

1 UNITED STATES DISTRICT COURT
2 FOR THE DISTRICT OF COLUMBIA

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4 IN RE: Docket No. MC 08-442
5 CA 02-828
6 GUANTANAMO BAY
7 DETAINEE LITIGATION Washington, D.C.
8 **August 26, 2008**
9 11:10 p.m.

10 -----X
11 **ORAL ARGUMENTS**

12 *BEFORE THE HONORABLE THOMAS F. HOGAN*
13 *UNITED STATES DISTRICT JUDGE*

14 APPEARANCES:

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21 Proceedings recorded by mechanical stenography, transcript
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1 P-R-O-C-E-E-D-I-N-G-S

2 (11:10 A.M.; OPEN COURT.)

3 THE COURT: Good morning, Counsel.

4 THE DEPUTY CLERK: Your Honor, this morning, this is
5 in In Re: Guantanamo Bay Detainee Litigation, Miscellaneous
6 No. 08-442; also Civil Action No. 02-828.

7 I'd ask the parties to step forward and identify
8 yourselves for the record, please.

9 MR. CYNAMON: Good morning, Your Honor. David
10 Cynamon appearing for the petitioners.

11 THE COURT: All right. Thank you, Mr. Cynamon.

12 MR. HAAS: Good morning, Your Honor. Alexander Haas
13 for Respondents.

14 THE COURT: All right. Mr. Haas, thank you.

15 All right. Before the Court today is Petitioner's
16 motion for injunctive relief; originally filed an emergency
17 injunction about six weeks ago and it's now ready for a
18 hearing. Petitioners Fayiz Mohammed Ahmed Al Kandari and
19 Fouad Mahmoud Al Rabiah's motions involving the Office of the
20 Chief Prosecutor of Military Commissions and its Investigative
21 Task Force Unit, anyone at their request or the direction,
22 from communicating with Petitioner without Petitioner's
23 counsel, consent.

24 And so I've had a chance to review the petition and
25 the opposition and reply and looked at the law a little bit on

1 it, so I'll hear from counsel. Petitioners first and then
2 I'll hear from the Government after that and give you a chance
3 at a brief reply.

4 All right. Thank you. Mr. Cynamon.

5 MR. CYNAMON: May it please the Court, the relief
6 that Petitioners seek in this motion is straightforward, but
7 it is of fundamental importance to protecting the integrity of
8 these habeas proceedings. What we are asking the Court to do
9 is to prohibit Government counsel from communicating with our
10 clients, either directly or through their agents, without our
11 knowledge or permission about the very allegations in this
12 habeas case, and thereby in violation of the ethical rules of
13 conduct to which Government counsel are unquestionably bound.

14 If the Government counsel are allowed to do this, as
15 they have already done, it will undermine our attorney/client
16 relationship with our detainee clients and thereby prejudice
17 our clients' ability to pursue the core habeas rights to which
18 the Supreme Court has held they are entitled.

19 THE COURT: You don't see the distinction with the
20 Military Commissions people and other counsel for the
21 Government who may be involved in a habeas case interviewing
22 your client?

23 MR. CYNAMON: None whatsoever, Your Honor, because
24 the touchstone is not which Government counsel happened to be
25 talking to our clients. It's what they are talking to our

1 clients about. Rule 4.2, which appears pretty much in
2 identical guise in all the ethical codes that might be
3 applicable here, and the one we point to in our brief, Your
4 Honor, is Rule 4.2 of the Army Code of Professional Ethics to
5 which the Chief Military Prosecutor is unquestionably bound,
6 and what that prohibits, as all rule -- all the no-contact
7 rules prohibit, is that an attorney cannot talk about the
8 subject of the representation with the party that the lawyer
9 knows to be represented by another lawyer in the matter.

10 THE COURT: In the same matter.

11 MR. CYNAMON: Yes. Now, the matter here, Your
12 Honor, are these habeas cases, and what the Government
13 lawyer -- lawyers are communicating with our clients about are
14 the allegations in these habeas cases, and I say that both for
15 two reasons. We know that because as my client, Mr. Al
16 Kandari, reported to me, the representative of the Criminal
17 Investigation Task Force spoke with him about an incident that
18 occurred in Kuwait after he was already in Guantanamo and that
19 incident is one of the specific grounds that are listed in his
20 CSRT proceeding and in the factual return the Government filed
21 in this case as a basis for his detention.

22 I also say it because it necessarily is the case
23 that any Military Commission charge will inevitably involve
24 the allegations of these --

25 THE COURT: I understand that. They can't be found

1 as unlawful enemy combatants, I mean, unless they have
2 evidence to show that. That evidence should be theoretically
3 some of the same evidence they'd use in the Military
4 Commission charges.

5 MR. CYNAMON: Exactly.

6 THE COURT: How -- what is your representational
7 status in the Military Commission area?

8 MR. CYNAMON: Well, of course, there is no Military
9 Commission hearing yet involving --

10 THE COURT: An investigation ongoing, I'll just say
11 that.

12 MR. CYNAMON: -- investigation. We -- we are
13 counsel for the Petitioners for all purposes, including the
14 Military Commission proceeding, and I say that because our
15 clients have authorized us to represent them for all purposes.

16 The rules clearly provide that the scope of an
17 attorney's representation of his client is determined by the
18 attorney and the client, not by some third party. The
19 Government doesn't get to decide to what extent we get to
20 represent our Petitioners, and --

21 THE COURT: The Petitioners have a right to civilian
22 counsel once they are charged by the Military Commission?

23 MR. CYNAMON: Yes, the Petitioners have the right to
24 civilian counsel at no cost to the Government, and we are that
25 counsel. Indeed, we --

1 THE COURT: But don't they have to be charged before
2 that attaches? Say "accused," in that interpretation, that
3 means charged?

4 MR. CYNAMON: Well, I'm not sure. I suppose as a
5 technical matter we can't very well enter our appearance on
6 their behalf until there's a matter for us to appear in, but I
7 don't see that there's any reason why, if our clients choose,
8 you know, having been told that they are under investigation
9 for Military Commission proceedings, why they can't retain us
10 in advance of that, and I don't see on what basis the
11 Government can say, "Well, we refuse to recognize that
12 engagement."

