a detainee, counsel must agree to comply fully with these Procedures and must sign an affirmation acknowledging an agreement to comply with them.
- b. This affirmation will not be considered an acknowledgment by counsel that these Procedures are legally permissible. Even if counsel elect to challenge these Procedures, counsel may not knowingly disobey an obligation imposed by these Procedures.
- c. DoD expects that counsel, counsel's staffs, and anyone acting on counsel's behalf will fully abide by the requirements of these Procedures. Counsel are required to provide DoD with signed affirmations from interpreters/translators, paralegals, investigators and all other personnel or support staff employed or engaged to assist in the litigation, upon utilization of those individuals by counsel in a manner that implicates these Procedures.
- d. Should counsel fail to comply with these Procedures, access to or communication with detainees will not be permitted.

10. Verification of Representation.

- a. Prior to being permitted access to a detainee, counsel must provide DoD with a Notification of Representation. This Notification must include counsel's licensing information, business and email addresses, and phone

number, as well as the name of the detainee counsel represents. Additionally, counsel shall provide evidence of their authority to represent the detainee.

- b. Counsel shall provide evidence of their authority to represent the detainee as soon as practicable and, in any event, not later than ten days after the conclusion of a second visit with a detainee. The Court recognizes that counsel may not be in a position to present such evidence after the initial meeting with a detainee. Counsel for detainees and counsel for respondents shall cooperate to the fullest extent possible to reach a reasonable agreement on the number of counsel visits allowed. Should a detainee's counsel believe the government is unreasonably limiting the number of visits with the detainee, counsel may petition the Court at the appropriate time for relief.
- c. If counsel withdraw from representation of a detainee, or if the representation is otherwise terminated, counsel shall inform DoD immediately of that change in circumstances.
- d. Counsel must provide DoD with a signed representation stating (a) that, to the best of counsel's knowledge after reasonable inquiry, the source of funds to pay counsel any fees or reimbursement of expenses are not funded directly or indirectly by persons or entities counsel believes are connected to terrorism or the product of terrorist activities, including "Specially Designated Global Terrorists," identified pursuant to Exec. Order No. 13,224, 66 Fed. Reg. 49,079 (Sept. 23, 2001) or Exec. Order No. 12,947, 60 Fed. Reg. 5079 (Jan. 23, 1995), and (b) counsel has complied with ABA Model Rule 1.8(f).

11. Logistics of Counsel Visits.

- a. Counsel shall submit to the Department of Justice ("DoJ") any request to meet with a detainee. Requests shall specify dates of availability for a meeting, the desired duration of the meeting, and the language that will be utilized during the meeting with the detainee. Reasonable efforts will be made to accommodate counsel's requests regarding the scheduling of a meeting. Once a request is approved, DoJ will contact counsel with the date and duration of the meeting.
- b. Legal visits shall take place in a room designated by JTF-Guantanamo. No more than two attorneys (or one attorney and one assistant) plus one interpreter/translator shall visit with a detainee at one time, unless approved in advance by the Commander, JTF-Guantanamo. Such approval shall not be unreasonably withheld.
- c. Due to the mission and location of GTMO, certain logistical details,

including arrangements for travel and lodging, will need to be coordinated by counsel prior to arrival. DoJ will provide specific information regarding these issues.

- d. In order to travel to GTMO, counsel must have a country and theater clearance for that specific visit. In order to begin processing country and theater clearances, counsel must have confirmed flight information for travel to GTMO and a valid, current United States security clearance at the Secret level or higher or its equivalent, as determined by appropriate DoD intelligence personnel. Country and theater clearances require twenty days to process. Accordingly, counsel shall provide DoD, through DoJ, with the required information no later than 20 days prior to the GTMO visit date, or as soon as a visit is scheduled. Requests for visits made inside of 20 days will not normally be granted.

D. Procedures for Correspondence Between Counsel and Detainees

12. Mail Sent by Counsel to Detainees ("Incoming Mail").

- a. Counsel shall send incoming legal mail for detainees to the privilege team at the appropriate address provided by government counsel. Each envelope or mailer shall be labeled with the name of the detainee and shall include a return address for counsel sending the materials. The outside of the envelope or mailer for incoming legal mail shall be labeled clearly with the following annotation: "Attorney-Detainee Materials-For Mail Delivery to Detainee."
- b. Each page of legal mail shall be labeled "Attorney-Detainee Materials." No staples, paper clips or any non-paper items shall be included with the documents.
- c. Upon receiving legal mail from counsel for delivery to the detainee, the privilege team shall open the envelope or mailer to search the contents for prohibited physical contraband. Within two business days of receipt of legal mail, and assuming no physical contraband is present, the privilege team shall forward the mail to military personnel at GTMO in a sealed envelope marked "Legal Mail Approved by Privilege Team" and clearly indicating the identity of the detainee to whom the legal mail is to be delivered. The privilege team shall return to the sender any incoming mail that does not comply with the terms of paragraphs 12.a and 12.b of these Procedures.
- d. Within two business days of receipt of legal mail from the privilege team, personnel at GTMO shall deliver the envelope or mailer marked by the privilege team as "Legal Mail Approved by the Privilege Team" to the detainee without opening the envelope or mailer. If counsel desire

confirmation that documents were delivered to the detainee, counsel shall provide a stamped, self-addressed envelope for that purpose. The detainee shall be responsible for mailing any confirmation of delivery to counsel as outgoing legal mail. This method shall be the sole and exclusive means by which confirmation of delivery is provided to counsel.

- e. Written correspondence to detainees not falling within the definition of legal mail shall be sent through the United States Postal Service to the appropriate address provided by government counsel. Non-legal mail includes, but is not limited to, letters from persons other than counsel, including family and friends of the detainee. These non-privileged communications will be reviewed by military personnel at GTMO under the standard operating procedures for detainee nonlegal mail.
 - f. Counsel shall treat all information learned from a detainee, including any oral and written communications with a detainee, as classified information, unless and until the information is submitted to the privilege team and the privilege team, this Court, or another court determines it to be otherwise. Accordingly, if counsel's correspondence contains any summary or recitation of or reference to a communication with a detainee that has not been previously determined to be unclassified, the correspondence shall be prepared, marked, transported and handled as classified material as required by Executive Order 12958, DOD Regulation 5200.1-R and AI 26, OSD Information and Security Supplement to DOD Regulation 5200.1R.
 - g. Written and oral communications with a detainee, including all incoming legal mail, shall not include information relating to any ongoing or completed military, intelligence, security, or law enforcement operations, investigations, or arrests, or the results of such activities, by any nation or agency or current political events in any country that are not directly related to counsel's representation of that detainee; or security procedures at GTMO, including names of U.S. Government personnel and the layout of camp facilities, or the status of other detainees, not directly related to counsel's representation.
13. Mail Sent by Detainees to Counsel ("Outgoing Mail").
- a. Detainees will be provided with paper to prepare communications to counsel. In the presence of military personnel, the detainee will seal the written communication in an envelope and it will be annotated as "Attorney-Detainee Materials-For Mail Delivery To Counsel." Each envelope shall be labeled with the detainee's and counsel's names. Envelopes annotated with the names of persons other the detainee's counsel, including family, friends, or other attorneys, shall be processed

according to the standard operating procedures for detainee non-legal mail.

- b. Military personnel will collect the outgoing legal mail within one business day of being notified by a detainee that the communication is prepared for sealing and mailing.
- c. After outgoing legal mail is collected from a detainee, the envelope will be sealed into a larger envelope by military personnel at Guantanamo. The larger envelope will be marked as "Attorney-Detainee Materials-For Mail Delivery To Counsel" and will be annotated with the detainee's and counsel's names. The envelope will be sealed and mailed in the manner required for classified materials. Within two business days of receipt from the detainee, the communication will be mailed to the appropriate address as provided by government counsel.
- d. Detainees also are permitted to send non-legal mail, including written communications to persons other than counsel, through the United States Postal Service. These communications shall be reviewed by military personnel at GTMO under the standard operating procedures for detainee non-legal mail.
- e. In the event any non-legal correspondence or messages from a detainee to individuals other than his counsel, including family, friends, or other attorneys, are sent to counsel as, or included with, legal mail, counsel shall return the documents to military personnel at GTMO for processing according to the standard operating procedures for detainee non-legal mail.

E. Materials Brought into Meetings with Detainees and Counsel

14. Counsel shall bring only legal mail, writing utensils and paper into any meeting with a detainee, unless counsel receives prior approval from the Commander, JTF-Guantanamo. The Commander shall not unreasonably withhold approval for counsel to bring into a meeting with a detainee letters, tapes, or other communications introducing counsel to the detainee, if the government has first reviewed the communication and determined that sharing the communication with the detainee would not threaten the security of the United States.
15. Written and oral communications with a detainee, including all documents brought into a meeting with a detainee, shall not include information relating to any ongoing or completed military, intelligence, security, or law enforcement operations, investigations, or arrests, or the results of such activities, by any nation or agency or current political events in any country that are not directly related to counsel's representation of that detainee; or security procedures at GTMO, including names of U.S. Government personnel and the layout of camp

facilities, or the status of other detainees, not directly related to counsel's representation.

F. Materials Brought out of Meetings with Detainees and Counsel

16. Upon completion of each meeting with a detainee or during any break in a meeting session, counsel will give the notes or documents used or produced during the meeting to a designated individual at Guantanamo. These materials shall be sealed in counsel's presence and handled as classified material as required by Executive Order 12958, DOD Regulation 5200.1-R and AI 26, OSD Information Security Supplement to DOD Regulation 5200.1R.
17. Upon completion of counsel's visit to Guantanamo, the notes or documents used or produced during the visits shall be sealed in counsel's presence and placed in an envelope labeled as "Attorney-Detainee Meeting Documents-For Delivery to Counsel." The envelope shall be sealed into a larger envelope by military personnel at Guantanamo. The larger envelope shall be marked as "Attorney-Detainee Meeting Documents-For Mail Delivery To Counsel" and annotated with the detainee's and counsel's names. The envelope shall be sealed and mailed in the manner required for classified materials. Within two business days following completion of counsel's visit to Guantanamo, the package shall be mailed to the appropriate address provided by government counsel.
18. Correspondence or messages from a detainee to individuals other than his counsel, including family, friends, or other attorneys, will not be handled through this process. If a detainee provides these communications to counsel during a visit, counsel shall give those communications to military personnel at Guantanamo so they can be processed under the standard operating procedures for detainee non-legal mail.

G. Classification Determination of Detainee Communications

19. Counsel may submit information learned from a detainee to the privilege team for a determination of its appropriate security classification. Counsel shall memorialize the information submitted for classification review into a written memorandum outlining as specifically as possible the information for which counsel requests a classification determination. All documents submitted for classification review shall be prepared, handled, and treated in the manner required for classified materials as required by Executive Order 12958, DOD Regulation 5200.1-R and AI 26, OSD Information Security Supplement to DOD Regulation 5200.1R. No information derived from these submissions shall be disclosed outside the privilege team pursuant to these Procedures until after the privilege team has reviewed it for security and intelligence purposes. Absent express consent of the Court, or except as otherwise provided in these Procedures, the submissions shall not be disclosed to any person involved in the interrogation of a detainee, and no such individual may make any use of those

communications, nor shall the submissions be disclosed to any government personnel involved in any domestic or foreign court, military commission, or combatant status tribunal proceedings involving the detainee.

20. Counsel shall send all materials submitted for classification review to the appropriate address as provided by government counsel. The outside of the envelope or mailer shall be clearly labeled "Attorney-Detainee Meeting Documents-For Classification Review By Privilege Team." Each envelope or mailer shall be annotated with the detainee's and counsel's names. Each page of the document submitted for classification review shall be marked "Attorney-Detainee Materials" and "Classified." The envelope or mailer shall be sealed and mailed in the manner required for classified materials.
21. As soon as possible after conducting the classification review, the privilege team shall advise counsel of the classification levels of the information contained in the materials submitted for review. The privilege team shall forward its classification determination directly to counsel after a review and analysis period not to exceed, from the time of receipt by the privilege team:
 - a. seven business days for information written in English;
 - b. fourteen business days for any information that includes writing in any language other than English, to allow for translations by the privilege team; and
 - c. twenty business days for any information where the privilege team has reason to believe that a code was used, to allow for further analysis.
22. While conducting classification review, the privilege team shall promptly report to the Commander, JTF-Guantanamo any information that reasonably could be expected to result in immediate and substantial harm to the national security. In his discretion, the Commander, JTF-Guantanamo may disseminate the relevant portions of the information to law enforcement, military, and intelligence officials, as appropriate.
23. If, at any time, the privilege team determines that information in the documents submitted for classification review relates to imminent acts of violence, the privilege team shall report the contents of those documents to the Commander, JTF-Guantanamo. In his discretion, the Commander, JTF-Guantanamo may disseminate the relevant portions of the information to law enforcement, military, and intelligence officials, as appropriate.
24. The privilege team shall not disclose outside the privilege team any information counsel submit for classification review, except as provided by these Procedures or as permitted by counsel submitting the information.

H. Telephonic Access to Detainees

25. Requests for telephonic access to a detainee by counsel or other persons will not normally be approved. Such requests may be considered on a case-by-case basis due to special circumstances and must be submitted to Commander, JTF-Guantanamo.
26. Any telephonic access by counsel is subject to appropriate security procedures. Such procedures shall not include contemporaneous monitoring or recording.
27. Any telephonic access by persons other than counsel is subject to appropriate security procedures, including contemporaneous monitoring and recording.

I. Counsel's Handling and Dissemination of Information from Detainees

28. Subject to the terms of the Protective Order, *see supra* Section I, and any other applicable protective order, counsel may disseminate the unclassified contents of a detainee's communications for purposes reasonably related to their representation of that detainee.
29. Counsel shall treat all information learned from a detainee, including any oral and written communications with a detainee, as classified information, unless and until the information is submitted to the privilege team and determined to be otherwise. All classified material must be handled, transported and stored in a secure manner, as provided by Executive Order 12958, DOD Regulation 5200.1-R and AI 26, OSD Information Security Supplement to DOD Regulation 5200.1R.
30. Counsel shall disclose to DoJ or Commander, JTF-Guantanamo any information learned from a detainee involving future events that threaten national security or involve imminent violence.
31. Counsel may not divulge classified information not learned from the detainee to the detainee. Counsel may not otherwise divulge classified information related to a detainee's case to anyone except those with the requisite security clearance and need to know using a secure means of communication. Counsel for detainees in these coordinated cases are presumed to have a "need to know" information in related cases pending before this Court. Counsel for respondents in these cases may challenge this presumption on a case-by-case basis for good cause shown.

J. JTF-Guantanamo Security Procedures

32. Counsel shall comply with the following security procedures and force protection safeguards applicable to the U.S. Naval Base in Guantanamo Bay, Cuba, JTF-Guantanamo and the personnel assigned to or visiting these

locations, as well as any supplemental procedures implemented by JTF-Guantanamo personnel.

33. Contraband is not permitted in JTF-Guantanamo, and all visitors are subject to search upon arrival and departure. Examples of contraband include, but are not limited to, weapons, chemicals, drugs, and materials that may be used in an escape attempt. Contraband also includes, but is not limited to, money, stamps, cigarettes, and writing instruments. No items of any kind may be provided to a detainee without the advance approval of the Commander, JTF-Guantanamo.
34. Photography or recording of any type is prohibited without the prior approval of the Commander, JTF-Guantanamo. No electronic communication devices are permitted. All recording devices, cameras, pagers, cellular phones, PDAs, laptops, portable electronic devices and related equipment are prohibited in or near JTF-Guantanamo. Should any of these devices be inadvertently taken into a prohibited area, the device must be surrendered to JTF-Guantanamo staff and purged of all information.
35. Upon arrival at JTF-Guantanamo, security personnel will perform a contraband inspection of counsel using metal detectors, as well as a physical inspection of counsel's bags and briefcases and, if determined necessary, a physical inspection of counsel's persons.
36. Counsel shall not interview or question members of the Joint Task Force about their duties or interactions with detainees without first obtaining permission from the Commander, JTF-Guantanamo. Should permission be unreasonably denied, counsel may seek an Order from this Court granting permission for good cause shown.
37. Counsel will meet with detainees in conference facilities provided by GTMO. These facilities are subject to visual monitoring by closed circuit TV for safety and security reasons. The only other method of visual observation available is for the door to remain open with military police sitting outside the door. No oral communications between counsel and the detainees will be heard.
38. At the conclusion of meetings with detainees, counsel will again be inspected using a metal detector and, if deemed necessary, by physical inspection of their persons.

SO ORDERED.

September 11, 2008

/s/

Thomas F. Hogan
United States District Judge

Exhibit A

EXHIBIT A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE:

GUANTANAMO BAY
DETAINEE LITIGATION

Misc. No. 08-0442 (TFH)

Civil Action No.

MEMORANDUM OF UNDERSTANDING REGARDING ACCESS TO
CLASSIFIED NATIONAL SECURITY INFORMATION

Having familiarized myself with the applicable statutes, regulations, and orders related to, but not limited to, unauthorized disclosure of classified information, espionage and related offenses; The Intelligence Identities Protection Act, 50 U.S.C. § 421; 18 U.S.C. § 641; 50 U.S.C. § 783; 28 C.F.R. § 17 et seq.; and Executive Order 12958; I understand that I may be the recipient of information and documents that belong to the United States and concern the present and future security of the United States, and that such documents and information together with the methods and sources of collecting it are classified by the United States government. In consideration for the disclosure of classified information and documents:

- (1) I agree that I shall never divulge, publish, or reveal either by word, conduct or any other means, such classified documents and information unless specifically authorized in writing to do so by an authorized representative of the United States government, or as expressly authorized by the Protective Order entered in the United States District Court for the District of Columbia in the above-captioned cases.
- (2) I agree that this Memorandum of Understanding and any other non-disclosure agreement signed by me will remain forever binding on me.
- (3) I have received, read, and understand the Protective Order entered by the United States District Court for the District of Columbia in the above-captioned cases, and I agree to comply with the provisions thereof.

Dated: _____

Exhibit B

EXHIBIT B

ACKNOWLEDGMENT

The undersigned hereby acknowledges that he/she has read the Protective Order first entered on September 11, 2008, in the United States District Court for the District of Columbia in the consolidated cases captioned In re Guantanamo Bay Detainee Litigation, No. 08-mc-0442, understands its terms, and agrees to be bound by each of those terms. Specifically, and without limitation, the undersigned agrees not to use or disclose any protected information or documents made available to him/her other than as provided by the Protective Order. The undersigned acknowledges that his/her duties under the Protective Order shall survive the termination of this case and are permanently binding, and that failure to comply with the terms of the Protective Order may result in the imposition of sanctions by the Court.

DATED: _____ BY: _____
(type or print name)

SIGNED: _____

FILED

OCT 29 2008

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIACLERK, U.S. DISTRICT COURT
DISTRICT OF COLUMBIA

IN RE:

GUANTANAMO BAY DETAINEE
LITIGATION

SEALED

Misc. No. 08-mc-0442 (TFH)

Civil Action No. 05-cv-392 (ESH)

ORDER

Pending before the Court are (1) Petitioner Djamel Ameziane's (ISN 310) Emergency Motion For Temporary Restraining Order And Preliminary Injunction Barring Djamel Ameziane's Forcible Transfer To Algeria and (2) the government's Cross-Motion To Confirm Designation Of Notice Of Transfer And Related Documents And Information As "Protected." Upon review of the motions and the record herein, the Court

ORDERS that Petitioner's Motion is **GRANTED** in part and **DENIED** in part.

Specifically, finding it necessary to protect its jurisdiction over Petitioner's petition for a writ of habeas corpus, pursuant to its remedial authority under the All Writs Act, 28 U.S.C. § 1651, *see Belbacha v. Bush*, 520 F.3d 452 (D.C. Cir. 2008), the Court temporarily enjoins the government from transferring Petitioner from the United States Naval Base at Guantanamo Bay, Cuba, to Algeria pending the United States Court of Appeals for the District of Columbia Circuit's decision in *Kiyemba v. Bush*, No. 05-5487 (consolidated with Nos. 05-5488, 05-5489, 05-5490, and 05-5492). Additionally, Petitioner's Motion and all documents related thereto—including the attached exhibits, the government's opposition to Petitioner's Motion, the government's opposition to Petitioner's request to file the motion under seal, and the government's Cross-Motion—shall not be filed on the Court's public docket. The government,

however, is not prohibited from sharing information contained in such documents with representatives of Algeria. The Court further

ORDERS that the government's Cross-Motion is **GRANTED**. Specifically, finding that special precautions are necessary to protect the security of the United States and other significant interests, the following documents and information shall be treated as "protected" under the Protective Order entered in this matter on September 11, 2008, pending further order of the Court: (1) the government's Notice Pursuant To The Court's July 10, 2008 Order, filed under seal on October 9, 2008; (2) Petitioner's Motion; (3) the government's opposition to Petitioner's Motion; (4) the government's Cross-Motion; and (5) any other documents and information related to or derived from the government's Notice of October 9, 2008.

SO ORDERED.

