

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

**ELHAM BATTAYAV,**

*Petitioner/Plaintiff,*

v.

**GEORGE W. BUSH,**

President of the United States  
*et al.,*

*Respondents/Defendants.*

Civil Action No.1:05-cv-714 (RBW)

**PETITIONER'S OPPOSITION TO GOVERNMENT'S MOTION  
TO EXAMINE PRIVILEGED COMMUNICATIONS SEIZED  
WITHOUT COURT APPROVAL OR NOTICE TO COUNSEL**

The government's motion should be denied. The materials in question are privileged attorney-client communications. As a matter of fundamental principle, and by specific order of this Court, those communications were supposed to be secure against seizure and review by the government. The government's seizure and review of those communications, without prior approval by the Court and notice to counsel, was illegal. The government's failure to disclose its actions to the Court and counsel until nearly a month after the fact is unacceptable. The government has destroyed a fundamental privilege and shattered any confidence the prisoners might still have had that their communications with their counsel would be safe from government inspection.

Even if the seizure and review were not a plain violation of this Court's order, the government's actions nonetheless would have been unlawful because the law requires the government to make a specific, *individualized* showing that there is a sufficiently compelling

justification for invading the attorney-client privilege. Here, the government has presented no specific, individualized evidence that petitioner's privileged communications with his attorneys should be invaded. Accordingly, the Court should order petitioner's legal papers be returned immediately or, alternatively, should impound the seized communications until it can decide whether further review of any of the communications is to be allowed. If the Court decides to allow any further review, the government should not be allowed to use such review as a fishing expedition. The review should be conducted in the first instance by a magistrate judge or a special master without the involvement of the military or the Department of Justice.

### **ARGUMENT**<sup>1</sup>

#### **A. No Exigent Circumstances Required the Government to Act Without First Seeking Approval of the Court and Notifying Counsel.**

On June 10, 2006, the military reported that three prisoners at Guantánamo Bay had been found dead in their cells.<sup>2</sup> The military reported the prisoners' deaths as suicides.<sup>3</sup>

In his news conference announcing the prisoners' deaths, Navy Rear Adm. Harry B. Harris, the commander of Joint Task Force–Guantánamo, denounced the deaths as an act of

---

<sup>1</sup> The government argues in a footnote to its motion that the Detainee Treatment Act divested the Court of jurisdiction over all of the Guantánamo habeas cases. (Mot. at 2 n.3.) The Supreme Court, however, has held that “§ 1005(e)(1) does not strip federal courts’ jurisdiction over cases pending on the date of the DTA’s enactment.” *Hamdan v. Rumsfeld*, slip op. 20 n.15. By its filing of the instant motion, the government implicitly acknowledges the Court’s continuing jurisdiction.

<sup>2</sup> Sara Wood, *Three Guantanamo Bay Detainees Die of Apparent Suicide*, June 10, 2006, available at [http://www.defenselink.mil/news/Jun2006/20060610\\_5379.html](http://www.defenselink.mil/news/Jun2006/20060610_5379.html).

<sup>3</sup> *Id.*

warfare: “I believe this was not an act of desperation, but an act of asymmetric warfare aimed at us here at Guantánamo,” he said. “We have men here who are committed jihadists. They are dangerous men and they will do anything they can to advance their cause.”<sup>4</sup> Colleen Graffy, Deputy Assistant Secretary of State for Public Diplomacy, called the deaths “a good PR move.”<sup>5</sup>

Admiral Harris requested an “investigation” by the Naval Criminal Investigative Service (NCIS) to establish the “official cause and manner of death.”<sup>6</sup> Now, nearly a month later, the government has disclosed that, between June 10 and June 18, as part of the investigation, NCIS seized and examined over half a ton of written communications between Guantánamo prisoners and their lawyers. The government claims that it seized these materials because notes found in the cells of the dead prisoners suggested the illicit use of privileged materials for communications among the prisoners.

