UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ABDULHADI OMER MAHMOUD FARAJ, ***Petitioner,*** **v.** **BARACK H. OBAMA, *et al.*,** ***Respondents.***	**Civil Action No. 05-1490 (PLF)**

PETITIONER'S MOTION FOR INJUNCTIVE OR DECLARATORY RELIEF REGARDING RESPONDENTS' WIKILEAKS GUIDANCE

INTRODUCTION

Beginning in 2010, WikiLeaks, a not-for-profit media organization, published hundreds of documents relating to prisoners at the U.S. Naval Station at Guantánamo Bay, Cuba. On December 3, 2010, after the release of some of those materials, the United States government, through the Court Security Officer, issued an email to all security-cleared counsel representing Guantánamo Bay prisoners in their habeas corpus petitions. Email from Christine E. Gunning, Ct. Security Officer, D.C. Dist. Court, to J. Wells Dixon, Senior Staff Att'y, Center for Constitutional Rights (Dec. 3, 2010, 16:57 EST), Ex. A, at 1 ("December Email"). Then, on June 10, 2011, the government issued what it termed a clarification to the December Email in an additional guidance on the use of WikiLeaks information. Clarification and Additional Guidance on Use of WikiLeaks Information, June 10, 2011, Ex. B ("Guidance"). In both the December Email and the Guidance, the government contends that security-cleared counsel should treat the public WikiLeaks material with some of the same precautions required for classified documents provided pursuant to the standard Nondisclosure Agreement, Classified Information

Nondisclosure Agreement, Standard Form 312 (Rev. 1-00), Ex. C; the Protective Order, Protective Order and Procedures for Counsel Access to Detainees at the United States Naval Base in Guantanamo Bay, Cuba, 577 F. Supp. 2d 143 (D.D.C. 2008), Ex. D; and its Memorandum of Understanding, Mem. of Understanding Regarding Access to Classified National Security Information, *id* at 164, Ex. E. December Email, Ex. A, at 1; Guidance, Ex. B, at 1-2. Specifically, the Guidance purports to restrain security-cleared habeas attorneys from downloading, saving, printing, disseminating, maintaining, transporting, or printing materials made publicly available by WikiLeaks. In the government's view, failure to comply with its directives exposes security-cleared counsel to the risk of prosecution or sanctions.

However, compliance with the Guidance and December Email substantially prejudices Petitioner Abdulhadi Faraj in the public eye, jeopardizing his possible repatriation or resettlement. Moreover, the Guidance and Email are an unwarranted bid by the government to expand after the fact the scope of the Nondisclosure Agreement and the Protective Order, along with its Memorandum of Understanding, that Mr. Faraj's counsel signed with the government. In fact, the Guidance is so incoherent that it is impracticable for Mr. Faraj's counsel to comply with its terms. Finally, the Guidance and December Email are impermissible prior-restraints on Mr. Faraj's attorneys' First Amendment right to disseminate information. This Court should enjoin the government from enforcing the Guidance and December Email or, in the alternative, issue a declaratory judgment against their enforcement.[1]

STANDARD FOR RELIEF

Mr. Faraj seeks a judgment from the Court either declaring the Guidance and December Email void or enjoining their enforcement by the government. Under the Uniform Declaratory

[1] Pursuant to Local Civil Rule 7(m), undersigned counsel conferred with opposing counsel regarding the instant Motion. Counsel for Respondents indicated that they intend to oppose this Motion.

