[ORAL ARGUMENT SCHEDULED FOR MAY 15, 2007]

Nos. 06-1197 and 06-1397

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

HAJI BISMULLAH and HAJI MOHAMMAD WALI, as Next Friend of Haji Bismullah,
Petitioners,
v.
ROBERT M. GATES,
Respondent.

HUZAIFA PARHAT, *et al.*,
Petitioners,
v.
ROBERT M. GATES, *et al.*,
Respondents.

ORIGINAL ACTIONS UNDER THE DETAINEE TREATMENT ACT OF 2005

BRIEF AMICI CURIAE OF BAR ASSOCIATIONS, LAWYERS' PROFESSIONAL ASSOCIATIONS, AND LEGAL ETHICS SCHOLARS IN SUPPORT OF PETITIONERS' MOTIONS TO SET PROCEDURES AND FOR ENTRY OF PROTECTIVE ORDER AND IN OPPOSITION TO RESPONDENT'S MOTION FOR PROTECTIVE ORDER

(See inside cover for list of Amici)

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LIST OF AMICI CURIAE

Association of the Bar of the City of New York

Boston Bar Association

Beverly Hills Bar Association

Association of Professional Responsibility Lawyers

International Senior Lawyers Project

Stephen Gillers, Emily Kempin Professor of Law
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David Luban, University Professor and Professor of Law and Philosophy at
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* The affiliations of Professors Gillers and Luban are provided for identification purposes only.

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28, counsel for amici curiae, the Association of the Bar of the City of New York, the Boston Bar Association, the Beverly Hills Bar Association, the Association of Professional Responsibility Lawyers, the International Senior Lawyers Project, and Professors Stephen Gillers and David Luban, certify the following:

A. Parties and Amici

Except for the following, all parties, intervenors and amici appearing before the district court and in this court are listed in Petitioners' Joint Brief in Support of Pending Motions to Set Procedures and For Entry of Protective Order, submitted on March 26, 2007.

Amici: Amici are the Association of the Bar of the City of New York, the Boston Bar Association, the Beverly Hills Bar Association, the Association of Professional Responsibility Lawyers, the International Senior Lawyers Project, and Professors Stephen Gillers and David Luban.

B. Rulings Under Review

References to the rulings at issue appear in Petitioners' Joint Brief in Support of Pending Motions to Set Procedures and For Entry of Protective Order, submitted on March 26, 2007.

C. Related Cases

References to related cases appear in Petitioners' Joint Brief in Support of Pending Motions to Set Procedures and For Entry of Protective Order, submitted on March 26, 2007.

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1, counsel for amici curiae the Association of the Bar of the City of New York, the Boston Bar Association, the Beverly Hills Bar Association, the Association of Professional Responsibility Lawyers, and the International Senior Lawyers Project makes the following disclosure:

The associations and organizations listed above do not issue stock. No parent companies or publicly held companies have 10% or greater ownership any of associations and organizations listed above.

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The Association of the Bar of the City of New York, founded in 1870, is a professional association of approximately 23,000 lawyers, judges and legal scholars. The Boston Bar Association, which has approximately 9,000 members, is the nation's oldest bar association and is the direct successor to the association founded in 1761 by Boston lawyers including John Adams. The Beverly Hills Bar Association has 4,000 members, and has dedicated itself to the advancement of the rule of law for more than 70 years. The Association of Professional Responsibility Lawyers is an independent national organization of lawyers practicing in the fields of professional responsibility and legal ethics. The International Senior Lawyers Project provides volunteer legal services by skilled and experienced attorneys to advance democracy and the rule of law and to protect human rights. Stephen Gillers is the Emily Kempin Professor of Law at New York Univeristy School of Law, where he has been teaching legal professional responsibility and ethics for 30 years and is the author of many articles and the leading casebook in the field. David Luban, University Professor and Professor of Law and Philosophy at Georgetown University Law Center,[1]

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[1] The references to Professor Luban's and Professor Gillers's affiliations are solely for identification purposes.

teaches and writes extensively on lawyers' professional responsibilities and legal ethics.

The government's motion for a protective order directly affects the professional responsibilities of the members of the Bar Association amici, many of whom currently provide *pro bono* representation to detainees at the Guantánamo Bay Naval Base ("Guantánamo"). The motion also directly affects interests which each of the amici have long promoted and with which they are deeply concerned. These include promoting and interpreting lawyers' professional responsibilities to provide competent and informed representation, preserve the confidences and secrets of their clients, inspire their clients' trust, and represent their clients zealously within the bounds of the law; assuring effective assistance of counsel for persons whose liberty is at stake as a fundamental element of the rule of law; and encouraging lawyers to provide *pro bono* representation for those in need, including unpopular persons.