October 28, 2008



Thomas F. Hogan
United States District Judge

Copies to:

Center for Constitutional Rights
J. Wells Dixon
Pardiss Kebriaei
666 Broadway, 7th Floor
New York, New York 10012
Tel: 212-614-6423

Joseph C. Folio III
Andrew I. Warden
United States Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Avenue, NW
Washington, DC 20530
Tel: 202-514-4107

United States District Court
For the District of Columbia

A TRUE COPY

NANCY MAYER WHITTINGTON, Clerk

By

Deputy Clerk

"PROTECTED INFORMATION" - FILED UNDER SEAL

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE:)	Misc. No. 08-442 (TFH)
GUANTANAMO BAY)	Civil No. 05-392 (ESH)
DETAINEE LITIGATION)	

**RESPONDENTS' MOTION TO STAY ALL PROCEEDINGS
FOR PETITIONER WHO IS APPROVED FOR TRANSFER OR RELEASE**

Respondents move the Court to stay all proceedings for Petitioner Djamel Ameziane (ISN 310, "Petitioner") in the above-captioned matter. The Department of Defense ("DoD") has approved Petitioner for transfer or release from United States custody at the Naval Base in Guantanamo Bay ("Guantanamo") and previously had made appropriate diplomatic arrangements to effect Petitioner's transfer from United States custody – the ultimate relief sought in this habeas case. The Court, however, has enjoined the transfer of Petitioner pending resolution of a matter currently before the Court of Appeals.¹ Therefore, because the detention of Petitioner is no longer at issue, and because Petitioner remains in United States custody pursuant to Court order, in the interest of judicial economy, Respondents ask that the Court stay this habeas proceeding in deference to the habeas proceedings of all other petitioners who are not slated for

¹ The Court enjoined the transfer of Petitioner pending the decision of the Court of Appeals in Kiyemba v. Bush, 05-5487 (consolidated with 05-5488, 05-5489, 05-5490, and 05-5491) (D.C. Cir.). See Order (under seal) of October 28, 2008 (TFH). The issue in Kiyemba is an order by the district court requiring Respondents to provide petitioners with 30-day notice of transfer.

"PROTECTED INFORMATION" - FILED UNDER SEAL

transfer or release.²

BACKGROUND

DoD previously approved Petitioner for transfer or release from United States custody at Guantanamo and made diplomatic arrangements to permit his transfer. These diplomatic arrangements were made consistent with the policies and procedures outlined in the declarations of Ambassador Clint Williamson (attached as Exhibit 1) and Deputy Assistant Secretary of Defense for Detainee Affairs Sandra Hodgkinson, which have been previously submitted to the Court in the context of litigation concerning advance notice of detainee transfers and otherwise. See Respondents' Status Report in Response to the Court's July 3, 2008 Order (Dkt. No. 57 in No. 08-MC-442). As explained there, after DoD approves a detainee for transfer or release, it then requests the assistance of the Department of State to make the appropriate diplomatic arrangements, typically with a detainee's country of citizenship. See Williamson Decl. ¶¶ 5-6.

The Department of State engages in a diplomatic dialogue to facilitate the transfer or release of individual detainees. The purpose of these discussions, inter alia, is to seek assurances that the Government considers necessary and appropriate with regard to the transferee country in question and to ensure that the transfer or release is consistent with United States policy, including its policy not to repatriate or transfer detainees to countries where it is more likely than not that the detainee will be tortured. Id. at ¶ 8. This is an elaborate, inter-agency process that involves senior level officials and includes consideration of the detainee's particular

² Respondents conferred with Petitioner's counsel via phone and email on December 12 and 15, 2008, pursuant to Local Rule 7(m). Petitioner's counsel oppose the motion on the ground that Respondents have determined Petitioner to be an enemy combatant.

"PROTECTED INFORMATION" - FILED UNDER SEAL

circumstances, an informed and well-rounded analysis of the current situation on the ground in the prospective transferee country, the input of various Department of State offices with relevant knowledge, personal interactions and negotiations with senior officials of the prospective transferee government, and consideration of assurances provided by the prospective transferee country, as well as their sufficiency and any mechanisms for verifying them. *Id.* at ¶ 7. Once the process is satisfactorily completed, the Government then relinquishes custody of these detainees.

Such arrangements were made in this case, and pursuant to the Court's July 10, 2008 order requiring advance notification, Respondents provided notice to Petitioner and his counsel, who then moved to enjoin the transfer. The Court then enjoined the transfer of Petitioner pending the decision of the Court of Appeals in Kiyemba. See Order (under seal) of October 28, 2008 (TFH).

Furthermore, merits proceedings have been scheduled by Judge Huvelle in this case, with certain production deadlines between now and March 2009, the tentative date for the start to the merits proceeding. See, e.g., Dkt. No. 125.

ARGUMENT

This Court has the discretion to stay proceedings in light of the particular circumstances of a case. See United States v. Stover, 576 F. Supp. 2d 134, *28 (D.D.C. 2008) (citation and quotation omitted) (habeas); Int'l Painters & Allied Trades Indus. Pension Fund v. Painting Co., 569 F. Supp. 2d 113, 120 (D.D.C. 2008) (citing Landis v. N. Am. Co., 299 U.S. 248, 254 (1936)). "[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for

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counsel, and for litigants.” Air Line Pilots Ass’n v. Miller, 523 U.S. 866, 879 n.6 (1998) (quoting Landis, 299 U.S. at 254-55). “A trial court may, with propriety, find it is efficient for its own docket and the fairest course for the parties to enter a stay of an action before it, pending resolution of independent proceedings which bear upon the case.” Painting Co., 569 F. Supp. 2d at 120 (quoting Leyva v. Certified Grocers of Cal., Ltd., 593 F.2d 857, 863-64 (9th Cir. 1979)). When circumstances may moot the case currently before the court, a stay is appropriate. See Painting Co., 569 F. Supp. 2d at 120-21.

Staying all proceedings for Petitioner will promote judicial economy and the appropriate use of the Court’s and parties’ resources in the unique circumstances of this litigation. The Guantanamo Bay Detainee Litigation includes approximately 200 pending habeas petitions. This Court has recognized the need to comply with the mandate of the Supreme Court in Boumediene that these matters be resolved expeditiously, and at the December 10, 2008 hearing regarding the Case Management Order, the Court encouraged the parties to seek ways to prioritize, group, or otherwise facilitate the efficient resolution of the Guantanamo cases.³ Prioritizing cases by staying Petitioner’s habeas proceedings will serve that purpose.

In the absence of a stay, Respondents, the Court, and opposing counsel will have to dedicate limited time and resources to a habeas proceeding concerning the detention of a petitioner whom Respondents no longer wish to detain. Because Respondents have determined to relinquish custody over Petitioner but have been prevented from doing so by the Court’s order,

³ See Case Management Order at 1 (citing Boumediene v. Bush, 128 S. Ct. 2229, 2275 (2008)).

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the only issue truly remaining is the country to which Petitioner should be sent – an issue that, in the Court's view, could be impacted or resolved by a decision in the Kiyemba case in the Court of Appeals. Accordingly, the need to conduct proceedings and otherwise pursue the merits of Petitioner's habeas case is less pressing than that of the remaining detainees not set for transfer or release. Indeed, DoD has already attempted to provide the very relief that is ultimately appropriate in habeas. See Munaf v. Geren, 128 S. Ct. 2207, 2221 (2008). On the other hand, Respondents continue to maintain custody over scores of other detainees who have habeas proceedings pending before the Court and who are not similarly situated in that they have neither been approved for transfer or release nor had arrangements previously made to effectuate such transfer. A stay of all proceedings concerning Petitioner will permit the Government, the Court, and counsel representing other detainees to focus exclusively on those other cases. This focus will expedite the detainee litigation on the whole,⁴ and will thus serve the broader purposes of judicial economy and fairness.

⁴ The primary remedy in habeas is release from the custody challenged. See Munaf v. Geren, 128 S. Ct. At 2221. Here, Respondents have already determined to release Petitioner. Thus, if the Court were to continue this habeas proceeding on the merits and if Petitioner prevailed, his remedy of release would not address the issue of to what country he could be released.

Petitioner has indicated his intent to pursue his habeas petition even after transfer. Respondents contest the merits of such a claim, see Qassim v. Bush, 466 F.3d 1073, 1078 (D.C. Cir. 2006) (noting that "the petitioner must demonstrate ... that his subsequent release has not rendered the petition moot"), but any uncertainty as to the ultimate merits of such a claim does not justify affording Petitioner the same priority as other detainees not approved for transfer or release. Indeed, having separately coordinated cases involving transferred detainees, the Court is already proceeding under such a framework of prioritization. See In re Guantanamo Bay Detainee Litigation, 08-MC-444 (D.D.C.).

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Finally, the consideration of the relative interests involved counsels in favor of a stay. As noted above, the Court should not force Respondents to litigate the merits of cases when they were prepared to relinquish custody over Petitioner. Any right to challenge the legality of one's detention through a habeas proceeding cannot reasonably extend so far as to require that the Government defend the merits of the detention after the Executive determines that the military rationales for enemy combatant detention no longer warrant such custody and steps are taken to arrange for the end of such custody. Comparatively, a stay of all proceedings will not unduly prejudice Petitioner, as the Government is already seeking his release. Furthermore, Respondents have filed a factual return for Petitioner. Therefore, should the status or circumstances of this case change such that further litigation is necessary or appropriate as compared to the other Guantanamo cases, the Court may lift the stay and promptly resume the proceedings. Certainly, at a minimum, the Court should not require that resources be expended litigating in the first instance a case in which Respondents seek to release the petitioner and that may become moot in the month ahead as the issue of the power of the Court to enjoin transfer is resolved, to the detriment or delay of litigation in other cases in which petitioners are not approved for transfer or release. As the Government explained in its motion seeking clarification and reconsideration of the November 6, 2008 Case Management Order, see Dkt. No. 1004 (08-MC-442), it is essential that the scores of Guantanamo cases be sequenced in a reasonable fashion if the litigation is to be feasible. Prioritizing cases by staying this habeas proceeding is one way of attempting to address that issue.

For the foregoing reasons, Respondents respectfully request that the Court stay all

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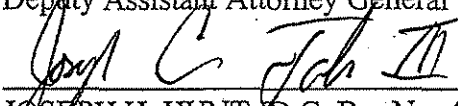
proceedings concerning this Petitioner whom Respondents have been enjoined from releasing from United States custody.

Dated: December 17, 2008

Respectfully submitted,

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Assistant Attorney General

JOHN C. O'QUINN
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Attorneys for the Respondent

CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of December, 2008, I caused copies of the foregoing (SEALED) Respondents' Motion to Stay All Proceedings for Petitioner to be served by electronic mail to counsel for Petitioner at the below listed e-mail addresses:

J. Wells Dixon wdixon@ccrjustice.org
Pardiss Kebriaei pkebriaei@ccrjustice.org



JOSEPH C. FOLIO III

DECLARATION OF DANIEL FRIED

I, Daniel Fried, pursuant to 28 U.S.C. § 1746, hereby declare and say as follows:

1. I have been the Special Envoy for the Closure of the Guantanamo Bay Detention Facility since accepting my appointment on May 15, 2009. In my capacity as Special Envoy, I engage in diplomatic dialogue with foreign governments concerning the repatriation and/or resettlement of individuals who are detained at the U.S. detention facility at Guantanamo Bay, Cuba. My position was established in order to intensify diplomatic efforts to arrange for the repatriation or resettlement of individuals approved for such disposition under the review procedures established by Executive Order 13,492, which was signed by President Obama on January 22, 2009. Prior to accepting these appointments, I was the Department of State's Assistant Secretary for European and Eurasian Affairs from May, 2005-May, 2009 and the Special Assistant to the President and NSC Senior Director for European and Eurasian Affairs from January, 2001-May-2005. I also served as Ambassador to Poland from 1997-2000 and prior to that in various posts at the State Department, at overseas posts, and at the NSC starting in 1977.

2. This declaration is submitted in support of the Government's motion to maintain the decisions resulting from reviews by the Guantanamo Review Task Force as "Protected Information" under the protective orders entered in the Guantanamo Bay habeas litigation. For ~~the reasons discussed below, indiscriminate public disclosure of the decisions resulting from~~ reviews by Guantanamo Review Task Force will impair the U.S. Government's ability effectively to repatriate and resettle Guantanamo detainees in accordance with the procedures established by Executive Order 13,492.

2

3. As Special Envoy, my primary task is to implement the mission set forth in Executive Order 13,492 of finding dispositions for individuals who are approved for repatriation or resettlement in a manner that is consistent with the national security and foreign policy interests of the United States, and that will allow the U.S. government to achieve the closure of the Guantanamo Bay Detention Facility as soon as practicable and in any event not later than January 22, 2010. In this task I am guided by the U.S. government's policies with respect to post-transfer security and post-transfer humane treatment, including the policy that the U.S. government will not transfer individuals to countries where it has determined that they are more likely than not to be tortured. In light of these policies, there are certain individuals who have been (or will be) approved for transfer out of U.S. custody but who the U.S. government determines cannot be safely and/or responsibly returned to their home countries.

4. While there have been some recent signs of progress in our efforts to identify appropriate resettlement options for approved Guantanamo detainees who cannot be repatriated, the task of identifying such options has up to this point been challenging. In order to find safe and responsible options for these individuals within the one year timeframe ordered by the President, the United States Government will need every tool of statecraft at its disposal, including the ability to develop and implement a comprehensive strategy under which potential destination countries are asked to focus on those detainees whom the U.S. government considers to be the best fit for those countries. Although I am aware that decisions by the Department of Defense Administrative Review Board (ARB) approving specific detainees for transfer or release were previously disclosed publicly, in my judgment the current circumstances and diplomatic climate render it necessary to maintain control over the dissemination of the decisions resulting

from review by the Guantanamo Review Task Force in order to enhance the U.S. Government's efforts to repatriate and transfer detainees as soon as practicable. Particularly given the pace at which the Executive Order review must proceed in order to meet the deadline set by the President, if large numbers of approved individuals (acting through, *inter alia*, counsel or non-government organizations) approach the same group of governments at the same time seeking resettlement, it could cause complications for and in some cases jeopardize our ability to implement a coherent diplomatic strategy.

5. More specifically, we have already seen a tendency of many of the detainees who are approved by the review process to express a preference for resettlement in certain European countries, even in cases where the U.S. government has determined that they can be returned to their home countries consistent with our humane treatment and security policies. Given that these European countries have in many cases expressed to the U.S. government that their capacity to absorb detainees is limited, it is important to the U.S. goal of closing Guantanamo to be able to focus diplomatic discussions with those countries on detainees for whom there is a compelling reason not to return them to their home countries. If petitioners' counsel or other organizations acting on behalf of dozens of detainees approach the same small group of governments at the same time, particularly if they relay information about formal U.S. government decisions resulting from review by the Guantanamo Review Task Force, it could ~~confuse, undermine, or jeopardize our diplomatic efforts with those countries and could put at~~ risk our ability to move as many people to safe and responsible locations as might otherwise be the case.

6. I am aware that counsel for many petitioners have conducted their own efforts to repatriate and resettle detainees by way of, *inter alia*, lobbying efforts and asylum applications to foreign governments. These efforts do not, however, involve petitioners' counsel conveying official U.S. Government information to a foreign country regarding the transfer status of a particular petitioner. It is the provision of this additional information—*i.e.*, the fact that a particular Guantanamo detainee has been approved for repatriation or resettlement as a result of review by the Guantanamo Review Task Force – by someone other than a representative of the U.S. Government that has the potential to create confusion and mixed messages. This is not to say that petitioner's counsel and non-government organizations have no role to play in the transfer process. In cases where the U.S. government considers it helpful, we may choose to reach out to petitioners' counsel, non-government organizations, and other interlocutors in order to seek to work collaboratively; indeed, we have done so on several occasions. In general, however, given the foreign policy and national security equities at stake in closing Guantanamo, it is important for the U.S. government to retain the prerogative to “speak with one voice” and to have the latitude to manage resettlement efforts without the problems potentially created by inconsistent signals from petitioners' counsel or other organizations.

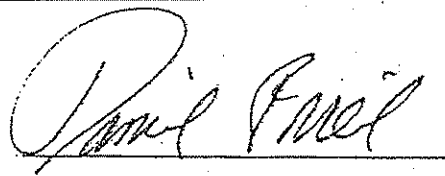
7. As Special Envoy, I also have responsibility for conducting repatriation and resettlement discussions in a manner that comports with the foreign policy interests of the United States. ~~Despite making a determination that we cannot repatriate a detainee to a particular~~
country because of post-transfer security or humane treatment considerations, the U.S. government may nevertheless have an important bilateral and strategic relationship with that country that it is in the foreign policy interests of the United States to maintain. The friction

caused by a decision to resettle detainees from the country of origin in a third country can be significant if not properly handled, and in particular if there is a failure to pursue resettlement efforts in a manner that is non-public and that minimizes embarrassment to the country of origin. The involvement of petitioners' counsel or other organizations in resettlement discussions may be considered on a case-by-case basis, but such involvement must be weighed carefully against the increased the risk of premature public disclosure of resettlement efforts in a manner that could result in friction of this nature and potentially undermine the bilateral relationship between the United States and the country of origin.

8. Premature disclosure of resettlement efforts also presents an opportunity for the country of origin to seek to undermine those resettlement efforts. Examples of this occurring go beyond the publicized instances of China exerting pressure on other countries not to accept the Chinese Uighurs currently at Guantanamo. I have been told by a number of European governments that such pressure exists and has complicated their ability to accept certain detainees. Because efforts of this nature have the potential for slowing and ultimately undermining our resettlement efforts, it is important for the U.S. government to have the latitude to approach potential destination countries in a discreet and confidential manner, in order to minimize the risk of undue publicity for as long as can be managed.

I declare under the penalty of perjury that the foregoing is true and correct.

Executed on June 9, 2009.



Daniel Fried

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

RECEIVED

JUN 23 2009

Clerk, U.S. District and
Bankruptcy Courts

DJAMEL AMEZIANE,

Petitioner,

v.

BARACK H. OBAMA,
President of the United States, *et al.*,

Respondents.

Civil Action No. 05-cv-0392 (BSH)

FILED UNDER SEAL

RESPONDENTS' STATUS REPORT

Respondents hereby submit this Status Report in response to the Court's Order of June 17, 2009, requiring the Respondents to file a status report detailing "the specific steps that have been and are being taken to effectuate the transfer of petitioner, including specific information regarding what countries are under consideration." Sealed Order of June 17, 2009.

1. On May 21, 2009, Respondents' counsel notified Petitioner's counsel and the Court of the fact that Petitioner had been approved for transfer from Guantanamo Bay as a result of the review by the Guantanamo Review Task Force.

2. On May 27, 2009, the Court issued a minute order staying this case in light of the approval for transfer. Minute Order of May 27, 2009.

3. Petitioner is a citizen of Algeria.

4. Beginning in July of 2008 Respondents began repatriating Algerian nationals detained at Guantanamo Bay back to their home country. This repatriation framework was the product of robust and assiduous diplomatic efforts on the part of multiple agencies within the Executive Branch. Since July 2008, Respondents have successfully transferred eight

Guantanamo Bay detainees to Algeria consistent with the policies and practices outlined in the

declarations of former Deputy Assistant Secretary of Defense for Detainee Affairs Sandra L. Hodgkinson and Ambassador Clint Williamson. See Hodgkinson Declaration and Williamson Declaration (attached as Exhibit 1 and Exhibit 2).¹

5. The current focus of the Respondents' efforts in this case is likewise to transfer the Petitioner back to his home country of Algeria.

6. As the Court is aware, Respondents attempted to repatriate Petitioner to Algeria in October 2008 and provided advance notice of the proposed transfer in accordance with the Court's April 12, 2005 Order (dkt. no. 12). See Respondents' Notice Pursuant To The Court's April 12, 2005 Order (filed under seal on October 8, 2008). In response to Respondents' notice, Petitioner filed a motion to enjoin the proposed transfer on the grounds that he would be subject to potential torture or mistreatment if returned to Algeria. Petitioner's motion was referred to Judge Hogan, who temporarily enjoined Respondents from transferring Petitioner to Algeria pending the outcome of related litigation in the Court of Appeals. See Order of October 29, 2008 ("[T]he Court temporarily enjoins the government from transferring Petitioner from the United States Naval Base at Guantanamo Bay, Cuba, to Algeria pending the United States Court of Appeals for the District of Columbia Circuit's decision in Kiyemba v. Bush, No. 05-5487"). On April 9, 2009, the Court of Appeals decided Kiyemba in Respondents' favor, holding that the "Supreme Court's decision in Munaf [v. Geren], 128 S.Ct. 2207 (2008)] precludes the district court from barring the transfer of a Guantanamo detainee on the ground that he is likely to be tortured or subject to further prosecution or detention in the recipient country." Kiyemba v. Obama, 561 F.3d 509, 516 (D.C. Cir. 2009).

7. Although Kiyemba was decided in Respondents' favor, the Court's injunction

¹ While Ms. Hodgkinson has recently left office, and Ambassador Williamson's office is no longer the office handling these matters within the State Department, the policies and practices set forth in their declarations regarding relinquishing custody of detainees remain in effect and are applicable to the instant case.

currently remains in place. Consequently, Respondents are not currently in a position to engage in meaningful discussions with the Government of Algeria regarding the repatriation of Petitioner. Any such discussions at this time would necessarily be contingent upon the outcome of future litigation. Such a contingency is problematic to the diplomatic process because Respondents must have the ability to make reliable representations and commitments when engaging directly with Algeria on matters of high sensitivity. Anything less could frustrate the diplomatic relationship with Algeria and ultimately delay the transfer of the Petitioner, as well as other detainees who are Algerian nationals.

8. Therefore, Respondents intend to file a motion to vacate this injunction within the next two weeks in light of the D.C. Circuit's decision in Kiyemba and the Supreme Court's decision in Mumaf. Once the injunction is vacated, Respondents will be able to engage in meaningful discussions with the Government of Algeria in order to effectuate the transfer of Petitioner expeditiously.