13 Again, the rule is that an engagement by a client is
14 determined by the client and the attorney. And again, I do
15 want to emphasize, I think that the distinction that the
16 Government is attempting to make here between representation
17 for habeas purposes and Military Commission purposes is
18 entirely artificial, because otherwise, it just destroys
19 entirely the no-contact rule as it applies to habeas
20 proceedings, because, of course, any discussion about
21 potential Military Commission charges will involve these
22 cases.

23 THE COURT: How do we jump over the elephant in the
24 room we haven't talked about, and that is, the jurisdictional
25 issue under the MCA or the Section 3 and the second part of

1 Section 7?

2 MR. CYNAMON: Well, Your Honor, I really think that
3 that elephant is not in this room. That elephant is in an
4 entirely different room and actually hasn't even reared its
5 trunk. There are no Military Commission proceedings, and we
6 are not asking Your Honor to issue a ruling with respect to
7 any Military Commission proceeding whatsoever.

8 We are not asking the Court to rule on what the
9 Government may investigate, what they may be charged with or
10 anything else. What we are asking for is the Court to rule
11 that no Government counsel, whether that counsel happens to be
12 counsel sitting at the table here today or whether it's the
13 Chief Military Prosecutor or one of his staff, that none of
14 them can communicate with our clients without our knowledge
15 and permission about the allegations in this habeas case.
16 That's all we're asking about.

17 So I think the Government's lengthy discourse about
18 the jurisdictional issues involving Military Commission is
19 something that this court really doesn't have to even reach or
20 consider. We're not asking the Court to take any steps there.

21 If I might point out, Your Honor, if the
22 Government's argument were followed to its logical conclusion,
23 then this court would have no jurisdiction to hear these
24 habeas cases because, of course, as Your Honor has already
25 recognized, these habeas cases are a necessary predicate to

1 any Military Commission charges.

2 If we are successful in the habeas cases on behalf
3 of our Petitioners, a fortiori, there will be no Military
4 Commission charges because they will not have been found to be
5 enemy combatants.

6 THE COURT: What exactly, besides this ethical rule
7 that you're saying the Government violated, would give me a
8 basis for issuing a preliminary injunction? I mean, where is
9 the harm that can't be cured later? It seems to me this is
10 very analogous to a *Kastigar* situation. That is, it's
11 analogous -- *Kastigar* is a case I will give to you.

12 That's where the -- your client is subpoenaed and
13 given immunity in a congressional hearing, and there is a co-
14 -- at that time, ongoing criminal investigation. It's what
15 happened in the Iran Contra, and the client then is compelled
16 to testify in Congress. Then the independent prosecutor in
17 that case, or the prosecutors, bring charges. They have to
18 show none of their evidence is related to the evidence that
19 was compelled to be given. And if they can't do that, the
20 charges are dismissed, and *Kastigar* is an example of that.

21 But if you can't show that your evidence is totally
22 separate and apart, has nothing to do with what the individual
23 is compelled to testify to previously, you can't bring the
24 case. And in Colonel North's case, that's what happened, and
25 that's why -- they couldn't show, they didn't learn anything

1 from the testimony in Congress.

2 Isn't that the result here, could be that instead of
3 saying there is irreparable injury because it interferes with
4 lawyer/client privilege relationship, that if the Government
5 comes here and attempts to use certain evidence to show why,
6 if that's their burden, or to respond to whatever you produce,
7 that they should be -- that this man should be held as an
8 enemy combatant, you could say they can't use it unless they
9 got it improperly, they violated the attorney/client privilege
10 by getting it? Isn't that how you solve that problem rather
11 than enjoin the Government from investigating?

12 It does affect the Military Commission. You say it
13 only affects the habeas, but it does affect their rights to
14 proceed with the Military Commission.

15 MR. CYNAMON: Your Honor, let me address that and
16 make several points. First of all, this is not -- although we
17 are asking for injunctive relief in the sense that we're
18 asking the Court to prohibit the Government's attorneys for
19 doing something, this is not a preliminary injunction motion
20 in the sense that we are seeking to preserve the status quo
21 pending a final determination on the merits.

22 This is really collateral to the merits and seeks to
23 preserve the integrity of the very adversary proceeding that
24 will determine those merits. So I think that in that regard,
25 what this really is, is a motion under which this court's

1 authority exists under both the All Writs Act and the Court's
2 inherent authority, which the Government has conceded, the
3 inherent authority to control the proceedings before it and
4 the conduct of counsel for the parties before it.

5 So, I think that there's really no doubt and the
6 Government doesn't dispute that this court does have that
7 authority to control the conduct of counsel.

8 As to why it would not be equally effective to wait
9 until there were some attempt by the Government to use
10 information that it would glean by -- through violations of
11 the ethics code, I think there are two problems with that.

12 One is, of course, it's somewhat difficult to trace
13 the fruits of the poisonous tree. If there's an improper
14 ethical conduct, then certain statements are obtained and then
15 further leads are taken from that. It may be difficult to
16 follow, but I think there's a more fundamental point.

17 As the ABA's formal opinion that we cited in our
18 brief points out, one of the principal purposes of the
19 no-conduct -- no-contact rule is to protect the
20 attorney/client relationship from being undermined by an
21 adversary, and that's a particularly acute concern in this
22 case, given the very difficult situation we have in being able
23 to communicate with and represent our clients.

24 And the problem with just focusing on what evidence
25 or information the Government might glean by unethical conduct

1 doesn't address the problem of the damage it does to the
2 relationship we have with our clients. If we have to wait
3 until our clients actually fire us or start being more
4 reticent about talking with us because they know that the
5 Government lawyers and the staff can come in and talk to them
6 whenever they want, if we have to wait till that point, the
7 damage will already be irrevocable and I don't believe that
8 the ethical rules -- I'm not aware of a case that says that
9 the Court cannot enforce the ethical rules in attorneys in
10 cases before it until the victim shows some tangible damage.

