

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA,) CRIM. NO. 02-10013-WGY
)
 vs.)
)
)
 RICHARD COLVIN REID,)
 a/k/a ABDUL-RAHEEM,)
 a/k/a ABDUL RAHEEM, ABU IBRAHIM)
 Defendant.)

GOVERNMENT'S MEMORANDUM IN RESPONSE TO
DEFENDANT'S MOTION TO DISSOLVE PROTECTIVE ORDER

Defendant Richard Colvin Reid ("Reid") has filed a "Motion to Dissolve Protective Order Placing Limits Upon Counsel's Disclosure Of Information Received From Defendant And Limits Upon Who May, As Part Of His Defense, Communicate With Defendant." In this memorandum, the government will argue, first, that assuming *arguendo* the absence of executive power, the Court has the authority to ensure that communications from an alleged terrorist defendant to his lawyer are not used, even unknowingly and inadvertently, to endanger the safety of the public. Pursuant to the Court's invitation, the government suggests modifications to the protective order fashioned by the Court. Second, the special administrative measures are applicable to a pretrial detainee such as Reid, and the limitations and restrictions, including but not limited to, the transmission of attorney-client communications to third parties, are reasonable. Third, Reid's other contentions are not meritorious.

At the outset, it is appropriate to frame the issue now before this Court. It arises during perilous times. The government submits that the defendant, as demonstrated by his conduct and words, is a committed loyalist who attempted to commit mass murder as part of a terrorist campaign against this nation--a campaign which deploys techniques of stealth and secrecy, including codes and "hidden messages." The government recognizes, and indeed, readily endorses, the importance of the Sixth Amendment, the essential and vital role of the defense function, and the principle that the right to counsel is absolute. Moreover, the government respectfully states that it does not in any way doubt the integrity or professionalism of defense counsel in this matter. Yet, there is a danger that even the most honorable of individuals might become the inadvertent, unknowing and unwitting conduit for the transmission of nefarious messages, even when there is good-faith belief that such communications are being made in pursuit of a client's defense. What is at issue before this Court is not attorney-client communications, which have not been monitored in this case, nor the content of defendant's communications with his attorney, which have not been restricted. Rather the question focuses on the power to ensure that communications from defendant to his counsel not be transmitted to third parties in such a way as to endanger the public or damage national security.

FACTUAL AND PROCEDURAL STATEMENT

On December 22, 2001, Reid, a 28-year-old British citizen, attempted to detonate an improvised explosive device on board American Airlines Flight 63 while it was over the Atlantic Ocean en route from Paris, France, to Miami, Florida. After the intervention of flight attendants and passengers averted an in-flight catastrophe, Flight 63 was diverted to Logan Airport and Reid was removed from the plane and arrested by the FBI. A complaint was filed the following day, charging Reid with interference with flight crew members and attendants, in violation of 49 U.S.C. §46504.

An initial appearance was held on December 24, 2001, at which time the government moved for detention under 18 U.S.C. §§3142(f)(1)(A) and (f)(2)(A) on the grounds that the defendant posed a danger to the community and a serious risk of flight. A probable cause and detention hearing was held on December 28, 2001, at which time Reid was represented by counsel. After conducting the probable cause and detention hearing, United States Magistrate Judge Judith Dein, noting that the charges against Reid arose out of an incident on December 22, 2001 on Flight 63, determined that the evidence against Reid was "very strong." Memorandum and Order on Issue of Probable Cause and on Government's Motion for Detention, (December 28, 2001), p. 4.

As summarized by the court:

While the aircraft was en route from Charles De Gaulle Airport in Paris, France, bound for Miami, Florida, there was a disturbance on board which resulted in the aircraft being diverted to Boston, Massachusetts. According to the flight attendant involved in the incident, about one and half hours into the flight, she smelled what she thought was a match. Reid was pointed out to her, and when she confronted him she saw him put a match into his mouth. She went to alert the captain over the intercom system, and when she returned a few moments later, she saw him light another match. It appeared that he was attempting to set fire to the inner tongue of his sneaker, from which a wire was protruding. A struggle ensued between the flight attendant and the defendant during which the flight attendant was shoved into the bulkhead, and pushed to the floor. As the first flight attendant got up and ran to get water, a second flight attendant joined the struggle, and was bitten by the defendant on the thumb. The first flight attendant returned and threw water in the defendant's face. Several passengers came to the aid of the flight attendants and restrained the defendant for the duration of the flight. They also injected him with sedatives which were carried onboard.

Based on preliminary laboratory analysis, it appears that each of the defendant's sneakers contained a "functioning improvised explosive device," i.e., a "homemade bomb." If the sneakers had been placed against the wall of the aircraft and exploded, the devices had the capacity to blow a hole in the fuselage.

