

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

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<b>ISA ALI ABDULLA ALMURBATI, <i>ET AL.</i>,</b>	)	
	)	
<b>Petitioners,</b>	)	<b>Civil Action No. 04-1227 (RBW)</b>
	)	
<b>v.</b>	)	
	)	
<b>GEORGE WALKER BUSH, <i>ET AL.</i>,</b>	)	
	)	
<b>Respondents.</b>	)	
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**MEMORANDUM OF LAW IN SUPPORT OF MOTION TO COMPEL**

**INTRODUCTION**

By Respondents' own admission, 20 pages of presumptively classified notes that were taken by counsel for Petitioners *Almurbati, et al.* (the "Almurbati Petitioners") during client interviews conducted at Guantanamo Bay appear to have been "lost in the mail." Respondents have cited national security concerns as the rationale for imposing onerous conditions upon *habeas* counsel with respect to client communications. At the same time, the government sent counsel's attorney-client privileged interview notes (which the government itself deems classified) from Guantanamo Bay to Washington, D.C. via regular U.S. mail, as if those notes were a postcard. The government's carelessness has caused significant harm.

The lost notes were the sole written record of the meetings that counsel held with Isa Ali Abdulla Almurbati. As such, counsel's visit to Guantanamo Bay has been rendered of little

value with respect to Mr. Almurhati. Naturally, a return visit to Guantanamo Bay must be scheduled shortly.

Respondents do not take issue with scheduling a return visit. However, they refuse to reimburse counsel for the costs that will be incurred in making this visit; such costs include airfare from New York and, most significantly, the expense of securing an interpreter's services. Instead, Respondents have offered to provide only air transportation from Jacksonville, Florida to Guantanamo Bay (counsel's offices are in New York, not Jacksonville). This offer is utterly inadequate, considering that the return visit is necessitated by nothing other than Respondents' own negligence.

The *Almurhati* Petitioners respectfully request that the Court compel Respondents to reimburse counsel for the *Almurhati* Petitioners for all expenses that will be incurred during the return visit to re-interview Mr. Almurhati. The *Almurhati* Petitioners also seek an order compelling Respondents to produce an affidavit detailing the chain of custody of the privileged and presumptively classified lost notes from the time the notes were turned over by the *Almurhati* Petitioners' counsel to Department of Defense personnel at Guantanamo Bay, and describing the efforts that have been made to locate the notes.<sup>1</sup>

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<sup>1</sup> Pursuant to Local Rule 7(m), counsel for the *Almurhati* Petitioners requested that Respondents produce an affidavit detailing the chain of custody of the lost notes, coordinate a return visit to Guantanamo Bay and reimburse counsel for the costs of making such a visit. Respondents agreed to coordinate a return visit, but did not agree to provide an affidavit and, as discussed, agreed to cover only a small fraction of the costs that will be incurred in making the return visit.

## DISCUSSION

### **I. Factual Background**

#### **A. The Access Procedures Require that *Habeas* Counsel Turn Over Interview Notes to the Government**

Respondents took the position that it would be unacceptable, as a matter of national security, for *habeas* counsel to retain any notes taken in a client interview at Guantanamo upon the completion of the interview or even during a brief break from the interview. Further, Respondents insisted that, at the conclusion of any counsel's visit to Guantanamo, all notes taken during the visit be provided to counsel's military escort and that counsel not keep copies of any notes. The rationale for Respondents' positions, apparently, was that any notes taken by counsel during client interviews would contain presumptively classified information and that counsel could not adequately protect such information.

In recognition of Respondents' concerns, the Court ordered *habeas* counsel to take the unusual step of providing notes containing attorney-client communications to an opposing party. *See Revised Procedures for Counsel Access to Detainees at the U.S. Naval Base in Guantanamo Bay, Cuba* (the "Access Procedures"), Section VI.

#### **B. Counsel for the *Almurbati* Petitioners Complied with the Access Procedures**

From October 25, 2004 through October 28, 2004, Stewart D. Aaron, Mark S. Sullivan and Joshua Colangelo-Bryan, counsel for the *Almurbati* Petitioners, conducted initial client interviews in Guantanamo Bay. Declaration of Joshua Colangelo-Bryan ("Colangelo Decl.") at ¶ 2. On each day during this period, Joshua Colangelo-Bryan conducted interviews with Mr. Almurbati. Mr. Colangelo-Bryan took extensive notes during these interviews which, naturally, were far-ranging in scope. Pursuant to the Access Procedures, Mr. Colangelo-Bryan turned over his interview notes to counsel's military escort after each interview session. *Id.* at ¶ 3.

On October 28, 2004, at the conclusion of counsel's visit to Guantanamo Bay, counsel's military escort sealed in an envelope all of the presumptively classified notes taken during the interviews with Mr. Almurbati. Mr. Colangelo-Bryan wrote his name and business address on the envelope along with the name "Isa Ali Abdulla Almurbati." This envelope was taken by counsel's military escort with five other envelopes of presumptively classified interview notes; each envelope contained notes of interviews with one of the six *Almurbati* Petitioners. *Id.* at ¶ 4. Naturally, counsel for the *Almurbati* Petitioners were not permitted to make copies of any of these notes. *Id.* at ¶ 5.

