

## Confronting Ethical Issues in National Security Cases: The Guantánamo Habeas Litigation

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I have been asked to say a few words about legal ethics issues that have arisen over the nearly decade-long Guantánamo detainee litigation, the entirety of which I have been fortunate enough to observe while working at the Center for Constitutional Rights (CCR). To start, I would be remiss if I failed to recommend a wonderful example of empirical scholarship on this topic, David Luban's *Lawfare and Legal Ethics at Guantánamo*,<sup>1</sup> which the author based on many interviews with habeas and military defense counsel.

One of the things Professor Luban notes is that the adversary system works well (or, at least, in the way it was ideally intended to work) only when the adversaries focus on presenting their strongest arguments for ultimate resolution by the court, instead of gaming the system by (1) trying to exclude or prevent the development of legitimate reliable evidence, (2) intimidating litigants or witnesses from participating in litigation, or (3) simply overwhelming or exhausting the other side's resources.<sup>2</sup>

In my view, the government's classification practices in these cases have gamed the system in all three ways, and I would like to spend some time describing how rules, ostensibly designed to secure information that might cause harm to the government if made public, in practice serve to hinder effective representation in an adversarial system (that is, putting aside concerns about whether they are also intended to hide not sensitive but rather embarrassing information—evidence of official incompetence or abuse). These issues quickly overlap with concerns about our own participation in these cases, which raise some of the most interesting ethical questions precisely because we usually ignore them once we have become close to

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<sup>1</sup> David Luban, *Lawfare and Legal Ethics at Guantánamo*, 60 STAN. L. REV. 1981 (2008).

<sup>2</sup> *Id.* at 1985.

these cases: To what extent does our mere participation in a process set up to be procedurally unfair serve to legitimate the process and/or undermine the interests of our clients?

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Judge Kollar-Kotelly's opinion in *Al Odah* in October 2004 basically set the conditions for attorney access that now govern in the Guantánamo cases: habeas attorneys will have unmonitored access to detainees in exchange for presumptive classification of their meeting notes, subject to classification review by a walled-off Privilege Review Team (PRT).<sup>3</sup> The PRT is composed of intelligence and Justice Department officials who are not (and will not ever be) involved in litigation respecting these detainees.<sup>4</sup> The written notes from such meetings are considered presumptively classified by the government, as are the very contents of the communications exchanged during such meetings<sup>5</sup>—meaning that if a lawyer has a great idea in the middle of the night about a factual point in a case deriving from something said in a meeting, she cannot scribble it down on a notepad on her nightstand, but instead has to travel to the Secure Facility located in Crystal City, Virginia (there is only one), and commit it to paper there.<sup>6</sup> Of course, the idea that everything a client says is per se classified until further notice from the government carries with it the corollary that the attorneys working on these cases must first receive security clearances before they travel to the base to visit their erstwhile clients. Never mind that this all implies that the clients are carrying around reams of classified information in their heads.<sup>7</sup> The baseline assumption—that a client's own statements can be classified even though the client lacks security clearance and has not received the information from the government—has created absurd results as the

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<sup>3</sup> *Al Odah v. United States*, 346 F. Supp. 2d 1, 15 (D.D.C. 2004).

<sup>4</sup> *Id.* at 3 n.2.

<sup>5</sup> *Id.* at 13.

<sup>6</sup> In practice, some of this is ameliorated by clearance of notes by the PRT, but by and large, anything substantive in the cases remains classified, meaning not only that it cannot be worked with outside of the Secure Facility but also that it evades first-hand media scrutiny.

<sup>7</sup> They obviously do not have clearances. They could not get the special type of SECRET level clearance required by the government even if they tried, as one must hold U.S. citizenship to obtain such clearance. Dual citizens qualify. The Court Security Office has never reduced this to writing; the protective order does not specify anything more than that the Department of Justice's (DOJ) Security Officer decides this issue. See Protective Order and Procedures for Counsel Access to Detainees at the United States Naval Base in Guantanamo Bay, Cuba, *In re Guantanamo Detainee Litig.*, 577 F. Supp. 2d 143, 148 (D.D.C. Sept. 11, 2008) [hereinafter Protective Order and Procedures].

litigation has matured. For example, after *Boumediene*,<sup>8</sup> the government has insisted that a client's own draft declaration, sent to his lawyer for review, be classified such that parts of it could not be shown to the client again during meetings.<sup>9</sup> This position is at least consistent with earlier assertions that transcripts of a client's own statements, supposedly given to military interrogators years earlier, may be classified so that the client cannot review what he is purported to have said.<sup>10</sup>

Essentially, this initial protective order was the product of a trade-off: the Court rejected the government's proposal for real-time monitoring of attorney-client meetings but, in exchange, allowed for classification of meeting notes and post-hoc review.<sup>11</sup> The scheme was not revisited after *Boumediene*. Throughout the post-*Rasul v. Bush*<sup>12</sup> period, the government's position on these issues was motivated by the idea of using habeas attorneys as, effectively, an extension of the interrogation process.<sup>13</sup> "Although the government was careful to omit this from their briefs, [at oral argument in the district court], the government also indicated that it plans to exploit the 'intelligence value' of monitoring Petitioners' conversations with counsel."<sup>14</sup> As the government attorney put it: "I don't understand why the court would think that problematic if the information is not going to be used to test the legality of [Petitioners'] detention."<sup>15</sup> Indeed, the idea is consistent with the contemporaneously created "personal representative" in the Combatant Status Review Tribunal (CSRT) process, which was instituted nine days after the *Rasul* decision.<sup>16</sup>

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<sup>8</sup> *Boumediene v. Bush*, 553 U.S. 723 (2008).

<sup>9</sup> This incident—one of many—occurred during the litigation of *Ameziane v. Bush*, No. 05-cv-392, 2008 U.S. Dist. LEXIS 108518 (D.D.C. 2008).

<sup>10</sup> In these instances the government argues that the interrogator's choice of what to make note of—what to record and what to ignore—conveys information from the client's head *and* from a government employee's head (the interrogator's) and thus is legitimately classified. Government's Motion to Amend Sept. 11, 2008, Protective Order and Counsel Access Procedures and January 9, 2009, Amended TS/SCI Protective Order and Counsel Access Procedures, *In re Guantanamo Bay Detainee Litig.*, No. 08-mc-442 (D.D.C. Mar. 11, 2009).

<sup>11</sup> See *Al Odah v. United States*, 346 F. Supp. 2d 1, 15 (D.D.C. 2004) (denying "real time monitoring . . . contingent on Petitioners' compliance with" framework described in text, as set forth at August 16, 2004, hearing).

<sup>12</sup> *Rasul v. Bush*, 542 U.S. 466 (2004).

<sup>13</sup> *Al Odah*, 346 F. Supp. 2d at 1, 10 n.11.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> Memorandum from Gordan England, Sec'y of Navy, to the Sec'ys of the Military Dept's et al., for Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants Detained at Guantanamo Bay Naval Base, Cuba (July 7,

This “representative” looked like a lawyer but in reality was a sort of anti-lawyer with an obligation under the CSRT rules to turn over to the tribunal any potentially inculpatory information the detainee shared with him.<sup>17</sup>

Luckily, the courts never permitted this sort of pervasive monitoring of habeas counsel. The converse, however—planting the idea with clients that their lawyers were interrogators—has been and continues to be a problem. Whenever we visit the base, our clients are told by the prison authorities that they have a “reservation”—the same ambiguous term that is used when an interrogator has come to visit.<sup>18</sup> In this case, the military’s thinking seems to be that our clients are more likely to voluntarily leave their cells for interrogations if they think there is a chance that an attorney is actually waiting to meet them.<sup>19</sup> Understandably, the opposite form of confusion is the more frequent effect: detainees stay in their cells, refusing to come out, when their own lawyers are at the base to see them because they mistakenly think that an interrogator will be waiting for them in the meeting room.<sup>20</sup>

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2004), *available at* <http://www.defense.gov/news/Jul2004/d20040707review.pdf>. The CSRTs themselves were created to short-circuit the habeas review process, their creators hoping that habeas courts would confine themselves to reviewing the record created by these administrative “tribunals” under appropriately deferential standards of review. *See* JOSEPH MARGULIES, *GUANTANAMO AND THE ABUSE OF PRESIDENTIAL POWER* 169–70 (2007).

<sup>17</sup> Note that the current protective order contains an *obligation* to disclose threats to national security or future immediate violence (as opposed to *permission* to disclose—which would be consistent with most professional norms governing attorney-client confidentiality). *See* Protective Order and Procedures *supra* 7.

<sup>18</sup> *See* Luban, *supra* note 1, at 1991.

<sup>19</sup> This is in contrast to the commonplace earlier idea that the intrusion of lawyers would interfere with interrogations at Guantánamo. *See* MARGULIES, *supra* note 16, at 26–27.

<sup>20</sup> Of course, the military has not been above fabricating claims that detainees have refused visits. One client of ours was scheduled to see an attorney in early 2007 in connection with an urgent matter—the government’s attempt to transfer him to Libya, where he feared being subjected to torture or worse. The military claimed he refused his visit, but we later learned from a visit to another client in an adjacent cell that in fact the first client was very eager to see his lawyers and tried to find out what had gone wrong. *See* Luban, *supra* note 1, at 1990–91 (describing the incident in some detail). Media pressure ultimately aborted the Libya transfer after the court process had failed to do so. *See* *Zalita v. Bush*, No. 05-1220, 2007 U.S. Dist. LEXIS 28951 (D.D.C. Apr. 19, 2007) (denying petitioner’s motion for a preliminary injunction to prevent his transfer to Libya), *dismissed*, 2007 U.S. App. LEXIS 9975 (D.C. Cir. Apr. 25, 2007), *injunction denied*, 550 U.S. 930 (2007), *vacated and remanded*, 554 U.S. 911 (2008). Both men have since been effectively granted asylum in safe third countries.