Id.

In determining that pretrial detention was warranted, Magistrate Judge Dein found that "[b]ased on all the evidence...the government has met its burden of proof by clear and convincing evidence that no condition or combination of conditions will reasonably assure the safety of the community, and by a preponderance of the evidence that no condition or combination of conditions will reasonably assure the appearance of the defendant as required." Id., p. 1. In finding that the defendant was a danger to the community and "that there are no conditions or combination of conditions of release which will reasonably assure the safety of others persons and the community," the Magistrate Judge stated:

In addition to the defendant's violent and assaultive behavior toward the flight attendants, the evidence is that the defendant was trying to set off an explosive device on a flight with approximately 183 passengers and 14 crew members on board. He acted with callous disregard for the safety of others, and, in fact, appears to have intended to cause them all serious harm, if not death. Under such circumstances, the only conclusion is that if the defendant is released he poses an acceptable and uncontrollable risk to the safety of others.

Id. at pp. 6-7.

In ordering that Reid be detained pending trial, the court ordered, in part:

(1) That the defendant be committed to the custody of the Attorney General for confinement in a correction facility separate, to the extent practicable, from persons awaiting or serving sentences or being held in custody pending trial;

(2) That the defendant be afforded a reasonable opportunity for private consultation with counsel.

Id., at 7. Reid was initially detained in the Plymouth County House of Corrections, and then moved on March 14, 2002 at the direction of the United States Marshal to the Commonwealth of Massachusetts Correctional Institute at Cedar Junction.

On January 16, 2002, a federal grand jury returned a nine count indictment against Reid, arising from the events that occurred on December 22, 2001, while Reid was a passenger aboard Flight 63. More specifically, Reid was charged with attempted use of a weapon of mass destruction (count 1), in violation of 18 U.S.C. §2332a(a)(1); attempted homicide (count 2), in violation of 18 U.S.C. §2332; placing an explosive device on an aircraft (count 3), in violation of 49 U.S.C. §§46505(b)(3) and (c); attempted murder (count 4), in violation of 49 U.S.C. §§46506(1) and 18 U.S.C. §1113; interference with flight crew and attendants (counts 5 and 6), in violation of 49 U.S.C. §46504; attempted destruction of an aircraft (count 7), in violation of 18 U.S.C. §§32(a)(1) and (7); using a destructive device during and in relation to a crime of violence (count 8),

in violation of 18 U.S.C. §924(c); and, attempted wrecking of a mass transportation vehicle (count 9), in violation of 18 U.S.C. §§1993(a)(1) and (8).

In both counts 1 and 2, the grand jury charged that:

1. At all times relevant to this count brought under Title 18, United States Code, Chapter 133B-Terrorism, Al-Qaeda was a designated foreign terrorist organization pursuant to 8 U.S.C. §1189.

2. At various times relevant to this count, Richard Colvin Reid received training from Al-Qaeda in Afghanistan.

Pursuant to 28 C.F.R. § 501.3(c), on February 19, 2002, the United States Marshals Service ("USMS") imposed "Special Administrative Measures" ("SAMs") regulating and/or limiting the confinement privileges of the defendant. The regulations set forth in 28 C.F.R. §501.3, entitled "Prevention of acts of

violence and terrorism," permit the government, upon the direction of the Attorney General, to impose special administrative measures (including, but not limited to housing the inmate in administrative detention and/or restricting privileges such as correspondence, telephone and visitation privileges) where, *inter alia*, the Attorney General finds that "there is a substantial risk that a prisoner's communications or contacts with persons could result in death or serious bodily injury to persons...." 28 C.F.R. § 501.3(a). The SAMs are imposed for up to a one-year period, subject to renewal. 28 C.F.R. §501.3(c).

The portions of the SAM which are relevant to defendant's instant motion are found in Section 2, "Attorney/Client Provisions." (See attachment A). Section 2(d) and 2(e), for example, provide:

d. Defense Counsel May Disseminate Inmate

Conversations--the inmate's attorney may disseminate the contents of the inmate's communications to third parties for the sole purpose of preparing the inmate's defense--and not for any other reason--on the understanding that any such dissemination shall be made solely by the inmate's counsel, and not by the counsel's staff.

e. Unaccompanied Attorney's Precleared Co-counsel or Paralegal(s) May Meet With Client--

The inmate's attorney's precleared co-counsel or paralegal(s) may meet with the client/inmate without the necessity of the inmate's attorney being present. An investigator or translator may not meet alone with the inmate. These meetings may be contact or noncontact in the discretion of the DF [detention facility]. (Footnotes omitted).