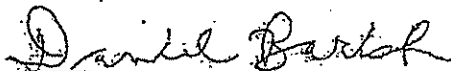
Dated: June 23, 2009

Respectfully submitted,

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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DJAMEL AMEZIANE, Civil Case No. 05-392

Petitioner

v.

BARACK OBAMA, et al,

Defendants,

-----X

Washington, D.C.
Tues., June 30, 2009
2:15 P.M.

TRANSCRIPT OF MOTION HEARING
BEFORE THE HONORABLE ELLEN SEGAL HUVELLE
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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Court Reporter: Lisa Walker Griffith, RPR
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Room 6507
Washington, D.C. 20001
(202) 354-3247

Proceedings recorded by mechanical stenography, transcript
produced by computer.

1 there are two countries in particular that we have focused
2 on. The first and the most obvious is Canada, where he has
3 prior residence, where he has family, where he speaks the
4 language.

5 The efforts that we've made there are substantial in
6 the following sense: First, he has applied for what's known
7 as sponsored resettlement. It is a formal process under
8 Canadian law to come to Canada under the sponsorship of an
9 organization.

10 There are designated organizations that are
11 recognized by the Canadian government. One of them is the
12 Anglican Church. And the Anglican Church, in particular the
13 Diocese of Montreal, has put Mr. Ameziane up for sponsorship.
14 Now, in conjunction with that, Mr. Ameziane has filed his own
15 application for sponsorship, and they are proceeding together
16 through the Canadian immigration process under Canadian law.

17 Now, in connection with that effort, we have
18 retained on behalf of Mr. Ameziane a Canadian immigration
19 lawyer who's based in Toronto. And we are working with an
20 organization called the Canadian Council for Refugees, which
21 is again recognized by the Canadian government as an
22 organization that facilitates these types of efforts for
23 refugees.

24 They coordinate. In other words, they're the ones
25 who work directly with the Canadian government, they're <55>

1 ones who work directly with the church. And they're the ones
2 who most recently have been seeking information about
3 Mr. Ameziane's status, whether he is cleared or not because,
4 as I understand the situation currently today, the Canadians
5 have taken Mr. Ameziane's application very seriously.

6 And there are four other detainees who have also
7 applied in Canada. So there's a total of five, three of whom
8 are Uighurs. So, I think that perhaps those cases may be
9 moot.

10 THE COURT: Why?

11 MR. DIXON: Because I believe that one of them has
12 been transferred to Bermuda. And if you believe the public
13 news reports, the U.S. is negotiating with the government of
14 Palau. So, you would be left with two individuals,
15 Mr. Ameziane and a Syrian.

16 Now, as I understand the current situation, the
17 government of Canada; that is, the Canadian Immigration
18 Service, has made at least one --

19 THE COURT: I'm sorry to interrupt you, but I
20 thought there were more Uighurs than -- if X number went to
21 Bermuda and then there were four, four, and there were still
22 some unaccounted for, I thought.

23 MR. DIXON: That's right, Your Honor, some have
24 applied for asylum in places like Switzerland, some in
25 Sweden. There are three, I believe, three who have appl. <56>

1 in Canada. That's my understanding.

2 THE COURT: But you think they overlap with the ones
3 that are under consideration in Palau and one went to
4 Bermuda?

5 MR. DIXON: I believe that to be the case. They're
6 all under consideration for Palau, if one of them has not
7 already gone to Bermuda. But I don't know that for sure,
8 that he has gone. I do know that two remain in Guantanamo.

9 THE COURT: Two?

10 MR. DIXON: Two Uighurs remain in Guantanamo, two
11 who have applied for sponsored resettlement.

12 Now, it's my understanding that the Canadian
13 government has approached the U.S. State Department and
14 indicated a willingness to consider these men pursuant to
15 Canadian law.

16 And what we understand, and this is from speaking
17 with the Canadian Council for Refugees in their discussions
18 with the Canadian government, it's not from the U.S.
19 government, it's from the Canadian side, that they have made
20 a request for access to Mr. Ameziane at Guantanamo for
21 purposes of processing his application under Canadian law.

22 Now, what that means as a practical matter is
23 interviewing him, getting his family background, getting his
24 medical history, taking a photograph of him, these sorts of
25 things, because these are the requirements under Canada <57>

1 law.

2 Now, it's our understanding again from the Canadians
3 that there has been some dialogue back and forth, but that
4 thus far the U. S. government has not responded with a yes or
5 a no or even a concrete maybe. They have had discussions and
6 that's just it. There has been nothing that has progressed
7 past that point. And that the requests to the State
8 Department for access to Mr. Ameziane is outstanding
9 currently.

10 Now, separately under Canadian law, there is
11 actually a treaty between the United States and Canada. It
12 is known as the Canada U.S. Safe Country Agreement. It was a
13 treaty that was negotiated and I believe signed in December
14 of 2002. And under Article IX of that agreement, if the
15 United States makes a request of the Canadian government to
16 take refugees, that the Canadian government is obligated by
17 that agreement to do so.

18 And I would add as a footnote to that, that the
19 agreement, as I understand it from the Canadian immigration
20 lawyer who we've hired for Mr. Ameziane, that the purpose of
21 that agreement was to facilitate the resettlement of
22 individuals who are from Haiti and were picked up on the
23 ocean, and to facilitate the resettlement of Cubans who end
24 up in Guantanamo Bay. That is, people who swim over or come
25 over on boats from mainland Cuba to the Navy base, they <58>

1 up in Guantanamo Bay, and then they're processed and they can
2 be put forward to Canada for resettlement under this
3 agreement.

4 I don't know whether the United States has attempted
5 to use that agreement or to activate that agreement with
6 respect to Mr. Ameziane or the others who have applied for
7 resettlement in Canada. What I do know, as I said, is that
8 the request is outstanding from the Canadians to the State
9 Department.

10 And I do know that these cases, the Canadian
11 resettlement cases, have been prioritized. They are moving
12 up much faster than ordinary resettlement applications, and
13 they have done so, it is our understanding, or I should say
14 we are informed and we believe that, with the authorization
15 of the Canadian immigration minister, Jason Kenney.

16 THE COURT: And you also said that some way or
17 another his brother who lives in Canada, the petitioner's
18 brother, is now aware that he's been cleared for transfer.

19 MR. DIXON: That's correct. As I indicated to Your
20 Honor on the phone and I indicated to the government prior to
21 that call, Mr. Ameziane's brother has been notified that
22 Mr. Ameziane has been cleared for transfer. And he did call
23 us, and I want to confirm that we, counsel for Mr. Ameziane,
24 have neither confirmed nor denied that to him, but he is
25 aware.

1 I would speculate that Mr. Ameziane's family in
2 Algeria is aware and I would speculate that perhaps the
3 immigration lawyer in Toronto knows or the Canadian Council
4 for Refugees knows. I don't know that to be the case, but I
5 would speculate that at this point.

6 But that raises an important issue because with
7 respect to whether the information should be designated as
8 protected. The Parhat case addressed a situation where some
9 of the information that the government sought to designate
10 had already entered the public domain. It's Page 853 of the
11 Parhat decision. And the Court indicated that that is not --
12 because the information is in the public domain, that is not
13 a proper category or piece of information to be designated as
14 protected, because the cat is out of the bag so to speak.

15 Now, Judge Hogan addressed this specifically in his
16 June 1st opinion on the propriety of designating unclassified
17 factual returns as protected. He essentially denied that
18 motion. But what he said, and I quote, that at a minimum,
19 "The specificity required by the D.C. Circuit precludes the
20 government from seeking to designate as protected
21 information, information that is already in the public
22 domain."

23 So we have that situation here.

24 THE COURT: What are you reading from?

25 MR. DIXON: From his opinion.

1 THE COURT: In what? What is the name of it?

2 MR. DIXON: It's the In Re: Guantanamo Detainee
3 Litigation. It's Miscellaneous Case Number 08-442. It's an
4 opinion that was filed in this case among a number of other
5 cases, on June 1st.

6 THE COURT: In response to?

7 MR. DIXON: The government's motion to confirm the
8 designation of unclassified factual returns as protected
9 information.

10 THE COURT: The government says that you've gotten
11 their status report, I assume?

12 MR. DIXON: I have, yes.

13 THE COURT: Okay. And they said they have
14 transferred eight detainees to Algeria. Are you aware of
15 these people?

16 MR. DIXON: Yes, Your Honor. If I may have a
17 moment, I will get my --

18 THE COURT: Are any of them Berbers, just out of
19 curiosity?

20 MR. DIXON: No, Your Honor. I did -- after our
21 phone call, I did canvas my colleagues who represent these
22 detainees, the Algerians, to see if there were any other
23 detainees at Guantanamo who are ethnic Berbers. And what I
24 was informed was that there is one other detainee who the
25 government identified initially at least as a Libyan, bu <61>

1 think is perhaps an Algerian. Is ISN 685, who is a Berber,
2 who fears repatriation to Algeria.

3 And that there is another detainee whose ISN is 311.
4 His name is Farthi, F.A.R.T.H.I. It's my understanding that
5 his ethnicity or his cultural background is disputed, so I
6 don't know whether he is Berber or not. But what I do know
7 is that my client is Berber and that ISN 685 is also Berber.
8 To my knowledge, those are the only Algerians who are at
9 Guantanamo who are Berber or who have been returned to
10 Algeria.

11 THE COURT: Who is 685? What is his name?

12 MR. DIXON: I believe it is Abdul Razzak,
13 R.A.Z.Z.A.K.

14 Mr. Ameziane is the only clear Algeria in terms of
15 acknowledged citizenship, at least as far as I know.

16 THE COURT: All right. What about the guy that was
17 the subject of Rosemary Collyer's case, is he still down
18 there? Do you know, Belbacha?

19 MR. DIXON: I'm sorry, Your Honor?

20 THE COURT: B.E.L.B.A.C.H.A.

21 MR. DIXON: Belbacha. Mr. Belbacha remains in
22 Guantanamo currently. His case is procedurally similar to
23 this case in the sense that he initially sought an injunction
24 barring transfer. That was appealed to -- his request was
25 denied because this was prior to the Boumediene decision. <62>

1 It was appealed to the D.C. Circuit. And he
2 obtained a stay, an injunction under the Court's, essentially
3 the Court's remedial authority under the All Writs Act, which
4 is similar to what Judge Hogan did in this case. And, in
5 fact, Judge Hogan cited Belbacha, cited the All Writs Act,
6 and cited the Court's remedial authority to bar the
7 injunction pending Kiyemba, because it seems under the
8 Kiyemba decision at least, that the rights and the interests
9 of the detainees that are at stake are substantial.

10 That is, if given the procedural posture of the
11 case, it is possible, perhaps likely, that there will be
12 further guidance from the appellate courts from the D.C.
13 Circuit on Belbacha, and perhaps from the Supreme Court on
14 the Kiyemba decision.

15 And to allow these men to be transferred against
16 their will until there has been a final resolution of those
17 issues, would deprive them of a substantial right, and
18 particularly, the right to petition for habeas. So it is a
19 similar issue.

20 THE COURT: So he is still down there and his case
21 is still before Judge Collyer?

22 MR. DIXON: He is.

23 THE COURT: Has he been cleared for a transfer, do
24 you know?

25 MR. DIXON: My understanding is he has.

1 THE COURT: All right.

2 MR. DIXON: Your Honor, may I have a moment to
3 confer with the government?

4 (There was a pause in the proceedings.)

5 MR. DIXON: Your Honor, he is ISN 290. And the
6 government is not certain as to whether he is cleared, so I
7 don't want to make a representation that he is.

8 I would like to add two other things. You asked
9 about resettlement options. The other item that I should
10 indicate is that we have had discussions with the French
11 foreign Ministry about resettlement of Mr. Ameziane. That
12 was on June 5th.

13 We have provided the French with some information in
14 January about Mr. Ameziane, and then a British barrister who
15 is working for the Center for Constitutional Rights met with,
16 actually with Mr. Belbacha's counsel and some other
17 individuals in the French foreign ministry. They also
18 expressed some interest in him, and they asked specifically
19 whether he had been approved for transfer by the task force.

20 THE COURT: Right. Your purpose here is you feel
21 that it would help his resettlement or repatriation some
22 place other than Algeria?

23 MR. DIXON: Yes. We think certainly it would help.

24 We think there are a number of other reasons why the

25 government's motion should be denied and ours should be

1 granted, including the fact we don't think that the free
2 declaration satisfies the requirement to designate
3 information as protected. We think that there is an issue
4 with regard to the right of public access to unclassified
5 information in these proceedings.

6 And the task force decisions are fundamental to
7 these proceedings. Your Honor stayed this case sua sponte
8 upon entry of this designation, the cleared designation. And
9 that has necessarily put on hold, at least temporarily,
10 Mr. Ameziane's right to pursue prompt habeas relief.

11 So, the task force decisions are fundamental. And
12 given the public importance of these habeas proceedings to
13 the country, certainly to the public, certainly to our client
14 and his family, we think that the public should have access
15 to this information. It is not classified information.

16 THE COURT: I understand. Judge Walton has an
17 Algerian.

18 MR. DIXON: He does.

19 THE COURT: One of those two people are Algerian,
20 right?

21 MR. DIXON: Right. One is a Tajik and one is
22 Algerian. And he denied --

23 THE COURT: 744, right.

24 MR. DIXON: Correct.

25 THE COURT: It is true that he denied it without ^{<65>}

1 benefit. He hadn't got these affidavits that have now been
2 filed in the motion to confirm designation.

3 MR. DIXON: It's my understanding that he did not
4 have the Freeman declaration, I don't know about the
5 Hodgkinson and the Williamson declarations.

6 THE COURT: He must have had those available. They
7 go back to '08.

8 MR. DIXON: I would assume so, but I don't know that
9 to be the case. I just don't know.

10 THE COURT: Let's see, when you keep talking -- oh,
11 Freeman.

12 MR. DIXON: Ambassador Freeman.

13 THE COURT: That one is '09, but the other two date
14 back to '08.

15 MR. DIXON: '08. So, I would assume he had them. I
16 do know that Naji, who is ISN 744, did litigate an injunction
17 in the same fashion that Mr. Ameziane did. And that Mr. Naji
18 won his injunction request in the same fashion that
19 Mr. Ameziane did. And that these declarations were attached
20 to those papers. I do know that.

21 THE COURT: Which declarations? The Hodgkinson and
22 Williamson are both from '08. They're old.

23 MR. DIXON: Correct.

24 THE COURT: Okay.

25 MR. DIXON: Correct. None of these declaration <66>

1 Your Honor, discuss Algeria. None of them discuss our
2 clients. None of them indicate that adequate assurances have
3 been obtained. They're essentially conclusory declarations.
4 They have been filed in numerous cases.

5 THE COURT: Do you know whether we have an Embassy
6 in Algeria?

7 MR. DIXON: I do not know the answer to that.

8 THE COURT: You can't travel from like Morocco to
9 Algeria or from Tunisia west. It's not exactly a country
10 that anybody knows a whole lot about.

11 MR. DIXON: Your Honor, there is an Algerian Embassy
12 here in Washington because I've met with the Algerian
13 ambassador, who indicated very clearly that Mr. Ameziane
14 would be subject to extreme scrutiny, I believe is the term
15 that he used, because he had lived in Canada and Europe, and
16 then had left those places for Afghanistan.

17 I do know as well and I can represent to you that
18 counsel for some of the other Algerians, counsel from the Law
19 Firm of Reprieve in London have attempted to obtain visas to
20 go to Algeria. And those requests have been denied because
21 the Algerians very clearly don't want counsel for these men,
22 at least American counsel for these men to be following up on
23 them in Algeria.

24 So, there is not really a meaningful opportunity to
25 ensure that if Mr. Ameziane is repatriated against his w <67>

1 that he's not persecuted. Certainly not an ability to do
2 that that extends into the future after Guantanamo is closed
3 and the State Department and everyone has turned away to
4 other diplomatic matters.

5 THE COURT: Yeah, well, you know what they're going
6 to argue about that too. We ought not to get into it.

7 Let's hear from Mr. Holyoak. All I'm here on is
8 whether or not they get to be public.

9 Why does the government, in this particular
10 instance -- I mean, if we went forward and he were to win, it
11 would be public information. So, I don't understand why they
12 care that people have been cleared for transfer.

13 MR. HOLYOAK: Well, Your Honor, there are several
14 considerations that we have to be careful with with the
15 government. I mean, as Ambassador Freeman made very clear in
16 his declaration, we have six-and-a-half months until we have
17 to get these individuals out of Guantanamo Bay. And that's
18 not just Mr. Ameziane.

19 THE COURT: That's your view of it. I mean,
20 six-and-half months, they've been there for seven, eight
21 years. What if he could get to some country to step up to
22 the bat before you can?

23 MR. HOLYOAK: Well, Your Honor, I think that goes to
24 the very first question that you asked him, is how likely is
25 it that he'll actually be able to get Canada to agree wi <68>

1 this. And I think something that petitioner's counsel has
2 pointed out is we know from press reports from June 6th, that
3 Canada has made very clear they're not taking any Guantanamo
4 Bay detainees.

5 And in addition to that, Canada has had some very
6 difficult and sensitive issues regarding its own citizens at
7 Guantanamo Bay. We've seen that in the press reports as
8 well.

9 So, I think whether or not Canada is willing to take
10 Mr. Ameziane is certainly not likely at this point.

11 THE COURT: I know, but so what, frankly? I mean,
12 find the government's position -- I mean, otherwise, why
13 isn't he entitled to have a habeas litigated? Because if he
14 could win, he would be slightly better off than sitting in
15 this limbo. You don't want to litigate all of these cases.

16 MR. HOLYOAK: Your Honor, in all honesty, we would
17 be basically in the same position. We most likely will be in
18 a similar position, trying to move him to Algeria because it
19 makes perfect sense to move individuals to their country of
20 nationality when --

21 THE COURT: Not necessarily. But I don't know that
22 we ought to get to that point at this point.

23 MR. HOLYOAK: I think that the other consideration,
24 which is definitely a government consideration and certainly
25 not petitioner's counsel's consideration, is the global <69>

1 here. We do have to consider every detainee at Guantanamo
2 Bay. We have to consider Mr. Ameziane individually. And
3 there will be individual considerations made for
4 Mr. Ameziane.

5 THE COURT: Where is the individual consideration of
6 an ethnic Berber from northern Algeria? Where is even the
7 consideration of Algeria? I mean, nothing -- I don't see any
8 individual consideration by the government. You filed this
9 massive motion that lists, you know, eight cases -- well,
10 it's more than eight. It must be more like 30 cases.
11 There's nothing individualized in any affidavit about
12 anything. I just -- what gets me is the sort of, for the
13 life of me, I don't know why this is a problem.

14 When Judge Leon let somebody out, you know, and
15 signs the habeas, everybody knows about it. When I signed
16 one, everybody knew about it. So, for the half a dozen or
17 more than half a dozen people for whom you are asking the
18 courts to get off your back while we try to place these
19 people because we've cleared them for transfer, and then you
20 say that this person is not entitled to -- it might help him
21 a little bit.

22 MR. HOLYOAK: Well, Your Honor, may I make a
23 practical point? One of the very practical considerations
24 here is that when these individuals proceed abroad, when the
25 petitioner's counsel proceeds abroad and begins to have <70>

1 discussions with other individuals, we've seen more than one
2 press account where these petitioner's counsel are confused
3 with government agents, with individuals acting on behalf of
4 the United States government.

5 THE COURT: You don't think the Canadians know who
6 he is?

7 MR. HOLYOAK: I'm certain the Canadians do, but at
8 the same time we can't be sure that would be conveyed
9 accurately in press reports. In addition, we have to think
10 about -- we have to think about petitioner's counsel making
11 agreements with the Canadians that may be possibly in
12 conflict with decisions that -- with agreements that we need
13 to make as the United States government with other nations.

14 I think back to the global issue --

15 THE COURT: But you're going to have that problem no
16 matter what we do here today. They're making their best
17 efforts. This man does not want -- he has left Algeria way
18 back when. He left because he was feeling like he would be
19 persecuted. He tried to stay in Canada, he didn't succeed.

20 MR. HOLYOAK: On his refugee application.

21 THE COURT: Yes, yes, right. I mean, he doesn't
22 want to be in Algeria. And so, they have the duty to try to
23 help him. That's their job as a lawyer. And they're going
24 to do that whether you give them this little piece of
25 information or not, frankly.

1 The government's position is remarkable to me. You
2 would think everybody would try to be getting people placed
3 and not back in -- well, you don't want Algeria to be
4 insulted? I don't get it.

5 MR. HOLYOAK: That is a real concern because you
6 have to consider how sensitive these diplomatic negotiations
7 are going to be. I mean, in all honesty, petitioner's
8 counsel has made it very clear that his goal is not to have
9 his client repatriated to Algeria. We can't have him out
10 scuddling these type of negotiations because, I mean, as the
11 old adage goes, too many chefs in the kitchen ruin the stew.

12 And at this point, we do have -- we have an
13 ambassador, we have an envoy who is very dedicated to this
14 project. And in addition to this, he made clear we need
15 every tool of state craft at our disposal. And if we don't
16 have every tool at our disposal, then it's going to be very
17 difficult to meet that date by January 20th of 2010.