These surveillance issues did not end with Judge Kollar-Kotelly's opinion allowing unmonitored attorney visits. After over a year of sitting on the story, the *New York Times* decided to publish an account of the secret National Security Agency (NSA) warrantless surveillance program instituted shortly after 9/11.<sup>21</sup> It quickly became apparent that the program had been directed at a category of communications that would seem to overlap quite neatly with those in which habeas counsel engage all the time: calls and emails where one end of the line is in the United States and one end outside, and where one party on the line is suspected of some link, however nebulous, to terrorism. Our calls to family members of detainees, witnesses in the detainees' cases, and perhaps even to co-counsel overseas (like Londoner Clive Stafford-Smith of Reprieve), investigators, and foreign journalists, might be subject to surveillance under the program, as might, latterly, communications to released clients.<sup>22</sup>

Given all of these intrusions on the presumptive confidentiality of attorney-client communications, what, then, are habeas counsel's ethical obligations to clients or to other litigation participants with whom they are communicating? The usual first-line response has been to offer a disclaimer at the beginning of the conversation: "Please understand that this conversation may be subject to illegal monitoring and you should assume that anything you say may be heard by the United States government" or a statement along those lines. As a practical matter, this tends to confirm the already-existing suspicion among Guantánamo detainees and their family members that all American lawyers are suspect and possibly agents of the government—something encouraged by the military, which has had interrogators make false claims of being officials of the International Committee of the Red Cross (ICRC), lawyers, doctors, etc.<sup>23</sup>

Moreover, that sort of disclaimer presumes that the conversation will touch on issues that are not serious enough to merit abstaining

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<sup>21</sup> James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES, Dec. 16, 2005, at A1.

<sup>22</sup> A FOIA request was duly made and litigated, with no results. *Wilner v. Nat'l Sec. Agency*, No. 07 Civ. 3883, 2008 U.S. Dist. LEXIS 48750, at \*25 (S.D.N.Y. June 25, 2008), *aff'd*, 592 F.3d 60 (2d Cir. 2009), *cert. denied*, 131 S. Ct. 387 (2010). A suit seeking, *inter alia*, the same records for CCR attorneys was dismissed and is pending appeal. Order at 2, *In re Nat'l Sec. Agency Telecomms. Records Litig.*, 3:06-md-1791 (N.D. Cal. Jan. 31, 2011), ECF No. 51, *appeal pending*. The case was originally filed as *Centre for Constitutional Rights v. Bush*, Civ. No. 06-cv-313 (S.D.N.Y. Jan. 17, 2006). Thus, the question of whether this surveillance took place remains open.

<sup>23</sup> See MARGULIES, *supra* note 16, at 133, 204, 215 (citing official reports of interrogators impersonating FBI and Department of State officials). Alternately, with a sophisticated client the disclaimer can simply come off as trite.

from communication in such an entirely unsecure format. For conversations during initial visits to Guantánamo, taken after long travel and under extreme time pressure, there may be little choice, from a practical perspective, whether or not to attempt to communicate about important but sensitive subjects (e.g., “If the military decided to let you go, would you feel safe returning to your home country?”). For electronic communications with family members, witnesses, and overseas counsel, however, other more secure but more expensive options exist. In our litigation challenging the NSA program, *CCR v. Bush*, we submitted declarations averring that legal staff at CCR had changed their communications practices in response to the disclosure of the existence of the warrantless surveillance program, in some cases deferring communications until in-person visits could take place or using alternative means of communication more burdensome than simply picking up the phone or writing an email.<sup>24</sup> Our ethics expert, Professor Stephen Gillers, opined that under certain circumstances, attorneys faced with such a conundrum are obliged to not use electronic means of communication at all (or for highly sensitive communications at least).<sup>25</sup>

Is there an equivalent circumstance for monitored visits? Might there be conditions under which an attorney would be obligated to forebear from even visiting a client? That is an ethical conundrum more familiar to staffers of the ICRC than to American lawyers on prison visits. The Red Cross, as a monitor-of-last-resort of humane treatment standards for military detainees, has a different institutional ethos than a habeas attorney would; institutionally, its default position is that it is better to be present to try to ameliorate the worst abuses, even when doing so risks lending legitimacy to horrific conditions (and, indeed, the representatives of the Red Cross may also end up asking questions like our earlier example: “If the military decided to let you go, would you feel safe returning to your home country?”).

The question of whether to participate in meetings with habeas clients was not a close question for us, especially given our largely political approach to these cases. In general, CCR’s historical choice of cases had been driven, in large part, by the notion that lawyers could achieve “success without victory”<sup>26</sup>—leveraging the litigation process

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<sup>24</sup> See Affirmation of William Goodman ¶ 15, *CCR v. Bush*, No. 06-cv-313 (S.D.N.Y. Mar. 9, 2006), ECF No. 9.

<sup>25</sup> Affirmation of Stephen Gillers ¶ 11, *CCR v. Bush*, No. 06-cv-313 (S.D.N.Y. Jun. 30, 2006), ECF No. 58.

<sup>26</sup> Cf. JULES LOBEL, *SUCCESS WITHOUT VICTORY: LOST LEGAL BATTLES AND THE LONG ROAD TO JUSTICE IN AMERICA* (2003).

to produce justice through supporting and encouraging political activism, and triggering mass media coverage, rather than through victories in court that produce significant results or advance precedent in useful ways. If one had gone into the post-*Rasul* litigation assuming that habeas courts would not ultimately be the quickest or most likely venue to produce the desired result—release—then the most sensible approach to early client meetings might well have been to use those early conversations not to talk about anything related to what the government alleged the detainees were doing prior to their detention,<sup>27</sup> but rather to focus exclusively on the abuses the detainees suffered in custody. This approach assumed that the political and diplomatic fallout from the exposure of these abuses was most likely to procure release by generating media attention that then resulted in pressure on the detainees' home governments to use diplomatic sway to negotiate release of their nationals with the U.S. government. Of course, this only proves that the *Rasul* case, which went to the Supreme Court in 2004, was in some ways an exception to the "success without victory" theory: the largest anticipated gains were to be made from gaining access to the clients, which required us to win access in court. Winning on the merits in habeas, however, is a different matter.<sup>28</sup>

We did, however, have more serious internal debates about whether we should be involved in these cases and, most pointedly,

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<sup>27</sup> In general, the government facilitated this sort of forbearance by simply declining to tell us what our clients were accused of, making the tactical decision as to what to talk about in those early meetings somewhat easier.

<sup>28</sup> That is especially so given the current state of play in the U.S. Court of Appeals for the District of Columbia, which has waged a campaign of resistance to the *Boumediene* decision worthy of Orval Faubus. Since *Boumediene* was decided in June 2008, D.C. Circuit decisions have validated wholesale admission of hearsay and raw intelligence. *Awad v. Obama*, 608 F.3d 1, 7 (D.C. Cir. 2010); *Al Odah v. United States*, 611 F.3d 8, 14 (D.C. Cir. 2010). The courts opened the door to reliance on the mass-accuser allegations that are the government's most frequent support in these cases; they questioned the necessity of the preponderance standard of proof, *see Al-Bihani v. Obama*, 590 F.3d 866, 878 n.4 (D.C. Cir. 2010), suggested "some evidence" ought to be the applicable standard, *see Esmail v. Obama*, 639 F.3d 1075, 1078 (D.C. Cir. 2011) (Silberman, C.J., concurring), used a novel theory of "conditional probability" to overturn a district court's habeas grant predicated on the factual credibility of the detainee's own testimony, *Al-Adahi v. Obama*, 613 F.3d 1102, 1105–06 (D.C. Cir. 2010), and opined that evidence supporting the government's "reasonable belief" that a detainee had ever "visited Al Qaeda guesthouses" or attended a training camp "would seem to overwhelmingly, if not definitively" justify detention, *Al-Bihani*, 590 F.3d at 873 n.2. *See also Uthman v. Obama*, 637 F.3d 400, 406 (D.C. Cir. 2011). Meanwhile, the district courts have decided that nearly all cases for detainees cleared by President Obama's Guantánamo Review Task Force should be stayed. We cannot, however, cite any such decision because the fact that the petitioner in any particular case is cleared for release is deemed "protected information."

over the question of whether we should participate in the military commission system under which many of our initial habeas clients were charged. Ultimately, the first round of the commissions never got very far, thanks to the *Hamdan* litigation, which resulted in the complete restructuring of the commissions in the Military Commissions Act of 2006 (MCA).<sup>29</sup> But the question of whether we should participate has occurred recently as well, because of special rules of access applied to the so-called high-value detainees (HVDs). That term—a euphemism for former CIA detainees held in black sites—refers to the fourteen men brought to Guantánamo in September of 2006, in the wake of the *Hamdan* decision, in order to provoke Congress to pass the MCA.<sup>30</sup> Our client, Majid Khan, was the first to be visited by habeas counsel in late 2007. That visit was the culmination of months of negotiations over conditions of access,<sup>31</sup> which were and are much more stringent than those for other Guantánamo detainees. HVD counsel have been forced to get a higher level of security clearance—sufficient to allow us to be exposed to Top Secret/Sensitive Compartmented Information (TS/SCI)—and agree to prepublication review of writings that might touch upon such information.<sup>32</sup> That is the same sort of arrangement that CIA agents enter into before starting their jobs, but here again the government’s main concern is not that we will somehow be exposed to information

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<sup>29</sup> Pub. L. 109-366, 120 Stat. 2600 (codified as amended at 10 U.S.C. §§ 948a–50w (2006) and in other scattered sections of 10 and 18 U.S.C.).

<sup>30</sup> See Jonathan Karl, *High Value Detainees Transferred to Guantanamo*, ABC NEWS (Sept. 6, 2006), <http://abcnews.go.com/International/story?id=2400470>.

<sup>31</sup> The government refused for many months to allow Khan to be visited by opposing his attorneys’ motion for entry of the standard protective order—citing to the MCA’s purported strip of habeas jurisdiction and ostensibly differentiating this case from others on the grounds that any protective order governing the former-CIA-detainee cases should be developed in the (government-friendly) confines of the D.C. Circuit, which would eventually have jurisdiction under the then-valid provisions for review in the Detainee Treatment Act of 2005. See Respondents’ Memorandum in Opposition to Petitioners’ Motion for Emergency Access to Counsel and Entry of Amended Protective Order at 8–22, *Khan v. Bush*, No. 06-cv-1690-RBW (D.D.C. Oct. 26, 2006), ECF No. 6.

