IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,	:	
	:	
v.	:	**CR. NO. 09-00276 (JR)**
	:	
STEWARD DAVID NOZETTE	:	
	:	
Defendant.	:	

DEFENDANT'S MOTION TO STRIKE ATTORNEY GENERAL'S IMPOSITION OF "SPECIAL ADMINISTRATIVE MEASURES" AS UNCONSTITUTIONAL AND/OR TO MODIFY CONDITIONS OF DETENTION

Pursuant to 18 U.S.C. § 3142 and the First and Fifth Amendments to the Constitution of the United States, defendant moves the Court for an Order striking the "Special Administrative Measures" ordered by the Attorney General to be imposed upon Mr. Nozette and/or to otherwise modify the conditions of his detention at the D.C. Jail.

I. Introduction

A. The Arrest of Mr. Nozette, the Detention Order and the Subsequent Imposition of the "Special Administrative Measures" by the Attorney General

On October 19, 2009, Mr. Nozette was arrested and charged with attempted espionage in violation of 18 U.S.C. § 794(a). An order of temporary detention was entered by the Magistrate the following day. On October 28, 2009, the government moved to detain Mr. Nozette pending trial. R. 14. After a detention hearing, Magistrate Robinson ordered Mr. Nozette committed to the custody of the Attorney General. A Memorandum of Findings of Fact and Statement of Reasons in Support of Order of Detention was filed by the Magistrate on November 6, 2009. R.

18. Neither the Magistrate's order for temporary detention nor her later one for detention directed that any special conditions of detention be imposed.

Two days after Mr. Nozette's arrest, the Attorney General sent the Director of the Marshals Service a memorandum directing the imposition of "Special Administrative Measures" [SAM] on Mr. Nozette. *See* Attachment B [Memorandum dated 10-21-09]. The SAM imposes significant limitations on Mr. Nozette's access to and ability to communicate with those in the outside world. *See* Attachment A. Among other restrictions, the SAM provides:

> Telephone Contacts: Mr. Nozette may only use the telephone to speak with immediate family members, government officials may limit the calls to one a month and the FBI, among others, may monitor and record the calls. Attachment A, 7-9.
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> Visitation: Similar rules apply to visitation. Mr. Nozette may only visit with immediate family members. Such visits can only take place with a minimum of 14 calendar days notice to the government and may be monitored by the FBI. *Id*., at 9-10.
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> Non-legal mail: Other than with the courts, members of the prosecution team and Congress, Mr. Nozette may only correspond with immediate family members and may be limited to three pieces of paper once per calendar week per recipient. All correspondence with his family is to be copied and sent to the FBI, who will review the same and forward it to the recipient within two weeks.
>
> Religious services and visitation: Mr. Nozette is prohibited from engaging in group prayer with other inmates, the FBI or other government official must approve his contact with any religious representation and the FBI may, at its discretion, attend and record any such religious-based contact.[3] *Id*., 12.
>
> Solitary Confinement and Prohibition of Contact with Other Inmates: The SAM

[3] § 5 (b) of the SAM provides that prayer with the "approved religious representative" may be conducted at the discretion of the FBI or other designated government official as part of "a contact or non-contact visit." Because § 3 of the SAM provides that the FBI may attend and record all non-legal visits, the two provisions in tandem provide that the FBI or its representative may attend and record any meeting Mr. Nozette has with a chaplain or other religious representative.

> provides that Mr. Nozette is to kept in solitary confinement. He is not only to be confined in a single-inmate cell, but also prohibited from making any statement which another inmates might overhear and from otherwise communicating with another inmate. *Id*.
>
> Access to radio, television, newspapers and other publications: Mr. Nozette is prohibited from access to radio and television and may only receive newspapers, books and other publications at the discretion of the FBI or other government officials. *Id.,* 13.

Mr. Nozette is presently housed at the D.C. Jail.[4] The restrictions and deprivations imposed by the SAM go well beyond those generally applicable to pretrial detainees at the D.C. Jail.[5]

At no time has the government requested the Court's approval of any of these draconian measures or otherwise asked the Court to impose any special conditions of detention. Further, there has been no allegation that Mr. Nozette has violated the rules and regulations of the D.C. Jail or any detention institution.

B. The Alleged Basis for the SAM

The October 21 Memorandum cited 28 C.F.R. § 501.3 as authority for imposition of the special measures. Attachment B.

§ 501.3 authorizes the Attorney General to direct the Director of the Bureau of Prisons to impose special administrative detention, including restrictions on housing, privileges, correspondence, visiting and contacts with the outside world where "reasonably necessary to

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[4]Mr. Nozette was detained at the Northern Neck Regional Jail in Warsaw, Virginia for several months prior to his transfer to the D.C. Jail. His claim is not specific to his incarceration at the D.C. Jail.

[5]The Rules and Regulations of the District of Colombia Department of Corrections may be found under the Programs Statement tab at its website.

protect persons against the risk of death or serious bodily injury." § 501.3(b) of this regulation provides that the inmate must be provided written notification of the basis for the restrictions absent justification in the interest of prison security or where necessary to prevent acts of violence or terrorism.