All of these interests are at stake in dramatically heightened form on these motions.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Association supports the petitioners in urging the Court to reject the government's proposed protective order[2] (the "Proposed Order"), and to adopt instead the standard form of protective order that has heretofore governed habeas proceedings in the district court (the "Standard Order").[3]

In this amicus brief, we show that, contrary to the government's assertion, effective assistance of counsel is a matter of right, not grace, that is implicit in the grant of judicial review by the Detainee Treatment Act[4] ("DTA"), and that the restrictions in the Proposed Order would effectively eliminate that right and unreasonably interfere with lawyers' professional responsibilities to their detainee clients.

Absent effective assistance of counsel, judicial review would be meaningless, especially for these detainees. They have been imprisoned without charges for years. They are held under harsh, often isolating conditions that in many cases have had damaging effects on their mental and physical condition. They are unfamiliar with our language, laws, and

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[2] Motion for Entry of Protective Order, Addendum B, *Bismullah* v. *Rumsfeld*, No. 06-1197 (D.C. Cir. Aug. 25, 2006).

[3] This amicus brief does not address the discovery issues that are also before the court.

[4] Pub. L. No. 109-148, §§ 1001-1006, 119 Stat. 2680 (2005).

customs. They are deprived of support or communication with family or friends and closely guarded by soldiers at all times. Finally, they are faced with the prospect of indefinite imprisonment, possibly for life, based on Combatant Status Review Tribunal ("CSRT") proceedings in which they had no access to counsel and no meaningful opportunity to defend themselves. Under these circumstances, their right to review by this Court of those CSRT determinations would be meaningless in the absence of effective assistance of counsel.

Equally important, the Court itself could not effectively conduct the review mandated by the DTA without a robust adversary process in which the detainees have effective assistance of counsel. The Court depends on effective counsel for both sides to provide the factual and legal input needed to assure a just and correct decision. The need for effective assistance of counsel where liberty interests are at stake is recognized as fundamental to the rule of law by our own jurisprudence and that of the civilized world. It is difficult to imagine any circumstances where that need is more compelling than it is here.

While the Court has discretion to enter reasonable protective orders to protect national security, it should not issue an order that unreasonably

restricts detainees' rights to – and this Court's need for – effective assistance of counsel.

The government's proposed restrictions would nullify that right and prevent counsel from complying with the professional obligations that assure effective representation. The Proposed Order would limit the lawyer to three visits with the detainee – a restriction that the commander of Guantánamo has recently acknowledged is unnecessary.[5] It imposes restrictions on the lawyer's mail communications with the detainee to a category of "legal mail" that is narrowly confined to papers to be filed with the Court and correspondence directly related to those papers, and excludes communications on all subjects other than the circumstances leading up to the individual detainee's capture and his CSRT proceedings. It gives a government Privilege Review Team authority to read and censor the content of this mail and disclose those contents based on the government's judgment of the needs of national security. It also limits the lawyer's access to classified information to a "need to know" category based on the

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[5] *See* Carol Rosenberg, *Guantánamo Chief Backs Off Limits on 'Habeas Corpus' Visits*, Miami Herald, May 4, 2007, at A10 (quoting Rear Admiral Harry Harris as stating "detainees ought to have an opportunity to visit with lawyers to discuss their cases" and "we would have no objection to the court ordering more than the number of visits that we suggested back in August").

government's unilateral judgment of what this Court needs to know, rather than the lawyer's judgment of what she needs to properly defend her client.

The restrictions on visits and legal mail deprive the lawyer of the ability to adequately consult with, inform, and obtain information from the client and, together with the restriction on access to classified information, make it virtually impossible for the lawyer to provide competent and informed representation. The expanded powers of the Privilege Review Team to read lawyer mail destroy the confidentiality so necessary to establish the trust that is the bedrock of effective assistance of counsel. Indeed, as recently reported, detainees' mistrust of American lawyers is increasingly corroding relationships between lawyers and their detainee clients.[6] These restrictions are bound to worsen that situation.

In addition, the Proposed Order threatens to deprive many detainees of *any* representation, let alone effective representation. Thus, it would effectively eliminate "next friend" representation, or representation as counsel appointed by this Court for pro se petitioners, unless the lawyer can obtain authorization from the detainee after a single visit. As petitioners show, and as noted above, given the conditions in which these detainees

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[6] *See* William Glaberson, *Many Detainees at Guantánamo Rebuff Lawyers*, New York Times, May 5, 2007, at A1.

have been held and the psychological state it has produced, establishing the trust needed to obtain such authorization may not be possible in a single visit. In addition, the government would have the power to terminate a lawyer's access to her client based on the government's unilateral determination that the lawyer violated the Proposed Order, without any court review or even consultation with the lawyer.

With all respect, and especially given the lack of any justification for these restrictions, we respectfully submit that an order adopting the proposed restrictions would be an abuse of discretion and would prevent meaningful review in this Court.