<sup>32</sup> This obviously limits the sort of media-centric litigation strategy that counsel might otherwise be inclined to adopt. The special “SCI Protective Order” for the HVD cases also contains a provision that allows the government to take “unilateral” action to safeguard classified information if it—not the court—concludes that a breach of the protective order has taken place. See Proposed Protective Order, Exhibit A to Emergency Stipulation to Immediate Entry of Interim Guantanamo SCI Protective Order ¶ 9.B, *Khan v. Gates*, No. 07-1324 (D.C. Cir. Oct. 12, 2007) (“The USG reserves the right to unilateral [*sic*] take protective measures to safeguard classified information if it concludes that any provision of the protective order has been violated and the result of such violation reasonably could be expect to lead to the unauthorized disclosure of classified information.”).



created by the government that is classified TS/SCI. Instead, we are once again speaking almost exclusively of information stored in the detainees' brains. In particular, as the government's public briefing in these cases demonstrates,<sup>33</sup> knowledge of the enhanced interrogation techniques used against certain detainees is not just classified but TS/SCI classified, even though the government has, by definition, disclosed it to the detainees in the course of using those techniques on them. In other words, for these clients, information stuck in their heads is classified as capable of causing "exceptionally grave damage to the national security" (the definition of TS/SCI information).<sup>34</sup> The ramifications are clear to all observers: as Marty Lederman noted at the time, such a system presumes that these clients can never be—and will never be—released.<sup>35</sup>

Post-*Boumediene*, these ground rules were further elaborated upon with the negotiation of a special protective order for all the HVD cases. Under the standard protective order, counsel in all cases are presumed to have a "need to know" the classified information produced to counsel in other habeas cases, and therefore can share it with each other subject to the usual strictures for handling classified information—which is to say, such sharing generally happens only in the confines of the Secure Facility.<sup>36</sup> This has proved inordinately useful, in particular, when one detainee has given witness against another. However, habeas counsel for HVDs cannot share information with habeas counsel for other HVDs without requesting that the government approve specific requests for sharing on a need-to-know basis.<sup>37</sup> In other words, we are, under this protective order, forced to notify our adversaries of our desire to share specific items of informa-

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<sup>33</sup> See Respondents' Memorandum in Opposition, *supra* note 31, at 3–4 ("For example, information such as where detainees have been held, the details of their confinement, interrogation methods, and other operational details constitute or involve TOP SECRET//SCI information.")

<sup>34</sup> See Exec. Order No. 13,292 § 1.2(a)(1), 68 Fed. Reg. 15,315 (Mar. 25, 2003).

<sup>35</sup> Marty Lederman, *You Call It "Torture"; We Call It "Coming into Possession of Classified Information,"* BALKINIZATION (Nov. 4, 2006, 2:54 PM), <http://balkin.blogspot.com/2006/11/you-call-it-torture-we-call-it-coming.html>.

<sup>36</sup> See Protective Order and Procedures, *supra* note 7, at 163. There are very limited, enumerated exceptions to the "need to know" presumption described in the text. *Id.*

<sup>37</sup> See, e.g., Protective Order for Habeas Cases Involving TOP SECRET//SENSITIVE COMPARTMENTED INFORMATION and Procedures for Counsel Access to Detainees at the United States Naval Base in Guantanamo Bay, Cuba, in Habeas Cases Involving TOP SECRET//SENSITIVE COMPARTMENTED INFORMATION at pt. I, ¶ 29, *Khan v. Bush*, No. 06-cv-1690 (D.D.C. Jan. 7, 2009), ECF No. 118.

tion between specific cases, and then gain their permission before doing so. That is a situation in some ways reminiscent of the feature of the military commission system whereby the defendant's adversary—the government—has to approve specific funding requests by the defendant's lawyers with the Office of the Military Commissions-Defense (OMC-D), except that the HVD rule on sharing information creates a more obvious risk of implicit disclosure of litigation strategy.<sup>38</sup>

Even when lawyers' participation in a skewed process is both ethical and beneficial for their clients, client trust is at stake in our willingness to push to the edge of what is permissible under such restrictive rules.<sup>39</sup> Take, for example, the issue of legal mail. Legal mail is defined in the standard protective order as correspondence "related to counsel's representation of the detainee;" only such mail can be delivered as privileged.<sup>40</sup> Now, are news stories ever "related to counsel's representation of the detainee"? What if they disclose political conditions in the client's home country, a place to which he fears returning and where judgment of the current balance of power is essential to evaluating such torture fears? What about political news from the United States? Surely, that might affect the outcome of these most highly politicized cases. What about diplomatic news from third countries that might offer resettlement to unfortunates like the Uighurs? All of this, in our view, is relevant to settlement—possible settlement being a part of every case by definition—but different lawyers have tended to draw the line in different places.<sup>41</sup> And with hundreds of lawyers representing hundreds of detainees, the conditions are ideal for generating a sort of contest between lawyers—officiated by the detainees—regarding how far each individual lawyer is willing to push the system: one detainee's lawyer brings some news

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<sup>38</sup> They also had to be approved by the chief defense counsel, raising hazards of indirect disclosure of "confidential information [to] clients with adverse interests." Luban, *supra* note 1, at 2007.

<sup>39</sup> Professor Luban's article contains an extended discussion of other aspects of the trust deficit habeas counsel have struggled against with detainees. *See id.* at 1991–98.

<sup>40</sup> *See* Protective Order and Procedures, *supra* note 7, at 156.

<sup>41</sup> For perspective—in case this sort of self-censorship seems overcautious—it is worth knowing that lawyers were initially blocked from bringing copies of the Supreme Court's *Hamdan* decision into meetings at the base on September 12, 2006, a few months after the decision was rendered. Though that issue was eventually resolved, other documents explaining the decision were not allowed in during base visits. CTR. FOR CONSTITUTIONAL RIGHTS & REPRIEVE, CONTINUED GOVERNMENT ATTEMPTS TO INTERFERE WITH THE LEGAL REPRESENTATION OF DETAINEES AT GUANTÁNAMO BAY, CUBA 9 (2007) (on file with author).

from the home country, another detainee's lawyer does not, and suddenly, one detainee is less content with his representation. This effect has been noted in many other discussions of lawyering at Guantánamo: extreme isolation and incommunicado detention, combined with these rules limiting access to basic outside news, means that the detainees are left with nothing extrinsic to allow them to figure out whether to trust their lawyers. Indeed, one major early victory was the inclusion of a provision in the protective order that allowed the bringing of introductory materials from the detainees' families on the outside into initial meetings, as a means for confirming identity and building trust. Often, especially in the first year of the litigation after *Rasul* in the district courts, counsel would try to first visit family and only then head to Guantánamo, in order to be able to bring videos or letters from close relatives into the initial meetings.<sup>42</sup>

One can imagine that this sort of game of playing habeas lawyers against each other becomes worse when the information a lawyer would like to share with her client is not a trivial news story but rather involves evidence against the detainee that a lawyer is foreclosed by the rules from sharing.<sup>43</sup> Such a situation arose in one of our cases, which ended happily with the client's release. This client, a Mr. B., had the typical jumble of mutually incoherent allegations against him. But there was one very damning classified allegation about him that we wanted to make sure he responded to. The allegation itself took up about four lines in one document, apparently relating to the interrogation of another detainee. It should have been very easy for Mr. B. to refute this allegation based on its content. That one vital document, however, was ninety-five percent redacted—including the

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<sup>42</sup> See Protective Order and Procedures, *supra* note 7, at 161–62.

[T]he Commander, JTF-Guantanamo . . . 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.

*Id.* This provision was added to the amended Counsel Access Procedures approved by Judge Green in November 2004. See Exhibit A to Amended Protective Order and Procedures for Counsel Access at 6, *Al Odah v. United States*, No. 02-cv-828 (D.D.C. Nov. 8, 2004), ECF No. 141; *cf.* Exhibit A to Notice of Supplemental Counsel Access Procedures, *Al Odah v. United States*, No. 02-cv-828 (D.D.C. Sept. 29, 2004), ECF No. 97.

<sup>43</sup> The text discusses a situation where the evidence was from another person accusing our client, but even more problematic is the frequent situation in which the “classified” evidence is something that the client purportedly said himself. *Cf. supra* note 10.

identity of the accuser—even though two of Mr. B.’s three habeas counsel had not just SECRET level but TS/SCI clearances.<sup>44</sup>

The government agreed to process the relevant part of this document for possible declassification, and we scheduled a two-day trip to meet with Mr. B. to discuss its contents. We told him we were coming specifically to discuss important allegations, based on assurances from the Justice Department that we would get the documents in time. On the first day of our trip, counsel arrived to find that no cleared documents were waiting. Our attorney spent a very long day meeting with a very frustrated Mr. B. That evening at the base, we received a copy of the four lines, newly cleared for disclosure to our client.<sup>45</sup> But the next day, Mr. B. refused to come out to meet with us. Per the usual procedures, we were allowed to write him a note. Typically, these refusal notes (which would probably, if the hundreds of them written at Guantánamo were bound together, make for a fine book) simply note that lawyers and not interrogators are here to visit during the “reservation.” That is usually enough to bring the detainees out of their cells. In this case, Mr. B. wrote us a very polite note back, saying, in so many words, “I don’t blame you, but the system of which you are a part, in which you are participating, is a joke, and I’m not playing along anymore.”<sup>46</sup>

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<sup>44</sup> Bear in mind that “declassified” does not mean “unprotected”—the government might decide that even unclassified materials are not suitable for public filing (in which case it may seek to designate those parts of the unclassified materials as “protected” under the terms of the governing Protective Order), and the government has not yet filed a fully public version of Mr. B.’s factual return, even though Mr. B. is back in his own home, free, and working towards his master’s degree.

<sup>45</sup> While the timing of the delays here was particularly frustrating, issues with leisurely or recalcitrant classification review were consistently problematic in the early days of the habeas litigation. While the original protective order provided for review of English submissions in seven days and non-English ones in fourteen, the government incredibly claimed in one incident in November 2005 that it lacked access to an Arabic translator and advised that counsel should resort to the court for classification review. See *CTR. FOR CONSTITUTIONAL RIGHTS & REPRIEVE*, *supra* note 41, at 10. A year later, in another case, when counsel did seek help from the district court, the court found that the government violated the protective order by failing to process the documents in question. See *Order* at 4–5, *Al-Anazi v. Bush*, No. 05-cv-345 (D.D.C. Sept. 25, 2006), ECF No. 71 (“[T]he PRT may not simply refuse to conduct a classification review of documents submitted to it by habeas counsel as a self-help mechanism . . . furthermore, the Protective Order clearly requires the PRT to conduct a classification review of any information submitted to it within very defined timeframes.”).