18 THE COURT: You're going to have a hard time making
19 it anyways. Congress had gotten in the way as well.

20 MR. HOLYOAK: Well, I do want to point out, Judge
21 Kessler's decision because as we brought up, ISN 311, whose
22 ethnicity is not quite determined --

23 THE COURT: 311?

24 MR. HOLYOAK: Right. Petitioner's counsel mentioned
25 him as one of the individuals from Algeria. Judge Kessl <72>

1 issued a decision on June 11th, 2009, basically mirroring
2 what's happening in this case. She denied their request --
3 or she upheld the government's request to keep the protected
4 status. She did that without prejudice. And as well, she
5 also lifted the injunction.

6 THE COURT: Do you have that?

7 MR. HOLYOAK: Yes, I do. I have copies. Your
8 Honor, I have copies of both the order --

9 THE COURT: I know she wouldn't impose an injunction
10 in one of them, but I don't know about the protected status.
11 What is the nationality of this one?

12 MR. HOLYOAK: Your Honor, 311 is Algerian.

13 That was a June 11th, 2009 decision. It was for Bin
14 Mohammed. It was in case number 05-1347. And Judge Kessler
15 denied the request to unseal without prejudice, and dissolved
16 the injunction in accordance with Kiyemba too.

17 THE COURT: I'm sorry, did you hand me up two of the
18 same thing?

19 MR. HOLYOAK: I did. I gave two copies.

20 I think that's very important.

21 THE COURT: They made a motion for -- okay.

22 MR. HOLYOAK: Yeah, it was very similar to this
23 case. They wanted to unseal the protected designation of the
24 task force. I think Judge Kessler recognized right away that
25 this is an issue of timing, that's why she denied it wit...<73>

1 prejudice.

2 THE COURT: I'm sorry, what did she deny, the
3 emergency motion --

4 MR. HOLYOAK: Her order doesn't make it clear that
5 she was -- what she denied, but if you look back at their
6 motion, you can see their emergency motion was to unseal the
7 protected designation of the task force decision.

8 THE COURT: Why was it denied without prejudice?

9 MR. HOLYOAK: I believe that's so they could bring
10 it again if we don't act fast enough. We have six-and-a-half
11 months, as I mentioned. We're under a time crunch. I think
12 the envoy knows we're under a time crunch.

13 THE COURT: Oh, I see. Okay, wait a minute.

14 Have you seen this? Oh, you're looking at it now.

15 MR. DIXON: I'm looking at it now, Your Honor. I
16 have not seen it previously.

17 THE COURT: So this was emergency motion of
18 petitioner.

19 MR. HOLYOAK: Right.

20 THE COURT: That's denied without prejudice.

21 MR. HOLYOAK: The government did not respond to that
22 motion because the hearing was set so quickly. It was pretty
23 much two days afterwards.

24 THE COURT: Okay.

25 MR. HOLYOAK: Your Honor, what is preventing us <74>

1 right now from moving forward with Mr. Ameziane is the
2 injunction. Otherwise, Mr. Ameziane would have been -- we
3 would have been making efforts to move him to Algeria back, I
4 believe, over a year ago.

5 So he's sitting in Guantanamo right now because we
6 haven't been able to engage Algeria. And we can't engage
7 Algeria until the injunction is lifted.

8 The point I really want to make here is we believe
9 petitioner's argument is based on a misunderstanding and then
10 that -- that's that lifting the protective order would
11 somehow clear his client's name. And as we know from the
12 task force decision, it wasn't our decision to clear him for
13 release. It was a decision to approve him for transfer.

14 That still means that -- that's only -- that
15 decision is only made because we believe we can get certain
16 assurances that he can be transferred consistent with
17 national security interest and foreign policy interest of the
18 United States. That doesn't mean that we would stand back
19 and say that we don't believe he has engaged in enemy
20 activity.

21 THE COURT: Well, I agree with that. But it also
22 doesn't -- you haven't won on the merits either. All that we
23 have here is that we're where we were before.

24 Okay. Well, I have to say, I understand the
25 government's position and I appreciate it, but I don't t <75>

1 it applies here. I think this is a particular instance in
2 which -- there is absolutely no reason. His brother knows
3 about it.

4 If we go forward on the merits, he could have a
5 public -- I don't see how you can decide that you're going to
6 treat this as protected information when people already in
7 Canada know about it. And I cannot see that -- yeah, it
8 might interfere with him going back to Algeria, and you're
9 going to maybe miss your goal of closing down Guantanamo. I
10 don't -- I mean, really.

11 MR. HOLYOAK: Can I please make one point about the
12 leak? Because we don't know how it happened, that's first of
13 all. Petitioner's counsel has represented that somehow his
14 brother found out. First of all, the protective order
15 applies to petitioners. So if petitioner was the one to tell
16 somebody, then the protective order actually governs that.

17 And if you look at the protective order in this
18 case, which was the third document filed in this case, it's
19 docket number three.

20 THE COURT: I don't have it in front of me right
21 now. Okay.

22 MR. HOLYOAK: The protective order is very important
23 because it makes it clear that petitioner is not only under
24 an obligation, but his counsel has obligation for advising
25 him and others of the content of this protective order. <76>

1 the designation of him being released or of him being
2 approved for transfer under the EO task force decision,
3 petitioner's counsel was under an obligation to advise him
4 not to release this information.

5 Also, I think what's important in the -- under
6 paragraph 41, I mean, this protective order was written very
7 carefully. And under paragraph 41, Mr. Dixon is prohibited
8 from making public or private statements regarding protected
9 information. So, regardless of whether or not it's been
10 leaked, I think already he can't be making public or private
11 statements about that.

12 And then if you look at paragraph 32, even if this
13 information does become public, and we dispute that this is
14 actually now public information because one or two people may
15 know about it, Mr. Dixon can only make statements about that
16 information that is indeed public. He can't make statements
17 revealing his knowledge about the public information.

18 And that goes to an important point here because
19 there is a big difference between there being a rumor that he
20 has been released or that he has been ordered approved for
21 transfer by the task force, and it being confirmed by
22 Mr. Dixon or the government that he has been released. And I
23 think -- or that he has been approved for transfer.

24 I think that's kind of the key. And the key nugget
25 to take out of this is that whether or not Your Honor de <77>

1 to rule that this information is no longer protected, there
2 is still the protective order covers this information. And
3 we need to make sure we follow that protective order because
4 it's what is basically keeping these cases together at this
5 point.

6 THE COURT: I know. But you have the duty under
7 that protective order to move. You've done that. They're
8 opposing it, whichever way -- they've also made a motion.

9 You have not had discussions with the Algerians
10 about this particular individual; is that right?

11 MR. HOLYOAK: Your Honor, we've haven't been able to
12 engage in those discussions because of the injunction.

13 THE COURT: So how do we know that they will be
14 disturbed by not keeping this protected? How can you
15 possibly offer that conjecture?

16 MR. HOLYOAK: Well, we aren't arguing that the
17 Algerians particularly will be disturbed that we've approved
18 him for transfer. I believe that --

19 THE COURT: No, that it becomes public, that I don't
20 protect that information. Why would that interfere with your
21 negotiations now or later with Algeria?

22 MR. HOLYOAK: Your Honor, it's honestly an issue
23 of --

24 THE COURT: That's the only place you want to send
25 him apparently. You're not considering anything else. <78>

1 MR. HOLYOAK: Well, two things: First, we're making
2 an individualized assessment. And in all honesty, I'm not
3 going to be the one making it, neither are individuals at the
4 government's table or neither are the individuals at
5 petitioner's counsel table. It's going to be done, as
6 Ambassador Freeman explains, by numerous agencies in the
7 government, high-level senior executives who are able to make
8 those kind of determinations and engage in that kind of
9 diplomatic discussion. So, that's the first point. And it
10 will be an individualized assessment. I mean, there's no --

11 THE COURT: But you haven't made the individualized
12 assessment yet? I don't understand. I thought that's the
13 reason why you wanted to keep this protected.

14 MR. HOLYOAK: Well, we can't engage Algeria at this
15 point because of the injunction. And practically speaking,
16 we can't go to Algeria and get them to start giving us
17 assurances when we're not even sure we can send him to
18 Algeria.

19 But there's also a public policy issue here. I
20 mean, the government is certainly concerned about
21 Mr. Ameziane. We're not going to be sending him to a country
22 where our public policy is that we don't send individuals to
23 countries where we believe that they will be tortured.
24 Whether his argument is that he's going to be persecuted or
25 those other statements --

1 THE COURT: Or prosecuted.

2 MR. HOLYOAK: Or prosecuted. But, Your Honor,
3 prosecution is not persecution. That's well established.
4 So, that's also established in Kiyemba.

5 I come from an immigration background. That's what
6 I do over -- before I came on detail here. And I can pretty
7 much guarantee that you can't win an asylum case by arguing
8 prosecution. You have to prove that there is some kind of
9 individualized risk. And there is just not here because in
10 the State Department and the other agencies that will be
11 involved will make that individualized determination.

12 THE COURT: But what I don't understand is how is it
13 that that determination or that whatever that comes next is
14 in any way inhibited or interfered with by allowing it to be
15 known in this particular instance that he has been cleared
16 for transfer? That's all that they can say, he has been
17 cleared for transfer.

18 Otherwise, we have to lift the stay and go forward.
19 That's what you're doing. Because if you're saying that
20 there is information he can't use and he says it could be
21 useful to him, you may disagree with that. Then why
22 shouldn't he be able to get a habeas adjudication? Then he
23 can be in a better position than he is now. I don't
24 understand that.

25 MR. HOLYOAK: The first is a slippery slope. A <80>

1 what point do we stop.

2 THE COURT: What point?

3 MR. HOLYOAK: At what point when he's asking for
4 this information so we can go around and shop Mr. Ameziane to
5 various western Europe countries and Canada. At what point
6 do we stop releasing protected information, classified
7 information, so that he can better make his case?

8 THE COURT: Well, I'll live with the slippery slope.
9 He'll have to come to me anyways. I don't think so.

10 Okay. I've heard enough. I must say, I'm appalled
11 at the situation here, that I should be forced in a position
12 to either litigate the merits or to give him this one piece
13 of information that's -- I don't understand how it will
14 interfere in anything. There's no particularized showing
15 here. I have affidavits that date back to '08, and I have
16 another affidavit. Nothing, nothing has to do with this case
17 in particular.

18 The government always want to win based on the fact
19 that somewhere or another the court system is interfering
20 with these highly individualized, highly sensitive
21 negotiations. I, frankly, in this particular instance as to
22 this particular petitioner, et cetera, I don't see it. I
23 don't know why in the world the only thing that the
24 government can see is Algeria here.

25 But put that aside, that's your business, not m... <81>

1 But if he is able to do better than what the government is
2 doing, I say fine. He has now been there seven years thanks
3 to the United States government. Why they want to stand in
4 the way of any possible, possible hope of something better
5 for him baffles me. I mean, I think it's our duty to try to
6 do something about these people down there and not just say,
7 okay, go to where you come from. We put you down there, and
8 we're going to try better.

9 And this is maybe the only way that I can see to do
10 this, but I am not going to confirm this designation as
11 protected. This is not what Parhat had in mind. You want it
12 across the board. It doesn't apply here. This gentleman has
13 the perhaps glimmer of hope that something could get slightly
14 better and he won't be prosecuted again in Canada. Why
15 should we stand in the way after the way we've treated him
16 for these seven years?

17 That's min, if you disagree, you better get a stay
18 from the Court of Appeals. I grant the motion and deny the
19 respondent's motion. What is now not protected will be the
20 fact that he has been cleared. The only thing is he is
21 cleared for transfer by the United States government. That's
22 all we know.

23 MR. HOLYOAK: Or approved for transfer.

24 THE COURT: Approved for transfer by the United
25 States government. That is no longer protected informat_<82>

1 And I will issue an order similar to Judge Walton's.

2 MR. HOLYOAK: Your Honor, can I just ask that, I
3 know you've made your ruling, I just ask that you enter a
4 brief stay of two weeks so that we, as the government, can
5 decide what steps need to be taken. And that also prevents
6 us from having to file an emergency stay over the holiday
7 weekend. If we could just ask for two weeks so that we
8 can --

9 THE COURT: I'll give you one week. You can file
10 it. Have the Court of Appeals say -- I hope they get the
11 full record in this gentleman's case.

12 If it weren't for the fact that you're asking for me
13 to stay the habeas. I just don't think you can have it both
14 ways. He either gets his habeas, what he is entitled to
15 because Boumediene told him he could have it. Which seems
16 just useless given what you're doing in your task force. Or
17 alternatively, let him use this information if he can
18 conceivably do it, especially in this case, unlike other
19 ones.

20 We know his brother already knows about it. I
21 certainly hope you don't take retribution against this guy
22 down there in Guantanamo because his brother knows. I have
23 no understanding of how the information got out.

24 I'll stay it for one week in my order, and you can
25 decide. It's going to go into effect exactly one week f^{<83>}

1 today. That's next Tuesday. You can get the Court of
2 Appeals to spend their Fourth of July weekend Good luck.

3 MR. DIXON: Thank you, Your Honor. I would like to
4 say one thing for the record because I don't want to leave it
5 uncorrected. And that has to do with the protective order
6 and the suggestion that perhaps we didn't advise our client
7 properly about the requirements of the protective order.

8 That is not correct. And as I indicated to the
9 Court and to the counsel for the government during the call
10 last week, Mr. Ameziane's brother was informed by the Red
11 Cross of this designation.

12 THE COURT: Oh, that's true. You did say that.

13 MR. DIXON: And we had nothing to do with it. And I
14 would add that Mr. Ameziane himself was advised of the
15 determination prior to our visit with him. So I don't know
16 when he communicated with the Red Cross. I don't know when
17 the Red Cross communicated to the brother. I don't know
18 those things. But I can tell you that we have complied with
19 the protective order. I don't think that the government --
20 well, I'll just leave it at that.

21 THE COURT: I don't think, and this is not
22 Mr. Holyoak or his co-counsel, but the government here,
23 compared to some of the outrageous activities committed down
24 in Guantanamo, certainly can't sit there and complain about
25 somebody talking in violation of a protective order if y-- <84>

1 ask me. Thank you.

2 (The motion concluded at 3:00 p.m.)

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CERTIFICATE OF REPORTER

9

10 I, Lisa Walker Griffith, certify that the foregoing
11 is a correct transcript from the record of proceedings in the
12 above-entitled matter.

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Lisa Walker Griffith, RPR

Date

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DJAMEL AMEZIANE,

Petitioner,

v.

BARACK H. OBAMA, et al.,

Respondents.

CA No. 05-0392

Washington, D.C.

Tuesday, July 7, 2009

2:52 p.m.

SEALED

TRANSCRIPT OF STATUS HEARING
BEFORE THE HONORABLE ELLEN SEGAL HUVELLE
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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(Via Telephone)

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Proceedings reported by machine shorthand, transcript produced
by computer-aided transcription.

P R O C E E D I N G S

1
2 THE DEPUTY CLERK: Civil action 05-392, Djamel
3 Ameziane versus Barack Obama, et al. I'm going to ask counsel
4 for the plaintiffs on the telephone to please identify
5 themselves for the record first and then defense counsel.

6 MR. DIXON: Good afternoon, Your Honor. This is
7 Wells Dixon from the Center for Constitutional Rights on behalf
8 of Mr. Ameziane.

9 THE COURT: Good afternoon.

10 MR. HOLYAOK: Good afternoon, Your Honor. This is
11 Dalin Holyoak on behalf of the government. At counsel table
12 with me is Daniel Barish, August Flentje, and Jeff Wurzburg.

13 THE COURT: Okay. Mr. Holyoak, you're arguing for the
14 government?

15 MR. HOLYAOK: Yes, I am, Your Honor.

16 THE COURT: For the record, Mr. Dixon, can you hear
17 all right?

18 MR. DIXON: I can, Your Honor.

19 THE COURT: The Court was served today, just before
20 lunch really, with a request for emergency motion to stay the
21 June 30 order pending either the resolution of respondent's
22 appeal of that order or a decision by the court of appeals on
23 respondent's request for an emergency stay of that order, or in
24 the alternative, motion for one-week stay. What do you want,
25 actually? What's your bottom line here?

1 MR. HOLYOAK: Your Honor, what we'd like is the Court
2 to stay its order until the circuit court has been able to make
3 its decision.

4 THE COURT: Well, have you appealed to the circuit?
5 I haven't got notice of an appeal.

6 MR. HOLYOAK: Your Honor, we filed our appeal this
7 morning.

8 THE COURT: Well, I didn't see it. I received this --
9 I suspect it came to me by fax -- at approximately 10 of 12:00.
10 Mr. Dixon probably got it shortly thereafter, correct?

11 MR. DIXON: Yes, Your Honor.

12 THE COURT: And I've now received it about five
13 minutes ago or 10 minutes ago an opposition filed by Mr. Dixon
14 on behalf of Mr. Ameziane. I have a couple of questions for the
15 government, first of all. I gave you a week. You asked for
16 two; I already denied two. Aren't you back here asking me for
17 something I denied once?

18 MR. HOLYOAK: Well, Your Honor, there was an
19 intervening act that happened, which was the decision of Judge
20 Lamberth. We responded as quickly as we could, basically a
21 business day and a half after that decision.

22 THE COURT: Well, just because we disagree, we have
23 two different petitioners. So what?

24 MR. HOLYOAK: Well, Your Honor, in this case it's
25 important because it involves the same protective order. Both

1 you and Judge Lamberth discuss Parhat in their decisions, it
2 discusses the same declaration, and it involves the exact same
3 issue which applies globally to all of these cases, which, as
4 Your Honor's well aware, are unique.

5 THE COURT: Well, the cases are each unique, if you
6 ask me. What happened with Judge Walton? He ruled the same way
7 I did. What did you do with him?

8 MR. HOLYOAK: Well, Your Honor, Judge Walton didn't
9 have the declaration of Ambassador Fried in front of him at that
10 time, and that's now been submitted. We believe that this is
11 actually a very important issue that will go up on appeal. All
12 we're asking the Court is to temporarily stay its order so the
13 circuit court can make a decision.

14 THE COURT: Well, I did stay my order. I'm a little
15 bit baffled by the speed with which you've operated. It was
16 only because Judge Lamberth did it that you decided it was
17 worthy of an appeal?

18 MR. HOLYOAK: Well, Your Honor, we filed our motion
19 today, basically three and a half business days after Your Honor
20 made your decision. And granted, we wish we could have acted
21 quicker, but we do represent the government. It does require
22 the government to take into consideration the agencies which we
23 represent. There is a reason why the government is usually
24 provided 60 days for an appeal. We acted incredibly fast.

25 THE COURT: Well, I've had cases that have gone up to

1 the court of appeals and have been decided on the merits within
2 24 hours. I don't, frankly, understand why one waited till the
3 day -- now we're two hours away from the end of my stay. That's
4 why I gave you a stay. You could have protected yourselves by
5 filing and always withdrawn, for pity's sakes.

6 MR. HOLYOAK: We appreciate it, Your Honor. We didn't
7 receive authorization from the SG until this morning.

8 THE COURT: Well, that certainly is not as a result of
9 my not issuing an opinion early, but may I point out a couple of
10 dates here? You gave notice that this gentleman was cleared for
11 transfer and asked me to stay these proceedings back on May
12 21st. You filed with Judge Hogan on June 15th asking that this
13 information be treated as protected.

14 Frankly, I don't even know what took so long. And then
15 there's been this lingering sort of undercurrent about the
16 injunction here. You say that the injunction prevents you in
17 some way from talking to Algeria?

18 MR. HOLYOAK: Your Honor, it does prevent us at this
19 time from entering into agreement with Algeria to accept
20 Mr. Ameziane, because we don't have authority until the Court
21 lifts the injunction.

22 THE COURT: That's not what the injunction says.
23 How do you interpret the injunction, Mr. Dixon? Can you
24 hear?

25 MR. DIXON: Yes, Your Honor. I interpret the

1 injunction to bar Mr. Ameziane's transfer to Algeria. The
2 question whether the government was free in the interim pending
3 the existence of the injunction to approach Algeria was an issue
4 that was litigated.

5 We, on behalf of Mr. Ameziane, attempted to obtain an order
6 from Judge Hogan prohibiting the government from speaking to the
7 government of Algeria. That request was denied, so they clearly
8 have the right to go and speak to Algeria should they seek to do
9 so.

10 THE COURT: Right. I have never understood -- I went
11 back to read Judge Hogan's order of October. It doesn't say
12 anything about your ability to talk to Algeria. The way I read
13 your status report -- you can correct me if I'm wrong -- you
14 haven't done anything about transferring him because the only
15 place that you're willing to consider is Algeria, and you
16 interpret the injunction to say we can't even talk to them.

17 MR. HOLYOAK: Your Honor, I do need to correct one
18 point there. It's not that the government is only willing to
19 consider Algeria, and that may have been a misstatement from me
20 before. The government is primarily considering Algeria because
21 that is where petitioner is from.

22 Therefore, he naturally has a link to Algeria, and Algeria
23 has a link to him. Should that later become a problem and that
24 decision will be made much higher than myself, then the
25 government would at that time reconsider. But at this point,

1 the government will be hopefully making those -- or requesting
2 those assurances from Algeria if the injunction is lifted.

3 THE COURT: But no one has ever filed an affidavit
4 regarding what difference it makes here as to this particular
5 person that anyone knows he's been cleared for transfer. That
6 has never been an issue. It is rather an omnibus, we don't want
7 anybody to know about anybody, but there are gaping exceptions
8 to your affidavit by Mr. Fried to start out with, and correct me
9 if I'm wrong.

10 One, if a person goes through a habeas and the judge such
11 as I have or Judge Leon or Judge Kessler says, We grant habeas,
12 that's known publicly. Correct?