The government seized and examined these privileged communications over an eight-day period without Court approval or supervision, and without prior notice to the prisoners’ counsel, and then waited nearly a month before disclosing its actions to the Court and counsel. The government’s seizure and examination of these materials violated not only this Court’s orders directing the government to respect the attorney-client privilege but also the Protective Order entered by this Court to ensure the protection of that privilege.

---

<sup>4</sup> *Id.*

<sup>5</sup> Peter Graff, *U.S. Rows Back From Guantanamo Suicide Comments*, June 12, 2006 (Reuters), available at <http://www.cageprisoners.com/articles.php?id=14438>.

<sup>6</sup> Reuters, *Three Guantanamo Detainees Die, US Army*, June 11, 2006. available at <http://www.cageprisoners.com/articles.php?id=14371>.

Having belatedly disclosed its illegal seizure and inspection of these privileged materials, the government now asks the Court to condone its actions and permit it to retain the seized materials and examine them even more closely. It comes as no surprise that the government sought judicial sanction for its actions only after habeas counsel, informed of the government's actions by their clients, began to seek relief from the Court.<sup>7</sup> The government obviously foresaw a deluge. True to the adage that the best defense is a good offense, it now seeks to preempt further requests for relief by obtaining blanket *post hoc* court approval of its actions.

The fact that Petitioners' legal papers were seized over an eight-day period demonstrates that no exigent circumstances required the government to act without first seeking the approval of the Court and notifying counsel. At the very least, a conference call with counsel and the Court on June 10, the day of the prisoner deaths, could have been arranged. The Department of Justice either approved the military's seizure of privileged legal materials without notice or court approval, or failed to have in place procedures to prevent what happened from occurring. The Department's failure to disclose the government's actions until the *Abdullah* motion forced its hand suggests that the Department was a full partner in the military's breach of the privilege.

**B. The Government Has No Authority To Seize Petitioner's Legal Papers.**

This Court has ruled that detainees held at Guantánamo have a right to representation by and access to counsel. It has recognized the privilege that applies to communications

---

<sup>7</sup> Mot. To Modify Stay To Direct Resp'ts To Return Impounded Privileged Legal Material and for Other Relief, *Abdullah v. Bush*, No. 05-00023(RWR) (filed July 5, 2006). The

between the detainees and their lawyers, and it has gone to great lengths to protect that privilege by creating access procedures protecting the confidentiality of attorney-client communications.

Nonetheless, the government committed a massive breach of the privilege and violated the court-ordered procedures in this case. Now the government asks the Court to condone an even more significant breach of the privilege by permitting it to review further the over half-ton of legal materials that it has seized. This Court should not approve the request. At a minimum, the Court should not allow further review except by a magistrate or special master, and it should not allow review absent individualized showings by the government that the seizure and review of the materials *as to each detainee* is justified.

**1. The Government Has Long Sought To Prevent the Guantánamo Prisoners From Having the Assistance of Counsel.**

When it comes to undermining the attorney-client relationship at Guantánamo, the government is a repeat-offender. The Court should consider the government's recent actions, and its instant motion, in light of its fierce five-year effort to undermine that relationship.

Most of the prisoners at Guantánamo have been held there for nearly five years. Four-and-a-half years ago, when the first next-friend habeas petitions were filed on behalf of prisoners, the government responded by asserting that the prisoners had no right to seek relief in federal court and no rights for a federal court to enforce. While these issues were being litigated, the government denied the prisoners access to counsel.

---

government states that its instant motion is an opposition to the *Abdullah* motion. U.S. Mot. at \_n.1.