**C. The Government Lost Counsel's Notes**

On November 16, 2004, Mr. Colangelo-Bryan and Mr. Sullivan visited the secure area created by Respondents in Virginia. *Id.* at ¶ 6. The Court Security Officer at the facility provided to Mr. Colangelo-Bryan and Mr. Sullivan five envelopes containing notes from counsel's visit to Guantanamo Bay. Mr. Colangelo-Bryan inquired as to the location of the sixth envelope, containing the notes from his meetings with Mr. Almurbati. The Court Security Officer replied that she had received only five envelopes. *Id.* at ¶ 7. On that day, Mr. Colangelo-Bryan requested that the Court Security Officer and counsel for Respondents make efforts to locate the missing classified notes. *Id.* at ¶ 8.

One month later, on December 17, 2004, counsel for Respondents sent a letter to Mr. Colangelo-Bryan regarding the lost notes. *Id.* at ¶ 9 (Ex. A thereto). Counsel for Respondents wrote that the government had not been able to locate the notes. Counsel wrote further that the government had not mailed the notes to the secure facility via certified mail, but evidently by regular mail. Quite notably, counsel also reported that the government's investigation had led to the "possible conclusion that the notes simply got lost in the mail."

Respondents, appreciating in some small measure the harm caused to the *Almurbati* Petitioners by their negligence, offered in their letter to arrange a return visit to Guantanamo Bay and to provide air transportation from Florida to Guantanamo Bay. However, Respondents did not agree to reimburse counsel for any other relevant costs. This offer is grossly insufficient.

## **II. The *Almurbati* Petitioners Should not Bear any Costs for a Return Visit**

Counsel for the *Almurbati* petitioners must – as Respondents concede – conduct a second series of interviews with Mr. Almurbati. As is plain, counsel’s return visit is necessitated solely by Respondents’ inexplicable decision to send presumptively classified, attorney-client privileged notes via regular mail, and not by any action taken by counsel for the *Almurbati* Petitioners. Respondents’ ill-advised decision is strikingly inconsistent with the stringent restrictions placed on *habeas* counsel in the Access Procedures and, in fact, appears to violate Department of Defense regulations that are cited in the Access Procedures.<sup>2</sup>

Counsel for the *Almurbati* Petitioners should not have to suffer any further financial consequences due to Respondents’ decision to ignore the very Access Procedures and regulations that they insisted govern the parties’ conduct in this matter. The government has lost classified and privileged documents and rightly should pay for its own negligence.

By offering to provide only air transportation from Florida to Guantanamo Bay, Respondents show that they are unwilling to do so. By far the greatest out-of-pocket expense that counsel would incur during a return visit would be for the services of an interpreter. In addition, the costs of round-trip ground and air transportation from New York to Florida are significant. No offer has been made to cover these costs or those that will be incurred for accommodations and meals.

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<sup>2</sup> See, e.g., Access Procedures, Section VI (citing DOD Regulation 5200.1-R, which provides that secret or confidential information generally must be transmitted by means at least as secure as U.S. Postal Service certified mail or registered mail. Regulation DOD 5200.1-R 7-103, 7-102).

While research (understandably) reveals no case addressing facts identical to those relevant here, it is well-settled that the Court enjoys broad discretion to impose monetary and other sanctions for litigation misconduct. *See, e.g., Webb v. District of Columbia*, 146 F.3d 964, 971, 975-76 (D.C. Cir. 1998); *Shepherd v. American Broad. Companies Inc.*, 62 F.3d 1469, 1474-75 (D.C. Cir. 1995); *Sacramona v. Bridgestone/Firestone, Inc.*, 106 F.3d 444, 446-447 (1st Cir. 1997). Further, travel costs (and even attorneys' fees) are routinely awarded where one party incurs costs and expends time in vain due to another party's actions. *See, e.g., West v. West*, 126 F.R.D. 82, 83 (N.D. Ga. 1989) (awarding attorneys' fees and travel expenses for two days' travel where noticed depositions were not held for failure of witnesses to appear); *Starlight Int'l, Inc. v. Herlihy*, 186 F.R.D. 626, 640 (D. Kan. 1999) (awarding expenses incurred during counsel's trip to London for a deposition that was ultimately fruitless because of defense counsel's litigation misconduct).

That Respondents should have agreed, and now should be compelled, to assume all costs associated with a return visit by counsel is all the more clear given that, even by doing so, Respondents could hardly make whole Mr. Almurbati or counsel for the *Almurbati* Petitioners. In fact, the government's behavior has resulted in a variety of harms for which there is no remedy. This too militates in favor of compelling Respondents to assume all relevant costs.