Judgment Act, rights and obligations may be adjudicated in cases brought by interested parties involving an actual controversy. The Uniform Declaratory Judgment Act of 1934, 28 U.S.C. § 2201 (2010). To invoke the Declaratory Judgment Act, a plaintiff must demonstrate that "there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *United Gov't Sec. Officers of Am., Local 52 v. Chertoff*, 587 F. Supp. 2d 209, 222 (D.D.C. 2008); *Atlas Air, Inc. v. Air Line Pilots Ass'n, Int'l*, 69 F. Supp. 2d 155, 162 (D.D.C. 1999) (citing *Maryland Cas. Co. v. Pac. Coal and Oil & Co.*, 312 U.S. 270, 273 (1941)), *rev'd on other grounds*, 232 F.3d 218 (D.C. Cir. 2000). The Supreme Court has held that the dispute must be "definite and concrete," so courts do not issue opinions advising what the law would be upon a hypothetical state of facts. *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 127 (2007) (citing *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240 (1937)).

In the alternative, a petitioner seeking a permanent injunction must satisfy a four-factor test before a court may grant such relief. The petitioner must demonstrate that: (1) she has suffered an irreparable injury; (2) remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) considering the balance of hardships between the parties, a remedy in equity is warranted; and (4) the public interest would not be disserved by a permanent injunction. *See eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006); *see also, e.g., Amoco Production Co. v. Gambell*, 480 U.S. 531, 542 (1987); *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 311–13 (1982). The decision to grant or deny permanent injunctive relief is an act of equitable discretion by the district court, reviewable on appeal for abuse of discretion. *See, e.g., Romero-Barcelo*, 456 U.S. at 320.

ARGUMENT

I. THE GUIDANCE SUBSTANTIALLY HARMS PETITIONER'S REPATRIATION OR RESETTLEMENT PROSPECTS

Mr. Faraj seeks declaratory judgment or, in the alternative, an injunction against enforcement of the Guidance and December Email because they prevent him from meaningfully discussing with counsel the prejudicial information about him and his case made public by WikiLeaks. As a result, Mr. Faraj cannot help develop a response that protects his presumption of innocence, his family's reputation and safety, and his prospects for safe repatriation or resettlement after his eventual release from Guantánamo Bay.

The National Defense Authorization Act of 2012 creates a National Security Waiver that would enable Mr. Faraj's repatriation or his resettlement in a third country. A new provision therein authorizes the Secretary of Defense to waive onerous certification requirements in order to repatriate or resettle Guantánamo Bay prisoners. National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, § 1028(d)(1), 125 Stat. 1298, 1566-69 (2012) ("NDAA") (providing that Defense Secretary may waive certification requirements if he determines that transfer is in U.S. government's national security interests and that "alternative actions will be taken" to "substantially mitigate such risks with regard to the individual to be transferred"). WikiLeaks has made available to the world Mr. Faraj's Detainee Assessment Brief ("DAB"). The U.S. military appears to have compiled this document to justify Mr. Faraj's indefinite imprisonment without charge. It is based in significant part on unreliable claims made by individuals under conditions that amount to coercion, if not torture. *See* Andy Worthington, *WikiLeaks and the Guantánamo Prisoners Released from 2002-2004*, Andy Worthington Blog

(Aug. 19, 2011);[2] *see also*, *WikiLeaks Reveals Secret Files on All Guantánamo Prisoners*, WikiLeaks.[3] The Guidance effectively prohibits undersigned counsel from conferring with their client in order to rebut the questionable claims advanced in his DAB.

The rules governing the attorney-client relationship dictate that Mr. Faraj be allowed to consult with his attorneys to contest these publicly-accessible allegations. Under the American Bar Association's Model Rules of Professional Conduct, "a lawyer shall abide by a client's decisions concerning the objectives of representation and . . . shall consult with the client as to the means by which they are to be pursued." Rule 1.2(a). In addition, "a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client." Rule 3.6(c). Only security-cleared attorneys are permitted to visit prisoners at Guantánamo, and they may not bring computers with them to client meetings. Through its Guidance, the government attempts to prohibit security-cleared attorneys from downloading, saving, printing, disseminating, reproducing, maintaining, or transporting any of the relevant information made available by WikiLeaks. Therefore, unless the Guidance and December Email are declared void or the government is enjoined from their enforcement, Mr. Faraj cannot review with his attorneys any of the pertinent documents published by WikiLeaks nor can he meaningfully consult with his attorneys to develop a response to the one-sided and negative narrative that the materials reflect. The relief Mr. Faraj seeks here is necessary to protect his family in Syria, to the extent possible, and to preserve his prospects for resettlement or repatriation without risk of torture should he be finally set free by the Court or the government.