Mr. Nozette was provided a copy of the SAM and the accompanying Memorandum of October 21. As a basis for these restrictions, the Memorandum simply recites that "an FBI investigation has revealed that Nozette, a former member of the White House Space Council who assisted in the development of numerous sensitive U.S. government satellite programs, attempted to pass classified information to an undercover FBI agent posing as an Israeli intelligence officer." Attachment B, at 1. The Memorandum contains no recital suggesting that its implementation was necessary "to protect persons against the risk of death or serious bodily injury," as required by § 501.3(a).

On March 2, 2010, the Director of the Marshals Service sent a Memorandum to the Director of Office Operations requesting the removal of restrictions on Mr. Nozette's access to publications/newspaper, television and radio. Attachment C.[6] This Memorandum references another regulation, 28 U.S.C. § 501.2, as the source of the restrictions. § 501.2 provides that special administrative measures similar to those recited above may be imposed "to prevent the

[6]The March 1st Memorandum recites that the Director of the Counterespionage Section of the National Security Division of the Department of Justice and the FBI had concluded that permitting Mr. Nozette to listen to the radio, watch television and have access to news publications would not "compromise national security." Lacking in either this Memorandum or the prior one of October 21, 2009, is any suggestion why Mr. Nozette's access to television or radio or uncensored newspapers or magazines would have had the slightest effect on national security in the first instance or why it took these officials six months to figure out that the nation's security would not be compromised by Mr. Nozette reading such material or watching CNN or I Love Lucy reruns, for example. *See* Attachment B, ¶ 9(a)-(c); Attachment C.

disclosure of classified information." As a basis for the measures, the March 2, 2010 Memorandum similarly contains only a brief one sentence summary of the allegations. Because counsel is unaware of any suggestion that Mr. Nozette's restrictions have been imposed to prevent violence or terrorism, it is assumed that the reference to § 501.3(a) in the Memorandum of October 21, 2009 was a typographical error and that the restrictions are being imposed pursuant to § 501.2. Mr. Nozette's motion is made within that context.

Neither the Memorandum of October 21, 2009, nor that of March 1, 2010, recite any facts suggesting Mr. Nozette had prior inappropriate contacts with *actual* foreign entities or agents which he might renew from the jail. Also, neither Memorandum makes reference to any other circumstances of the alleged offense, such as the fact that the alleged acts of Mr. Nozette occurred after he was approached by agents of the United States - agents who were fully aware of - and participated in the source of - his vulnerabilities at the time and who nonetheless enticed him with promises of thousands of dollars and other promised benefits.

C. Mr. Nozette's Requested Visits with his Wife

Mr. Nozette's wife is Wendy McColough. They have been marred 17 years. Wendy is a graduate of Colombia Law School, a member of the New York bar since 1981 and the D.C. bar since 1983. She has worked as an attorney at the Department of Labor since 1992.

Wendy does not drive and thus was unable to visit Mr. Nozette when he was housed at Northern Neck. Shortly after his transfer at the D.C. Jail, counsel for Mr. Nozette contacted the government attorneys to arrange for Wendy to visit Mr. Nozette. Counsel requested that the visit be arranged as promptly as possible, as Mr. Nozette had been held in isolation for several months and was particularly anxious to visit his wife. Pursuant to the SAM, arrangements must be made

with government counsel and/or the FBI well in advance of the visit. Attachment A, at 9-10.

The proposed visit was initially scheduled for April 2, 2010. The visit was thereafter postponed at the insistence of government counsel, first until April 9, and later to April 14. Defense counsel was aware that the SAM authorized a government agent to attend the meeting and assumed that the monitoring agent would be a member of the taint team that had been previously established by the Magistrate to deal with issues concerning the search of Mr. Nozette's computer. Mr. Kyonaga therefore informed government counsel that he intended to be present during the visit. Thereafter, on April 12, Mr. Kiyonaga received a series of communications from government counsel stating that there might not be "room" for him to attend the meeting and suggesting that he needed to confirm his presence with the jail. During one of these phone calls late in the day, Mr. Kiyonaga was told that the agent who would monitor the visit was a member of the prosecution and not the taint team. In sum, the government apparently interpreted the SAM as authorizing its case agent to sit in on Mr. Nozette's meeting with his wife, use any statements that might be made by Nozette in his trial (because, in the government's view, Mr. Nozette was "waiving" any privilege) and do all this in the absence of his counsel because there might not be "room" for him.

The following day, April 13, defense counsel objected to the presence of the case agent in the meeting and suggested that a member of the taint team be substituted. In an effort to further accommodate the government, defense counsel also agreed that Mr. Nozette would not discuss his work during the visit. The government declined these suggestions, claiming that any spousal privilege would be "waived" by the presence of the case agent, whose presence was necessary "as he is familiar with the case and the classified information involved." E-mail from Heather

Schmidt to John Kiyonaga, 4-13-10, 2:46 pm.[7] The visit was canceled after defense counsel responded that "Although Dr. Nozette, and Mrs. Nozette, have been looking forward to this meeting for some time, we cannot in good conscience agree to proceed with the condition you propose." E-mail from John Kiyonaga to Heather Schmidt, 4-13-10, 5:41 p.m.

