

ORAL ARGUMENT NOT YET SCHEDULED

No. 13-5218

(consolidated with Nos. 13-5220 and 13-5221)

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

SAEED MOHAMMED SALEH HATIM, et al.,*Petitioners-Appellees,*

v.

BARACK OBAMA, et al.,*Respondents-Appellants.*

On Appeal from the United States District Court
for the District of Columbia

JOINT BRIEF FOR PETITIONERS-APPELLEES

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Parties and amici. Parties, intervenors, and amici appearing before the district court and in this Court are listed in the Brief for Respondents-Appellants, except that Donnie Thomas is incorrectly identified as a Respondent-Appellant. Donnie Thomas is a past commander of the Joint Defense Group, JTF-GTMO; the current commander of the Joint Defense Group, JTF-GTMO is Colonel John V. Bogdan.

In addition, the motion for relief that was granted in the district court was also filed on behalf of the petitioners in the following cases: *Abdullah v. Bush*, Civ. No. 05-0023 (RWR) (D.D.C.); *Al-Baidany v. Obama*, Civ. No. 05-2380 (CKK) (D.D.C.); *Al-Bihani v. Obama*, Civ. No. 05-1312 (RJL) (D.D.C.); *Alhag v. Obama*, Civ. No. 05-2199 (RCL) (D.D.C.); *Al-Mithali v. Obama*, Civ. No. 05-2186 (UNA) (D.D.C.); *Al-Zarnouqi v. Obama*, Civ. No. 06-1767 (RCL) (D.D.C.); *Anam v. Obama*, Civ. No. 04-1194 (TFH) (D.D.C.); *Al Qyati and Al Azani v. Obama*, Civ. No. 08-0219 (RBW) (D.D.C.); *Al Warafi v. Obama*, Civ. No. 09-2368 (RCL) (D.D.C.); *Hidar v. Obama*, Civ. No. 05-2386 (RBW) (D.D.C.); *Mohammed v. Obama*, Civ. 05-2385 (UNA) (D.D.C.); *Obaydullah v. Obama*, Civ. No. 08-1173 (RJL) (D.D.C.); *Odah v. Obama*, Civ. No. 06-1668 (TFH) (D.D.C.); *Sanad al-Kazimi v. Obama*, Civ. No. 05-2386 (RBW) (D.D.C.).

Rulings under review. References to the rulings under review appear in the Brief for Respondents-Appellants.

Related cases. There are no related cases currently pending in this Court or in any other court of which counsel are aware.

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INTRODUCTION

At the beginning of May, 2013, the prison commander at Guantanamo ordered a drastic revision to the long-standing procedures that were followed when detainees either met with counsel or spoke with counsel on the telephone. The prior procedures were designed to respect the deep-seated religious and cultural sensitivities of the Muslim detainees by instructing the guards not to frisk the genital areas of the detainees. The new procedures require intimate genital-area searches both before and after all meetings or telephone calls with counsel. The effect of the new search procedures was immediate and predictable -- numerous detainees were unwilling to meet or speak with counsel in connection with their habeas petitions if as a condition they would be subject to a genital-area search. Several months earlier, the prison commander also eliminated the long-standing option of having meetings in the facility where a detainee is housed, requiring instead that all counsel meetings, without exception, take place at a separate facility.

Then-Chief Judge Lamberth carefully assessed the purported justifications for the new procedures as well as their impact on the detainees' access to counsel. He acknowledged that the Executive Branch was responsible for running the Guantanamo facility, and recognized that his role was limited to protecting the constitutional right of the detainees to have access to counsel for purposes of

pursuing habeas relief. *See Boumediene v. Bush*, 553 U.S. 723 (2008). The district court had, years earlier, taken on the role of monitoring and regulating counsel-access for the Guantanamo detainees, most recently pursuant to a post-*Boumediene* Protective Order issued by former Chief Judge Hogan in 2008. In a thorough 35-page opinion, Judge Lamberth found that the Government's new procedures were part of a long-standing pattern of behavior by the Government to impede access to counsel, and that they placed unjustified burdens on access to counsel for detainees seeking to pursue habeas relief. Accordingly, he amended the Protective Order to require a return to the *status quo ante* with respect to searches for access to habeas counsel, as well as to provide an option for physically weak or medically compromised detainees to meet habeas counsel in the facilities where they are housed.

The Government's appeal to this Court should be rejected. Judge Lamberth found that the new genital-area search procedures unduly burdened the detainees' access to habeas counsel and that their purported justification by the Government was at best flimsy, and at worst pretextual. These findings were amply supported in the record. The Government does not even attempt to show that the district court's factual findings were clearly erroneous, and thus they are controlling on this appeal. The district court's decision did nothing more than require the Government to follow procedures for counsel access that had been successfully

followed for years, and that were not shown ever to have resulted in disruption or disorder, or in the introduction of contraband to the prison, or in causing any other problems. There is every reason for this Court to respect the judgment of the Chief Judge of the district court in matters, such as this one, which involve the day-to-day administration of the habeas litigation. The district court's decision should be affirmed.

STATEMENT OF JURISDICTION

The Government asserts that the district court lacked jurisdiction to issue its order. Gov't Br. 1. This argument is rebutted below in Section I of the Argument.

STATEMENT OF THE ISSUES

1. Whether the district court's jurisdiction to ensure that Guantanamo detainees have reasonable access to counsel for purposes of pursuing habeas corpus relief includes jurisdiction to remove procedural impediments to access.

2. Whether the Government has shown any error in the district court's findings that the Government's adoption of new procedures governing searches and meeting rooms in connection with access to habeas counsel for Guantanamo detainees unlawfully burdened the detainees' habeas rights and unjustifiably altered access procedures which had been in place for years without causing any problems or disruption.

STATUTES AND REGULATIONS

The “suspension” clause in Clause 2, Section 9 of Article I of the United States Constitution provides as follows: “The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.”

STATEMENT OF FACTS

A. Factual Background

Most Guantanamo detainees are held in two closely-adjacent prisons, known as Camp 5 and Camp 6. Slip op. 4, JA 145; JA 25. (So-called “high value” detainees are held in a separate facility.) In the past, counsel met with their clients either in Camp 5 or Camp 6, *i.e.*, in the prisons where they are being held, or in a nearby separate facility known as Camp Echo. JA 25. Detainees have telephone calls with their lawyers in another facility, Camp Delta. When the detainees have meetings or calls in Camp Echo or Camp Delta, they are transported by van back and forth to Camps 5 or 6. Slip op. 4, 7, JA 145, 148.