ARGUMENT

The basic premise on which the government predicates the severe restrictions it would impose on the detainees' lawyers is that assistance of counsel is a matter of grace, and that accordingly, *any* access to counsel, no matter how restricted or how much it hampers the provision of effective assistance of counsel, is more than the assistance to which the detainees are entitled. *See* Respondent's Br. at 41. This premise is wrong. As we show in Section I, the DTA necessarily confers a right to effective assistance of counsel. In Section II, we show that the proposed restrictions would deny

that right and force lawyers to abandon their most fundamental professional responsibilities.

I. Effective Assistance of Counsel Is Fundamental to the Rule of Law and Is Required By the Detainee Treatment Act

The right to effective assistance of counsel where liberty interests are at stake is fundamental to the rule of law and is deeply embedded in our own jurisprudence and that of civilized nations. This right is predicated on the recognition that persons faced with the loss of liberty cannot meaningfully defend themselves without the assistance of counsel and that courts cannot reach correct and just decisions in an adversary system without such assistance from counsel. Congress's grant of jurisdiction to review CSRT determinations in this Court, therefore, would be meaningless unless it were accompanied by a right to effective assistance of counsel, especially given the circumstances of these detainees. Inasmuch as Congress is presumed not to enact meaningless legislation, such a right is implicit in the DTA.

A. An Adversarial System of Justice Cannot Function Without Effective Assistance of Counsel

As the Supreme Court has repeatedly made clear, "[i]n an adversary system of criminal justice, there is no right more essential than the right to the assistance of counsel." *Lakeside* v. *Oregon*, 435 U.S. 333, 341 (1978); *see also Gideon* v. *Wainwright*, 372 U.S. 335, 344 (1963) ("[L]awyers in

criminal courts are necessities, not luxuries. The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours."). While the Sixth Amendment guarantees the right to counsel in criminal prosecutions, entitlement to the assistance of counsel exists whenever liberty interests are at stake in adversarial proceedings, even in civil cases, because "it is the defendant's interest in personal freedom, and not simply the special Sixth and Fourteenth Amendments right to counsel in criminal cases, which triggers the right to appointed counsel." *Lassiter* v. *Dep't of Social Servs.*, 452 U.S. 18, 24 (1981) (citing *In re Gault*, 387 U.S. 1 (1967)).

Thus, in *Hamdi*, the Supreme Court concluded that a United States citizen detained as an alleged "enemy combatant," even though he was allegedly arrested on a battlefield, engaged in hostile combat against the United States, and held outside the bounds of the criminal justice system, "unquestionably has the right to access to counsel." *Hamdi* v. *Rumsfeld*, 542 U.S. 507, 539 (2004) (plurality opinion); *see also id.* at 553 (Souter, J., concurring in part and dissenting in part, joined by Ginsburg, J.) ("[N]or, of course, could I disagree with the plurality's affirmation of Hamdi's right to counsel."). We submit that fundamental fairness and the "interest in personal freedom" require that the same right must be afforded to alien

detainees held at Guantánamo, many of whom, like petitioners, were not captured on any battlefield or while engaged in hostile combat against the United States. *See Boumediene* v. *Bush*, 127 S. Ct. 1478, 1480 (2007) (Breyer, J., dissenting from denial of certiorari) (noting that "many [detainees] were seized outside of any theater of hostility").

Assistance of counsel is necessary because "[l]aymen cannot be expected to know how to protect their rights when dealing with practiced and carefully counseled adversaries." *Brotherhood of R.R. Trainmen* v. *Virginia* ex rel *Virginia State Bar*, 377 U.S. 1, 7 (1964). While this is true even for "the intelligent and educated layman," *Powell* v. *Alabama*, 287 U.S. 45, 67 (1932), courts have long recognized that this protection is all the more crucial where the litigant is in a vulnerable position because of limited resources, education, or language skills, or otherwise "ha[s] a greater need for assistance in exercising [his] rights." *Vitek* v. *Jones*, 445 U.S. 480, 496 (1980).[7] Thus, the Court concluded in *Powell* that in light of "the ignorance

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[7] *See also Gagnon* v. *Scarpelli*, 411 U.S. 778, 790-91 (1973) ("In passing on a request for the appointment of counsel, the responsible agency should also consider . . . whether the probationer appears to be capable of speaking effectively for himself."); *Lassiter*, 452 U.S. at 30 (noting, in the context of parental right revocation proceedings, "parents are likely to be people with little education . . . thrust into a distressing and disorienting situation").

and illiteracy of the defendants, their youth, the circumstances of public hostility, the imprisonment and close surveillance of the defendants by the military forces, the fact that their friends and families were all in other states and communications with them necessarily difficult, and above all that they stood in deadly peril of their lives," the State's failure to permit defendants to obtain counsel was "a clear denial of due process." 287 U.S. at 71. As noted *supra*, and as petitioners have amply demonstrated, the conditions that heighten the need for assistance of counsel are at least equally, if not more dramatically, present here.