In 2004, the Supreme Court rejected “the proposition of Guantánamo Bay as a legal black hole.”<sup>8</sup> Unfazed, the government insisted that “detainees’ access to counsel existed purely at the pleasure of the government, with restrictions to be imposed as it saw fit.”<sup>9</sup> Judges of this Court “flatly rejected” the government’s position and its effort to impose “significant restrictions on attorney-client communications, including real-time monitoring of counsel meetings with detainees.”<sup>10</sup>

## **2. Petitioners’ Attorney-Client Materials Cannot Be Seized and Reviewed Without an Individualized Showing of Probable Cause.**

The attorney-client privilege is “the oldest of the privileges for confidential communications known to the common law.”<sup>11</sup> Its purpose is to “encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice.”<sup>12</sup> As this Court has recognized in the context of the Guantánamo litigation, “[t]he privilege that attaches to communications between counsel and client has long held an exceptional place in the legal system of the United States.”<sup>13</sup>

---

<sup>8</sup> *Adem v. Bush*, 425 F. Supp. 2d 7, [redacted] (D.D.C. 2006) (citing *Rasul v. Bush*, [cite]).

<sup>9</sup> *Id.* at \_\_.

<sup>10</sup> *Id.* at 11–12.

<sup>11</sup> *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981).

<sup>12</sup> *Swidler & Berlin v. United States*, 524 U.S. 399, 403 (1998); *see also Lanza v. State of New York*, 370 U.S. 139, 143–44 (1962) (“[I]t may be assumed that even in a jail, or perhaps especially there, the relationships which the law has endowed with particularized confidentiality must continue to receive unceasing protection.”).

<sup>13</sup> *Al Odah*, 346 F. Supp. 2d at 10.

Nowhere is the effectuation of the privilege more important than in the context of pre-trial detention. “An inmate’s need for confidentiality in his communications with attorneys through whom he is attempting to redress his grievances is particularly important.”<sup>14</sup> For such prisoners, “contact with an attorney and the opportunity to communicate privately is a vital ingredient to the effective assistance of counsel and access to the courts.”<sup>15</sup> Even for prisoners convicted of crimes, the Supreme Court has held, “[r]egulations and practices that unjustifiably obstruct the availability of professional representation or other aspects of the right to access to the courts are invalid.”<sup>16</sup>

Seizure of legal papers is particularly egregious because it strikes at the heart of the attorney-client relationship and interferes with the inmate’s access to the courts. “The taking of legal papers will often (though perhaps not always) interfere with an inmate’s right of access to the courts.... [T]he destruction or withholding of inmates’ legal papers burdens a constitutional right, and can only be justified if it is reasonably related to a legitimate penological interest.”<sup>17</sup> The government’s vague allegations of notes found in a deceased’s cell written by another prisoner cannot qualify as a “legitimate penological interest” in

---

<sup>14</sup> *Bach v. Illinois*, 504 F.2d 1100, 1102 (7th Cir. 1974); *see also Johnson-El v. Schoemehl*, 878 F.2d 1043, 1051 (8th Cir. 1989) (“Pretrial detainees have a substantial due process interest in effective communication with their counsel and in access to legal materials. When this interest is inadequately respected during pre-trial confinement, the ultimate fairness of their eventual trial can be compromised.”).

<sup>15</sup> *Bach*, 504 F.2d at 1102.

<sup>16</sup> *Procunier v. Martinez*, 416 U.S. 396, 419 (1974).

<sup>17</sup> *Goff v. Nix*, 113 F.3d 887, 892 (8th Cir. 1997) (internal citations omitted); *see also Simmons v. Dickhaut*, 804 F.2d 182, 183–84 (COURT?); *Ruiz v. Fisher*, 165 F.3d 28, \_\_\_ (6th Cir.

seizing *all* legal documents from *all* detainees. Seizing legal papers interferes with a detainee's access to courts and chills the giving, receiving, and continued possession of communications from attorney to client, particularly when seized without notice to the detainees' attorneys or the court.