11 If I can use an analogy, an ethical rule that more
12 commonly comes up in litigation is the violation of the no
13 conflict rules, and there, if an attorney represents -- is
14 adverse to a former client and it's shown that the attorney is
15 adverse to the former client on a substantially related
16 matter, there is then an irrebuttable presumption that the
17 attorney has gained confidential information from that former
18 client.

19 The former client is not obligated to come in and
20 show that in fact there was. And I would submit that
21 similarly here, there's no basis for saying that the
22 Government counsel gets to undermine the relationship we have
23 with our client, which is tenuous as it is. I will tell you
24 that they do not have much faith in our legal process, and
25 from their perspective --

1 THE COURT: You have an affidavit from prior
2 counsel.

3 MR. CYNAMON: What's that?

4 THE COURT: You have an affidavit from prior counsel
5 that was concerning about allegations of statements made to
6 the detainee and by prior counsel.

7 MR. CYNAMON: Correct. And, Your Honor, I'm not
8 suggesting for a moment that the Government cannot continue to
9 investigate and prepare whatever charges it believes it may
10 have here. I mean, the Government can do that through proper
11 methods.

12 It can investigate through other information it has.
13 Why would it need -- I mean, I suppose in any criminal case it
14 would be nice if the prosecutors could waltz in and talk to
15 the defendant or prospective defendant without regard to the
16 fact that the defendant might be represented by counsel. But
17 one of the, you know, essential elements of our adversary
18 system is that when parties are represented by counsel, they
19 have a right to full and effective representation, and I think
20 Judge Kollar-Kotelly wrote very eloquently on that very point
21 in this very case. I think we quoted from it.

22 In these cases, in particular, these Petitioners
23 will have no meaningful habeas rights if they do not have
24 meaningful representation by counsel. And I submit to Your
25 Honor that allowing the Government to undermine that core

1 relationship by violating one of the basic rules of the code
2 of ethics, the no-contact rule, would do a great deal of
3 damage.

4 So, that's why I think it would be, if you will, too
5 little and too late to limit us to seeking to exclude
6 information that is improperly obtained.

7 You know, Your Honor, I think those are the
8 principal points I make. Obviously, to the extent the Court
9 has further questions, I'd be happy to address any other
10 concerns you may have.

11 THE COURT: All right. Have you had any opportunity
12 to discuss this with the Government to try to resolve this
13 situation about what could be done or not done?

14 MR. CYNAMON: Well, our opportunity to discuss
15 things with the Government usually -- usually result in, "I'm
16 sorry. We're not really authorized to talk to you about any
17 of this." I think you've seen the communications that --
18 we've attached them, the e-mail communications between my
19 colleague, Mr. MacLean and Colonel Morris, and he was pretty
20 blunt. He says, you know, "I'm going ahead and doing it."

21 And so there has been no indication of any -- you
22 know, any view by Government counsel that they will change
23 their view in that.

24 I would also point out, encourage Your Honor to take
25 a look at a case that the Government cites actually. They

1 cited a recent decision from the District of Oregon, the
2 Al-Haramain case. It was just decided in June of this year,
3 and they cite it for the proposition that the Court can't
4 grant a preliminary injunction on a matter not outlined in the
5 complaint.

6 As I have explained, this is not really a
7 preliminary injunction, but the part of the case that they
8 ignore that I think significant is where the Court addresses
9 the concern expressed by the Plaintiffs that not only is the
10 Government in that case allegedly intercepting privileged
11 communications, but the Government counsel are looking at
12 privileged communications and making use of that. And in that
13 respect, the Court, in the slip opinion, specifically agrees
14 that he has authority to control the process of the
15 litigation, has authority to control the Government counsel
16 but points out that in that case the plaintiffs provided no
17 evidence that Government attorneys were in fact doing anything
18 unethical. And indeed, he points out, the Government counsel
19 have assured Plaintiffs and me that they understand and take
20 seriously their ethical obligations.

21 In this case, we have precisely the opposite. We
22 have a flat statement by Government counsel, the Chief
23 Military Prosecutor that he has no obligation whatsoever to
24 adhere to Rule 4.2 and we have undisputed evidence that such a
25 communication has occurred. So, I think that the Al-Haramain

1 case actually further supports the conclusion that this court
2 has the authority and should exercise the authority to enforce
3 the ethical rules.

4 THE COURT: Obviously, we have an overlap with the
5 habeas issues and the Government Military Commission. The
6 Military Commission issues in part and you have a statute
7 depriving us of jurisdiction, and that concerns me.

8 What type of order were you envisioning for the
9 Court? Because one of the problems I had, and I read through
10 it, is the breadth of your order as submitted would be
11 basically, I think, barring the Government from investigating
12 very much at all about the charges they wish to bring against
13 the Petitioner.

14 MR. CYNAMON: Well, Your Honor, I mean, I didn't --
15 I didn't perceive that the relief we're requesting here is any
16 broader than what the ethical rule requires, which is that the
17 Government counsel or agents acting on behalf of Government
18 counsel cannot communicate directly with our clients without
19 our knowledge and permission. It doesn't -- as I say, it
20 doesn't --

21 THE COURT: The order submitted originally, the one
22 that Judge Kotelly that was just now before me, filed
23 July 2nd, alleges that -- states that neither the Military
24 Commission's Chief Prosecutor nor anyone else on their behalf
25 shall have any communications with the Petitioners without

1 consent of Petitioners' counsel relating to matters alleged to
2 be grounds for their confinement, including any matters for
3 which Military Commission charges may be brought.

4 So, I mean, you want to have no communications at
5 all with the detainee, basically, without your permission or
6 your being present, basically, because condition of
7 confinement cover everything, the way I read that.

8 MR. CYNAMON: Yes. Well, it's not conditions of
9 confinement. It's grounds for their confinement; in other
10 words, the basis for why they're there, which is are they or
11 are they not enemy combatants, and that's -- that's really it.