13 MR. HOLYOAK: That's correct.

14 THE COURT: Second of all, we know that Judge Sullivan
15 issued orders back in October for a gentleman, and it was public
16 in his orders and nobody said anything. My understanding is --
17 and this is the last name, is B-a-t-a-r-f-i 05/04/09 -- the
18 orders went out on the public record saying he's been cleared
19 for transfer. This is April. This is before you've decided
20 that this kind of information will be difficult or will undercut
21 your national interest, I guess.

22 MR. HOLYOAK: Your Honor, if I may address those
23 arguments in a moment, I would like to allow my co-counsel to
24 clarify one of the things that I spoke about.

25 MR. BARISH: Yes. If we could just clarify, you had

1 asked questions about Algeria, and again, we want to clarify
2 what was in the status report. We explained in the status
3 report that based on the information that the government has, we
4 believe that Mr. Ameziane can safely be repatriated to Algeria.
5 So that's what we explained --

6 THE COURT: How do you have the information if you
7 haven't talked to Algeria about him? That's what I can't --

8 MR. BARISH: Your Honor --

9 THE COURT: Maybe somebody else can go to Algeria; I
10 understand that, but you haven't got anything concrete as to
11 this particular petitioner.

12 MR. BARISH: With respect, Your Honor, that's not
13 correct. Again, let me explain. We don't think it's
14 appropriate to get into the diplomatic discussions and
15 negotiations under the clear case law of Kiyemba II and another
16 case law where the Court should defer to the executive branch
17 determination of whether it's safe to send someone to a
18 particular country or not.

19 But I will say, as we also explain in the status report,
20 that we cannot engage in meaningful discussions with the
21 government of Algeria given the current injunction, because we
22 obviously can't make an agreement when there's -- we can't
23 hypothetically say, Yeah, we'll send them to Algeria, because
24 there's an injunction barring that.

25 However, as we state in our papers, we expect to file a

1 motion to lift that injunction within the next week or so based
2 on KiyembaII, and the clear case law there will show that that
3 injunction must be lifted. I just want to clarify that, and
4 I'll let Mr. Holyoak respond to your other questions.

5 THE COURT: The inconsistencies of the government --
6 and I hadn't finished before you interrupted me -- you will
7 allow Mr. Dixon to go and try to get some other location to
8 repatriate him to but he just can't use this information.
9 You admit that, correct?

10 MR. HOLYOAK: Well, Your Honor, we can't prevent
11 Mr. Dixon from going out and engaging in these actions.

12 THE COURT: Are you aware the circumstances
13 surrounding Judge Lamberth's petitioner?

14 MR. HOLYOAK: Your Honor, I'm only aware of what was
15 in the order. I'm not familiar with the case myself.

16 THE COURT: Well, are you, Mr. Dixon?

17 MR. DIXON: Yes, Your Honor. The petitioner in front
18 of Chief Judge Lamberth, his name is Mohammed Abdullah Mattan,
19 ISN 684 --

20 THE COURT: Wait a minute, wait a minute. Slow down.

21 MR. DIXON: He's a Palestinian from the West Bank. He
22 is in a materially different position --

23 THE COURT: One minute.

24 MR. DIXON: -- from Mr. Ameziane in the sense --

25 THE COURT: Mr. Dixon, hold up.

1 MR. DIXON: -- that he is effectively stateless.

2 I don't know what, if anything, was argued before Chief Judge
3 Lamberth prior to entry of the order, nor do I know whether
4 Chief Judge Lamberth was aware of Your Honor's order when he
5 issued the order in his case. But certainly the circumstances,
6 given that Mr. Mattan is stateless, is a materially different
7 situation from a case where Mr. Ameziane fears repatriation.

8 THE COURT: Wait a minute. How do you know he's
9 stateless? Where do you come up with that idea?

10 MR. DIXON: Because he's Palestinian. He's from the
11 West Bank.

12 THE COURT: It indicates here that they want to send
13 him back to Palestine, I thought.

14 MR. DIXON: My understanding, Your Honor, and this is
15 not from the government but from our own work, is that in order
16 for a detainee who is Palestinian to be released from
17 Guantánamo, they would be turned over to the custody of Israel,
18 not to the custody of Palestinian authority.

19 That is why, it's my understanding, I'm informed and
20 believe, that prior transfers of Palestinians have occurred to
21 Jordan rather than Israel because they're concerned about the
22 treatment by the Israelis of the Palestinians.

23 THE COURT: Who's concerned?

24 MR. DIXON: State Department, I believe.

25 THE COURT: For the court reporter, though, Mohammed

1 Abdullah, and the next name is T-A-H-A, last name is
2 M-A-T-T-A-N. He's ISN 684, and it is in case 09-745. I also
3 understand that there isn't any particular negotiations or any
4 specific kind of possibility regarding this person getting
5 anywhere else other than, I suppose, Palestine or what you've
6 just said.

7 Whereas here, part of the reason the Court was motivated to
8 do what it did, among other things, is that there have been,
9 whether they'll be successful or not, this is a gentleman who's
10 been there for seven years in Guantánamo. He had a merits
11 hearing scheduled.

12 The government decided to declare him for transfer, which
13 stayed the case because it's a complete waste of every court's
14 time to go through a merits hearing, except that what bothers me
15 is if he went through a merits hearing and won, he'd be better
16 off than he is now because no one will know he's been cleared
17 for transfer.

18 So you have a situation where people are giving up their
19 right to a habeas hearing, but they're not getting the benefit
20 of anyone knowing they're cleared for transfer. They're relying
21 solely on your efforts -- yours, the U.S. government's efforts
22 -- to put them someplace else.

23 I think that, to date -- I asked and I got a status
24 report -- that no efforts have been made to put this gentleman
25 anywhere else than the very country he fled from back in 1990.

1 So nothing has happened in that regard. You say it's the
2 petitioner's fault, but I don't know that we have to get into
3 that. Judge Hogan issued an injunction. That still stands.

4 But you are basically saying, Well, we have eight other
5 people who went to Algeria, we think in general Algeria is fine,
6 and someday we'll maybe be able to do something about it.

7 The petitioner has two, both France and Canada, who may be
8 interested, and they've been negotiating, and you can't stop the
9 lawyer from negotiating. On top of it, the information is
10 known, I guess, to the petitioner via -- I'm sorry, his brother
11 in Canada was told that he had been cleared for transfer by the
12 Red Cross. So the cat's already out of the bag, so to speak.

13 MR. HOLYOAK: Your Honor, you've raised a number of
14 issues there. Let me see if I can respond. I think, first of
15 all, in looking back at the Lamberth decision in Mattan, I think
16 there are some very important similarities between that case and
17 this case. Both of them, as I said, relied on the Fried
18 declaration.

19 And also, the issue of returning him to Palestine wasn't
20 the issue in Judge Lamberth determining that that information
21 should remain protected. The reason Judge Lamberth found that
22 information should remain protected was based on the Fried
23 declaration.

24 THE COURT: Yeah, but -- okay.

25 MR. HOLYOAK: At the very least, this case presents a

1 very serious legal question, and under the requirement for a
2 stay, which is what we are asking today, we are asking the Court
3 just to stay this long enough for the circuit court to provide
4 uniform guidance. Under that standard, then because this
5 district court has made conflicting decisions using the same
6 declaration on the same protective order and also involving the
7 same types of cases --

8 THE COURT: That's where I disagree with you. They're
9 not the same types of cases. I don't think you can tell me why
10 Mr. Mattan from Palestine is comparable to Mr. Ameziane. I
11 don't know that, for instance, he was on the verge of having a
12 merits hearing and the government said, We're going to transfer
13 you. Also, mind you, in this case the government said he was
14 going to be transferred once before, in '08. We've had --

15 MR. HOLYOAK: And the injunction prevented that.

16 THE COURT: From going to Algeria. But you have now
17 got a situation where the counsel have at least had overtures or
18 has made overtures to get him placed in Canada where he has
19 family. He left Algeria in 1990. It's not like he's going back
20 home. He hasn't been there for years.

21 I admit Canada did not grant him asylum, but that isn't the
22 issue. The issue is this information is already known to
23 people. You can't do anything about that. I mean, the brother
24 knows; the Red Cross knows.

25 MR. HOLYOAK: Your Honor, we would disagree with that

1 point. Whether or not it's rumor by his brother -- as I
2 mentioned at the oral argument before, whether or not his
3 brother has stated to others, wherever that information has
4 gone, it's not been confirmed by petitioner's counsel from
5 official government sources. There is a big difference there,
6 and it's significant.

7 THE COURT: What do you say about the fact that -- why
8 does Judge Sullivan get to write it in an order? Why does Judge
9 Walton? You're just saying that Judge Walton's decision in
10 05-2386, you hadn't given him an affidavit and therefore -- I
11 don't understand how you define the security interest.

12 MR. DIXON: Your Honor, may I interject for a moment?

13 THE COURT: Yes.

14 MR. DIXON: With respect to Judge Sullivan's case,
15 it's my understanding that the government did not seek to
16 designate Mr. Batarfi's clearance as protected information.
17 With respect to the cases before Judge Sullivan, it's my
18 understanding that although the government did not present the
19 Fried declaration for Judge Walton's consideration, that they
20 made similar arguments and that Judge Walton rejected those
21 arguments as speculation. That is with respect to the proffered
22 harm. They're taking a different position, I think, here.

23 With respect to the decision in the Mattan case by Chief
24 Judge Lamberth, with respect to the government, I don't think
25 that that adds much to the issues here in the sense that they

1 brought to Your Honor's attention the decision by Judge Kessler.
2 So we already have at least one conflicting decision here, and
3 they really haven't presented anything new.

4 The arguments that are being made about the harm, about the
5 Fried declaration, about Kiyemba II, those are issues that have
6 been addressed, those are issues that have been considered by
7 Your Honor, and they are issues that have been rejected by
8 Your Honor, at least in the context of this case and with
9 respect to this issue.

10 THE COURT: Do you know, either of you, either
11 Mr. Holyoak or Mr. Dixon, in Judge Lamberth's Mattan, was there
12 any kind of injunction in place? Was this comparable to this
13 case in that regard?

14 MR. DIXON: I do not know, Your Honor.

15 MR. HOLYOAK: Well, I do know that both cases involved
16 individuals' counsels who are looking to shop them to different
17 countries. Certainly, these are incredibly similar cases. I
18 think getting into the merits of the injunction, that goes
19 beyond what we are arguing here or what we argued before, which
20 is the protective order, and what we are now arguing, which is
21 only a stay. The fact that we are here arguing this is
22 demonstrative of the fact that there is a serious legal
23 question. The fact that Judge Lamberth issued his decision --

24 THE COURT: You keep calling it a serious legal
25 question.

1 MR. HOLYOAK: Right.

2 THE COURT: I see it much more factually oriented.

3 You have the burden under Parhat to provide specific
4 nonconclusory statements about why this information should be
5 protected. It took you three weeks after you cleared the guy to
6 even file a motion.

7 Then, after that, we have a situation where other judges
8 are declaring who's been free to go. We have a situation having
9 gone forward. What bothers me is having someone land up worse
10 off than if they got to exercise their habeas rights, which you
11 don't want them to do.

12 MR. HOLYOAK: Well, Your Honor, I'm glad that you
13 mentioned Parhat, because I think that is where the legal issue
14 lies in this case. Both Your Honor and Judge Lamberth cited
15 Parhat but for different propositions. Basically, Judge
16 Lamberth found that the Fried declaration was sufficient under
17 Parhat, and Your Honor found it was not. There is a legal issue
18 there. I think at the very least, we should be allowed to take
19 that to the circuit court to let them decide and give us uniform
20 guidance.

21 THE COURT: My ruling is specific to this gentleman.
22 This gentleman is not Mattan, and I am applying a legal standard
23 to the facts. The facts include the fact that the Red Cross
24 knows he's been cleared, his brother knows he's been cleared,
25 that there have been discussions to date between counsel for the

1 petitioner and Canada, and there have at least been papers
2 exchanged with France.

3 No one can give me a good reason why, given the status of
4 any discussions you're having, since you think that you can't
5 have any discussions given the injunction, which I'm quite
6 perplexed by, that this gentleman, without exercising his rights
7 to habeas, which Boumediene says he should have, with all
8 deliberate speed, is going to sit down there for as long as
9 humanly possible.

10 MR. HOLYOAK: Well, Your Honor, I do want to respond
11 to those issues. I understand the Court is concerned. I think,
12 first of all, if we look at Judge Lamberth's decision, he had a
13 similar concern. That's why he required the respondents to
14 provide status reports, but he did have faith in the government
15 that we were actually engaged actively in trying to resettle
16 these individuals or repatriate them.

17 I think that provides some guidance for this court so that
18 the Court can be assured the government continues to engage
19 actively in moving Mr. Ameziane out of Guantánamo Bay. I also
20 think that by Your Honor mentioning the fact that this really
21 involves Mr. Ameziane specifically, that's exactly where the
22 legal issue lies with us, because we believe that this is a
23 global issue.

24 We believe that -- Ambassador Fried pointed out in his
25 declaration, the problem isn't just with one petitioner going

1 out and revealing the information regarding their transfer
2 decision. It's about all petitioners or various petitioners'
3 counsels deciding to do exactly what Mr. Wells Dixon would like
4 to do, which is to shop his client to different countries. That
5 creates a global problem for the United States because --

6 THE COURT: He'd like to work with you, right,
7 Mr. Dixon? They've always wanted --

8 MR. DIXON: Yes, Your Honor. And I would add with
9 respect to the global issue, that was exactly what the Court in
10 Bismullah confronted and the exactly what the court in Parhat
11 confronted, was an attempt by the government to take a global
12 one-side-fits-all approach to the question of whether
13 information can be designated as protected.

14 What the Court said in Bismullah and said in Parhat is that
15 this is an exercise of discretion by the district court.
16 District court has discretion to seal a judicial record that
17 would otherwise be open to the public. So it is a question of
18 discretion, and I don't think there's any argument that
19 Your Honor abused your discretion here in denying the
20 government's request.

21 THE COURT: Well, they think I did because Judge
22 Lamberth disagrees.

23 MR. DIXON: Your Honor, I submit that Judge Lamberth's
24 decision does not alter the analysis at all. I think what's
25 happening here is that the government is using Judge Lamberth's

1 opinion as an opportunity to relitigate issues that Your Honor
2 has decided.

3 The question of the adequacy of the Fried declaration, the
4 need for uniformity, you know, the government's argument, as I
5 understand it, is premised on the fact that all of these -- that
6 the protected designation of clearance determination must be
7 decided in the same fashion for every detainee. Your Honor has
8 considered that argument and rejected it, and the government has
9 given you nothing new to change that conclusion.

10 MR. HOLYOAK: There is something new here, and the
11 difference is between this case and Parhat. We're not just
12 making a general argument regarding burden, and we're not
13 stating broadly that certain types of information shouldn't be
14 available. We have identified specifically the information that
15 cannot be released, and that is the transfer decisions.

16 MR. DIXON: And Your Honor has rejected that argument.

17 MR. HOLYOAK: And it does have global implications.
18 I think for petitioner's counsel to argue it doesn't is
19 disingenuous. If he is actually able to go out, use this
20 information, is able to get his client to be able to be
21 resettled in Canada or France, that takes up a position which
22 another detainee at Guantánamo Bay who cannot be resettled
23 because they actually have a genuine concern regarding CAT or
24 they have an actual concern regarding torture or some other
25 persecution in their home country, they cannot then later go to

1 Canada because Canada has already accepted an individual.

2 As I pointed out in the last argument, this is a very
3 delicate decision by these countries. They're making very
4 careful political decisions on who to take and when to take
5 them. We've seen that specifically with Canada. Canada's not
6 willing at this time to even accept its own citizen.

7 They cannot take their own citizen because of political
8 issues. I find it disingenuous that petitioner's counsel
9 believes that he will accept Mr. Ameziane when he's not a
10 Canadian citizen and when he can possibly go to Algeria, and the
11 U.S. government will address those Committee Against Torture
12 concerns, those types of concerns, because it is in our interest
13 to do that so we can continue to move detainees out of
14 Guantánamo Bay. At the very least, we have presented a legal
15 issue in this case.

16 MR. DIXON: Your Honor, with respect to Canada, I
17 would like to add, I had informed the government after the last
18 hearing that despite Canada's statement publicly that they would
19 not take certain detainees, that that was specific to Uighurs.

20 In fact, we have had communications with the Canada
21 government since that announcement, and we have been told that
22 the application for Mr. Ameziane is continuing, they're taking
23 it seriously, and we are informed that they want to know what
24 his status is. The same with respect to the French. We've had
25 communications with the French. They want to know what his

1 cleared status is.

2 MR. HOLYOAK: There are two points here. The first is
3 that if petitioner's counsel is already that far along in his
4 process, what does this information get him? He's not going to
5 be able to tell the Canadians he's cleared, because this is not
6 a clearance decision. It's only a decision regarding transfer,
7 and that is, as the U.S. government views it, country-specific.

8 THE COURT: How can you have it both ways,
9 Mr. Holyoak? No habeas, you're cleared for transfer, but if it
10 could help you -- even assuming it could help you, we think
11 hypothetically it's going to hurt us. You have a statement that
12 you've attributed to it will in some way hinder the government's
13 own diplomatic efforts to secure petitioner's release to a
14 foreign country. Now, exactly how will that happen here?

15 MR. HOLYOAK: Your Honor, I think that concern about
16 whether or not we're moving fast enough and we'll actually get
17 him moved out of Guantánamo Bay was Judge Lamberth's concern,
18 and that's why he required status reports.

19 I think, second of all, we do want the participation of
20 petitioner's counsel when we need it. I mean, these are very
21 difficult political decisions. We're trying to engage in
22 diplomacy, and yeah, we will need the active participation of
23 petitioner's counsel.

24 That, as a segue, the Batarfi decision where they actually
25 allowed that information out, yeah, it's in the government's

1 prerogative to at times allow certain information in specific
2 cases because it may advance that information in that case. If
3 the government were --

4 THE COURT: Where did he go? Is this the one that
5 went to England?

6 MR. HOLYOAK: I'm not sure where Batarfi was
7 resettled.

8 MR. DIXON: Mr. Batarfi is from Yemen, and he is still
9 in Guantánamo.

10 THE COURT: He is?

11 MR. DIXON: Yes.

12 THE COURT: The problem I have is that you're working
13 under a premise that because the president of the United States
14 says he's going to close Guantánamo in January, these people
15 will all be placed somewhere and that I or petitioner's counsel
16 are standing in the way of you achieving that goal. That's
17 really what's happening here, not that you really, if it becomes
18 known that this person's been cleared for transfer.

19 A hundred people have been cleared for transfer. You can
20 almost, you know, flip a coin and figure out who's been cleared
21 for transfer. I don't, for the life of me, understand why this
22 is such important information to you when it's known, for
23 instance, who we've granted habeas for, who we have other cases
24 like Judge Walton and Judge Sullivan. They didn't grant habeas,
25 but they were known.

1 And now, all of a sudden, we have a security interest
2 because one gentleman might have a better shot to go someplace
3 besides Algeria where he left because he was being persecuted in
4 1990. And, worse than that, the information's already out
5 there. This, from your point of view -- there are 15 people now
6 out there who probably know and can talk about it.

7 MR. HOLYOAK: Your Honor, this squarely presents the
8 issue of executives expertise in foreign policy and foreign
9 diplomacy. We understand the concern of the Court of moving
10 Mr. Ameziane quickly, but that was the same concern as Judge
11 Lamberth. That's why we are moving as quickly as we can to lift
12 that injunction so that we can consider, at very least, Algeria
13 so that we can move him.

14 THE COURT: Just inform me about that. You've been
15 saying that now since June. I have pleadings in the middle of
16 June saying we're moving swiftly to lift the injunction. I'm
17 not aware of any motion, so I really don't feel as though -- I
18 get an emergency motion with two hours to go before my stay is
19 lifted, but if it's so important to your foreign policy to lift
20 the injunction, it would have seemed to me that it would have
21 been better for you to do something about it.

22 I don't know the effect -- Mr. Dixon, what's the effect of
23 what the Supreme Court's done in Kiyemba in all of this, if you
24 know? What's your position?

25 MR. DIXON: Your Honor, I think that the relevant

1 decision is Kiyemba II which was decided by the panel of the
2 court of appeals. That is pending in a petition for rehearing.
3 The court of appeals, on its own, issued a stay of the mandate.
4 The issue that the government intends to raise, that is whether
5 the injunction should remain in place, is one that is squarely
6 briefed and addressed in the court of appeals.

7 The government's filed a motion to govern saying, in
8 essence, that the injunction should be dissolved. We have filed
9 a motion saying that the injunction should be preserved, and the
10 court of appeals has that. They haven't decided it, and it's
11 appearing to us as if the court of appeals may not decide the
12 rehearing petition until sometime in the fall, and perhaps do
13 that in conjunction with whether the Supreme Court accepts cert
14 in Kiyemba I.

15 One of the issues raised in Kiyemba I is whether the
16 detainees are entitled to Fifth Amendment due process rights and
17 other relief, and that will necessarily impact the court of
18 appeals' consideration in rehearing petitioner. At least,
19 that's the way it appears to us.

20 THE COURT: Well, neither of you may know the
21 answer --

22 MR. DIXON: I can predict that if the government moves
23 before Your Honor to lift the injunction, we will of course
24 oppose that, and I think regardless of what happens with what
25 Your Honor decides, the case will be appealed, sit in the court

1 of appeals exactly where that issue is sitting right now.