This Court has recognized that Petitioners – who have not been tried and who seek the opportunity through their counsel to challenge the basis of their detention – have a right to counsel and are entitled to a confidential relationship with their counsel. Over the government's objections, “[t]he Court [found] that Petitioners are entitled to be represented by counsel.”<sup>18</sup> Thus, “the Court determine[d] that the government is not entitled to unilaterally impose procedures that abrogate the attorney-client relationship and its concomitant attorney-client privilege covering communications between them.”<sup>19</sup> Yet the government has decided, in the teeth of this decision, “to unilaterally impose procedures that abrogate the attorney-client relationship and its concomitant attorney-client privilege covering communication between them.”<sup>20</sup>

To give meaning to the attorney-client privilege in this context, the Court implemented Access Procedures which created avenues of confidential communication between detainees and their attorneys by laying the ground rules for in-person meetings, and

---

1998); *Wright v. Newsome*, 795 F.2d 964, 968; *Carter v. Hutto*, 781 F.2d 1028, 1031–32 (4th Cir. 1986); *Hiney v. Wilson*, 520 F.2d 589, 591 (2d Cir. 1975).

<sup>18</sup> *Al Odah*, 346 F. Supp. 2d at 5.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

for written communication between these parties. The government sought the ability to monitor these communications, but that request was squarely rejected by the Court.

The government's actions here are a plain violation of the terms of the Protective Order and accompanying Access Procedures. The government does not attempt to justify its actions under the Protective Order, but rather admits that the seized materials "will likely include some number of attorney-client communications potentially subject to attorney-client privilege."<sup>21</sup>

But the government's unilateral abrogation of the privilege would have been unlawful even if it had not directly violated a Court order. Abrogation of the attorney-client privilege in any context requires the government to make a specific, *individualized* showing that there is sufficiently compelling justification for invading the privilege. For example, where the government invokes the crime-fraud exception to the attorney-client privilege, it bears the burden of making an adequate showing that the exception applies – i.e., that *that* client "made or received the otherwise privileged communication with the intent to further an unlawful or fraudulent act," and actually carried out that act.<sup>22</sup> Similarly, when the government seizes materials from a location that likely contains privileged papers, that

---

<sup>21</sup> (Mot. at 9.)

<sup>22</sup> *In re Sealed Case*, 107 F.3d 46, 49 (D.C. Cir. 1997); *see also Doe v. United States*, No. \_\_\_, 2003 WL 22879314 (2d Cir. Dec. 4, 2003) (reversing contempt order where government failed to meet burden of showing that crime-fraud exception applied); *In re Richard Roe, Inc.*, 68 F.3d 38, 40 (2d Cir. 1995) (requiring a showing of probable cause to believe that a crime or fraud has been attempted or committed and that attorney-client communications were used to further that crime or fraud); *In re Grand Jury Subpoenas Duces Tecum*, 798 F.2d 32, 34 (2d Cir. 1986) (reversing civil contempt order because the government did not satisfy its burden of showing that the crime-fraud exception applied to the documents the corporation failed to produce).

seizure must be supported by probable cause and a warrant, and it still must employ appropriate means of screening out privileged materials.<sup>23</sup>

The government has not cited any cases that suggest the privilege may be invaded without an *individualized*, sufficiently rigorous showing that materials of a particular client or particular attorney are likely to have been abused in furtherance of a crime.<sup>24</sup> Even when such documents will be reviewed *in camera* by the court – and not by the government – “the judge should require a showing of a factual basis adequate to support a good faith belief by a reasonable person that *in camera* review of the materials may reveal evidence to establish the claim that the crime-fraud exception applies.”<sup>25</sup>

### **3. The Government Has Made No Such Individualized Showing.**

The government has presented no specific evidence that any of Petitioners have misused their attorney-client materials. Indeed, the government does not even purport to do so. Four or five documents seized from just a few prisoners cannot justify seizing over half-a-ton of privileged materials from hundreds of prisoners.

These documents, moreover, offer little support for the government’s position that attorney-client materials are being misused – let alone specific evidence that any of Petitioners have misused such materials. The initial documents cited by the government

---

<sup>23</sup> See, e.g., *United States v. Stewart*, 2002 WL 1300059 (S.D.N.Y. June 11, 2002).

<sup>24</sup> See, e.g., *United States v. Skeddle*, 989 F. Supp. 890, 894 (N.D. Ohio 1997) (permitting review of attorney-client materials “[i]n light of the finding of probable cause that had preceded the issuance and execution of the warrant”); *United States v. Grant*, No. 04 CR 207, 2004 WL 1171258, at \*2 (S.D.N.Y. Dec. 14, 1982) (documents “seized pursuant to a valid warrant, which was based upon a [judicial] finding of probable cause”).

