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Abstract

This Note analyzes the Green Protective Order, and the arguments of its proponents and critics. It aims to facilitate broader public awareness of an issue that, while not commanding newspaper headlines, may actually have greater consequence for Guantánamo prisoners and their counsel than those issues that do attract mass media attention. Part I provides a brief background on protective orders in general and their use in cases involving confidential national security, before examining the Green Protective Order in detail. Part II considers, in detail, three different assessments of the Green Protective Order named above, as these positions have been articulated in court submissions and other sources. In doing so, Part II emphasizes the considerable distance between the parties' positions. Finally, Part III of this Note interrogates the Government's purported motive in seeking a more restrictive protective order, and argues that the Green Protective Order already substantially compromises lawyers' ability to effectively represent prisoners at Guantánamo. It also urges counsel for Guantánamo prisoners to continue to make courts and the general public aware of the restrictions placed upon their advocacy, and the consequences these restrictions have for their clients.

THE GUANTÁNAMO PROTECTIVE ORDER

*Brendan M. Driscoll**

INTRODUCTION

For as long as there have been legal challenges to the detention of prisoners[1] at the U.S. naval base at Guantánamo Bay, Cuba, ("Guantánamo"),[2] courts hearing such cases have con-

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1. People imprisoned at Guantánamo are often called "detainees," following the lead of the Government, which has avoided the term "prisoners" to avoid implying that the people at Guantánamo are prisoners of war under the Geneva Conventions. *See* JOSEPH MARGULIES, GUANTÁNAMO AND THE ABUSE OF PRESIDENTIAL POWER 255 n.3 (2006) (explaining author's choice of word "prisoners" throughout that book); *see also* STEPHEN GREY, GHOST PLANE: THE TRUE STORY OF THE CIA TORTURE PROGRAM (2006) (using term "prisoners" to describe people in U.S. custody at Guantánamo and elsewhere). The Government may also use the term "detainees" to avoid implying that prisoners' detention is punitive. *See* Navy Rear Admiral Harry B. Harris Jr., Op-Ed., *Inside Guantanamo Bay*, CHI. TRIB., May 17, 2006, at 27 (characterizing Guantánamo as "detention camp," not "prison camp" because Guantánamo detention is intended to be neither punitive nor rehabilitative). For the sake of simplicity and candor, this Note refers to people imprisoned at Guantánamo as "prisoners." This Note also follows the practice of spelling "Guantánamo" with an accent over the second letter "a," as written in Spanish, except where quoting a document that does not use this accent in spelling the word.

2. The United States' current use of Guantánamo began on January 11, 2002, when the first planeload of prisoners arrived at Guantánamo from Afghanistan. *See* Steve Vogel, *U.S. Takes Hooded, Shackled Detainees to Cuba*, WASH. POST, Jan. 11, 2002, at A10 (reporting arrival of prisoners at Guantánamo); *see also* MARGULIES, *supra* note 1, at 4 (describing arrival of prisoners). The first petition for a writ of habeas corpus on behalf of prisoners at Guantánamo was filed by a group of clergy, lawyers, and law professors nine days after the prisoners arrived, on January 20, 2002; it was subsequently dismissed for want of standing and jurisdiction. *See Coalition of Clergy v. Bush*, 189 F. Supp. 2d 1036 (C.D. Cal. 2002) (dismissing petition), *aff'd* 310 F.3d 1153 (9th Cir. 2002); *see also* Jeff Adler, *U.S. Judge Dismisses Challenge to Detentions*, WASH. POST, Feb. 22, 2002, at A15 (reporting dismissal). Shortly thereafter, the Center for Constitutional Rights filed several other habeas corpus suits in federal court on behalf of prisoners David Hicks, Asif Iqbal, and Shafiq Rasul. *See* John Mintz, *Detention of 3 Men in Cuba Disputed*, WASH. POST, Feb. 20, 2002, at A10 (reporting filing of habeas corpus suits); *see also* MARGULIES, *supra* note 1, at 9-10 (describing circumstances of decision to challenge prisoners' detention). These suits remain pending. Since 2002, several hundred Guantánamo prisoners have sought habeas corpus. *See, e.g.*, John Does 1-570 v. Bush, No. 05 Civ. 313, 2006 WL 3096685 (D.D.C. Feb. 10, 2006) (dismissing suit seeking habeas

fronted a tension between the Government's desire to restrict access to certain information about the prisoners, the base, and other aspects of the Government's "War on Terror," and the prisoners' lawyers' need to access some of the same information to effectively represent their clients.[3] The federal district courts of the District of Columbia[4] have generally dealt with this situation by implementing protective orders to govern the circumstances under which Guantánamo prisoners and their counsel may access and use confidential information possessed by the Government.[5] In the interest of judicial consistency and efficiency, most courts handling Guantánamo prisoners' cases have adopted the same protective order, modeled after the protective order issued on November 8, 2004, by U.S. District Judge Joyce Hens Green.[6]

Entitled "Amended Protective Order and Procedures for Counsel Access to Detainees at the United States Naval Base in Guantanamo Bay, Cuba," Judge Green's protective order (the "Green Protective Order") specifies rules governing the access to and use of confidential or otherwise protected information learned in the course of Guantánamo litigation.[7] Significantly, it

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corpus for 570 unnamed Guantánamo prisoners); *see also* Josh White, *Levin Protests Move to Dismiss Detainee Petitions*, WASH. POST, Jan. 5, 2006, at A02 (noting, in article about legislation crafted to deny prisoners habeas corpus rights, that Center for Constitutional Rights represents "hundreds" of Guantánamo prisoners).

3. *See* In re Guantanamo Detainee Cases, 344 F. Supp. 2d 174, 175 (D.D.C. 2004) (noting "classified national security information" and "other protected information" involved in Guantánamo habeas corpus litigation); *see also* Adem v. Bush, 425 F. Supp. 2d 7, 14-26 (2006) (negotiating between need to protect information and need to facilitate counsel access).

4. Prisoners at Guantánamo have generally filed petitions for habeas corpus in U.S. District Court for the District of Columbia. *See* Rasul v. Bush, 542 U.S. 466, 481 (2004) (confirming District Court's jurisdiction over habeas corpus suit brought by prisoner at Guantánamo); *see also* Rasul v. Rumsfeld, 433 F. Supp. 2d 58, 65 (D.D.C. 2006) (same).

5. *See* In re Guantanamo Detainee Cases, 344 F. Supp. 2d at 175 (implementing original protective order); Adem v. Bush, 425 F. Supp. 2d at 10-12, 19 (discussing history and ubiquity of protective order); Qasim v. Bush, No. 05-cv-01179, at *1 n.1 (D.D.C. Aug. 2, 2006) (implementing protective order and noting its use in "vast majority" of Guantánamo habeas corpus cases); *see also* Geri L. Dreiling, *Changing the Ground Rules: DOJ Proposes New Limits on Lawyer Access to Detainees, Data*, 5 No. 44 A.B.A. J. E-REP. 1 (Nov. 3, 2006) (last visited Feb. 10, 2007), http://www.abanet.org/journal/ereport/n3terror.html (reporting protective order used in more than 200 cases).

6. *See* In re Guantanamo Detainee Cases, 344 F. Supp. 2d 174 at 174-183 (implementing original protective order); *see also* Dreiling, *supra* note 5 (noting ubiquity of protective order).

7. *See* In re Guantanamo Detainee Cases, 344 F. Supp. 2d at 174-75 (describing

also specifies requirements for access to and communication with the prisoners at Guantánamo themselves—restrictions that generally have not appeared in other cases potentially involving national security information.[8] Most counsel representing prisoners at Guantánamo are by now quite familiar with its regulations governing attorney-client communications, use of classified information, and other matters—indeed, they are required to affirm as much before they ever meet their clients or file anything on their behalf.[9]

In spite of the Green Protective Order's ubiquity, it remains somewhat controversial.[10] Some counsel for Guantánamo prisoners consider the Order a necessary aspect of a case involving national security matters, and even embrace the protections it provides them.[11] Other counsel chafe against the restrictions it

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purpose of protective order as establishing procedures to be followed by petitioners, counsel, translators, and other individuals who receive access to certain information or documents in connection with Guantánamo cases); Dreiling, *supra* note 5 (characterizing protective order as "ground rules" governing access to clients and information); Neha S. Gohill & Shams S. Mitha, *Representing Guantánamo Bay Detainees*, 35 A.B.A. FALL BRIEF 68 (2005) (describing purpose of protective order at Guantánamo).

8. *See* In re Guantanamo Detainee Cases, 344 F. Supp. 2d at 191-92 (requiring counsel to sign memorandum of understanding agreeing to abide by protective order).

9. Pursuant to the Green Protective Order, attorneys representing prisoners at Guantánamo must sign a declaration affirming their awareness of and agreement to abide by the terms of the protective order. *See* In re Guantanamo Detainee Cases, 344 F. Supp. 2d at 191-92 (including sample memorandum of understanding and statement of acknowledgement to be signed by counsel); Adem v. Bush, No. 05-cv-723, 2006 WL 1193853, at *2 (D.D.C. Apr. 28, 2006) (noting filing of memorandum of understanding in that case, pursuant to Green Protective Order); *see also* Gohill & Mitha, *supra* note 7 (describing requirement that counsel adhere to rules of Green Protective Order).

10. *See generally* Dreiling, *supra* note 5 (discussing current dispute about Green Protective Order); Adem, 425 F. Supp. 2d at 10-12 (discussing, in decision ruling on proper interpretation of Green Protective Order, various disputed aspects of that order).

11. *See, e.g.*, Pet'r's Opp'n to Resp's Mot. for Entry of a Protective Order and Pet'r's Mot. for Referral to a Special Master, Bismullah & Wali v. Rumsfeld, No. 06-cv-1197, at *14,19 (D.C. Cir. Oct. 18, 2006) [hereinafter Bismullah Opp'n to Proposed Protective Order] (arguing, in opposition to Government's motion to implement protective order more restrictive than Green Protective Order, that protective order implicates substantial issues of national security and the safety of U.S. service personnel, but that after two years, Green Protective Order has proven "generally successful"; Pet'r's Mem. (I) in Opp'n. to Repondents' [sic] Cross Mot. to Enter Proposed Protective Order and Stay Proceedings, and (II) in Further Support of Pets' Emergency Mot. for an Order Setting Procedures Governing Pet. for Immediate Relief and Other Relief under Detainee Treatment Act of 2005, Parhat v. Gates, No. 06-cv-1397, at *8-13 (D.C. Cir. Jan. 3, 2007) [hereinafter Parhat Opp'n to Proposed Protective Order] (arguing for appropriateness of Green Protective Order); *see also* Dreiling, *supra* note 5 (quoting various

imposes.[12] In its continued opposition to prisoner access to the courts and attorney access to Guantánamo,[13] the Government has complained that the Green Protective Order is not restrictive enough to adequately protect national security.[14]

This is by no means a purely academic debate. Recently, in cases brought by two Guantánamo prisoners under the Detainee Treatment Act of 2005 ("DTA"),[15] the Government has asked

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counsel for Guantánamo prisoners about importance of attorney access provisions of Green Protective Order).

12. *See, e.g.*, Pet'r's Mot. to Vacate Order Entered Dec. 16, 2004, Applying Protective Order, Paracha v. Bush, No. 04-cv-2022 (D.D.C. Jan. 18, 2005), *mot. denied*, Paracha v. Bush, No. 04-cv-2022 (D.D.C. Mar. 23, 2005) [hereinafter Paracha Mot. to Vacate] (criticizing Green Protective Order as too restrictive); *see also* Gohil & Mithra, *supra* note 7 (describing logistical challenges to counsel posed by Green Protective Order, including invasive background check, limited number of security clearances allotted per law firm, strict rules governing confidential information, and lack of traditional administrative support due to sensitivity of information involved).

13. *See* MARGULIES, *supra* note 1, at 25-28 (discussing Defense Department resistance to attorneys meeting clients at Guantánamo; explaining Government resistance to attorney and court access as fueled by belief that contact with attorneys would be "disastrous to the sense of dependency and trust that [U.S. Government] interrogators are attempting to create. The prisoner must realize that his welfare is wholly in the hands of his interrogators, and that help is not on the way." (internal quotation marks omitted)); *see also* Carol D. Leonnig, *U.S. Stymies Detainee Access Despite Ruling, Lawyers Say*, WASH. POST, Oct. 14, 2004, at A11 (reporting continued Government efforts to resist attorney visits to base following *Rasul* ruling permitting access).

14. *See* Mot. for Entry of Protective Order, Bismullah v. Rumsfeld, No. 06-cv-1197 (D.D.C. Aug. 25, 2006), at *1 [hereinafter Gov't Mot. for Protective Order] (arguing for more restrictive protective order); *see also* Adem, 425 F. Supp. 2d at 10-12 (discussing Government efforts to limit access even beyond Green Protective Order).

15. *See* Detainee Treatment Act of 2005, Pub. L. No. 109-148, §§ 1001-1006, 119 Stat. 2680, 2739-45 (2005), (hereinafter DTA) (amending 2005 Defense Department appropriations bill passed by the House of Representatives). Designed to prevent the inhumane treatment of prisoners at Guantánamo and elsewhere by requiring that interrogators avail themselves of only those techniques included in the U.S. Army Field Manual on Intelligence Interrogation, *see* DTA § 1002(a), the DTA also contains a clause that purports to divest the federal district courts of jurisdiction over Guantánamo prisoners' habeas corpus claims, granting the U.S. Court of Appeals for the District of Columbia Circuit ("D.C. Circuit") exclusive jurisdiction to determine the validity of any final decision of a Combatant Status Review Tribunal ("CSRT") that an alien is properly detained as an enemy combatant. *See* DTA § 1005(e) (purporting to grant D.C. Circuit exclusive jurisdiction); *see also* Josh White, *Detainees Face Limited Access to Courts*, WASH. POST, Dec. 24, 2005, at A04 (reporting on jurisdiction-limiting aspects of DTA). The constitutionality of the DTA has been questioned, and is currently under consideration by the D.C. Circuit in the consolidated cases of Al Odah v. United States, No. 05-cv-5062 (D.C. Cir.) and Boumediene v. Bush, No. 05-cv-5064 (D.C. Cir.). *See* Hamdan v. Rumsfeld, 548 U.S. __, 126 S. Ct 2749, at 2765 (2006) (acknowledging dispute over constitutionality of DTA; finding no need to address DTA constitutionality in instant case); *see also* Amanda L. Tyler, *Is Suspension a Political Question?*, 59 STAN. L.R. 333, 349-50 (2006) (discussing whether DTA violates Suspension Clause (Art. I, § 9, cl. 2) of U.S. Constitu-

the Court of Appeals for the District of Columbia Circuit (the "D.C. Circuit") to enter a protective order significantly more restrictive than the Green Protective Order, including even stricter rules for counsel access to and communication with prisoners.[16] If the D.C. Circuit enters a more restrictive order, it could replace the Green Protective Order as the new standard protective order entered in Guantánamo cases; and the impact on both prisoners and counsel will be dramatic indeed.[17] This debate may have even broader consequences for any litigation involving information classified on the grounds of national security.[18]

This Note analyzes the Green Protective Order, and the arguments of its proponents and critics. It aims to facilitate broader public awareness of an issue that, while not commanding newspaper headlines, may actually have greater consequence for Guantánamo prisoners and their counsel more than those issues that do attract mass media attention.[19] Part I provides a brief background on protective orders in general and their use in cases involving confidential national security, before examining the Green Protective Order in detail. Part II considers, in detail, three different assessments of the Green Protective Order named above, as these positions have been articulated in court submissions and other sources. In doing so, Part II emphasizes the considerable distance between the parties' positions. Finally, Part III of this Note interrogates the Government's purported motive in seeking a more restrictive protective order, and argues

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tion). To date, two Guantánamo prisoners, Haji Bismullah and Huzaifa Parhat, have brought cases pursuant to the DTA in the D.C. Circuit. *See* Bismullah v. Rumsfeld, No. 06-cv-1197 (D.C. Cir. 2006); Parhat v. Gates, No. 06-cv-1397 (D.C. Cir. 2006). These two cases represent a focal point of the debate over the appropriateness of the Green Protective Order (and are thus a primary focus of this Note). *See supra* note 10 (collecting sources that object, in context of cases brought pursuant to DTA, to Government's Proposed Protective Order, which would be more restrictive than Green Protective Order).

16. *See generally* Gov't Mot. for Protective Order, *supra* note 14; Dreiling, *supra* note 5 (reporting Government's motion).

17. *See* Dreiling, *supra* note 5 (noting possible consequences of stricter protective order, including reduced access to counsel); *cf.* Adem, 425 F. Supp. 2d at 19-21 (2006) (noting importance of protective order in protecting prisoners' rights).

18. *See* Dreiling, *supra* note 5 (discussing potentially broad consequences of protective order litigation); *see also* In re Guantanamo Detainee Cases, 344 F. Supp. 2d at 174-75 (describing importance of protective order in protecting classified information).

19. *See* Dreiling, *supra* note 5 (discussing consequences of litigation for prisoners); *see also* In re Guantanamo Detainee Cases, 344 F. Supp. 2d at 174-75 (describing importance of protective order).

that the Green Protective Order already substantially compromises lawyers' ability to effectively represent prisoners at Guantánamo. It also urges counsel for Guantánamo prisoners to continue to make courts and the general public aware of the restrictions placed upon their advocacy, and the consequences these restrictions have for their clients.

I. *BACKGROUND*

A. *Protective Orders in General*

1. Purpose

A protective order is a court order that prohibits or restricts a party from engaging in conduct, especially a legal procedure such as discovery, that unduly annoys or burdens the opposing party or a third-party witness.[20] Protective orders are used in both civil[21] and criminal[22] contexts to limit discovery for various reasons,[23] to control contact between parties and between par-

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20. *See* BLACK'S LAW DICTIONARY (2nd pocket ed. 2001) 567 (defining "protective order"). The term "protective order" is also occasionally used as a synonym of "restraining order," such as those typically granted in domestic violence cases. *See id.* (noting various uses of term).

21. In civil cases in federal court, protective orders are governed by Federal Rule of Civil Procedure 26(c) ("Rule 26(c)"). FED. R. CIV. P. 26(c). That rule grants federal district courts the broad power to issue, upon motion by a party or by the person from whom discovery is sought, "any order which justice requires to protect a party or a person from annoyance, embarrassment, oppression, or undue burden or expense." *See generally* 8 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE §§ 2036, 2043 (2d ed. 2006) (describing grounds for application of Rule 26(c) in protective order context; collecting case law governing interpretation of Rule 26(c) and application to protective orders).

22. In criminal cases in federal court, protective orders are governed by Federal Rule of Criminal Procedure 16(d)(1) ("Rule 16(d)"), which grants federal district courts broad discretion to deny, restrict, or defer discovery upon a party's showing of need. FED. R. CRIM. P. 16(d). *See generally* WRIGHT, MILLER & COOPER, *supra* note 21, § 258 (describing grounds for application of Rule 16(d) in protective order context; collecting case law governing interpretation of Rule 16(d) and application to protective orders).

