

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FAWZI KHALID ABDULLAH FAHAD)
AL ODAH, *et al.*)

Plaintiffs,)

v.)

Civil Action No. 02-CV-0828 (CKK)

UNITED STATES OF AMERICA,)
et al.,)

Defendants.)

**RESPONDENTS' OPPOSITION TO PETITIONER'S EMERGENCY MOTION
TO MODIFY ORDER OF AUGUST 17, 2004**

INTRODUCTION

This case is one of fourteen similar cases challenging the legality of the detention of alien enemy combatants held at Guantanamo Bay, Cuba, in connection with hostilities involving al Qaeda, the Taliban, and their supporters. By Order dated August 17, 2004, the Calendar and Case Management Committee of the Court designated Senior Judge Joyce Hens Green "to coordinate and manage all proceedings in these matters and to the extent necessary, rule on procedural and substantive issues that are common" to the cases. Further, on September 15, 2004, the Court adopted a Resolution of the Executive Session authorizing the transfer of Guantanamo Bay detainee cases to Judge Green "for coordination and management," and, on September 17, 2004, Judge Kollar-Kotelly transferred this case to Judge Green for such coordination. *See* Order of Sept. 17, 2004. Petitioner-plaintiffs' Emergency Motion to Modify Order of August 17, 2004 seeks to carve out from the coordination regime established by the

Court petitioners' pending challenge to counsel access procedures being applied by the government with respect to visits and communications by counsel with petitioner-detainees in this and the other related cases, so as to permit a ruling from Judge Kollar-Kotelly with respect to the *Al Odah* petitioner-detainees alone. As explained below, because the counsel access issues upon which petitioners seek a ruling are common to all of the pending cases, the emergency motion improperly seeks to disrupt and bypass the coordination process ordered by the Court and should be denied.

ARGUMENT

The counsel access issues involved were raised in briefing and argument before Judge Kollar-Kotelly concluding on August 16, 2004. After entry of the August 17, 2004 coordination order, petitioners, on September 2, 2004, sent a letter to Judge Green urging Judge Green to rule immediately on the counsel access issues. Apparently dissatisfied that a ruling has not issued, petitioners now seek a modification of the August 17, 2004 Order to obtain authorization for Judge Kollar-Kotelly to rule on the issues in *Al Odah* alone. See Petitioners' Emergency Motion to Modify Order of August 17, 2004 at 8 (filed Sept. 15, 2004) ("Emerg. Mot.")¹ Petitioners claim that the August 17th Order should not apply with respect to the counsel access issues because: (1) the issues were briefed and argued before Judge Kollar-Kotelly prior to entry of the August 17th Order; (2) the counsel access issues are not common to the Guantanamo Bay cases because whether real-time monitoring of counsel-detainee meetings is appropriate is an issue only with respect to three of the twelve petitioners in this case and none of the petitioners in the

¹ Petitioners' emergency motion was filed before Judge Kollar-Kotelly transferred this case to Judge Green for coordination and management.

other cases; and (3) the assignment of the coordination function to Judge Green has caused a delay in counsel's ability to have access to the petitioner-detainees in this case. *See* Emerg. Mot. at 8-10. These stated bases offered to justify modification of the August 17th Order do not support the requested modification of the coordination scheme ordered by the Court.²

Contrary to petitioners' argument, the counsel access issues raised by petitioners are common to the Guantanamo Bay cases, and, thus, the need for a coordinated ruling on the issues is manifest. The counsel access issues involved in this matter are not limited, as petitioners suggest, merely to whether the government may monitor, in real-time, conversations between counsel and the three petitioner-detainees for whom monitoring has been required. Rather, petitioners have also challenged the authority of the government to review – via a privilege team walled off from participation in any court or military proceedings concerning the detainee – mail and other document exchanges (*e.g.*, documents brought into and out of meetings) between counsel and petitioner-detainees for classification and other purposes. *See* Memo. in Opposition to Defs' Response to Complaint (Docket No. 48) at 9-13, 21. Petitioners even challenge the governments' ability to control the number of counsel in each meeting with a petitioner-detainee and to obtain a signed statement acknowledging that counsel, after conferring with a petitioner-detainee, has actually been authorized by the detainee to represent him in this case (which is currently styled as a "next friend" petition). *See id.* at 21. Further, petitioners ask the Court to replace the reasonable and necessary counsel access procedures currently being applied by the government with a regime under which the government has no role except to authorize any

² Further, it is unclear that petitioners' motion, filed only in this case, is a proper vehicle for seeking modification of a coordination regime implemented by the Court through the Court's Calendar and Case Management Committee and the Resolution of the Executive Session.

public disclosure of information counsel learn from the detainee or otherwise in the case – a regime that, as proposed by petitioners’ counsel, would cede to counsel the role of discerning and disclosing information learned from the detainee regarding possible future terrorist activity or other national security threats, a role that, under the government’s access procedures, is reserved to the specially trained privilege team.