[2] Available at http://www.andyworthington.co.uk/2011/08/19/wikileaks-and-the-guantanamo-prisoners-released-from-2002-to-2004-part-nine-of-ten (last visited Mar. 24, 2012).
[3] Available at http://wikileaks.ch/gitmo/# (last visited Mar. 9, 2012).

Indeed, authorities in Mr. Faraj's home country of Syria, who are known to torture political prisoners, U.S. Dep't of State, *2010 Human Rights Report: Syria*, 1 (Apr. 8, 2010), can easily access this DAB. According to Human Rights Watch, "Syrian security services regularly arrest men suspected of Islamist affiliation or sympathies" and torture them to obtain confessions. Human Rights Watch, *Syria: Wives of Islamist Suspects Detained, Whereabouts Unknown* (Aug. 18, 2008). Additionally, the Syrian government has previously detained family members of alleged "Islamists," *id.*, and the accusations contained in the leaked DAB, especially if left unrebutted, put Mr. Faraj's family at risk of similar treatment. Given the current violent response by the Syrian government to pro-democracy protesters, the unchallenged narrative depicting Mr. Faraj as a "terrorist" only increases the risk of harm to him and his family. *See* Amnesty International, *I Wanted to Die: Syria's Torture Survivors Speak Out* (Mar. 14, 2012).[4] The false allegations in the leaked DAB, especially if left unrebutted, jeopardize Mr. Faraj's safety upon repatriation and that of his family.

Moreover, foreign public sentiment has a direct impact on whether and where a detainee may be resettled. In this regard, the Guidance and December Email frustrate both Mr. Faraj's and the government's common interest in resettlement from Guantánamo. *See* Press Briefing by Press Sec'y Jay Carney, Office of the Press Sec'y, The White House (Jan. 12, 2012) (reiterating that administration's "goal of closing Guantanamo is well established and widely understood").[5] As evidenced by news articles from international media outlets, members of the public are questioning their governments' role resettling alleged terrorists. *See, e.g.*, Paul Wallis, *Australia*

[4] Available at http://www.amnestyusa.org/research/reports/i-wanted-to-die-syria-s-torture-survivors-speak-out (last visited Mar. 24, 2012).

[5] Available at http://www.whitehouse.gov/the-press-office/2012/01/12/press-briefing-press-secretary-jay-carney-112201 (last visited Apr. 13, 2012).

Not Thrilled About Resettling Guantánamo Detainees, Digital Journal (Jan. 2, 2009);[6] *see also* Charlie Savage & Andrew W. Lehren, *Cables Depict U.S. Haggling to Clear Guantánamo*, The New York Times (Nov. 29, 2010);[7] James Rowley, *Europe Seeks Details to Accept Guantánamo Detainees*, Bloomberg (Mar. 17, 2009).[8] Because the DAB from WikiLeaks is among the top-recalled items when using a search engine such as Google to find news of Mr. Faraj, it is especially important for the Court to grant the relief sought herein so counsel and Petitioner can develop a public response to the DAB allegations.

II. THE GUIDANCE UNILATERALLY EXPANDS THE SCOPE OF APPLICABLE INSTRUMENTS AND COUNSEL CANNOT COMPLY WITH ITS TERMS

Referring to the WikiLeaks materials, the December Email instructs counsel that they "are hereby cautioned that this presumptively classified information must be handled in accordance with all relevant security precautions and safeguards, including but not limited to, use and preparation in the Secure Facility and filing under seal with the Court Security Officer." December Email, Ex. A, at 1. The government subsequently released the Guidance, stating, "while you may access such material from your non-U.S.-Government-issued personal and work computers, you are not permitted to download, save, print, disseminate, or otherwise reproduce, maintain, or transport potentially classified information." Guidance, Ex. B, at 1. These two separate sets of instructions purport to expand the scope of the Nondisclosure Agreement, the Protective Order, and its Memorandum of Understanding beyond what was contemplated in those instruments. Moreover, taken separately and jointly, the restrictions in the Guidance and December Email are incoherent. By reversing course on the proposition that WikiLeaks