Historically, detainees were searched prior to meetings or telephone calls with counsel. Slip op. 6, JA 147. Since the “early years of detention operations at Guantanamo,” the search protocol did not allow the guards to frisk detainees’ genital areas except with special authorization from the prison commander. Slip op. 6, 21, JA 147, 162. Rather, the guards would grasp the detainee’s trousers and then shake them to dislodge any contraband. *Id.*; JA 35. As explained in a report

by Admiral Patrick Walsh in 2009, the reason for this search procedure was to respect the detainees' religious and cultural sensitivities. Slip op. 5-6, JA 146-47, citing "Review of Department Compliance with President's Executive Order on Detainee Conditions of Confinement" (2009); JA 35. All or virtually all of the detainees are Muslims, and the great majority are Arabs.

On May 3, 2013, the commander of the Guantanamo prison, Colonel John Bogdan, ordered a major change in the procedures for searching detainees whenever they were moved from their prison camp to another location, including when they were moved to Camp Echo to meet with counsel or to Camp Delta to have a telephone call with counsel. Instead of simply "grasping the detainee's waistband and shaking it vigorously," the new protocol required a search and a frisking of the genital area. Slip op. 6-7, JA 147-48. The detainees were to be searched twice for each such movement, both when they left Camp 5 or Camp 6 and when they returned. *Id.* In a declaration submitted to the district court, Colonel Bogdan stated that he decided to change the search protocol to make it consistent with standard procedures followed in other military prisons, out of fear that the searches would not "be conducted consistently between guard members." JA 112. There was, however, no evidence that there had ever been any inconsistent application of the long-established search protocol that had been in place for years at Guantanamo, and no evidence that the prior procedure had ever

been ineffective with respect to meetings or calls with counsel.¹ Slip op. 21-22, JA 162-63.

Colonel Bogdan also ordered that meetings with counsel could no longer take place in meeting rooms in the prisons where the detainees are housed, Camps 5 and 6, but could only take place in Camp Echo. Slip op. 4-5, JA 145-46; JA 111.²

The effect of the new genital search procedures was “actively [to] discourage petitioners from taking phone calls or meeting with counsel.” Slip op. 25, JA 166. Numerous detainees were unwilling to meet or speak with counsel in connection with their habeas petitions if as a condition they would have to undergo a “religiously and culturally abhorrent” search of their genital areas. Slip op. 25, JA 166; JA 19-20, 27, 70-71, 76-77, 87-88, 97-98, 130, 134-35.³ For many

¹ There was, however, evidence that the real reason for the change in the search protocol was to interfere with the detainees’ access to counsel so as to punish them for participation in a hunger strike that had started in February. *See* JA 20, 82; *see also* JA 44-45, 72-73.

² There was also a change in the type of vans used to transport detainees from Camps 5 and 6 to Camps Echo and Delta. The new vans were smaller, and forced the detainees, while shackled, to be in a crouched stressful position. Slip op. 8, JA 149. The Government said that it was working to correct the problem by installing lower benches in the vans. JA 113. Judge Lamberth ordered as an interim measure that detainees, at their request, be transported only in vans where they could “sit upright,” JA 141, which was a “truly costless” solution because the old vans were still available. Slip op. 34, JA 175. The Government reports that the new vans have now all been retrofitted to enable “all detainees to sit upright.” Gov’t Br. 9. Accordingly, the van issue has been resolved and is no longer at issue in the case.

³ One of these petitioners, Saeed Mohammed Saleh Hatim, had refused a meeting and a phone call in May and a phone call in July with counsel. JA 26-27; Exhibits (continued...)

“devout Muslims,” the new search procedures constituted an insurmountable barrier to access to their habeas counsel. Slip op. 25, JA 166. Accordingly, on May 22, 2013, less than three weeks after the new search procedures were implemented, emergency motions on behalf of petitioners in seventeen pending habeas cases were filed with the Chief Judge of the district court to challenge these new policies and to restore access to counsel for all detainees with pending or potential habeas claims.

B. The District Court’s Decision

On July 11, 2013, Chief Judge Lamberth issued a comprehensive 35-page decision on the counsel-access issues that were raised by the new genital-area search policy and the new policy prohibiting any meetings with counsel under any circumstances in Camps 5 and 6. JA 142-76.

He began his analysis by explaining that the Supreme Court’s ruling in *Boumediene v. Bush*, 553 U.S. 723 (2008), that the Guantanamo detainees have a right to pursue habeas relief in federal court necessarily means that they are entitled to access to counsel. Slip op. 11-12, JA 152-53. In the Guantanamo cases, access to the court and access to counsel are “inseparable concepts and must run

L and M to Appellees’ Memorandum in Opp. to Appellants’ Motion for a Stay, Aug. 2, 2013. However, he participated in a call in August, advising counsel that he was not subject to a genital-area search for that call. He then refused an attempted follow-up call on September 23, 2013, evidently because he would be subjected to a genital-area search. Counsel arranged another follow-up phone call, for October 10, but he refused that call as well.

together.” Slip op. 12, JA 153. Confined in an island prison, facing a severe language barrier, and lacking any knowledge of the American legal system, it is simply impossible for the Guantanamo detainees to pursue habeas relief without access to counsel. *Id.*

Judge Lamberth observed that for years, the district court had regulated counsel access at Guantanamo through detailed protective orders. Slip op. 9-10, JA 150-51. The first order was issued by Judge Green in 2004. It served as a “boon for the Court, for the Government, and for detainees” and “stood without objection for four years.” Slip op. 9, JA 150. It was replaced in 2008 by a “substantially similar” protective order issued by Judge Hogan to govern counsel access and related matters in the wake of *Boumediene*. Slip op. 10, JA 151, citing *In re Guantanamo Bay Detainee Litigation*, 577 F. Supp. 2d 143 (D.D.C. 2008).

The district court rejected the Government’s assertion that petitioners’ motions were a challenge to “conditions of confinement” over which it had no jurisdiction. Slip op. 12-14, JA 153-55. Instead, petitioners were making “a narrow challenge to alleged government interference to petitioners’ access to counsel that prevents them from prosecuting habeas cases.” Slip op. 13, JA 154. It held that the “challenge falls squarely within the Court’s jurisdiction.” *Id.* The “action focuses solely on what rules will govern counsel access for the Guantanamo detainees during their habeas cases and whether the government, in

contravention of Judge Hogan's protective order and numerous other rulings, may interfere with detainees' access to counsel." Slip op. 14, JA 155.

The district court also rejected the Government's claims that the standard applied by courts in reviewing domestic prison regulations should also apply to challenges to regulations at Guantanamo that burdened access to counsel for Guantanamo detainees. Slip op. 16-19, discussing *Turner v. Safley*, 482 U.S. 78 (1987), and related cases, JA 157-60. The court held that the constitutional right to pursue habeas relief, unlike other constitutional rights such as freedom of association and free speech, cannot be limited by prison authorities -- "[t]o restrict a detainee's access to habeas corpus solely by virtue of his detention would run counter to the writ's purpose and would eviscerate the writ." Slip op. 18, JA 159. The need to protect the habeas right was particularly important in the Guantanamo cases because, as noted in *Boumediene*, the detainees had not been tried or convicted, but were being held pursuant to executive order. *Id.*, citing 553 U.S. at 783. The district court, however, found it unnecessary to define the proper test for regulations at Guantanamo that impinge on habeas rights because "the new procedures challenged by petitioners would fail even under *Turner*." Slip op. 19, JA 160.