Thus, the issues raised regarding counsel access involve far more than merely whether real-time monitoring of communications is appropriate, as petitioners seek to portray the matter in their current motion. Because similar issues regarding handling of mail and other written communications, as well as the other matters petitioners raise, are or will be common to all of the Guantanamo Bay detainee cases as counsel in those cases begin visiting and communicating with the petitioner-detainees in the cases,³ a coordinated ruling on these issues is essential. A ruling on the issues in *Al Odah* alone would require relitigation of the same issues with respect to the other cases, and could potentially produce inconsistent rulings that would require observance of multiple, distinct counsel access regimes among the pending cases, in turn presenting extreme and unworkable logistical difficulties for the government. For this very reason, the counsel access issues were cited by respondents – in the motion that ultimately led to the Calendar Committee’s coordination order – as prime examples of the common questions demonstrating

³ Indeed, in cases other than *Al Odah*, where counsel visits or mail have been involved, counsel have already raised issues with respect to the handling of mail and documents intended for delivery to or from petitioner-detainees.

Based on those experiences and issues that have arisen in recent days, the government intends shortly to issue supplemental guidance and procedures regarding the handling of counsel-detainee mail and document exchanges.

the need for coordinated proceedings in the cases.⁴ See Respondents' Motion for Joint Case Management Conference, Entry of Coordination Order, and Request for Expedition (filed August 4, 2004) at 12. Further, the issue of counsel access procedures in these cases has been discussed with Judge Green in one of the conferences she has held in her role as coordinating judge for these cases and in a September 1, 2004 letter she requested from respondents' counsel. Given the impact that a ruling on the counsel access issues raised in *Al Odah* will likely have on all the Guantanamo Bay cases, any such ruling should be coordinated by and through Judge Green pursuant to her role under the August 17th Order, the Resolution of the Executive Session, and Judge Kollar-Kotelly's transfer order of September 17, 2004.

Regardless, petitioners' allegation that the absence of a coordinated ruling on counsel access issues has prevented counsel from scheduling visits to petitioner-detainees in this case is not supportable. The real-time monitoring issue petitioners' raise is applicable to only three of the twelve petitioner-detainees in this case. Counsel are free to begin the process of making arrangements for visits with respect to the other petitioner-detainees in the case, subject to the currently applicable counsel access procedures being used for such visits.⁵ Counsel in another case already has visited the petitioner-detainees in that case at Guantanamo Bay. Counsel in two

⁴ That counsel access issues in *Al Odah* were briefed prior to issuance of the August 17th coordination order does not make the issues, as petitioners suggest, any less suitable for coordination among the pending cases given that a decision on the issues will likely affect all the cases.

⁵ To the extent petitioners believe the resolution of the counsel access issues they raise, aside from real-time monitoring of meetings, prevents counsel from scheduling a visit with the nine petitioner-detainees not subject to such real-time monitoring, petitioners must concede that the resolution of the access issues would potentially impact the other Guantanamo Bay detainee cases, as argued *supra*.

additional cases had visits to Guantanamo Bay scheduled, but canceled those visits for reasons aside from the counsel access procedures at issue; one of those counsel has rescheduled his visit. By contrast, *Al Odah* counsel have not attempted to schedule a visit with the nine petitioner-detainees in this case for whom meetings will not be monitored in real-time. They have not, to respondents counsel's knowledge, even taken the necessary step for any such visit of seeking and obtaining from the government confirmation of the required security clearances possessed by the "Arabic-speaking interpreters who already have U.S. security clearances," whom petitioners' counsel claim to have contacted for purposes of a Guantanamo Bay visit, *see* Emerg. Mot. at 4. Thus, the absence of a ruling on real-time monitoring has not constrained counsel from access to the majority of their petitioner-detainees at Guantanamo Bay.

CONCLUSION

In sum, the counsel access issues raised in *Al Odah* involve issues common to the Guantanamo Bay cases and, accordingly, a decision on such issues should be coordinated by Judge Green pursuant to the role established for her pursuant to the Court's August 17, 2004 coordination order, the Resolution of the Executive Session, and Judge Kollar-Kotelly's transfer order of September 17, 2004. Petitioners' attempt to bypass the coordinated proceedings ordered by the Court has no legitimate basis and should be rejected. The Emergency Motion to Modify the Order of August 17, 2004 should be denied.

Dated: September 17, 2004

Respectfully submitted,

PETER D. KEISLER
Assistant Attorney General

KENNETH L. WAINSTEIN
United States Attorney

BRIAN D. BOYLE
Principal Deputy Associate Attorney General

DOUGLAS N. LETTER
Terrorism Litigation Counsel

ROBERT D. OKUN
D.C. Bar No. 457-078
Chief, Special Proceedings Section
555 Fourth Street, N.W.
Room 10-435
Washington, D.C. 20530
(202) 514-7280

/s/ Terry M. Henry
JOSEPH H. HUNT (D.C. Bar No. 431134)
VINCENT M. GARVEY (D.C. Bar No. 127191)
TERRY M. HENRY
PREEYA M. NORONHA
Attorneys
United States Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Ave., N.W. Room 7144
Washington, DC 20530
Tel.: (202) 514-4107
Fax: (202) 616-8470

Attorneys for Respondents