But the assistance of counsel is necessary not only to protect an accused's liberty interests; it also furthers the court's and society's interest in ensuring justice. It is essential to the Court's proper exercise of its judicial powers under Article III. Courts can reach correct and just decisions only when they are based on fully developed factual and legal records forged in the crucible of our adversarial process. *See, e.g.*, *McBryde* v. *Comm. to Review Circuit Council Conduct and Disability Orders,* 264 F.3d 52, 78 (D.C. Cir. 2001) ("Critical to the development of a proper record is a well-functioning adversarial process in which lawyers serve both as zealous representatives of their clients and as officers of the court . . . ."); *see also Polk County* v. *Dodson*, 454 U.S. 312, 318 (1981) ("The system assumes

that adversarial testing will ultimately advance the public interest in truth and fairness."). Indeed, courts, judges, and the adversarial judicial system as a whole cannot function without the aid of effective attorneys. As Judge Robert Sweet has noted, "the task of determining the correct legal outcome is rendered almost impossible without effective counsel." Robert Sweet, *Civil Gideon and Confidence in a Just Society*, 17 Yale L. & Pol'y Rev. 503, 505 (1998); *see also* Irving R. Kaufman, *The Court Needs a Friend in Court*, 60 A.B.A. J. 175, 175 (1974) ("This interdependence of bench and bar is the linchpin of our legal system.").

The Supreme Court has repeatedly recognized that robust, adversarial presentation from competing counsel is essential to reaching just and correct results – and, as a corollary, that the absence of such presentation places that objective in peril. *See, e.g.*, *Lankford* v. *Idaho*, 500 U.S. 110, 127 (1991) ("If . . . the adversary process is not permitted to function properly, there is an increased chance of error, and with that, the possibility of an incorrect result.") (internal citations omitted); *United States* v. *Cronic*, 466 U.S. 648, 655 (1984) ("'The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free.'") (quoting *Herring* v. *New York*, 422 U.S. 853, 862 (1975)); *Strickland* v.

Washington, 466 U.S. 668, 686 (1984) ("The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results.").

For these reasons, the right to effective assistance of counsel where liberty is at stake is now recognized as a fundamental principle of the law of nations, and "[a] state violates international law if" a person detained by the government "is not given early opportunity . . . to consult counsel." Restatement (Third) of Foreign Relations § 702(e) & cmt. h (1987) (noting that detention absent early access to counsel is "arbitrary").

Of course, the assistance of counsel at all stages of the judicial process is of no use – either to the client or the court – unless such assistance is effective, and thus "'[i]t has long been recognized that the right to counsel is the right to the effective assistance of counsel.'" *Cronic*, 466 U.S. at 654 (quoting *McMann* v. *Richardson*, 397 U.S. 759, 771 n.14 (1970)). As a consequence, it is not only the total denial of access to counsel that violates the right and interferes with the judicial process, but also the imposition of conditions on that access that prevent the rendering of effective assistance. As the Court recognized in *Powell*, "'[i]t is vain to give an accused a day in court, with no opportunity to prepare for it, or to guarantee him counsel

without giving the latter any opportunity to acquaint himself with the facts or the law of the case.'" 287 U.S. at 59 (quoting *Commonwealth* v. *O'Keefe*, 148 A. 73, 74 (Pa. 1929)); *see also id.* at 57 (stating that "perhaps the most critical period of the proceedings" in the case was the pre-trial period, "when consultation, thorough-going investigation and preparation were vitally important"). Accordingly, courts have sought to ensure that attorneys have sufficient opportunities to meet and confer with their clients, both to gather crucial information from the client as well as to develop that "'[b]asic trust between counsel and defendant [that] is the cornerstone of the adversary system and effective assistance of counsel.'" *Morris* v. *Slappy*, 461 U.S. 1, 21 n.4 (1983) (quoting *Linton* v. *Perini*, 656 F.2d 207, 212 (6th Cir. 1981)).[8] And in service of this same end, courts have zealously protected the attorney-client privilege, the existence of which "recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client." *Upjohn Co.* v. *United States*, 449 U.S. 383, 389 (1981).

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[8] *See also Morris*, 461 U.S. at 24 (stating that "trust and confidence between the client and his attorney" is "particularly essential, of course, when the attorney is defending the client's life or liberty") (quoting *Smith* v. *Superior Ct.*, 440 P.2d 65, 74 (Cal. 1968)).