The district court in applying the *Turner* standard recognized "both the special expertise of the Executive and Legislature in prison administration and its

own limited expertise in that area.” Slip op. 20, JA 161. However, regulations that had no rational connection to a legitimate penological interest could not be sustained if they infringed constitutional rights. *Id.*

The district court then examined the new genital-area search policy, stating that “the Court finds that the new search procedures lack a ‘valid, rational connection’ to the legitimate government interest -- security -- put forward to justify them.” *Id.* The Government’s first justification was that the long-standing search procedures at Guantanamo, which avoided the genital area, differed from standard military prison procedures, and this supposedly posed a risk that the guards would be inconsistent in their performance of the Guantanamo procedures. “This justification does not hold water.” Slip op. 21, JA 162. The court found that the old procedures had been in place for years and that there was nothing to indicate that American soldiers were having any trouble implementing them effectively and consistently, or that they were incapable of doing so. Slip op. 21-22, JA 162-63.

A second justification arose from the death of detainee Adnan Latif in September 2012, by overdosing on pills that he allegedly had “hoarded.” Slip op. 22, JA 163. There was nothing, however, that linked this episode to meetings with counsel. The court found that the purported Latif justification not only has “the patina of pretext,” but also was “belie[d]” by the fact that the new search

procedures were not implemented until May 2013, long after his death. Slip op. 22-23, JA 163-64. The court found that “linking the new searches to the death of Latif and the subsequent investigation was merely an afterthought.” *Id.*

The third justification was that contraband had been found in Camp 6 during a search of the prison. *Id.* However, there was “nothing in the record [that] indicates that detainees have received any contraband from their attorneys or that detainees have attempted to pass contraband to each other during phone calls or meetings with attorneys.” Slip op. 26, JA 167. Detainees were “shackled and under guard” when they were moved to meet with counsel (as well as subject to the non-genital-area search procedures), and “guards may search detainee’s cells or the detainees themselves at other times.” Slip op. 26-27, JA 167-68. Any purported need for the genital-area search in connection with counsel meetings and calls was thus “reduced.” *Id.*

The district court found that “[t]he motivation for the searches is not to enhance security but to deter counsel access.” Slip op. 26, JA 167. In this regard, the court also considered the history of counsel access at Guantanamo, with which it was intimately familiar, agreeing that the Government “is a recidivist when it comes to denying counsel access,” and finding that it “seemingly at every turn, has acted to deny or to restrict Guantanamo detainee’s access to counsel.” Slip op. 24,

JA 165. The Government's previous actions "substantially increase the likelihood that its [security] justification is mere pretext." Slip op. 25, JA 166.

The court found that "multiple petitioners have foregone . . . phone calls or meetings with counsel" as a result of the new search policies. *Id.* The court rejected the argument that the detainees' refusals to meet or talk with counsel were merely "voluntary" acts by the detainees. This is because "the choice between submitting to a search procedure that is religiously and culturally abhorrent or foregoing counsel effectively presents no choice for devout Muslims." *Id.* "[T]he Court finds that the new search procedures actively discourage petitioners from taking phone calls or meeting with counsel." *Id.* The court also found that "[a]bsent face-to-face meetings and telephone calls, petitioners' habeas cases will not go forward." Slip op. 27, JA 168. The new search procedures thus "effectively leave petitioners without alternative avenues to exercise their right to habeas corpus." *Id.*

As a result of its findings, the court amended the Protective Order applicable to the Guantanamo habeas cases to provide that detainees shall be subject to search before and after each meeting or call with counsel, but that the search should be limited to the previously-used search procedure identified by Admiral Walsh, *i.e.*, "guards shall be limited to grasping the waistband of the detainee's trousers and shaking the pants to dislodge any contraband." Order, JA 140. The previously-

used procedure had represented a “considered policy judgment on the part of the former J[oint] D[etention] G[roup] commanders,” and was a “proven alternative” to the genital-area searches. Slip op. 6, 28, JA 147, 169.

The district court then turned to Colonel Bogdan’s decision to forbid detainees to meet with counsel in rooms at Camps 5 and 6 (where they resided), as historically had been an option, and instead to require all meetings to take place at Camp Echo. Petitioners sought to have this decision invalidated by the court, and the court found that most of the justifications for this decision were either unrelated to camp security or illogical. Slip op. 29-31, JA 170-72. The court found, however, that there were some logistical justifications. Slip op. 31-32, JA 172-73. These, however, were outweighed in cases where the detainee is “in a weakened physical state due to participation in the hunger strike” or has “a medical condition that similarly makes travel outside the housing camps difficult.” Slip op. 33, JA 174. The court amended the Protective Order to permit these physically weak or medically compromised detainees to meet with counsel in Camps 5 or 6 rather than Camp Echo. Order, JA 140-41.

In his conclusion, the district judge reiterated that “[f]or Guantanamo detainees, it is undisputed that access to the courts means nothing without access to counsel.” Slip op. 34, JA 175. The new search and meeting procedures “flagrantly disregard[] the need for a light touch on religious and cultural matters that Admiral

Walsh recognized years ago.” Slip op. 35, JA 176. The court concluded that the “challenged procedures and regulations [are] invalid as they pertain to counsel access.” *Id.*

SUMMARY OF THE ARGUMENT

I. The Government argues that the district court had no authority to enjoin “full-frisk” searches of the detainee’s genital areas in connection with meetings or calls with counsel because the searches are “conditions of confinement.” As such, it argues, the challenge to those searches was outside the court’s jurisdiction because Section 7 of the Military Commissions Act of 2006, 28 U.S.C. § 2241(e)(2), bars challenges to “conditions of confinement.”

It is undisputed that for Guantanamo detainees the constitutional right to the “meaningful” habeas remedy promised by the Supreme Court in *Boumediene*, 553 U.S. at 796, necessarily includes the right to access to counsel. Counsel access is essential in Guantanamo cases because the detainees have no familiarity with American law, are held in an offshore and inaccessible fortress, and generally have little education or ability to speak English. The Supreme Court in *Boumediene* expressly ruled that counsel access issues are to be resolved by the district court. *Id.* The district court’s ruling concerning genital-area searches was narrowly limited to those searches performed in connection with meetings or calls with habeas counsel, and is thus within the court’s habeas jurisdiction as recognized by

Boumediene. The district court expressly ruled that its decision “does not affect the ability of the J[oint] D[etention] G[roup] to continue to administer the Guantanamo detention facility as it finds appropriate with respect to issues unrelated to counsel access.” Slip op. 35, JA 176.