D. Summary of Mr. Nozette's Position

Mr. Nozette begins with the proposition the SAM is unconstitutional, as the Attorney General has no legal authority to unilaterally impose individualized "special administrative measures" on a pretrial detainee who has not violated any institutional rules. Mr. Nozette does not question the *Court's* power to impose whatever conditions it believes are reasonably necessary to a defendant's pretrial detention nor the government's right to seek judicial authorization for imposition of specific measures. Mr. Nozette also does not challenge a detention facility's ability to impose appropriate rules and regulations that apply across-the-board to all pretrial detainees or to a particular group of troublesome pretrial detainees under its authority to adopt content-neutral regulations affecting the safety and security of the institution or to protect the public. But the unilateral imposition of severe restrictions by order of the Attorney General on a *particularized* pretrial detainee through a so-called SAM is constitutionally far different, as this constitutes *punishment* imposed by a non-judicial official on an un-convicted defendant and is thus barred both by the Due Process Clause of the Fifth Amendment and the

[7]The government's response did not explain why the presence of the third party, the case agent no less, would be voluntary when that very presence was forced upon Mr. Nozette by the government's own SAM. Neither did the government attempt to reconcile its position that only the case agent could adequately monitor the visit because of his "familiar[ity] with the case and the classified information involved" with the fact that the Magistrate had previously established a taint team for other matters that required similar familiarity with the case.

relevant constitutional right being deprived or inappropriately restricted by the particular deprivation.

Even if the Court finds that the imposition of a SAM by the Attorney General on a specific pretrial detainee is not punishment and therefore not unconstitutional *per se*, the Court must still analyze the particular restrictions pursuant to the four part test of *Turner v. Safly,* 482 U.S. 78, 89-91 (1987). As can be gleaned from the discussion above, it is the government's inappropriate insistence that its case agent monitor the meeting with Nozette's wife that provided the impetus for this motion. The SAM also imposes severe and inappropriate restrictions in several additional areas, as well. Without waiving other objections to specific provisions of the SAM, Mr. Nozette will only address herein the application of *Turner* to this particular restriction of the SAM, as it has been interpreted and applied by the government. This analysis will show that the condition that a case agent monitor Mr. Nozette's visit with his wife is not, in the language of *Turner*, "reasonably related" to a cognizable penological interest and, at best, represents an "exaggerated response" to any legitimate concerns of the government. *Turner*, 482 U.S. 78, 89-90, 98 (1987).

II. Overview of the Relevant Supreme Court Cases

Mr. Nozette has not been convicted of any offense which forms the basis for the SAM, but, regardless, even convicted prisoners do not forfeit all of their constitutional rights upon entering the prison. *Turner v. Safly*, 482 U.S. 78, 84 ("Prison walls do not form a barrier separating prison inmates from the protections of the Constitution."); *Wolff v. McDonnell*, 418 U.S. 539, 555-56 (1974) ("There is no iron curtain drawn between the Constitution and the prisons of this country."). Nevertheless, restrictions on the constitutional rights of *convicted*

defendants will be upheld if "they are 'reasonably related' to legitimate penological interests. . . and are not an 'exaggerated response' to such objectives." *Beard v. Banks*, 548 U.S. 521, 528 (2006), citing *Turner*, 482 U.S. at 87 (restriction on particularly recalcitrant convicted inmates' access to newspapers, magazines and photographs upheld); *see also Overton v. Bazzetta*, 539 U.S. 126, 123 S.Ct. 2162 (2003) (upholding the limitation on, and in some instances, denial of visitation privileges for up to two years for convicted defendants in Michigan prisons who have repeatedly violated prisons' drug and substance abuse policies); *Turner v. Safley*, 482 U.S. 78, 107 S.Ct. 2254 (1983)(upholding restriction on convicted inmates' correspondence with inmates of other institutions on grounds of security, but striking down regulations prohibiting convicted inmates from marrying in the absence of permission of prison officials). Each of these cases stress the deference that must be accorded the judgment and expertise of prison administrators. *See Beard*, 548 U.S. at 530*; Overton*, 539 U.S. at 132 ("We must accord substantial deference to the professional judgment of *prison* administrators, who bear a significant responsibility for defining the legitimate goals of a *corrections* system") (emphasis added); *Turner*, 482 U.S. at 84 ("Where a state *penal* system is involved, federal courts. . . . accord deference to the appropriate prison authorities.")(emphasis added).

Turner establishes a four-part test for determining the reasonableness of prison regulations, directing courts to consider (1) whether there is a "valid rational connection" between the regulation and the asserted government interest (2) whether there are alternative means of exercising the right that remain open to prison inmates (3) the impact accommodation of the asserted constitutional right will have on guards and other inmates and the allocation of prison resources generally and (4) the absence of ready alternatives. *Id*., at 89-91. Subsequent

cases have applied *Turner* in evaluating the constitutionality of prison regulations. *Banks*, 548 U.S. at 531-33; *Overton*, 539 U.S. at 132-34. *Thornburg v. Abbott*, 490 U.S. 401, 414-19 (1989).