23. *See* United States v. Columbia Broadcasting System, 666 F.2d 364, 368-69 (9th Cir. 1982 (characterizing protective orders under Rule 26(c) as safeguard for protection of parties and witnesses in view of broad discovery rights authorized in Rule 26(b)); Simons-Eastern Co. v. United States, 55 F.R.D. 88, 89 (N.D. Ga. 1972) (noting trial courts' broad powers to regulate discovery); Kenneth S. Broun & Daniel J. Capra, *Getting Control of Waiver of Privilege in Federal Courts: A Proposal for a Federal Rule of Evidence 502*, 58 S.C. L. REV. 211, 240 (2006) (observing that federal courts undoubtedly possess power to limit use of information obtained in discovery). *See generally* WRIGHT, MILLER & COOPER, *supra* note 21, § 2036.

ties and witnesses,[24] and to protect confidential information from public disclosure,[25] among other uses.[26] Those to whom a protective order applies must abide by its rules; violators may face sanctions for contempt of court,[27] or even criminal charges.[28]

Federal district courts possess broad discretion to issue pro-

24. Contact between parties and witnesses may be controlled either to ensure the safety of witnesses, or to safeguard the integrity of proceedings by preventing perjury through the intimidation of witnesses. *See* WRIGHT, MILLER & COOPER, *supra* note 21, § 258, n.5 (observing that Advisory Committee Note to 1975 amendments to Rule 16(d)(1) indicate that protective order should be entered when there is reason to believe that a witness would be subject to physical or economic harm if his identity is revealed); United States v. Pelton, 578 F.2d 701, 708 (8th Cir. 1978) (upholding trial court's decision to bar criminal defendant from hearing tape recordings of her own voice, when access to recordings might jeopardize safety of individuals cooperating in case); United States v. Price, 448 F. Supp. 503, 507-18 (D.Co. 1978) (analyzing, across federal circuits, allowable scope of discovery where criminal defendant asks for names of government witnesses; noting both "safety of witnesses" and "perjury or witness intimidation" as possible circumstances for application of protective order); *see also* A.B.A. STANDARDS FOR CRIMINAL JUSTICE, 2d ed. 1980, § 11-2.5(b) (providing that in certain circumstances court may deny disclosure where there is substantial risk to any person of physical harm, intimidation, or bribery, if that risk is not outweighed by usefulness of disclosure to the defense).

25. *See, e.g.*, Coca-Cola Bottling Co. v. Coca-Cola Co. 107 F.R.D. 288 (D. Del 1985) (holding, in dispute between cola company and bottler, that secret formula for Coca-Cola, even though extremely valuable trade secret, was also central to litigation of the parties' dispute; ordering formula's disclosure but issuing protective order limiting extent of disclosure and manner in which plaintiff could use this information); *see also* Reliance Ins. Co. v. Barron's, 428 F. Supp. 200, 203 (S.D.N.Y. 1977) (stating factors to be considered in court's evaluation of whether commercial information justifies protective order); DDS v. Lucas Aerospace Power Transmission Co., 182 F.R.D. 1, 4-5 (N.D.N.Y. 1998) (same). *See generally* FRANCIS H. HARE ET AL., CONFIDENTIALITY ORDERS (1988).

26. *See* FED. R. CIV. P. 26(c) (empowering courts to issue any order that justice requires to protect party or person from annoyance, embarrassment, oppression, or undue burden or expense); *see also* WRIGHT, MILLER & COOPER, *supra* note 21, § 2036 (observing impossibility of setting out in a rule all of the circumstances that may require limitations on discovery or the kinds of limitations that may be needed).

27. *See, e.g.*, McDonald v. Cooper Tire & Rubber Co., No. 8:01-cv-1306-T-27, 2005 WL 2810707 (M.D. Fla. Oct. 27, 2005) (approving magistrate judge's recommendation of monetary sanctions for party's violation of protective order to limit disclosure of confidential business information); Nevil v. Ford Motor Co., No. CV 294-015, 1999 WL 1338625 (S.D. Ga. Dec. 23, 1999) (ordering sanctions for party's violation of protective order governing use of confidential trade secrets).

28. *See* United States v. Sunguard Data Systems, 173 F. Supp. 2d 20, 30 (D.D.C. 2001) (issuing protective order governing access to confidential information; requiring parties to affirm their subjection, without limitation, to civil and criminal penalties for contempt of Court); United States v. Flemmi, 233 F. Supp. 2d 75, 86 (D. Mass. 2000) (citing rule; noting that violations of protective order, perhaps in conjunction with violations of other court rules, could include imprisonment for criminal contempt).

tective orders.[29] This power arises both from the federal rules of procedure and the inherent power of district courts to supervise their proceedings.[30] Given this broad authority, protective orders may be as general or as specific as the judge deems appropriate.[31] They may be, and often are, tailored to meet the exigencies of individual cases,[32] but they may also be lifted as boilerplate from orders issued in similar cases.[33] The broad authority of the district court also encompasses the authority to amend or dissolve protective orders as needed.[34] In making such determinations, judges must weigh the competing interests of parties and witnesses, as well as the general public's interest in public proceedings.[35] Given the broad discretion of the district court

29. *See* FED. R. CIV. P. 26(c) (empowering courts to issue "any order which justice requires to protect a party or a person from annoyance, embarrassment, oppression, or undue burden or expense"); *see also* WRIGHT, MILLER & COOPER, *supra* note 21, § 2036 (characterizing Rule 26(c) as emphasizing court's "complete control" over discovery process and limitations thereupon); Galella v. Onassis, 487 F.2d 986, 997 (2d Cir. 1973) (stating that "grant and nature of protection is within discretion of the district court and may be reversed only on a clear showing of abuse of discretion"); Chem. & Indus. Co. v. Druffel, 301 F.2d 126, 129 (6th Cir. 1962) (same), *see also* Broun & Capra, *supra* note 23 at 240 (stating that protective orders, especially those involving trade secrets, "abound and are universally upheld").

30. *See* FED. R. CIV. P. 26(c) (empowering courts to issue protective orders); *see also* Chem. & Indus. Co. v. Druffel, 301 F.2d 126 at 129 (noting that extent of discovery and use of protective orders is within the discretion of the trial judge).

31. *See* Chem. & Indus. Co. v. Druffel, 301 F.2d 126 at 129 (stating broad scope of court's discretion to craft protective orders); *see also* WRIGHT, MILLER & COOPER, *supra* note 21, § 2036 n.6 and accompanying text (noting that court may be as inventive as necessary to achieve the "benign purposes" of Rule 26(c); providing examples of particularly inventive protective orders).

32. *See* Chem. & Indus. Co. v. Druffel, 301 F.2d 126 at 129 (stating broad scope of court's discretion to craft protective orders); *see also* WRIGHT, MILLER & COOPER, *supra* note 21, § 2036 (providing examples of orders designed to meet requirements of individual cases).

33. *See* Reyes v. Freeberry, No. 02-1283-KAJ, 2005 WL 3560724, *5 (D. Del. 2005) (stating acceptability of boilerplate terms in protective order governing confidential information); *see also* Dreiling, *supra* note 5 (noting common protective order in many Guantánamo habeas corpus cases).

34. *See* Armstrong v. Executive Office of the President, 1 F.3d 1274, 1289 (D.C. Cir. 1993) (stating courts' "inherent power" to enforce compliance with their lawful orders); *see also* In re Agent Orange Product Liability Litigation, 821 F.2d 139, 147 (2d Cir. 1987) (stating that Rule 26(c) protective order is subject to modification); United Nuclear Co. v. Cranford Ins. Co., 905 F.2d 1424, 1427 (10th Cir. 1987) (stating that court retains power to modify its protective order even where underlying suit is dismissed); WRIGHT, MILLER & COOPER, *supra* note 21, § 2044 (collecting case law on modifying protective orders; noting that protective orders are "flexible devices").

35. *See* United States v. Microsoft Corp., 165 F.3d 952, 959-60 (D.C. Cir. 1999) (noting that Rule 26(c) requires individualized balancing of many interests present in a

in these matters, the propriety of protective orders is subject to only limited appellate review.[36]

2. Protective Orders and Confidential Information

Traditionally, protective orders have been used in both civil and criminal cases to govern the use of confidential information by attorneys and others who, in the course of litigation, become privy to confidential information.[37] Frequently, such protective

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particular case); *see also* Ramirez Rodríguez v. Boehringer Ingelheim Pharmaceuticals, 425 F.3d 67 (1st Cir. 2005) (citing *Microsoft*; noting district court's willingness to work with parties to balance physicians' privacy and safety concerns with interest in conducting discovery). *See generally* SEDONA CONFERENCE WORKING GROUP ON PROTECTIVE ORDERS, CONFIDENTIALITY & PUBLIC ACCESS, THE SEDONA GUIDELINES: BEST PRACTICES ADDRESSING PROTECTIVE ORDERS, CONFIDENTIALITY & PUBLIC ACCESS IN CIVIL CASES 5-20 (rev. public comment draft, 2005), *available at* http://www.thesedonaconference.org/content/miscFiles/publications_html (discussing contours of public's right of access to information in public proceedings; recommending that public have qualified right of access to a variety of court documents; advocating prerogative of non-parties, upon proper showing, to intervene to challenge protective order that limits disclosure of otherwise discoverable information).

36. *See supra* note 28 and accompanying text (stating limits of appellate review of district court protective orders).

37. In the civil context, protective orders designed to prevent the unauthorized disclosure of confidential information tend to arise in litigation involving commercial secrets. *See* WRIGHT, MILLER & COOPER, *supra* note 21, § 2043 (collecting civil cases involving confidential information subject to limited disclosure under protective order; noting use of protective orders to protect trade secrets and other confidential research, development, or commercial information); *see also* Coca-Cola Bottling Co. v. Coca-Cola Co. 107 F.R.D. 288 (D. Del 1985) (holding, in dispute between cola company and bottler, that secret formula for Coca-Cola, even though an extremely valuable trade secret, was also central to the litigation of the parties' dispute; ordering formula's disclosure but issuing protective order limiting extent of disclosure and manner in which plaintiff could use this information); Reliance Ins. Co. v. Barron's, 428 F. Supp. 200, 203 (S.D.N.Y. 1977) (stating factors to be considered in court's evaluation of whether commercial information justifies protective order); DDS v. Lucas Aerospace Power Transmission Co., 182 F.R.D. 1, 4-5 (N.D.N.Y. 1998) (same). *See generally* FRANCIS H. HARE ET AL., CONFIDENTIALITY ORDERS (1988). Frequently such protective orders are designed not to completely bar a party from access to certain information which may be crucial to that party's case, but rather to limit who may have access to disclosed confidential information, and what they may do with this information. *See, e.g.*, Covey Oil Co. v. Continental Oil Co., 340 F.2d 993 (10th Cir. 1965) (granting limited but not absolute access to certain trade secrets); *Coca-Cola*, 107 F.R.D. 288 at 300 (limiting access to and disclosure of formula for Coca-Cola). In the criminal context, protective orders may be issued where the prosecution wishes to prevent the defense from learning, or revealing to others, sensitive information relevant to the prosecution's investigation of the case. *See, e.g.*, United States v. Pelton, 578 F.2d 701, 708 (8th Cir. 1978) (upholding trial court decision to grant protective order denying defense to access tape-recording of defendant's voice, where hearing voice might identify government collaborator); United States v. Aiken, 76 F. Supp. 2d 1339, 1343 (S.D. Fla. 1999) (stating that where

orders limit both what information attorneys may disclose to the general public, and how they may use information learned in the course of litigation.[38]

In cases involving confidential information deemed by the court to be vital to national security, federal district courts have often structured protective orders to restrict access to certain information.[39] In addition to the sources of authority named above, federal district courts crafting such orders have also typically relied upon the Classified Information Procedures Act ("CIPA")[40] and the Procedures established pursuant to that Act by the Chief Justice of the Supreme Court.[41]

As protective orders governing confidential national security information vary greatly from case to case,[42] a comprehensive

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the government has reason to believe that the defendant may make improper attempts to influence government witness before trial, it can seek protective order). To the extent that criminal cases may compromise business secrets, a protective order may also be issued by a criminal court to limit access to or use of certain information. *See* United States v. Aluminum Co. of America, 232 F. Supp. 664, 665 (E.D. Pa. 1964) (issuing, in criminal antitrust case, protective order limiting discovery of defendants' competitors' records to protect trade secrets); United States v. Int'l Machines Corp., 67 F.R.D. 40, 44-45 (S.D.N.Y. 1975); (noting that commercial information may be offered some protection in the criminal proceeding).

38. *See* WRIGHT, MILLER & COOPER, *supra* note 21, § 2043 (noting most common type of protective order is order limiting who may access information disclosed and how they may use this information).

39. *See* United States v. McVeigh, 954 F. Supp. 1441, 1451 (D. Colo. 1997) (invoking Rule 16(d) in ordering parties to comply with court-specified guidelines restricting defendant's access to certain evidence, some of which included national security information); United States v. Lindh, 198 F. Supp. 2d 739 (E.D. Va. 2002) (noting that courts should endeavor to ensure that protective orders designed to protect national security are not overly broad); United States v. Moussaoui, No. Crim. 01-455-A, 2002 WL 1311736, at *1 (E.D. Va. June 11, 2002) (issuing protective order governing defendant's access to and use of "Sensitive Security Information" regarding aviation); *see also* A.B.A. Standards for Criminal Justice § 11-2.6(c) (1969) (stating that disclosure of information related to national security shall not be required where it involves substantial risk of grave prejudice to national security and where a failure to disclose will not infringe constitutional rights of the accused).

40. *See* Confidential Information Procedures Act, 18 U.S.C. App. 3, §§ 1-16 [hereinafter CIPA] (governing disclosure of classified information); *see also* Ellen C. Yaroshefsky, *The Slow Erosion of the Adversary System: Article III Courts, FISA, CIPA and Ethical Dilemmas*, 5 CARDOZO PUB. L. POL'Y & ETHICS J. 203, 209-217 (2006) (discussing ethical issues raised by CIPA).

41. *See, e.g.*, United States v. Mejia, 448 F.3d 436, 453-59 (D.C. Cir. 2006) (interpreting CIPA in context of protective order in criminal case); *see also* Aref v. United States, 452 F.3d 202, 204 (2nd Cir. 2006) (noting district court's implementation of protective order pursuant to CIPA).

42. *See* WRIGHT, MILLER & COOPER, *supra* note 21, § 2036 n.6 and accompanying text (providing examples of particularly inventive protective orders); *id.* at § 2043 (not-

analysis of their use in cases involving confidential national security information is beyond the scope of this Note. But two examples, drawn from two recent and particularly high-profile cases, are instructive in demonstrating how protective orders have been crafted to govern the use of and access to confidential national security information.

In the criminal espionage case of *United States v. Hanssen*, a former Federal Bureau of Intelligence ("FBI") counterintelligence agent was accused of selling U.S. intelligence secrets, including signals information, the names of spies, and the location of a secret tunnel, to the Soviet Union.[43] The FBI has described Hanssen's actions, which took place over a fifteen-year period, as among the most damaging instances of espionage in its history.[44]

Prosecuting the case in the U.S. District Court for the Eastern District of Virginia, the Government moved for a protective order to prevent the unauthorized disclosure or dissemination of certain national security information.[45] Invoking CIPA, the Court implemented a protective order governing the circumstances under which the defendant, his lawyers, and their assistants (collectively, "the defense") could access classified information.[46] The order permitted the defense to access classified documents and information "as required by the government's discovery obligations and otherwise as necessary to prepare for

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ing that varieties of protective orders are limited only by the "needs of the situation and the ingenuity of court and counsel").

43. *See* Indictment, U.S. v. Hanssen, No. 01-cr-188A (E.D. Va. May 16, 2001) (dkt. 26) (charging Hanssen with twenty-one counts of espionage and related crimes); *see also* Michael Killian, *FBI Spy Hanssen Gets Life, Apologizes,* CHI. TRIB., May 12, 2002, at 1 (reporting Hanssen's sentencing).

44. *See* U.S. Dept. of Justice, REVIEW OF FBI SECURITY PROGRAMS 1 (2002), *available at* http://www.usdoj.gov/05publications/websterreport.pdf (last visited Feb. 10, 2007) (describing Hanssen's treason as worst in FBI history); *see also* ELAINE SHARON & ANN BLACKMAN, THE SPY NEXT DOOR: THE EXTRAORDINARY SECRET LIFE OF ROBERT PHILIP HANSSEN, THE MOST DAMAGING FBI AGENT IN U.S. HISTORY (2002).

45. *See* Mot. by United States as to Robert Philip Hanssen Mot. for Protective Order and Incorporated Mem. of Law, No. 01-cr-188A (E.D. Va. May 16, 2001) (dkt. 17) (requesting protective order).

46. *See* Protective Order and Incorporated Mem. of Law, No. 01-cr-188A (E.D. Va. May 16, 2001) (dkt. 18) [hereinafter Hanssen Protective Order](granting, on basis of CIPA and other grounds, protective order governing Hanssen case); *see also* Terry Frieden, *Judge Orders Secrets Protected in Spy Case,* CNN.COM, Mar. 6, 2001, *available at* http://archives.cnn.com/2001/LAW/03/06/spy.protective.order/index.html (last visited Feb. 10, 2007) (reporting issuance of protective order).

proceedings."[47] It forbade the defense from disclosing classified documents and information to any unauthorized person.[48] Though the order enjoined the defendant from disclosing any confidential information learned before the case to any unauthorized person, it made clear that defense counsel and their assistants would be authorized to receive such information, provided that they possessed a security clearance and agreed to abide by the security procedures.[49] These security procedures included accessing classified documents only at a secure facility, and filing court documents via a designated Court Security Officer charged with deciding whether filings should be made public or kept under seal.[50]

In *United States v. Lindh*, a U.S. citizen was charged with conspiracy to murder U.S. citizens or nationals as well as a variety of other crimes arising from his involvement with the Taliban in Afghanistan.[51] That case involved a number of protective orders and modifications to those orders.[52] The main protective order governing classified national security information in this case ex-

47. *See* Hanssen Protective Order, *supra* note 46, ¶ 10 (specifying terms of access to classified documents); *see also* Frieden, *supra* note 46 (describing terms of access specified in order).

48. *See* Hanssen Protective Order, *supra* note 46, at ¶¶ 16, 18 (forbidding unauthorized disclosure of confidential information); *see also* Frieden, *supra* note 46 (reporting on order's nondisclosure requirements).

49. *See* Hanssen Protective Order, *supra* note 46, at ¶ 10 (authorizing defense counsel, and additional individuals whose assistance the defense reasonably requires, to access classified information pursuant to terms of protective order); *see also* Frieden, *supra* note 46 (noting defense team granted access to secrets).

50. *See* Hanssen Protective Order, *supra* note 46, at ¶¶ 13-15 (specifying requirements); *see also* Frieden, *supra* note 46 (describing terms of access specified in order).

51. *See* Indictment, United States v. Lindh, No. 02-cr-37A (dkt. 13) (E.D. Va. Feb. 5, 2002) (indicting Lindh); *see also* Editorial, *Justice for John Walker Lindh?*, WASH. POST, July 20, 2002, at A20 (comparing Lindh's twenty-year sentence to sentences issued to white-collar criminals).

52. *See, e.g.*, Order as to John Phillip Walker Lindh, for Reasons Stated from the Bench and without Objection, Granting the [134-1] Mot. for Partial Modification of [111-1] Protective Order Regarding Unclassified Detainee Interview Reports, United States v. Lindh, No. 02-cr-37A (dkt. 136) (E.D. Va. May 6, 2002) (modifying order regarding Guantánamo prisoner interview materials); Protective Order Granting [213-1] Mot. by USA and John Phillip Walker Lindh for Entry of Proposed Protective Order Regarding True Names of Active Military Personnel as to John Phillip Walker Lindh, United States v. Lindh, No. 02-cr-37A (dkt. 221) (E.D. Va. June 12, 2002) (forbidding counsel from disseminating true names of certain military personnel involved in case); Supplemental Protective Order as to John Phillip Walker Lindh, United States v. Lindh, No. 02-cr-37A (dkt. 266) (E.D. Va. June 24, 2002) (designating certain documents as sensitive and thus protected under order).

plicitly forbade the defendant, John Walker Lindh, from any access to classified information without the consent of the Government or the permission of the Court.[53] Similar to the order in *Hanssen*, the order in *Lindh* required defense counsel to possess a security clearance, agree to abide by the security procedures, access classified information only at a secure facility, and submit filings through a Court Security Officer.[54] As in *Hanssen*, the order in *Lindh* restricted the defense from disclosing confidential information to unauthorized persons.[55] Unlike the order in *Hanssen*, however, the protective order in *Lindh* did not explicitly state that defense counsel and their assistants should be given access to classified information as required by discovery obligations or otherwise necessary to prepare for proceedings.[56] Neither the protective order in *Hanssen* nor *Lindh* purported to restrict counsel's access to the defendant himself, or to restrict attorney-client communications not involving confidential information.[57]

B. *Protective Orders in the Guantánamo Context*

1. Guantánamo Prisoners' Access to Counsel

A prison camp built to contain people captured during the U.S. Government's "War on Terror," interrogate them for infor-

53. *See* Protective Order, United States v. Lindh, No. 02-cr-37A (dkt. 31) (E.D. Va. Feb. 27, 2002) at ¶ 14 [hereinafter Lindh Protective Order] (ordering that defendant shall not have any access to classified information except under specified circumstances); *see also* Radack v. Department of Justice, No. 04-cv-01881, 2006 WL 2024978 at *1-2 (D.D.C. July 17, 2006) (noting Lindh court's implementation of protective order).