<sup>25</sup> *Zolin*, 491 U.S. at 572 (quotations and citations omitted).

were found either in the possession of one of the deceased or were written by one of the deceased. And the additional documents are telling in what they reveal – not a single inappropriate document was found in an attorney-client envelope.

First, the document labeled “FOUO” is a red herring. “FOUO” or “For Official Use Only” stamps are *not* classification designations; documents so-labeled are not necessarily sensitive in any manner. “FOUO” is nothing but an internal Department of Defense designation whose purpose is to determine whether a particular document may be released to the public under the Freedom of Information Act. “The abbreviation ‘FOUO’ is used to designate *unclassified* portions that contain information that may be exempt from mandatory release to the public under [FOIA] ....”<sup>26</sup> The designation is specifically “not authorized as an anemic form of classification to protect national security interests”<sup>27</sup> and in fact “is, by definition, unclassified.”<sup>28</sup> The Protective Order does not prevent prisoners from being in possession of FOUO documents; such documents by definition represent no security risks, and there is therefore no reason why a prisoner should not legitimately be in possession of such documents.

Second, the document that is marked with a crossed-out “SECRET” stamp is surely *not* a classified document and therefore should be of no concern to NCIS investigators. (Because the government failed to provide counsel with copies of the documents it relies upon for the instant motion, counsel can only make an educated guess about the nature of the

---

<sup>26</sup> DoD Regulation 5200.1: C5.2.7.1.1.3 (emphasis added).

<sup>27</sup> *Id.* 5400.7-R: C4.1.1.

formerly “SECRET” document.) Based on counsel’s experience with handling the documents in these cases, it seems quite likely that the document was *once* classified and that – whether by request of counsel or the media, or *sua sponte* by the government – the document was declassified and marked accordingly. It is typical for such documents to have the original “SECRET” stamp crossed out and “Unclassified” written beside it. The Protective Order does not prevent prisoners at Guantánamo from possessing unclassified documents, and there is therefore no reason why a prisoner should not legitimately be in possession of such documents.

Third, the so-called “knot-tying” document found by the government is not purported to have been labeled “attorney-client material” and is not alleged to have been discovered in a prisoner’s privileged legal folder. (Again, counsel have not seen the document and have no way even to know whether the government’s characterization of this document is fair.) The document therefore appears to have no relevance to the instant motion, which after all seeks review only of privileged items that have been confiscated by government agents.

Fourth, an apparent suicide note that was handwritten on the back of a piece of paper marked “attorney-client privileged” was quite obviously not being “hidden” by any of the prisoners. The piece of paper was discovered in the mesh of the cell of one of the deceased, not secreted in the privilege folder of any of the prisoners. If the deceased were seeking to keep this document from the prying eyes of the prison guards by disguising it as a privileged document, why did he place in the open where it would inevitably be discovered? The answer, most probably, is that the prisoner in fact wanted the note to be discovered and that

---

28 *Id.* AP3.2.2.3.2.

he drafted it on the only piece of paper readily available to him. In all likelihood, the only “abuse” of the privilege system was one prisoner’s agreement to provide the deceased with a piece of paper from his privilege folder in order to allow him to express his last wishes to his family.

Finally, the government does alert counsel and the Court to a single document that – from the government’s description of it, anyway – likely should not have been in the possession of a prisoner. Remarkably, however, the document is an *email from JTF-Guantánamo itself* – a document that obviously was not provided to a prisoner by counsel, since counsel does not have access to such documents. How did this document come into possession of a prisoner? Counsel respectfully suggests that the NCIS inquire of JTF-Guantánamo and its staff, rather than take advantage of JTF-Guantánamo’s apparent security breakdown as a justification to rifle through the privileged papers of every detainee in the prison.