Each of these cases involved restrictions on the constitutional rights of convicted defendants by regulations applicable to the entire inmate population, or to a particularly problematic group of inmates, based upon a determination by prison officials that the regulations or restrictions were necessary to the safety, security and mission of the prison. None involved the constitutionality of a special regulation directed to an individual detainee. Mr. Nozette, in contrast, does not stand convicted of any offense related to imposition of the SAM. This distinction, standing alone, does not end the inquiry, however, as the Supreme Court has held that restrictions necessary to the safety and security of the institution may also be imposed on pretrial detainees. But, in so holding, the Court carefully distinguished between generalized restrictions and those which may constitute punishment prior to conviction in violation of the Due Process Clause of the Fifth Amendment. *Bell v. Wolfish*, 441 U.S. 520 (1979).[8]

Bell addressed the issue of regulations of and conditions in the MCI in New York City. Because *Bell* is the seminal Supreme Court case dealing with restrictions and deprivations imposed on pretrial detainees, it bears a closer look. The *Bell* plaintiffs contended that the policies of double-bunking and searching cells without prior notice and the requirement that books come from the publisher were unconstitutional in that they infringed upon their rights prior to conviction. In response to plaintiffs' assertion that double-bunking violated their right to due

[8]Mr. Nozette's unauthorized punishment argument is put forth as a Fifth Amendment due process violation rather than as a claim that the punishment is cruel and unusual under the Eighth Amendment because he has not been convicted of any crime underlying the SAM. Scrutiny under the Eighth Amendment only comes into play *after* a conviction complying with due process. *Bell*, 441 U.S. at 535, n. 16.

process, the court held that "the proper inquiry is whether those conditions amount to punishment of the detainee. For under the Due Process Clause, a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law." *Id*., at 535-36. Likewise, the Clause protects "a detainee from certain conditions and restrictions of pretrial detainment." *Id*., at 533. The threshold inquiry in the pretrial detainee cases is thus whether the regulation, at issue, is penal or regulatory. *Bell* noted that "[T]he factors identified in *Mendoza-Martinez* [cite omitted, *see infra*] provide useful guideposts in determining whether particular restrictions and conditions accompanying pretrial detention amount to punishment in the constitutional sense of the word." *Id*., at 538.[9] Because detention pending trial necessarily contemplates the "employ[ment] [of] devices that are calculated to effectuate this detention," *id*., at 537, and because double-bunking was instituted because of overcrowding at MCI, the Court held the practice did not constitute punishment and thus did not violate due process.[10]

In addition to the due process claim, the *Bell* detainees alleged that the book and search regulations violated specific constitutional guarantees, namely their First and Fourth Amendment

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[9]*Bell* went on to observe that "[A]bsent a showing of an expressed intent to punish on the part of detention facility officials, that determination generally will turn on 'whether an alternative purpose to which [the restriction] may rationally be connected is assignable to it, and whether it appears excessive in relation to the alternative purpose assigned. . . .' [citation omitted]." *Id*., at 538. Obviously, the Attorney General is unlikely to expressly state that the SAM is designed for the purpose of punishment when there has been no allegation that its subject has violated institutional rules, but, as argued in the next section, the fact that it is directed to a specific individual based solely on conduct for which the Attorney General has indicted the detainee, and for whom he seeks significant penalties, is strong evidence that the SAM functionally constitutes punishment.

[10]There was no suggestion in *Bell* that the double-bunking policy was directed to any particular pretrial detainee or that it was invoked as punishment for violation of the institution's rules. *See also Block v. Rutherford*, 468 U.S. 476 (1984) (upholding institution-wide policy prohibiting contact visits of pretrial detainees).

rights. *Id.,* at 544-560. Balancing these retained constitutional rights against the deprivations associated with any lawful incarceration, the court held that the "mutual accommodation" between these concerns "applies equally to pretrial detainees and convicted prisoners," *id*., at 546, and that prison officials must therefore be accorded deference "in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security." *Id*., at 547.

In sum, these cases hold that deprivations and restrictions that are imposed on pretrial detainees for the purpose of punishment violate due process, as a defendant may not receive punishment prior to conviction. Deprivations and restrictions on pretrial detainees that implicate other constitutional guarantees are constitutionally acceptable if imposed by prison officials because they are related to institutional security and discipline, as evaluated under the *Turner* test, and if they are not an "exaggerated response" to such concerns.

The SAM imposed on Mr. Nozette fails on both counts.

III. The Attorney General Has No Power to Issue a SAM Imposing Draconian Restrictions on an Individual Pretrial Detainee

Bell compels the conclusion that the SAM is unconstitutional if it constitutes punishment before conviction. Several factors indicate that the SAM is just that. First, the fact that it is directed solely to Mr. Nozette strongly suggests its punitive character. Each of the restrictions addressed in the above cases involve regulations and policies imposed either institutionally across-the-board as in *Turner, Overton and Bell*, or directed to a particularly narrow group of inmates who had repeatedly violated the institution's rules, as in *Beard* and *Overton*. None involved the severe deprivation of the rights of a particularized inmate not alleged to have

otherwise violated any institutional rule or to have violated the law while incarcerated in the institution.