54. *See* Lindh Protective Order, *supra* note 53, ¶¶ 9-13 (specifying requirements for access to classified information and filing of documents); *see also* Radack, 2006 WL 2024978 at *1-2 (noting restricted access to documents under protective order).

55. *See* Lindh Protective Order, *supra* note 53, ¶¶ 13-14 (ordering that defense counsel shall not disclose classified information to defendant and others without proper authorization); *see also* Radack, 2006 WL 2024978 at *1-2 (adjudicating alleged violation of protective order).

56. *Compare* Hanssen Protective Order, *supra* note 46, ¶ 10 (ordering that defense counsel, approved employees, and others who the defense reasonably requires may access confidential materials with permission of the court), *with* Lindh Protective Order, *supra* note 53, ¶ 13 (making no mention of defense counsel's employees or others who defense reasonably requires to access confidential materials).

57. *Compare* Hanssen Protective Order, *supra* note 46, ¶ 10 (limiting access to materials, but not limiting client access or attorney-client interaction), *with* Lindh Protective Order, *supra* note 53, ¶ 13 (permitting counsel access but making no mention of defense counsel's employees or others; not restricting attorney-client communications involving confidential information).

mation about terrorist activities, and perhaps to charge them with crimes, Guantánamo is a location with a high concentration of secret information, some of which may be relevant to national security.[58] In part because of the secrecy of this information, and in part because the Government's methods of interrogating prisoners to produce such information involve creating, unhindered by the outside world, an environment of "debility, dependence, and dread" among prisoners, the Government has been particularly reluctant to grant lawyers access to Guantánamo.[59]

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58. *See* MARGULIES, *supra* note 1, at 23 (describing centrality of secrecy to Bush Administration's "mosaic theory" approach to intelligence gathering); *see also* John Mintz, *From Veil of Secrecy, Portraits of U.S. Prisoners Emerge*, WASH. POST, Mar. 15, 2002, at A03 (describing Guantánamo prisoners as "rich source of intelligence" relevant to national security). *But see* John Mintz, *Detainees at Base in Cuba Yield Little Valuable Information*, WASH. POST, Oct. 29, 2002, at A15 (reporting frustration of Government officials with quantity and quality of information learned from interrogation of Guantánamo prisoners).

59. *See* MARGULIES, *supra* note 1, at 39 (characterizing the Bush Administration's intentions at Guantánamo as creating world of "debility, dependence, and dread"). According to Margulies,

> [I]nterrogators are allowed—indeed, they are encouraged—to disorient, confuse, shame, embarrass, and exhaust the prisoners, and to keep them in this condition as long as the interrogators believe necessary. They are permitted to traumatize the prisoners, for traumatic experiences open the greatest window of psychological vulnerability. They are expected to maintain total control over the prisoners, who are held *incommunicado* to maximize their sense of "debility, dependence, and dread." In this environment, prisoners will realize, at the most primal level, that their lives depend on nothing less than a complete surrender to their interrogator. They are deprived of virtually all contact with the outside world. At a prison like this, judges will not be allowed to oversee interrogations and attorneys will not be allowed to interfere. At a prison like this, interrogators operate unrestrained by the quaint niceties of the law. To the greatest extent possible, a prison like this is lawless. *Id.*

See also Josh White, *Lawyers Seek Access to 53 at Guantanamo*, WASH. POST, July 2, 2004, at A04 (reporting, following Rasul v. Bush, 542 U.S. 466 (2004), that lawyers were not yet permitted to visit prisoners at Guantánamo). Journalists, of course, have been invited to report from Guantánamo since the first C-130 military transport plane full of prisoners arrived from Afghanistan in early 2002); *see also* Steve Vogel, *U.S. Takes Hooded, Shackled Detainees to Cuba*, *supra* note 2, at A10 (reporting first prisoners' arrival at Guantánamo). Journalists have been consistently forbidden, however, from speaking with or otherwise communicating with any prisoners held there. *See* Vikram Dodd, *American Military Bans BBC Crew from Guantanamo Bay for Talking to Inmates*, GUARDIAN UNLIMITED, June 21, 2003, http://www.guardian.co.uk/cuba/story/0,11983,982122,00.html (last visited Feb 10., 2007) (describing journalists' attempts to speak with prisoners); *see also* Ben Wedeman, *CNN Tours Gitmo Prison Camp*, CNN.COM, July 7, 2005, http://www.cnn.com/2005/US/07/06/gitmo.tour/index.html (last visited Feb. 10, 2007) (reporting that military rules pre-

Nevertheless, since the Supreme Court rulings in *Hamdi v. Rumsfeld*[60] and *Rasul v. Bush*,[61] the Government has grudgingly permitted prisoners at Guantánamo limited access to counsel.[62] In its arguments, however, the Government has consistently opposed the notion that prisoners have any fundamental right of access to counsel;[63] outside of court, a Government representative has even maligned the intentions of counsel representing Guantánamo prisoners.[64] The precise contours of Guantánamo

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vented access to some aspects of camp including most prisoners). Likewise, international human rights observers and members of Congress have been permitted to visit the base, but only under carefully restricted circumstances, and visitors are never permitted contact with prisoners. *See* Josh White, *U.N. Inspectors Are Invited to Guantanamo Bay*, WASH. POST, Oct. 29, 2005, at A16 (reporting international human rights observers hesitant to accept invitation because private access to prisoners would not be permitted); *see also* Mike Allen, *Lawmaker Tours Become Part of Guantanamo Life*, WASH. POST, Aug. 6, 2005, at A01 (describing guided tours of base as "PR push"). Lawyers, of course, come to Guantánamo specifically to meet and speak with their imprisoned clients. *See* Josh White, *Lawyers Seek Access*, *supra* (reporting lawyers' demands for unrestricted access to clients).

60. 542 U.S. 507 (2004) (reversing dismissal of habeas corpus petition brought on behalf of U.S. citizen detained indefinitely at Guantánamo and in South Carolina; holding that U.S. citizens have right to challenge their detention even if held as "enemy combatant"); *see also* Jenny S. Martinez, *Hamdi v. Rumsfeld. 124 S.Ct. 2633. United States Supreme Court, June 28, 2004*, 98 AM. J. INT'L L. 782 (2004) (discussing decision).

61. 542 U.S. 466 (2004) (holding that U.S. court system has jurisdiction to hear habeas corpus petitions brought by Guantánamo prisoners); *see also* David L. Schloss, *Rasul v. Bush. 124 S.Ct. 2686. United States Supreme Court, June 28, 2004*, 98 AM. J. INT'L L. 788 (2004) (discussing decision).

62. Adem v. Bush, 425 F. Supp. 2d 7, 11-12 (D.D.C. 2004) (discussing counsel access post-*Rasul*); In re Guantanamo Detainee Cases, 344 F. Supp. 2d 174, 175-192 (D.D.C. 2004) (implementing protective order governing prisoner access to counsel).

63. *See, e.g.*, *Adem*, 425 F. Supp. 2d at 12 (noting that Government took position that detainees' access to counsel existed "purely at the pleasure of the Government, with restrictions imposed as it saw fit"); *see also* Gov't Mot. for Protective Order, *supra* note 14 at 13 (arguing that DTA does not compel unlimited access by counsel to clients at Guantánamo military base). Prisoners designated to be tried by military commissions, such as those found unconstitutional in *Hamdan*, have, however, been assigned military defense counsel. *See Hamdan v. Rumsfeld*, 548 U.S. ___, 126 S. Ct. 2749, 2786 (2006) (noting defendant's right to counsel in military commission procedure); Military Commission Order No. 1, Department of Defense, Mar. 21, 2002, at §§ 4(C)(2)-(3), *available at* http://www.defenselink.mil/news/Mar2002/d20020321ord.pdf (last visited Feb. 10, 2007) (providing that prisoners charged by military commission are entitled to appointed military counsel and may hire civilian counsel at their own expense, provided civilian counsel is security-cleared and holds U.S. citizenship). *See also* John Mintz, *Military Lawyers Question Tribunal Rules*, WASH. POST, Jan. 13, 2004, at A07 (reporting on Supreme Court brief in which military counsel representing Guantánamo criticize fairness of military commissions).

64. *See* John Heilprin, *Views on Detainee Representation Draw Fire*, WASH. POST, Jan.

prisoners' right to legal counsel remain, as a matter of law, somewhat ambiguous.[65]

The vast majority of suits filed by prisoners, or on their behalf, are petitions for habeas corpus seeking a legal and factual explanation for the prisoner's detention, or, alternatively, to free the prisoner.[66] At least two prisoners have filed suits alleging that their detention and conditions of confinement violate the DTA, which prohibits inhumane treatment of prisoners at Guantánamo.[67] The DTA also purports to deny Guantánamo prisoners the right to habeas corpus relief in the federal courts, and for

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14, 2007, at A05 (reporting Defense Department disavowal of comments of Deputy Assistant Secretary of Defense Cully Stimson, who urged companies to boycott law firms representing Guantánamo prisoners); Editorial, *Unveiled Threats*, WASH. POST, Jan. 12, 2007, at A18 (labeling Stimson's remarks "a crude gambit on detainees' legal rights"); *see also* Statement of Law Deans, Yale Law School, Jan. 15, 2007, *available at* http://www.law.yale.edu/documents/pdf/News_&_Events/Law_Deans_Statement9.pdf (last visited Feb. 10, 2007) (urging, in statement signed by 130 law school deans, that Bush Administration repudiate Stimson's remarks). Counsel representing Guantánamo prisoners invariably do so for free. Since 2004, the Center for Constitutional Rights ("CCR") has arranged for pro bono counsel for several hundred lawsuits on behalf of prisoners. These pro bono counsel include attorneys from law firms large and small, public defender groups, independent practitioners, and law school clinics. *See generally* CCR Guantánamo Global Justice Initiative Litigation Page, http://www.ccr-ny.org/v2/gac/cases.asp (last visited Feb. 10, 2007) (providing information about various cases brought on behalf of Guantánamo prisoners by Center for Constitutional Rights).

65. In her plurality opinion in Hamdi v. Rumsfeld, Justice O'Connor wrote that Hamdi, an American citizen detained as an "enemy combatant," was entitled, on due process grounds, to a meaningful opportunity to challenge his detention; Justice O'Connor also indicated that non-citizen prisoners alleged to be "enemy combatants" have a right to habeas corpus. *See Hamdi v. Rumsfeld*, 542 U.S. 507, 535 (2004) (stating that while "full protections that accompany challenges to detentions in other settings may prove unworkable and inappropriate in the enemy-combatant setting. . . a citizen's core rights to challenge meaningfully the Government's case and to be heard by an impartial adjudicator" remain unassailable; stating that "Hamdi unquestionably has the right to access to counsel in connection with the proceedings on remand"). Her opinion refrained from ruling, however, on the question of whether alleged "enemy combatants" have an absolute right to counsel access, because Hamdi was eventually permitted access to counsel. *See Hamdi*, 542 U.S. at 539 (noting that Hamdi had been appointed counsel). The Supreme Court has not ruled on the exact contours of counsel access for prisoners at Guantánamo. *See generally* Jonathan Hafetz, *Habeas Corpus, Judicial Review, and Limits on Secrecy in Detentions at Guantánamo*, 5 CARDOZO PUB. L. POL'Y & ETHICS J. 127, 146-59 (2006) (discussing habeas corpus rights as defining limits of counsel access for prisoners, but noting ambiguity as well).

66. *See, e.g.*, John Does 1-570 v. Bush, No. 05 Civ. 313, 2006 WL 3096685 (D.D.C. Feb. 10, 2006) (dismissing suit seeking habeas corpus for 570 unnamed Guantánamo prisoners); *see also* MARGULIES, *supra* note 1, at 46-47 (describing Guantánamo prisoners' pursuit of justification for their detention via habeas corpus suits).

67. *See* Bismullah & Wali v. Rumsfeld, No. 06-cv-1197, (D.C. Cir.) (filing suit under DTA); Parhat v. Gates, No. 06-cv-1397 (D.C. Cir.) (filing suit under DTA); *see also* Dreil-

this reason its constitutionality has been challenged.[68] In part because of the traditional strength of the Great Writ of Habeas Corpus, habeas corpus suits have been the legal vehicle of choice in challenging the confinement of Guantánamo prisoners.[69]

There are significant legal differences between a habeas corpus suit and a DTA action. While the basis of a habeas corpus suit is the common-law writ of habeas corpus and the Constitution itself, as well as the federal habeas corpus statute, the basis of a DTA action is purely statutory.[70] A case brought under the DTA is to be heard directly by the D.C. Circuit, not a federal district court.[71] Significantly, the scope of the D.C. Circuit's review over the case may be narrower than the scope of a district court's jurisdiction over a habeas petition.[72] The difference between a petition for habeas corpus and a suit brought pursuant to the DTA is a key issue underlying the arguments over the appropriateness of the Green Protective Order that are examined in Part II of this Note.

In the course of their representation, counsel representing prisoners in any suit against the Government—whether suing for habeas corpus or under the DTA—normally request access to certain information, held by the Government, that the Government may consider classified or otherwise protected.[73] First and

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ing, *supra* note 5 (noting suits brought pursuant to DTA); *supra* note 15 and accompanying text (describing purposes of DTA).

68. *See* Dreiling, *supra* note 5 (noting suits brought pursuant to DTA); *see also supra* note 15 and accompanying text (describing purposes of DTA).

69. *See* Dreiling, *supra* note 5 (noting only two suits brought pursuant to DTA in comparison to many habeas corpus suits); *see also* Hafetz, *supra* note 65, at 149-60 (comparing DTA and habeas remedies). Where counsel for Guantánamo prisoners have filed DTA actions, they have done so either because the habeas remedy is unavailable, or for strategic reasons idiosyncratic to the facts of their cases. *See id.* (quoting habeas attorney as stating that if habeas remedy is cut off, cases will have to be refiled under DTA).

70. *See* Hafetz, *supra* note 65, at 150-63 (describing habeas regime in contrast to DTA regime); *see also* David L. Shapiro, *Habeas Corpus, Suspension, and Detention: Another View*, 82 NOTRE DAME L. REV. 59, 59 n.2 (2006) (discussing common law basis of Great Writ of habeas corpus).

71. *See* DTA § 1005(e) (purporting to grant D.C. Circuit exclusive jurisdiction); *see also* White, *supra* note 15 at A04 (reporting on jurisdiction-limiting aspects of DTA).

72. *See* DTA § 1005(e)(3)(D) (limiting scope of review to whether CSRT tribunal decision was consistent with its standards and procedures, as well as consistency with Constitution and other laws of United States); *see also* Hafetz, *supra* note 65, at 149-50 (discussing limited scope of DTA review in context of broader efforts to limit all review of prisoners' detention).

73. *See, e.g.*, Mot. for Factual Returns, el-Mashad v. Bush, 05-cv-270 (D.D.C. Oct. 14,

foremost, counsel normally seek access to clients themselves, through visits to Guantánamo, and access to clients through the mail and, however unlikely, by telephone.[74] Attorneys in Guantánamo litigation typically seek to meet with their clients for the same reasons that attorneys meet with their clients in any other context: to gather factual information from their clients about their cases, to explain what a client's options may be, and to make strategic choices together.[75] Yet, to the extent that the Government considers that access to prisoners at Guantánamo itself constitutes access to confidential and/or protected information, the routine act of attorney-client visitation is a contested matter.[76]

Beyond access to their clients and the information that they may provide, counsel generally seek access to any records that the Government may have pertaining to their client's captivity: factual documentation alleged by the Government to justify the prisoner's status as an "enemy combatant," medical records, interrogation logs, information about other prisoners or government officials, and a variety of other information.[77] The Government has opposed most of these requests.[78]

2005) (requesting government provide CSRT documents as well as other information relevant to petitioner's captivity); Pet'r's Mot. to Allow and to Accelerate Disc., Paracha v. Bush, No. 04-cv-2022 (D.D.C. Mar. 23, 2005) (requesting discovery of government information related to petitioner's detention).

74. *See, e.g.*, John Does 1-570 v. Bush, No. 05 Civ. 313, 2006 WL 3096685 (D.D.C. Feb. 10, 2006) (dismissing suit seeking, in addition to habeas relief, permission to meet with clients, learn circumstances of their detention, and "ascertain their wishes" with regard to filing habeas corpus petitions); *see also* MARGULIES, *supra* note 1, at 25 (stating that lawyers for Hamdi and Padilla "did what any lawyer would do, and what lawyers had always been allowed to do in this country: they tried to meet with their clients" but were refused access).

75. *See* White, *supra* note 15 at A04 (reporting lawyers' demands for access to clients); *see also* MARGULIES, *supra* note 1, at 25-28 (discussing lawyers' motivations in meeting clients).

76. *See, e.g.*, Resp'ts' Opp'n to Petitioner's Mot. for Release of Papers and to Compel Disc., Paracha v. Bush, No. 04-cv-2022 (D.D.C. Feb. 28, 2005) (requesting release of documents and discovery); *see also* MARGULIES, *supra* note 1, at 25-28 (discussing Defense Department resistance to attorneys meeting clients at Guantánamo and reluctance to provide information about clients); Hafetz, *supra* note 65, at 146-47 (describing Government attempts to limit counsel access).

77. *See, e.g.*, Mot. for Factual Returns, el-Mashad v. Bush, 05-cv-270 (JR) (D.D.C. Oct. 14, 2005) (requesting documents and information relevant to petitioner's captivity); Petitioner's Mot. to Allow and to Accelerate Disc., Paracha v. Bush, No. 04-cv-2022 (D.D.C. Mar. 23, 2005) (requesting discovery of government information related to petitioner's detention).

78. *See, e.g.*, Resp'ts' Opp'n to Pet's Mot. for Release of Papers and to Compel

2. The Green Protective Order

Prior to *Rasul v. Bush*, the Government asserted that it could lawfully hold Guantánamo prisoners incommunicado and without access to counsel.[79] Following the Supreme Court's decision in *Rasul*, the D.C. Circuit remanded that case back to the district court for further proceedings in accordance with the Supreme Court's ruling.[80] At that point, the Government drafted a set of proposed procedures governing counsel access to Guantánamo prisoners and classified information.[81] The proposed rules, which would have permitted counsel to meet with prisoners only under Government surveillance, were opposed by prisoners' counsel.[82] After multiple hearings and extensive negotiation in two district courts over several months, a version of the Government's Proposed Protective Order was ruled upon by U.S. District Judge Colleen Kollar-Kotelly in *Al-Odah v. Bush*, and subsequently implemented as a protective order issued by U.S. District Judge Joyce Hens Green on November 8, 2004.[83] This version of the protective order would eventually be implemented in the majority of Guantánamo prisoner cases.[84]

Disc., Paracha v. Bush, No. 04-cv-2022 (D.D.C. Feb. 28, 2005) (opposing request for documents and information); *see also* MARGULIES, *supra* note 1, at 25-28 (discussing Defense Department resistance to attorney-client meetings at Guantánamo and reluctance to provide information about clients).

79. *See* Rasul v. Bush, 542 U.S. 466, 471-72 (2004) (describing procedural history of case); *see also* Adem v. Bush, 425 F. Supp. 2d 7, 10-11 (D.D.C. 2006) (narrating history of Guantánamo prisoners' access to counsel).

80. *See* Al Odah v. United States, 103 Fed. Appx. 676, at *1 (D.C. Cir. 2004) (remanding consolidated cases to district court for further proceedings in accordance with *Rasul* decision); *Adem*, 425 F. Supp. 2d at 11 (narrating post-*Rasul* proceedings culminating in Green Protective Order).