[6] Available at http://digitaljournal.com/article/264388 (last visited Mar. 24, 2012).
[7] Available at http://www.nytimes.com/2010/11/30/world/americas/30gitmo.html?pagewanted=all (last visited Mar. 24, 2012).
[8] Available at http://www.bloomberg.com/apps/news?pid=newsarchive&sid=a4ANNiZEipjA&refer=germany (last visited Mar. 24, 2012).

materials must be handled in accordance with procedures for classified documents, the Guidance serves less as a "clarification" than an outright repudiation of the December Email. This Court should enjoin enforcement of the December Email and Guidance, or declare them void.

A. The Guidance and December Email Exceed any Authority Granted by the Applicable Instruments

Notwithstanding the government's contentions, the Nondisclosure Agreement and the Protective Order, along with its Memorandum of Understanding, do not confer any authority to restrict attorneys' use of the WikiLeaks materials. Under those instruments, the government provides Mr. Faraj's security-cleared attorneys with access to specific classified information in exchange for the attorneys' compliance with outlined terms of confidentiality. Classified Information Nondisclosure Agreement, Standard Form 312 (Rev. 1-00), Ex. C, at 1; Protective Order and Procedures for Counsel Access to Detainees at the United States Naval Base in Guantanamo Bay, Cuba, 577 F. Supp. 2d 143, 145 (D.D.C. 2008), Ex. D, at 6; Memorandum of Understanding Regarding Access to Classified National Security Information, *id.* at 164, Ex. E, at 2. When the WikiLeaks website released thousands of documents about the prisoners held at the Guantánamo Bay facility, the government did not contend that it had previously made available these materials to security-cleared counsel pursuant to the Nondisclosure Agreement, Protective Order, or Memorandum of Understanding. Rather, the government acknowledged that the materials were released by a third party through a public media outlet. Therefore, the Wikileaks documents fall outside the authority of the aforementioned instruments. Consequently, the Court should enjoin the government from enforcing the Guidance and December Email, or, in the alternative, declare them void, as they are beyond the scope of the applicable instruments cited by the government.

The Nondisclosure Agreement (or Standard Form 312 / SF-312) memorializes a quid pro quo where "access" to some, not all, classified information is obtained "by signing [the] Agreement." Ex. C, at ¶ 7. A security-cleared attorney who signs the instrument stipulates that "[she] understand[s] that *all classified information to which [she has] access or may obtain access by signing this Agreement* is now and will remain the property of, or under the control of the United States Government." *Id.* (emphasis added). This instrument therefore does not apply to all classified or potentially classified information in existence, but rather only to the information that the government provides security-cleared counsel in the course of habeas litigation. *See* Resp. of Appellees Barack H. Obama, *et al.* at 4, *Bensayah v. Obama*, 610 F.3d 718 (D.C. Cir. 2010) (No. 08-CV-5537) (government reaffirming that security-cleared habeas attorneys must have "demonstrated need-to-know" specific classified information before it is disclosed to them (citing 28 C.F.R. § 17.41(a) (2012)). The agreement's language is unambiguous. Classified material is deemed the type "to which [the attorney has] access or may obtain access by signing this Agreement." Nondisclosure Agreement, Ex. C, at ¶ 7. When a security-cleared habeas attorney executes the instruments, she receives access to information the government or the Court deems relevant to the particular habeas case. The obligations created cannot extend to information beyond that specifically contemplated by the instruments—that is to say, only that information the government provided directly to Mr. Faraj's attorneys.