12 I would point out, Your Honor, that this order would
13 not prohibit communications by the Government with our clients
14 that are not by or at the behest of Government counsel for use
15 in this case.

16 For example, nothing in what we're requesting here
17 would require -- would prohibit legitimate intelligence
18 gathering efforts by Government attorneys -- not Government
19 attorneys -- by Government interrogators at the Department of
20 Defense engaged in legitimate intelligence gathering.

21 Now, it's kind of a moot point in our case. My
22 clients have not been interrogated for quite a long time,
23 because presumably, since they've been in Guantanamo for
24 almost seven years, they have nothing of value to provide, but
25 we're not suggesting that the Government, as a whole, is

1 precluded from engaging in proper intelligence gathering or
2 whatever. What we are saying is that Government lawyers who
3 are involved in these cases and under the ethical rules cannot
4 violate those ethical rules by talking to our clients.

5 I do not think that that is an overly broad order.
6 I do not think it in way affects the ability of the Government
7 to investigate, prepare, prosecute whatever cases, other than
8 to the extent, as I said before, that any limitation on the
9 Government, be it in these cases, be it in criminal cases,
10 that prevents them from talking with defendants without the
11 consent of their counsel is a limitation, but I submit that
12 that's a necessary concomitant of our adversary system and the
13 ethical rules that were built up to protect that adversary
14 system.

15 THE COURT: All right. Thank you very much,
16 Mr. Cynamon.

17 MR. CYNAMON: Thank you, Your Honor.

18 THE COURT: All right. On the Government's behalf,
19 Mr. Haas.

20 MR. HAAS: May it please the Court. By seeking to
21 enjoin the office or communications by Office of Military
22 Commission attorneys that by Petitioners' own allegations
23 relate directly to the bringing of Military Commission
24 charges, Petitioners ask this court for remarkable injunctive
25 relief that goes to the very heart of the Military Commission

1 progress.

2 Congress has expressly withdrawn jurisdiction to
3 consider such claims, such as the Petitioners here, that
4 concern either the Military Commission process on the one
5 hand, or on the other, to the extent that these claims truly
6 do relate to the habeas case, they seek relief as to ancillary
7 issues distinct from challenges to the legality of the
8 detention, or as my opposing counsel just stated, ones that
9 were, quote, collateral to the merits.

10 Now, whatever the appropriate form may be to
11 evaluate ethical charges by OMC personnel in these OMC
12 communications with Petitioners, surely this court is not it.
13 At bottom, Petitioners' motion has been brought in the wrong
14 form and at the wrong time.

15 THE COURT: Didn't they try to bring it before the
16 Commission and were told they couldn't?

17 MR. HAAS: They did. They did try to bring it. It
18 was dismissed without prejudice for lack of jurisdiction, but
19 I don't think that they argue and we certainly don't argue
20 that they couldn't bring it when charges were actually
21 brought.

22 THE COURT: How do you address the overlap where the
23 charges would necessarily relate to the reasons why they are
24 being declared enemy combatants and held and have to justify
25 that eventually here in our court in the habeas matters? I

1 don't understand the difference. How do you distinguish
2 between the two?

3 MR. HAAS: Well, I think in even the ordinary case,
4 Your Honor, the Petitioner -- the relief that's sought would
5 be remarkable. And taken to its logical ends, they
6 essentially ask this court to conclude that representation in
7 a civil matter, such as this habeas case, is an absolute
8 shield to investigative inquiry of criminal charges by
9 separate attorneys. I'm aware of no set of cases where that's
10 the norm.

11 In fact, as I understand it, the opposite is true,
12 and that in cases where you have both civil and criminal
13 potential liability, for example, in False Claims Act or
14 CERCLA or securities actions cases, it is permissible at the
15 pre-indictment stage to have interviews.

16 Now, in fact --

17 THE COURT: Are they represented by counsel, without
18 counsel's knowledge, in a civil case, you could go and
19 interview the --

20 MR. HAAS: Well, again, it goes to what the matter
21 is, of course, Your Honor, and we haven't addressed the merits
22 of 4.2, but I point out, consistent with the Court's questions
23 about the representational status that the statute is quite
24 clear in defining the legal relationship, the attorney/client
25 relationship here.

1 10 USC 948k(a)(3) states specifically that the
2 provision of detailed defense counsel occurs only after the
3 swearing of charges in the Military Commission case. And with
4 respect to the -- whatever subjective feeling that Petitioners
5 and their counsel may have about the scope of their
6 representation, I think that the law is clear.

7 THE COURT: I'm still concerned that -- on your
8 first point here. If there's counsel representing an
9 individual, I don't care if it's civil or criminal, let's just
10 say in a civil case because that's what you're saying, these
11 are civil proceedings, and the Government wished to
12 investigate that person for other reasons, criminal matters,
13 that necessarily include the civil case basis, they are free
14 to go and talk to this individual without their individual's
15 counsel's permission or knowledge.

16 MR. HAAS: Well, again, Your Honor, I think that the
17 easiest answer here is to focus on the comments to Rule 4.2
18 itself. Comment 2 states that communications authorized by
19 law include constitutionally permissible investigative
20 activities representing governmental entities, directly or
21 indirectly, prior to the commencement of civil or criminal
22 proceedings, and they're separate proceedings.

23 The same is true here. The OMC and Military
24 Commission proceedings are separate, and frankly, that's why
25 Congress wanted to funnel specific claims through that

1 process, and that's why, through the review channeling
2 provision that we cited in Section 3 of the MCA, Congress
3 withdrew jurisdiction over claims just -- just as these.

4 THE COURT: Well, Congress obviously had a overall
5 picture where they had included habeas, as well, being outside
6 our ambit, and when that's been tossed by the Supreme Court, I
7 think it changes the field somewhat that we're playing on.