81. *See* Rasul v. Bush, No. 02-299 (D.D.C. July 26, 2004) (dkt. No. 51) (instructing parties to file joint status report and briefing schedule regarding proposed procedures for prisoners' access to counsel); *see also* Al Odah v. United States, No. 02-828 (D.D.C. July 23, 2004) (dkt. 38) (setting briefing schedule on issue of proposed procedures for prisoners' access to counsel); *Adem*, 425 F. Supp. 2d at 11 (narrating post-*Rasul* proceedings culminating in Green Protective Order).

82. *See* Al Odah v. United States, 346 F. Supp. 2d 1, 3-4 (D.D.C. 2004) (noting opposition to Government's proposed procedures for counsel access); *see also Adem*, 425 F. Supp. 2d at 11-12 (noting opposition to Government's proposed procedures).

83. *See Al Odah*, 346 F. Supp. 2d at 5-14 (ruling on merits of protective order submitted by Government); *see also* In re Guantanamo Detainee Cases, 344 F. Supp. 2d 174, 175 (D.D.C. 2004) (implementing protective order); *Adem*, 425 F. Supp. 2d at 11 (narrating chronology of proceedings culminating in implementation of Green Protective Order).

84. *See Adem*, 425 F. Supp. 2d at 19 (observing that Green Protective order has been entered in "vast majority" of Guantanamo habeas cases); Qasim v. Bush, No. 05-cv-

Entitled "Amended Protective Order and Procedures for Counsel Access to Detainees at the United States Naval Base in Guantánamo Bay, Cuba," Judge Green's order implemented a set of procedures, the "Revised Procedures for Counsel Access to Prisoners at the U.S. Naval Base in Guantánamo Bay, Cuba," (the "Revised Procedures") created by the Department of Defense and submitted with the Government's motion for a protective order.[85] These procedures govern the extent to which counsel for Guantánamo prisoners could access and disclose certain information that the Government deems related to national security, or otherwise protected.[86] Among these procedures are rules governing access to clients themselves,[87] the logistics of counsel visits, and correspondence between counsel and prisoner.[88]

1179, at *1 n.1 (D.D.C. Aug. 2, 2006) (implementing protective order and noting its use in majority of Guantánamo habeas corpus cases); *see also* Dreiling, *supra* note 5 (reporting protective order used in more than 200 cases).

85. *See* In re Guantanamo Detainee Cases, 344 F. Supp. 2d at 183-92 (implementing "Revised Procedures for Counsel Access to Prisoners at the U.S. Naval Base in Guantánamo Bay, Cuba"); *see also Adem*, 435 F. Supp. 2d at 19 (noting implementation of procedures). This set of procedures slightly modified an earlier set of procedures, the "Procedures for Counsel Access to Prisoners at the U.S. Naval Base in Guantánamo Bay, Cuba" (the "Procedures"), that had been submitted to the court in a different prisoner case. *See* In re Guantanamo Detainee Cases, 344 F. Supp. 2d at 176 (implementing procedures); *see also Al Odah*, 346 F. Supp. 2d at 4 (noting, in ruling prior to Green Protective Order, existence of several proposed procedures for counsel access).

86. *See* In re Guantanamo Detainee Cases, 344 F. Supp. 2d at 175 (stating purpose as "to prevent the unauthorized disclosure or dissemination of classified national security information and other protected information that may be reviewed by, made available to, or are otherwise in the possession of, the petitioners and/or petitioners' counsel in these coordinated cases"); *Adem*, 425 F. Supp. 2d at 19 (noting purpose of order as to govern the procedures by which counsel for Guantanamo detainees may meet and communicate with their clients). The order amended slightly a substantively identical protective order issued by Judge Green three days previous, which had governed the Guantánamo cases that had been consolidated before Judge Green. The Green Protective Order was subsequently modified slightly, to clarify filing procedures. *See* Al Odah v. United States, 02-cv-828 (D.D.C. Nov. 10, 2004) (dkt. 144) (amending original order); Al Odah v. United States, 02-cv-828 (D.D.C. Dec. 13, 2004) (dkt. 167) (amending original order); Adem v. Bush, No. 05-cv-723, 2006 WL 1193853, at *1 (D.D.C. Apr. 28, 2006) (mentioning amendments made to Green Protective Order on November 10, 2004 and December 13, 2004).

87. *See* In re Guantanamo Detainee Cases, 344 F. Supp. 2d at 184-86 (describing requirements for access to and communication with clients); *see also* Hafetz, *supra* note 65, at 147-48 (mentioning rules for counsel access and communications).

88. *See* In re Guantanamo Detainee Cases, 344 F. Supp. 2d at 185-91 (establishing rules for logistics of counsel visits and attorney-client correspondence); *see also* Hafetz, *supra* note 65, at 148-50 (noting restrictions for counsel visits and correspondence put in place by Green Protective Order).

In some ways, the Green Protective Order appears similar to the protective orders issued in the *Hanssen* and *Lindh* cases. It requires counsel for Guantánamo prisoners to possess a security clearance, to affirm their understanding of the security procedures, and to access classified information only at a secure facility.[89] Likewise, the Green Protective Order requires counsel to submit filings through a Court Security Officer charged with determining whether filings are to be made public, or are to be filed with the Court under seal.[90] There are, however, several aspects of the Green Protective Order that are different from the earlier orders. The most significant of these are as follows.

The Green Protective Order provides rules requiring counsel to verify that they represent their client at Guantánamo.[91] The Order states that this verification should include evidence that counsel has the "authority" to represent the prisoner at Guantánamo.[92] It specifies that this evidence should be provided within ten days after the second visit to the prisoner at Guantánamo.[93] As part of this verification, the Order also requires that counsel affirm that they are not funded directly or indirectly by persons connected with terrorism.[94]

Unlike the orders in *Hanssen* and *Lindh*, the Green Protective Order further specifies procedures for the logistics of coun-

89. *Compare* In re Guantanamo Detainee Cases, 344 F. Supp. 2d at 178-79, 191-92 (stating rules for security clearance, memorandum of understanding, and use of secure facility to access information), *with supra* notes 50, 56 and accompanying text (stating rules in Hanssen and Lindh protective orders).

90. *Compare* In re Guantanamo Detainee Cases, 344 F. Supp. 2d at 178-79, 191-92 (stating procedures for filing and declassification), *with supra* notes 50, 56 and accompanying text (stating rules in Hanssen and Lindh protective orders).

91. *See* In re Guantanamo Detainee Cases, 344 F. Supp. 2d at 185 (requiring counsel to verify their representation of prisoners as specified); *see also* H. Candace Gorman, *Inside America's Gulag: A Guantántanamo Lawyer Reports from a Parallel Legal Universe*, IN THESE TIMES, Feb. 13, 2007, *available at* http://www.inthesetimes.com/article/3023/inside_americas_gulag/ (commenting on "daunting series of bureaucratic hurdles" imposed by Green Protective Order).

92. *See* In re Guantanamo Detainee Cases, 344 F. Supp. 2d at 185 (requiring counsel to present "evidence of his or her authority" to represent client at Guantánamo); *see also* Gorman, *supra* note 91 (describing clearance process required before client visitation).

93. *See* In re Guantanamo Detainee Cases, 344 F. Supp. 2d at 185 (specifying time limit for presenting verification of representation); *see also* Gorman, *supra* note 91 (describing clearance process).

94. *See* In re Guantanamo Detainee Cases, 344 F. Supp. 2d at 185 (requiring signed representation that counsel is not recipient of terrorist-related funds).

sel visits.[95] Counsel wishing to meet with their client must submit a request to the Government to do so, indicating the dates of availability and the duration of the meeting; the Government is to take reasonable efforts to accommodate such requests.[96] Other logistical details, such as arrangements for travel to the base and lodging while visiting, are to be coordinated with the Government.[97] In addition to the required security clearance, counsel must have a country and theater clearance, and confirmed flight information for travel to the base, all provided no later than twenty days prior to the anticipated visit.[98]

The Green Protective Order also specifies procedures for correspondence between counsel and prisoner.[99] It establishes a "privilege team" of Defense Department attorneys to review correspondence being sent from counsel to a prisoner at Guantánamo.[100] Correspondence designated "legal mail," defined as legal documents and other letters related to the counsel's representation of that prisoner, is inspected by the privilege team "for prohibited physical contraband" before being sent to the prisoner.[101] The Green Protective Order provides that materials not falling within the definition of legal mail, including letters from family and friends of the prisoner, may be sent to Guantánamo

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95. *See* In re Guantanamo Detainee Cases, 344 F. Supp. 2d at 185-86 (providing requirements for logistics of counsel visits); *see also* Gorman, *supra* note 91 (describing intricacies of client visitation).

96. *See* In re Guantanamo Detainee Cases, 344 F. Supp. 2d at 185 (specifying procedure for arranging visit to base to meet with client); *see also* Gorman, *supra* note 91 (describing experience of visitation procedure).

97. *See* In re Guantanamo Detainee Cases, 344 F. Supp. 2d at 185 (describing requirement that logistical details such as accommodations be arranged in advance); *see also* Gorman, *supra* note 91 (describing meeting client after "eight months of delays and obstruction").

98. *See* In re Guantanamo Detainee Cases, 344 F. Supp. 2d at 186 (requiring all clearances and travel information confirmed in advance of visit); *see also* Gorman, *supra* note 91 (describing clearance process required before client visitation); *see generally* Gorman, *supra* note 91 (describing Protective Order rules in practice).

99. *See* In re Guantanamo Detainee Cases, 344 F. Supp. 2d at 186-88 (specifying procedures for correspondence between counsel and client); *see generally* Gorman, *supra* note 91 (describing Protective Order rules in practice).

100. *See* In re Guantanamo Detainee Cases, 344 F. Supp. 2d at 186-87 (requiring that written correspondence from attorney to client be first sent to privilege review team, which in turn should pass authorized materials to clients); *see generally* Gorman, *supra* note 91 (describing Protective Order rules in practice).

101. *See* In re Guantanamo Detainee Cases, 344 F. Supp. 2d at 186 (describing mail inspection procedure); *see generally* Gorman, *supra* note 91 (describing Protective Order rules in practice).

prisoners only via the U.S. Postal Service, and may not be included with legal mail.[102] Mail sent from the prisoner to counsel must likewise be designated as "legal" or "non-legal" mail, though "legal mail" does not pass through the privilege team.[103] The Green Protective Order also specifies a similar set of procedures for materials, including the attorney's notes, which are brought into and out of a meeting between the attorney and his or her client at Guantánamo.[104]

According to the Green Protective Order, any material learned from a prisoner at Guantánamo is determined to be presumptively classified, and as such may not be disclosed to any unauthorized person (including unauthorized members of the defense) unless and until it has been approved for disclosure by the privilege team or by the Court itself.[105] Thus, all attorney notes taken in client meetings must be submitted to the privilege team for classification review.[106] Any materials that are not approved for disclosure by the privilege team may only be accessed by counsel at the secure facility in Washington, D.C., and their content may not be disclosed to any unauthorized persons.[107]

There are several other miscellaneous yet noteworthy aspects of the Green Protective Order. Unlike the orders in *Hanssen* and *Lindh*, the Green Protective Order also specifically restricts telephonic access between prisoners and counsel, stating

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102. *See* In re Guantanamo Detainee Cases, 344 F. Supp. 2d at 186-87 (describing alternate procedures for sending non-legal correspondence); *see generally* Gorman, *supra* note 91 (describing Protective Order rules in practice).

103. *See* In re Guantanamo Detainee Cases, 344 F. Supp. 2d at 187-89 (describing procedure for mail sent from client to attorney); *see generally* Gorman, *supra* note 91 (describing Protective Order rules in practice).

104. *See* In re Guantanamo Detainee Cases, 344 F. Supp. 2d at 188-90 (specifying procedures for processing of materials brought into and out of meetings with clients at Guantánamo); *see generally* Gorman, *supra* note 91 (describing Protective Order rules in practice).

105. *See* In re Guantanamo Detainee Cases, 344 F. Supp. 2d at 190 (stating that counsel is required to treat all information learned from client as classified until submitted to the privilege team and deemed to be otherwise); *see also* Gorman, *supra* note 91 (describing Protective Order rules in practice).

106. *See* In re Guantanamo Detainee Cases, 344 F. Supp. 2d at 190 (specifically indicating that attorney notes must be submitted to privilege team for possible declassification before being disseminated); *see also* Gorman, *supra* note 91 (describing Protective Order rules in practice).

107. *See* In re Guantanamo Detainee Cases, 344 F. Supp. 2d at 178 (requiring all documents potentially containing classified information to remain in secure facility until declassified); *see also* Gorman, *supra* note 91 (describing Protective Order rules in practice).

that requests for such access will generally not be permitted but may be considered on a case-by-case basis.[108] The Order also forbids counsel from using cameras, laptops, cell phones, or other recording devices at Guantánamo, and permits Guantánamo security personnel to search lawyers themselves if the base authorities consider it necessary.[109] Among other unconventional restrictions is a requirement that all documents containing classified information—presumably those in the possession of the defense as well as the Government—shall be destroyed by the Court Security Officer at the conclusion of the cases.[110]

Thus, the Green Protective Order is considerably different from the types of orders employed in *Hanssen* and *Lindh*, two cases which also involved national security concerns.[111] As the Green Protective Order's rules about counsel access and communication indicate, the Green Protective Order does more than limit counsel's access to and use of information: it actually limits the extent, nature, and timing of attorney-client contact.[112]

II: *THE DEBATE OVER THE GREEN PROTECTIVE ORDER AND THE GOVERNMENT'S PROPOSED PROTECTIVE ORDER*

There is considerable debate about the appropriateness of the Green Protective Order. This debate is most vigorously presented in the arguments submitted by the parties in the pending cases *Bismullah v. Rumsfeld* and *Parhat v. Gates*, brought pursuant to the DTA.[113] In these cases, the question of the

108. *See* In re Guantanamo Detainee Cases, 344 F. Supp. 2d at 190 (providing rules limiting telephone access); *see generally* Gorman, *supra* note 91 (describing Protective Order rules in practice).

109. *See* In re Guantanamo Detainee Cases, 344 F. Supp. 2d at 191 (describing general Guantánamo security procedures); *see generally* Gorman, *supra* note 91 (describing Protective Order rules in practice).

110. *See* In re Guantanamo Detainee Cases, 344 F. Supp. 2d at 180-81 (requiring document destruction at conclusion of case).

111. *Compare supra* notes 89-90 and accompanying text (describing similarities of orders), *with supra* notes 91-110 and accompanying text (describing features unique to Green Protective Order).

112. *See supra* notes 91-110 and accompanying text (describing various ways in which Green Protective Order limits attorney-client contact).

113. *See* Gov't Mot. for Protective Order, *supra* note 14 (petitioning for protective order more restrictive than Green Protective Order); Bismullah Opp'n. to Proposed Protective Order, *supra* note 11 (opposing Government's motion to implement protec-

whether the Green Protective Order should be put in place is currently being litigated.[114] The Government's position, as articulated in arguments made to the *Bismullah* and *Parhat* Courts, is essentially that the Green Protective Order has inadequately limited the flow of information into and out of Guantánamo, and that national security concerns warrant the implementation of a more restrictive protective order, particularly in cases brought directly to the D.C. Circuit, pursuant to the DTA.[115] In opposition to this position, prisoners Bismullah and Parhat argue that the Green Protective Order has been generally appropriate and should continue to be implemented by courts hearing prisoners' cases, including suits brought pursuant to the DTA.[116] This Part examines these two competing claims about the Green Protective Order's appropriateness. It also examines a relevant third position, not arising in the *Bismullah* and *Parhat* cases, but articulated in *Paracha v. Gates*, a habeas corpus case, which maintains that the Green Protective Order is flawed because it is too restrictive.[117]

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tive order more restrictive than Green Protective Order); Parhat Opp'n to Proposed Protective Order, *supra* note 10 (arguing for appropriateness of Green Protective Order); *see also* Dreiling, *supra* note 5 (reporting on Government's motion for protective order in Bismullah case).

114. *See* Dreiling, *supra* note 5 (reporting on current litigation of Green Protective Order); *see also* Hafetz, *supra* note 65, at 149-50 (noting current dispute over scope of counsel access at Guantánamo).

115. *See* Gov't Mot. for Protective Order, *supra* note 14 at 4-20 (arguing for stricter protective order; citing "disputes over how provisions work, unanticipated consequences, and unworkable or unwise provisions"); *see also Dreiling*, *supra* note 5 (reporting on Government's argument).

116. *See* Bismullah Opp'n to Proposed Protective Order, *supra* note 11, at 2-9 (summarizing argument opposing more restrictive protective order and requesting Green Protective Order be implemented instead; claiming that Proposed Protective Order "specifically interferes" with scope of discovery and attorney-client relationship); Parhat Opp'n to Proposed Protective Order, *supra* note 11, at 8-14 (arguing that Government has used protective order as excuse to withhold basic information about prisoners' detention; urging implementation of Green Protective Order); *see also* Dreiling, *supra* note 5 (reporting Bismullah's opposition to Government motion for protective order).

117. *See* Paracha Mot. to Vacate, *supra* note 12, at 19-31 (listing seven particular objections to the restrictions imposed by the Green Protective Order, including its requirement of security clearance for defense counsel, executive branch inquiry into the source of fees, discouraging of telephone access to prisoners, restrictions on what counsel may tell a prisoner, restrictions on what a prisoner may tell counsel, or on what counsel may do with information learned from the prisoner, abrogation of attorney-client confidentiality and failure to screen off or isolate the privilege teams, and requirement that records be destroyed).

A. *The Government's Position: The Green Protective Order Is Not Restrictive Enough*

To the Government, the underlying purpose of a protective order for counsel access to prisoners at Guantánamo is to prevent the unauthorized disclosure or dissemination of classified national security information and other protected information available to petitioners and petitioner's counsel, in the interests of national security.[118] To this end, a protective order should establish procedures by which petitioners and their counsel, as well as other individuals, may receive access to classified or protected information or documents under specified circumstances.[119]

As discussed above, the Green Protective Order sets certain limitations on the actions an attorney may take in handling information from a client in connection with the representation of a prisoner held at Guantánamo.[120] The Government's position, as articulated by counsel in the pending *Bismullah* case, is that these limitations do not go far enough; they do not provide an adequate level of control over attorney-client visitation.[121] Invoking their experience operating under the Green Protective Order, the Government has named a variety of concerns.[122] In addition, the Government has asked the D.C. Circuit to adopt, in cases brought under the DTA, an alternative protective order (the "Proposed Protective Order") that is considerably stricter

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118. *See* Gov't Mot. for Protective Order, *supra* note 14, at addendum B, 1 (describing purpose of protective order as protecting national security); *see also* Dreiling, *supra* note 5 (reporting Government's argument for protective order).

119. *See* Gov't Mot. for Protective Order, *supra* note 14, at 4 (stating that Government cannot properly facilitate counsel access and visits in DTA cases absent protective measures implemented through the Proposed Protective Order); *see also* Dreiling, *supra* note 5 (reporting Government's Proposed Protective Order establishing procedures for counsel access).

120. *See supra* notes 91-110 and accompanying text (describing restrictions imposed by Green Protective Order).

121. Gov't Mot. for Protective Order, *supra* note 14, at 1-2 (stating that limitations do not "adequately address the unique security needs presented by visiting a secure military base and communicating with an alien detained by the military as an enemy combatant during a time of war"); *see also* Dreiling, *supra* note 5 (reporting Government's position).

122. *See* Gov't Mot. for Protective Order, *supra* note 14, at 6-12 (describing concerns including alleged problems with legal mail system, lawyer visitation, procedures to govern initiation of suit by detainee, definition of "need-to-know" information, and other issues); *see also* Dreiling, *supra* note 5 (quoting Government as saying greater restrictions are needed because of experience with district court order).

than the Green Protective Order.[123] The Government's concerns, and the remedies it asks the court to adopt in the Proposed Protective Order, are summarized as follows.