The Protective Order, like the Nondisclosure Agreement, does not support the authority asserted in the government's Guidance. The restrictions set forth in this instrument apply only to classified information that the government provided to a security-cleared habeas attorney in connection with specific cases. "This Protective Order establishes procedures that must be followed by petitioners and their respective counsel ... in connection with [the Guantánamo

habeas litigation], [to] receive access to classified national security information." Protective Order, Ex. D, at ¶ 1. It specifies that no habeas corpus attorney "shall have access to any classified information involved in these cases unless the person has received the necessary security clearance from the Department of Justice Security Officer and signed the Memorandum of Understanding agreeing to comply with the terms of the Protective Order." *Id*. at ¶ 16. Further, counsel "shall have access to the classified information made available to them in the secure area" that the government maintains. *Id*. at ¶¶ 22-23. As in the Nondisclosure Agreement, the Protective Order refers not to all classified information in existence, but rather to the specific classified information the government releases to security-cleared attorneys in connection with habeas litigation.

Importantly, the Protective Order is to be read in conjunction with the Memorandum of Understanding, which states that, "[i]n consideration for the disclosure of classified information and documents," habeas counsel agree never to divulge "such classified information and documents" as were disclosed. Mem. of Understanding, Ex. E, at 1-2. Here, the government does not contend that Mr. Faraj's attorneys obtained access to the material published by WikiLeaks in consideration for signing the Protective Order. Even if the government had advanced that claim, it still would not have triggered the Memorandum of Understanding's consideration clause. Mr. Faraj's attorneys therefore are not prohibited by those instruments from downloading, saving, printing, disseminating or otherwise reproducing, maintaining or transporting publicly-accessible WikiLeaks materials.

The Nondisclosure Agreement, Protective Order and Memorandum of Understanding cannot reasonably be construed to prohibit Mr. Faraj's counsel from divulging or otherwise disseminating the information they access via WikiLeaks and other public media outlets. Of

course, when commenting on classified information that has "enter[ed] the public domain," security-cleared counsel are bound not to make "statements revealing personal knowledge from non-public sources … or disclosing that counsel had personal access to classified … information confirming, contradicting, or otherwise relating to the information already in the public domain." Protective Order, Ex. D, at ¶ 31. In all other regards, when the information in question is publicly-available and neither accessed pursuant to the Nondisclosure Agreement nor the Protective Order, Mr. Faraj's security-cleared attorneys must be treated no differently from the general public with respect to that information. Therefore, the Court should enjoin the government from enforcing the Guidance and December Email or, in the alternative, declare them void.

B. The Restrictions Are Incoherent

The Wikileaks Guidance provides contradictory instructions to Mr. Faraj's security-cleared counsel, making compliance with its terms pointless or impracticable. While purporting to prohibit certain activities such as printing WikiLeaks materials, the Guidance leaves intact counsel's ability under the Protective Order to make public and private statements on information in the public domain. There is no logic—whether allegedly flowing from national security interests or otherwise—that can justify such arbitrary restrictions. And, by referencing the Protective Order, the government indicates that, in its view, penalties for breaching the Guidance are coextensive with those imposed by the Protective Order—to wit, revocation of counsel's security clearance as well as possible civil and criminal sanctions. Protective Order, Ex. D, at ¶¶ 31, 51.

The Guidance states, "in the event that classified information enters the public domain, you may make private or public statements about the information already in the public domain, but only to the extent that the information is in fact in the public domain." Ex. B, at 2-3. This is

consistent with the Protective Order, which prohibits counsel from making statements revealing personal knowledge "from non-public sources regarding the classified or protected status of the information." Ex. D, at ¶ 31. But the Guidance also replaces the blanket restriction on public statements in its predecessor December Email with the following list of specific prohibitions:

> Counsel are permitted to view on any non-U.S.-government-issued computer, including personal and work computers, potentially classified information on the WikiLeaks website, or on other websites that reproduce such material found on the WikiLeaks site. While you may access such material from your non-U.S.-Government-issued personal and work computers, you are not permitted to download, save, print, disseminate, or otherwise reproduce, maintain, or transport potentially classified information.