First, the loss of the interview notes is likely to have a greatly detrimental impact on the fledgling relationship between counsel and Mr. Almurbati. Prior to counsel's first visit, Mr. Almurbati had been held virtually *incommunicado* for several years. Presumably, Mr. Almurbati was subject to interrogation during that time, as are many Guantanamo Bay detainees, according to public reports. Under such circumstances, the process by which an American attorney develops an appropriate client relationship with a detainee such as Mr. Almurbati is a delicate

one, especially because the attorney must ask many of the same questions that interrogators presumably have been asking. Now, in addition to those challenges, counsel will be forced to try again to discuss, in the same level of detail, all subjects discussed during counsel's first visit. Counsel will be able to offer only one reason as to why this is necessary, *i.e.*, counsel was required to give privileged interview notes to the very government officials who are responsible for Mr. Almurbati's incarceration, and those notes were then "lost in the mail." It may well be nearly impossible for Mr. Almurbati to believe that his lawyer is being honest with him upon hearing this, or to trust his lawyer thereafter. In this manner, an attorney-client relationship that is being formed under what are already the most challenging of circumstances will be made all the more difficult.

Second, counsel have no written record of meetings with Mr. Almurbati because, in strict accordance with the Access Procedures, counsel never made any writings regarding those meetings other than the lost notes.<sup>3</sup> As such, counsel are not able to conduct any factual investigation regarding Mr. Almurbati based on the interviews conducted with him. Indeed, counsel are not able even to submit interview notes to the Privilege Team for classification review, the prerequisite for any factual investigation; it is noted that the Privilege Team review of the interview notes which were not lost took nearly a month, despite the fact that such reviews are to be completed in seven business days pursuant to the Access Procedures.<sup>4</sup> Colangelo Decl. at ¶ 10. Obviously, there is no remedy with respect to the time that has been lost in conducting factual investigation relevant to Mr. Almurbati.

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<sup>3</sup> Any suggestion that counsel should attempt to recreate the lost notes at the secure area would be misguided, considering that counsel took approximately 20 pages of detailed notes during four separate interview sessions that took place two months ago.

<sup>4</sup> Similarly, we understand that counsel in *Habib*, (02-CV-1130) (CKK), requested a Privilege Team review of motion papers submitted on November 23, 2004 and, as of December 21 2004, the review evidently had not been completed.

Third, documents created by counsel that contain information protected by the attorney-client privilege are unaccounted for and could be in the possession of virtually anyone. This violation of the sanctity of the attorney-client relationship is particularly galling – and all the more potentially damaging – considering the highly sensitive nature of the Guantanamo Bay representation. Naturally, at present one cannot know what tangible harm might be suffered by Mr. Almurbati or counsel should these notes fall into the wrong hands, although one can imagine a myriad of potential harms (merely by way of example, the notes could end up posted on the Internet).

Finally, there will be no compensation for the value of counsel's time in making a return trip to Guantanamo Bay. Counsel for the *Almurbati* Petitioners are working on a *pro bono* basis and have already been forced to needlessly expend time in an attempt to resolve this matter with the government and now to draft the instant motion. The time that will be spent on a return trip to Guantanamo Bay, duplicating efforts already made, will have a negative financial effect on counsel, even if counsel's expenses are reimbursed by Respondents.

In sum, the government failed to follow its own procedures by sending, via regular mail, presumptively classified documents that were created during meetings with an individual whom the government has deemed an enemy combatant. As a result, counsel for the *Almurbati* Petitioners – who have devoted hundreds of *pro bono* hours to, and have made considerable non-reimbursed expenditures in connection with, this matter – must return to Guantanamo Bay to re-interview a client whose trust in his counsel will likely be severely eroded.

In light of this, it is only equitable for the government to remedy at least some of the damage resulting from its carelessness by reimbursing counsel for all reasonable costs associated with the return visit. That Respondents are not able to remedy all harm that counsel and Mr.

Almurbati have suffered and may suffer, underscores that this is the least that Respondents should be made to do. Indeed, it would be entirely inequitable to force counsel for the *Almurbati* Petitioners – who have been in full compliance with the Access Procedures – to incur any expenses for a return visit necessitated only by the government’s negligence.

## CONCLUSION

For the reasons stated herein, Petitioners respectfully request that the Court issue an order compelling Respondents to: (i) produce an affidavit detailing the chain of custody for the missing notes from the time the notes were turned over to Department of Defense personnel by counsel for the *Almurbati* Petitioners at Guantanamo Bay and detailing all efforts Respondents have made to locate the notes, and (ii) reimburse counsel for the *Almurbati* Petitioners for the costs of making a return trip to Guantanamo Bay, including the costs of transportation, lodging, and meals for one attorney and one interpreter (for three nights) and the costs of an interpreter's services (for two days' travel time and two days' interpretation).

Dated: Washington, D.C.  
December 23, 2004

Respectfully submitted,

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