1. Concerns about Communication with Prisoners

a. General Communication Between Clients and the Outside World

A substantial portion of the Green Protective Order pertains to communication between attorneys and their clients at Guantánamo, limiting the information that counsel may communicate to their clients or share with other people.[124] The Government asserts that the Green Protective Order is inadequate because, in spite of the order being in place, counsel have provided information to prisoners about events outside of Guantánamo, and communicated to others purportedly sensitive information obtained in the course of their representation.[125] As evidence for this assertion, the Government alleges various instances in which attorney-client communication governed by the Green Protective Order resulted in information improperly entering or leaving the base.[126] It mentions, for example, an incident in which a prisoner was overheard saying that his habeas attorney had told him about "acts of war and terrorism" in Israel,

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123. *See* Gov't Mot. for Protective Order, *supra* note 14, at add. B, 1-55 (providing sample protective order more restrictive than Green Protective Order, to be applied in cases brought pursuant to the DTA); *see also* Dreiling, *supra* note 5 (summarizing Government's Proposed Protective Order as seeking to (a) limit counsel to four visits with the client over the course of the entire litigation; (b) prevent lawyers from discussing topics the government designates as "protected"; (c) limit correspondence from attorneys and allow attorneys access only to the record considered by panel making "enemy combatant" determination"; and (d) give the government the right to unilaterally terminate visits and access to classified information).

124. *See supra* notes 99-107 and accompanying text (describing restrictions on communication with prisoners under Green Protective Order).

125. *See* Gov't Mot. for Protective Order, *supra* note 14, at 6-7 (claiming that legal mail and lawyer visit system governed by the Green Protective Order has been used to provide information to prisoners, presenting "security issues" at the base and going beyond the "legitimate purposes for which counsel access is provided"); *see also* Dreiling, *supra* note 5 (noting Government's assertions).

126. *See* Gov't Mot. for Protective Order, *supra* note 14, at 6-7 (referencing attached Declaration of Commander Patrick M. McCarthy, which states that prisoners have been informed of terrorist attacks in Iraq, London and Israel, and claims that prisoner was provided with book including information about abuse at Abu Ghraib prison, among other assertions); *see also* Dreiling, *supra* note 5 (noting assertions made in Government's submissions).

Iraq, Syria, and London.[127] The Government also alleges an instance in which photographs of Guantánamo visitor access badges were posted on the website of a New York radio station, requiring that the base security manager change the badges given to base visitors.[128] The Government's papers also describe an instance in which an attorney allegedly took questions from a journalist with him to a client meeting on base, and provided the reporter with the prisoner's answers afterward.[129] It also asserts, in general terms, the existence of other instances in which communication between attorneys and prisoners under the Green Protective Order has caused problems at the base.[130] These events have apparently not been reported outside of the Government's court documents. In addition, there is evidence that Guantánamo prisoners have learned information about the outside world from their captors.[131]

The Government's Proposed Protective Order purports to address these concerns by imposing a significantly broader defi-

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127. *See* Gov't Mot. for Protective Order, *supra* note 14, at add. A, 3, 5 (stating that a prisoner was overheard in conversation with another prisoner, reporting that his habeas attorney told him about various acts of war and terrorism in Iraq, as well as information about London bombing and violence in Syria and Iraq; stating that, after meeting with attorney, prisoner was overheard discussing recent developments in conflict between Hezbollah and Israel); *see also* Dreiling, *supra* note 5 (noting assertions made in Government's submissions).

128. *See* Gov't Mot. for Protective Order, *supra* note 14, at 7 (claiming that security was breached by photographing of access badges worn by Guantánamo military staff; claiming photographs were posted on the Internet); Gov't Mot. for Protective Order, *supra* note 86, at add. A, 4 (asserting that attorneys posted pictures of their access badges and picture of a U.S. Coast Guard port security boat on website of New York commercial radio station); *see also* Dreiling, *supra* note 5 (noting assertions made in Government's submissions).

129. *See* Gov't Mot. for Protective Order, *supra* note 14, at add. A, 4-5 (asserting that an article on the British Broadcasting Corporation ("BBC") news website posted an article using information provided by a prisoner at Guantánamo; asserting prisoner's attorney took questions from BBC reporter with him to meeting with prisoner); *see also* Dreiling, *supra* note 5 (noting assertions made in Government's submissions).

130. *See* Gov't Mot. for Protective Order, *supra* note 14, at 6 (asserting "numerous other instances" of passing "improper information" to prisoners); *see also* Gov't Mot. for Protective Order, *supra* note 14 add. A, at 5 (stating that cited examples are only "sampling of the problems" experienced under Protective Order).

131. *See, e.g.*, Heike Westendorf, *The World Cup Gitmo-Style*, SPIEGEL ONLINE, June 29, 2006, http://www.spiegel.de/international/0,1518,424304,00.html (last visited Feb. 10, 2007) (reporting that some prisoners were permitted to watch World Cup soccer games, perhaps as "propaganda war"); *see also* Rob Taylor, *Guantanamo Inmates Shown Saddam Hanging Photos: Lawyer*, ABC NEWS.COM, Feb. 10, 2007, http://abcnews.go.com/International/wireStory?id=2840208 (last visited Feb 10, 2007) (reporting incident in which prisoners were shown photo of execution of Saddam Hussein).

nition of "protected material," that would further restrict counsel's handling and dissemination of information from prisoners.[132] The Green Protective Order defines "protected information" as "any document or information deemed by the Court, either upon application by counsel or *sua sponte*, as worthy of special treatment as if the document or information were classified, even if the document or information has not been formally deemed to be classified."[133] The Government's Proposed Protective Order, by contrast, would allow the Government, not the Court, to classify any information as protected information, and would narrow the circumstances under which counsel may share protected information with his client.[134]

b. Legal Mail System

The Government further argues that the Green Protective Order's procedure for communicating with prisoners via legal mail does not provide close enough oversight of attorney-client communication between prisoners and their counsel.[135] The Government claims that, pursuant to the Green Protective Order, legal mail may be reviewed for physical contraband, but not

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132. *See* Gov't Mot. for Protective Order, *supra* note 14, at add. B, 10, 19-20 (granting Department of Defense privilege team specific authority to identify and designate information "Protected Information"; forbidding disclosure or distribution of protected information except to (a) other security-cleared counsel representing the same prisoner who have agreed to be bound by the protective order; and (b) the Court and its support personnel); *see also* Dreiling, *supra* note 5 (noting that Proposed Protective Order would prevent lawyers from discussing topics government designates as "protected").

133. *See* In re Guantanamo Detainee Cases, 344 F. Supp. 2d 174, 177 (D.D.C. 2004) (defining "protected information"); *see also* Dreiling, *supra* note 5 (reporting that Proposed Protective Order would limit access to "protected" information).

134. *See* Gov't Mot. for Protective Order, *supra* note 14, at add. B, 21 ('providing that counsel shall not disclose protected information to petitioner, unless that information was obtained from the petitioner, unless counsel obtains permission of Government counsel or Court); *see also* Dreiling, *supra* note 5 (noting that Proposed Protective Order would prevent lawyers from discussing topics the government designates as "protected").

135. *See* Gov't Mot. for Protective Order, *supra* note 14, at 6 (asserting that legal mail and lawyer visit system has been used to provide information to prisoners, presenting "security issues" at base); *see also* Gov't Mot. for Protective Order, *supra* note 14, at add. A, 2 (asserting that problems are result of legal mail being reviewed only for "physical contraband" and not "content contraband," resulting in non-legal documents and information being delivered through legal mail system). It should be noted that the phrase "content contraband" is apparently a neologism in the lexicon of the federal courts, as a Westlaw search by the author of all federal cases revealed no prior use of this phrase.

for "content contraband."[136] As a result, the Government alleges, "non-legal documents" were sent into and out of Guantánamo though the legal mail system.[137]

In support of this assertion, the Government alleges instances in which material that officials consider to be "content contraband" has been received by prisoners through the legal mail system governed by the Green Protective Order.[138] One instance involved a prisoner possessing a book about torture at Abu Ghraib prison in Iraq, which had apparently been sent to the prisoner through the legal mail system.[139] The Government's primary problem with the book was that it contained information related to investigations of military operations in Iraq which, they say, could "incite prisoners to violence" or lead to "destabilization of the camp."[140] Another instance involved an attorney who sent his client, through the legal mail system, a copy of a speech given at an Amnesty International conference.[141] The Government claimed that the speech contained information regarding current political events in Iraq and elsewhere; again, the Government's concern was that such content could threaten the security of the camp by inciting violence.[142]

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136. *See* Gov't Mot. for Protective Order, *supra* note 14, add. A at 2 (noting legal mail was reviewed only for "physical contraband" and not "content contraband").

137. *See* Gov't Mot. for Protective Order, *supra* note 14, at add. A, 2-3 (claiming "non-legal" documents including a book about Abu Ghraib were labeled "legal mail" and received by prisoners through the legal mail system Dreiling, *supra* note 5 (noting that Proposed Protective Order would prevent lawyers from discussing topics the government designates as "protected").

138. *See* Gov't Mot. for Protective Order, *supra* note 14, at add. A, 2-3 (asserting presence of "content contraband").

139. *See* Gov't Mot. for Protective Order, *supra* note 113, at 6 (asserting that book containing information about abuse at Abu Ghraib prison was provided to prisoner); Gov't Mot. for Protective Order, *supra* note 14, at add. A, 2-3 (characterizing book about Abu Ghraib torture and military operations of United States in Iraq as "content contraband").

140. *See* Gov't Mot. for Protective Order, *supra* note 14, at 7 (asserting that book about investigations of abuse at Abu Ghraib prison constitutes a "serious threat" to security of the prison); Gov't Mot. for Protective Order, *supra* note 14, at add. A, 3 (claiming "content contraband" could incite prisoners to violence, leading to "destabilization" of prison).

141. *See* Gov't Mot. for Protective Order, *supra* note 14, at add. A, 3 (claiming that attorney gave client a copy of Amnesty International speech containing "inflammatory information regarding current political events" without sending it through the non-legal mail review processes).

142. *See* Gov't Mot. for Protective Order, *supra* note 14, at 6 (asserting that information allegedly passed from counsel to prisoners "presents a serious threat to the security of the camp"); Gov't Mot. for Protective Order, *supra* note 86, add. A, at 3 (stat-

In another alleged instance, the Government claimed that biographies and photos of Guantánamo prisoners were sent to other prisoners through the legal mail system.[143] The Government asserted that these incidents are representative of many problems arising from the legal mail system.[144] Again, these events do not seem to have been reported outside of the Government's court submissions.

The Government's Proposed Protective Order would dramatically narrow the definition of "legal mail" and explicitly forbid counsel providing certain materials—some of which are routinely given to prisoners by their counsel under the Green Protective Order—in correspondence labeled legal mail.[145] Whereas the Green Protective Order defined legal mail as letters written between counsel and a prisoner that are related to the counsel's representation of the prisoner, as well as privileged documents and publicly-filed legal documents relating to that

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ing that "inflammatory information regarding current political events" that "threatens the security of the camp, as it could incite violence among the detainees").

143. *See* Gov't Mot. for Protective Order, *supra* note 113, at add. A, 4 (asserting that group of prisoners, some co-clients of same law firm, possesed documents containing biographies and photos of various detainees, and news articles about relating to Guantánamo Bay, none of which submitted through non-legal mail process).

144. *See* Gov't Mot. for Protective Order, *supra* note 14, at 6 (asserting "numerous other instances" of passing improper information to and from detainees); Gov't Mot. for Protective Order, *supra* note 14, add. A, at 5 (characterizing examples as "only a sampling" of the problems encountered under Green Protective Order).

145. *See* Gov't Mot. for Protective Order, *supra* note 14, at 7 (asserting need to clarify and limit the scope of what is deemed legal mail; asserting need for privilege review team to prevent inappropriate material or information from being communicated to prisoners); *see also* Gov't Mot. for Protective Order, *supra* note 14, at add. B, 7-9 (defining legal mail) According to the Government, legal mail is limited to:

> [D]ocuments and drafts of documents that are intended for filing in this action and correspondence directly related to those documents that are directly related to the litigation of this Detainee Treatment Act action . . . address only (a) those events leading up to this detainee's capture or (b) the conduct of the CSRT proceeding relating to this detainee; and do not include any of the following information, in any form: (a) information relating to any ongoing or completed military, intelligence, security, or law enforcement operations, investigations, or arrests, or the results of such activities, by any nation or agency; (b) information relating to current political events in any country; (c) information relating to security procedures at the Guantanamo Naval Base (GTMO) (including names of U.S. Government personnel and the layout of camp facilities) or the status of other detainees; (d) publications, articles, reports, or other such material including newspaper or other media articles, pamphlets, brochures, and publications by non-governmental or advocacy organizations, or any descriptions of such material). *Id.*

representation,[146] the Government's Proposed Protective Order would limit the definition to only documents and drafts of documents that are intended for filing in this action and correspondence directly related to those documents that is related to the litigation of a DTA action, and address only events leading up to the prisoner's capture and/or the conduct of his CSRT proceeding.[147] Information relating to ongoing or completed military, intelligence, security, or law enforcement operations, investigations, or arrests, or the results of such activities, by any nation or agency, would also be explicitly forbidden, even where directly pertinent to a client's case.[148] So, too, would the Proposed Protective Order forbid counsel from communicating with a prisoner via legal mail about information relating to current political events in any country, providing information dealing with security procedures at Guantánamo, or addressing the status of other prisoners.[149] It would also be explicitly forbidden to send one's client, via legal mail, any publications, articles, reports, or other such material including newspaper or other media articles, pamphlets, brochures, and publications by non-governmental or advocacy organizations, or any descriptions of such material.[150]

Whereas, under the Green Protective Order, legal mail is inspected by security officers only for "physical contraband,"[151] under the Government's proposed procedures, the privilege review team would be given specific authority to examine legal mail for "content contraband," including the material noted above.[152] Though this privilege review team would generally not

146. *See* In re Guantanamo Detainee Cases, 344 F. Supp. 2d at 184 (defining "legal mail").

147. *See supra* note 145 and accompanying text (noting Government's proposed definition of permissible legal mail).

148. *See supra* note 145 and accompanying text (listing materials falling outside Government's proposed definition of permissible legal mail).

149. *See supra* note 145 and accompanying text (listing materials falling outside Government's proposed definition of permissible legal mail).

150. *See supra* note 120 and accompanying text (listing materials falling outside Government's proposed definition of permissible legal mail).

151. *See* In re Guantanamo Detainee Cases, 344 F. Supp. 2d 174, 186 (D.D.C. 2004) (stating that upon receiving legal mail from counsel for delivery to the prisoner, privilege team shall open materials to search the contents for prohibited physical contraband, forwarding materials to base military personnel for delivery within two days if approved).

152. *See* Gov't Mot. for Protective Order, *supra* note 14, at 7 (noting that legal mail regime under Proposed Protective Order would have a privilege review team that would

be permitted to share information learned by reading prisoners' legal mail with the Government, it would be permitted to do so in limited circumstances where communications relate to imminent acts of violence or could harm the national security.[153] Under the Proposed Protective Order, counsel violating the legal mail rules could be barred access to the base and the legal mail system,[154] and the Government may take such actions without consulting the Court or counsel.[155]

2. Concerns about Verifying Representation

The Green Protective Order provides rules for counsel that, in representing prisoners with pending habeas corpus petitions filed on their behalf by a "next friend," visit the base to secure direct authorization of representation by their clients.[156] According to the Government, which has long opposed and repeatedly challenged the legitimacy of petitions brought on "next friend" standing,[157] this aspect of the Green Protective Order is

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review all written communications to and from prisoners); Gov't Mot. for Protective Order, *supra* note 14, at add. B, 9-10 (authorizing privilege team to review written communications and all other materials sent between counsel and prisoner).

153. *See* Gov't Mot. for Protective Order, *supra* note 14, at 7 (asserting that privilege team cannot share information with Government except in carefully limited circumstances where communications "relate to imminent acts of violence or could harm the national security"); *see also* Gov't Mot. for Protective Order, *supra* note 14, at add. B, 9-11 (stating that privilege team may not disclose communications reviewed, except to Department of Defense Special Litigation Team, to which it may disclose certain otherwise privileged information).

154. *See* Gov't Mot. for Protective Order, *supra* note 14, at add. B, 19, 26-28 (providing that failure to comply with Proposed Protective Order rules may result in the revocation of counsel's security clearance, revocation of authorization to travel to Guantanamo and possible civil and/or criminal liability).

155. *See* Gov't Mot. for Protective Order, *supra* note 14, at add. B, 27 (reserving right of Government to "unilaterally take protective measures" without consent of opposing counsel if it concludes that any provision of protective order has been violated or in the event of an unauthorized disclosure of classified information).

156. *See* In re Guantanamo Detainee Cases, 344 F. Supp. 2d 174, 185 (D.D.C. 2004) (requiring that counsel provide evidence of authority to represent client as soon as practicable, no later than ten days after the conclusion of second visit with client); *see also* Adem v. Bush, 425 F. Supp. 2d 7, 10-14 (D.D.C. 2006) (noting Green Protective Order's relevance to disputes over habeas corpus suits brought by "next friends").

157. *See Adem*, 425 F. Supp. 2d at 10-14 (noting history of disputes between counsel and Government over nature and extent of "next friend" standing in habeas corpus cases brought by prisoners); *see also id.* at n.14 (listing several habeas corpus cases brought by Guantánamo prisoners, in which Government had contested "next friend" standing).

unacceptable.[158] The Government has not, however, offered factual examples of any instances in which counsel visiting to secure authorization of representation have posed a specific problem.[159]

Under the Green Protective Order, counsel representing a prisoner whose petition has been brought by a "next friend" are permitted two visits with their client to secure direct authorization, which need not be in writing.[160] Under the Government's Proposed Protective Order, such counsel would be limited to only one visit, for the sole purpose of obtaining authorization, and they must obtain authorization in writing, on a form provided by the Government and signed by the prisoner.[161]

3. Concerns about Counsel Access to Confidential and/or Protected Information

The Green Protective Order establishes procedures pursuant to which civilian attorneys may be permitted access to information that the Government deems classified or protected.[162] According to the Government, these procedures are not strict enough.[163] Though the Government offers no specific descrip-

158. Gov't Mot. for Protective Order, *supra* note 14, at 6 (describing order as "unworkable or inappropriate in many respects"); *see also* Dreiling, *supra* note 5 (reporting Government's argument).

159. *See* Gov't Mot. for Protective Order, *supra* note 14, at 8 (asserting that the Green Protective Order inadequately addresses procedures to govern initiation of a suit by prisoner and that counsel for "next friends" had sought to visit prisoners and occasionally been refused to be seen by prisoners, but offering no specific examples of problems with Green Protective Order's "next friend" regime).

160. *See* In re Guantanamo Detainee Cases, 344 F. Supp. 2d at 185 (requiring counsel to provide evidence of authority to represent prisoner as soon as practicable, no later than ten days after second visit with client); *see also Adem*, 425 F. Supp. 2d at 10-14 (parsing "next friend" in Guantánamo context).

161. *See* Gov't Mot. for Protective Order, *supra* note 14, at 9 (asserting that, under Proposed Protective Order, counsel will be permitted to visit clients to ask client to sign form granting counsel authorization to represent him and access his CSRT records; if the prisoner does not sign the form, however, no further visits will be afforded, counsel will not be afforded access to legal mail system, and counsel will not be granted access to classified CSRT material.; *see also* Gov't Mot. for Protective Order, *supra* note 86, at add. B, 30 (providing that filing of "next friend" suit will not by itself entitle counsel to visit prison or communicate with client as his counsel through the legal mail system; describing written authorization requirement for representation of prisoner filing a "next friend" petition).

162. *See* In re Guantanamo Detainee Cases, 344 F. Supp. 2d at 181-83 (stating rules governing access to classified or protected information).