The language of the Memorandum of October 21 also evidences the SAM's purpose as punishment. That Memorandum recites Mr. Nozette's reported passage of national defense information to an undercover FBI agent as the basis of the severe restrictions of the SAM. Restrictions and deprivations based on particularized conduct are normally incident to and constitute punishment.

Bell also noted that the same considerations used to evaluate whether an Act of Congress is penal or regulatory also bear on the issue of whether the regulation constitutes unconstitutional punishment of a pretrial detainee, citing *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963) (setting out factors for evaluating the penal vs. regulatory character of statutes). *Bell*, 441 U.S. at 538. Applying the *Mendoza-Martinez* factors, the SAM involves "affirmative disabilities and restraints", which have been "historically regarded as a punishment."[11] Further, the SAM is based on a finding of *scienter*,[12] its operation "promotes the traditional aims of punishment - retribution and deterrence,"[13] it applies to behavior that "is already a crime," and, for several reasons otherwise discussed herein, is "excessive in relation to the alternative purpose

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[11]Severe restrictions and deprivations of the kind imposed by the SAM are usually reserved for the punishment and rehabilitation of inmates accused of institutional misbehavior. *See Wolff v. McDonnell*, 418 U.S. 539 (!974) (discussing due process for prison disciplinary hearings)

[12]The SAM recites the very conduct for which Mr. Nozette is indicted, which requires *scienter*. *See* 18 U.S.C. § 798 ("whoever *knowingly* and *wilfully*. . . .)

[13]*Overton v. Bazzetta*, 539 U.S. at 129 (restrictions on visitation imposed to punish and rehabilitate prisoners engaged in continued substance abuse).

assigned." *See* 372 U.S. at 168-69.

The Supreme Court has held that pretrial detention imposed by a *court* pursuant to the Bail Reform Act is regulatory rather than punitive. *United States v. Salerno*, 481 U.S. 739, 746-47 (1987). The absence of the very factors which *Salerno* cited in support of that conclusion also strongly supports characterization of this pretrial SAM as punitive rather than regulatory. *Salerno* concluded that the Bail Reform Act is regulatory in large part because of the due process procedural protections inherent in the Act, including the right to a prompt judicial hearing within five days with its accompanying right to cross-examine witnesses, present evidence and enjoy the representation of counsel, 18 U.S.C. 18 U.S.C. § 3142(f), and the substantive limitations on the length and conditions of such detention (pretrial detainee should be held in a "facility separate, to the extent practicable, from persons awaiting or serving sentences or being held in custody pending appeal," pursuant to 18 U.S.C. § 3142(i)(2)). *See* 481 U.S. at 747-48. The appropriate domain of the Attorney General is therefore to petition the Court for imposition of any condition he deems necessary to protect the public - not to unilaterally impose them himself before conviction. If he elects to make such a motion, Mr. Nozette can respond and the Court can then address the requests in the course of judicial proceedings, consistent with fair play and due process.

There is another important distinction between the above cases and the SAM. The deference normally accorded to prison officials in matters of security and safety of the institution, a cornerstone of those decisions, is not a consideration here. Indeed, there is no claim that the SAM was issued at a result of the prison officials' exercise of such judgment. Rather, it was issued by the prosecutor, Attorney General, who directed the United States Marshal to impose the

restrictions. Thus the deference undergirding *Bell*, *Turner*, *Overton* and other "prisoner rights" cases thus has no applicability.

The majority of cases dealing with SAMs concern those imposed on convicted defendants, who are subject to the traditional purposes of punishment, including retribution, deterrence and rehabilitation. While there are a few reported upholding SAMs on pretrial detainees, there is little meaningful discussion of the fundamental question of whether a SAM placed on a pretrial detainee actually constitutes punishment within the regulatory/penal framework of *Bell v. Wolfish* and *Kennedy v. Mendoza-Martinez*. In *Basciano v. Lindsay*, 530 F. Supp. 2d 435 (E.D. N.Y. 2008), the court upheld a pretrial SAM placed on the leader of the Bonanno crime family, but this was based on conduct committed while in the institution, as the evidence established that the defendant had successfully solicited a murder while incarcerated and awaiting trial on racketeering charges and composed a "hit list" of five others while there. That severe institutional restrictions are placed on a detainee who executes murderous schemes while incarcerated is hardly surprising as prisons have historically imposed restrictions on defendants who engage in serious prison misconduct.

