



NEW YORK
CITY BAR

BARRY M. KAMINS
PRESIDENT
Phone: (212) 382-6700
Fax: (212) 768-8116
bkamins@nycbar.org

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Hon. Alberto R. Gonzales
Attorney General
United States Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

Dear Attorney General Gonzales:

On behalf of the Association of the Bar of the City of New York, I write to urge you to withdraw the proposed order restricting attorney-client relations at the Detention Camp at Guantánamo Bay ("Guantánamo"). The proposed rules – to be proffered by government lawyers before the Court of Appeals for the District of Columbia Circuit on May 15, 2007 – would constrain attorney access so as to make effective representation virtually impossible. The restrictions, moreover, are incompatible with a just process for determining the propriety of individual detentions at Guantánamo.

For the past two years, litigation at Guantánamo has been covered by a standard protective order negotiated between the adverse parties and overseen by district judges. The standard protective order, *inter alia*, controls visitation and limits counsel from discussing many matters "not directly related to counsel's representation." To our knowledge, the government has never asserted a specific violation of this order, or sought the heavy sanctions available under it for an offending habeas counsel. Therefore, we know of no reason to believe that the current system needs revising.

In its brief to the D.C. Circuit, the Justice Department argues that the standard protective order should be superseded with a new regime that would limit the number of visits (to three), that restrict written communications, and would terminate "next-friend" actions. The proposed order would demand that all detainees so represented sign government-approved forms in English at the end of one meeting with counsel in order to permit further representation.

These limitations would pose novel and onerous intrusions on the attorney-client relationship in any circumstance. At Guantánamo, they would have the practical effect of thwarting effective representation and precluding any adequate judicial process.

It defies reality to suggest that effective representation is feasible under the proposed conditions. At the heart of the attorney-client relationship lies a measure of trust. The proposed limitations on access and communication preclude the establishment of the necessary relationship between counsel and client that enable effective representation.

Even in the best of circumstances, it would not be feasible to establish an effective attorney-client relationship within the constraints proposed. But Guantánamo presents much more challenging circumstances. Detained virtually incommunicado for years without access to an independent magistrate and interrogated with coercive or psychologically manipulative methods, Guantánamo detainees have been placed in an excruciatingly difficult position. The proposed new limitations would deny counsel any meaningful opportunity to provide the kind of representation that the ABA Rules of Professional Conduct demand.

Implicit in the proposed new scheme is the assumption that there is no further need for fact-finding. The Justice Department brief posits judicial review as a rubber-stamp of the Combatant Status Review Tribunals (“CSRT”) created after the US Supreme Court’s decision in *Rasul v. Bush*, 542 U.S. 466 (2004). The CSRTs do not provide adequate fact-finding mechanisms for reasons that Judge Joyce Hens Green explained in *In Re Guantánamo Detainees Cases*, 355 F. Supp. 2d 443 (D.D.C. 2003). Detainees face these CSRTs without counsel, often with insufficient notice, and are not informed of the specific facts allegedly supporting their detention. These allegations are frequently based on secret evidence. Requests for documentary evidence are routinely refused. Every request for a witness not at Guantánamo has been denied; and requests for the testimony of other detainees have been denied 74 % of the time. The CSRTs are simply not designed to sift lawful from unlawful detentions. They lack adequate or fair fact-finding procedure and cannot under any circumstances be considered adequate substitute for Article III courts.

The Justice Department’s brief attempts to justify new limitations by implying that attorneys have encouraged disruptive actions such as hunger strikes. It is striking, however, that, to our knowledge, not one infraction of the current protective order has been reported to the district courts. Not once has the government sought sanctions against an attorney for the infraction of the existing rules.

The government points to “[u]nrest at Guantanamo” and asks the Court of Appeals to assign blame for this unrest to attorneys. This is an astonishing and disingenuous assertion. Many Guantánamo detainees have been held for over five years without trial. Many have been held in solitary confinement for prolonged periods. Many have lost hope of a fair hearing to demonstrate their innocence—let alone of seeing family again. It is these extraordinary conditions, in our view, which have precipitated unrest. To blame counsel ignores the fact that lawyers reportedly have more often advised restraint, and talked detainees down from protest or self-inflicted violence. Indeed, the very purpose of counsel becoming engaged is to invoke the lawful channel of the judicial system to obtain relief. To blame counsel is to try to evade the Government’s responsibility for establishing the conditions sufficiently onerous to explain any strife that has occurred.

Moreover, blaming counsel for the hunger strikes and other unrest is a continuation of a disreputable and unwarranted smear campaign against counsel, evidenced by the recent remarks of former Deputy Assistant Secretary for Detainee Affairs Cully Stimson and other initiatives of this Administration. The New York City Bar believes that this kind of assault on the professionalism and intentions of counsel should come to an end. It is undignified and unbecoming a government of laws.

Over the course of the last four years, Guantánamo has developed into a symbol of abuse, mistreatment and injustice in the eyes of the entire world. The practices tolerated there have done incalculable damage to the reputation of the United States as an advocate of fundamental justice and the rule of law. President Bush has acknowledged this situation, saying that he "would like to close Guantánamo." But rather than ameliorate this embarrassing situation, the Justice Department's proposal strikes yet another blow against core concepts of justice and fairness.

For these reasons, I respectfully urge you to maintain the existing standard protective order governing attorney-client relations at Guantánamo. A more restrictive regime is unwarranted, and calls for it appear to be no more than part of a campaign to undermine the effectiveness and legitimate purpose of the lawyers concerned.

Very truly yours,



Barry Kamins

cc: Hon. Robert Gates
Hon. Harry Reid
Hon. Mitch McConnell
Hon. Nancy Pelosi
Hon. John Boehner
Hon. Patrick Leahy
Hon. Arlen Specter
Hon. John Conyers
Hon. Lamar Smith