On March 4, 2002, defense counsel notified the government that they would not sign the SAMS attorney's affirmation, stating that the government's threat to cut off all communications between defendant and counsel unless counsel agreed to the SAMS was a serious violation of defendant's rights. On March 22, 2002, counsel filed "Defendant's Motion for Injunction Preventing the Attorney General and the United States Attorney from Prohibiting Communication between Undersigned Counsel and Defendant; Request for Immediate Hearing." On March 25, 2002, this Court held a hearing on defendant's motion. At the hearing, the Court voiced disagreement with the government's position, expressing doubt as to whether the SAMS should be given effect, and suggesting that the SAMS pertained to prisoners, and not to pretrial detainees such as Reid. (Emergency Hearing, March 25, 2002), pp. 9-10. However, while expressing doubt as to whether the Attorney General could issue such regulations where the defendant is presumed innocent and has not been convicted, the Court ruled that it was unnecessary to reach such constitutional issues. Id., pp. 25, 26. Rather, the Court, noting that Reid had been detained by order of Magistrate Judge Dein, stated that it would fashion an order that would be responsive to the governmental concerns regarding the danger Reid posed to national security, while also protecting Sixth Amendment rights. At the hearing, the Court determined from the government that under the present terms of the existing SAMS, there was no present monitoring of attorney-client communications, nor

consulate- defendant communications. Id., p. 8. With respect to terms of the SAMs which prohibit transmission to third parties of communications outside of the attorney-client relationship from defendant to defense counsel, defense counsel made the undertaking that "subject to further order of this court, [they] would undertake to make no communications to others of the substance of Mr. Reid's communication to [them], save in the actual defense of his case." Id., p. 13. The Court further observed that the government had properly raised...[that] part of these special administrative regulations don't infringe directly on communications between client and attorney. What they do is try to restrict data, which if it gets loose, might impair the national interest of the United States. And in view of the setting in which we find ourselves, that argument resonates, I have to say. Id., p. 19.

In fashioning its order, the Court ruled that Reid's liberty was being restrained not pursuant to the SAMs, but pursuant to the Order of Magistrate Judge Dein, and the Order of the District Court concerning the "reasonable restrictions upon his liberty." Id., p. 26. In pertinent part, that order provided:

[Two], his attorneys, Owen Walker and Tamar Birckhead, who are themselves officers of this court and respected officers of this court, shall have access to Mr. Reid at all reasonable times and reasonable dates consistent with the security of the institution of where Mr. Reid is now housed. Those regulations, subject to further order of this court are the regulations for attorney visits to that institution where the Marshal is housing

Mr. Reid, which were, in effect, within the Commonwealth of Massachusetts and within the United States Marshal's Service prior to the promulgation of the special administrative measure.

If I have to refine that, I will. I certainly contemplate then when Ms. Birckhead and Mr. Walker go to see Mr. Reid that they may be and their effects may be, giving security to legal papers, searched both going in and going out.

Further, three, while in the presence of Mr. Reid, Mr. Walker and Ms. Birckhead are not to be monitored. Mr. Reid may talk freely and confidentially to his attorneys and they to him.

Four, for the moment--and for the moment I mean for the next week or sooner, Mr. Walker, if you want to brief it and bring it back before the court, the substance of what Mr. Reid may say to you confidentially as his attorney will be held by you inviolate and communicated to no one. I do not, by this protective order, intend to infringe--I certainly do not impugn, you or Ms. Birckhead, who are trusted officers of this court. But the national security concerns are in my mind such that for the moment, until I reflect further, you best keep that to yourself. Now, that does not mean that you can't send out investigators. You can't start following up leads. You can't act on the substance of what he may say. I just don't want you repeating the substance of what he says to anyone.

.....

There are a variety of restrictions in the special administrative measure that do not trench on the attorney-client relationship. And that is the manner of his housing and his communications with other prisoners. Nothing that I've said is intended to affect those in any way. ...[e]ven though I don't think the SAM applies, that's something that the Marshal's Service can work out with the appropriate correctional officials. And my order is not in any way intended to trump that or set that aside. I'm simply saying that--setting out the parameters for his communications with counsel and counsel with him.

Id., pp. 26-29.

In giving further guidance on the order, the Court noted that neither the Court, defense counsel, or the government could identify all ramifications or factual issues on short notice. Accordingly, the Court advised that if the order "pinches too hard, you can come back." Id., p. 30. The Court also advised defense counsel "what I would hope you would do is sit down with the government--you don't have to sign off on their requirements under the SAM--work out an "appropriate [protective] order."