SAMs imposed on pretrial detainees charged with terrorism have also been upheld in *United States v. El Hage*, 213 F.3d 74, 81-2 (2nd Cir. 2000) (to prevent secretary of Osama Bin Laden in the Kenya and Tanzania Embassy bombing cases from communicating with co-conspirators) and *United States v. Abu Ali*, 396 F.Supp. 703 (E.D.Va. 2005)(defendant member of al Qaeda charged, *inter alia,* with conspiracy to assassinate the President and conspiracy to commit air piracy). But both *El-Hage* and *Abu-Ali* mistakenly collapse *Bell's* penal v. regulatory inquiry concerning pretrial detainees into the *Turner* inquiry. Mr. Nozette does not question that

the *Turner* analysis - adopted and thereafter applied by the Supreme Court in context of convicted prisoners serving sentences - also has a role in the detainee context. But this role only ripens *after* analysis of all the evidence suggesting whether the SAM directed to an individual detainee is punitive or regulatory. Rather than independently analyze *Martinez-Mendoza* and the other factors relevant to the penal/regulatory inquiry, both *El-Hage* and *Abu Ali* effectively skipped this step and instead simply used the *Turner* test to answer both questions.

Because the serious deprivations entailed by the SAM constitute punishment inflicted on an individual pretrial detainee and cannot be justified by deference to the prison administrator's expertise concerning the safety and security of the institution, the unilateral imposition of the SAM by the Attorney General violates Mr. Nozette's due process right to be free from punishment prior to conviction. As noted, the Attorney General is not without remedy. He may petition this Court for an Order imposing various restrictions on Mr. Nozette's pretrial confinement, which is governed by the provisions of the Bail Reform Act, 18 U.S.C. § 3141. Mr. Nozette does not contend that this Court is without power to impose to appropriate conditions to reasonably assure the safety of the community, whether he is released on bail or detained.

IV. Irrespective of the Attorney General's Power to Issue the SAM, *ab initio*, the Requirement that a Case Agent Monitor Visits Between Mr. Nozette and His Wife Fails to Satisfy the Four Part Test of *Turner v. Safly*, *supra*, and Represents an Exaggerated Response to the Government's Concerns.

While the SAM places numerous inappropriate and unnecessary restrictions on Mr. Nozette, as noted above, the initial impulse for this motion was the government's overreaching insistence that its case agent monitor the interview and its rejection of counsel's alternative

suggestion that a taint team agent be substituted. That said, it should be clear that the defense's position is that there is no need for any government agent to sit in on Mr. Nozette's visit with his wife. Mr. Nozette's wife is a licensed attorney in good standing and a long-time employee of the U.S. government. Counsel is unaware of any allegations that she is involved in the misconduct alleged in this case or that she has had inappropriate contact with any foreign agents or that she has any motive to do so. Appropriate instructions to both Mr. Nozette and his wife concerning the limitations of permissible topics during their visits are sufficient. As noted in the beginning, counsel's initial suggestion that a taint team agent monitor the visit was simply to avoid a last-minute cancellation of the anticipated visit, not an admission that the presence of any agent is necessary or appropriate.

But, even if the Court finds that the Attorney General has the power to issue the SAM and its provisions are thus analyzed under the deferential standard of the *Turner* line of cases, the requirement that the case agent sit in and monitor Mr. Nozette's visit with his wife cannot pass constitutional muster. This analysis must begin with recognition of the important and constitutionally cognizable interests that are implicated for both Mr. Nozette and his wife - concerns grounded in the First Amendment and the interests of a detainee in having visitors and maintaining the marital relationship as much as possible in light of the incarceration.

First, the Supreme Court has long recognized the right to intimate family relationships is an essential component of liberty protected by the Constitution. *Meyer v. Nebraska*, 262 U.S. 390, 399 (1925); *Roberts v. United States Jaycees*, 468 U.S. 607, 617-618 (1982) (right of association includes the "choice[] to enter into and maintain intimate human relationships [and] must be secured against undue intrusion by the State because of the role of such relationships in

safeguarding the individual freedom that is central to our constitutional scheme."). Prison does not place unnecessary barriers to maintenance of such relationships. "Access [to prisoners] is essential. . . . to families and friends of prisoners who seek to sustain relationships with them [citation omitted]." *Thornburg v. Abbott*, 490 U.S. 401, 407 (1989); *see also Overton v. Bazzetta*, 539 U.S. at 134 (noting that two year bar on visitors (other than attorney and clergy) imposed on inmates who commit multiple substance violations is "severe").[14]

Second, the restriction impinges on Mr. Nozette's right to meaningfully communicate with his wife. The Supreme Court has held that there is a "constitutionally protected marital relationship in the prison context," noting that:

> "Many important attributes of marriage remain, however, after taking into account the limitations of prison life… emotional support and public commitment… an exercise of religious faith as well as an expression of personal dedication… and other, less tangible benefits… These incidents of marriage, like the religious and personal aspects of the marriage commitment, are unaffected by the fact of confinement or the pursuit of legitimate corrections goals.