8 MR. HAAS: Well, I don't think --

9 THE COURT: I'm concerned because it seems to me --
10 I don't know how you distinguish between the grounds for
11 habeas and interviewing the detainee, be that whatever they
12 want to interview them about, about the nature of charges that
13 could be brought against them in the Military Commission.
14 Won't they necessarily overlap in that what they learn in
15 their interviews in the criminal investigation could be used
16 against a detainee in the civil case here?

17 MR. HAAS: Well, again, there's no evidence that
18 that has actually occurred, Your Honor.

19 THE COURT: Well, I'm not saying -- it's
20 speculation, I understand that, but I mean, isn't that true,
21 that that could happen?

22 MR. HAAS: Well, could it happen? I suppose
23 that's --

24 THE COURT: If he's charged with committing a war
25 crime, whatever it may be, wouldn't that necessarily be the

1 grounds of why they're trying to hold them as an enemy
2 combatant?

3 MR. HAAS: Well, not necessarily, no. I think that
4 there are -- there could be independent bases for a Military
5 Commission charge and for holding somebody in a habeas case.
6 I think it would depend on the facts of the particular case,
7 but again, that's not a question I think we can talk about in
8 the abstract. It's one that can be addressed by the Court at a
9 later stage.

10 I guess I would also point out, though, that even to
11 the extent that this claim relates to the habeas litigation,
12 and I am somewhat dubious about that, because I think it is
13 inextricably intertwined with the Military Commission process,
14 and then, therefore, subject to Section 3 of the MCA, we
15 believe and I think Judge Urbina recently agreed in the *Vighur*
16 cases that part of Section 7 applies.

17 I guess, before I get too ahead of myself, I would
18 point out also that the Petitioners have really only pointed
19 to the lack of formal charges as the reason why Section 3
20 doesn't apply. I find that entirely unconvincing,
21 particularly in light of the argument or the precedent in this
22 circuit concerning exclusive review forwarded to the -- or
23 entrusted into the courts of appeals. *Telecommunication*
24 *research and action committee v. FCC* and the companion case
25 that comes right after it are prime examples that show that

1 the mere fact that some agency action has not yet occurred is
2 not a basis to allow a district court to oust the jurisdiction
3 of the court of appeals.

4 The interesting thing, Your Honor, about that case
5 is that it was the D.C. Circuit that relied on the All Writs
6 Act to ensure that it had exclusive jurisdiction over its --
7 over any future case. I think that would squarely apply here.

8 THE COURT: What about the practice of -- since this
9 is a civil matter, you're saying, the habeas and the Military
10 Commission criminal matter, of the Government attorney, relays
11 a discussion with habeas Petitioners, setting aside the
12 Military Commission, are those not charged or contemplated to
13 be charged for a Military Commission, is it the Government's
14 position that Government attorneys are there represented in
15 the interview of the detainees about matters that will be
16 coming before the Court as to their status as enemy combatants
17 representing detainees?

18 MR. HAAS: Your Honor, the OMC personnel do not
19 represent the Government in habeas cases, period. We don't --
20 and Government counsel in the habeas cases don't control them
21 and their actions.

22 THE COURT: You used the word "inextricably
23 intertwined." I think that's right, and it does concern me
24 because obviously there are ethical rules binding all
25 attorneys that we all agree to that it seems to me would

1 normally not be having our representatives ourselves
2 interviewing the other's client without counsel's knowledge.

3 MR. HAAS: And I'd point out, there's no allegation
4 that Government habeas counsel are engaged in these contacts.

5 THE COURT: I understand that. But there's no
6 question that the Military Commission people have begun their
7 investigation or continued with it by interviewing the
8 detainee. From the e-mails from the Colonel, it's obvious
9 they feel they have the right to do that, regardless if
10 they're represented, and regardless if they also represent the
11 military matter because they said they are not yet charged so
12 they don't have the right to representation.

13 MR. HAAS: But again, there is an avenue open to
14 petitioners to challenge these very things. As soon as they
15 are charged, they can preserve these arguments, they can have
16 an Article III court look at them, and if the Court upholds it
17 at -- by necessity, makes it okay to use it here.

18 THE COURT: Would not the Government have some
19 concerns that if this military proceeds this way in these
20 cases, that we will end up with hearings here in court as to
21 the legitimacy of the evidence attempting to be used against
22 the detainees to hold them as enemy combatants before us if
23 they -- some of that evidence may have come or be tainted by
24 the criminal investigation that was done without a lawyer
25 present?

1 MR. HAAS: Well, again, that would present, I think,
2 a more concrete factual situation that would allow us to, I
3 think, make a determination, and in fact, formally brief
4 whether or not we felt that there was a 4.2 violation that had
5 occurred. But I think, as the Court recognized, there are
6 also other remedial aspects that the Court could employ should
7 that situation arise.

8 THE COURT: I mean, I would think it would be a
9 concern, because, as I said, it's a little analogous to
10 *Kastigar*, but the Court could then limit the evidence that
11 could be used before this court that was gathered by the
12 Military Commission people and attempted to be used here,
13 particularly where there's the same basic charges in each
14 case. I mean, that's my concern. The Government may end up
15 unwittingly, not because they wished that it happened that
16 way, but where they could have problems here with the validity
17 of the evidence that was gathered by the Criminal
18 Investigation Task Force or the Military Commissions people.
19 That's a concern for the Court.

20 How do we answer the allegation that the -- this
21 process would undermine the attorney/client relationship with
22 the detainee and their counsel where the Military Commission
23 or their task force are allowed to interview the individual
24 without the counsel's consent or presence, how do we respond
25 to that? What -- doesn't that necessarily interfere with the

1 attorney/client relationship?

2 MR. HAAS: Well, I don't think that it's been
3 established in this case, that's for certain. I think it was,
4 again, Petitioner's counsel who said that it was Al Kandari
5 himself who reported to him that these contacts had occurred.
6 We haven't, in fact, inquired as to whether or not Mr. Cynamon
7 then advised him not to say anything further to these
8 investigators.

9 There certainly are less invasive remedies than
10 ordering an injunction that I think, as the Court rightfully
11 recognizes, is quite broad in holding all communications
12 between the OMC and Petitioners concerning the possibility of
13 Military Commission charges.