163. *See* Gov't Mot. for Protective Order, *supra* note 14, at 4 (stating that Govern-

tion of a situation in which this classification system has posed a specific problem, its apparent concern with these procedures is their ambiguity and the opportunities for litigation that ambiguity can create.[164]

The Government's Proposed Protective Order would limit counsel's access to confidential or protected information and expand the scope of information that the Government may classify as confidential or protected.[165] In particular, it would limit the classified information that may be received by a prisoner's attorney in a suit brought pursuant to the DTA to that prisoner's Combatant Status Review Tribunal ("CSRT") file—essentially, the information used by the Government at the prisoner's CSRT hearing to establish the prisoner's status as an "enemy combatant."[166] The Government seeks this rather drastic curtailing of the information available to counsel by reasoning that, under the DTA, the D.C. Circuit purportedly only has jurisdiction to evaluate the decision, made by the CSRT panel, to classify the prisoner as an "enemy combatant"; to this end, in suits brought pursuant to the DTA, prisoner's counsel should only have access to the materials used in making that decision (as opposed to broader discovery about the circumstances of a prisoner's capture, interrogation methods, conditions of confinement, exculpatory evidence, or other information traditionally relevant in challenging a prisoner's detention).[167] This aspect of the Gov-

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ment cannot permit counsel access in DTA cases without protective measures such as those in Proposed Protective Order); *see also* Gov't Mot. for Protective Order, *supra* note 14, add. A, at 4 (stating that process outlined by protective order has been successful in protecting national security interests while ensuring attorney-client communications, but that inadequacies in Green Protective Order have threatened "safety and security" of base).

164. *See* Gov't Mot. for Protective Order, *supra* note 14, at 6 (stating that the Green Protective Order has led to disputes over "how provisions work, unanticipated consequences, and unworkable or unwise provisions."); Dreiling, *supra* note 5 (quoting counsel for prisoners, who characterized Government's motivation as opposition to "effective and zealous advocacy.").

165. *See supra* note 132 and accompanying text (describing expanded definition of "protected information" in Government's Proposed Protective Order).

166. *See* Gov't Mot. for Protective Order, *supra* note 14, at 12-14 (claiming that because review under DTA is on record of CSRT, counsel does not have a need to engage in "factual development or unlimited consultation" with clients); *see also* Gov't Mot. for Protective Order, *supra* note 14, at add. B, 13-19 (describing procedures for access to classified information, with access only to CSRT record material that Government has determined petitioners' counsel has need to know).

167. *See supra* note 166 and accompanying text (stating Government's reasoning

ernment's Proposed Protective Order is particularly controversial, given that the constitutionality of the DTA and the scope of its appellate review are in doubt.[168]

As this Part has shown, the Government has opposed certain aspects of the Green Protective Order, and in its litigation of cases brought under the DTA, advocated a Proposed Protective Order that it argues would remedy the Green Protective Order's perceived flaws. Finally, however, it should be noted that the Government's opposition to the Green Protective Order has not only been articulated in the context of cases brought pursuant to the DTA. The Government has also elsewhere argued that the facts specific to a particular class or type of prisoner (as opposed to the general circumstances of Guantánamo) warrant a protective order more restrictive than the Green Protective Order.[169] In that case, the prisoner in question, Majid Khan, spent time in a Central Intelligence Agency secret prison, where he was allegedly subjected to "alternative interrogation methods" before being transferred to Guantánamo.[170] When Khan moved the district court for entry of the Green Protective Order, the Govern-

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that limited scope of DTA review warrants a reduced access of counsel to confidential information in suit filed pursuant to DTA.

168. The constitutionality of the DTA has been questioned, and is currently under consideration by the D.C. Circuit in the consolidated cases of Al Odah v. United States, No. 05-cv-5062 (D.C. Cir.) and Boumediene v. Bush, No. 05-cv-5064 (D.C. Cir.). *See* Hamdan v. Rumsfeld, 548 U.S. ___, 126 S. Ct 2749, at 2765 (2006) (acknowledging dispute over constitutionality of DTA; finding no need to address DTA constitutionality in instant case); *see also* Amanda L. Tyler, *Is Suspension a Political Question?*, 59 STAN. L.R. 333, 349-50 (2006) (discussing whether DTA violates Suspension Clause (Art. I, § 9, cl. 2) of U.S. Const.).

169. *See* Resp'ts' Mem. in Opp'n to Pet'r's Mot. for Emergency Access to Counsel and Entry of Am. Protective Order, Khan v. Bush, 06-cv-1690, at *14-15 (D.D.C. Oct. 26, 2006) (arguing that Green Protective Order regime is inappropriate given "unique circumstances of Khan," because of his prior confinement in a "high-value terrorist detainee program."); *see also* Scott Shane, *Detainees' Access to Lawyers is Security Risk, C.I.A. Says*, N.Y. TIMES, Nov. 5, 2006, at 1 (reporting on Government's request for stricter protective order in Khan case); Editorial, *Top-Secret Torture*, WASH. POST, Nov. 21, 2006 at A26 (calling Government argument "disturbing"; warning that Government's approach will prevent accountability for administration's treatment of alleged terrorists, as well as ensure that key parts of military trials are kept from public).

170. *See* Resp'ts' Mem. in Opp'n to Pet'r's Mot. for Emergency Access to Counsel and Entry of Am. Protective Order, Khan v. Bush, 06-cv-1690, at *14 (D.D.C. Oct. 26, 2006) (arguing that Khan possesses "important operational information" about "high-value terrorist program," including knowledge of locations of secret CIA facilities, interrogation method, and other information"); *see also* Shane, *supra* note 169, at 1, 29 (quoting habeas counsel suggesting Government seeks to hide torture inflicted on Khan).

ment claimed that Khan's knowledge of classified information—including, the interrogation methods he endured—required a stricter protective order that would prevent him from revealing this confidential information even to his lawyer.[171] The type of protective order appropriate for that case, they argued, would need to be altered to address "the nature of the information likely to arise in connection with a prisoner such as Khan."[172]

B. *The Bismullah/Parhat Position: The Green Protective Order is Adequate*

In litigating the question of what protective order should be put in place in their respective cases, prisoners Bismullah and Parhat argue that the purpose of a protective order is not merely to limit the scope of information available to petitioners and their counsel (the Government's position)[173] but rather to achieve balance between the Government's interest in protecting national security, and the prisoner's interest in protecting his right to counsel access and to government information.[174] To this end, in their view, a protective order should not only establish procedures by which petitioners and their counsel may receive access to classified or protected information, but also establishes procedures that ensure that the prisoner's access to counsel and to certain government information is not unfairly infringed.[175] The Green Protective Order, Bismullah and Parhat

171. *See supra* notes 169-70 and accompanying text (describing Government's possible rationale for a stricter protective order in Khan case).

172. *See* Resp'ts' Mem. in Opp'n to Pet'r's Mot. for Emergency Access to Counsel and Entry of Am. Protective Order, 06-cv-1690, at *14 (D.D.C. Oct. 26, 2006) (arguing that protective order in Khan case should account for national security concerns and classification issues "unique to Khan and others like him"); *see also Top-Secret Torture*, *supra* note 169, at A26 (characterizing Government's requested protective order as "extraordinary measure" to ensure Khan's silence).

173. *See supra* note 118 and accompanying text (describing Government's assertions about purpose of protective order).

174. *See* Bismullah Opp'n to Proposed Protective Order, *supra* note 11, at 14-15, 19 (arguing that purpose of protective order is to protect national security as well as protect rights of prisoners); *see also* Parhat Opp'n to Proposed Protective Order, *supra* note 11, at 8-9 (arguing that aspects of protective order are essential to protect "fragile" attorney-client relationship).

175. *See* Bismullah Opp'n to Proposed Protective Order, *supra* note 11, at 20 (claiming that Court is required to properly balance the interests of parties while preserving access to relevant discoverable information under conditions that protect against risk of harm); *see also* Parhat Opp'n to Proposed Protective Order, *supra* note 11, at 8-9 (characterizing purpose of protective order as protecting both "legitimate

argue, basically achieves this balance and is thus justified in its status as the model protective order for other Guantánamo prisoner cases.[176] In its defense of the Green Protective Order, and opposition to the Government's alternative protective order, Bismullah and Parhat argue as follows.[177]

1. The Green Protective Order is Appropriate

Whereas the Government asserts that the Green Protective Order has been inadequate, Bismullah and Parhat argue that the Green Protective Order has been generally successful.[178] As evidence for this position, Bismullah cites a statement by a high-ranking naval officer at Guantánamo—a statement made in the Government's own submissions to the court—that characterizes the existing protective order as effective.[179] Bismullah and Parhat also cite the lengthy and careful process by which the Green Protective Order was originally formulated,[180] and the

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governmental interests" and "fragile attorney-client relationship" challenged by the Guantánamo environment).

176. *See* Bismullah Opp'n to Proposed Protective Order, *supra* note 11, at 19 (claiming that, after two years, district court protective order has proven to be "generally successful"); *see also* Parhat Opp'n to Proposed Protective Order, *supra* note 11, at 8-13 (arguing that Green Protective Order is appropriate).

177. The argument in favor of the Green Protective Order was not the only argument brought by Bismullah against the Government's Proposed Protective Order. Bismullah also argued, in the alternative, that a court appoint a special master to recommend an appropriate protective order and to resolve any subsequent issues arising from the protective order. *See* Bismullah Opp'n to Proposed Protective Order, *supra* note 11, at 15-18 (arguing for special master to resolve contested issues of client and information access, as alternative to implementation of Green Protective Order. At the time of writing, the Court had not yet ruled on the matter, apparently deferring a ruling until the D.C. Circuit rules on its jurisdiction in *Al Odah*. *See* Dreiling, *supra* note 5 (noting possibility that court will address "jurisdiction-stripping issues" first).

178. *See supra* note 176 and accompanying text (characterizing Green Protective Order as generally successful).

179. *See* Bismullah Opp'n to Proposed Protective Order, *supra* note 11, at 19 (noting that Government's own declarant, Commander McCarthy, has characterized Green Protective Order as generally successful); *see also* Gov't Mot. for Protective Order, *supra* note 14, at add. A, 2 (characterizing process outlined by Green Protective Order as "successful in protecting the legitimate and important national security interests of the United States while ensuring that attorneys representing detainee are permitted effective access to their clients" though not without "situations threatening the safety and security" of prison).

180. *See* Bismullah Opp'n to Proposed Protective Order, *supra* note 11, at 12 (noting that Green Protective Order was entered following four months of extensive litigation and negotiation); *see also* Parhat Opp'n to Proposed Protective Order, *supra* note 11, at 8 (describing entry of Green Protective Order after "extensive and close scrutiny of the issues").

length of time that the Green Protective Order has been in use.[181] Calling attention to the considerable amount of time already invested by the judiciary in fine-tuning the Green Protective Order, as well as the multiple parties that have come to be governed by it, Bismullah and Parhat suggest that other parties that would be affected should be consulted before any order replaces the Green Protective Order.[182]

2. The Government's Concerns are Unjustified

a. Claims Unspecific and Hearsay

In articulating its concerns about the Green Protective Order, the Government mentions several situations in which, it claims, the Green Protective Order has failed to prevent information flowing into or out of Guantánamo.[183] In response to these allegations, Bismullah and Parhat argue that the descriptions of these situations are unreliable, as they are based on various levels of hearsay, from unnamed and perhaps unreliable sources.[184] Bismullah and Parhat also point out that none of the supposed violations of the Green Protective Order involved them or their counsel, and that there is no evidence that they have ever violated the Green Protective Order or done anything to justify a more restrictive protective order.[185]

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181. *See* Bismullah Opp'n to Proposed Protective Order, *supra* note 11, at 19 (noting two years of experience during which Green Protective Order has proven to be "generally successful"); *see also* Parhat Opp'n to Proposed Protective Order, *supra* note 11, at 8-9 (observing lack of allegations of violations of the of Green Protective Order).

182. *See* Bismullah Opp'n to Proposed Protective Order, *supra* note 11, at 19 (arguing that, if many DTA cases are to follow, courts would benefit of hearing from other counsel, including those who participated in litigation and negotiation of Green Protective Order); *see also* Parhat Opp'n to Proposed Protective Order, *supra* note 11, at 12-13 (stating that, before modifying Green Protective Order regime, Court should hear from all interested parties, including Bismullah and any other DTA petitioners).

183. *See supra* notes 124-31 and accompanying text (describing Government concerns about information entering and leaving Guantánamo).

184. *See* Bismullah Opp'n to Proposed Protective Order, *supra* note 11, at 20-21 (arguing that declaration included with Government's motion for protective order does not assert enough facts, and may constitute "unreliable hearsay," from unidentified sources; noting that six of the seven alleged problems occurred before Commander McCarthy, the Government's declarant, arrived at Guantánamo); *see also* Parhat Opp'n to Proposed Protective Order, *supra* note 11, at 9 (arguing that Government's Proposed Protective Order is intended to "scuttle effective review").

185. *See* Bismullah Opp'n to Proposed Protective Order, *supra* note 11, at 19 (arguing that Government has failed to show adequate cause for Proposed Protective Order, which at time of writing would apply only to Bismullah's case); *see also* Parhat Opp'n to

b. Claims Not Asserted Before District Court

In addition, the parties opposing the Government's allegations argue that the Government has not sought modifications to the Green Protective Order in pending district court cases; however great the problems with the Green Protective Order may be, the Government has generally not tried to remedy them before district court judges.[186] This fact, Bismullah and Parhat argue, strongly suggests that the Government's pursuit of a new protective order may be motivated by concerns other than the supposed failure of the Green Protective Order.[187]

3. The Government's Proposed Protective Order is Overly Restrictive

Bismullah and Parhat are strongly critical of the Government's Proposed Protective Order, which they consider overly restrictive, unnecessary, and crafted to serve fundamentally different ends than the Green Protective Order.[188] Whereas the Green Protective Order was designed to balance the interests of the parties, they claim, the Government's Proposed Protective Order is designed specifically to limit with the scope of discovery and interfere with the attorney-client relationship between prisoners and counsel.[189] The net result, they argue, will be a strangling of the prisoners' rights to seek judicial review of their de-

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Proposed Protective Order, *supra* note 11, at 9 (disputing Government allegations that Green Protective Order has been "misused").

186. *See* Bismullah Opp'n to Proposed Protective Order, *supra* note 11, at 20 (arguing that Government submits no evidence that Respondent has sought to effect similar modification to Green Protective Order); *see also* Parhat Opp'n to Proposed Protective Order, *supra* note 10, at 9 (arguing that Government never alleged violations of, or previously sought to amend, protective order).

187. *See* Bismullah Opp'n to Proposed Protective Order, *supra* note 11, at 19 (claiming that Government decision to request more restrictive protective order "seems guided more by litigation tactics than national security concerns"); *see also* Parhat Opp'n to Proposed Protective Order, *supra* note 10, at 9 (describing Government's argument for new protective order as "merely tactical").

188. *See* Bismullah Opp'n to Proposed Protective Order, *supra* note 11, at 19 (arguing that purpose of protective order is to protect national security as well as protect "legitimate rights and needs" of prisoners); *see also* Parhat Opp'n to Proposed Protective Order, *supra* note 11, at 8-9 (characterizing purpose of protective order as protecting both governmental interests and "fragile" attorney-client relationship).

189. *See* Bismullah Opp'n to Proposed Protective Order, *supra* note 11, at 3-4 (arguing that Proposed Protective Order interferes with the scope of discovery attorney-client relationship, which will make it difficult, hindering client's ability to seek judicial review of his detention); *see also* Parhat Opp'n to Proposed Protective Order, *supra* note

tention.[190] Bismullah and Parhat voice several complaints about the Government's Proposed Protective Order.

a. Limitations on Discovery

According to Bismullah and Parhat, the Government's Proposed Protective Order would greatly limit the scope of discovery.[191] In particular, it would limit the material that counsel may access on behalf of a prisoner to that prisoner's classified CSRT record; it would apparently not permit access to other information—classified or unclassified—relevant to the CSRT process and determination that a prisoner is an "enemy combatant."[192] In addition, according to the parties opposing the Proposed Protective Order, the order would further limit the scope of discovery in "next friend" cases.[193] Counsel representing a prisoner pursuant to a "next friend" request would not be permitted access to classified CSRT records.[194] The net result, Bismullah and Parhat argue, would be the impairment of the prisoner's right, upheld in *Rasul v. Bush*, to challenge the basis of indefinite de-

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11, at 8-10 (arguing that Government's intention is to "scuttle effective review," limit counsel visits, and curtail litigation brought on "next friend" standing).

190. *See* Bismullah Opp'n to Proposed Protective Order, *supra* note 11, at 4 (arguing that Proposed Protective Order will obstruct effective judicial review); *see also* Parhat Opp'n to Proposed Protective Order, *supra* note 11, at 8-10 (arguing that Government's intention is to limit access to courts and attorneys).

191. *See* Bismullah Opp'n to Proposed Protective Order, *supra* note 11, at 3-4 (arguing that Proposed Protective Order interferes with scope of discovery); *see also* Parhat Opp'n to Proposed Protective Order, *supra* note 11, at 8 (characterizing Government's requested "need-to-know" rules as obstructing access to classified material).

192. *See* Bismullah Opp'n to Proposed Protective Order, *supra* note 11, at 4-5 (arguing that Proposed Protective Order would cut short fact-finding process by "absolutely foreclos[ing] Bismullah's counsel from seeking any other information, no matter how relevant or critical to Bismullah's claim, including information that is neither classified nor sensitive"); *see also* Parhat Opp'n to Proposed Protective Order, *supra* note 11, at 8 (criticizing Government's unwillingness to provide counsel even the CSRT record).

193. *See* Bismullah Opp'n to Proposed Protective Order, *supra* note 11, at 6-7 (arguing that Proposed Protective Order incorporates rule rejected by the district courts and requires that next friend cases be converted to direct cases in order to meaningfully prosecute the case); *see also* Parhat Opp'n to Proposed Protective Order, *supra* note 11, at 10 (arguing that Proposed Protective Order would avoid a series of closely-reasoned next friend decisions including *Adem*, 425 F. Supp. 2d at 9-14).

194. *See* Bismullah Opp'n to Proposed Protective Order, *supra* note 11, at 4 (observing that, under Proposed Protective Order, counsel who fail to get direct authorization from prisoner will be denied visitation, access to legal mail, and classified material in CSRT record); *see also* Parhat Opp'n to Proposed Protective Order, *supra* note 11, at 10 (arguing that Government's intention is to curtail litigation brought on "next friend" standing).

tention in federal court.[195]

b. Interference with Attorney-Client Relationship

According to Bismullah and Parhat, the Government's Proposed Protective Order would radically interfere with the attorney-client relationship between prisoners and counsel, a relationship that is already considerably strained by an environment cultivated to psychologically destabilize prisoners and eliminate their confidence in the legal system, as well as by judicial inaction and certain cultural factors.[196] Under the Proposed Protective Order, counsel would be limited to only three visits with their clients, after an initial meeting to establish authorization of representation; counsel representing prisoners with "next friend" petitions would be allowed to visit clients only at the Government's discretion, only to procure written authorization of representation and nothing more.[197]

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195. *See* Bismullah Opp'n to Proposed Protective Order, *supra* note 11, at 4 (asserting that Proposed Protective Order would limit discovery and impair substantive rights for reasons other than protection of classified information or camp security); *see also* Parhat Opp'n to Proposed Protective Order, *supra* note 11, at 9 (arguing that Government's proposed order will "scuttle effective review").