Ex. B, at 1. In this way, the Guidance creates a list of bizarre access rules. It is unclear what will be accomplished by allowing counsel to "view" but not "download" nor "print," especially when counsel can comment publicly about the materials as long as they comply with the Protective Order. Similarly, while the Guidance purports to prohibit transportation of WikiLeaks materials, it permits counsel to view these materials on their personal computers, leaving open the question whether counsel may access these materials on a personal laptop computer or tablet device, which by their nature are transportable.

The Guidance ignores other practical realities of modern technology. Most computers and internet web browsers are set to automatically cache the webpages that the user visits. *See United States v. Tucker,* 150 F. Supp. 2d 1263, 1265 at n.2 (D. Utah 2001) ("When a website is viewed on the Internet some of its contents are automatically stored to the computer's drive in the cache file so that future visits to that site can load more quickly. The information that is stored in the cache file retains images from the website that was visited."). This means that when the security-cleared attorney views a WikiLeaks document on her personal computer, that page is stored in the computer's memory despite the attorney's lack of intent to download the

document. The Guidance therefore purports to authorize criminal and civil sanctions for an inadvertent omission or failure to act. Unless the habeas attorney is technologically savvy, compliance with this provision would impose a significant burden on the attorney's time. *See Commonwealth v. Simone*, 63 Va. Cir. 216 (2003), rev'd, No. 0551-04-1, 2005 WL 588257, at *4 (Va. Ct. App. Mar. 15, 2005) (reversing conviction because user "did not have sufficient dominion and control over the computer on [the date alleged in the indictment]"); *see also* Giannina Marin, *Possession of Child Pornography: Should You Be Convicted When the Computer Cache Does the Saving for You?*, 60 Fla. L. Rev. 1205, 1235 (2008).

Because whatever security interest the government may have asserted in its December Email was undermined in whole by the permissions granted by the Guidance, and in light of the impracticability of complying with these restrictions, the Court should enjoin the government from enforcing the Guidance and December Email or, in the alternative, declare them void.

III. THE GUIDANCE AND DECEMBER EMAIL IMPOSE AN UNCONSTITUTIONAL PRIOR RESTRAINT ON SECURITY-CLEARED HABEAS COUNSEL'S FIRST AMENDMENT RIGHTS

This Court should enjoin the government from enforcing the Guidance and December Email or, in the alternative, declare them void because they violate the First Amendment rights of Mr. Faraj's security-cleared habeas counsel. The First Amendment prohibits the government from abridging the freedom of speech. The right of freedom of speech and press is intended to prohibit the State from "contract[ing] the spectrum of available knowledge" and, as such, "includes not only the right to utter or to print, but the right to distribute, the right to receive, the right to read and freedom of inquiry, freedom of thought, and freedom to teach." *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965).

When the government suppresses speech in advance of its expression, its action is considered a "prior restraint." *See Alexander v. United States*, 509 U.S. 544, 550 (1993). The Supreme Court has made clear that "[a]ny system of prior restraints on expression [bears] a heavy presumption against its constitutional validity." *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971) (citing *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963)). Indeed, prior restraints are reviewed under strict scrutiny, and the Supreme Court has held that "an order issued in the area of First Amendment rights must be couched in the narrowest terms that will accomplish the pin-pointed objective permitted by constitutional mandate and the essential needs of the public order." *Carroll v. President & Comm'rs of Princess Anne*, 393 U.S. 175, 183 (1968); *see also*, *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 913 (2010) (invalidating Federal Election Commission regulatory scheme that operated akin to prior restraint because it was not narrowly tailored to further compelling government interest); *Alderman v. Philadelphia Hous. Auth.*, 496 F.2d 164, 170 (3d Cir. 1974) (holding that "government must offer compelling proof that [a] prior restraint is essential to a vital government interest").