Turner v. Safley, 482 U.S. at 95-6. Visiting one's spouse with a government agent charged with attempting to place the detainee in prison (here, possibly for the rest of his life) is hardly consonant with the intimate conversations envisioned by the marital relationship. In fact, the case agent's very presence would likely undermine and inhibit expression of the very emotional bonds expected to accompany marital communication in these circumstances. As noted, *Turner*

[14]Overton upheld the regulation as reasonably related to a penological objective since it was imposed only on those who have seriously violated the institutions rules on a number of occasions. In so doing the Court noted that these inmates may still communicate with outsiders by phone and letter. *Id*., at 135. In addition to Mr. Nozette not being accused of any prison misconduct, these alternatives are not available under or severely restricted by the SAM. *See* Attachment B, at 7-9.

struck down a prison regulation that impinged on the marital relationship in the context of convicted defendants.

Third, the SAM also implicates the First Amendment rights of both Mr. Nozette and his wife. "A prison inmate retains those First Amendment rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system." *Pell v. Procunier*, 417 U.S. 817, 822 (1974). Mrs. Nozette also has a cognizable First Amendment claim to communicate with her husband even though he is incarcerated. *Thornburg v. Abbott*, 490 U.S. 401, 407 (1989) ("prison walls do not. . . . bar free citizens from exercising their own constitutional rights by reaching out to those on the 'inside.'"); *Procunier v. Martinez*, 416 U.S. 396, 408 (1974) ("Whatever the status of a prisoner's claim to uncensored correspondence with an outsider, it is plain that the latter's interest is grounded in the First Amendment's guarantee of freedom of speech.").[15]

As interpreted by the government to require the presence of a case agent during Mr. Nozette's visits with his wife, the SAM fails even the deferential four-part *Turner* analysis:

(1) Is there a "valid rational connection" between the regulation and the asserted

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[15] *Martinez* established a two-step test concerning a prison regulation's encroachment on First Amendment rights, asking first whether the regulations "further[s] an important or substantial governmental interest unrelated to the suppression of expression," and if so, whether the regulation is "greater than necessary or essential to the protection of the particular government interest involved." 416 U.S. at 413-14. The issue in *Martinez* was censorship of both incoming and outgoing prisoner mail by the California Department of Corrections. Drawing a distinction between the two, *Thornburg* overruled *Martinez* as applied to incoming mail only and adopted the "reasonable relation" test of *Turner* concerning this category of prisoner mail. 490 U.S. at 413. The distinction need not be pursued here because, as argued immediately below, the SAM, as interpreted to require the case agent's presence, fails even the more deferential *Turner* standard.

government interest? 482 U.S. at 89. Accepting, *arguendo*, such a rational connection,[16] this factor bears little weight when joined with the remaining three factors.

(2) Is there an alternative means of exercising the right available to Mr. Nozette? *Id*., at 90. The alternative of having the case agent present is not an acceptable substitute as it imposes numerous dangers that Mr. Nozette should not be forced to undergo to visit with his wife. It requires Mr. Nozette to waive not only his spousal privilege [according to the government's theories], but also his privilege against self-incrimination. The case agent's express purpose is to assist the prosecution in its quest to convict Mr. Nozette and subject him to severe penalties. Everything the agent hears or see is subject to being parsed for that purpose and presented in that light. Given the seven months since his arrest and his isolation during this period, it would hardly surprising if the meeting between Mr. Nozette and his wife is emotional for both and their unguarded comments could easily be subject to misunderstanding and misuse by an agent eager to advance his own agenda. To take a simple example, what if Mr. Nozette were to look at his wife and suddenly blurt out "I'm sorry?" An agent, or prosecutor, blinded by the goal of conviction, might interpret this as an admission, while the speaker may have only meant the remark as a general apology for the circumstances in which the other spouse is now found. Further, Mr. Nozette may want to confide in the person with whom he has the most intimate

[16]On the one hand, one can posit a rational connection between the government's asserted interest in preventing Mr. Nozette from communicating classified information and requiring that all his visits, including that with his wife, be monitored. On the other, such reasoning would justify limitations on every inmates' rights on the speculative basis that he might commit a crime during the visit, be it threats to potential witnesses, instructions to confederates concerning commission of additional crimes, solicitation of contraband or a host of other easily-conjured evils. Although there is perhaps limited room for consideration of a defendant's pre-incarceration conduct, normally such restraints are imposed based on the inmate's abuse of visitation or telephone privileges in the prison.

connection information concerning his present mental state or, irrespective of any question of classified information, may want to discuss how his lawyers view the case or the intended defense strategy. Mr. Nozette and his wife may wish to discuss intimate family matters, including the very private medical condition of both spouses or similarly private issues that may have arisen concerning the family since his incarceration. The government's case agent is simply not entitled to insight into these confidential matters under the guise of the SAM. Finally, as a practical matter it takes little imagination to envision the potential for mischief and creation of messy issues that might spring from the case agent's intrusion into and monitoring of these visits.

(3) The impact of the accommodation of the asserted right on guards, other inmates and prison resources: *Id*. It makes no difference whether the Court rules that no monitor is required or that defense counsel or a taint team agent can serve as the monitor. None of these alternatives will have any more impact on prison security and resources than monitoring by the case agent (none have any impact).