The Government does not claim that the district court lacks power to enforce counsel access for habeas petitioners. Instead, it argues that its new genital-area search policy cannot be challenged in court because it applies not only to lawyer visits and calls, but also “universally” to any instance when a detainee is moved from his camp for any purpose. It is impossible to take this argument seriously. The Government with as much justification could eliminate all visits by counsel and claim that this is unreviewable simply by simultaneously applying the visit-ban “universally” to all potential visitors. The district court expressly found that the new search procedures had “actively discourage[d] petitioners from taking phone calls or meeting with counsel,” and that “devout Muslims” had “no choice” but to refuse to meet or speak with counsel if they had to submit to a “religiously and culturally abhorrent” search. Slip op. 25, JA 166. It also found that access to counsel is a prerequisite for obtaining habeas relief. No claim is made that these findings are clearly erroneous. The court’s order addressed the genital-area search policy only as it affected counsel access, and thus was comfortably within its habeas jurisdiction.

II. The Government incorrectly seeks to liken attempts by Guantanamo detainees to exercise their habeas rights to attempts by criminals in domestic prisons to challenge infringements of various liberty rights. As the district court recognized, what is at stake here is the right of an imprisoned person to a meaningful habeas remedy, which requires access to counsel. While restrictions in domestic prisons on such constitutional rights as free association may be permissible, the Executive is not empowered to circumscribe a prisoner's habeas rights, because the very purpose of habeas is to enable a prisoner to challenge his imprisonment by the Executive. The court nonetheless examined the challenged policies against the domestic-prisons standard asserted by the Government, and found that they failed even under this standard.

The district court thoroughly evaluated the purported justifications for the new genital-area search and meeting-room policies and found that they were so flimsy as to suggest pretext. The argument that the guards might be unable to implement the old search procedures on a consistent basis was supported by nothing. The claim that the apparent drug overdose of a detainee in 2012 justified the new search policy was belied not only by the fact that the new policy was not implemented until nearly eight months after his death, but also by the fact that any "hoarding" of pills by that detainee had nothing to do with lawyer visits. Similarly, there was no evidence that lawyer visits or telephone calls had ever

resulted in contraband being brought into the facility. The fundamental truth was that for years at Guantanamo, no one frisked a detainee's genital area as a precondition for access to counsel. During all these years, there was no evidence of even a single instance where meetings or calls with counsel had resulted in contraband coming into the camp or in any other problems. There was, in short, no empirical justification for insisting on genital-area searches as the price for access to counsel. The court correctly found that the new search and meeting-room policies lacked a valid, rational connection to legitimate governmental interests.

The district court's order imposed no burdens on the Government. It simply restored the *status quo ante* with respect to searches in connection with access to counsel, and carved out a limited exception to allow physically weak and sick detainees to meet with their lawyers in the camps where they are housed rather than Camp Echo. The order is necessary to preserve counsel access, and thus access to a meaningful habeas remedy, for many of the detainees. If Judge Lamberth's order is reversed, on the other hand, the effect in practice will be to strip many detainees of their habeas rights.

STANDARD OF REVIEW

The district court's findings of fact must be accepted unless shown to be clearly erroneous. *Ellipso, Inc. v. Mann*, 480 F.3d 1153, 1157 (D.C. Cir. 2007). “[I]f the district court's account of the evidence is plausible in light of the record

viewed in its entirety, the court of appeals may not reverse it. . . . Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Awad v. Obama*, 608 F.3d 1, 7 (D.C. Cir. 2010) (quotation marks, citation, and alterations omitted). This deferential standard applies "whether the factual findings were based on live testimony or, as in this case, documentary evidence." *Id.* at 6-7 (citing *Anderson v. Bessemer City*, 470 U.S. 564, 572 (1985)). Questions of law are reviewed de novo. *Ellipso*, 480 F.3d at 1157.

ARGUMENT

I. THE DISTRICT COURT HAD JURISDICTION TO ENTER ITS ORDER.

The Supreme Court in *Boumediene* held that the Guantanamo detainees "are entitled to the privilege of habeas corpus to challenge the legality of their detention," and that this requires that they have a "meaningful opportunity to demonstrate" that their detention is unlawful. 553 U.S. at 771, 779. The Supreme Court had previously held that a Guantanamo detainee "unquestionably has the right to access to counsel" in habeas cases. *Hamdi v. Rumsfeld*, 542 U.S. 507, 539 (2004). The Court in *Boumediene* confirmed that "access-to-counsel issues" are "within the expertise and competence of the District Court in the first instance." 553 U.S. at 796.

As the district court recognized, access to counsel for Guantanamo detainees is necessary or they “will be unable to prosecute their habeas claims.” Slip op. 15, JA 156; *see also* slip op. 27, JA 168 (“face-to-face meetings and telephone calls” with counsel are essential for a habeas case to “go forward”). The detainees have little if any education or ability to speak English and none has familiarity with American law. Slip op. 15, JA 156. They are locked away in an island outpost and, apart from contact with guards and lawyers, are essentially out of reach. They have zero ability to prosecute habeas claims *pro se*. It is thus undeniably the case that the district court’s habeas jurisdiction includes jurisdiction to protect the Guantanamo detainees’ access to counsel.

The Government does not contest the district court’s jurisdiction to assure that the Guantanamo detainees have access to counsel.⁴ It argues, however, that Judge Lamberth’s order barring genital-area searches in connection with meetings and calls with counsel was not intended to protect counsel access but to regulate

⁴ The district court’s habeas jurisdiction is founded on 28 U.S.C. § 2241(a) and 28 U.S.C. § 1331, as well as on the Suspension Clause. The Government previously conceded that there is a right of access to counsel. *See In re: Guantanamo Detainee Continued Access to Counsel*, 892 F. Supp. 2d 8, 15 n.10 (D.D.C. 2012). Similarly, the Government has not sought to invalidate the Protective Orders entered by the court to govern counsel access. *See in re Guantanamo Bay Detainee Litigation*, 577 F. Supp. 2d at 157-64 (Protective Order detailing “logistics of counsel visits,” security measures for counsel’s “telephonic access to detainees,” “procedures for correspondence between counsel and detainees,” and permissible “security procedures” governing counsel visitation at Guantanamo). The protective orders have been in place since 2004 without challenge. *See* slip op. 9-10, JA 150-51.

“conditions of confinement,” which 28 U.S.C. § 2241(e)(2) bars it from doing.⁵

Gov’t Br. 15-22. The argument is meritless.