Id. The Court stated that it

bears the responsibility that Mr. Reid remains safe and in a more generic sense that nothing I do impairs the security of the people of the United States....All I've prohibited is your [defense counsels'] repeating in verbatim or in substance things that he [defendant] tells you. I do not infringe your ability to defend him....And it seems to me we can revisit this as soon as we have a chance to reflect on it presently.

Id., 30-31. Furthermore, in response to defense counsel's query regarding the basis for his restrictions on communications from defendant to defense counsel, the Court stated it was relying "upon the general supervisory power," and that the "temporary order that [it had] entered to give you a chance to talk to the government is a provident one in light of the national and international situation." Id., p. 32.

Despite the government's attempt to negotiate a protective order with defense counsel or some other types of compromise detention terms and conditions for Reid, defendant now comes

before this Court and moves to dissolve the Court's "March 25, 2002 protective order (as modified on April 22, 2002) insofar as it imposes limits upon counsel's disclosure of information received from defendant and limits who, as part of his defense, may communicate with defendant." Defendant's Motion, p. 1. Defendant contends that neither statute nor the inherent power of the Court allows the issuance of the protective order; that even if the Court had the power to issue a protective order placing special limits upon the defense, such an order would violate a defendant's Sixth Amendment right to counsel and both defendant's and counsel's First Amendment rights; and that "restrictions upon counsel are not needed in order to reduce the chance that counsel could be a conduit for communications to or from defendant that could endanger public safety, especially because the absence of restrictions for over two months has resulted in no harm."

Defense counsel's arguments are not persuasive. While the government will address each below, there are two basic points which ought to be addressed at the outset. First, (assuming *arguendo* the absence of executive authority), the restrictions of the sort at issue here, designed to protect the public from the danger posed by the defendant while in custody, are consistent with the Court's power to order pretrial detention of a defendant who poses a danger to the community.¹ Pursuant to

¹ The legitimacy of the Court's reliance on its supervisory powers as authority for the protective order is, in the government's view, dependent upon an absence of a similar power in the Executive. While the Court suggested preliminary views

this Court's invitation, the government suggests modifications of the protective order which is the subject of this litigation. Second, with respect to the applicability of the SAMs, the government submits that the SAMs are not only applicable to a pretrial detainee, but impose reasonable restrictions regarding attorney-client communications which pass constitutional muster.

ARGUMENT

I. Assuming Arguendo the Absence of Executive Authority, The Court Has the Power to Ensure that Communications from An Alleged Terrorist Defendant to His Lawyer Are Not Used, Even Unknowingly and Inadvertently, to Endanger the Safety of the Public²

Congress has enacted a statute, 18 U.S.C. §3142(e), which authorizes the Court to detain a person prior to trial where it finds proof by clear and convincing evidence "that no condition or combination of conditions will reasonably assure...the safety

to the contrary at the March 25th hearing, as argued below, the SAMs are an appropriate and authorized exercise of Executive authority over pretrial detainees, negating the need for this Court to rely upon its supervisory powers.

² The government argues below in Section II, that the SAMs, which derive from the power of the Attorney General, are applicable to Reid as a pretrial detainee. If that is the case, it follows that it is only the Executive, and not the Court, with the power to control, absent constitutional infringements, a detainee's conditions of detention. *Cf. United States v. Sotelo*, 94 F.3d 1037, 1041 (7th Cir. 1996) (in sentencing context, district court lacked authority to restrict inmate's communications where Congress has delegated authority over the treatment and discipline of inmates to the Bureau of Prisons); *United States v. Ginyard*, 215 F.3d 83, 87 (D.C. Cir. 2000) (citing *Sotelo*).

of any other person and the community." As the Supreme Court noted in upholding the constitutionality of this provision:

While the Government's general interest in preventing crime is compelling, even this interest is heightened when the Government musters convincing proof that the arrestee, already indicted or held to answer for a serious crime, presents a demonstrable danger to the community. Under these narrow circumstances, society's interest in crime prevention is at its greatest. *United States v. Salerno*, 481 U.S. 739, 750 (1987).

Assuming *arguendo* the absence of executive authority, it follows from this power to detain persons who endanger the community that the Court can impose conditions of detention which protect that same important interest of personal and community safety. To hold otherwise would be to suggest that a person who was considered sufficiently dangerous that he had to be removed from society, could nonetheless be permitted to continue to harm persons or society at large from behind bars.

The Magistrate Judge quite appropriately ordered Reid's detention here, on the basis of the danger that he posed to persons or the community at large. Moreover, investigation since December 22, 2001, has established that Reid was not unassisted in his efforts to destroy Flight 63, and that his choice of a target was a deliberate and calculated act of international terrorism.