The government’s generalized security concerns are of the type already rejected by the Court. The government, when it sought to justify the real-time monitoring and recording of attorney-client meetings, claimed that the prisoners would use meetings with counsel “to further terrorist operations or otherwise disclose information that will cause immediate and substantial harm to national security.”<sup>29</sup> The Court rejected the government’s claims, finding them “thinly supported.” As for the government’s speculation that Petitioners’ counsel are improperly sharing classified information with their clients, this Court long ago reminded the government that “the government’s decision to grant an individual attorney a security

clearance amounts to a determination that the attorney can be trusted with information at that level of clearance.”<sup>30</sup>

**C. Even if the Privilege Must Yield, Review Should Be by a Neutral Party Rather than a Government Filter Team.**

Even if the government has shown sufficient basis to abrogate the attorney-client privilege, the use of a Department of Defense Filter Team is inappropriate here. As confirmed by the government’s lack of case citations, courts have shown great reluctance to entrust attorney-client privileged materials to such governmental teams. Indeed, “the use of government taint teams has often been questioned or outright rejected by the courts.”<sup>31</sup> Just last week, the Sixth Circuit overruled a district court’s decision to permit review of potentially privileged documents by an independent government “taint team” because the review posed unacceptable risks to the attorney-client privilege.<sup>32</sup> Even when such teams have been authorized, “at least three courts that have allowed for review by a government

---

<sup>29</sup> *Al Odah*, 346 F.2d at 4 n.4.

<sup>30</sup> *Al Odah*, 346 F. Supp. 2d at 14.

<sup>31</sup> *In re Search of the Scranton Hous. Auth.*, No. \_\_\_\_, 2006 WL 1722565, at \*5 (M.D. Pa. Jun. 22, 2006). See, e.g., *Black v. United States*, 172 F.R.D. 511, 516 (S.D. Fla. 1997) (even though government needed documents to pursue escaped fugitive, court rejected proposed “taint team” and ordered that “a United States district judge or his designee” would review documents for privilege”); *United States v. Abbell*, 914 F. Supp. 519, 520–21 (S.D. Fla. 1995) (appointing special master rather than filter team to review potentially privileged documents obtained by search warrant).

<sup>32</sup> See *In re Grand Jury Subpoenas 04-124-03 and 04-124-05*, Nos. 05-2274/2275, slip op. at 6 (6th Cir. July 13, 2006) (Ex. [REDACTED]).

privilege team have opined, in retrospect, that the use of other methods of review would have been better.”<sup>33</sup>

To the extent that the government can make a specific, individualized showing that a particular detainee is using his attorney-client materials for improper ends, the Court at most should order that those documents be reviewed *in camera* by a judge, in the presence of habeas counsel and without government lawyers. This procedure would reduce the appearance of impropriety and relieve Petitioners’ of some of their understandable unease over sharing their privileged papers with yet another party who is not their legal representative. Especially given the government’s history of interfering with the attorney-client relationships in this case, as well as its expressed desire to “exploit the ‘intelligence value’” of monitored attorney-client communications,<sup>34</sup> “it is important that the procedure adopted on this case not only be fair but also appear to be fair.”<sup>35</sup> Yet “[i]t is a great leap of faith to expect that members of the general public would believe that any such Chinese wall would be impenetrable; this notwithstanding the honor of [those involved].”<sup>36</sup> Here, “there is no doubt that, at the very least, the ‘taint team’ procedures create an appearance of unfairness.”<sup>37</sup>

---

<sup>33</sup> *United States v. Stewart*, No. 02 CR 396, 2002 WL 1300059, at \*6 (S.D.N.Y. June 11, 2002).

<sup>34</sup> *Al Odah*, 346 F. Supp. 2d at 10 n.11.

<sup>35</sup> *Stewart*, 2002 WL 1300059, at \*8.

<sup>36</sup> *In re Search Warrant for Law Offices*, 153 F.R.D. 55, 59 (S.D.N.Y. 1994).

<sup>37</sup> *United States v. Neill*, 952 F. Supp. 834, 841 n.14 (D.D.C. 1997).