14 THE COURT: Has there been any attempt to informally
15 resolve this matter?

16 MR. HAAS: If there has, I'm not aware of it. I do
17 know that early on in this litigation, or I'm aware at least
18 that early on in this litigation, that the Department of
19 Justice advised Petitioners' counsel that we don't control the
20 OMC, that they are independent. So, I mean, I guess I would
21 leave it at that.

22 THE COURT: That's interesting. Okay.

23 MR. HAAS: I guess I would point out also, Your
24 Honor, the breadth of the proposed injunctive order struck me
25 as well, and I think I would point out, focusing again on the

1 habeas case, that there really is no logical stopping point.
2 Petitioner's argument would bar any and all contacts with the
3 detainees represented by habeas counsel, even those solely for
4 intelligence purposes, if it could be shown that an attorney
5 touched it at all.

6 That's a truly remarkable conclusion, in my opinion,
7 and simply cannot be the reach of the ethical rule,
8 particularly given the commentary that I provided to the Court
9 to the rule itself. And I would suggest that to the extent
10 that Petitioners disagree and say that these contacts are
11 different, well, they are different. The difference is that
12 the purpose is to bring charges against them where they have
13 an avenue to bring these claims, and we think it's quite
14 clear, for the reasons that we set forth and the reasons that
15 Judge Urbina has recognized with regard to Section 7 of the
16 MCA, there is simply no jurisdiction over this matter at this
17 time.

18 THE COURT: All right. Thank you, Mr. Haas. I
19 appreciate it.

20 MR. HAAS: Thank you.

21 THE COURT: Mr. Cynamon, do you want to respond to
22 this briefly?

23 MR. CYNAMON: Yes. Thank you, Your Honor.

24 Your Honor, I'm surprised that counsel for the
25 Government takes the position that a prosecutor can violate or

1 disregard Rule 4.2 in a criminal case even when the Defendant
2 is represented in a simultaneous civil case by counsel, and
3 the prosecutor knows that, and I would point to *United States*
4 *versus Bowman*, which we cited at page 10 of our opening brief
5 in which the Court made exactly that point, that it's not
6 only -- not only had the Government prosecutors made an
7 unauthorized contact there, but the Court pointed out it
8 was -- it was particularly inappropriate since the Government
9 knew that the defendants were represented by counsel in an
10 adversary judicial proceeding at the time of their
11 conversations and that adversary proceeding was a civil
12 forfeiture proceeding arising out of the same facts. It's
13 very analogous here.

14 You have a civil -- a civil case in which the
15 defendants are represented by counsel and then a -- an
16 investigation into a potential criminal case in which the
17 prosecutors, knowing that the defendants or the potential
18 defendants are represented by counsel, disregard Rule 4.2, and
19 I think that *Bowman* clearly rejects the position that
20 Government counsel has taken here.

21 Second, I think it's entirely artificial to say
22 that, Well, gee, we hear -- we, the Government lawyers in the
23 habeas cases, say, you know, we're -- we're not going to
24 violate the ethical rules, but we can't do anything about the
25 office of military counsel, neither can this court.

1 Again, this court has and the Government conceded it
2 has, inherent authority to exercise control and enforce the
3 disciplinary rules over counsel for the parties that appear
4 before it. And to say that counsel at this table can't do it
5 but some other Government lawyers can would be like me going
6 back to my law firm and saying, "Hey, one of my partners, I
7 can't talk to my adversary in this case but you're not in the
8 case, you go talk to them."

9 Again, Rule 4.2 doesn't focus on who's in the case
10 and who's not. It's in representing a client, and absolutely
11 the Office of Chief Military Counsel is representing the
12 Government. A lawyer, like the Chief Military Counsel, shall
13 not communicate about the subject of the representation that
14 the party the lawyer knows to be represented by another lawyer
15 in the matter. And again, contrary to what Government counsel
16 said, it is undisputed that there has been a communication by
17 a staff member for the Office of Chief Military Prosecutor
18 about one of the very allegations that is the basis for
19 detaining my client that will be in issue in this habeas case.

20 And finally, again, I do not believe that our order
21 requests -- certainly we did not intend it to request that
22 there can be no communication by Government agents with our
23 clients. What there cannot be are communications in violation
24 of the ethical rules by Government counsel or people acting as
25 their alter-egos, and there's a lot of law on that, so there

1 isn't a lot of confusion about what that would be, and that's
2 what's going on and that's what we're trying to stop, and that
3 is not an overly broad request, Your Honor.

4 THE COURT: How do I issue this injunction without
5 violating the military -- the law in Section 7 of the MCA,
6 Military Commissions Act, where it says no court or judge or
7 jurisdiction to consider -- I've already heard the hearing --
8 it says to hear or consider, any other action against the
9 United States or its agents relating to any aspect of the
10 detention, transfer, treatment or conditions of confinement of
11 an alien who is detained by the United States as an enemy
12 combatant, and an aspect of their detention would be who can
13 communicate with them?

14 MR. CYNAMON: Your Honor, I respectfully disagree.
15 First of all, Section 7 has been held unconstitutional by the
16 Supreme Court, and I know the Government -- the Government has
17 a lot of arguments about why the Supreme Court really didn't
18 hold it all unconstitutional, but the language of the Supreme
19 Court is that Section 7 is unconstitutional.

20 But putting that aside, Your Honor, this is not -- I
21 emphatically state this is not a request to this court to
22 present a claim relating to conditions of confinement. This
23 is -- this motion would be identical, even if our clients were
24 not in confinement. What we are asking the Court to do is
25 exercise its jurisdiction in this case, which it

1 unquestionably has. The Supreme Court has said this court has
2 jurisdiction to hear core habeas cases, and what we're saying
3 is that the ability to prosecute that core habeas case is
4 undermined if Government counsel, whether the counsel at this
5 table or otherwise, are allowed to undermine our
6 attorney/client relationship. So it has nothing to do with
7 the conditions of confinement. It has to do in which the
8 manner in which this adversary proceeding is proceeding.