<sup>46</sup> His exact words:

First, please know that I am not upset with you or upset about what happened, but this is the choice that I have chosen for myself. After lengthy reflection, I have concluded that from the government, there is no justice to be hoped for, however much you try. You have seen your-

Mr. B. was eventually cleared and sent back home to his war-torn home country, from which he had fled decades ago as a refugee before being scooped up and handed to the Americans. The government only cleared him after we filed an extensive Motion for Judgment on the Record (the rough equivalent to summary judgment in these cases), spending six weeks of attorney time in the miserably cold Secure Facility drafting it, with a hearing on the near horizon. As of the writing of this piece, the government is fighting Mr. B.'s ability to litigate his habeas case, post-release, to resolution so that he can get his life back and maybe leave his country again for a better life.

Mr. B.'s case illustrates many elements of ethically questionable government conduct common to this litigation: withholding exculpatory evidence, refusing to allow exposure of bogus inculpatory evidence to scrutiny that could make it evaporate, and preventing a merits disposition by gamesmanship after extracting the maximum of effort from the lawyers on the opposite side. That is, of course, putting to one side the less sophisticated attempts to drive a wedge between lawyers and clients—the well-documented efforts by the Department of Defense to get habeas law firms' corporate clients to boycott the firms<sup>47</sup> and to convince detainees that their lawyers were gay, Jewish, and/or working for Israel on the side.<sup>48</sup> These policies were designed to ensure that detainees had a disincentive to meet with lawyers—for instance, transferring detainees to solitary confinement huts in Camp Echo used for attorney-client meetings for as much as eleven days prior to the meeting,<sup>49</sup> gradually imposing see-

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self how the government balances are flawed. Those who were captured in the battlefield are released, while those who were abducted from their homes languish in prison without a reason except that they have no government demanding to have them or that they do not belong to a country that is esteemed by the U.S.A. Please convey my salutations to [my father].—[Signed, B].

<sup>47</sup> See Luban, *supra* note 1, at 1981–83.

<sup>48</sup> See *id.* at 1994–96.

<sup>49</sup> See CTR. FOR CONSTITUTIONAL RIGHTS & REPRIEVE, *supra* note 41, at 7–8.

When lawyers were first allowed on the base, prisoners were forced to sit in isolation in Camp Echo for as long as *eleven days* prior to a legal visit . . . and have been held an equal time afterwards. Jamal Kiyemba, a British resident, was held in isolation for ten days before his lawyer's visit. He wrote: "Camp Echo is the most lonely place on earth. I was all alone for ten days. They brought me over here, they would not let me take my Qur'an, and they put me in an isolation cell with nothing. There is no way to talk to any other prisoner, you're not meant to talk to the guards. There is a camera and microphones in the cell to make sure this is obeyed. . . . If I complain about Camp Echo, I am told that

mingly arbitrary policies that have reduced the total amount of visit time available in a week at the base from sixty-three working hours per seven day week to thirty hours,<sup>50</sup> and allowing horrendous delays in the processing and delivery of legal correspondence.<sup>51</sup>

These crude efforts were matched by more sophisticated ones during the absolute nadir of post-*Rasul* attorney access, in the wake of the passage of the MCA. In early 2007, the government argued that a new, much more restrictive protective order should be adopted in order to protect the security of sensitive information, including, of course, the clients' own statements to their lawyers.<sup>52</sup> The issue of the

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it is the lawyer's fault. If I did not have to come for a legal visit, I would not be treated like this." . . . One detainee . . . was forced to wake up at three in the morning in order to be taken forty yards across the street for a legal visit that did not begin until 9am. Another . . . wrote to his lawyer that he is sometimes forced to "spend two days in solitary for you, sometimes a week."

*Id.*

<sup>50</sup> *See id.* at 9 (noting that originally attorneys were permitted to visit clients seven days a week for the full time from 8:00 a.m. to 5:00 p.m. without any mandated break, but that, currently, that has been reduced to approximately five hours per day because the visit day now runs from approximately 9:00 a.m. to 4:30 p.m. with a mandatory lunch break lasting about one and a half hours—though with permission, sessions can be extended through lunch and an hour or so into the evening, at the complete discretion of Guantánamo authorities—and with weekday-only visits the norm except in exceptional circumstances). The current situation represents some improvement (especially in terms of the discretion outline above) over the situation at its nadir in the wake of the passage of the MCA: "Indeed, in letters of complaint to the government, attorneys have detailed being allowed as few as eighteen hours with clients in an entire week, in early 2007." *Id.*

<sup>51</sup> *See id.*

Legal mail sent to the detainee is required to be delivered to the detainee within two business days of its clearance [by the Privilege Review Team]; legal mail sent by the detainee must be collected within one business day and must then be sent to the appropriate address within two business days after its collection. There have, however, been numerous instances in which legal mail has either been lost or substantially delayed. One attorney testified to Congress that he has been in Guantánamo when legal mail has arrived for his clients five or six weeks after it was sent; and that legal mail from his clients has arrived weeks or months later, and sometimes not at all.

*Id.* (footnotes omitted) (citing *Subcomm. on Def. of the H. Comm. on Appropriations*, 110th Cong. 2 (2007) (statement of Thomas Wilner, Attorney, Guantánamo Detainees)).

<sup>52</sup> The government sought to make all access subject to the terms of the protective order it had previously sought in the context of the first petitions for review under the Detainee Treatment Act of 2005. *See* Motion for Entry of Protective Order at 13–14, *Bismullah v. Rumsfeld*, No. 06-1197 (D.C. Cir. Aug. 25, 2006) (DTA petition for review)

[B]ecause review under the DTA is on the record of the CSRT, counsel does not have a need to engage in factual development or unlimited

new protective order was argued on May 15, 2007.<sup>53</sup> Surely by coincidence, on May 21, 2007, one week later, the Defense Department announced that, pursuant to a FOIA request by undisclosed parties, it was planning to release materials concerning “alleged violations by habeas counsel of the protective order.”<sup>54</sup> The government released only selected correspondence about the supposed violations; it never released the dispositions (formal or informal, administrative or otherwise) of its allegations and never once sought sanctions from a court or revoked an attorney’s security clearance, despite the fact that clearance status is, for all practical purposes, in its unfettered discretion. The implications of such mudslinging go far beyond the confines of the curious legal black hole that is Guantánamo, for even the most trivial violations of protective orders reflect on the issue of whether adversary attorneys should be trusted to play any role in a process of judicial review for military detainees, or, more broadly, for terrorism suspects wherever they may be held. Each such attempt, in the wake of ever-broader jurisdiction-stripping efforts by the govern-

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consultation with the detainee. We understand, however, that some consultation may be useful in preparing the detainee’s DTA case and could assist this Court in its record review function. Thus the proposed order allows such consultation. . . . [However,] it must be remembered that there is no right to counsel in this context and there is no tradition of attorney client privilege.

*Id.* “The government is in no way conceding that the detainees . . . have a right to counsel or that their counsel have a legal right to view classified materials” submitted by the government in these cases. *Id.* at 12–13. “[T]he order precludes the sharing of classified material between private counsel [with security clearances] for different petitioners who are involved in different detainee cases.” *Id.* at 10.

<sup>53</sup> See Brief of Respondent in Opposition to the Petitions for Rehearing at 5, *Boumediene v. Bush*, 551 U.S. 1160 (2007) (No. 06-1195).

<sup>54</sup> See CTR. FOR CONSTITUTIONAL RIGHTS & REPRIEVE, *supra* note 41, at 2 n.3 (quoting DoD notice to counsel).

I am writing to inform you, as a courtesy, that certain correspondence between you and the Department of Justice in the context of the Guantanamo habeas litigation will be released by the Department this week in its response to a Freedom of Information request seeking documents relating to alleged violations by habeas counsel of the protective order entered in many of the Guantanamo district court habeas cases. Please be aware that the Department’s response will also include any correspondence from you responding to allegations of a violation of the protective order. Also, to the extent it may have been included in the correspondence, personal information, specifically cell phone numbers and home addresses (as opposed to business contact information), will be redacted from the materials and not disclosed. Similarly, to the extent they are included in the correspondence, names of Guantanamo personnel not otherwise made public by the government will be redacted from the materials and not disclosed.

*Id.*

ment, carried the implicit threat of resort to Congress to remove access to our clients entirely. Ultimately the original protective order created after *Rasul* by Judge Green has, with slight modification, governed attorney-detainee contact after *Boumediene*.

At the same time, the government began aggressively denying additional clearances to firms and organizations representing groups of detainees. For instance, I took over as head of CCR's Guantánamo project in late December 2006, but the Justice Department refused to allow me to submit my clearance application—that is, it refused to process my clearance application. The justification offered was that, at the time, CCR already had two cleared attorneys, and, in the wake of the MCA, there was next to nothing left to litigate, so additional clearances were unnecessary and would simply widen the pool of individuals with access to the classified materials in these cases. The Justice Department contended that this would increase the risk of accidental or negligent disclosures and the burden on the government of processing the applications. Although my clearance was ultimately processed by January 2008 in connection with the disputes described above in the *Khan* case,<sup>55</sup> the government maintained its parsimonious attitude towards clearances until *Boumediene* was decided, at which time the government's practice became somewhat liberalized. In the interim, of course, this posed a great burden to many law firms as their associates often carried the bulk of the onerous travel-requiring duties of visiting the base and working with the factual materials in the Secure Facility.

Also worth noting are the varied forms in which the government has violated the no-contact rule: (1) FBI clean teams re-interviewed numerous tortured detainees from 2007 to 2008;<sup>56</sup> (2) officials held one detainee for five extra months after his clearance for transfer because the government was busily negotiating his immunity in exchange for testimony in Salim Hamdan's military commission—all without informing his habeas counsel;<sup>57</sup> and (3) in August 2010, a Staff Judge Advocate (a military lawyer) went into the cell of a client who hung up during a phone call with counsel to ask him if he "still" wanted to "fire his lawyer and withdraw his case."<sup>58</sup>

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<sup>55</sup> See *supra* note 31.

<sup>56</sup> See Luban, *supra* note 1, at 2023 (citing Josh White, Dan Eggen & Joby Warrick, *U.S. to Try 6 on Capital Charges Over 9/11 Attacks*, WASH. POST, Feb. 12, 2008, at A1 (government confirming detainee and attorney accounts)).

<sup>57</sup> See *id.* at 2023–24.