Judge Lamberth’s decision was addressed solely to the “narrow” issue of counsel access that was presented by petitioners’ motions. Slip op. 13, JA 154. He found that the genital-area search policy was “religiously and culturally abhorrent” to “devout Muslims,” leaving them with “no choice” but to refuse to meet with counsel. Slip op. 25, JA 166. He also found that the policy “actively discourage[s]” petitioners from meeting or speaking with counsel. *Id.* No claim is made that these findings (or any of the court’s findings) are clearly erroneous. As he also found, the impact of the new search policy on the habeas claims of those who refuse to undergo the search is devastating, because their cases simply cannot be prosecuted without access to counsel. Slip op. 27, JA 168. For instance, petitioner Hatim’s case is subject to a scheduling order, but his refusals to meet or speak with counsel has forced the schedule to be deferred. His case will have to be stayed indefinitely unless and until the Court affirms the decision below or the

⁵ Although the Supreme Court in *Boumediene* invalidated 28 U.S.C. § 2241(e)(1), this Court has held that § 2241(e)(2) remains enforceable. *See Al-Zahrani v. Rodriguez*, 669 F.3d 315, 319 (D.C. Cir. 2012); *Kiyemba v. Obama*, 561 F.3d 509, 512 n.1 (D.C. Cir. 2009), *cert. denied*, 559 U.S. 1005 (2010). Because this panel is bound by prior rulings of panels of the Court, this brief does not challenge the enforceability of § 2241(e)(2). However, petitioners reserve the right to make such a challenge to this Court en banc and/or to the Supreme Court.

Government voluntarily abandons its punitive approach and reinstates the search procedures that had been used successfully for years prior to May 2013.

The Government concedes that a deprivation that affects “the fact or duration of confinement” is not a “condition of confinement” and is subject to habeas challenge. *See* Gov’t Br. 18, citing cases. As the court found, the genital-area search policy has the effect of depriving many detainees of access to counsel, thereby impairing or destroying their habeas opportunities. Slip op. 27, JA 168. As such, the policy is clearly pertinent to the “fact or duration of confinement” because it impairs a detainee’s ability to use the habeas procedure to obtain release, and is thus well within the district court’s jurisdiction to regulate. *See also* 28 U.S.C. §§ 1331, 2241(a).

The Government’s principal argument is that the genital-area search policy is immune from challenge because it applies not only to counsel meetings and calls but also applies “universally” to any other times when a detainee is moved from Camp 5 or Camp 6. Gov’t Br. 20-21. The Government asserts that detainees could with as much justification refuse to meet with counsel unless they were provided better food or recreational opportunities, and thus by “artful pleading” convert conditions claims into counsel-access claims. Gov’t Br. 21-22. The argument is risible. The only policy being challenged is the one that governs the detainee’s trip from his cell to the location where he can meet or talk with his

counsel. The court's order does not purport to regulate anything unrelated to the very act of access. The court explicitly limited its decision to searches incident to calls and meetings with counsel, leaving the guards free to make genital-area searches at times when counsel access was not at stake. Slip op. 27, 35, JA 168, 176. The guards are not free, however, to force a detainee to run a gauntlet (as used in the colonial meaning of that term) just to meet or speak with counsel. Indeed, if the Government's argument were accepted, it could eliminate counsel access simply by adopting policies that "universally" blocked any access by anyone.

This case does not present a challenge to a policy that only "indirectly" affects counsel access, as the Government suggests (at 20), but to one that obliterates access for many detainees. The fact that some detainees may be willing to undergo "abhorrent" genital-area searches as a price for meeting with counsel does not undercut the undeniable fact that many are unwilling to do so.⁶ As the district court noted, in an unchallenged finding, the "relationship between the

⁶ The Government cites General Kelly's declaration for the proposition that the prison staff "scheduled" 193 meetings between January 1 and May 31, 2013. JA 181. This is meaningless because (a) he does not identify how many, if any, meetings took place after May 3 when the genital-area search policy took effect, and (b) he does not state how many of these meetings involved military commission defendants for their criminal defense, or how many of the "scheduled" meetings did not take place due to a refusal by the detainee. His claim that 100 calls were "arranged" "between" March and May is meaningless for the same reasons. Indeed, the time between March and May pre-dates the start of the genital-area search policy.

searches and petitioners' choices to refuse phone calls and counsel meetings is clear and predictable." Slip op. 25, JA 166.

The court's order has nothing to do with conditions of confinement and everything to do with access to counsel for purposes of pursuing habeas relief. The district court clearly had jurisdiction to issue its order.

II. THE DISTRICT COURT'S DECISION TO PRESERVE COUNSEL ACCESS FOR GUANTANAMO HABEAS PETITIONERS SHOULD BE AFFIRMED.

A. The Standard of Review

The Government argues that the standard for reviewing the counsel-access restrictions at issue in this case is the deferential standard described in *Turner v. Safley*, 482 U.S. 78 (1978), for review of regulations in domestic prisons. The argument should be rejected.

As the district court explained, under the *Turner* line of cases, domestic prison officials have authority to limit such constitutional rights as free speech and free association in order to maintain order and security, and otherwise to "accomplish valid penological objectives." Slip op. 17-18, JA 158-59. These objectives, of course, include measures directed at accused or convicted criminals that are punitive in nature or which otherwise deprive inmates of liberty rights. *See, e.g., Overton v. Bazzetta*, 539 U.S. 126, 131 (2003) ("freedom of association is among the rights least compatible with incarceration" and "[s]ome curtailment of

that freedom must be expected in the prison context”). The constitutional right to petition for habeas relief, on the other hand, comes into play precisely when a person is incarcerated, and “indeed it is most valuable as a right to one who is incarcerated.” Slip op. 118, JA 159. The habeas right is especially valuable in this case because the detainees have not been and will not be charged or convicted of any crimes, have never had the benefit of a trial, and are being held solely at the direction of the Executive. *Id.* Any attempt by the Executive, as here, to limit the availability of “meaningful” habeas relief “would be antithetical to the purpose of the writ,” slip. op. 19, JA 160, and is forbidden by the Suspension Clause. U.S. Const., art I, § 9, cl. 2 (“The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.”).

The Government’s brief essentially ignores the district court’s analysis as to the inapplicability of *Turner v. Safley*. Instead it offers the ipse dixit that this case merely presents “a question of the judgment of prison administrators . . . about security needs at the facility” in the face of a demand by detainees to “be free from full-frisk searches.” Gov’t Br. 26. This is completely off the mark. Rather, this case presents a question as to whether prison administrators have acted so as to deprive Guantanamo detainees of reasonable access to counsel for purposes of pursuing their habeas rights, rights which in the Guantanamo context may be

completely eviscerated if there were no access to counsel. Petitioners for their part are not challenging *all* full-frisk searches but only those that are inflicted as a precondition for meeting or talking with counsel. The district court found that access was being blocked for many detainees as a result of the Government's policies (slip op. 25, 27, JA 166, 168), and there is no claim that this finding was clearly erroneous. Accordingly, the district court properly enjoined the Government's attempt to limit the habeas right by requiring a "religiously and culturally abhorrent" search of genital areas as a price for meeting or talking with habeas counsel. *See* slip op. 25, JA 166.