9 THE COURT: You agree, as counsel said, inextricably
10 intertwined with the Military Commissions proceeding, the
11 investigation and the habeas?

12 MR. CYNAMON: Yes, I do. And as I said before --

13 THE COURT: And then what Section 3 of the MCA, if
14 you don't like Section 7, get around Section 3 for me, clearly
15 says no court, again, even to hear or consider any claim
16 related to the prosecution under the Military Commission,
17 including challenge of lawfulness of the proceedings. How do
18 we get over that?

19 MR. CYNAMON: Your Honor, we get over that, as I
20 said before, because the fact that they're inextricably
21 intertwined means that there are going to be some
22 circumstances where this court's unquestionable jurisdiction
23 over the habeas cases are inevitably going to have some effect
24 on the Military Commission. That does not mean -- it
25 certainly cannot mean what the Government has argued.

1 As I said before, the logic of the Government's
2 argument in Section 3 is we might as well stop these cases
3 right now because anything we do to try to establish that the
4 Government has no basis for holding our clients as enemy
5 combatants will unequivocally affect the Military Commissions,
6 and therefore, what I am saying is that the fact that this
7 court is exercising its inherent authority to control the
8 ethical conduct of the counsel appearing before it, in no way
9 trespasses on the limitations of Section 3 of the Military
10 Commissions Act.

11 It's a necessary corollary to being able to
12 effectively prosecute these habeas cases which this court
13 unquestionably has jurisdiction to do.

14 THE COURT: All right. Thank you very much,
15 Mr. Cynamon.

16 MR. CYNAMON: Thank you, Your Honor.

17 THE COURT: All right. The Court has before it the
18 emergency motion for the injunction to prohibit the Office of
19 the Chief Prosecutor, the Military Commissions or its
20 alter-ego alleged -- I'm reading from the brief of the
21 Plaintiff -- the commission, the Criminal Investigation Task
22 Force or anyone else acting on behalf or at the direction of
23 the Office of the Chief Prosecutor of Military Commissions
24 from having any communications with Petitioners without the
25 consent of Petitioners' counsel relating to matters alleged to

1 be grounds for the confinement, including any matters in which
2 the Military Commission charges may be brought.

3 They obviously have expressed their concerns about
4 the situation of their client being interviewed by
5 representatives of the Government in the Military Commissions
6 proceedings when they represent them in the habeas proceedings
7 before us, which is a civil action number or civil case.

8 The Court is obviously concerned any time there is
9 ethical issues brought before it, as I'm sure Government
10 counsel are as well, and it concerns the Court and it's
11 certainly, in the normal case -- that counsel would be having
12 their staff, or people involved with them, in any fashion,
13 communicating with the litigant on the other side without the
14 other side's litigant counsel being present or with their
15 consent, that is something that's simply not done and the
16 Court would take immediate remedial action if it was brought
17 to its attention that was happening.

18 The situation here is a little different than that,
19 unfortunately. I think, because of the way that the Supreme
20 Court has decided *Boumediene* and has upset the congressional
21 crafted relief that was provided for the Guantanamo detainees,
22 it has tossed, colloquially, I guess, a monkey wrench into how
23 these proceedings are normally going to go forward, and we are
24 faced now with the aftermath in this court after the decision
25 of the Supreme Court.

1 I am troubled by the challenge that has been brought
2 in the sense that the Government represents that its habeas
3 lawyers have nothing to do with the criminal proceedings and
4 that they have no way of controlling them, in essence, and
5 that the military prosecutors can act as they wish.

6 I think that that ultimately could represent a
7 situation where there would be problems when they get to the
8 merits of the habeas cases where the Court, because of
9 potentially tainted evidence problems, analogous to *Kastigar*
10 and other cases, if that is the decision to go forward that
11 way and have representatives from the military people be
12 allowed to interview the detainees that are represented in the
13 habeas cases where the grounds for the military prosecution
14 and the detainees' grounds for being held as an enemy
15 combatant are the same or overlap closely, at the same time,
16 granting a preliminary injunction, which would directly affect
17 the Military Commissions' proceedings, although couched in
18 terms of its -- only relates to the habeas, the effect would
19 be to interfere with the Military Commissions' proceedings
20 where they would not be allowed to interview the detainee in
21 preparation of the charges and obtain information prior to the
22 time that he has a right to counsel, flies directly in the
23 Military Commissions Act, statute under Article -- Section 3
24 that I referred to, and I think still the remaining viability
25 of what remains in Section 7. (e)(1) was specifically held

1 unconstitutional in the Supreme Court. (e)(2) maybe not
2 specifically. It wasn't specifically, but may be
3 inferentially, and has, I think, still some life to it.

4 It does concern the Court. I think it concerned
5 Judge Kotelly, and it's unfortunate it has come to this extent
6 when we could not have had some communications to attempt to
7 resolve this without trying to put the Court in the middle of
8 the -- what is a very muddled situation in these cases.

9 What the Court's going to do is as follows, with
10 that preamble, and this will be the ruling of the Court in its
11 findings under the rule. I'm going to deny the motion for
12 preliminary injunction. When you consider a motion for
13 preliminary injunction, you obviously consider the four
14 factors set forth in multiple cases under the statute in our
15 circuit, the excess -- substantial likelihood of success on
16 the merits is the first and most important one, combined with
17 suffer irreparable injury if the injunction is not granted.
18 The injunction would not substantially injure other persons
19 and the public interest would be furthered by the injunction.

20 Looking at those factors, the first one, likely
21 success of the merits, the Supreme Court just held in a --
22 recently about where you're faced with a difficult question as
23 to jurisdiction that makes the success of the merits more
24 unlikely due to the potential impediments to reaching the
25 merits, that it should not then grant a summary -- a

1 preliminary injunction as requested. That's *Munaf*, M-u-n-a-f,
2 at 128 Supreme Court 2219. So Section 3, it seems to me,
3 provides a substantial impediment to granting a preliminary
4 injunction. It indicates that I have no authority even to
5 hear -- and Government counsel could have said there shouldn't
6 have been a hearing in this case, I think -- even to hear or
7 consider any claim related to the prosecution of a Military
8 Commission, and that's what we're talking about, including
9 challenges to the lawfulness of the procedures. Well, now,
10 this is a procedure that they're alleging is inappropriate or
11 unlawful because it violates ethical rules.