<sup>58</sup> Status Report of Respondents in Advance of Status Conference, at ex. A, Decl. of Capt. Don A. Martin ¶ 12, *Al-Qahtani v. Obama*, No. 05-cv-1971 (D.D.C. Sep. 16,



These examples illustrate the central ethical failing that has characterized these cases: the government has gamed the process to maximize the burden of litigation on its opponents and to delay resolution on the merits<sup>59</sup> in court, all of which is contrary to the basic notion that the adversary system only works *in the way intended* if both sides agree to fight hard, but fight toward a just resolution in court,<sup>60</sup> and not seek to win by increasing or leveraging transaction costs.

The response, ironically, of habeas counsel to this grinding delay and gamesmanship has been, in a sense, to game the system themselves, generally focusing efforts on airing out information from the black box that was pre-*Rasul* Guantánamo. Faced with a heavily resourced adversary willing to expend its vast storehouse of credibility with the courts in an effort to delay a day of reckoning on the merits, habeas lawyers responded rationally: they attempted to resolve cases through public political forums, both here at home and, perhaps more effectively in the years prior to 2005, overseas.<sup>61</sup>

It is quite a stretch to call that gamesmanship, but doing so would of course assume that the ground rules of the existing process are fair, such that systematic criticism would not be in order.<sup>62</sup> Many of the men at Guantánamo have responded to the roller coaster of nine years of litigation, punctuated by frequent farcical events, by refusing to participate. At times, defense counsel have done so as well or have participated while risking their employment as defense counsel in an effort to criticize the whole system. The National Association of Criminal Defense Lawyers issued guidance stating that it would be an ethical violation for attorneys to work on the defense of detainees in the original military commissions.<sup>63</sup> Military lawyer Dan

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2010), ECF No. 224; *cf.* Transcript of Status Conference at 6–8, *Al-Qahtani v. Obama*, No. 05-cv-1971 (D.D.C. Sep. 17, 2010) (Judge Collyer requesting DOJ to enforce the no-contact rule and asking DOJ to warn the staff judge advocates at the base to avoid future violations).

<sup>59</sup> Despite the typically marginal nature of the cases going forward (as almost every case for a cleared detainee is stayed), the record of detainees in the district courts stands at thirty-seven wins and twenty losses. *Guantanamo Bay Habeas Decision Scorecard*, CTR. FOR CONST. RTS., <http://ccrjustice.org/GTMOscorecard> (last visited Sept. 20, 2011); *see also supra* note 28 and accompanying text.

<sup>60</sup> I would include just *settlements* in the category of cases resolved through resort to the courts; thus, many cases where justice was served through release would be included.

<sup>61</sup> *See supra* text accompanying note 27.

<sup>62</sup> *See* Luban, *supra* note 1, at 2002–06 (exploring the conflict between fundamental military norms of loyalty to government and the hierarchy and legitimate criticism of military commission process).

<sup>63</sup> *See id.* at 2019 n.176.

Mori made such frequent and insistent criticisms of the “kangaroo court”—the first military commission system—in his client David Hicks’ home country of Australia that the military prosecutors threatened to court-martial him.<sup>64</sup> Of course, many others on the prosecutorial side of the commissions chose to resign rather than take part in the proceedings: Stuart Couch, who refused to prosecute Mohammedou Slahi because he had been subjected to torture; Darrel J. Vandeveld, who resigned from the commission prosecution of Afghan juvenile Mohammed Jawad; Major Robert Preston, Major John Carr, and Captain Carrie Wolf, who requested reassignment from the pre-*Hamdan*/pre-MCA commissions because they were designed to ensure no acquittals; and Col. Morris Davis, who quit as Chief Prosecutor in October 2007.<sup>65</sup>

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One set of issues rarely discussed, but always lurking in the background in the early days of the litigation, concerns the material support statute.<sup>66</sup> Under that statute and similar sanctions regimes created by regulation under the International Emergency Economic Powers Act (IEEPA),<sup>67</sup> the government creates blacklists of designated terrorist organizations, at which point nearly any form of association with agents<sup>68</sup> of a blacklisted group—providing “training,” “expert ad-

<sup>64</sup> See *id.* at 2015–16.

Mori, who was in Australia investigating the case, delivered a number of blistering public comments against the military commissions, charging that they are rigged for conviction. . . . As a result, Colonel Davis suggested that Mori might be court-martialed for violating a military law prohibition on speaking disrespectfully of high U.S. government officials.

*Id.* “The important documents in this incident—including news stories and e-mail messages from Col. Davis—may be found as attachments to the defense’s motion to disqualify Col. Davis.” *Id.* at 2016 n.157.

<sup>65</sup> See, e.g., Jesse Bravin, *The Conscience of the Colonel*, WALL ST. J., Mar. 31, 2007, A1.

<sup>66</sup> 18 U.S.C. § 2339B (2006). For an early general discussion, see Shayana Kadidal, *Public Interest Lawyering: “Material Support” of Terrorism?*, JURIST (May 6, 2010), <http://jurist.org/forum/2010/05/public-interest-lawyering-material-support-of-terrorism.php>.

<sup>67</sup> 50 U.S.C. § 1705(b) (2006).

<sup>68</sup> Our office’s correspondence regarding licensing questions indicates that the government’s working definition of “agent” of a designated organization to be “persons or entities owned or controlled by or acting on behalf of a designated terrorist organization, regardless of whether or not they appear on the [master] SDN [Specially Designated Nationals] List.” Letter from Andrea Gacki, Assistant Dir. for Licensing, U.S. Dep’t of the Treasury, to Ctr. for Constitutional Rights (Mar. 10, 2010) (on file with author). Regulations under Part 597 purport to define “agent” in the same manner as above, but the regulations themselves disclaim placing any limitation on the scope of the statute. See 31 C.F.R. §§ 597.101, 597.301 (2011); Global

vice and assistance,” “personnel” (whether yourself or through other individuals), or “services”—becomes a federal felony. The material support statute is the statute under which attorney Lynne Stewart was prosecuted and convicted in February 2005.<sup>69</sup> Stewart was convicted for essentially providing her detained client with a window to communicate with his followers on the outside; thus, she became “personnel” to her client’s blacklisted organization.<sup>70</sup> At an early day-long training session for habeas counsel just after the conviction, the initial questions from the audience of prospective habeas counsel all concerned the case and its ramifications for attorneys venturing into this strange new world of the habeas protective order. Easy parallels to Stewart’s case may be found in some of the restrictions on disseminating information from the mouths of detainees described above.<sup>71</sup> The provision of “services,” however, presents a much more troubling question.

The government has always interpreted “services” to include “legal services,” and when the scope of the statute was tested against a

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Terrorism Sanctions Regulations, *id.* § 595.408(a) (purporting to prohibit charitable contributions to an entity or individual—whether designated or not—“acting for or on behalf of, or owned or controlled by, a specially designated terrorist.”); *see also id.* § 595.408(b) (“Individuals and organizations who donate or contribute funds, goods, services or technology without knowledge or reason to know that the donation or contribution is destined to or for the benefit of a specially designated terrorist shall not be subject to penalties for such donation or contribution.”); *cf.* *United States v. Al-Arian*, 308 F. Supp. 2d 1322, 1340 (M.D. Fla. 2004).

In contrast, appellants in the Holy Land Foundation criminal appeals noted, “E.O. 12947—the source of authority for the regulation—contemplates that such entities will themselves be designated and placed on the Treasury Department list.” Opening Brief of Appellant Ghassan Elashi (with Common Issues) at 81 n.41, *United States v. El-Mezain*, No. 09-10560 (5th Cir. Oct. 19, 2010), *available at* <http://www.scribd.com/doc/40448532/Ghassan-Elashi-appeal>.

<sup>69</sup> *See United States v. Sattar*, 395 F. Supp. 2d 79 (S.D.N.Y. 2005).

<sup>70</sup> *United States v. Stewart*, 590 F.3d 93, 114 (2d Cir. 2009).

<sup>71</sup> Indeed, obedience to restrictions on information dissemination from a detainee, Omar Abdel Rahman, was central to the government’s case against Stewart. *See* Interview by Amy Goodman and Juan Gonzalez with Michael Tigar, Professor of the Practice of Law, Emeritus, Duke Law Sch., Attorney to Lynne Stewart (Feb. 11, 2005), *available at* [http://www.democracynow.org/2005/2/11/convicted\\_attorney\\_lynne\\_stewart\\_you\\_cant](http://www.democracynow.org/2005/2/11/convicted_attorney_lynne_stewart_you_cant).

The only way that we will ever get to the bottom of the American concentration camp abuses at Gitmo and Abu Ghraib is that if the lawyers for these prisoners are permitted to tell their stories to the world. If the government can shut off that communication, which they have attempted to do over and over and over again, these activities will continue in secret . . . .

*Id.*

First Amendment challenge in *Holder v. Humanitarian Law Project*,<sup>72</sup> the government defended that interpretation against several rounds of pointed questioning from the judges.<sup>73</sup> But what about merely forming an attorney-client relationship? Can an attorney be retained to provide pro bono legal services<sup>74</sup> for someone accused of being an agent of a blacklisted organization—such as Al Qaeda or the Taliban,<sup>75</sup> groups essentially every Guantánamo detainee is alleged to have been associated with—without falling afoul of the material support statute and similar terrorism sanctions regimes?

<sup>72</sup> 130 S. Ct. 2705 (2010). In *Humanitarian Law Project*, plaintiffs, who were various aid and human rights groups, sought to provide training and political advocacy for two banned groups. *Id.* at 2713. The Court agreed with the plaintiffs that such proposed “material support” was speech, but then upheld the statute’s restriction on that speech in the face of heightened scrutiny. *Id.* at 2723. The case thus marks the only standing precedent in the history of the Court to uphold a content-based speech restriction. The only previous such precedent, *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), was overturned by *Citizens United v. Federal Election Commission*, 130 S. Ct. 876 (2010). The polling-place pamphletting restriction case *Burson v. Freeman*, 504 U.S. 191 (1992), is often mistakenly cited as upholding a content-based restriction, but it was ultimately decided on the basis of Justice Scalia’s fifth vote, which was predicated on the fact that sidewalks around a polling place were not by tradition a public forum. *Id.* at 214–17 (Scalia, J., concurring in the judgment).

<sup>73</sup> See Transcript of Oral Argument at 49–53, *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705 (2010) (Nos. 08-1498/09-89) (“Justice Breyer: ‘I want to know if that’s what you’re saying . . . an organization has American citizens, engages in terrible stuff, but they are not entitled under the Constitution to have a lawyer in the United States who does legal work like filing amicus briefs.’ . . . Justice Kennedy: ‘[Is one permitted to say:] here’s how to file an amicus brief?’ Solicitor General Kagan: ‘. . . you can’t.’”).