Reid's British passport reveals, consistent with Reid's own post-arrest statements, that starting on July 12, 2001, he traveled from Belgium to Israel, to Egypt, to Turkey, and finally to Pakistan, before leaving that country for an unknown destination on August 14, 2001. His passport also indicates a

second trip to Pakistan on November 20, 2001, with an exit from that country on December 5, 2001. Airline records disclose that he flew from Karachi to Belgium. On December 18, 2001, Reid purchased a round trip airline ticket on Flight 63 with the cash equivalent of \$1,800 (US). Despite the amount of money necessary to fund such travels, Reid had no known source of income during the summer of 2001, or before.

An examination of one of the explosive devices in Reid's shoes disclosed evidence of a confederate (or confederates). A human hair was found within the internal components of the explosive device, and a palm print was found on the paper used to make the detonator which was located in the device. Forensic comparisons have ruled Reid out as the source of either the hair or the palm print.

In his post-arrest statements to law enforcement agents, Reid stated that he decided to choose an American target after the United States began bombing the Taliban in Afghanistan. He further claimed to have chosen to attack an airplane because he believed an airplane attack, especially during the holiday season, would cause the American public to lose confidence in airline security and stop traveling, leading to a substantial loss of revenue, which would, in turn hurt the American economy. In an e-mail to his mother dated two days before the attempted bombing of Flight 63, Reid prefaced his message by expressing his hope that it would not upset his mother "as what I am doing is part of the ongoing war between islam and disbelief, (and as such a duty upon me as a muslim)." He further stated: "(The

reason for me sending you [a document he calls his "will"] is so that you can see that i didn't do this act out of ignorance nor did i do just because i want to die, but rather because i see it as a duty upon me to help remove the oppressive american forces from the muslim land and that this is the only way for us to do so as we do not have other means to fight them)." [Spelling as in Reid's e-mail message].

Moreover, the indictment alleges that Reid received training from Al-Qaeda, a designated "foreign terrorist organization." A document now commonly referred to as the "Al-Qaeda Training Manual," which is publicly available on the Internet at www.usdoj.gov, was found prior to September 11, 2001. It is a veritable how-to guide on terrorist activities.³ There is an entire section on the use of "secret writing" (invisible ink) and the use of ciphers and codes. Within this section, there is the instruction to use "an innocent-looking letter (family-personal greeting)" to pass on coded or secret messages. Moreover, the manual provides instructions regarding continuing the *jihad* from prison. The manual instructs Al-Qaeda detainees to "[take advantage of visits to communicate with brothers outside prison and exchange information that may be

³ Although the indictment alleges that Reid was Al-Qaeda trained in Afghanistan, such eventual and ultimate proof is not necessary for consideration of the present issues regarding Reid's confinement conditions. Reid's own admissions establish him as an international terrorist soldier in a war against the United States. Whether Reid was Al-Qaeda trained or not, the Al-Qaeda Training Manual provides a sense of the potential security risks a detained international terrorist poses to the national security of the United States.

helpful to them in their work outside prison...The importance of mastering the art of hiding messages is self-evident here."

In fashioning its order, this Court was concerned appropriately that Reid not be permitted to continue his criminal conduct from behind bars, and that his communications to his attorney not be permitted to be used in such a way as to damage national security or to continue "business as usual."⁴ The danger of "hidden messages" is not a frivolous one. As the government noted at the outset, it does not in any way doubt the integrity or professionalism of defense counsel in this matter. Yet there is a danger that even the most honorable of individuals might become the inadvertent, unknowing and unwitting conduit for the transmission of nefarious messages, even when there is a good-faith belief that such communications are being made in pursuit of a client's defense. Thus, it is

⁴ Instructive is *United States v. Salerno*, noted above, which upheld the constitutionality of pretrial detention based on dangerousness to the community. In setting forth the facts, the Supreme Court quoted the following findings of the district court:

The activities of a criminal organization such as the Genovese Family do not cease with the arrest of its principals and their release on even the most stringent of bail conditions. The illegal businesses, in place for many years, require constant attention and protection, or they will fail. Under these circumstances, this court recognizes a strong incentive on the part of its leadership to continue business as usual. When business as usual involves threats, beatings, and murder, the present danger such people pose in the community is self-evident.

United States v. Salerno, 481 U.S. at 744 (quoting 631 F. Supp. 1364, 1375 (S.D.N.Y. 1986)).

recognized that counsel can be made to abide by rules and regulations that are essential to our national security, the security of our prisons, or the security of others. For example, in *United States v. Bin Laden*, 58 F. Supp. 2d 113, 118 (S.D.N.Y. 1999), the court rejected the defendants' argument that imposition of a security clearance requirement on defense counsel violated their Sixth Amendment right to counsel. The court noted that the security clearance requirement was warranted by "the exceptional facts" of the case, explaining that it is "easier to prevent the release of classified information in advance than to attempt to undo the damage of unauthorized disclosures after the fact." 58 F.Supp.2d at 121. In requiring a clearance, the court also relied on the possibility that disclosure of classified information could "place additional lives in danger." Id. And, the court made clear that its order requiring security clearances did not turn on the reputations of defense counsel.