B. The Unreasonableness of the Challenged Government Actions

Although holding the *Turner v. Safley* standard to be inapplicable to restrictions on habeas rights, the district court nonetheless evaluated the challenged procedures against that standard and rightly concluded that they could not be sustained even on that basis. Its decision was clearly correct.

Two points must be noted at the outset. First, Judge Lamberth expressly acknowledged the "special expertise" of the Government "in prison administration" and his "own limited expertise in that area." Slip op. 20, 31, JA 161, 172. There is no basis for not taking him at his word that he accounted for this "expertise" in his decision. Of course, he can hardly be faulted for refusing to give the Government "blind deference." Slip op. 31, JA 172. It is the court's role

and responsibility to protect the detainees' habeas rights by protecting their access to counsel. The suggestion that any decisions of a prison official at Guantanamo must be upheld just because the official says that the decision relates to base security evokes the law-free status of Guantanamo's early years, when the detainees had no access to counsel and the Executive refused to recognize the existence of habeas rights.

Second, the Government attempts to portray this as simply a garden-variety prison regulation case. It is not. It is instead a counsel access case. The court's decision addresses the use of genital-area searches only in connection with meetings or telephone calls with counsel, making it clear that its order does not prevent the guards from searching detainees' genital areas or cells "at other times." Slip op. 27, 35, JA 168, 176. The issue in this case is whether the severe burdens on counsel access imposed by the new Guantanamo procedures are outweighed by the marginal security advantages (assuming *arguendo* that there are any such advantages) of those procedures when applied to meetings and calls with counsel. The Government ignores the impact of its policies on counsel access, and makes no attempt to weigh or justify the loss of counsel access resulting from its procedures. This failure should be fatal to its appeal to this Court.

1. Genital-area searches

In the district court, the Government relied entirely on the declaration of Colonel John Bogdan, the prison commander, to justify the new genital-area search policy. JA 108-13. Colonel Bogdan stated that he instituted the new search procedure because the modified procedures that had been put in place at Guantanamo to respect “detainee cultural sensitivities” were “contrary to the standard procedure” used by the Army in other prisons. JA 112. He asserted a concern that the non-standard Guantanamo procedures would be “conducted inconsistently between guard members, creating a risk that the searches will not be effective and weapons or contraband will be overlooked.” *Id.*

This purported explanation was impossible to defend. There was no basis for thinking that the guards had ever conducted the prior searches inconsistently, or that they were incapable of understanding that they should shake the detainees’ pants and otherwise avoid the genital area. Slip op. 21-22, JA 162-63. As the court found, “American soldiers are intelligent and capable and have proven themselves able to implement correctly different protocols in different situations,” and at Guantanamo itself had “proven themselves capable of navigating the differences between” different systems. *Id.* Accordingly, the court had no difficulty in concluding that Colonel Bogdan’s “justification does not hold water.” Slip op. 21, JA 162. The Government’s appellate lawyers apparently now agree.

Although the supposed “inconsistent search” problem was said by Colonel Bogdan to be the reason for his decision to institute genital-area searches, the Government’s brief neither mentions nor defends it.

The Government also suggests that the need for genital-area searches is shown by the death of detainee Adnan Latif, who the Government claims “hoarded” medications and then used these medications to commit suicide. Gov’t Br. 30, 38. Latif’s death, however, provides no logical basis for genital-area searches in connection with counsel access, because Latif obtained medications from the prison’s medical personnel, not from lawyers. As Judge Lamberth found, the attempt to use Latif’s death to justify the genital-area searches in connection with counsel meetings and calls has “the patina of pretext.” Slip op. 22, JA 163. Indeed, the fact that the new search policy was not implemented until more than seven months after Latif’s death “belie[s] the suggestion” that it was a reason for the policy, and “shows” instead that “linking” Latif’s death to the policy “was merely an afterthought.” Slip op. 23, JA 164.

The Government also claims that the genital-area search is justified because guards found contraband in some of the cells when they were searched in April and June 2013. Gov’t Br. 38. There is, however, no evidence that any of the “contraband” got into the prison as a result of meetings or telephone calls with counsel. Slip op. 26, JA 167. If there had been any such evidence, it surely would

have been trumpeted by the Government.⁷ It is, moreover, virtually impossible for detainees to obtain contraband as a result of meetings with counsel, and physically impossible in the case of telephone calls. They are shackled and under guard when they are moved to locations to meet or talk with lawyers, and they are subject to visual monitoring by the guards during the meetings and telephone calls. Slip op. 5, 26-27, JA 146, 167-68. The lawyers have secret security clearances from the Government and thus have already been thoroughly vetted, and are themselves searched prior to and after any meetings with detainees. *See In re Guantanamo Bay Detainee Litigation*, 577 F. Supp. 2d at 157-64.

The nature of the Guantanamo facility also reduces to a virtual nullity any risk that meetings with counsel will result in the introduction of contraband. The facility is completely sealed off from the outside world, and has no history of the types of smuggling problems common in American prisons. The prison population is relatively small at only 164 detainees, no new detainees have been brought there for years, and the relatively few “high value” detainees are separately incarcerated

⁷ The “contraband” itself appears trivial in nature. The Government submits two photographs of what it characterizes as a “large stash” of contraband that was found in June 2013. JA 188-89. The handful of items depicted in the photographs include such things as a cup, a coin, dark glasses (possibly military-issue), and what appears to be a broken popsicle stick. It seems likely that most if not all of the items were not smuggled into the camp by the detainees, but were brought into the facility by Government personnel. The “shanks,” presumably, were not smuggled into the camp, but were simply made from materials already in Camps 5 and 6. The Government does not claim that any of the “contraband” was smuggled into the camps by detainees on their return from trips outside of Camps 5 and 6.

in another facility. The detainees have no visitors other than their lawyers and representatives of the International Red Cross and other international officials. And the order does not protect detainees from searches of their cells and “full frisk” searches of their bodies except in connection with movements to or from meetings or telephone calls with counsel. Slip op. 27, JA 168.

For the eight-to-nine-year period at Guantanamo prior to May 2013, no one searched a detainee’s genital area as a precondition for counsel access. Slip op. 21, JA 162. The Government has not identified a single instance when the prior search practice resulted in contraband getting into the prison, or caused any other problems, much less an instance when the search was incident to a meeting with counsel. Slip op. 26, JA 167. This history of counsel meetings and calls decisively refutes any claim that genital-area searches were needed for counsel meetings and calls, and compels the conclusion that the insistence on genital-area searches is pretextual. As the district court found, the new policy was intended “not to enhance security but to deter counsel access,” which was the “clear and predictable” effect of the new genital-area search procedures, and the purported justifications for changing long-standing policies in ways that interfered with counsel access were unpersuasive, if not pretextual. *See, e.g.*, slip op. 21-22, 26, 28, 33, JA 162-63, 167, 169, 174.