<sup>74</sup> Whether an attorney can be paid by the blacklisted party for doing such work is a separate and more difficult question. The government has always asserted that it can cut off blocked funds from being used to pay attorneys under international sanctions regimes. *Compare* *Am. Airways Charters, Inc. v. Regan*, 746 F.2d 865, 875 (D.C. Cir. 1984) (“[N]othing in our disposition is properly read as authorizing payment to counsel without the approval of OFAC.”), *with infra* text accompanying note 91 (describing 75 Fed. Reg. 75,904, which permits lawyers to receive payment in certain carefully circumscribed circumstances).

<sup>75</sup> Note that Al Qaeda is on the Foreign Terrorist Organization list of groups to which support is banned by the material support statute, but the Taliban is not. *Foreign Terrorist Organizations*, U.S. DEP’T STATE (Sept. 15, 2011), <http://www.state.gov/s/ct/rls/other/des/123085.htm>. It is instead designated under a different sanctions scheme—created by executive order pursuant to the IEEPA—the GTSR, as a “Specially Designated Global Terrorist” (SDGT). Oddly, the “Pakistani Taliban” and the “Kurdish Taliban” are each on both lists. *Id.* For a “master list” of individuals and organizations designated under various similarly designed sanctions schemes, see *Specially Designated Nationals List (SDN)*, U.S. DEP’T THE TREASURY, <http://www.treas.gov/offices/enforcement/ofac/sdn> (last updated Sept. 29, 2011). For a description of the various schemes, see *Holder v. Humanitarian Law Project*, CTR. FOR CONST. RTS., <http://ccrjustice.org/hlp> (last visited Sept. 27, 2011).

At oral argument, then-Solicitor General and current Justice Elena Kagan offered a safe harbor: if there was a constitutional right capable of vindication in the courts (e.g., Sixth Amendment criminal process rights for an individual facing charges,<sup>76</sup> a Fifth Amendment interest in seized property, or a Suspension Clause or due process interest in habeas), “then the government believes that the statute should be read so as not to include that” in the scope of what is criminally prohibited.<sup>77</sup> That position is also consistent with the one decision addressing this issue in any detail—*American Airways Charters, Inc. v. Regan*,<sup>78</sup> authored by Justice Ginsburg when she was a judge on the D.C. Circuit.

That “constitutional right” safe harbor is, of course, small comfort to the public interest and pro bono attorneys who represented Guantánamo detainees—some for pay<sup>79</sup>—over the last nine years.<sup>80</sup>

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<sup>76</sup> When commentators such as Marc Thiessen state so vehemently that detainees, such as Khalid Sheikh Mohammed, have no Sixth Amendment rights, perhaps part of what they are trying to state is that attorneys should not feel free to represent them without the government’s consent. See Marc Thiessen, *The “Al-Qaeda Seven” Aren’t Like John Adams*, WASH. POST POSTPARTISAN BLOG (Mar. 11, 2010, 11:06 AM), [http://voices.washingtonpost.com/postpartisan/2010/03/the\\_al-qaeda\\_seven\\_arent\\_like\\_john.html](http://voices.washingtonpost.com/postpartisan/2010/03/the_al-qaeda_seven_arent_like_john.html). Note that the original (2006) MCA allowed some degree of vetting control by the government of civilian defense counsel beyond that implicit in the granting of clearances. See Military Commissions Act of 2006, Pub. L. No. 109-148, §§ 948k(b)(2), 949c(b)(3), 950h(c), 120 Stat. 2600 (codified in scattered sections of 10, 18, 28, and 42 U.S.C.).

<sup>77</sup> Transcript of Oral Argument, *supra* note 73, at 49–50.

<sup>78</sup> 746 F.2d 865, 871–73 (D.C. Cir. 1984) (holding that, at least in the absence of clear statement of congressional intent, it would be inconsistent with due process to interpret the statute as permitting the Office of Foreign Assets Control (“OFAC”) to ban formation of attorney-client relationship). This opinion concerned whether a lawyer could represent an entity that was targeted under the Cuban economic embargo regulations, which bar most transactions, whether they involve money or not, between Cuban nationals and Americans. *Id.* at 867–69. The government may ban payments to the lawyer and in fact the Cuban government’s lawyers in the United States seek annual licenses to get paid for their work. See *id.* at 872. But on the question of whether the lawyer could form an attorney-client relationship with his black-listed client—that is, whether he could represent them at all, even pro bono—the court only offered this small comfort: where the Due Process Clause of the Constitution guaranteed some rights enforceable in court to the client, then the lawyer could provide his legal “services” for free without fear of criminal prosecution. See *id.* at 873.

<sup>79</sup> The Kuwaiti government initially retained Shearman & Sterling to represent all twelve of its nationals at Guantánamo, though the proceeds were donated to a non-profit group. See Debra Cassens Weiss, *For Three Law Firms, Gitmo Cases Weren’t Strictly Pro Bono*, ABA J. (July 29, 2008), [http://www.abajournal.com/news/article/for\\_three\\_law\\_firms\\_gitmo\\_cases\\_werent\\_strictly\\_pro\\_bono](http://www.abajournal.com/news/article/for_three_law_firms_gitmo_cases_werent_strictly_pro_bono). Of course, that is not to diminish the firm’s political courage in taking on these cases, which has been tested and validated time and again since early 2002.

Even the Bush administration's Justice Department declined to focus on this question of whether lawyers had the right to represent clients without criminal liability. The administration, however, has consistently claimed that *Rasul v. Bush* did not establish any constitutional right to habeas. The government argued and continues to argue that *Rasul* only established a statutory right and that it was only with 2008's *Boumediene* decision that a constitutional right to habeas was established.<sup>81</sup>

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<sup>80</sup> It remains an uncertainty whether or how far former Solicitor General Kagan's concession also applies to non-litigation advocacy connected to issues at stake in individual litigation cases. One can imagine that for advocacy directed at the cases *as a group*, the exception the Supreme Court recognized for "independent advocacy" would generally apply. To the extent that much of the initial non-litigation/media advocacy was carried out overseas, that would seem to make little difference on the face of the statute. The statute's text claims that it applies to any individual whose transactions, presumably in the goods or services that are subject to the violation, have any effect on domestic *or foreign* commerce, or persons aiding/abetting/conspiring with the above, as well as persons who later enter the United States. See 18 U.S.C. § 2339B(d)(1)(c) (2006). It is also unclear to what extent various marginal examples literally fitting the above criteria would meet Due Process nexus and notice requirements.

Note also that the initial habeas petitions included a number of statutory claims, including, for example, claims under the Alien Tort Statute (ATS) for violations of international law (e.g. norms against torture and arbitrary detention) and treaties (including the Geneva Conventions) in tort. See, e.g., Petition for Habeas Corpus and Complaint for Declaratory and Injunctive Relief, *Ameziane v. Bush*, No. 05-392 (D.D.C. Feb. 24, 2005), ECF # 1, Claims 5-9 (ATS); Petition for Writ of Habeas Corpus, *Rasul v. Bush*, No. 02-299 (D.D.C. Feb. 19, 2002), ECF # 1, Claims 3-4 (international law). Though the ATS—reading "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States," 28 U.S.C. § 1350 (2006)—is usually thought of as a vehicle for damages claims in tort, tort claims under ATS can presumably be remedied by injunction. See, e.g., *Kadic v. Karadzic*, No. 93 Civ.1163 (S.D.N.Y. Aug. 16, 2000) (enjoining defendant and his forces from various actions in furtherance of genocide); *Von Dardel v. Union of Soviet Socialist Republics*, 623 F. Supp. 246 (D.D.C. 1985), *vacated on other grounds*, 736 F. Supp. 1 (D.D.C. 1990) (default judgment against the Soviet Union, granting injunctive, declaratory, and compensatory relief under the ATS, and ordering the Russian government to release a political prisoner or otherwise account for his whereabouts); cf. *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1, 40-44 (D.D.C. 2010) (rejecting ATS claims because court found no cognizable international law tort and declined to waive sovereign immunity, but not questioning concept of injunctive relief under ATS generally). Would claims brought under these non-constitutional provisions be subject to sanctions for providing material support, on the theory that the ATS and treaties stand at parity with the generally later-in-time sanctions statutes? Would a *jus cogens* status of the violation of international law change the calculus?

<sup>81</sup> See, e.g., Defendants' Motion to Dismiss at 5-8, *Celikogus v. Rumsfeld*, No. 06-cv-1996 (D.D.C. Feb. 19, 2010), ECF No. 43; Reply in Further Support of Defendants' Motion to Dismiss at 5-7, *Celikogus v. Rumsfeld*, Civ. No. 06-cv-1996 (D.D.C. May 21, 2010), ECF No. 46; Individual Defendants' Motion to Dismiss Plaintiffs' Constitu-

How should an attorney ethically confront those issues in situations of constitutional doubt? Might such personal risk distort the way an attorney argued such a case, tilting her judgment towards favoring aggressive assertion of constitutional claims? One scholar has suggested a clear statement rule presuming that statutory schemes should be read to allow public interest representation in such circumstances unless there is a clear statement of contrary intent from Congress.<sup>82</sup> The Supreme Court in *Humanitarian Law Project*, however, failed to read an explicit First Amendment disclaimer in the material support statute<sup>83</sup> with any breadth. Perhaps situations where an attorney-client relationship was created to advance a *colorable* constitutional claim should be judged with a strong presumption in favor of counsel—a sort of rule of lenity for public interest representation.

Of course, there are other alternatives to taking one's chances. Had the government made an issue of this, then perhaps counsel would have sought specific licenses,<sup>84</sup> pointed to footnote fifteen in *Rasul*,<sup>85</sup> and/or the due process and other constitutional claims in the original petitions,<sup>86</sup> or simply sought to somehow construe the claims to fit within another safe harbor of *Humanitarian Law Project*, such as that for “independent advocacy” by third parties not coordinating with the blacklisted group or its agents (e.g., the family-

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tional Claims at 20–22, *Al Zahrani v. Rumsfeld*, No. 09-cv-28 (D.D.C. Jun. 26, 2009), ECF No. 13.

<sup>82</sup> I owe this suggestion to Professor Peter Margulies of Roger Williams University School of Law.

<sup>83</sup> See 18 U.S.C. § 2339B(i) (2006); *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2724–31 (2010).

