IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FAWZI KHALID ABDULLAH FAHAD AL ODAH, *et al.,*	)	
Plaintiffs,	)	
	)	
v.	)	**No. CV 02-0828 (CKK)**
	)	
UNITED STATES OF AMERICA, *et al.,*	)	
	)	
Defendants.	)	
	)	

AL ODAH PLAINTIFFS' SEPARATE REPORT TO JUDGE GREEN CONCERNING DEFENDANTS' PROPOSED PROTECTIVE ORDER[1]

Introduction

Fawzi Khalid Abdullah Fahad Al Odah, *et al*., plaintiffs in this civil action [collectively, the "Kuwaiti Detainees"], join in the objections raised by petitioners in the other Guantanano Bay cases to the proposed Protective Order ("PPO") drafted by defendants [the "government"]. However, the Kuwaiti Detainees have additional objections that are set forth below and that reflect their unique experience litigating this case with the government for more than two and a half years. This experience has taught the Kuwaiti Detainees that one of the government's tactics is to delay and obstruct the Kuwaiti Detainees' ability to have their day in Court. The Kuwaiti Detainees write separately to demonstrate the unjust and unwarranted provisions that are included in the PPO and that among, other things, would add to that delay or obstruction. For those reasons alone the Court should not approve the PPO.

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[1] Counsel for petitioners in *El-Benna v. Bush*, Civil Action No. 04-CV-1144 (RWR) have authorized counsel for the Kuwaiti Detainees to state that petitioners in *El-Benna* join in this separate report.

Specific Objections to PPO

Paragraph 1: The Kuwaiti Detainees object to the creation of a broad category of information denominated "protected information" whose public disclosure is prohibited and whose internal dissemination is severely restricted under the PPO. The Kuwaiti Detainees do not oppose incorporating provisions to protect against the disclosure of nonclassified information that may jeopardize national security interests, such as the names of guards at the Guantanamo Bay Naval Base. But as the Kuwaiti Detainees will point out later, the government's proposed definition of "protected information" is so broad that the government could use it to cover virtually any information it chooses.

Paragraph 6: This paragraph incorporates the provisions of the "Procedure for Counsel Access to Detainees at the US Naval Base in Guantanamo Bay, Cuba," which have been challenged by the Kuwaiti Detainees. Although it says it will not apply to provisions "overriden by the Court," it is not known when the Court will rule on the Kuwaiti Detainees' challenge, and the Kuwait Detainees should not be compelled to abide by the challenged provisions until the Court has finally ruled on their validity.

Moreover, the government's new counsel access procedures make it clear that all verbal information provided by the Kuwaiti Detainees to counsel must be deemed classified unless and until a "privilege review team" advises counsel otherwise. This is similar to a procedure proposed by the Kuwaiti Detainees as a ***substitute*** for the "real-time monitoring" that three of them are made subject to under the government's counsel access procedures. However, under this paragraph those Kuwaiti Detainees would be subject to this procedure ***in addition*** to being subject to "real-time monitoring." This is unjustified.

Paragraph 11: The Kuwaiti Detainees object to the definitions of "protected information and/or documents," "protected information," and "protected documents" because they are overbroad and not carefully tailored to serve the government's protective interests. The government's definitions cover (1) all nonclassified information that has not been filed in the public record in the government's factual returns (2) and all nonclassified information that the government designates as "protected" because its storage, handling, and control "require special precautions" to protect the national security or to protect "other significant interests." These definitions would allow the government unilaterally to designate virtually ***any*** information as "protected" and, therefore, prohibited from public disclosure under paragraphs 35-38 of the PPO.

There is no reason for such a broad definition of "protected information." As the Department of Justice's regulations provide, 28 C.F.R. § 50.9, "[b]ecause of the vital public interest in open judicial proceedings, the Government has a general overriding affirmative duty to oppose their closure." There are strict guidelines governing the closure of judicial proceedings and the sealing of nonclassified court filings that do not involve classified information, and government attorneys may not seek or consent to such closure without the express authorization of the Deputy Attorney General or the Associate Attorney General. 28 C.F.R § 50.9(c), (d). There has been no showing by the government that these requirements have been met with respect to the "protected information" defined in this paragraph.