2. Meeting rooms

Petitioners asked the district court to restore the previous practice at Guantanamo of permitting detainees to meet with counsel in the prisons where they are housed, Camps 5 and 6, rather than in a separate facility, Camp Echo. Colonel Bogdan asserted that there were various logistical and administrative reasons justifying his decision to require all meetings to be held in Camp Echo. JA 108-11. The district court found that there was some administrative merit in the assertions, but that an absolute ban with respect to any meetings in Camps 5 and 6 “lacks a valid rational connection to the Government’s legitimate penological interests in security or orderly administration.” Slip op. 31, JA 172. The court concluded that a refusal to accommodate requests by physically weak or medically infirm detainees to meet with counsel in Camps 5 and 6 seemed “like an attempt to deny counsel access through alternative means.” Slip op. 32, JA 173; Order JA 140. Accordingly, the court ordered that detainees who were physically weak as a result of the hunger strike and detainees who had a medical condition that made it difficult to travel to Camp Echo must be allowed to meet with counsel in Camp 5 or Camp 6. Order, JA 140-41.

The Government ignores the limited nature of the court’s ruling, and simply rehashes the arguments it made below that Colonel Bogdan prefers for logistical reasons that all counsel meetings take place in Camp Echo. But the district court’s

order was limited to circumstances where access to counsel might be denied altogether if a sick or weak detainee was required to travel to Camp Echo to meet with counsel. The court had carefully balanced the needs of camp administration with the imperative of assuring counsel access to those who would have physical and medical difficulties in travelling to Camp Echo. Prior to the arrival of Colonel Bogdan, counsel meetings had routinely taken place in Camps 5 and 6, with no evidence of contraband or other security problems. It is obviously not a meaningful burden for the Government to continue to permit such meetings for the relatively few detainees whose physical and medical condition warrant such treatment, and any such burden is far outweighed by the need to maintain counsel access. *See* slip op. 4-5, 31-33, JA 145-46, 172-74.

The Government and Colonel Bogdan do not even attempt to address the counsel-access issues involving weak or medically vulnerable detainees that was the rationale for the court's decision concerning use of the meeting rooms at Camps 5 and 6. This failure refutes the Government's claim that it has a "strong interest" in protecting the detainees' right to access to counsel. *See* Gov't Br. 33-34.

C. The Government's Motivation

The district court found as a fact that "[t]he motivation for the [genital-area] searches is not to enhance security but to deter counsel access." Slip op. 26, JA

167. The Government does not argue that this devastating finding was clearly erroneous. Rather, it argues that it was improper for the district court to consider the motivation behind the challenged policies because *Turner v. Safley* supposedly bars any consideration of motive. Gov't Br. 35. The argument is completely without merit.

First, as explained above, *Turner v. Safley* has no applicability to infringements of a detainee's habeas rights, which is what is at stake here. See Section II.A.

Second, courts have recognized that the motivation behind a particular prison policy is in fact centrally relevant under *Turner v. Safley*. The Second Circuit has expressly held that, under *Turner*, "once a prisoner shows that a prison regulation impinges on a protected right [as detainees surely have done here], prison officials must show that the disputed official conduct was *motivated* by a legitimate penological interest." *Salahuddin v. Goord*, 467 F.3d 263, 276 (2d Cir. 2006) (emphasis added). *Turner* requires "that prison officials actually had, not just could have had, a legitimate reason for burdening protected activity." *Id.* at 277. The Eighth Circuit has likewise held that prison officials "are not entitled to the deference described in *Turner*" when "their actions are not actually *motivated* by legitimate penological interests at the time they act," and the district court in that case found that "the *motivation* for the officials' actions" was not legitimate.

Quinn v. Nix, 983 F.2d 115, 118 (8th Cir. 1993) (emphasis added). The district court was affirmed because “the prison officials . . . were not motivated by the legitimate interests they assert.” *Id.* Similarly, the Third Circuit has relied on improper motivation in invalidating a prison rule under *Turner*. *Abu-Jamal v. Price*, 154 F.3d 128, 134, 137 (3d Cir. 1998) (prison officials enjoined because they were “motivated, at least in part,” by improper concerns). *See also Walker v. Sumner*, 917 F.2d 382, 386 (9th Cir. 1990).⁸

There was substantial evidence that the motive behind the searches was to deny access. Not only were the purported justifications so flimsy as strongly to suggest pretext, but a Guantanamo official admitted to a detainee that the purpose of the genital area searches was to discourage detainees from meeting and talking with counsel. *See* JA 81-82; *see also* JA 28, 71, 76. The motive to deny access is consistent with the original governmental motivation of establishing the Guantanamo prison as a lawyer-free “legal black hole.” *See Adem v. Bush*, 425 F. Supp. 2d 7, 11 (D.D.C. 2006). Judge Lamberth observed that the Government,

⁸ The Government fails to mention these cases. Rather, it relies on a Seventh Circuit decision, *Hammer v. Ashcroft*, 570 F.3d 799 (7th Cir. 2009) (en banc), which involved an attempt by a prisoner to obtain damages as a result of being limited in communicating with the press by a federal prison policy applicable to high security facilities. The court affirmed a rule of the Bureau of Prisons. Its observations about *Turner* appear to be dicta, *see id.* at 803, and in any event are irrelevant here. The *Hammer* court asked “why one bad motive would spoil a rule that is adequately supported by good reasons.” *Id.* Here, however, there are no “good reasons” supporting the rule as well as an improper motive.

“seemingly at every turn, has acted to deny or to restrict Guantanamo detainee’s access to counsel.” Slip op. 24, JA 165. He was in a position to know, because he has been on the front lines of the habeas litigation, both in his role as a judge in individual cases and as the Chief Judge of the district court. His approval of the observation that the Government is a “recidivist when it comes to denying counsel access” (*id.*) was borne out by the historical record “replete with examples of ‘past or imminent official interference with individual [detainees’] presentation of claims to the courts.’” *Id.* at 15, 24-25 (including “multiple instances . . . where the government sought to inhibit counsel access in individual cases”), JA 156, 165-66.

Third, the Government’s case in the district court rested entirely on a declaration by the camp commander, Colonel Bogdan.⁹ This declaration was prepared after petitioners’ motions were filed, and the Government offered no pre-motions documents to support Colonel Bogdan’s assertions as to the purported reasons for the new policies. The credibility of Colonel Bogdan’s judgments, and thus his motivation, was relevant to whether or not the new procedures could be

⁹ When the Government filed its motion to stay the district court’s order pending appeal, it offered a declaration by General John Kelly, Commander of U.S. Southern Command. JA 177-86. General Kelly is not based at Guantanamo, has no evident prison expertise, and the information in his declaration seems largely if not entirely derivative of information given to him by Colonel Bogdan and others at Guantanamo. The fact that the Government submitted his declaration is a strong indication that it realized that Colonel Bogdan was not a believable witness.

justified. For reasons explained in his decision, Judge Lamberth took a dim view of the quality of Colonel Bogdan's judgments, finding among other things, that they do "not hold water," had the "patina of pretext," were "belie[d]" by the facts, and were "purely speculative." Slip op. 21-23, 28, JA 162-64, 169. These findings are not only supported by the record, they are borne out by subsequent events.