Finally, it is well-established that "an indispensable element" of rendering effective assistance in the context of litigation against the government "is the ability to act independently of the Government" during the course of the representation. *Ferri* v. *Ackerman*, 444 U.S. 193, 204 (1979). The adversarial system is undermined when one party is given, in essence, control of his opponent's case, and "[g]overnment violates the right to effective assistance when it interferes in certain ways with the ability of counsel to make independent decisions about how to conduct the defense." *Strickland*, 466 U.S. at 686.

In short, restrictions on access to counsel and undue limitations on the effectiveness of counsel are properly viewed both as a danger to individual rights and as a "severe impairment of the judicial function." *Legal Services Corp.* v. *Velazquez*, 531 U.S. 533, 546 (2001). As discussed in detail in Section II, the restrictions sought by the government would ultimately limit counsel's presentation of the issues "upon which courts must depend for the proper exercise of the judicial power." *Id.* at 545. Under such circumstances, there could be no effective judicial review, because an appellant lacking counsel's assistance in developing the factual and legal record will have "only the right to a meaningless ritual, while the

[represented party] has a meaningful appeal." *Douglas* v. *California*, 372 U.S. 353, 358 (1963).

B. Petitioners' Right to Effective Assistance of Counsel Is Implicit in the Right to Judicial Review Established by the Detainee Treatment Act

Section 1005(e)(2) of the DTA vests this Court with jurisdiction to review "claims brought by or on behalf of" petitioners and to determine, *inter alia*, whether CSRT determinations of their status are consistent with the standards and procedures for CSRTs established by the Department of Defense ("DoD"). The precise scope of such review is beyond the scope of this amicus brief, but it is clear that if the Proposed Order were adopted, the detainees' right to review of their claims and this Court's ability to conduct that review – whatever its scope – would be meaningless. The Court effectively would be limited to rubber stamping the government's presentations. Congress did not intend such a "meaningless ritual." *Douglas*, 372 U.S. at 358; *see also National Council of Resistance of Iran* v. *Dep't of State*, 251 F.3d 192, 198 (D.C. Cir. 2001) (noting that courts reject "interpretations of statutes that 'cast Article III judges in the role of petty functionaries'" required to "rubberstamp" executive decisions) (quoting *Gutierrez de Martinez* v. *Lamagno*, 515 U.S. 417, 426 (1995)).

Courts do not interpret statutory provisions as being meaningless or having no practical effect. Rather, "courts presume that Congress has used its scarce legislative time to enact statutes that have some legal consequence." *Fund for Animals, Inc.* v. *Kempthorne*, 472 F.3d 872, 877 (D.C. Cir. 2006). Implicit in the Congressional grant of jurisdiction to review CSRT determinations is the notion that such review must have some meaning. This Court should "not, without more, assume that Congress intended for [its] jurisdiction to be meaningless," *Ramah Navajo Sch. Bd., Inc.* v. *Babbitt*, 87 F.3d 1338, 1344 n.6 (D.C. Cir. 1996), because "Congress cannot be presumed to do a futile thing," *Halverson* v. *Slater*, 129 F.3d 180, 185 (D.C. Cir. 1997).

As Judge Kollar-Kotelly observed in circumstances closely analogous to those here (and in a portion of her opinion which the government never challenged[9]):

> To say that Petitioners' [Guantánamo alien detainees] ability to investigate the circumstances surrounding their capture and detention is 'seriously impaired' is an understatement. The circumstances of their confinement render their

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[9] *See Hicks* v. *Bush*, 452 F. Supp. 2d 88, 100 (D.D.C. 2006) ("The government . . . does not deny that petitioners have a right to counsel, or that the privilege is applicable at Guantánamo, nor has it challenged Judge Kollar-Kotelly's holding that 'it is not entitled to unilaterally impose procedures that abrogate the attorney-client relationship . . . .'").

> ability to investigate nonexistent. Furthermore, it is simply impossible to expect Petitioners to grapple with the complexities of a foreign legal system and present their claims to this Court without legal representation. Petitioners face an obvious language barrier, have no access to a law library, and almost certainly lack a working knowledge of the American legal system.

Al-Odah v. *United States*, 346 F. Supp. 2d 1, 8 (D.D.C. 2004). Because the Supreme Court determined that the *Al-Odah* petitioners had the right to bring their statutory habeas claims in the district court, and because they could not "be expected to exercise this right without the assistance of counsel," Judge Kollar-Kotelly held "that Petitioners are entitled to counsel, in order to properly litigate the habeas petitions . . . before the Court and in the interest of justice." *Id.* Similarly, such a right is necessarily implicit here if the DTA's provision for judicial review is to have any meaning at all.

