

# JUDGE LAMBERTH UPHOLDS GITMO DETAINEES' RIGHT TO COUNSEL

I'm a bit cranky, so reading this scathing opinion from Royce Lamberth rejecting the government's effort to impose a new Memorandum of Understanding concerning Gitmo detainees' right to counsel was just the ticket. The operative ruling reads,

The court, whose duty it is to secure an individual's liberty from unauthorized and illegal Executive confinement, cannot now tell a prisoner that he must beg leave of the Executive's grace before the Court will involve itself. The very notion offense the separation-of-powers principles and our constitutional scheme.

But the part where Lamberth lists the differences between the existing Protective Order and the MOU the government proposed.

For example, the Protective Order assumes that counsel for the detainees have a "need to know," which allows them to view classified information in their own and related Guantanamo cases. Counsel for detainees are also specifically allowed to discuss with each other relevant information, including classified information, "to the extent necessary for the effective representation of their clients. And, the Protective Order assures that counsel have continuing access to certain classified information, including their own work-product.

The MOU, on the other hand, strip counsel of their "need to know"

designations, and explicitly denies counsel access to all classified documents or information which counsel had “previously obtained or created” in pursuit of a detainee’s habeas petition. Counsel can obtain access to their own classified work product only if they can justify their need for such information to the Government. “Need to know” determinations for this and all other classified information would be made by the Department of Defense Office of General Counsel (DoD OGC), in consultation with the pertinent classification authorities within DoD and other agencies. However, there is no assurance that such determinations will be made in a timely manner. As this Court is keenly aware from experience, the inter-agency process of classification review can stretch on for months. It is very likely that this provision would result in lengthy, needly and possibly oppressive delays. It would also require counsel to divulge some analysis and strategy to their adversary merely to obtain their past work-product.

[snip]

While this Court is empowered to enforce the Protective Order, all “disputes regarding the applicability, interpretation, enforcement, compliance with or violations of” the MOU are given to the “final and unreviewable discretion of the Commander, Commander, Joint Task Force-Guantanamo Bay” (JTF-GTMO). The MOU further gives the JTF-GTMO Commander complete “authority and discretion” over counsels’ access to classified information and to detainees, including in-person visits and written communications. Apparently, the MOU also gives the Government to unilaterally modify its terms.

[snip]

Unlike the Protective Order, which repeatedly states that the Government may not unreasonably withhold approval of matters within its discretion, the MOU places no such reasonableness requirement on the Commander of JTF-GTMO. Because the MOU does not come into effect until countersigned by the Commander at JTF-GTMO, the Commander could presumably refuse to sign the MOU, leaving a detainee in the lurch without access to counsel. The MOU also states that both the “operational needs and logistical constraints” at Guantanamo as well as the “requirements for ongoing military commissions, periodic review boards, and habeas litigation” will be prioritized over counsel-access. This provision is particularly troubling as it places a detainees’ access to counsel, and their constitutional right to access the courts, in a subordinate position to whatever the military commander of Guantanamo sees as a logistical constraint. [citations removed]

This is a better summary of all the potential abuses in the new MOU than any I’ve seen in commentary on this issue. Rather than treating the government as an entity that has always acted in good faith in the history of Gitmo litigation (and other counterterrorism cases), Lamberth lays out all the big loopholes that the government would use to infringe on habeas corpus.

It’s worth a read. Cause I’m sure the government will appeal, and who knows what this will look like after someone like Janice Rogers Brown gets ahold of it.