(4) The absence of ready alternatives (which may suggest reasonableness of the regulation): *Id*., at 90-91. There are other readily available and equally viable options. As stated, the defense does not believe that any monitoring is necessary if appropriate instructions are given to Mr. Nozette and his wife. If the Court does decide that the visit should be monitored, this can be accomplished by the attendance of defense counsel, alone. If the Court Security Officer has concluded that defense counsel can be trusted with the classified and national defense information, this finding, coupled with defense counsel's obligations to the Court and the Bar, provide adequate assurance that Mr. Nozette and his wife will not discuss inappropriate matters.

As a last resort, monitoring by a taint team agent is an additional ready alternative to the presence of the case agent. The government's claim that the case agent must be present "as he is familiar with the case and the classified information involved," *supra*, is unworthy of serious response. Clearly, a taint team agent can be briefed both by the case agent and the prosecutor as to any subject areas that might lead to the revelation of classified information. And, if necessary, the taint team agent could also review the file to provide further guidance. As noted above, this discussion is academic in any event, as a taint team composed of prosecutors and agents is already in place and, as the sealed pleading previously filed by that team reveals, its members are perfectly familiar with the facts of Mr. Nozette's case and can easily monitor the proposed visit.

Application of the *Turner* factors thus suggests that the government's attempt to require the presence of the case agent is not reasonably related to its asserted interest, but rather an "exaggerated response" to its asserted concerns. *See Turner*, 482 U.S. at 97-98. Indeed, it is nothing short of a naked attempt to further its goal of convicting Mr. Nozette.

V. Conclusion

For the reasons stated herein, Mr. Nozette requests that the Court enter an Order striking, in its entirety, the SAM imposed by the Attorney General on October 21, 2009, as modified by the Memorandum of March 1, 2010, as this SAM constitutes individualized punishment of Mr. Nozette without due process of law. Mr. Nozette has no objection to the Court staying implementation of this Order for a reasonable period of time to permit the government to file any motion addressing the conditions of Mr. Nozette's pretrial confinement that it deems appropriate and permitting the defense to appropriately respond.

Because of its immediacy, Mr. Nozette asks the Court to promptly address the issue concerning the visit with his wife. Because the government cannot under any circumstances establish that the presence of the case agent is either necessary or consistent with the applicable law, Mr. Nozette asks the Court to enter an Order at this time either permitting an unmonitored visit with his wife or requiring the presence of defense counsel alone as the monitor. Alternatively, as a last resort, Mr. Nozette asks the Court to order that a taint team member attend the meeting rather than a case agent.[17]

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[17]There is another unstated and disturbing aspect to this SAM. Its underlying premise is that the government can isolate Mr. Nozette and prohibit all normal human interactions by Mr. Nozette in the unlimited future. The October 21 Memorandum suggests the extreme measures of holding Mr. Nozette in solitary confinement and not permitting him to make any statement that another inmate might overhear, Attachment B, at 12, are being imposed because Mr. Nozette has worked on several sensitive satellite programs at the White House Space Council and thus, at a minimum, likely has sensitive information "in his head." But, of course, what Mr. Nozette knows is unlikely to change. While § 501.2 (c) limits the SAM to one year, it provides that the Attorney General can renew the SAM in his discretion with no time limitations. Thus, if the government is successful in its attempt to convict Mr. Nozette, the SAM apparently authorizes the government to hold Mr. Nozette totally incommunicado for his entire term of incarceration (up to life) or until he develops Alzheimer's or some other mentally disabling affliction which causes him to "forget" what he knows. The Supreme Court has held that regulations that are otherwise sustainable pursuant to the discretion and expertise of prison experts may fail constitutional scrutiny if they amount to a "*de facto* permanent ban" on exercise of the asserted right. *Overton v. Bazzetta*, 539 U.S. at 134. The government's only other option thus is to seek execution of this accomplished scientist who has contributed so much to his nation's agenda in order to ensure that no person not approved by the government ever "overhears" him again. While this sounds far-fetched in light of the both the law and the facts, the government has still not responded to either defense counsel or this Court's request concerning its intention to seek the death penalty despite its clear inapplicability. 18 U.C.S. § 794 does provide for the death penalty for attempts to violate its provisions, but it is almost certain that application of the death penalty provision to an *attempted* violation in the context of a sting by FBI agents where no national defense information was actually passed to an unauthorized person, and where no life was taken, would be unconstitutional. *See generally Kennedy v. Louisiana*, 128 S.Ct. 2641 (2008) (Eighth Amendment bars death penalty for child rape). Further, the allegations do not even facially satisfy the required statutory aggravators for the death penalty for violations of § 794, as Mr. Nozette has not previously convicted of espionage or treason, his alleged offense apparently did not create a "grave risk of death" to anyone and no principled argument can be

Respectfully submitted,

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made that the offense constituted a "grave risk to national security," again because no information was actually passed to an unauthorized recipient. *See* 18 U.S.C. §§ 3591(a)(1) & 3592(b)(1)-(3). Whether the imposition of these draconian SAM provisions and the government's dragging of its feet on the death penalty issue springs from any realistic fear that Mr. Nozette will actually attempt to communicate any national defense information in the future or from more unflattering concerns will likely surface as the case proceeds.