After the decision, Colonel Bogdan submitted another declaration, claiming that a few lines of text in paragraphs 19-22 of his original declaration should be kept under seal because disclosure of these snippets "would better prepare enemies to attack the detention facility" and "will enable our enemies, foreign or domestic, to better prepare for an assault or operation against JTF-GTMO."¹⁰ JA 194-95. This is preposterous. For an attacking force to reach the prison it would first have to get to Cuba. Perhaps Colonel Bogdan thinks that al Qaeda has an ocean-going navy, or perhaps he thinks it might book passage on the few commercial flights to the base, or perhaps arrive by spaceship. The prison, moreover, is inside a military base which is guarded by the U.S. Marines to protect against an attack by the Cuban military. And even if the attackers got inside the base, they would still have to overcome the guard force, and then find a way to get themselves and the

¹⁰ These lines of text are identified in Exhibit 2 to the "Errata to Respondents' Opp. to the Motion of Jason Leopold to Intervene and to Unseal Certain Evidence," filed under seal on August 9, 2013, and unsealed by Order dated October 2, 2013 (Doc. 72).

prisoners off the island. Moreover, the snippets that he sought to conceal (*e.g.*, that the prison used Ford Econoline vans) could not possibly have been of any help to an attacking force, and in any event the information that he wanted to keep secret had already been publicly disclosed in the district court's opinion, with citations to his declaration. Slip op. 6-8 (citing ¶¶ 19-22 of Colonel Bogdan's declaration), JA 147-49. Colonel Bogdan's claim that disclosure of a few snippets of his declaration might lead to an assault on the Guantanamo prison is so fanciful as to require any sensible person to discredit his security judgments.¹¹

Finally, putting aside any question of governmental motivation, the "clear and predictable" consequence of the new procedures was that they would make many detainees unwilling to meet with counsel, slip op. 25, JA 166, thus eviscerating their habeas rights. The court did not hold, as the Government claims (at 37), that "the search policy was reasonably related to the goal of security"; to the contrary, it found "that the new search procedures lack a 'valid, rational connection' to the legitimate government interest -- security -- put forward to justify them." Slip op. 20, JA 161. The district court ordered measured, reasonable steps to preserve counsel access for habeas claims. That was surely an

¹¹ Judge Lamberth recently rejected Colonel Bogdan's request that parts of his declaration be kept under seal, and it is now on the public record. Memorandum Opinion, Sept. 17, 2013 (Misc. No. 12-mc-398) (RCL). The Government had 14 days to ask this Court for a stay of the disclosure, but it declined to do so.

appropriate response both to the underlying guarantee of *Boumediene* that the Guantanamo detainees may pursue habeas rights and to *Boumediene*'s directive that counsel access issues be addressed by the district court. Accordingly, wholly apart from the finding as to the Government's motivation, Judge Lamberth's decision should be affirmed given the undeniable impact of the new procedures on counsel access.

* * * * *

The district court has long had responsibility for managing a substantial docket of Guantanamo habeas cases. This responsibility has included the adoption of court-wide protective orders to govern the handling of cases, including how lawyers may communicate with their Guantanamo clients. The current protective order was a "carefully crafted and thorough" one, issued by Judge Hogan on behalf of the court. Slip op, 9-10, JA 150-51; *In re Guantanamo Bay Detainee Litigation*, 577 F. Supp. 2d 143 (D.D.C. 2008). Judge Hogan's order followed closely after the Supreme Court's decision in 2008 in *Boumediene*, in which the Court confirmed that "access-to-counsel" issues "are within the expertise and competence of the District Court to address in the first instance." 553 U.S. at 796. In this case, after a comprehensive review of the issues, the district court concluded that the genital-area search policy is an unjustified burden on the overriding imperative to permit counsel access for Guantanamo detainees, and that the need

for counsel access likewise dictates that physically weak or medically compromised detainees should be permitted, as they had been permitted in the past, to meet with counsel in the prisons where they are held. The district court thereupon amended Judge Hogan's protective order to deal with these issues.

The decision below is a classically correct exercise of the district court's equitable power, as well as its power to ensure that the cases before it are not sabotaged by one of the parties. This Court is removed from both the daily management of these cases and the history of district court supervision of the interaction between counsel, prison staff, and detainees. The district court's order should be affirmed.

CONCLUSION

Petitioners-appellees respectfully request that the decision below be affirmed.

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing Joint Brief for Petitioners-Appellees complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) and D.C. Cir. R. 32(a)(1). It contains 9,713 words, excluding portions of the brief excluded by Fed. R. App. P. 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman 14-point font.

Brian E. Foster

Brian E. Foster

CERTIFICATE OF SERVICE

I certify that true and correct copies of the foregoing brief of the petitioners-appellees were served today, October 11, 2013, upon counsel of record for the appellants via the CM/ECF system.

Brian E. Foster

Brian E. Foster

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

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|----------------------------------|---|---|--------------------------------|
| <hr/> | |) | |
| SAEED MOHAMMED SALEH |) |) | |
| HATIM, <i>et al.</i> , |) |) | |
| |) |) | |
| <i>Petitioners-Appellees,</i> |) |) | |
| |) |) | |
| v. |) |) | No. 13-5218 (consolidated with |
| |) |) | with Nos. 13-5220 and 13-5221) |
| BARACK H. OBAMA, <i>et al.</i> , |) |) | |
| |) |) | |
| <i>Respondents-Appellants.</i> |) |) | |
| <hr/> | |) | |

CORRECTED CERTIFICATE OF SERVICE

I certify that a true and correct copy of the Joint Brief For Petitioners-Appellees in the above-captioned cases was served today, October 11, 2013, upon counsel of record for the appellants via email at Edward.Himmelfarb@usdoj.gov.

See attachment.

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Sent: Friday, October 11, 2013 11:05 PM
To: 'Himmelfarb, Edward (CIV)'
Cc: Livingston, Bill; David Remes; 'David Muraskin'; Brent Rushforth
Subject: Service Copy of Joint Appellees Brief in 13-5218, 13-5220, 13-5221
Attachments: 13-5218 Joint Appellees Brief re Genital Search.pdf

Importance: High

Ed,

Attached for service please find the Joint Brief For Petitioners-Appellees in Case No. 13-5218, consolidated with No. 13-5220 and No. 13-5221.

For the past few hours I have been attempting to file and serve the brief via CM/ECF, but I have encountered an error message every time. I will continue trying to serve and file electronically, and I also intend to deliver the brief to the Court's 24-hour drop box before midnight tonight.

Best regards,
Brian E. Foster

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