For example, a court found a prior restraint where the Federal Bureau of Investigations sought to prevent a member of the American Library Association from stating publicly that it had received a National Security Letter requesting information on its members. The court held that "the statutory language in the [national security letter], signed by the FBI, would appear sufficient to 'persuade' or 'intimidate' most recipients into compliance," and therefore was a prior restraint. *Doe v. Gonzales*, 386 F. Supp. 2d 66, 74 (D. Conn. 2005). Here, the Guidance purports to prohibit security cleared habeas counsel from downloading, saving, printing, disseminating, or otherwise reproducing, maintaining, or transporting WikiLeaks materials. Ex.

B, at 1. These activities are speech for purposes of the First Amendment. *See Griswold*, 381 U.S. at 482 (finding that freedom of speech includes "not only the right to utter or to print, but the right to distribute, the right to receive, the right to read"). As explained above, should security-cleared counsel exercise these forms of protected speech, the Guidance and December Email threaten criminal prosecution, civil sanctions, or revocation of their security clearance, which would deprive counsel of access to case-related materials necessary to represent clients. Protective Order, Ex. D, at ¶¶ 31, 51; Nondisclosure Agreement, Ex. C, at ¶¶ 4, 7. Because the Guidance seeks to suppress speech in advance of its expression, it is a prior restraint that is presumptively unconstitutional.

A. The Guidance Is Unconstitutional Because the Information it Seeks to Protect Is Already in the Public Realm and the Restriction Does Not Accomplish its Purpose of Protecting Classified Information

The dissemination of publicly-available information by law-abiding, security-cleared habeas counsel is a protected activity under the First Amendment. The Supreme Court has held that the government cannot restrain the dissemination of information that has been "publicly revealed" or exists "in the public domain." *Oklahoma Publ'g Co. v. Dist. Court*, 430 U.S. 308, 311 (1977). A restriction on dissemination does not accomplish its stated purpose where the restriction operates on a defined class only and the protected information is otherwise publicly-available. *See Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97, 104-05 (1979). "[T]he State may not employ means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." *Carroll*, 393 U.S. at 183-84; *see also Tory v. Cochran*, 544 U.S. 734, 738 (2005) (finding that state action should not sweep any broader than necessary) (citing *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 390 (1973)).

For example, where a statute restricted newspapers but not electronic media or any other form of publication from printing the names of juvenile defendants, the Court found that, "even

assuming the statute served a state interest of the highest order, it does not accomplish its stated purpose." *Smith*, 443 U.S. at 104-05. Additionally, where Federal Election Commission regulations prohibited corporations from using general treasury funds for "electioneering communications," the Court warned against laws that privilege one speaker over another, declaring that "[p]rohibited, too, are restrictions distinguishing among different speakers, allowing speech by some but not others." *Citizens United*, 130 S.Ct. at 898. Because the categorical ban on corporate political speech was asymmetrical to the government's purported interest in preventing corruption, the regulatory scheme failed under strict scrutiny.

Similar to the statutory restriction on newspapers only in *Smith*, the government's Guidance attempts to restrain only security-cleared habeas counsel, as a class, from various forms of expression in relation to information that is already publicly-available. The general public may download, print, save, disseminate, and transport materials available on WikiLeaks, but security-cleared habeas attorneys may not carry out any of these activities. Yet, under the Guidance, cleared counsel may view, access and comment publicly on the generally accessible WikiLeaks materials. It is unclear why downloading, printing, disseminating, and other activities should be prohibited, when public statements and viewing the WikiLeaks materials are purportedly permitted under the Guidance and the construction of the Protective Order that it proposes. The Guidance thus does not achieve any interest the government has proffered in defense of these restrictions. Because it purports to prohibit security-cleared habeas counsel from engaging in a broad swath of arbitrarily-selected activities while leaving unfettered the general public's ability to engage in those same activities, the government's restraint is not narrowly tailored to further any apparent government interest. Therefore, this Court should

enjoin the government from enforcing the Guidance and December Email, or in the alternative, declare both void.