2 So I'm not sure it's going to get us any further along, and
3 in any case, as Your Honor pointed out, there is no motion
4 pending, and these questions about the injunction, about
5 Kiyemba II, are not really relevant to the basic fact here, the
6 basic question here and the fact that the government has
7 presented nothing new since last week to warrant a different
8 balance of equities or to merit a different decision.

9 It certainly seems to us the government waited till the
10 last possible moment to create this crisis that now confronts
11 this court and certainly will confront the court of appeals
12 later this afternoon, I'm sure. So again, nothing really has
13 changed here.

14 THE COURT: You haven't heard from the court of
15 appeals yet, have you?

16 MR. HOLYOAK: Not yet.

17 THE COURT: All right. The Court has weighed this
18 once and thought about it and had hoped that if you were going
19 to invoke the powers of the court of appeals it would have been
20 done by now. I feel that specific to this individual -- and I
21 will try to get something out in writing as soon as humanly
22 possible.

23 My view is that this particular individual, the
24 circumstances are such that people already know about it. He
25 gave up his habeas, not voluntarily but because you wanted a

1 stay, and I agreed that it ought to be stayed because it's a
2 waste of everyone's time. But for him to give that up and be in
3 a worse position than somebody who exercises their habeas
4 rights, you can't have it both ways. It's just not fair.

5 And then the fact that other petitioners get to be able to
6 use the fact of their being cleared for transfer, but because
7 finally the government comes up with a declaration by Daniel
8 Fried, this gentleman can't. I think the public, among other
9 things, this is not classified information. This does not
10 interfere with your national security interest.

11 You may have an interest in making sure that you negotiate
12 on behalf of as many petitioners as humanly possible, but I have
13 no specifics about this gentleman, and you're hard pressed to
14 come up with specifics because you say you can't even talk to
15 Algeria about him. And as far as I know from the status report,
16 that is the only country with whom you have ever thought about
17 putting him anywhere or had discussions or haven't had
18 discussions, I don't know what.

19 But why do people in Judge Walton's case or in Judge
20 Sullivan's case have benefits that this gentleman doesn't when
21 he has specific places that he has discussed his repatriation
22 with, has family in Canada, and his brother knows about this;
23 the Red Cross knows about it.

24 The Court thinks that this is a situation where it is not a
25 legal issue. This doesn't deserve to be protected, and I don't

1 know what the public interest is in your keeping things secret.
2 I thought the whole purpose of what was going on was far more
3 transparency, and I find that there's a blanket that's being
4 extended to 200-plus detainees. It's very porous, based on I'm
5 not sure what considerations, but there's an inconsistency which
6 I'm unable to find is rational. So the --

7 MR. HOLYOAK: Your Honor, with all due respect, before
8 you rule on this, I do believe that given the fact that there
9 are distinct conflicting opinions by Your Honor and Judge
10 Lamberth, at very least the government deserves the opportunity
11 to exercise our appellate rights.

12 THE COURT: Well, I did.

13 MR. HOLYOAK: And by not extending the stay, then we
14 are deprived of that. That essentially deprives the government
15 of our ability to go to the appellate court and seek
16 reconsideration.

17 THE COURT: It does not. You've had at least three
18 calendar days. The appellate court is always available. It's
19 amazing how available they.

20 MR. HOLYOAK: Judge Lamberth, as you can see from the
21 fax on the top of it, we got it at 6:51 on the night of
22 Thursday. The government was gone on July 3, as it was a
23 holiday. This essentially happened yesterday. We acted as
24 quickly as humanly possible. I myself can say that I was at the
25 U.S. Department of Justice until two o'clock in the morning last

1 night.

2 We all know the time constraints in these cases, but at
3 very least, there's harm that's going to be done by the
4 government. At least Judge Lamberth has accepted that. One
5 judge, the chief judge of this circuit, has found there is harm
6 to the U.S. government.

7 THE COURT: Well --

8 MR. DIXON: Your Honor has concluded otherwise, and
9 again, the decision by Chief Judge Lamberth doesn't add anything
10 to what Your Honor considered previously. You know, the
11 government raised the decision by Judge Kessler, so this
12 purported split is nothing new.

13 There is absolutely nothing new here to warrant a different
14 decision or an extension of the stay. The government had its
15 right to go to the court of appeals. Your Honor was very clear
16 about that. Your Honor was very clear that the government could
17 try to do that notwithstanding the July 4 holiday, and they
18 didn't do it. They waited till the very last possible moment to
19 create the very situation from which they now seek the relief.

20 MR. HOLYOAK: That's completely untrue. I'm sorry.
21 That is completely untrue.

22 THE COURT: Well, he says that only Judge Lamberth --
23 I find it difficult to think that Judge Lamberth is the reason
24 you're appealing. Either it is really in your security interest
25 and really does pose a problem specific to this individual, or

1 frankly, I was asked to give a stay, I gave a stay. It wasn't
2 as long as you wanted, but the court of appeals is available.
3 The motion is denied, and I will issue something in writing as
4 soon as I can.

5 MR. HOLYOAK: Your Honor, what is the time frame for
6 that motion?

7 MR. BARISH: Your Honor, if we could ask respectfully,
8 at what time does your stay expire today?

9 THE COURT: Five o'clock. And if I don't get anything
10 in writing, the record here will exist.

11 THE DIXON: Your Honor, to clarify, at five o'clock,
12 if there is no stay in the court of appeals, we are free to
13 disclose the information publicly?

14 THE COURT: According to my order, you are.

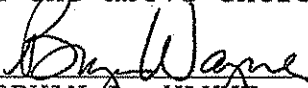
15 Thank you.

16 (Proceedings adjourned at 3:30 p.m.)
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CERTIFICATE

I, BRYAN A. WAYNE, Official Court Reporter, certify that the foregoing pages are a correct transcript from the record of proceedings in the above-entitled matter.


BRYAN A. WAYNE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DJAMEL AMEZIANE,

Petitioner,

v.

BARACK H. OBAMA,
President of the United States, *et al.*,

Respondents.

Civil Action No. 05-cv-0392 (ESH)

NOTICE OF APPEAL

NOTICE is hereby given that Respondents Barack H. Obama, President of the United States, *et al.*, (*i.e.*, all respondents herein) hereby appeal to the United States Court of Appeals for the District of Columbia Circuit from the sealed order entered in this action on the 30th day of June, 2009, (Dkt. No. 223-2).

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Dated: July 7, 2009

Respectfully submitted,

TONY WEST
Assistant Attorney General
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JOSEPH H. HUNT
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s/ Dalin R. Holyoak

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Attorneys for Respondents

Three weeks passed without any motion by the government to designate petitioner's clearance status as protected. On June 11, 2009, petitioner filed a motion to unseal petitioner's clearance status or, in the alternative, for a hearing to address whether to lift the stay in his habeas case.

On June 15, 2009, the government filed an identical motion in twenty-two different Guantanamo cases, seeking to confirm its protected designation of the government's approval of these petitioners for transfer and all related and derivative documents. In addition, in response to the Court's Order requiring the government to provide a status report detailing the specific steps that have been and are being taken to effectuate petitioner's transfer, the government filed a status report on June 23, 2009, indicating the government's desire to return petitioner to Algeria, although it has yet to even begin discussions with that country ostensibly because of the Order entered by Judge Hogan on October 29, 2008, enjoining petitioner's transfer to Algeria.

On June 30, 2009, the Court heard argument on the issue of whether petitioner's clearance for transfer from Guantanamo Bay should be deemed protected. The Court granted petitioner's motion to unseal his clearance, denied the government's cross-motion to designate his clearance as protected, and issued an Order stating that "petitioner and his counsel may publicly disclose that he has been approved for transfer from Guantanamo by the Guantanamo Review Task Force." *See* Order (June 30, 2009) (Dkt. No. 223).

The government orally requested a two-week stay of the Court's Order in order to seek relief from the Court of Appeals. The Court granted that request in part, and stayed its Order for one week so that the government could pursue an appeal. The Court's Order specified that it would stay only "until the close of business on July 7, 2009 unless a stay is entered by the D.C. Circuit Court of Appeals." *See* Order (June 30, 2009) (Dkt. No. 223).

The government did not immediately appeal the decision. Instead, it waited until mid-day on July 7, 2009, the very date the stay was set to expire, to file its appeal. At or about 11:30 a.m. on July 7, the government also filed a motion for an indefinite stay pending resolution of its appeal, or, alternatively, for another one-week stay.² Petitioner filed an opposition less than two hours later, and the Court held a hearing at 2:30 p.m. that same day.

ANALYSIS

To prevail on a motion for a stay pending appeal, a party must show: (1) a likelihood of prevailing on the merits of its appeal; (2) that it will suffer irreparable injury absent the stay; (3) that the non-moving party will not be harmed by the issuance of a stay; and (4) that the public interest will be served by a stay. *Al Maqaleh v. Gates*, ___ F. Supp. 2d ___, 2009 WL 1528847, *3 (D.D.C. June 1, 2009) (citing *United States v. Philip Morris, Inc.*, 314 F.3d 612, 617 (D.C. Cir. 2003)).

The Court has already considered and rejected the government's arguments to protect petitioner's clearance status. For those reasons, and for the reasons stated below, the Court concludes that the government is not likely to prevail on appeal, the government has not shown irreparable injury, the stay will further prejudice this detainee's ability to be released from detention at Guantanamo Bay, and the public has an interest in having access to this information in this case. It therefore again denies the government's request for an additional stay.

"It is the court, not the Government, that has discretion to seal a judicial record, which the public ordinarily has the right to inspect and copy. Therefore, insofar as a party seeks to file with the court nonclassified information the Government believes should be 'protected,' the

² The government has failed to provide a convincing reason as to why it waited a full seven days before filing its appeal. See D.C. Circuit Handbook of Practice and Internal Procedures 32 (2009) ("Where counsel or a party gives only a vague or general explanation as to why [an "emergency motion"] was not filed at least 7 calendar days before the date of the requested court action, the Court may conclude that expedited consideration of the motion is unwarranted.").

Government must give the court a basis for withholding it from public view.” *Bismullah v. Gates*, 501 F.3d 178, 188 (D.C. Cir. 2007). The government has no power to unilaterally designate information as protected. See Mem. Op. at 2, *In re Guantanamo Bay Detainee Litig.*, Misc. No. 08-442 (TFH) (D.D.C. June 1, 2009) (Dkt. No. 1780) (“[T]he Protective Order permits the government to ask the Court to designate unclassified information as ‘protected,’ thereby shielding such information from the public.”) (emphasis added).

Paragraph 34 of the protective order governing the Guantanamo Bay habeas cases requires the government to notify habeas counsel if it seeks to designate information as protected. If the parties cannot agree – as is the case here – then the government is required to file a motion asking the Court to order the designation. See Protective Order and Procedures for Counsel Access to Detainees at the United States Navel Base at Guantanamo Bay, Cuba, *In re Guantanamo Bay Detainee Litig.*, Misc. No. 08-442 (TFH) (D.D.C. Sept. 11, 2008) (Dkt. No. 409).

In making determinations regarding protected designations, the Court is mindful that the judiciary may not involve itself in matters left solely within the province of the executive. See *El-Shifa Pharmaceutical Industries Co. v. United States*, 559 F.3d 578, 582 (D.C. Cir. 2009) (“The province of the court is, solely, to decide on the rights of individuals, not to enquire how the executive, or executive officers, perform duties in which they have a discretion.”) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803)). It is, however, the judiciary’s duty to decide whether unclassified information should be protected based on a careful consideration of the specific circumstances and unique facts presented by each case. In doing so, the Court recognizes that “public access plays a significant positive role in the functioning” of habeas proceedings. Mem. Opin. at 14, *In re Guantanamo Bay Detainee Litig.*, Misc. No. 08-442 (TFH)

(D.D.C. June 1, 2009) (“Opening the judicial process ensures actual fairness as well as the appearance of fairness.”).

The government’s rationale for protecting petitioner’s clearance status is riddled with contradictions. On one hand, the government argues that release of petitioner’s clearance status would lead to widespread release of the clearance status of all detainees which would in turn frustrate the government’s diplomatic efforts. Yet, the government has previously permitted the fact that a petitioner has been cleared for transfer to be public without apparent concern for its global impact. For example, in *Batarfi et al. v. Gates*, Civ. No. 05-409 (EGS), the government released the petitioner’s clearance status to the public – a fact which was subsequently noted in unsealed orders by the court. *See, e.g.*, Order (Mar. 30, 2009) (EGS) (“Petitioner has been approved for transfer from Guantanamo Bay.”). In *Omer and Yoyej v. Obama et al.*, Civ. No. 05-2386 (RBW), Judge Walton issued a decision denying the government’s request to protect the fact that the petitioners have been approved for transfer, but the government chose not to appeal that decision. *See, e.g.*, Order (June 4, 2009) (RBW). Notably, one of those petitioners is an Algerian.

Moreover, when a petitioner held at Guantanamo Bay is granted habeas relief, that information immediately becomes public. There is no rational distinction between the public disclosure of court decisions ordering the release of the detainee and the public disclosure of transfer clearance notices. Petitioner’s case was stayed because of the government’s decision to clear him for transfer, and the public has an interest in understanding why petitioner’s habeas case is not proceeding promptly, as required by *Boumediene v. Bush*, 128 S. Ct. 2229, 2275 (2008) (“The detainees in these cases are entitled to a prompt habeas corpus hearing.”). There is no practical reason to keep clearance approval secret from the public simply because it has been

granted by the government instead of the Court, nor should petitioner potentially be put in a worse position by being cleared for transfer than by having an adjudication of his habeas case.

This Court has already conducted a fact-based inquiry to determine whether the information sought to be protected is supported by specific and valid reasons, and the Court must again reject the government's attempt to file an identical motion and generalized declarations in twenty-two cases that fails to address any of the specific factors related to petitioner's individual circumstances. As the D.C. Circuit admonished in *Parhat v. Gates*, the government cannot rely "solely on sparse, generic assertions of the need to protect information." 532 F.3d 834, 852-53 (D.C. Cir. 2008). Despite this admonition, the government provides no specificity as to why Ameziane's cleared status must be protected or why his counsel should be prohibited from using the information to advocate for his resettlement to other countries. Without "an explanation tailored to the specific information at issue," this Court has "no way to determine whether [Ameziane's transfer clearance] warrants protection – other than to accept the government's own designation," which would usurp the Court's discretion to seal a judicial record. *Parhat*, 532 F.3d at 853.

In addition, petitioner will be prejudiced by the nondisclosure his clearance status. Petitioner has been imprisoned at Guantanamo for more than seven years. His counsel is currently engaged in resettlement discussions with two potential host countries, including the country where family members live and where petitioner previously lived. Both countries have expressed an interest in whether petitioner has been cleared for transfer. Notice of petitioner's transfer clearance would likely advance those discussions and secure a more speedy release of petitioner. Moreover, petitioner's habeas case has been stayed on account of his transfer clearance, and it would be unfair if he were in a worse position to advocate for his resettlement

to foreign countries than if his habeas case had proceeded and he was ordered released by this Court.

Nor is the Court convinced by the government's speculative and conclusory arguments that the release of petitioner's clearance status would cause significant harm to the interests of the government. If disclosure of the clearance decisions constituted a security threat, then the government could have designated that information as classified, which, of course, it did not.³ Moreover, protecting petitioner's clearance status will do little to prevent petitioner's counsel from soliciting other countries to accept him because, as the government admits, petitioner's counsel is free to communicate directly with foreign governments to advocate for his resettlement irrespective of this Court's June 30, 2009 Order.

Most importantly, the record demonstrates that protecting petitioner's clearance status would serve little purpose because that information has already been made public. As counsel indicated, both the Red Cross and petitioner's brother in Canada are already aware that petitioner has been cleared for transfer. The fact that the information is already in the public domain counsels against protection. *See, e.g., Cottone v. Reno*, 193 F.3d 550, 554 (D.C. Cir. 1999) (“[M]aterials normally immunized from disclosure under FOIA lose their protective cloak once disclosed and preserved in a permanent public record.”)

Finally, permitting the government to take additional time to pursue its appeal would be contrary to the Supreme Court's directive that “the costs of delay can no longer be borne by those who are held in custody,” *see Boumediene v. Bush*, 128 S. Ct. 2229, 2275 (2008) (“The

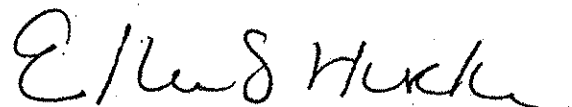
³ The Executive has “authority to classify and control access to information bearing on national security,” and the Supreme Court has stated that “the protection of classified information must be committed to the broad discretion of the agency responsible, and this must include broad discretion to determine who may have access to it.” *Dep't of the Navy v. Egan*, 484 U.S. 518, 527 (1988); *see also Fitzgibbon v. Cent. Intelligence Agency*, 911 F.2d 755, 762 (D.C. Cir. 1990). The government has determined petitioner's clearance status does *not* need to be classified.

detainees in these cases are entitled to a prompt habeas corpus hearing.”), especially given the lack of any compelling reason for the government’s delay in seeking an appeal. In this regard, the government claims that Judge Lamberth’s July 2, 2009 decision in *Mattan v. Obama et al.*, Civ. No. 09-745 (RCL), granting the government’s motion for protected designation, was the reason for its delay. This argument cannot withstand scrutiny. First, Judge Lamberth issued his ruling on July 2. Second, his decision did not, as argued by the government, create a new split among the district judges since Judge Kessler had issued a similar decision weeks earlier, which the government could have relied upon in its appeal. Moreover, the different decisions arose not from “serious legal questions,” as the government asserts, but from unique factual circumstances that distinguish the instant case from Judge Lamberth’s. Here, petitioner’s clearance status has already been publicly disclosed both to a family member and to a nonprofit organization; petitioner’s counsel is engaged in serious discussions with two potential host countries who have requested notice of his clearance; and petitioner’s summary judgment motion had already been decided and his habeas case was moving swiftly to a full-blown merits hearing before it was stayed on account of the government’s transfer decision.

The government waited more than three weeks before it filed its motion in support of protected designation, and then it waited a full week before filing its appeal of the Court’s June 30, 2009 decision denying that motion. The Court previously provided the government the relief that it seeks here – a temporary stay to allow the government to seek further relief from the Court of Appeals – but the government failed to take advantage of that Order. There is no reason for this Court to grant an additional stay.

CONCLUSION

For the foregoing reasons, the Court denies the government's request for a stay of the
June 30, 2009 Order.



ELLEN SEGAL HUVELLE
United States District Judge

DATE: July 8, 2009

EXHIBIT 6

DECLARATION OF SANDRA L. HODGKINSON

I, Sandra L. Hodgkinson, pursuant to 28 U.S.C. § 1746, hereby declare and say as follows:

1. I am the Deputy Assistant Secretary of Defense for Detainee Affairs in the Department of Defense ("DoD"). My office is organized under the office of the Under Secretary of Defense for Policy. The Office of Detainee Affairs, which I supervise, is responsible for providing policy advice to the Under Secretary of Defense on matters regarding detainees in DoD control. I have served in this position since July 9, 2007. The statements in paragraphs 5 through 8 of this Declaration provide a general overview of the process of transferring detainees in DoD control at the United States Naval Base at Guantanamo Bay, Cuba ("GTMO"), to the control of a foreign government. These statements are not intended to be an exhaustive description of all of the steps that might be undertaken in particular cases, but rather they reflect United States policy and practices with respect to transfers of detainees from GTMO. I make this declaration based upon my personal knowledge and upon information made available to me in the performance of my official duties.

2. One of DoD's current missions is to use all necessary and appropriate force to defeat the al Qaeda terrorist network and its supporters. In the course of that campaign – which remains ongoing – the United States and its allies have captured thousands of individuals overseas, virtually all of whom are foreign nationals. Through a screening and evaluation process, DoD determines whether the individuals should be detained during the conflict as enemy combatants. As of July 2, 2008, approximately 265 foreign nationals are being held by DoD at GTMO.

3. It is lawful and appropriate for DoD to detain enemy combatants as long as hostilities are ongoing. Nonetheless, DoD has no interest in detaining enemy combatants longer than necessary. Accordingly, DoD conducts regular reviews of GTMO detainees who have been determined to be enemy combatants but have not been referred to military commission or previously cleared for transfer or release to determine whether continued detention is warranted based on factors such as whether the detainee continues to pose a threat to the United States and its allies. Where continued detention is deemed no longer necessary, a detainee may be transferred to the control of another government for release. Furthermore, the United States also transfers GTMO detainees, under appropriate circumstances, to the control of other governments when those governments are willing to accept responsibility for ensuring, consistent with their laws, that the detainees will not continue to pose a threat to the United States and its allies. Once transferred, detainees may be subject to detention, investigation, and/or prosecution if appropriate under the receiving country's laws. Such governments can include the government of a detainee's home country, or a country other than the detainee's home country, including a country that may have a law enforcement, prosecution, or other interest in the detainee.

4. Since 2002, approximately 500 detainees have departed Guantanamo for other countries including Albania, Algeria, Afghanistan, Australia, Bangladesh, Bahrain, Belgium, Denmark, Egypt, France, Germany, Iran, Iraq, Jordan, Kuwait, Libya, Maldives, Mauritania, Morocco, Pakistan, Russia, Saudi Arabia, Spain, Sweden, Sudan, Tajikistan, Tunisia, Turkey, Uganda, the United Kingdom, and Yemen.