196. *See* Bismullah Opp'n to Proposed Protective Order, *supra* note 11, at 5 (noting that actions on behalf of prisoners frequently commence with the filing of a next friend petition due to circumstances of detention incapacitated); *see also* Parhat Opp'n to Proposed Protective Order, *supra* note 11, at 10-11 (arguing that prisoners' circumstances instill reluctance to trust attorneys and participate in U.S. legal system, and situation is aggravated by judicial inaction). Parhat reasons:

> It may be difficult for the thoughtful jurist to comprehend why, in the first visit, an innocent prisoner would not simply "sign a form" and cheerfully dictate a complete statement to his American lawyer. But the jurist has not been in an American cage for five years. He has not been stripped naked by American guards; not hooded, berated, searched, nor beaten by helmeted Americans wielding truncheons. He has not been chained to the floor, not watched by MPs as he defecates, nor had his chambers searched regularly by Americans; he has not been isolated from family, nor deprived of newspapers, books, journals, and all the food of the mind, nor repeatedly promised that he is innocent, and that he would be leaving soon. The jurist is not separated by language and culture from Americans, and has not, after five years of this treatment, come to mistrust them. The jurist is not meeting in a cell another American (who claims to be a lawyer, but—who knows?—might be an interrogator); he is not being asked to sign a form in a foreign language that might be anything. An entire career has taught the jurist to believe in the American justice system and in the attorney-client relationship. But five years at Guantanamo has taught these petitioners that the American justice system is an illusion, and that people asking him to sign things have other agendas. *Id.*

197. *See* Gov't Mot. for Protective Order, *supra* note 14, at add. B, 30-31 (providing rules governing access to prisoners and classified information where suit is brought on

According to Bismullah and Parhat, the proposed order would further interfere with the attorney-client relationship by sharply limiting the content of what attorneys may communicate with their clients in correspondence.[198] The order would, for example, limit attorney-client correspondence to documents and drafts of documents that are intended for filing in the action brought under the DTA, and only those related directly to its litigation.[199] As Bismullah points out, this would prohibit Bismullah from writing to his attorney to report that he is being tortured, and prevent counsel from providing the prisoner with a copy of the DTA or a court opinion from another case, without permitting the Government to redact it first.[200]

Bismullah also challenges language in the Proposed Protective Order that would prohibit counsel from sharing classified and "protected" information with other prisoner counsel, even those with security clearance, and even when such information is critical to another prisoner's case.[201] Also unfair, it is argued, is language in the Proposed Protective Order that would permit the Government to unilaterally sanction counsel for alleged misconduct in violation of the Proposed Protective Order, including preventing access to the prisoner, without the approval of the court.[202]

"next friend" basis); *see also supra* notes 156-59 and accompanying text (describing restrictions on "next friend" suits under Government's Proposed Protective Order).

198. *See* Bismullah Opp'n to Proposed Protective Order, *supra* note 11, at 8-9 (claiming that Proposed Protective Order places "significant burdens" on counsel access to clients and information, including regulating the content of attorney-client correspondence, prohibiting discussion of events occurring after the date of CSRT classification, restricting counsel sharing classified or non-classified information with other security-cleared counsel, authorizing the Government to unilaterally sanction counsel suspected of violating the protective order, and restricting the number of visits); *see also* Parhat Opp'n to Proposed Protective Order, *supra* note 11, at 9 (arguing that Government's proposed order will "scuttle effective review" by limiting available information to "need to know" information).

199. *See* Bismullah Opp'n to Proposed Protective Order, *supra* note 11, at 28-29 (describing limitations imposed by Government's Proposed Protective Order).

200. *See* Bismullah Opp'n to Proposed Protective Order, *supra* note 11, at 29 (arguing that Proposed Protective Order would unreasonably deny proper attorney-client communication).

201. *See* Bismullah Opp'n to Proposed Protective Order, *supra* note 11, at 9 (noting that Proposed Protective Order's restrictions would prevent counsel from sharing classified and non-classified "protected" information, even when information is critical to another prisoner's case).

202. *See* Bismullah Opp'n to Proposed Protective Order, *supra* note 11, at 29 (arguing against section of Proposed Protective Order that would "vest in Respondent the

c. Proposed Rules Are Arbitrary

Bismullah also argues that some aspects of the Government's Proposed Protective Order are arbitrary; the rules proposed do not correspond to any specific problem described by the Government.[203] For example, he argues that the rule limiting prisoners to three visits with counsel over the course of the litigation is not backed by any evidence linking this limited number of visits to a specific national security interest, or to any indication that three visits is sufficient to prepare a case.[204] Likewise, both Bismullah and Parhat claim, the Proposed Protective Order's approach to designating certain non-classified information as "protected" would seem to invite information to be classified as such arbitrarily.[205]

d. Proposed "Clarifications" Unlikely to Prevent Disputes

The Government argues that the Green Protective Order is ambiguous in some areas, leading to increased litigation.[206] While recognizing that protective order litigation is complex and time-consuming, Bismullah disputes the notion that the government's proposed "clarifications" would limit litigation, asserting instead that this complexity necessitates a structure for solving such disputes, modeled after the one in place to interpret

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authority "unilaterally" to terminate counsel's right to visit Bismullah, to use the legal mail, to see classified information, and any other right or benefit available under the terms of the protective order; characterizing this authority as "unfettered police power").

203. *See* Bismullah Opp'n to Proposed Protective Order, *supra* note 11, at 20-21 (stating that, while Government's argument in favor of Proposed Protective Order purports to remedy "problems" with Green Protective Order, it includes "no evidence that Respondent has sought to effect similar modifications to the form of the district court protective order"; stating that McCarthy Declaration submitted by Government does not correspond to "remedies" contained in Proposed Protective Order).

204. *See* Bismullah Opp'n to Proposed Protective Order, *supra* note 11, at 27 (stating that Proposed Protective Order would "arbitrarily limit" number of visits while specifying an arbitrary and likely insufficient number of client visits).

205. *See* Bismullah Opp'n to Proposed Protective Order, *supra* note 11, at 28 (arguing that, under Proposed Protective Order, Government may prevent counsel from discussing any topic with Bismullah by designating it "protected information"); *see also* Parhat Opp'n to Proposed Protective Order, *supra* note 11, at 9-10 (stating that, if Government determines that Parhat does not have a "need to know" something in unclassified CSRT record, Parhat will have no ability to challenge this designation).

206. *See* Gov't Mot. for Protective Order, *supra* note 14, at 4-20 (arguing for stricter controls on information and client access); Dreiling, *supra* note 5 (reporting on Government's complaints about Green Protective Order).

the Green Protective Order.[207]

e. Attempt to Influence Outcome of Litigation

The Government's intent in establishing procedures that would limit the scope of discovery and interfere with the attorney-client relationship, as well as those that are arguably arbitrary, Bismullah and Parhat argue, goes beyond simply restricting information flow in the name of national security.[208] Rather, they maintain, these aspects of the Proposed Protective Order are proposed so as to influence the outcome of the prisoner's case by resolving contentious issues (such as the scope of the review of a DTA action) by incorporating a rule favorable to the Government into the protective order.[209] This attempt to influence the litigation, they argue, also motivates the Government to include provisions that would effectively eliminate petitions brought on "next friend" standing.[210]

C. *The Paracha Position: The Green Protective Order is Too Restrictive*

The debate over the Green Protective Order is more complex than the pro and con positions articulated by Bismullah and Parhat and the Government, respectively.[211] As shown by

207. *See* Bismullah Opp'n to Proposed Protective Order, *supra* note 11, at 15-18 (recommending Special Master for resolution of disputes, similar to in district courts).

208. *See* Bismullah Opp'n to Proposed Protective Order, *supra* note 11, at 3 (arguing that Proposed Protective Order "betrays attention to litigation tactics, not camp security"); *see also* Parhat Opp'n to Proposed Protective Order, *supra* note 11, at 9-10 (arguing that Government's intent in proposing protective order may be to reduce scope of appellate review).

209. *See supra* note 208 and accompanying text (suggesting Government motivated by more than just national security concerns).

210. *See* Bismullah Opp'n to Proposed Protective Order, *supra* note 11, at 22 (arguing that Proposed Protective Order incorporates "flawed arguments on disputed substantive legal issues" such as the scope of the Court's review, next friend standing, and the right to assistance of counsel under the Constitution and federal statute); *see also* Parhat Opp'n to Proposed Protective Order, *supra* note 11, at 9-10 (criticizing Government's efforts to limit appellate review and next friend standing).

211. To the extent that Bismullah and Parhat are currently litigating the issue of the proper protective order against the Government, it makes sense to refer to their positions as pro and con with respect to the Green Protective Order. It should be noted that both parties' positions are litigation stances, and reflect a strategic calculus as well; it is not clear whether the Government would be universally opposed to the Green Protective Order in all possible contexts, just as it is not clear that Bismullah and Parhat would embrace the Green Protective Order in all contexts.

the position argued by prisoner Paracha, there is no consensus between opponents of the Government about the merits of the Green Protective Order.[212] To Paracha, the compromise position embodied in the Green Protective Order still deviates too much from established procedures for dealing with classified information developed by the judiciary prior to the advent of Guantánamo.[213] The procedures employed by the federal judiciary prior to the "War on Terror," he argues, remain adequate and should be followed for counsel representing Guantánamo prisoners.[214] Though the Green Protective Order may be appropriate for some Guantánamo cases, in general it permits the Government too much interference in the crucial attorney-client relationship, and limits too greatly the ability of the judiciary to resolve matters involving confidential information on an individual basis.[215] Articulating his arguments against the Green Protective Order in the context of a motion to vacate that order in his habeas corpus case, Paracha lists several objections to the Green Protective Order.[216] In addition, Paracha makes two suggestions about what sort of protective order may be an appropriate substitute for the Green order.[217] Each of these objections and suggestions will be addressed below.

1. Objections to the Green Protective Order

Generally, Paracha's objections to the Green Protective Order arise from what he perceives as the court's unwarranted deviation from established procedures by which the judiciary

212. *See generally* Paracha Mot. to Vacate, *supra* note 12, at 10-34.

213. *See* Paracha Mot. to Vacate, *supra* note 12, at 4-10 (naming a series of "long recognized" privileges; arguing that they not be abrogated by compromise in the Guantánamo context).

214. *See* Paracha Mot. to Vacate, *supra* note 12, at 8-10 (arguing for sufficiency of procedures for access to classified information in place before September 11, 2001, particularly CIPA, and other security procedures for protecting classified information in federal criminal cases).

215. *See* Paracha Mot. to Vacate, *supra* note 12, at 10 (claiming that Green Protective Order "goes far beyond the traditional privileges" and strips Paracha of certain essential rights.

216. The Green Protective Order was implemented in Paracha's case *sua sponte*. *See* Paracha Mot. to Vacate, *supra* note 12, at 1 (prefacing motion by objecting to entry of Green Protective Order without notice and "unjustified as a matter of law"); *see also* Paracha v. Bush, No. 04-cv-2022 (D.D.C. Dec. 16, 2004) (dkt. 13) (entering Green Protective Order *sua sponte*).

217. *See* Paracha Mot. to Vacate, *supra* note 12, at 32-33 (describing permissible protective orders as alternatives to Green Protective Order).

handles cases involving sensitive information.[218] Paracha argues that existing doctrine governing military secrets, state secrets, and informer's privilege, as well as the statutory rules of the Classified Information Procedures Act, do not justify the procedures for preserving secrecy provided for in the Green Protective Order.[219] Invoking the examples of several individuals, including Army Captain James Yee, who were charged by the Government for violating information security procedures at Guantánamo, Paracha further notes the aggressiveness with which the Government prosecutes violations of its rules, and from this emphasizes the danger posed to counsel by an overly broad protective order.[220] Paracha's specific concerns are as follows:

a. Requiring Clearance for Defense Counsel

The Green Protective Order requires that counsel have an executive branch security clearance before they access certain filings and evidence, and before they are permitted to visit their client at Guantánamo.[221] To Paracha, this requirement unreasonably limits the prisoner's right to counsel by permitting the executive branch to interfere with the judiciary's power to supervise lawyers.[222] Noting proposed legislation on the issue which was not adopted, Paracha further asserts that permitting the executive branch to select which lawyers are to be granted security

218. *See* Paracha Mot. to Vacate, *supra* note 12, at 9-10 (arguing that prior to September 11, 2001, the judicial branch demonstrated ample experience in protecting military secrets, state secrets, informer's privilege, and material covered by executive branch classification schemes, but that Green Protective Order exceeds the "traditional privileges").

219. *See* Paracha Mot. to Vacate, *supra* note 12, at 4 (discussing extent of military secrets privilege); 6 (discussing state secrets privilege); 7 (discussing informer's privilege); 8-9 (discussing CIPA and other procedures for secrecy).

220. *See* Paracha Mot. to Vacate, *supra* note 12, at 19 (noting that Government has brought charges against translators and others in contact with prisoners, especially Capt. James Yee; noting that such charges have often been baseless, yet prosecuted with excessive strictness).

221. *See* In re Guantanamo Detainee Cases, 344 F. Supp. 2d 178-79 (D.D.C. 2004) (requiring security clearance); Gohil & Mithra, *supra* note 7 (describing logistical challenges to counsel posed by Green Protective Order, including security clearance requirement).

222. *See* Paracha Mot. to Vacate, *supra* note 12, at 20-21 (arguing that security clearance requirement in Green Protective Order either "a useless, but costly, interference with the independence of the judiciary," or "an impermissible abridgement of the right to counsel"; arguing that strict professional standards imposed on lawyers and policed by judiciary are sufficient).

clearance invites the arbitrary exercise of that discretion, and imposes an expensive, invasive, and time-consuming application process on counsel themselves.[223]

b. Executive Branch Inquiry into Source of Fees

Paracha further objects to the sections of the Green Protective Order that require counsel to certify that funds received for legal expenses are not connected to terrorism or the product of terrorist activities.[224] This determination, he argues, is virtually impossible to make in practice.[225] Individual situations arising from any counsel receiving "dirty money" may be dealt with by the court, and need not be included in a protective order.[226]

c. Discouraging Telephone Access to Client

The Green Protective Order provides that telephone communication between prisoner and counsel will not normally be allowed.[227] Characterizing this as a limitation premised on the Government's failure to concede the right to counsel, Paracha argues that this rule is unreasonable, particularly given that telephone is the most convenient method of communication over long distance.[228] The benefits of permitting telephone access, he argues, outweigh the risks.[229]

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223. *See* Paracha Mot. to Vacate, *supra* note 12, at 21 (citing legislative history of CIPA and criticism of CIPA articulated in Brian Z. Tamanaha, *A Critical Review of the Classified Information Procedures Act*, 13 AM. J. CRIM. L. 277 (1986)).

224. *See* Paracha Mot. to Vacate, *supra* note 12, at 21-23 (criticizing as "dangerously vague" Green Protective Order's requirement that funds received are not "connected to terrorism or the product of terrorist activities"); *see also* In re Guantanamo Detainee Cases, 344 F. Supp. 2d at 185 (forbidding funding from sources "connected to terrorism").

225. *See* Paracha Mot. to Vacate, *supra* note 12, at 22 (reasoning that it is impossible for counsel to that certify finds received from family, organization, or individual from prisoner's home country, are not in some way "connected to terrorism").

226. *See* Paracha Mot. to Vacate, *supra* note 12, at 22 (arguing that, any counsel funded by terrorist organization can be dealt with individually, without protective order).

227. *See* In re Guantanamo Detainee Cases, 344 F. Supp. 2d at 190 (stating that requests for telephone calls between counsel and prisoner will generally be denied).

228. *See* Paracha Mot. to Vacate, *supra* note 12, at 23 (arguing that provision against telephone access demonstrates Government's intent to impede access to counsel; characterizing telephone communication as the normal method of attorney-client communication today).

229. *See* Paracha Mot. to Vacate, *supra* note 12, at 23 (arguing that even monitored conversations would generally be better than no telephonic conversations).

d. Restrictions on What Counsel May Tell Client

The Green Protective Order limits the extent to which counsel may divulge classified information not learned from the prisoner to the prisoner.[230] Citing federal case law for the proposition that communication between counsel and petitioner is necessary to make meaningful the right to counsel, Paracha asserts that this provision of the Green Protective Order is "per se wrong."[231] In addition, Paracha objects to the Green Protective Order's expansive description of prohibited communications, which may be read to prohibit communication about innocuous matters as well as those crucial to litigation.[232]

e. Restrictions on What Client May Tell Counsel, or on What Counsel May Do with Information Learned from Client

Paracha's most vigorous arguments concern sections of the Green Protective Order pertaining to the privilege team.[233] The Green Protective Order provides that all information learned from a prisoner, including oral and written communications, is to be treated by counsel as presumptively classified.[234] Paracha vehemently objects to this presumptive classification scheme, which he claims interferes with counsel's ability to gather evi-

230. *See* In re Guantanamo Detainee Cases, 344 F. Supp. 2d at 187 (stating, among other restrictions, that written and oral communications with prisoners including all incoming legal mail, "shall not include information relating to any ongoing or completed military, intelligence, security, or law enforcement operations, investigations, or arrests, or the results of such activities, by any nation or agency or current political events in any country that are not directly related to counsel's representation of that detainee; or security procedures at GTMO (including names of U.S. Government personnel and the layout of camp facilities) or the status of other detainees, not directly related to counsel's representation.").

231. *See* Paracha Mot. to Vacate, *supra* note 12, at 24 (arguing that ability of counsel and prisoner to confer is essence of right to counsel; citing cases including Geders v. United States, 425 U.S. 80 (1976) (reversing conviction where counsel ordered not to confer with defendant during recess) and Mudd v. United States, 798 F.2d 1509 (D.C. Cir. 1989) (holding restrictions to counsel access require reversal without showing of specific harm)).

232. *See* Paracha Mot. to Vacate, *supra* note 12, at 25 (criticizing broadness of Green Protective Order, which purports to ban wide range of conversation topics).

233. *See* Paracha Mot. to Vacate, *supra* note 12, at 25-28 (objecting to presumptive classification of information learned from prisoner).

234. *See* In re Guantanamo Detainee Cases, 344 F. Supp. 2d 174, 190 (D.D.C. 2004) (requiring that counsel treat all information learned from prisoner as classified information unless cleared by privilege team); *see also* Gohil & Mithra, *supra* note 7 (describing requirement that counsel adhere to rules about information received or disclosed).

dence and communicate candidly with his client.[235] These restrictions, Paracha argues, sap counsel's ability to engage in pretrial investigation, gather evidence, and provide zealous representation, because they require that attorney-client communication pass through the hands of the Government, via the privilege team.[236] Paracha further notes that the Green Protective Order departs from the judiciary's usual approach to classified material by categorizing all information received from prisoners as "born classified," a classification previously reserved only for Government information about atomic weapons.[237]

f. Failure to Screen Off Privilege Team and Other Limitations on Attorney-Client Confidentiality

Paracha's objections to the privilege team established by the Green Protective Order also reflect a concern about whether the privilege team, operated by the Government and physically located in close proximity to Government officials in Washington, D.C., is adequately insulated from the Government.[238] Paracha notes that the privilege team is not screened from other Government lawyers in the manner in which large law firms routinely erect internal barriers to avoid conflicts of interest.[239] He also objects to language in the Green Protective Order that requires the privilege team to report to the Government "any information that reasonably could be expected to result in immediate and substantial harm to the national security," as well as certain

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235. *See* Paracha Mot. to Vacate, *supra* note 12, at 26-28 (claiming that restriction forbids lawyer from investigating in search of supporting evidence and otherwise limits counsel's ability to prepare his case).

236. *See* Paracha Mot. to Vacate, *supra* note 12, at 26 (claiming that requirement that attorney-client communication pass through hands of the Government, through privilege team, grants Government "absolute control" over counsel's preparation of case).

237. *See* Paracha Mot. to Vacate, *supra* note 12, at 26 (claiming that only category of information "born classified" in past was information pertaining to nuclear weapons).

238. *See* Paracha Mot. to Vacate, *supra* note 12, at 28-31 (claiming that privilege team established by Green Protective Order is inadequately "screened off" from Government lawyers).

239. *See* Paracha Mot. to Vacate, *supra* note 12, at 28-31 (objecting to lack of language in Green Protective Order screening Government lawyers from privilege team; objecting to language suggesting that privilege team should "collect and disseminate" information for use with in other prisoners' cases).

other information.[240] To Paracha, this requires that the privilege team effectively function as an intelligence-collecting arm of the Government, particularly considering the generally expansive way in which the Government tends to interpret "harm to national security" in the Guantánamo context.[241] As such, Paracha asserts, counsel themselves may become complicit in the Government's collection of information; in which case, they are not really functioning as a prisoner's advocate at all.[242]

Paracha is not, however, absolutely opposed to the notion of a privilege team to oversee dissemination of classified information.[243] Though not convinced that one is warranted in his case or as a default for all Guantánamo cases, he is at least open to the idea, provided that it is operated by a neutral agency, perhaps the court itself, and located away from Government lawyers.[244]

g. Requirement of Record Destruction

The Green Protective Order requires the destruction of certain documents following the "final conclusion" of a prisoner's case.[245] Paracha also objects to this requirement.[246] Such document destruction, he argues, either constitutes an unlawful taking and interference with a lawyer's work, or violates federal

240. In re Guantanamo Detainee Cases, 344 F. Supp. 2d 174, 189 (D.D.C. 2004) (specifying privilege team function).

241. *See* Paracha Mot. to Vacate, *supra* note 12, at 29 (arguing that exceptions weaken assurances that privilege team will not pass information to Government; noting that Government's rationale for holding prisoners suggests that "harm to the national security" will be interpreted broadly).