Paragraph 12: The definition of "petitioners' counsel" includes "paralegals" and "support staff employed or engaged to assist in the litigation." Yet in the present case the government has refused to issue security clearance forms or to commit to expedite security clearances for the Kuwaiti Detainees' paralegals and support staff. These paralegals and support

staff cannot be bound by the provisions governing the handling of classified information as long as the government effectively denies them access to this information.

Paragraph 29: The Kuwaiti Detainees oppose the prohibition on disclosing classified information to other counsel in the Guantanamo Bay cases that have appropriate security clearances and a "need to know" the information. It is entirely conceivable that issues common to all the Guantanamo Bay cases may arise based on classified information that counsel in those cases will want to share for purposes of preparing a common position. Indeed, one of the rationales for the coordination and management of these cases put forth by the government and acknowledged by the Court is the presence of common issues. The government has failed to demonstrate why this prohibition is necessary.

Paragraph 30: The Kuwaiti Detainees oppose the prohibition on disclosing classified information not provided by a detainee to the detainee to the extent that information bears on the reasons given by the government for his detention. Under the Supreme Court's decisions, the Kuwaiti Detainees are entitled to know ***all*** the reasons for their detention by the government. Counsel for the Kuwaiti Detainees cannot fulfill their professional duty of developing and presenting the Kuwaiti Detainees' claims to this Court if they are prohibited from discussing with them, and ascertaining facts that may be used to rebut, classified information relied upon by the government to justify their detention. If the government decides that, for reasons of national security, it does not wish to disclose such information to a detainee, then, as occasionally happens in criminal cases, the government should be compelled to release that detainee.

Furthermore, although this paragraph authorizes counsel for the Kuwaiti Detainees to request the declassification of any classified information they wish to share with the detainees, the request would be forwarded by a "privilege review team" to "the appropriate government

agency authorized to declassify the classified information for a determination." The information could not be shared with the detainee until "[t]he privilege review team … inform[s] petitioners' counsel of the determination …" There is no timeframe for this determination and it could take months or years. Therefore, this proposed declassification procedure is illusory.

Paragraphs 35-45: The Kuwaiti Detainees object to the prohibitions and proscriptions for dealing with "protected information" because of the overbreadth of the definition of such information, as described above.

Paragraph 46: The Kuwaiti Detainees object to this paragraph to the extent it includes "protected information" as defined in the PPO, and to the extent there is no timeframe for a determination by the "appropriate agencies" that the proposed filing does not contain classified information. Furthermore, as mentioned above, the government has failed to show it has complied with 28 C.F.R. § 50.9 in seeking the closure and sealing of nonclassified filings.

Paragraph 48: The Kuwaiti Detainees object to this provision to the extent it permits the government to justify its detention of them on the basis of classified information the government refuses to disclose to them or their counsel. The PPO imposes extensive constraints and prohibitions on the Kuwaiti Detainees and the petitioners in the other Guantanamo Bay cases. Yet in this paragraph the government proposes that the PPO function, if the government so chooses, as a one-way street. Under the Supreme Court's decisions, and in light of the security clearances granted to counsel for the Kuwaiti Detainees, the government should be obligated to share with counsel ***all*** classified information upon which the government relies to justify its detention of the Kuwaiti Detainees.

Paragraph 49: The Kuwaiti Detainees object to the admonition in this paragraph that "indirect unauthorized disclosure" by recipients of classified information or "protected

information" could jeopardize national security and, presumably, subject those recipients to sanctions and criminal penalties. The term "indirect unauthorized disclosure" is neither defined nor limited, and it could be used by the government to justify the institution of sanctions or criminal proceedings for wholly innocent conduct.

Conclusion

For these reasons and the reasons given by petitioners in the other Guantanamo Bay cases, plaintiffs respectfully submit that defendants' proposed Protective Order should not be approved by the Court.

Respectfully submitted,

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