5. When the DoD transfers GTMO detainees to the control of other governments, the DoD does so after dialogue with the receiving government. Such dialogue may be initiated by the receiving government or may be initiated by the United States. Unless a transfer is to be a transfer for release, a purpose of the dialogue is to ascertain or establish what measures the receiving government intends to take pursuant to its own domestic laws and independent

determinations that will ensure that the detainee will not pose a continuing threat to the United States and its allies. In all cases of transfer, the detainee is transferred entirely to the custody and control of the other government, and once transferred, is no longer in the custody and control of the United States; the individual is detained, if at all, by the foreign government pursuant to its own laws and not on behalf of the United States. When detainees are transferred to the custody or control of their home governments, it is frequently the case that the home government takes the detainee into its custody, at least for an initial period. In some cases, the home government has subsequently released the detainee, sometimes after a period of questioning or investigation, while in other cases, the detainees have remained in confinement or subject to other restrictions in their home countries for various reasons based on the determinations and laws of the home government. Of the GTMO detainees who have been transferred by the DoD to the control of their home countries, most have subsequently been released from detention.

6. Once a DoD transfer of a GTMO detainee is proposed, the views of interested United States Government agencies are considered. For such a transfer, it is the policy of the United States, consistent with the approach taken by the United States in implementing the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, not to repatriate or transfer individuals to other countries where it believes it is more likely than not that they will be tortured. Therefore, if a transfer is deemed appropriate, a process is undertaken, involving the Department of State, in which appropriate assurances regarding the detainee's treatment are sought from the country to whom the transfer of the detainee is proposed. The Declaration of Clint Williamson dated July 7, 2008, accurately and completely describes that process to the best of my knowledge and belief.

July 10, 5:04 AM

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No. 3363

P. 2/25/08

7. The ultimate decision to transfer a detainee to the control of another government is made with the involvement of senior United States Government officials. The Secretary of Defense or his designee ultimately approves transfers. Decisions on transfers are made on a case-by-case basis, taking into account the particular circumstances of the transfer, the country, and the detainee concerned, as well as any assurances received from the receiving government. If a case were to arise in which the assurances obtained from the receiving government were not sufficient when balanced against treatment concerns, the United States would not transfer a detainee to the control of that government unless the concerns were satisfactorily resolved. Circumstances have arisen in the past where the Department of Defense elected not to transfer detainees to their country of origin because of torture concerns.

8. The Executive Branch is best situated to make decisions regarding transfers of detainees, as noted in the Declaration of Clint Williamson. Requiring the United States to disclose information unilaterally about proposed transfers and negotiations outside of appropriate executive branch agencies could adversely affect the relationship of the United States with other countries and impede our country's ability to obtain vital cooperation from concerned governments with respect to military, law enforcement, and intelligence efforts, including with respect to our joint efforts in the war on terrorism. Judicial review, including the possible overturning of decisions to transfer and delays in transfers occasioned by review and possible appeals, could lead to similar harm.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on July 9, 2008.



Sandra L. Hodgkinson

EXHIBIT 7

DECLARATION OF CLINT WILLIAMSON

I, Clint Williamson, pursuant to 28 U.S.C. § 1746, hereby declare and say as follows:

1. I am the Ambassador-at-Large for War Crimes Issues and have supervised the ~~operation of the Department of State Office of War Crimes Issues (S/WCI) since July 10, 2006.~~ In that capacity I advise the Secretary of State directly and formulate U.S. policy responses to serious violations of international humanitarian law committed in areas of conflict throughout the world. As the President's envoy, I travel worldwide and engage foreign government leaders and international organizations to build bilateral and international support for U.S. policies related to accountability for atrocities committed in armed conflicts and other violations of international humanitarian law. Following September 11, 2001, S/WCI was assigned the additional role of maintaining a diplomatic dialogue with foreign governments whose nationals have been captured in connection with the armed conflict with the Taliban and al Qaeda and who are detained at the U.S. Naval Base at Guantanamo Bay, Cuba. The following statements provide a general overview of the Department of State role in carrying out United States policy with respect to the transfer to foreign governments of detainees held by the Department of Defense at Guantanamo Bay and the process that is followed to ensure that any international obligations and United States policies are properly implemented. These statements are not intended to be an exhaustive description of all of the steps that might be undertaken in any particular case, but do reflect United States policy and practices with respect to transfers from Guantanamo. I make these statements based upon my personal knowledge and upon information made available to me in the performance of my official duties.

2. The United States has no interest in detaining enemy combatants longer than necessary. While acting in accordance with the President's stated objective of moving toward

the day when we can eventually close the detention facility at Guantanamo Bay, the U.S. Government's paramount goal is to ensure, to the maximum extent reasonably possible, that transferring a detainee out of U.S. Government control prior to the cessation of hostilities will not increase the risk of further attacks on the United States or its allies. The Secretary of Defense, or his designee, is generally responsible for approving the transfer of detainees from Department of Defense control at Guantanamo Bay to other governments either for release or for possible detention, investigation, prosecution or other control measures, as appropriate. On an ongoing basis, the Department of Defense reviews the continued detention of each individual it holds at Guantanamo Bay Naval Base, Cuba. Since 2002, approximately 500 detainees have departed Guantanamo for other countries including Albania, Afghanistan, Algeria, Australia, Bangladesh, Bahrain, Belgium, Denmark, Egypt, France, Germany, Iran, Iraq, Jordan, Kuwait, Libya, Maldives, Mauritania, Morocco, Pakistan, Russia, Saudi Arabia, Spain, Sweden, Sudan, Tajikistan, Tunisia, Uganda, the United Kingdom, and Yemen.

3. The Department of Defense consults with appropriate United States Government agencies, including the Department of State, before determining whether to transfer particular individuals. Detainees have been transferred for release when it was determined that they do not meet the criteria of enemy combatants or no longer pose a continuing threat to the U.S. security interests. Detainees have been transferred to the control of their governments of nationality for possible detention, investigation, prosecution or control, as appropriate, when those governments were willing to accept responsibility for ensuring, consistent with their laws, that the detainees will not continue to pose a threat to the United States and its allies. A detainee may be considered for transfer to a country other than his country of nationality, such as in

circumstances where that country requests transfer of the detainee for purposes of criminal prosecution or in situations where humane treatment concerns prevent the transfer of the detainee to his country of nationality.

4. Of particular concern to the Department of State in making recommendations on transfers is the question of whether the foreign government concerned will treat the detainee humanely, in a manner consistent with its international obligations, and will not persecute the individual on the basis of his race, religion, nationality, membership in a social group, or political opinion. The Department is particularly mindful of the longstanding policy of the United States not to transfer a person to a country if it determines that it is more likely than not that the person will be tortured or, in appropriate cases, that the person has a well-founded fear of persecution and would not be disqualified from persecution protection on criminal- or security-related grounds. This policy is consistent with the approach taken by the United States in implementing the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment and the Protocol Relating to the Status of Refugees. The Department of State works closely with the Department of Defense and relevant agencies to advise on the likelihood of persecution or torture in a given country and the adequacy and credibility of assurances obtained from a particular foreign government prior to any transfer.

5. The Department of State generally has responsibility to communicate on transfer-related matters as between the United States and foreign governments. The Department of State receives requests from foreign governments for the transfer of detainees and forwards such requests to the Department of Defense for coordination with appropriate Departments and agencies of the United States Government. The Department of State also communicates

requests from the United States to foreign governments to accept the transfer of their nationals. In cases where approved detainees cannot be transferred to their countries of nationality because of humane treatment concerns, the Department of State communicates with foreign governments to explore third-country resettlement possibilities. More than 60 countries have been approached to date with respect to various detainees who fall within this category, and the only country where the U.S. Government has had success in resettling detainees with no prior legal ties to that country is Albania.

6. Once the Department of Defense has approved a transfer from Guantanamo Bay and requests the assistance of the Department of State, my office would facilitate transfer discussions with the foreign government concerned or, where repatriation is not an available option because of humane treatment concerns or for other reasons, with third countries where resettlement might be appropriate. The primary purpose of these discussions is to learn what measures the receiving government is likely to take to ensure that the detainee will not pose a continuing threat to the United States or its allies and to obtain appropriate transfer assurances. My office seeks assurances that the United States Government considers necessary and appropriate for the country in question. Among the assurances sought in every transfer case in which continued detention or other security measures by the government concerned are foreseen is the assurance of humane treatment and treatment in accordance with the international obligations of the foreign government accepting transfer. The Department of State considers whether the State in question is party to the relevant treaties, such as the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and ensures that assurances are tailored accordingly if the State concerned is not a party or other circumstances warrant.

7. Decisions with respect to Guantanamo detainees are made on a case-by-case basis, taking into account the particular circumstances of the transfer, the country, the individual concerned, and any concerns regarding torture or persecution that may arise. Recommendations by the Department of State are decided at senior levels through a process involving Department officials most familiar with international legal standards and obligations and the conditions in the countries concerned. Within the Department of State, my office, together with the Office of the Legal Adviser, the Bureau of Democracy, Human Rights, and Labor, and the relevant regional bureau, normally evaluate foreign government assurances in light of the circumstances of the individual concerned, and, if deemed appropriate, brief the Secretary or other Department Principals before finalizing the position of the Department of State. The views of the Bureau of Democracy, Human Rights, and Labor, which drafts the U.S. Government's annual Human Rights Reports,¹ and of the relevant regional bureau, country desk, or U.S. Embassy are important in evaluating foreign government assurances and any individual fear of persecution or torture claims, because they are knowledgeable about matters such as human rights, prison conditions, and prisoners' access to counsel, in general and as they may apply to a particular case in the foreign country concerned, as well as particular information about the entity or individual that is offering the assurance in any particular case and relevant background about any allegations of mistreatment that may have surfaced in connection with past transfers to the country in question.

¹ The Human Rights Reports are the official State Department reports to Congress on human rights conditions in individual countries for a given year as mandated by law (sections 116(d) and 502(b) of the Foreign Assistance Act of 1961, as amended, and section 505(c) of the Trade Act of 1974, as amended).

8. The essential question in evaluating foreign government assurances relating to humane treatment is whether, taking into account these assurances and the totality of other relevant factors relating to the individual and the government in question, the competent Department of State officials believe it is more likely than not that the individual will be tortured in the country to which he is being transferred. In determining whether it is "more likely than not" that an individual would be tortured, the United States takes into account the treatment the individual is likely to receive upon transfer, including, *inter alia*, the expressed commitments of officials from the foreign government accepting transfer. When evaluating the adequacy of any assurances, Department officials consider the identity, position, or other information concerning the official relaying the assurances, and political or legal developments in the foreign country concerned that would provide context for the assurances provided. Department officials may also consider U.S. diplomatic relations with the country concerned when evaluating assurances. For instance, Department officials may make a judgment regarding foreign government's incentives and capacities to fulfill its assurances to the United States, including the importance to the government concerned of maintaining good relations and cooperation with the United States. In an appropriate case, the Department of State may also consider seeking the foreign government's assurance of access by governmental or non-governmental entities in the country concerned to monitor the condition of an individual returned to that country, or of U.S. Government access to the individual for such purposes. In instances in which the United States transfers an individual subject to assurances, it would pursue any credible report and take appropriate action if it had reason to believe that those assurances would not be, or had not been, honored. In an instance in which specific concerns about the treatment an individual may

receive cannot be resolved satisfactorily, we have in the past and would in the future recommend against transfer, consistent with the United States policy.

9. The Department of State's ability to seek and obtain assurances from a foreign government depends in part on the Department's ability to treat its dealings with the foreign government with discretion. Consistent with the diplomatic sensitivities that surround the Department's communications with foreign governments concerning allegations relating to torture, the Department of State does not unilaterally make public the specific assurances or other precautionary measures obtained in order to avoid the chilling effects of making such discussions public and the possible damage to our ability to conduct foreign relations. Seeking assurances may be seen as raising questions about the requesting State's institutions or commitment to the rule of law, even in cases where the assurances are sought to highlight the issue for the country concerned and satisfy the Department that the country is aware of the concerns raised and is in a position to undertake a commitment of humane treatment of a particular individual. There also may be circumstances where it may be important to protect sources of information (such as sources within a foreign government) about a government's willingness or capability to abide by assurances concerning humane treatment or relevant international obligations.

10. If the Department were required to disclose outside appropriate Executive branch channels its communications with a foreign government relating to particular mistreatment or torture concerns, that government, as well as other governments, would likely be reluctant in the future to communicate frankly with the United States concerning such issues. I know from experience that the delicate diplomatic exchange that is often required in these contexts cannot

occur effectively except in a confidential setting. Later review in a public forum of the Department's dealings with a particular foreign government regarding transfer matters would seriously undermine our ability to investigate allegations of mistreatment or torture that come to our attention and to reach acceptable accommodations with other governments to address those important concerns.

11. The Department's recommendation concerning transfer relies heavily on the facts and analyses provided by various offices within the Department, including its Embassies. Confidentiality is often essential to ensure that the advice and analysis provided by those offices are useful and informative for the decision-maker. If those offices are expected to provide candid and useful assessments, they normally need to know that their reports will not later be publicly disclosed or brought to the attention of officials and others in the foreign States with which they deal on a regular basis. Such disclosure could chill important sources of information and could interfere with the ability of our foreign relations personnel to interact effectively with foreign State officials.

12. The Executive Branch, and in particular the Department of State, has the tools to obtain and evaluate assurances of humane treatment, to make recommendations about whether transfers can be made consistent with U.S. government policy on humane treatment, and where appropriate to follow up with receiving governments on compliance with those assurances. The Department of State has used these tools in the past to facilitate transfers in a responsible manner that comports with the policies described herein. The judicial review of the diplomatic dialogue between the U.S. Government and other governments concerning the terms of transfer, or of the ultimate decision to effect a transfer to a given country, risks undermining the ability of the U.S.

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Government to speak with one voice on Guantanamo transfer issues. This is critical as we continue to seek a reduction in the number of detainees in the Guantanamo detention facility and move toward the day when the facility can be closed altogether.

I declare under the penalty of perjury that the foregoing is true and correct.

Executed on July 7, 2008.

A handwritten signature in cursive script, appearing to read "Clint Williamson", is written over a horizontal line.

Clint Williamson

EXHIBIT 8

DECLARATION OF DANIEL FRIED

I, Daniel Fried, pursuant to 28 U.S.C. § 1746, hereby declare and say as follows:

1. I have been the Special Envoy for the Closure of the Guantanamo Bay Detention Facility since accepting my appointment on May 15, 2009. In my capacity as Special Envoy, I engage in diplomatic dialogue with foreign governments concerning the repatriation and/or resettlement of individuals who are detained at the U.S. detention facility at Guantanamo Bay, Cuba. My position was established in order to intensify diplomatic efforts to arrange for the repatriation or resettlement of individuals approved for such disposition under the review procedures established by Executive Order 13,492, which was signed by President Obama on January 22, 2009. Prior to accepting this appointment, I was the Department of State's Assistant Secretary for European and Eurasian Affairs from May, 2005-May, 2009 and the Special Assistant to the President and NSC Senior Director for European and Eurasian Affairs from January, 2001-May-2005. I also served as Ambassador to Poland from 1997-2000 and prior to that in various posts at the State Department, at overseas posts, and at the NSC starting in 1977. This declaration is submitted in support of the Government's motion to vacate the injunctions barring the Government from repatriating six Algerian nationals -- Nabil Hadjarab (ISN 238); Motai Saib (ISN 288); Ahmed Belbacha (ISN 290); Djamel Ameziane (ISN 310); Fathi Saeed bin Mohammed (ISN 311); Abdul Aziz Naji (ISN 744) -- to Algeria. For the reasons discussed below, the injunction in this case places an inappropriate obstacle in the way of U.S. Government diplomatic efforts aimed at transferring these detainees to their country of nationality.

2. As Special Envoy, my primary task is to implement the mission set forth in Executive Order 13,492 of finding dispositions for individuals who are approved for repatriation or

resettlement in a manner that is consistent with the national security and foreign policy interests of the United States, and that will allow the U.S. Government to achieve the closure of the Guantanamo Bay Detention Facility as soon as practicable and in any event not later than January 22, 2010. In this task I am guided by the U.S. Government's policies with respect to post-transfer security and post-transfer humane treatment, including the policy that the U.S. Government will not transfer individuals to countries where it has determined that they are more likely than not to be tortured.

3. Through the application of these policies, the Department of State has assessed, on the basis of available information and in accordance with the procedures set forth in the attached declaration of Ambassador Clint Williamson,¹ that the six Algerian detainees referenced above can be repatriated to their country of nationality consistent with our policies on post-transfer humane treatment. In making this determination, the Department of State has taken into account that the United States Government has, from July 2008 to the present, transferred eight detainees to the exclusive custody and control of the Government of Algeria and we have received no credible allegations to suggest that the Government of Algeria has treated any of these individuals in a manner inconsistent with its obligations under the Convention Against Torture and other Cruel, Inhuman, or Degrading Treatment or Punishment (which includes prohibitions on torture and other forms of cruel, inhuman or degrading or treatment or punishment). We are not aware of any information that would lead the Department of State to conclude that the

¹ Although Ambassador Williamson's office is no longer the office handling issues related to the transfer of Guantanamo Bay detainees within the State Department, the policies and practices set forth in his declaration remain in effect.

Government of Algeria will deviate from this track record in its treatment of the six detainees referenced above. Decisions with respect to transfer of Guantanamo Bay detainees are made on an individual case-by-case basis, taking into account a variety of information and sources regarding the particular circumstances of the transfer, the country, the individual concerned, and any concerns regarding torture or persecution that may arise. See Williamson Decl. ¶ 7-8. In the cases of the six Algerian nationals at issue here, we have considered a variety of information, including submissions we have received to date from counsel representing the detainees, to reach our present conclusion that the detainees can be repatriated to Algeria consistent with our policies on post-transfer humane treatment.

4. Executive Order 13,492 requires the closure of the Guantanamo Bay detention facility no later than January 22, 2010. The implementation of this order is an important foreign policy objective of the United States Government. In order to give effect to this order it is critical that the Department of State be in a position to negotiate for the repatriation of detainees who have been approved for transfer and can be returned to their home countries consistent with the United States Government's security and post-transfer humane treatment policies.

5. The Department of State cannot, however, engage constructively in negotiations for repatriation of the six Algerian nationals without clarity about whether or not it will be possible to implement repatriation arrangements once they are concluded. Indeed, the injunctions interfere with the U.S. Government's ability to have meaningful diplomatic engagement on this issue with the Government of Algeria. Any such discussions at this time would necessarily be contingent upon the outcome of uncertain future litigation to vacate the transfer injunctions. This type of contingency harms the diplomatic process because the Department of State must

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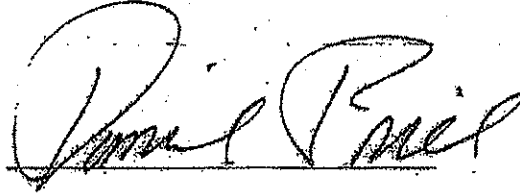
have the ability to make reliable representations and commitments when engaging directly with Algeria on matters of such high sensitivity. Based on our prior experience with the Government of Algeria regarding previous detainee transfers, we judge that once arrangements have been concluded, the Algerian Government is likely to have a strong expectation of prompt implementation, and that any delay on the part of the U.S. Government is likely to raise concerns on the part of the Algerians as to our credibility. These concerns could lead the Algerians to reconsider their position regarding acceptance of their nationals, delay the U.S. Government's ability to carry out the proposed repatriation, and create adverse implications for the repatriation of other Algerians. Given these risks and based on consultation with senior U.S. diplomats with responsibility for our bilateral relationship with Algeria, I do not believe it would be appropriate or constructive to engage in discussion with the Algerian Government with respect to the repatriation of six Algerian nationals referenced above until such time as the injunctions have been lifted.

6. As explained above and in the attached declaration of Ambassador Williamson, the U.S. Government will not transfer individuals to countries where it has determined that they are more likely than not to be tortured. The Department of State has, and will continue, to apply this policy in its dealings with the Government of Algeria. In the event additional information comes to light that leads the Department of State to reconsider its current conclusion that the six Algerian nationals can be repatriated to Algeria consistent with this policy, then the repatriation will not occur, notwithstanding the consequences to our diplomatic relationship with Algeria, until such concerns are addressed.

5

I declare under the penalty of perjury that the foregoing is true and correct.

Executed on July 9, 2009.

A handwritten signature in black ink, appearing to read "Daniel Fried", written over a horizontal line.

Daniel Fried

EXHIBIT 2



One World Research

Public Interest Research and Investigations

Declaration of John Sifton of One World Research

CREDENTIALS

1. I am a resident of New York City, where I have lived most of my life.
2. Attached to this declaration is a copy of my curriculum vitae.
3. I hold a J.D. *cum laude* from New York University School of Law and a B.A. *cum laude* from St. John's College in Annapolis, Maryland.
4. I am a licensed attorney and a licensed private investigator, a human rights researcher and advocate; and an expert on human rights law, international humanitarian law, and refugee law, among other subjects. I have extensive experience working in Afghanistan and Pakistan, and in other countries in South Asia and the Middle East and North Africa. From October 2001 to September 2007 I worked as an investigator and researcher for Human Rights Watch, a global human rights research organization, spending significant time in the Middle East, North Africa, and South Asia. From January 2001 to September 2001 I worked for the International Rescue Committee, a humanitarian and advocacy group, as a researcher on refugee human rights protections in Afghanistan and Pakistan. As part of my work for Human Rights Watch and the International Rescue Committee, I regularly briefed ambassadors, U.S. military and executive branch officials, members of Congress, and journalists. I also worked as a human rights researcher in Albania and Kosovo during armed conflict there in 1999.
5. I currently serve as the executive director of One World Research, an investigation and research firm that specializes in international investigative services. One World Research, among other projects, carries out extensive investigative work in North Africa, the Middle East, and South Asia, for a variety of clients, including law firms and non-profit groups. Our work includes research, consulting, and investigative work. I personally supervise most One World Research projects.
6. In preparing this declaration, I consulted One World Research's previous research and investigation experience in Algeria, including knowledge gained from extensive investigation over the last one-and-a-half years in trips to Algiers and in extensive telephone calls to contacts there. In addition, I consulted with staff of One World Research to confirm or obtain information about relevant practices, policies, and events, and to refresh my memory or add to my knowledge. Further, both I and staff under my supervision consulted with several contacts familiar with the matters discussed in this affidavit and engaged in telephone and e-mail correspondences with other knowledgeable sources.