Concerns about the appearance of propriety are especially important here, given the difficulties that counsel has experienced in gaining Petitioners' trust. Before counsel met Petitioners, they had "been detained virtually incommunicado for nearly three years without being charged with any crime."<sup>38</sup> Moreover, "Petitioners face an obvious language barrier, have no access to a law library, and almost certainly lack a working knowledge of the American legal system."<sup>39</sup> Worse, as a result of statements from interrogators and other government personnel, many Petitioners suspect that their civilian attorneys are simply guards or interrogators in disguise.<sup>40</sup> These suspicions will only intensify when Petitioners learn that their attorney-client materials are being reviewed by lawyers for the military that detains and interrogates them.

Another unacceptable aspect of the government's proposal is its suggestion that the Filter Team should be allowed to conduct its own review of the confiscated documents to determine whether they were properly "privileged" in nature, whether or not the documents are relevant to the NCIS suicide-plot investigation.<sup>41</sup> If the filter team determines that the documents are not privileged, the government proposes, then they will be "returned ... to JTF-Guantánamo for appropriate action."<sup>42</sup> Such a review for privilege leaves "the government's fox . . . in charge of the [clients'] henhouse," with no check against the

---

<sup>38</sup> *Al Odah*, 346 F. Supp. 2d at 12.

<sup>39</sup> *Id.*

<sup>40</sup> *See, e.g.,* Charlie Savage, *Guantánamo Detainees Find Fault with Lawyers*, Boston Globe, Aug. 10, 2005, at A1.

<sup>41</sup> (*See Mot.* at 11.)

possibility that the Filter Team would draw “false negative conclusions” overriding legitimate claims of privilege.<sup>43</sup>

If granted, the government’s motion will chill attorney-client communications. In its motion, the government suggests that “possibly others” – *i.e.*, non-prisoners – may have participated in a “manifest abuse of the legal mail system.”<sup>44</sup> It is difficult not to construe this unfounded assertion as a veiled threat to habeas counsel, designed to deter them from communicating effectively with their clients. Indeed, buried in a footnote is the government’s conclusion that because counsel is prohibited “from sharing ... certain types of materials with detainees ... [if] prohibited materials are discovered in the course of review, the Filter Team would not be constrained from bringing the matter to the Court’s attention for appropriate action.”<sup>45</sup> Habeas counsel with access to classified information are aware that they work under the shadow of possible contempt and criminal actions. They have all been deemed not to be a security risk by the FBI and they are all officers of the Court. There is no warrant for a new team of Department of Defense lawyers to begin scouring their privileged communications in order to uncover an alleged, nefarious plot to assist their clients in committing suicide.

---

<sup>42</sup> (*Id.*)

<sup>43</sup> *In re Grand Jury Subpoenas*, slip op. at 10.

<sup>44</sup> (Mot. at 10.)

<sup>45</sup> (Mot. at 11 n.10.)

**CONCLUSION**

For the preceding reasons, the government's motion should be denied and the Court should order petitioner's legal papers be returned immediately. Alternatively, the Court should impound the seized communications until it can decide whether further review of any of the communications is to be allowed. If the Court decides to allow any further review, the review should be conducted in the first instance by a magistrate judge or a special master without the involvement of the military or the Department of Justice.

Dated: July 17, 2006.

Respectfully submitted,

/s/ Thomas R. Johnson

Paul T. Fortino (OSB # 83201)  
Thomas R. Johnson (OSB # 01064)  
Cody M. Weston (OSB # 98429)

**PERKINS COIE**

1120 N.W. Couch Street, Tenth Floor  
Portland, OR 97209-4128  
Tel: (503) 727-2000  
Fax: (503) 727-2222

Attorneys for Petitioner

Barbara Olshansky (NY0057)  
Deputy Director

**CENTER FOR CONSTITUTIONAL RIGHTS**

666 Broadway, 7<sup>th</sup> Floor  
New York, NY 10012  
Tel: (212) 614-6439  
Fax: (212) 614-6499

Of Counsel for Petitioner