II. The Proposed Restrictions Would Effectively Deprive the Detainees of Their Right to Effective Assistance of Counsel by Preventing Lawyers from Exercising Their Professional Responsibilities

The proposed restrictions would interfere with lawyers' most basic professional responsibilities and deprive detainees of effective assistance of counsel. The provisions of the Proposed Order would severely impact a lawyer's duty to provide competent and zealous representation within the bounds of the law. They would frustrate the lawyer's ability to keep her client fully informed and consult with her client. And they would impede, if

not entirely annul, the lawyer's ability to maintain client secrets and confidences, thus destroying the trust so essential to effective representation.

The very first responsibility mandated by the ABA Model Rules of Professional Conduct ("ABA Rules") and the District of Columbia Rules of Professional Conduct ("D.C. Rules") is the duty to provide competent representation. "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation." D.C. Rules, Rule 1.1; *see also* ABA Rules, Rule 1.1 (same). As Comment 5 to Rule 1.1 of the D.C. Rules explains, "[c]ompetent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation and continuing attention to the needs of the representation to assure that there is no neglect of such needs." *See also Upjohn*, 449 U.S. at 390-91 ("The first step in the resolution of any legal problem is ascertaining the factual background and sifting through the facts with an eye to the legally relevant."). In any given case, "[t]he required attention and preparation are determined in part by what is at stake . . . ." D.C. Rules, Rule 1.1, cmt. 5. Here, the stakes could not be higher. These proceedings could determine

whether these detainees will continue to be held indefinitely, possibly for life.

While competence is the irreducible minimum for ethical representation, it is not enough. "The duty of a lawyer, both to the client and to the legal system, is to represent the client zealously within the bounds of the law . . . . This duty requires the lawyer to pursue a matter on behalf of a client despite opposition, obstruction, or personal inconvenience to the lawyer, and to take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer should act with commitment and dedication to the interests of the client." D.C. Rules, Rule 1.3, cmt. 1; *see also id.* Rule 1.3(a) ("A lawyer shall represent a client zealously and diligently within the bounds of the law."). Thus, as the Supreme Court concluded in *Powell*, if a lawyer's performance is merely "pro forma" rather than "zealous and active," the defendant is "not accorded the right of counsel in any substantial sense." 287 U.S. at 58.

Lawyers are also obligated to keep their clients fully informed and to consult with clients on important decisions. Subject to exceptions not relevant here, a lawyer is obliged to "abide by a client's decisions concerning the objectives of representation . . . and shall consult with the client as to the means by which they are to be pursued." D.C. Rules, Rule

1.2(a). To ensure that a client can make informed judgments regarding his case, "[a] lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." *Id.*, Rule 1.4(b); *see also* ABA Rules, Rule 1.4(b) (same). And because effective representation is impossible without sufficient consultation between lawyer and client, "[a] lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information." D.C. Rules, Rule 1.4(a).

Simply put, a lawyer cannot provide effective assistance without sufficient communication with her client. A lawyer must be able to communicate with her client so that the client has "sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued . . . ." *Id.*, Rule 1.4, cmt. 1. Moreover, the lawyer "must initiate and maintain the consultative and decision-making process if the client does not do so and must ensure that the ongoing process is thorough and complete." *Id.*, Rule 1.4, cmt. 2. In short, "[a]dequate consultation between attorney and client is an essential element of competent representation." *United States* v. *Tucker*, 716 F.2d 576, 581 (9th Cir. 1983); *see also Gaines* v. *Hopper*, 575 F.2d 1147, 1150 (5th Cir. 1978) (noting that "meaningful discussion with one's

client of the realities of his case" is a "cornerstone[] of effective assistance of counsel").

Of critical importance to the effective assistance of counsel is the confidentiality of lawyer-client communications and client information. Except under limited circumstances that do not apply here, a lawyer must not "reveal a confidence or secret of the lawyer's client." D.C. Rules, Rule 1.6(a)(1); *see also* ABA Rules, Rule 1.6(a) (same). "The observance of the ethical obligation of a lawyer to hold inviolate confidential information of the client . . . facilitates the full development of facts essential to proper representation of the client," D.C. Rules, Rule 1.6, cmt. 2, by encouraging the client "to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter," *id.*, Rule 1.6, cmt. 4. Because there can be no effective representation unless a client can trust his lawyer to safeguard sensitive and private information, American courts have long recognized that disclosures made by clients to their attorneys to facilitate legal advice must be protected with a "seal of secrecy." *See, e.g.*, *Hunt* v. *Blackburn*, 128 U.S. 464, 470 (1888). Therefore, "[i]t is clear 'that an accused does not enjoy the effective aid of counsel if he is denied the right of private consultation with him.'" *Mastrian* v. *McManus*, 554 F.2d

813, 820-21 (8th Cir. 1977) (quoting *Coplon* v. *United States*, 191 F.2d 749, 757 (D.C. Cir. 1951)).

The government's Proposed Order would severely interfere with each of the above professional responsibilities so crucial to the effective assistance of counsel.