7. As part of our mission to Algeria in January 2008, my colleagues and I conducted extensive interviews with attorneys and experts in Algiers, including numerous Algerian attorneys experienced with Algerian criminal law, applicable laws and provisions, rules of procedure, and practices, in particular attorneys experienced in cases involving alleged activities considered to involve "terrorist" or "subversive" acts. The information collected from these attorneys comprises collectively decades of experience defending suspects before Algerian courts, including in cases involving alleged terrorist activities.

ASSESSMENT OF RISK

Algerian Attorneys Interviewed Face Intimidation

8. As a preliminary matter, it should be noted that some of the information contained in this affidavit was gathered from repeated discussions and interviews with Algerian attorneys who have worked on cases of detainees returned to Algeria from Guantanamo as well as other cases involving persons with alleged involvement with Islamist groups in other countries who were returned to Algeria from the United States, Canada, or Europe.
9. Many of the attorneys and experts my colleagues and I interviewed in Algeria requested that their names not be used or connected with the issues addressed in this declaration, for fear that they could face persecution by government officials or jeopardize their clients' rights or well-being. Accordingly, I have not used the names of interviewees in preparing this declaration.
10. Many of returned detainees' local attorneys—if such persons have local attorneys—have fears of their own, vis-à-vis intimidation by Algerian authorities. Algerian authorities have made threats to attorneys who criticize the government, and in some cases prosecuted lawyers who represented persons suspected of involvement in terrorism and subversive activities. As a result, many of the attorneys who represent returned detainees are afraid to speak out about the cases, and fear retaliation from authorities if they criticize the fairness of the cases or too harshly challenge the questionable basis of the evidence against their clients.
11. To provide an example of how serious their fear is, some of the attorneys who represent returned detainees were too afraid to sign their names to affidavits stating the same facts as I state in this affidavit. Even when suggested that their affidavits could possibly be filed under seal, lawyers refused, stating their fear of prosecution or harassment.

Overall risk of interrogation, detention, investigation, and prosecution

12. All persons One World Research have interviewed in Algeria as part of its research agree that it is highly likely—almost certain—that current Guantanamo detainees will be arrested at the airport upon arrival to Algeria and detained by the Algerian security services (*Département du Renseignement et de la Sécurité*, or DRS).
13. Most detainees will be transferred to Algerian custody simultaneously with a file containing information from U.S. authorities, with information sufficient for prosecution in Algerian

courts. Alternatively, even if no file is transferred with detainees, it is likely that Algerian authorities will be aware of former allegations made against detainees while they were in Guantanamo. Several former Guantanamo detainees who have already been deported to Algeria have been charged under article 87.6.

14. In most cases, allegations made against returned detainees, whether from Guantanamo or in cases of returned suspects from other countries, are not based on information collected or investigated by Algerian authorities but instead simply contained in documents or files of government agencies. Foreign governments often appear to hand over files to Algerian authorities with detainees, upon their transfer, which are then used in cases against them.
15. Alternatively, in cases where no detailed substantive evidence exists against an individual, the "evidence" presented in a case may simply consist of allegations contained in media reports or, in the case of the Guantanamo detainees, U.S. government reports from the past or the documents or files delivered upon transfer, and information contained in any confession the detainees may be forced to sign as a result of the treatment described above. The attorneys stressed that Algerian judges would come to conclusions about the detainees' criminal liability based on the thinnest of evidentiary needs.
16. Algerian attorneys who have worked on previous cases of detainees returned from Guantanamo (discussed further below) indicate that in many of these cases, the allegations against detainees appear to be based on the original allegations that were made against them in U.S. custody. It is not clear whether this is because the charges are being directly based on some evidentiary file provided by the U.S. government, along with returned detainees, or because detainees have been interrogated on the basis of a file provided by U.S. authorities and then "confessed" to allegations made against them.
17. In any case, it is very likely that the U.S. allegations will be the backbone of most prosecutions going forward, raising at the very least the appearance that the Algerian government is prosecuting the returnees "for" the U.S. government.
18. Upon arrival to Algeria, the detainees will likely be held in DRS detention for up to twelve days, per provisions of domestic law applicable in similar cases, and interrogated about their activities abroad and in Algeria. The initial twelve day period of detention upon arrest is called the *garde à vue*. The term *garde à vue* is an old-fashioned French idiom that literally translates as "keep in sight" or "keep in view."
19. During *garde à vue*, the detainees will be taken to unofficial and secret detention facilities, where the interrogation will take place. While in detention they will have no access to an attorney and their detention will not be supervised by the judiciary. It is possible that detainees will face torture or the threat of torture while in *garde à vue* custody.
20. Following *garde à vue*, the detainees will likely be prosecuted under the Algerian penal code. Authorities will be aware of their past detention at Guantanamo and allegations made against them, and will arrest them at the airport upon return. As explained below, arrest is

what has happened in the clear majority of cases of returned detainees from Guantanamo in 2008 and the first half of 2009.

Risk of Prosecution and Risk of an Unfair Trial

21. Attorneys in Algeria also stated that, if prosecuted, many Guantanamo detainees will likely be convicted of charges against them. Whether prosecuted for activities abroad or in Algeria, attorneys stated that authorities will try to ensure that any prosecution happens quietly, and slowly, and that they will attempt to effect a situation where the detainees does not have an attorney to represent him, thereby preventing them from receiving a fair trial.

22. One attorney stated it is likely returned Algerians may be "smuggled in front of a judge" and "quietly convicted."

23. Attorney B.S. emphasized that the Algerian judiciary was not "independent":

There are those who pull the strings behind the wall. . . . Generally, for alleged terrorists, it's very difficult to assure fair trials.

24. One World Research investigators asked B.S. whether a presumption of innocence existed in Algerian law and practice, and he laughed out loud:

[Laughing:] While the law states that all persons are presumed innocent until proven guilty, in actuality, in Algeria all alleged terrorists are presumed guilty until proven innocent.

25. One possibility for former Guantanamo detainees is that they will be prosecuted (where the government determines allegations are feasible) under various provisions of article 87 of the Algerian penal code, for previous association with groups that are alleged to be connected, affiliated, involved or alleged to be supporting terrorism. One attorney pointed out that it is common practice for authorities to make general allegations of membership in alleged "terrorist groups," such as the Algerian GIA (a radical Islamist insurgent group) without specific evidence. Convictions are routinely obtained on flimsy government accusations.

26. More likely, returned detainees may be prosecuted under Article 87.6 of the penal code, proscribing "terrorist" and "subversive" activities committed *outside* of Algeria, or membership in any group or organization that is believed to be involved in such activities.

Algeria's Record with Returned Guantanamo Detainees as of July 2009

27. Based on our review and discussions with relevant U.S. and Algerian attorneys, One World Research has determined that seven of the eight detainees returned from Guantanamo so far have been charged or will face charges under the Algeria penal code, article 87.6. (Some cases have already been referred to trial, others are in a pre-trial stage.)

28. All eight of the returned detainees appear to have been held in *garde à vue* custody after their return, without attorneys present. And while it appears that all detainees, including the six who were charged, have been released since return, the seven who are facing charges remain under judicial control.
29. As noted above, Algerian attorneys who have worked on these cases indicate that the allegations against detainees appear to be based on the original allegations that were made against them in U.S. custody. It appears that the U.S. allegations may form the basis of the prosecutions, raising the appearance that the Algerian government is prosecuting the returnees "for" the U.S. government.

The Risk of Torture and Mistreatment in DRS Custody

30. It is also important to note that previously returned detainees, as well as returned detainees in coming months and years, are at risk of arrest and interrogation in event of a national security threat or terrorist attack in the future. A small number of bombing attacks on government and civilian targets in Algiers have occurred in recent years, and authorities routinely round up suspected "radical" Islamists in the wake of attacks. Attorneys fear that in the future, in the event of a larger or more spectacular attack, authorities could round up larger numbers of people, and include former Guantanamo detainees among them.
31. If arrested in the event of a future attack, former Guantanamo detainees will face a serious risk of torture in DRS custody. Attorneys interviewed stated that mistreatment and torture of DRS detainees, or threat of it, is commonplace in DRS facilities, especially for "Islamist" detainees or persons suspected of involvement in alleged terrorist or subversive activities. They similarly stated that mistreatment at DRS facilities is ongoing and that torture continues to be a "method they use when they need to" and a "method they use to get information." The attorneys concluded that returnees are at risk of torture and mistreatment whilst in the custody of the DRS.
32. N.K., an attorney, said that torture was widespread in cases alleging terrorism. K.L., another attorney, stated that when DRS arrest a person suspected of links to terrorism, they will "not limit themselves on the methods they use" to get prisoners to confess to alleged activities, citing the use of physical beatings in particular:

*In 95 percent of all cases interrogated by DRS, the person will be tortured. . . .
Well, maybe not 95 percent, but in the majority of cases there will be torture. . . .
. This will be both physical and psychological torture. . . . I have had clients
who suffered the worst forms of torture.*

33. Attorney N.K. indicated that in many cases detainees are forced to sign a statements confessing to violations of Article 87 of the penal code. My team of investigators asked various follow up questions on this point, as follows:

One World Research: How will the detainee be forced to sign confessions?

N.K.: He will be tortured or beaten into signing it.

One World Research: Is it torture, or is it just mistreatment?

N.K.: No, it's really torture. I had a case of a person who worked for an international company who was linked to a group of people who were arrested by the DRS for taking bribes on international contracts—and he was abominably tortured. If torture is happening in these kinds of cases, it is definitely happening for returning detainees. In cases of terrorism, torture is almost automatic.

34. Almost all of the attorneys my team of investigators interviewed spoke of torture as a common cause and effect of the Algerian judiciary's reliance on confessions, in the *procès-verbaux*, to obtain criminal charges against detainees or even to obtain convictions. Attorneys stated, as noted above, that torture and other mistreatment of detainees occurs primarily during the *garde à vue*, but said also that it occurs during subsequent pre-trial detention. The authorities have little concern about any checks or balances that might exist because of the judicial process. As one attorney described it, the DRS is a "rogue wing of the military which is under no judicial control."
35. Attorney T.N. described a method of torture used at the Hydra facility called the *preuve de chiffon*, somewhat like "waterboarding," whereby a prisoner is tied to a table by his arms and feet and with straps over his forehead and chin, water is then poured into the prisoner's mouth, and down his throat, until his stomach is swollen, after which someone sits on the prisoner so the water is painfully forced out. Incidents of sexual abuse have also been disclosed by clients in some cases.
36. Examples of allegations of psychological torture described by attorneys include allegations that DRS officials confined clients in a small space and surrounded them with barking dogs (presumably to frighten them and deprive them of sleep), and allegations that DRS officials regularly threaten detainees or threaten to rape detainees' wives or sisters. Attorneys stated that some detainees have also claimed that they heard the sounds of other prisoners screaming, which attorneys cited as an example of psychological torture. Attorneys also indicated that in some cases detainees are subjected to forced standing and sleep deprivation.

Risk of inhumane detention

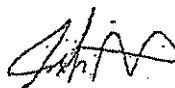
37. Attorneys interviewed stated that detainees, after conviction, will be taken to prisons in which they will be at risk of further mistreatment.
38. Attorneys described the harsh conditions in which their clients have reported being held. Many prisons in Algeria are very old and were built in colonial times. It was consistently reported to my investigators that the conditions in the prisons do not meet international standards. A attorney familiar with the report of the *Commission Nationale Consultative de la Defense des Droits de l'Homme* and a confidential report written by the ICRC stated that this is confirmed in both of these reports.

39. As a baseline problem, there is a severe problem of overcrowding in Algerian prisons, which is exacerbated by the many people who are held in prolonged preventative detention prior to their trials. The clearest example of the violation of international standards given was the size of the cells in which the prisoners are reported to be kept. These conditions were described as being "very far from international standards." Attorneys reported to me that the prisoners are kept in cells with many people, sometimes in cells as small as 27 metres squared for over forty people. Overcrowding results in individual prisoners having only 1.5 or 2 metres squared each to live within.
40. The attorneys interviewed highlighted that "Islamist" prisoners are kept in different conditions of detention in the prisons from other prisoners. They are kept isolated from the main population and are referred to as "Les Speciaux". The conditions for these prisoners were described as "frightening" and are worse than those for the main population. One attorney indicated that the conditions under which prisoners are detained are influenced by who controls the prison. There is an underlying problem, especially with the prisons close to Algiers, of the Ministry of Defense controlling the prisons even though officially they should be run by the Ministry of Justice. This has significant implications for the "Islamist" prisoners who have often come directly from detention by the *Departement du Renseignement et de la sécurité* (DRS), a division of the Ministry of Defense.

CONCLUSION

41. Based on the information included in this declaration, I have concluded that Guantanamo detainees returned from U.S. custody to Algeria face a well-founded fear of persecution, torture, or other mistreatment if returned.
42. If returned to Algeria it is highly likely they will be arrested and taken into the custody of the DRS, charged with violations of Article 87.6 of the penal code, and even if released, will be at risk of torture or mistreatment in the future, either after their conviction or in the event of a national security emergency or terrorist attack in Algeria. If prosecuted, they will be at risk of an unfair trial. As noted above, the charges against the detainees will most likely be based on the very allegations originally provided or inspired by the U.S. government, suggesting that the Algerian government may be prosecuting the returnees in consultation with, or on behalf of, the U.S. government. It is highly likely that, after conviction, they will be kept in inhumane detention conditions in prison.

I swear under penalty of perjury that the above is true and correct to the best of my knowledge.
Signed this 27th day of July, 2009:



John Sifton

APPENDIX A: ARTICLE 87 OF THE ALGERIAN PENAL CODE AND ALGERIA'S RECONCILIATION CHARTER

Attorneys interviewed have predicted accurately the returned Guantanamo detainees will likely be prosecuted under provisions of the Algerian Penal Code, Section 4, entitled "About Crimes Qualifying as Terrorist or Subversive Acts." Article 87 is the applicable article.

The first paragraphs of Article 87 define "terrorist or subversive acts" broadly, for the purposes of interpretation within and outside Algeria:

Terrorist and subversive acts are all acts directed at the safety of the state, unity of the territory, the stability and normal functioning of the institutions, with the main purpose of being:

- *to disseminate terror at the heart of the population and to create a climate of insecurity, while bringing psychological or physical harm to people or putting their lives, liberty or security in danger, or while harming their well-being;*
- *to hold up traffic or get in the way of freedom of movement on the roads and to occupy public places by crowding.*
- *to attempt [an attack on] the symbols of the Nation and of the Republic and to violate sepulchers [graves or burial sites];*
- *to bring harm to the means of communication and transport, to private and public property, and to take possession of them or to occupy them unduly;*
- *to bring harm to the environment or to bring into the atmosphere, on the ground, underground, or in the waters, including the territorial waters, a substance which will put in danger the health of the people or the animals or the natural environment;*
- *to stand in the way of the work of the public authorities or to the exercise of free religion and to public liberties, as well as to the functioning of the establishments responsible for public service;*
- *to stand in the way of the functioning of public institutions, or to bring harm to the life or property of their agents, or to interfere with the application of laws and regulations.*

Further, Article 87.3 provides that:

Anyone who creates, founds, organizes or directs any association, body, group or organization whose mission or activities fall under the provisions of article 87 of the present ordinance are to be punished with a sentence of life in prison.

All membership or participation, in whatever form, in associations, bodies, groups or organizations at which the present article is directed against, with knowledge of their activities or missions, is to be punished by a prison sentence of ten to twenty years.

In addition, articles 87.4 and 87.5 provide for punishments for any person who "makes apologies for, encourages, or finances, by any means whatsoever," or who "knowingly reproduces or disseminates documents, print-outs, or directions which make apologies for" the actions defined in the overarching section—i.e., any of the acts described by the various provisions of article 87. Article 87.7 also criminalizes various uses of weapons and explosives.

The specific provision about which attorneys raised the most serious concerns was Article 87.6. The article has two paragraphs:

All Algerians who are active in or who are enrolled in a terrorist or subversive association, group or organization abroad, whatever their form or their denomination, even if this associate, group or organization's actions are not directed towards Algeria, are punished by a prison sentence of ten to twenty years and by a fine of 500,000 DA to 2,000,000 DA.

When the actions listed in the preceding paragraph have the object of harming Algerian interests, the punishment is life in prison.

Almost all of the attorneys interviewed said that persons returned to Algeria connected to terrorist groups outside of Algeria—however vague the allegations of a connection—could be charged under the first paragraph of 87 above. Attorneys provided several examples of such cases, including Algerians deported from the United Kingdom and Canada.

The attorneys interviewed for this report said that the provisions above, taken separately and together, offer the government of Algeria an arsenal of legal options to utilize in prosecuting persons who are suspected of involvement in terrorist activities in countries outside of Algeria.

Attorneys were adamant that the very fact that suspects had travelled abroad to countries like Pakistan, Afghanistan, or Chechnya, and had later been arrested, could be used as a reason to convict them.

Attorney K.L. summed up the overarching concern:

Article 87. . . says that every Algerian who belongs to a terrorist organization working abroad will be prosecuted. . . The fact of being transferred from a foreign government works against them. The charge will be for belonging to an active group abroad. There is little chance they will not go to prison.

Algeria's Reconciliation Charter

All of the attorneys interviewed agreed that the 2006 reconciliation charter would not apply to the major possible criminal charges that might be invoked against returnees under article 87.6 of the penal code. The attorneys indicated that the charter, by specific terms, only applies to the specific violations noted in the second paragraph of article 87.6, i.e., those actions that have the object of "harming Algerian interests."

EXHIBIT 4

الجمهورية الجزائرية الديمقراطية الشعبية
وادي الجوز

محكمة وادي الجوز

2009/04/14

2009/04

أشعار بلحاجة القضية أمام غرفة الاتهام

البلادي أمام لدى مجلس قضاء الجزائر

السكن: مقر بلدية الجوز اثر الوسيطى الجزائر
تطبيقا لفصل المادة 182 من قانون الاجراءات الجزائية نذكركم بان ملف القضية
المفتوح على متصفين محكمة سادس امعهد الخزفة التاسعة
ضد الدعوى الثالثة / 09
المحكم (09) لاختراط في جماعة ان مائة استيط بالبحار
سوف يحضرون امام غرفة الاتهام لدى مجلس قضاء الجزائر بتاريخ 2009/04/14
على الساعة التاسعة (09) صباحا للنظر في امر ذلك الوضع تحت الاتهام
الاجراءات الدعوى تحسب غرفة الاتهام لتحدد في غرفة المشورة يحضرون
مجلس القادة العامة نظام الاجراءات وهي بغتابة اشعار وفي حالة ما لم تكن لديكم محام
تمكنكم لتكم سكرتير لدى كتابة ضبط غرفة الاتهام لدى مجلس قضاء الجزائر وهذا
تطبيقا لفصل المادة 182 من قانون الاجراءات الجزائية

حرر بالكتابة العامة في 05 / 04 / 2009



People's Democratic Republic of Algeria
Justice Ministry

Judiciary Council of Algeria
Prosecutor's Office
Indictment Chamber
2009/04/14
Case Number: 2009/909

Declaration of the Presentation of this Case to the Indictment Chamber

The Prosecutor for the Algerian Judiciary Council

To: Mr. Belbacha Mohamed
Residing: In the Borough of Central Algiers, Algeria

Implementing Article 182 of the Penal Code Procedures, we inform you that this case file is open at the level of the Sid Mohamed Court, Room 9, to the named, Belbacha Ahmed.

The reason: joining a terrorist group active abroad.

Scheduled for the Indictment Chamber of the Judiciary Council of Algeria on April 14, 2009 at 9 AM to look into putting him under accusation.

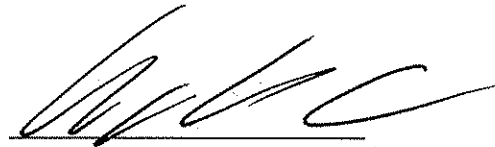
The procedures for this sitting of the Court for the Indictment Chamber will be held in the room of consultancy in the presence of the Prosecutor and the lawyers for the other parties and this is just to give official notice. If you do not have a lawyer, you should forward a written statement which will be kept at the office of the Indictment Chamber for the Algerian Judiciary Council, and that is in accordance with Article 182 of the Penal Code Procedures.

Written at the office of the Attorney General: 2009/04/05
Deputy Attorney General

PROTECTED INFORMATION – FILED UNDER SEAL**CERTIFICATE OF SERVICE**

I certify that on this 6th day of August, 2009, I caused to be served overnight mail one true and correct copy of the foregoing appendix addressed to the following:

J. Wells Dixon
Pardiss Kebriaei
Center for Constitutional Rights
666 Broadway, 7th Floor
New York, NY 10012



AUGUST E. FLENTJE
Attorney

PROTECTED INFORMATION – FILED UNDER SEAL