<sup>84</sup> This was done in the recent *Al Aulahi* litigation. See Complaint at ¶ 5, *ACLU v. Geithner*, No. 10-cv-1303 (D.D.C. Aug. 3, 2010), ECF No. 1. The downside of a license request, of course, is that it puts the government on notice as to the aid proposed to be provided, which is especially problematic when that aid is legal assistance in suing the government, and it can be viewed as a tacit admission that the restrictions are otherwise applicable in the absence of specific exemption.

<sup>85</sup> See *Rasul v. Bush*, 542 U.S. 466, 485 n.15 (2004)

Petitioners' allegations—that, although they have engaged neither in combat nor in acts of terrorism against the United States, they have been held in executive detention for more than two years in territory subject to the long-term, exclusive jurisdiction and control of the United States, without access to counsel and without being charged with any wrongdoing—unquestionably describe “custody in violation of the Constitution or laws or treaties of the United States.”

*Id.* ((citing 28 U.S.C. § 2241(c)(3)(2006); *United States v. Verdugo-Urquidez*, 494 U.S. 259, 277–78, (1990) (Kennedy, J., concurring), and cases cited therein”).

<sup>86</sup> See Petition for Writ of Habeas Corpus at 15–17, *Rasul v. Bush*, No. 02-cv-299 (D.D.C. Feb. 19, 2002), ECF No. 1, available at <http://news.findlaw.com/hdocs/docs/terrorism/rasulbush021902pet.html>.

member next friends).<sup>87</sup> The same problems reassert themselves once detainees are released with their habeas petitions dismissed—can their attorneys provide services or send them tangible assistance without falling afoul of the sanctions schemes, especially when, as always, the government has not withdrawn its allegations despite release? Given the intensity of the government’s attempts to date to “[s]ilenc[e] the adversary’s lawyer [as] a means of winning cases”<sup>88</sup> and indeed the government’s broad assertions of the scope of its detention power, clearly modeled on the material support statute itself,<sup>89</sup> it is perhaps surprising that these issues have not been more thoroughly vetted to date.

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<sup>87</sup> *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2726 (2010) (“The statute reaches only material support coordinated with or under the direction of a designated foreign terrorist organization. Independent advocacy . . . is not covered.”). “We think a person of ordinary intelligence would understand that independently advocating for a cause is different from providing a service to a group that is advocating for that cause. . . . [A]ny independent advocacy in which plaintiffs wish to engage is not prohibited by § 2339B.” *Id.* at 2722. The Court noted government concession in its briefs that “[t]he statute does not prohibit independent advocacy or expression of any kind.” *Id.* at 2723. As to future applications of the statute or similar, novel schemes, “we in no way suggest that a regulation of independent speech would pass constitutional muster, even if the Government were to show that such speech benefits foreign terrorist organizations.” *Id.* at 2730.

<sup>88</sup> See Luban, *supra* note 1, at 2021.

<sup>89</sup> See, e.g., *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 475 (D.D.C. 2005)

In response to the [Court’s] hypotheticals, counsel for the respondents argued that the Executive has the authority to detain the following individuals until the conclusion of the war on terrorism: “[a] little old lady in Switzerland who writes checks to what she thinks is a charity that helps orphans in Afghanistan but [what] really is a front to finance al-Qaeda activities, . . . a person who teaches English—to the son of an al-Qaeda member, . . . and a journalist who knows the location of Osama Bin Laden but refuses to disclose it to protect her source.”

*Id.* Note that as to the little old lady in the actual hearing, the government answered that she could be detained, in the military’s discretion. Transcript of Motion to Dismiss at 26, *Rasul v. Bush*, No. 02-cv-299 (D.D.C. Dec. 1, 2004) (on file with author). She would, however, clearly be exempted by the requirement added to the material support statute by Congress (as a result of government losses in earlier rounds of the *Humanitarian Law Project* litigation in the lower courts) mandating that the defendant have knowledge that the organization was designated as terrorist or engages in terrorism. See Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, Title VI, Subtitle G, § 6603(c)–(f), 118 Stat. 3762 (amending 18 U.S.C. § 2339B(a)(1)). Similarly, at argument, Judge Green’s hypothetical postulated that the English teacher taught someone who “the CIA knew” was a member of Al Qaeda. Transcript of Motion to Dismiss at 27, *Rasul v. Bush*, No. 02-cv-299 (D.D.C. Dec. 1, 2004). Again, if the teacher lacked such actual knowledge (or perhaps “reason to know”), it is hard to imagine he/she could be convicted under the statute. See 31 C.F.R. § 595.408(b) (2011).



In any event, the scheme in place as of *Rasul* offered little comfort to habeas counsel. Regulations issued in December 2010 have dulled the pressure on public interest lawyers<sup>90</sup> but have not resolved the ultimate constitutional issue of whether the government may legitimately restrict the ability of attorneys to merely form an attorney-client relationship with individuals said to be agents of blacklisted organizations.<sup>91</sup>

<sup>90</sup> At least outside of the material support statutory scheme. See *infra* note 91 (discussing apparent limitations of 18 U.S.C. § 2339B(j) (2006)).

<sup>91</sup> The new regulations were issued in response to a complaint filed to allow the ACLU and CCR to bring claims in federal court for the benefit of Anwar al-Aulaqi, who reportedly had been approved for assassination by President Obama but was himself a designated SDGT. Complaint, *ACLU v. Geithner*, No. 10-cv-1303 (D.D.C. Aug. 3, 2010), ECF No. 1; Global Terrorism Sanctions Regulations, 31 C.F.R. § 594 (2011); Terrorism Sanctions Regulations, 31 C.F.R. §§ 595 (2011); Foreign Terrorist Organizations Sanctions Regulations, 31 C.F.R. §§ 594, 595, 597 (2011). After the filing of the complaint, the OFAC issued a license permitting provision of such legal services, and shortly afterwards, the *Al-Aulaqi v. Obama* complaint was filed. *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1, 54 (D.D.C. 2010) (dismissing the complaint).

Prior to the Al-Aulaqi controversy, there had been regulations that allowed representation on a variety of issues that did not cover the preliminary injunctive relief sought by the ACLU and CCR. The GTSR permit provision of legal services to SDGTs regarding

compliance with the laws of any jurisdiction within the United States . . . when named as defendants in or otherwise made parties [i.e. involuntarily] to domestic U.S. legal, arbitration, or administrative proceedings . . . defense of property interests subject to U.S. jurisdiction . . . before any federal or state agency with respect to the imposition, administration, or enforcement of U.S. sanctions . . . [r]epresentation of persons, wherever located, detained within the jurisdiction of the United States or by the United States government, with respect to either such detention or any charges made against such persons . . . and [p]rovision of legal services in any other context in which prevailing U.S. law requires access to legal counsel at public expense.

31 C.F.R. § 594.506 (2011). The new rules modify the GTSR to allow, in addition to the above,

[t]he provision of legal services not otherwise authorized [above] to or on behalf of persons whose property and interests in property are blocked pursuant to [the GTSR] in connection with the initiation and conduct of legal, arbitration, or administrative proceedings before any U.S. federal, state, or local court or agency . . . .

*Id.* § 594.506(b).

Similar rules were created under another major scheme not discussed above—the Terrorism Sanctions Regulations (TSR) a sanctions regime created by President Clinton to address the Israeli-Palestinian conflict. Regulations implementing financial transaction restrictions exist under the material support statute but, presumably, since these banking regulations do not touch on services, they do not contain a license provision allowing provision of legal services. See *id.* § 597. Licenses under the material support statute would still be sought from the Secretary of State (not the Treasury Secretary) under the statute’s licensing provision, which on its face seems to provide the Secretary leeway to license only three of the four intangible forms of

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A brief word is in order regarding issue conflicts. Although the detainees share certain common interests against the government, their interests do not perfectly align and sometimes conflict. Such situations have been commonplace over the years. Some clients, cleared for release by President Obama's Guantánamo Review Task Force, want the fact of their clearance to be public information; others, not cleared, have an interest in keeping everyone's clearance status as non-public, "protected" information. There is no limit to such examples and their existence is not terribly surprising, though it does occasionally complicate our lives, especially given CCR's special role in coordinating the litigation of these cases.

Perhaps more interesting is the series of "issue conflicts"<sup>92</sup> that have arisen between human rights NGOs that historically advocate broadly on national security, detention, and interrogation issues, and habeas counsel who represent individual detainees. On a variety of issues, habeas counsel and the lobbying NGOs have split: on the question of whether it made sense to close Guantánamo—in symbol, if not in essence—by moving all the detainees to a federalized prison in Thomson, Illinois, presumptively with pervasive super-maximum conditions and perhaps also additional public scrutiny;<sup>93</sup> on preference for any trials to take place in Article III courts as opposed to military commissions;<sup>94</sup> and on the wisdom of forming a truth-and-reconciliation-style "accountability commission" able to offer immu-

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"material support" defined in the statute: "personnel," "training," or "expert advice," but *not* "services." 18 U.S.C. § 2339B(j) (2006) ("No person may be prosecuted under this section in connection with the term 'personnel', 'training', or 'expert advice or assistance' if the provision of that material support or resources to a foreign terrorist organization was approved by the Secretary of State with the concurrence of the Attorney General.").

Finally, the new regulations also authorize several payment mechanisms. See 31 C.F.R. §§ 594.517, 595.515, 597.505, 597.513 (2011).

<sup>92</sup> I use the term here colloquially; these are obviously not "conflicts" in the formal sense in which litigators use the term.

<sup>93</sup> See, e.g., Press Release, Constitution Project, Constitution Project Welcomes Thomson Acquisition if Used for Pre-Trial and Post-Conviction Detention (Dec. 15, 2009), *available at* [http://www.constitutionproject.org/news/2009/12152009n\\_cpthomson.php](http://www.constitutionproject.org/news/2009/12152009n_cpthomson.php).

<sup>94</sup> See, e.g., *Ten Years After the Attack*, HUM. RTS. WATCH (Sept. 8, 2011), <http://www.hrw.org/news/2011/09/08/ten-years-after-september-11>; *US: Groups Urge End to Military Commission Cases*, HUM. RTS. WATCH (Mar. 12, 2010), <http://www.hrw.org/news/2010/03/12/us-groups-urge-end-military-commissions-case-against-child-soldier>.

ity from prosecution as a second-best accountability mechanism.<sup>95</sup> On all of these issues, the difference of opinion between human rights groups has generally broken down according to whether the group represented clients at Guantánamo.