A. Limitations on Visits

The Proposed Order would require counsel to agree in advance to limit themselves to three visits with the detainee client. *See* Proposed Order, §§ 9(c), 10(c). Lawyers cannot reasonably predict in advance that three visits would be sufficient to enable them to obtain the information needed to competently and effectively represent the client and to consult with and adequately inform the client on matters pertinent to the representation. As noted, the commander of Guantánamo now concedes that this restriction is unnecessary and that an (unspecified) larger number of visits will not prejudice the operation of Guantánamo. But there is no basis for fixing the number to three, or *any* other number. The circumstances of each case will differ. Particularly where detainee clients may be distrustful or suffering from depression or resignation because of their long period of detention, more visits may be needed than with other clients. There is no reason to

expect that lawyers acting *pro bono* are going to needlessly visit Guantánamo.

Lawyers should be able, as they now are under the Standard Order, to make such visits as they find necessary to obtain the information they need and consult with and inform their clients, and to establish the trust necessary to effective representation, as required by their professional responsibilities. *See* Standard Order, Ex. A, § III(D).

The government's argument that detainees' counsel have little need for extensive consultation with their clients because of the government's narrow interpretation of the scope of review is misguided. Even if the government's interpretation were correct, it is emphatically not for the detainees' adversary to decide how much information the detainees' counsel needs to represent their clients effectively. *See Strickland*, 466 U.S. at 686.

B. Legal Mail and Privilege Review Teams

The limit on visits is compounded by the expansion of the restrictions on "legal mail" – the mail lawyers can use for privileged communications with their clients – and the expansion of the role of the Privilege Review Teams to permit the government to read the contents of "legal mail" and not just search for physical contraband, as limited by the Standard Order. *Compare* Proposed Order, § 13(A)(iv), *with* Standard Order, Ex. A,

§ IV(A)(3). These provisions will make the mail a largely useless means of communication.

Under the Standard Order, "legal mail" includes correspondence related to counsel's representation. *See* Standard Order, Ex. A, § II(E). The Proposed Order would narrow the definition of "legal mail" to documents "intended for filing in this action and correspondence directly related to those documents" that are "directly related to" the DTA action. Proposed Order, § 2(J). It would permit counsel to address only the "events leading up to [the] detainee's capture or . . . the conduct of the CSRT proceeding relating to [the] detainee." *Id.*, § 2(J)(ii). The Proposed Order would specifically prohibit various types of information that might be useful in keeping the client informed about his plight and prospects, or events pertinent to them. *See id.*, § 2(J)(iii). For example, it would prevent a lawyer from discussing with his detainee client developments in similar detainee cases that might be directly relevant to the defense of the lawyer's client.

Moreover, the review of content that the Privilege Review Teams would conduct under the Proposed Order would effectively eliminate the availability of mail as a means of privileged communication. *See id.*, § 13(A)(v). Lawyers could use the mail for meaningful communications

only at the risk of violating their duty to maintain their clients' secrets and confidences. Equally important, the mere existence of this provision would destroy the relationship of trust that duty is designed to establish.

The government's assertion that the Privilege Review Teams would not make disclosure to anyone except a Special Litigation Team is not an acceptable protection of lawyer-client confidentiality. *See* Respondent's Br. at 45-46; Proposed Order §§ 4(E), 13(A)(v). First, the DoD retains the right to disclose the contents of lawyer-client communications when, in its sole discretion, it concludes the material may affect national security. *See* Proposed Order, §§ 13(A)(ix), (x). Perhaps more important, the relationship of trust that lawyer-client confidentiality is designed to foster can hardly be established when the client must be told that his jailers will read his lawyer's correspondence with him. This is true no matter what restrictions or "firewalls" his jailers claim to establish.

C. Classified Information and the "Need to Know"

Although each of the detainees' counsel would have security clearance, the Proposed Order would limit their access to classified information on a "need to know" basis, based on the government's unilateral determination of what the Court needs to know. *See id.* § 5(B)(i). This would give the government the decision as to what information is needed by

the detainee's lawyer to mount an effective defense. Limiting detainees' lawyers' access to information to their adversary's determination of what the Court needs to know is anathema to our adversary system and to our society's most fundamental values.

In addition, while the Standard Order permits counsel for detainees to exchange and discuss classified information with one another, the Proposed Order would bar such exchanges. *Compare* Standard Order, ¶ 29 *with* Proposed Order § 5(M). Such exchanges with other counsel may be the only source of information vital to the defense of a lawyer's client or provide leads to important information that otherwise might not be obtained under these especially difficult circumstances. For example, if counsel for a detainee determined to be an enemy combatant based on interrogation records of a second prisoner is unable to discuss those records with counsel for the second prisoner, she will be severely, if not completely, hindered in preparing her client's defense. As all detainee lawyers have security clearance and are under the same prohibitions on disclosure of classified information, this restriction can have no purpose other than to hinder defense efforts.