B. Counsel Did Not Waive Their First Amendment Rights When They Signed the Nondisclosure Agreement and Protective Order

Mr. Faraj's security-cleared counsel did not waive their First Amendment rights with respect to the WikiLeaks materials when they signed the Nondisclosure Agreement and Memorandum of Understanding because such a waiver extends only to the materials covered under those agreements and not to information accessible in the public domain. The Supreme Court has consistently drawn a distinction based on the source of the information sought to be covered by secrecy agreements. Where the information was obtained outside the relationship between the government and its employee, rather than as a product of that relationship, the government may not infringe on the employee's First Amendment right of free speech. *Snepp v. United States*, 444 U.S. 507, 513 n.8 (1980) (stating that "if in fact information is unclassified or in the public domain, neither the CIA nor foreign agencies would be concerned"); *McGehee v. Casey*, 718 F.2d 1137, 1141 (D.C. Cir. 1983) (noting that secrecy agreement applies only to classified information obtained by virtue of connection to government and does not extend "to information obtained from public sources" which government may not censor); *see also United States v. Marchetti*, 466 F.2d 1309, 1313 (4th Cir. 1972); *Wright v. FBI*, 613 F. Supp. 2d 13, 23 (D.D.C. 2009). Finally, it is well-settled that the government may not suppress the speech of a "law-abiding possessor of information," let alone one who never worked for the government, as a means of "deter[ring] conduct by a non-law-abiding third party." *Bartnicki v. Vopper*, 532 U.S. 514, 529-30 (2001).

For example, where the government sought to prevent a former CIA agent from publishing a book, allegedly because it contained classified information, the Court found that the

former agent had not surrendered his First Amendment rights when he accepted employment with the CIA and signed a secrecy agreement. *Marchetti*, 466 F.2d at 1313. The Court said it "would decline enforcement of the secrecy oath signed when [the agent] left the employment of the CIA to the extent that it purports to prevent disclosure of unclassified information, for, to that extent, the oath would be in contravention of his First Amendment rights." Accordingly, the agent was permitted to speak and write about the CIA as long as he did "not disclose classified information obtained by him during the course of his employment which is not already in the public domain." *Id*.

The Nondisclosure Agreement, the Protective Order, and its Memorandum of Understanding create an agreement between the government and the security-cleared habeas attorney. This agreement gives the habeas attorney access to classified information relevant to her cases in exchange for a waiver of her First Amendment rights with regard to those particular documents. The quid pro quo is limited to the specific documents provided by the government. The Guidance purports to restrain Mr. Faraj's habeas attorneys' ability to use information gained outside of the agreement with the government. The government here is attempting to leverage the classified information existing in these cases and the security clearances given counsel to restrict a constitutional right in a manner that would be impermissible even if counsel in these cases were government employees, which they are not. Since Mr. Faraj's security-cleared habeas counsel did not illegally disclose or come into possession of this information, but rather merely seek to make use of it in its already-public form, they are no different from the public at large and the government may not restrict their use of WikiLeaks materials.

CONCLUSION

The Court should enjoin the government from enforcing the Guidance and December Email, or in the alternative, declare both void.

Dated: April 18, 2012

Respectfully submitted,

____/s/_____

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ABDULHADI OMER MAHMOUD FARAJ, ***Petitioner,*** **v.** **BARACK H. OBAMA, *et al.*,** ***Respondents.***	**Civil Action No. 05-1490 (PLF)**

[PROPOSED] ORDER

Upon consideration of Petitioner's Motion for Injunctive or Declaratory Relief Regarding Respondents' WikiLeaks Guidance, it is hereby ORDERED that the Motion is GRANTED.

SIGNED this ____ day of _____, 2012.

HON. PAUL L. FRIEDMAN
United States District Judge