242. *See* Paracha Mot. to Vacate, *supra* note 12, at 29-30 (arguing that privilege team reporting requirement is fatal to effective assistance of counsel; reasoning that, under such a regime, counsel are effectively complicit in eliciting information from prisoners).

243. *See* Paracha Mot. to Vacate, *supra* note 12, at 31 (suggesting possibility of a privilege team operated by "neutral agency").

244. *See* Paracha Mot. to Vacate, *supra* note 12, at 31 (arguing that "neutral agency . . . should be physically located away from the military and intelligence agencies, and away from the Department of Justice lawyers working on these cases" Paracha would also admit a possible exception for information-screening rules in emergency situations. *See id.* (describing "possible exception for emergency situations" in which privilege team could disclose information).

245. *See* In re Guantanamo Detainee Cases, 344 F. Supp. 2d at 180-81 (requiring document destruction upon final resolution of cases).

246. *See* Paracha Mot. to Vacate, *supra* note 12, at 31-32 (objecting to Green Protective Order's requirement of document destruction).

law.[247]

2. Suggestions for Appropriate Protective Order

Though critical of the Green Protective Order, Paracha is open to some sort of protective order, implemented upon a proper showing of need, and constructed to protect the prisoner's right to the assistance of counsel.[248] Such a protective order could be premised not on a doctrine of national security, but on an attorneys' ethical obligation not to further criminal conspiracies.[249] Given that the judiciary is already adept at handling such matters, Paracha argues, a potential protective order constructed along these lines could amount to a promise, signed by counsel, to reveal any information about future acts of terror or other crimes.[250]

III. *ANALYSIS AND COMMENT*

The debate over the Green Protective Order is consequential in a variety of ways. This Part first discusses some of the potential ramifications of the debate. Analyzing the arguments articulated above, this Part argues that, in deciding whether to replace the Green Protective Order with a more restrictive order, the D.C. Circuit should recognize the extent to which the existing protective order has already dramatically limited prisoners basic access to counsel—going far beyond the protective orders in the *Hanssen* and *Lindh* cases—and should avoid limiting it further. Finally, this Part urges counsel for Guantánamo prisoners to continue to make courts and the general public aware of the restrictions placed upon their advocacy.

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247. *See* Paracha Mot. to Vacate, *supra* note 12, at 31 (characterizing document destruction as potentially unlawful taking and/or violation of federal record-keeping law).

248. *See* Paracha Mot. to Vacate, *supra* note 12, at 32-34 (describing possible protective orders acceptable to Paracha).

249. *See* Paracha Mot. to Vacate, *supra* note 12, at 33 (citing D.C. Bar Rule 1.6(c)(1), which allows a lawyer to reveal "confidences and secrets to the extent reasonably necessary to prevent a criminal act that lawyer reasonably believes is likely to result in death or substantial bodily harm"; citing D.C. Bar Rule 1.2, which forbids attorneys to counsel client to "engage or assist in conduct that lawyer knows is criminal or fraudulent").

250. *See* Paracha Mot. to Vacate, *supra* note 12, at 32-34 (stating that, pursuant to ethical rules, counsel could be required not to assist any criminal conduct; they could be asked to agree not to, for example, transmit messages in foreign languages on behalf of their client, or to transmit any messages at all except in paraphrase).

A. *Significance of the Debate*

The debate about the appropriateness of the Green Protective Order is significant for a variety of reasons.[251] Most immediately, the question of the proper protective order will affect current and future Guantánamo litigation. Given that, in *Bismullah* and *Parhat*, this dispute over the proper scope of the protective order is taking place at the Circuit level, that court's ruling will thus be at least potentially binding on the D.C. district courts.[252] In addition, the district courts' apparent emphasis on judicial consistency in handling prisoner cases—as evidenced by the ubiquity of the Judge Green order—will likely lead them to follow whatever decision is made in *Bismullah* and *Parhat*.[253] This debate's outcome will thus probably dictate the type of protective orders put in place in other cases, and in future cases, especially those cases brought under the DTA.[254]

Additionally, this debate is significant because its result will influence the conduct, and likely the outcome, of some prisoners' cases.[255] To the extent that the protective order restricts access to classified information, it restricts discovery;[256] to the extent that it restricts communication between counsel and client, it obstructs counsel's ability to zealously represent of that client.[257] Though this is a concern in any normal case involving a protective order, it is highly consequential in Guantánamo litigation, in which discovery and communication are already substantially challenged by logistical and cultural factors.[258]

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251. *See supra* notes 15-18 and accompanying text (describing ramifications of debate over Green Protective Order).

252. *See supra* note 18 and accompanying text (noting likelihood that district courts will follow D.C. Circuit's ruling on protective order).

253. *See supra* notes 5-6 and accompanying text (noting ubiquity of Green Protective Order).

254. *See supra* notes 11, 15, 168-187 and accompanying text (noting context of debate in cases brought pursuant to DTA); describing Bismullah and Parhat's concerns about consequences should Government's Proposed Protective Order become standard).

255. *See supra* notes 208-210 and accompanying text (characterizing Government's Proposed Protective Order as effort to influence the outcome of cases).

256. *See supra* notes 37-41, 166, 168-172, 192-195 (describing potential restrictions protective orders may place on access to information; discussing argument that Government's Proposed Protective Order limits discovery).

257. *See supra* notes 173-170, 204-214 and accompanying text (discussing argument that protective orders restrict communication between counsel and client).

258. *See supra* notes 12-13, 59, 64, 196 and accompanying text (describing logistical and cultural challenges to discovery, communication, and client access).

The outcome of this debate will likely also have an effect on other undetermined legal questions arising from the DTA.[259] For example, the scope of review of a petition brought under the DTA remains undecided.[260] Should the *Bismullah* Court impose a more restrictive protective order in that case, that decision could be construed as resolving this undecided substantive issue through an initial procedural motion.[261]

Furthermore, this debate may have wide-reaching implications for cases dealing with classified information even outside the Guantánamo context.[262] Both the Green Protective Order and, if adopted, the Government's Proposed Protective Order, have the potential to set an example for other cases involving national security information.[263] The protective orders used in *Hanssen* and *Lindh* did not restrict access to counsel in the manner that the Green Protective Order does.[264] The Government's Proposed Protective Order would even further restrict access to counsel—should it be implemented, it would have the potential to normalize protective orders specifying terms for access to counsel in other cases involving confidential national security information.[265] Furthermore, in treating certain information—basically, anything learned from a prisoner—as presumptively classified, the Green Protective Order expands the class of information that is to be treated as classified—a policy decision that should be a matter of public discussion.[266] The Government's Proposed Protective Order would expand this class even further,

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259. *See supra* notes 16-17, 168 and accompanying text (describing unresolved interpretations of recent legislation).

260. *See supra* note 168 and accompanying text (describing unresolved scope of appellate review under DTA).

261. *See supra* note 168 and accompanying text (describing Bismullah's argument that Government's Proposed Protective Order would constitute ruling on scope of appellate review under DTA).

262. *See supra* notes 17-18 and accompanying text (noting possible implications regarding classification of national security information).

263. *See supra* notes 17-18 and accompanying text (noting potential precedent to be set by Green Protective Order and Government's Proposed Protective Order).

264. *See supra* notes 111-112 and accompanying text (contrasting Hanssen and Lindh protective orders with Green Protective Order).

265. *See supra* notes 16-17, 182, 190, 196 and accompanying text (describing possible adverse consequences if Government's Proposed Protective Order were implemented).

266. *See supra* notes 105, 165-166, and accompanying text (describing presumptive classification of information learned from prisoners; discussing expanding category of classified information).

while also endorsing a nebulous class of "protected" information that, while apparently not classified, is restricted in some fashion.[267]

On an even broader level, this debate is significant because it engages grave legal, policy, and moral questions about the separation of powers, the robustness of the right to counsel, and the manner in which the United States treats those in its custody, among other serious questions.[268] How this debate is resolved will have profound implications for the practice of law and the meaning of the phrase "American system of justice."[269] To the extent that the Government's Proposed Protective Order specifies rules for the handling of sensitive information that are stricter than those normally administered by the federal courts,[270] it would also threaten to write into law the unsavory presumption that lawyers, usually considered trusted officers of the court, are somehow less trustworthy if they represent a particular class of clients.[271]

These important legal consequences should not, of course, obscure the immediate and profound impact of this debate upon the lives of prisoners Bismullah, Parhat, and the other prisoners at Guantánamo currently represented by counsel, as well and the lives of their families and friends.[272] These individuals may or may not have confidence in the U.S. legal system's ability to remedy their loved one's indefinite detention, but more restrictive protective order minimizing access to counsel and further restricting communications would even further dim

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267. *See supra* note 132-134 and accompanying text (describing new class of "protected" information under Government's Proposed Protective Order).

268. *See supra* notes 17-18, 59, 60-61, 63, 195-196, 220 and accompanying text (noting aspects of protective order implicating separation of powers, right of access to counsel, and treatment of persons in U.S. custody).

269. *See supra* note 196 and accompanying text (noting abuse perpetrated by U.S. personnel at Guantánamo).

270. *See supra* notes 105, 165-166, 213-214 and accompanying text (describing rules for handling sensitive information; contrasting rules applied in Guantánamo context with previous rules).

271. *See supra* notes 64, 222-223 and accompanying text (noting Government's attempt to malign lawyers representing prisoners at Guantánamo; describing Paracha's argument that federal courts have long since proven their ability to deal with sensitive information).

272. *See supra* note 59 and accompanying text (describing atmosphere of "debility, dependence, and dread" in which prisoners exist, punctuated only by lawyer visits).

whatever confidence in the legal system they do have.[273]

B. *Analysis*

The three assessments of the Green Protective Order described above each recommend a way forward for future Guantánamo litigation.[274] The divergence between the three positions suggests that a compromise position may be difficult to reach.[275] Evaluating the arguments brought by each, however, and considering the dramatic consequences of a decision to adopt a more restrictive protective order makes it clear that any compromise between the Bismullah/Parhat and Government positions—the positions currently before the D.C. Circuit—would ignore the already significant restrictions placed on advocacy by the Green Protective Order.[276] As the Paracha position illustrates, the Green Protective Order is itself a compromise position that significantly limits the ability of counsel to advocate on behalf of their clients.[277] Any further restrictions beyond those implemented in the Green Protective Order would be unnecessary and unfair, and would probably encourage the Government to continue pressing the courts to restrict access even further.[278] Each of the positions discussed above will be briefly critiqued below.

1. Critique of the Government's Position

The Government's concerns about the Green Protective Order are unwarranted, and their argument for a more restrictive

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273. *See supra* note 59, 196 and accompanying text (describing proposed changes to protective order that would minimize counsel access; describing factors straining prisoner confidence in legal system).

274. *See supra* Part II (describing three assessments of Green Protective Order).

275. *See supra* notes 115-117 and accompanying text (summarizing three positions discussed in Part II).

276. *See supra* notes 211-217 and accompanying text (summarizing Paracha's argument against restrictions imposed by Green Protective Order).

277. *See supra* note 211-217 and accompanying text (summarizing Paracha's argument).

278. *See supra* notes 184-87, 220, 236-237 and accompanying text (discussing Bismullah's assertion that Government's proposed restrictions are arbitrary and lack adequate justification; describing Paracha's concern about aggressive prosecution of perceived rule violations; discussing expansive limitations on advocacy articulated by Paracha).

order is weak.[279] To begin with, the Government's argument rests on a questionable premise: that the primary purpose of a protective order is to prevent unauthorized disclosure or dissemination of sensitive information.[280] As their general use in civil and criminal courts shows, placing limitations on access to or use of information is but half of their purpose; the other of a protective order's purpose is to ensure the fundamental fairness of court proceedings by protecting counsel's access to certain sensitive information.[281] Ignoring this important aspect of the nature of protective orders, the Government's position urges a misleadingly one-sided approach to the question of the Green Protective Order's relative success.[282]

As blisteringly argued by Bismullah and Parhat, the Government's argument in favor of a more restrictive protective order is deeply flawed by its lack of factual specifics and its reliance on nonspecific allegations that the Green Protective Order is "unworkable," stated by individuals who are not in a position to judge such questions objectively.[283] Many of these allegations arise from the simple fact that Guantánamo prisoners have learned information from the outside world.[284] Setting aside the inherent cruelty (and futility) of a policy that bans all news of the outside world, to find flaw with the Green Protective Order's rules governing communication between prisoners and counsel simply because information has somehow penetrated the base would seem to lack the necessary element of proximate cause establishing that lawyers (and not, for example, guards or service personnel) are responsible for such information.[285] Similarly,

279. *See supra* notes 183-210 and accompanying text (describing Bismullah's argument about various flaws in Government's criticism of Green Protective Order).

280. *See supra* notes 118-119 and accompanying text (stating Government's position on purpose of protective order).

281. *Compare supra* notes 118-119 and accompanying text (showing Government's position on purpose of protective order), *with* 174-75 (noting Bismullah's position on purpose of protective order).

282. *See supra* notes 125-167 and accompanying text (presenting Government's criticism of Green Protective Order regime).

283. *See supra* notes 183-185 and accompanying text (criticizing Government's reliance on nonspecific allegations and hearsay in arguing for stricter protective order).

284. *See supra* notes 125-131 and accompanying text (describing Government's finding fault with Green Protective Order because of information possessed by prisoners).

285. *See supra* notes 125-131 and accompanying text (describing Government's finding fault with Green Protective Order because of information possessed by prisoners).

the Government's problems with "content contraband" in the legal mail system seem to have more to do with the Government's frustrated aspirations to total information control at Guantánamo than they do with the provisions of the Green Protective Order dictating the processes for handling legal mail.[286] Their arguments about the "unworkable" handling of next friend cases have no apparent factual justification.[287]

Designed to remedy the supposed flaws of the Green Protective Order, the Government's Proposed Protective Order is too broad for that purpose.[288] As Bismullah and Parhat persuasively argue, the Proposed Protective Order not only unnecessarily limits its counsel's access to information, it effectively limits the scope of discovery and interferes with the attorney-client relationship.[289] Effectively hard-wiring a result favorable to the Government into the rules governing the conduct of Guantánamo cases, the Government's proposed Order goes far beyond what is necessary to address the Government's allegations about problems with the Green Protective order justified.[290]

2. Critique of the Bismullah/Parhat Position

The Bismullah/Parhat position is particularly valuable in that it is the most direct illustration of the flaws of the Government's position, as well as the dramatic consequences likely to occur should the Green Protective Order be replaced.[291] As such, the Bismullah/Parhat position draws important attention to the extent to which the Government's Proposed Protective Order, even more than the Green Protective Order, imposes ag-

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286. *See supra* notes 208-210 and accompanying text (describing Government's complaints about legal mail system under Green Protective Order).

287. *See supra* note 210 and accompanying text (noting lack of factual justification for Government's asserted problems with "next friend" counsel visits).

288. *See supra* notes 184-185 accompanying text (describing various ways in which Government's Proposed Protective Order addresses more flaws than it establishes exist).

289. *See supra* notes 191-192, 196-197, 218-220 and accompanying text (discussing argument that Government's Proposed Protective Order limits discovery and challenges attorney-client relationship).

290. *See supra* notes 184-185, 191-192, 196-197, 218-220 and accompanying text (criticizing Government's reliance on nonspecific allegations and hearsay in arguing for stricter protective order).

291. *See supra* Part II(B) (describing Bismullah and Parhat positions).

gressive restrictions on the prisoners' access to counsel.[292] In doing so, both the Green Protective Order and the Government's Proposed Protective Order dramatically depart from the protective orders implemented in the *Hanssen* and *Lindh* cases.[293] Furthermore, the arguments articulated by Bismullah and Parhat argument demonstrate that access to counsel is not the only area in which the Government seeks to use the protective order as leverage in litigating the case.[294] For example, as Bismullah and Parhat assert, the Government's Proposed Protective Order would, in effect, establish a standard of review in DTA cases without the court having directly considered the issue.[295] Likewise, as the Bismullah/Parhat position notes, some of the rules proposed by the Government are arbitrary and correspond in no way to the allegations made by the Government about how the Green Protective Order has failed; this, too, would suggest an effort to achieve through litigation of the protective order what the Government cannot achieve otherwise.[296]

The Bismullah/Parhat position could be stronger, however, if it amplified to a greater degree the extent to which the Green Protective Order already significantly constrains counsel representing Guantánamo prisoners.[297] Though reminding us that the Green Protective Order was the product of lengthy negotiation and compromise, it should articulate more strongly exactly what counsel gave up in those negotiations, and how the compromises built into the Green Protective Order make further compromise unfair.[298]

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292. *See supra* notes 196-202 and accompanying text (summarizing Bismullah's argument about restrictions on access to counsel).

293. *See supra* notes 111-112 and accompanying text (summarizing differences between Lindh Protective order, Hanssen Protective Order, Green Protective Order, and Government's Proposed Protective Order).

294. *See supra* notes 187, 220, 241 and accompanying text (noting various ways in which Government seeks to use protective order litigation to its advantage).

295. *See supra* notes 167-168 and accompanying text (describing Bismullah's argument that Government's Proposed Protective Order would constitute ruling on scope of appellate review under DTA).

296. *See supra* notes 184-185, 187, 191-192, 196-197, 218-220, 220, 241 and accompanying text (describing unjustified and arbitrary character of some of Government's proposed rules; noting concern about Government attempting to use protective order for litigation advantage).

297. *See supra* notes 211-217 and accompanying text (summarizing significant limitations on advocacy articulated by Paracha).

298. *See supra* notes 218-250 and accompanying text (discussing in detail Paracha's

3. Critique of the Paracha Position

Though not articulated in the context of a Government motion for a protective order even more restrictive than the Green Protective Order, the Paracha assessment of the Green Protective Order clarifies precisely how limiting to counsel access that order is.[299] In doing so, it rightly emphasizes that courts have long fashioned measures for protecting confidential national security information, and done so without needing to go to the lengths required by the Green Protective Order.[300] Indeed, the correctness of this approach is demonstrated by the measures for handling confidential information embodied in the *Hanssen* and *Lindh* protective orders.[301] Paracha is also well-justified in objecting to the Green Protective Order's rules treating all information received from a prisoner as presumptively classified.[302] Finally, Paracha's suggestions for an appropriate protective order built upon the rules of ethics would solve the problem of access to classified information without compromising the attorney-client relationship.[303]

The weakness of the Paracha position is that it is not more broadly articulated. Paracha's criticism of the Green Protective Order is sound, and deserves to be heard by those evaluating the merits of the Green Protective Order. All counsel familiar with the Green Protective Order understand its limitations.[304] They should not be hesitant to speak out about them.

CONCLUSION

The Green Protective Order is both central to Guantánamo

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argument about constraints on counsel, including privilege team, legal mail access, and other restrictions on communication).

299. *See supra* notes notes 211-217 and accompanying text (summarizing significant limitations on advocacy articulated by Paracha).

300. *See supra* notes 222-223 and accompanying text (describing Paracha's arguments that federal courts have long since proven their ability to deal with sensitive information).

301. *See supra* notes 37-57 and accompanying text (describing general approach of federal courts to protective orders governing classified information).

302. *See supra* notes 105, 165-166 and accompanying text (describing presumptive classification of information learned from prisoners).

303. *See supra* notes 244, 249 and accompanying text (suggesting protective order built upon rules of ethical conduct for attorneys).

304. *See supra* note 8 and accompanying text (noting broad familiarity of counsel with limitations of Green Protective Order).

litigation and highly controversial. Its restrictions on counsel access are noteworthy and apparently unprecedented. The new, more restrictive, Proposed Protective Order, however, would have even more profound consequences on the nature of Guantánamo litigation. As this Note shows, compromise between the proponents and detractors of the Green Protective Order may be neither possible nor advisable, given the degree to which the Green Protective Order already restricts counsel access. Rather, this Note urges, counsel for the prisoners at Guantánamo should continue to make the courts and the public aware of the limitations on representation already imposed by the Green Protective Order.