12 I think that potential impediment is a -- weighs
13 heavily against granting a injunctive relief, even if there
14 is -- the Court has expressed its concerns about the
15 Government proceeding with what may be found eventually to be
16 unethical activities in their investigation in the criminal
17 commission charges where we have the habeas cases pending over
18 the same issues.

19 But further than that, even if I assume I had
20 jurisdiction to hear this, because it's strictly a habeas
21 matter, the Supreme Court has given us authority to hear now.
22 I have some questions on the substantial likely success on the
23 merits and irreparable injury. For these reasons, you could
24 argue that the Section 3 of the Act is not applicable, I
25 guess, because those charges have not yet been brought, but

1 the rule that the Petitioners arguing apply, the ethical rule
2 is Rule 4.2 of the Army Rules of Professional Responsibility
3 of the lawyers. That's the, quote, no-contact rule. It reads
4 as follows: In representing a client, a lawyer shall not
5 communicate about the subject of the representation with a
6 party the lawyer knows to be represented by another lawyer in
7 the same manner -- matter, unless the lawyer has the consent
8 of the other lawyer or is authorized by law to do so.

9 Now, it seems to me then that the Government would
10 only be prohibited from communicating with Petitioners about
11 the basis for their designation as a unlawful enemy
12 combatants, which is a jurisdiction prerequisite of the
13 Military Commission charge. So, they could argue that it's --
14 that the Petitioners' counsel don't represent him yet in that
15 because he's not been charged, so it wouldn't apply because of
16 the subject of the representation in the same matter; although
17 both sides recognize these are intertwined matters.

18 The -- additionally, the Government has argued
19 before the Military Commissions that he's not entitled to
20 counsel yet because he's not been formally charged so that
21 they are not interfering with any relationship. The concern
22 the Government has to face, obviously, is what the Court is --
23 and Petitioner's counsel argued somewhat, is that -- and the
24 Court has expressed interest in is that since they're
25 basically the same subject matter, it's very difficult to

1 distinguish then the materials that -- information gained from
2 the Military Commissions interview and proceedings when they
3 come here to justify that they should be detained as enemy
4 combatants and it may result in evidentiary hearings as to
5 what evidence can be used and what has been tainted if it's
6 determined there was a violation of the ethical rules.

7 The other issue is irreparable injury, and counsel
8 argued that damage, which is very difficult, attorney/client
9 relationships in these individuals who understandably, very
10 leery of American lawyers representing them in the context of
11 their being detained for up to seven years without any
12 proceeding in court. The -- and they have affidavits attached
13 as to that harm that could be done or harm that had been done
14 in the past with references to the counsel's representations
15 by investigators talking to these individuals.

16 Petitioner didn't address whether or not he's now
17 informed his client not to talk to anyone and he's not to
18 cooperate and what damage could result in the future, if any,
19 and has not shown that there could be any harm in the future
20 if he so advised his client not to talk to individuals from
21 the Government.

22 The -- really, no specific showing before me at this
23 time, but speculative showing, it may interfere with the
24 attorney/client relationship. The problem with counsel as to
25 Petitioners is, it's really not a preliminary injunction case.

1 It's really, he's attempting to get an order for the Court to
2 order the Government to behave in accordance to with what he
3 believes is the proper ethical obligations of the Government
4 under this military code of justice and our general rules of
5 ethical conduct as lawyers.

6 Obviously, I do have inherent authority to order
7 corrective actions to be taken, if necessary, but obviously,
8 there is issues that have not been resolved over the
9 jurisdiction of the Court for interfering with the Military
10 Commission process. It's very clear I do not have that
11 authority, unless it's determined to be unconstitutional, that
12 section of the statute.

13 But certainly as to irreparable injury at this time,
14 it seems to me it's speculative and that there is an avenue,
15 eventually, to repair any harm, so it's not irreparable, to
16 suppression of any evidence that's improperly gathered that
17 would be coming into the habeas hearing if that is ultimately
18 determined.

19 And finally, and for the Military Commission,
20 Petitioner would have a right to raise this issue again as to
21 allegations of harm incurred by the interviews of the
22 petitioner without counsel present when Petitioner asserts he
23 represents the individual in the military charge as well, and
24 that would be up to the Military Commission and the Court of
25 Military Commission Review and finally the D.C. Circuit, if

1 that stay is in issue, so there is ultimately ways to repair
2 what is alleged to be irreparable injury.

3 So, the substantial harm to other persons and the
4 public interest, I think, are just equally weighed, and either
5 side, that is, objection of this does not harm other
6 interested parties at this time in this case and in the end
7 that the public interest is necessarily forwarded by --
8 furthered by the injunction or not, but the overall balance,
9 it seems to the Court, is that because of the jurisdictional
10 issue, which is overriding, regardless of the -- categorizing
11 this as a case affecting only the habeas, it necessarily
12 affects the Criminal Commission's proceedings, and that the
13 statute bars the Court from taking any action in those regards
14 at this time, I'm going to deny the motion for preliminary
15 injunction for those reasons, but the Government has, I think,
16 been clearly put on notice as to consequences that could occur
17 in these proceedings if it's determined the military
18 individuals, who, the Government asserts are acting outside
19 the Justice Department on their own, decide to go forward in
20 these types of interviews and impact the habeas proceedings.

21 All right. Thank you for coming in. I'll issue an
22 order to the effect of my bench ruling. All right.

23 THE DEPUTY CLERK: All rise.

24 (PROCEEDINGS END AT 12:00 P.M.)

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CERTIFICATE OF REPORTER

I, Catalina Kerr, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

Catalina Kerr

Date