In the instant case, this Court has made clear that the order which it fashioned was subject to revision (see Emergency Hearing, March 25, 2002, pp. 23, 28, 32), particularly as individual circumstances warranted, and also called upon counsel to try to devise alternative language if they deemed such appropriate. Indeed, the government has suggested to defense counsel, (but without agreement), that a protective order might be appropriate which includes provisions, as set forth below, that are consistent with the language of the present SAMs--and which are presented to this Court for its consideration:

(a) Defense counsel for Reid are to be provided access to their client for the purpose of engaging in confidential oral conversations and exchanging written communications, solely for the purpose of preparing Reid's defense.

(b) Defense counsel may share the substance of their oral conversations with Reid, and the written communications sent to or received from Reid, only with each other and third parties who are engaged in the preparation of Reid's defense, and for the sole purpose of preparing that defense, except as subsequently modified by the Court.

(c) Reid's conversations and written communications with Defense Counsel are subject to the Procedural Statement and Security Regulations of the Institution (The Massachusetts Correctional Institute at Cedar Junction) and otherwise applicable policies or regulations of the United States Marshals Service that were in effect prior to the February 19, 2002 issuance of the Special Administrative Measures ("SAMs") in this case.

(d) Pursuant to the terms of the presently existing SAMs, the United States is not monitoring Reid's conversations with defense counsel per the authority of the SAMs.

(e) Without waiving any challenge to, or defense of, the applicability of the SAMs, the authority of the United States Attorney General to issue such SAMs, or the constitutionality of the authorizing regulation, the parties acknowledge that, except as otherwise provided herein, the SAMs limitations placed upon Reid's confinement terms and conditions that were authorized by the United States Attorney General and were commenced and

implement on February 19, 2002, otherwise remain in full force and effect.

(f) The parties acknowledge and agree that nothing herein precludes either party from moving this Court to modify the terms and conditions of this Protective Order, or the SAMs.

II. The SAMs are Applicable to a Pretrial Detainee such as Reid, and the Limitations and Restrictions, Including but not Limited to Transmission of Attorney-Client Communications to Third Parties, Are Reasonable.

At the March 25, 2002 emergency hearing, the Court expressed doubt as to whether the SAMs applied to a pretrial detainee (in contrast with an inmate or prisoner). Moreover, the Court expressed concern as whether the Executive could impose such restrictions on a person who was presumed innocent, and who had not yet been convicted of a crime. However, as discussed below, the SAMs are applicable to Reid as a pretrial detainee; moreover, the restrictions concerning the transmission of attorney-client communications to third parties--which are at issue before this Court--are indeed reasonable, and clearly do not infringe constitutional protections.

a. On its face, the SAMs, which are issued pursuant to the authority of the Attorney General⁵, apply to pretrial detainees.

⁵ The authority provided as the basis for the regulations is set forth in 28 C.F.R. Part 500 and Part 501 as follows: 5 U.S.C. §301, 18 U.S.C. §§3621, 3622, 3624, 4001, 4042, 4081, 4082, 5039; 28 U.S.C. §§509, 510; 28 C.F.R. ¶¶0.95-0.99.

Thus, 28 C.F.R. §500.1(c), the definitional section for Part 50, was clarified on October 31, 2001 to provide:

Inmate means all persons in the custody of the Federal Bureau of Prisons or Bureau contract facilities, including *persons charged with or convicted of offenses against the United States; D.C. Code felony offenders; and persons held as witnesses, detainees, or otherwise.*

(Emphasis added). Pursuant to the SAMs regulations, the Attorney General made the required finding in ordering the SAM for Reid that "there is a substantial risk that [Reid's] communications or contacts with persons could result in death or serious bodily injury to persons."

Additionally, the United States Court of Appeals for the Second Circuit, even before the October 31, 2001 clarification to the definition of the term inmate, upheld the application of SAMs to a pretrial detainee in *United States v. El-Hage*, 213 F.3d 74 (2d Cir.), cert. denied, 121 S. Ct. 173 (2000), a case arising from a prosecution which charged El-Hage, Usama Bin Laden, and others, with conspiracies to attack United States citizens and interests world-wide. There the Second Circuit rejected due process challenges by a pre-trial detainee to the conditions of confinement under the SAMs. While the particular conditions challenged in *El-Hage* are not the attorney-client provisions before this Court, the Second Circuit's due process analysis is persuasive.

b. As found by the Attorney General, the SAMs imposed on Reid are reasonably related to overwhelming security concerns arising out of the nature of the crimes that Reid is alleged to

have committed, and the terrorism war in which Reid, by his own admissions, has been a combatant. They promote a valid public interest in preventing communications by Reid intended to further additional crimes and/or terrorist acts by Reid or others. Moreover, the fact that Reid has not yet been adjudicated guilty does not preclude the SAMs from being implemented in this matter.