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Diminished capacity clients always present special problems to attorneys from the standpoint of professional ethics. These problems are exacerbated in the unique situation of Guantánamo cases that involve habeas petitions challenging executive detention (i.e., detention in the absence of any prior judicial proceeding) brought in the first instance almost exclusively by “next friends.” These habeas petitioners were typically not facing any kind of mandatory judicial process—unlike a defendant who is criminally charged by the government, a habeas petitioner initiates his judicial process at his pleasure. Indeed, the initial demand of the Guantánamo habeas petitioners was simply to be charged. The habeas proceedings were a voluntary attempt to achieve a change in status. Over the years, many rational clients have decided that they did not wish to continue their habeas proceedings often for reasons mundane—“If I don’t have an attorney, I can have a blanket, and I’d rather have a blanket because you can’t do anything for me”<sup>96</sup>—but often for philosophical reasons as well.<sup>97</sup> As I have noted above, their lawyers have often rationally questioned, from a philosophical standpoint, whether participation

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<sup>95</sup> See LISA MAGARRELL, INT’L CTR. FOR TRANSITIONAL JUSTICE, U.S. INQUIRY INTO HUMAN RIGHTS ABUSES IN THE “WAR ON TERROR” (2008), available at <http://ictj.org/sites/default/files/ICTJ-USA-Commission-Inquiry-2008-English.pdf>

<sup>96</sup> See Luban, *supra* note 1, at 1998 (quoting Telephone Interview with Charles Swift, Atlanta, Ga. (Dec. 10, 2007)).

<sup>97</sup> One ongoing challenge for counsel has been the representation of “refuseniks”—clients who have a next-friend authorization but refuse to come out of their cells to meet habeas counsel and usually refuse calls and legal mail as well. This is a familiar situation in the capital appeals context, where it is typical for counsel to be allowed to walk up to a cell door to communicate with their client, if only to have that interaction as part of the basis for a competency challenge. At Guantánamo, habeas counsel have, with one exception, never been allowed to go back into the housing areas of the camps to meet detainee clients. Instead, when a refusal occurs, a note can be written and translated, and the staff judge advocate takes it to the prisoner’s cell. In practice, almost no feedback is given on the reasons the client is refusing to come out, if he is refusing at all. See *supra* note 20; see also *supra* note 46. Typically medical experts may be given a similar opportunity to examine the prisoner in an ordinary prison context but not at Guantánamo. See *infra* note 105. In the exceptional environment of Guantánamo, one could easily argue that counsel have an obligation to pursue direct contact with such refusal clients more vigorously than they might be ethically obliged to for clients held in ordinary prisons. The same logic may apply to situations in which clients purport to fire attorneys by mail or other forms of mediated contact, limiting the ability to observe the clients mental state.

in the various judicial, quasi-judicial, or administrative processes set up at Guantánamo simply served to legitimate them.<sup>98</sup> That lends a unique color to the evaluation of Guantánamo clients exercising what are traditionally the last two rights left to prisoners held in the worst of conditions: the right to fire their lawyers and the right to stop eating.<sup>99</sup>

Long-term hunger strikers at Guantánamo have posed some of the most wrenching dilemmas for habeas attorneys. The general consensus<sup>100</sup> has been that when the client is so infirm that he is no longer able to make an independent rational decision to continue the hunger strike, the attorney may intervene to seek assistance in keeping the client alive. This follows the pattern of the model rules.<sup>101</sup> Difficult questions are posed by the frequent situation in which the client has not yet progressed to the point of having lost free will, but further deterioration is foreseeable.<sup>102</sup> The absolutely brutal treatment of hunger strikers at Guantánamo serves to exacerbate what would already be an impossible situation.<sup>103</sup> The Model Rules expressly contemplate a situation where the attorney may seek the appointment of independent third parties, psychiatric experts, guardians, etc., to essentially serve as neutral referees overseeing the

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<sup>98</sup> See *supra* text accompanying note 63.

<sup>99</sup> See, e.g., Toni Locy, *Military, Lawyers at Odds Over Gitmo Hunger Strike*, USA TODAY, Sept. 19, 2005, at 19A; Jonathan Mahler, *The Bush Administration vs. Salim Hamdan*, N.Y. TIMES (Magazine), Jan. 8, 2006, at 10 (“[S]ome detainees told their American lawyers that they would no longer meet with them, and a number went so far as to formally fire them.”).

<sup>100</sup> We at CCR are fortunate enough not to be lead counsel in any such cases at present.

<sup>101</sup> See MODEL RULES OF PROF’L CONDUCT R. 1.14(b) (2004) (stating that an attorney “may take reasonably necessary protective action” on behalf of client with diminished capacity).

<sup>102</sup> The government once attempted to ban lawyers from one major law firm from visiting the base altogether, in part because the Defense Department claimed the lawyers had advised a hunger striking client that the United States lacked authorization to feed hunger-striking detainees indefinitely. In fact, the hunger striking client had been told by the military—incorrectly—that there was an order from the federal district court requiring them to force-feed him through an enteral tube. In response to a request from their client, counsel merely clarified that no such order had been issued in his *habeas* proceeding.

CTR. FOR CONSTITUTIONAL RIGHTS & REPRIEVE, *supra* note 41, at 14–15.

<sup>103</sup> See Letter from Counsel for Twenty-Six Hunger Strikers to Robert M. Gates, Def. Sec’y Sandra Hodgkinson, Deputy Assistant Sec’y of Def. for Detainee Affairs, & Alan Liotta, Principal Dir. of the Office of Detainee Affairs (Mar. 12, 2009) (on file with author).

attorney-client relationship in such difficult circumstances.<sup>104</sup> At various points during the Guantánamo litigation, however, access to the clients by such third parties has been next to impossible given the attitude of the government and the courts. The number of independent psychiatric evaluations that have been allowed to take place at the base at the behest of habeas or defense counsel can be counted on the fingers of one hand. “Next friends” might typically serve in a role akin to guardians—but here, most are other prisoners.<sup>105</sup> What then?

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We are seemingly a long way removed from the days when our mere participation in these cases—in the early commissions process, in monitored habeas visits, or in the HVD cases under the strictures of the TS/SCI protective order—itsself raised ethical questions. Perhaps the surest reassurance of legitimacy came from the fact that during the Bush administration, the government had been trying so steadfastly to keep civilian lawyers out of these cases. Most of the problems described above have been motivated by the desire of our party-opponent to drive us out of the picture in order to reinforce isolation and dependency in the prisoners and cover up abuses. At the same time, those abuses and the lack of process made mere access extraordinarily valuable. In contrast, the new administration seems eager to have lawyers in the process: witness the provision for some form of outside representation in the Periodic Review Board process

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<sup>104</sup> See MODEL RULES OF PROF'L CONDUCT R. 1.14(b) (2004) (“[R]easonably necessary protective action [may] includ[e] consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian *ad litem*, conservator or guardian.”); see *id.* cmts. 5–6.

<sup>105</sup> The first burst of individual petitions filed after *Rasul* involved relatives as “next friends,” but locating them was backbreaking and risky work, resulting in two attorneys being detained by the secret police of detainees’ home countries. Eventually counsel began filing petitions based on next friend authorizations from other prisoners—those first clients whose relatives had authorized their petitions. The military initially allowed visits by such counsel, then fought the validity of the “prisoner next friend” petitions, and eventually lost in court. See, e.g., *Adem v. Bush*, 425 F. Supp. 2d 7 (D.D.C. 2006). While these legal struggles went on, however, various detainees spent months waiting to meet their counsel, in some cases informing the lawyers that they were cleared by their Combatant Status Review Tribunals. See, e.g., *id.* at 9 (“Adem has now had a lawyer for nearly a year. However, it is unclear if Adem even knows that his lawyer exists because Respondents refuse to acknowledge counsel’s authority to represent him.”). In one instance, a detainee who was on a list of men scheduled for release died shortly after his first attorney visit was authorized by court order. See Motion for Order Requiring Respondents to Allow Counsel to Meet with Petitioner In-Person, *Al-Habardi v. Bush*, No. 05-1857 (D.D.C. Apr. 14, 2006), ECF No. 15; First Declarations of George Daly & Jeffrey J. Davis, *Al-Habardi v. Bush*, No. 05-1857 (D.D.C. Apr. 14, 2006), ECF No. 16.

recently created by Executive Order 13,567 on March 7, 2011.<sup>106</sup> At the same time, the legal standards that apply in the habeas litigation are, for all practical purposes, approaching those that the Bush administration argued for in the immediate wake of the *Rasul* decision.<sup>107</sup> For years, habeas lawyers have essentially adhered to Woody Allen's maxim that eighty percent of success was showing up. In habeas, where the case moves forward at the will of the detainee and the detainee is the one seeking to change the status quo, it is understandable that the value of the lawyer's presence to further the detainee's best interests might go unquestioned. But here we are faced with a process that is no longer, by and large, designed to isolate detainees or hide visibly brutal abuses,<sup>108</sup> but rather is skewed towards perpetuating the perception of legal order and due process by an administration that depends on that perception to make continued detention politically palatable. Will there come a point at which the most effective—the most *loyal*—advocacy will involve refusing to participate in that process?<sup>109</sup>

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<sup>106</sup> Exec. Order No.13,567, 76 Fed. Reg. 13,277 (Mar. 7, 2011).

<sup>107</sup> At the time, the Bush administration argued that "some evidence" should be the standard of proof and that the scope of review should be limited to examination of a cold administrative record. For a discussion of the divergent standards applied by the courts of appeals, see *supra* note 26.

<sup>108</sup> Two points bear repeating here: even with the great improvement that the transition in administration has brought for the majority of detainees at Guantánamo: (1) the HVDs and the hunger strikers still face inhumane conditions, and (2) the lack of any certainty about when they might be released is an awful burden to bear even, and perhaps especially so, for those detainees cleared for release and not in the two aforementioned categories still facing the worst conditions.

<sup>109</sup> One habeas attorney recently dismissed two appeals from denials of the writ on the rationale, essentially, that it was now hopeless to proceed in light of the state of the case law in the D.C. Circuit. See Benjamin Wittes, *Two Guantanamo Detainees Drop Appeal*, LAWFARE BLOG (June 2, 2011, 4:08 PM), <http://www.lawfareblog.com/2011/06/two-guantanamo-detainees-drop-appeals> (describing the detainees' decisions in *Al-Assani v. Obama* and *Al-Nahdi v. Obama* to dismiss their habeas appeals).