D. Restrictions on "Next Friend" Actions

The proposed restrictions would effectively eliminate "next friend" representations, which in many cases will mean that prisoners receive no representation whatsoever. The proposed restrictions would limit counsel to a single visit to obtain authorization from someone represented by a "next friend," and if such authorization is not obtained, counsel would be barred from further visits with the client and access to the legal mail system and classified information. *See* Proposed Order, § 10. As petitioners explain, a single visit will be inadequate in many or most cases to establish a relationship sufficient to win the trust of the detainee and to obtain his authorization – particularly with those detainees whose mental condition has severely deteriorated as a result of the isolation and loss of hope, or who will, after years of isolation, manifest a mistrust of any unfamiliar figures. *See* Petitioners' Joint Br. at 30-33. The Proposed Order's restriction on "next friend" actions will, in practice, often operate as a "no counsel" rule. The restriction also conflicts with the DTA's grant of review brought "on behalf of" the detainee.

The government would apply the same restriction to lawyers appointed by this Court to represent pro se petitioners if the lawyers were

unable to obtain authorization on a single visit, thus directly interfering with the Court's ability to assure an effective adversary process.

E. Unilateral Termination of Counsel's Access to the Client

Finally, the Proposed Order would give the government unfettered discretion to terminate a lawyer's right to visit her client, to use the legal mail, and to access classified information if, in the government's view, the lawyer violated the protective order. *See* Proposed Order, §§ 8(B), 19(H). This unilateral termination could be done without consultation with the court or the lawyer, and would give the government unchecked power to deprive detainees of any meaningful right to counsel. Such a power is unjustified and unnecessary, and it is contrary to the right of review by this Court granted by the DTA.

* * *

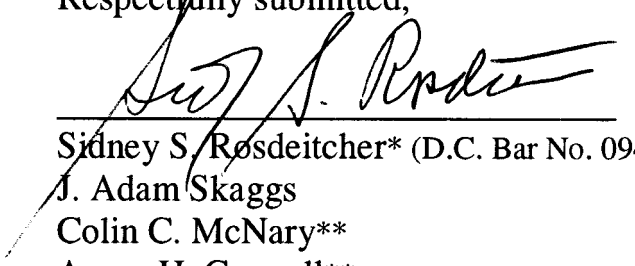
In sum, the proposed restrictions unreasonably deprive detainees of effective assistance of counsel. They would interfere with lawyers' ability to provide competent representation, communicate and consult with the client, and protect confidences and secrets, and would effectively give the government the power to decide what information the lawyer and client would require to mount an effective defense. Such a scheme would be a mockery of the concept of effective assistance of counsel.

Moreover, as petitioners have shown, there is no legitimate justification for these restrictions, and the Guantánamo commander has begun to walk away from them, indicating that the conditions that led to at least one of the proposed restrictions no longer obtain. The government's assertions that lawyers are responsible for the conditions that gave rise to their application – such as unrest, hunger strikes or suicide attempts – are unsubstantiated. Given the circumstances in which the detainees have been held for five years with no process, the actual cause of such conditions is obvious. These allegations are unworthy of our Departments of Justice and Defense. The Proposed Order should be rejected.

CONCLUSION

For the foregoing reasons, amici respectfully request that the Court deny respondent's motion seeking entry of the Proposed Order, and grant petitioners' motion seeking entry of the Standard Order.

Respectfully submitted,



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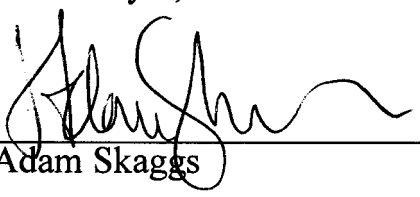
CERTIFICATE OF COMPLIANCE

I hereby certify pursuant to Federal Rule of Appellate Procedure 32(a)(7) and Circuit Rule 32(a) that the foregoing brief was prepared using Microsoft Word 2003 and that its text contains 6,432 words according to the Microsoft Word 2003 automatic word count function, which has been specifically applied to include all text, including headings, footnotes, and quotations (exclusive of the certificates required by Circuit Rules 28 and 26.1, the table of contents, the table of authorities, the certificate of service and this certificate).

Dated: May 9, 2007



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CERTIFICATE OF SERVICE

I hereby certify that on May 9, 2007, I caused copies of the foregoing to be served upon the following counsel by causing copies to be sent by e-mail transmission and Federal Express delivery:

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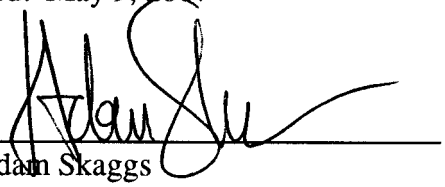

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