"Not every disability imposed during pretrial detention amounts to 'punishment' in the constitutional sense." *Bell v. Wolfish*, 441 U.S. 520, 537 (1979). "Once the Government has exercised its conceded authority to detain a person pending trial, it obviously is entitled to employ devices that are calculated to effectuate this detention." *Id.* Consistent with this principle, "the Government must be able to take steps to maintain security and order at the institution. . . ." *Id.* at 540. *Accord United States v. Felipe*, 148 F.3d 101 (2d Cir.) (upholding severe post-conviction restrictions on inmate), *cert. denied*, 119 S. Ct. 246 (1998). "The presumption of innocence is a doctrine that allocates the burden of proof in criminal trials;...[b]ut it has no application to a determination of the rights of a pretrial detainee during confinement before his trial has even begun." *Wolfish*, 441 U.S. at 533.

Of course, there are limits on the restrictions which prison officials may impose on a pretrial detainee. Specifically, "under the Due Process Clause, a detainee must not be punished prior to an adjudication of guilt in accordance with due process of law." *Bell v. Wolfish*, 441 U.S. at 535. In

accordance with this rule, "[a] court must decide whether the disability is imposed for the purpose of punishment or whether it is but an incident of some other legitimate governmental purpose." *Id.* at 538. "Absent proof of intent to punish, . . . this determination 'generally will turn on 'whether an alternative purpose to which [the restriction] may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned [to it].'" " *Block v. Rutherford*, 468 U.S. 576, 584 (1984) (quoting *Wolfish*, 441 U.S. at 538, in turn quoting *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963)) (brackets in original).

The Supreme Court has instructed that in determining whether restraints are justifiable, the courts should defer to the decisions of the Bureau of Prisons since, "prison administrators . . ., and not the courts, [are] to make the difficult judgments concerning institutional operations." *Jones v. North Carolina Prisoners' Union*, 433 U.S. 119, 128 (1977). See also *Turner v. Safley*, 482 U.S. 78, 89 (1987); *United States v. Felipe*, 148 F.3d at 110.

Deference is particularly appropriate when the restrictions at issue are intended to promote security concerns. Thus, as long as prison officials "'put forward' a legitimate government interest, and provide some evidence that the interest put forward is the actual reason for the regulation," the restriction likely will be upheld. *Casey v. Lewis*, 4 F.3d 1516, 1520-21 (9th Cir. 1993) (quoting *Walker v. Sumner*, 917 F.2d 382,

385 (9th Cir. 1990), in turn quoting *Turner v. Safley*, 482 U.S. at 89).

Following these principles, the Supreme Court has held that four factors must be considered in evaluating the reasonableness of a prison regulation. *Turner v. Safley*, 482 U.S. 78, 87 (1987). In *United States v. El-Hage*, 213 F.3d at 81, the Second Circuit applied this four factor test to uphold the constitutionality of the SAMs as applied to a pretrial detainee. The four factor test provides: "First, there must be a 'valid, rational connection' between the prison regulation and the legitimate governmental interest put forward to justify it." *Turner*, 482 U.S. at 89. Second, the court should determine "whether there are alternative means of exercising the right that remain open to prison inmates." *Id.* at 90. "Where 'other avenues' remain available for the exercise of the asserted right . . . , courts should be particularly conscious of the 'measure of judicial deference owed to corrections officials . . . in gauging the validity of the regulation.'" *Id.* (quoting *Pell v. Procunier*, 417 U.S. at 827). Third, the court should consider the "impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally." *Id.* Fourth, the court should consider "the absence of ready alternatives [as] evidence of the reasonableness of a prison regulation." *Id.* "This is not a 'least restrictive alternative' test: prison officials do not have to set up and then shoot down every conceivable alternative

method of accommodating the [defendant's] constitutional complaint." *Id.* at 90-91.

As the *El-Hage* court stated, "Where the regulation at issues imposes pretrial, rather than post-conviction, restrictions on liberty, the 'legitimate penological interests' served must go beyond the traditional objectives of punishment." 213 F.3d at 74 (quoting *McGinnis v. Royster*, 410 U.S. 263, 273 (1973)).

The Bureau of Prisons, at the direction of the Attorney General, authorized the appropriate officials of the Department of Justice and others who properly have custody of defendant Reid to implement the SAMs in this case to avoid the "substantial risk" that Reid will communicate with others outside the prison to facilitate or incite additional crimes and/or acts of terrorism. The likelihood that Reid would attempt to communicate with others is amply supported by the judicial record, even arising in cases outside this district. In *El-Hage*, for example, the record includes evidence of the vast and global nature of international terrorism and terrorist organizations, like Al- Qaeda; the demonstrated loyalty of terrorists; the efforts that terrorists and terrorist groups have undertaken to avoid detection, including careful monitoring of prior court proceedings against members and associates, and the widespread use of codes; and the defendant's proven desire and ability to commit terrorist acts resulting in mass murder. *El-Hage*, 213 F.3d at 81 (citing sufficient evidence to establish threat posed by outside communications by Al-Qaeda associate.)

Moreover, as detailed in the facts set forth above, Reid's conduct and admissions demonstrate that he is a committed loyalist who sought to engage in mass murder as part of his terrorist mission.

The government's concerns regarding Reid's ability to communicate dangerous information from prison, or to use his counsel as unknowing, unwitting, innocent conduits, are well-founded. Past experience has amply demonstrated that detainees -- even those who receive the expected extra scrutiny afforded someone charged with a terrorist crime -- retain the ability to engage in dangerous conduct while in custody. Indeed, it hardly can be challenged that the defendant in this case, though not convicted, represents a far greater risk to society than virtually any convicted defendant or group of defendants. See *Wolfish*, 441 U.S. at 546 n.28 (pretrial detainees may in certain circumstances present a greater risk than convicted inmates),

In the instant matter, the restrictions imposed on Reid in Section 2 of the SAMs, regarding attorney-client communications, are reasonably related to the nonpunitive objective of protecting the community safety and national security interests. They serve the regulatory purpose of preventing Reid from communicating with unconfined persons involved in terrorist and/or other criminal activities, or from using others, including innocent, unknowing counsel, from transmitting information which might be used in nefarious ways toward destructive ends by those sympathetic to Reid's terrorist endeavors. See *Wolfish*, 441 U.S. at 535; *El-Hage*, 213 F.3d at

82. The restrictions are less burdensome than have been imposed in other cases, compare *United States v. Felipe*, 148 F.3d at 110. In addition, there are no "ready alternatives" to the SAMs. At the same time, they are responsive to the Sixth Amendment, and its interest in protecting a vigorous defense on behalf of those accused of criminal activity.

III. Reid's Other Contentions Are Without Merit

a. Reid contends that the Court's protective order imposes an improper prior restraint on him and his counsel which is prohibited by the First Amendment. Courts, however, may impose limits on the exercise First Amendment in the interest of protecting other competing fundamental values. See generally, L. Tribe, *American Constitutional Law* (2d ed.) (1988) (chapter 12); see, for example, *United States v. Levine*, 764 F.2d 590, 599 (9th Cir. 1985) (restraining order prohibiting attorneys from communicating with media may be upheld if the activity restrained poses either a clear and present danger or a serious and imminent threat to a protected competing interest, the order is narrowly drawn, and less restrictive alternatives are not available); Local Rule 83.2(B) of the United States District Court for the District of Massachusetts (authorizing special order governing such matters as extrajudicial statements by parties and witnesses "likely to interfere with the rights or the accused or the litigants to a fair trial.") See also *Bell v. Wolfish*, 441 U.S. 520, 550-51 (1979) (upholding restrictions on right of publishers to send hardcover books to pretrial

detainees, and finding no First Amendment violation; Court held "[t]hat limited restriction is a rational response by prison officials to an obvious security problem," particularly where hardback books "were serviceable for smuggling contraband into an institution.") The restrictions at issue here, directed at the transmission of communications in such form that they might endanger public safety, do not run afoul of the First Amendment.

b. Reid claims that restrictions of the sort required by the protective order are unnecessary because "the absence of restrictions for over two months" prior to their imposition has "resulted in no harm." This contention is unpersuasive--the seeming absence of harm has no bearing on the potential impact of such communications.

CONCLUSION

For the reasons stated above, the government asks this Court to conclude that the authority to control the conditions of confinement of pretrial detainees rests, in the first instance, with the Attorney General, negating the need for this Court to issue a protective order under its supervisory powers. To the degree that the defendant thereafter challenges the special administrative measures imposed by the Attorney General, the government asks this Court to find that they are an authorized and appropriate exercise of the Executive's power over pretrial

detainees. Alternatively, the government asks this Court to modify its current protective order as suggested in Part I above.

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