

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

<b>FAWZI KHALID ABDULLAH</b>	)	
<b>FAHAD AL ODAH, <i>et al.</i>,</b>	)	
	)	
<b>Petitioners,</b>	)	<b>Civil Action No. CV 02-0828 (CKK)</b>
	)	
<b>v.</b>	)	
	)	
<b>UNITED STATES, <i>et al.</i>,</b>	)	
	)	
<b>Respondents.</b>	)	
<hr/>	)	

**PETITIONERS’ REPLY IN SUPPORT OF MOTION FOR  
ORDER ALLOWING PETITIONERS’ MILITARY DEFENSE  
COUNSEL ACCESS TO CLASSIFIED INFORMATION**

In its opposition to Petitioners’ Motion for Order Allowing Military Defense Counsel Access to Classified Information, the government misleadingly and incorrectly states as follows:

[M]ilitary counsel are expressly excluded from the Protective Order in light of the separate protective order governing military counsel’s access to detainees and classified information in the context of the commission proceedings. See Protective Order ¶ II.A.2 (“These Procedures do not apply to counsel who are retained solely to assist in a detainee’s defense in a trial by military commission.”)

This Court’s Protective Order and Procedures for Counsel Access to Detainees at the United States Naval Base in Guantanamo Bay, Cuba, issued on September 11, 2008, is divided between Part I, entitled “Protective Order,” which governs access to classified and protected information, and Part II, entitled “Procedures for Counsel Access to Detainees at the United States Naval Base in Guantanamo Bay, Cuba,” which governs access to detainees in Guantanamo. The “Procedures” referred to in paragraph II.A.2 of this Court’s September 11, 2008 Order are specifically defined as the “Procedures for Counsel Access to Detainees at the United States Naval Base in Guantanamo Bay, Cuba.” See Order ¶ II.A.1. The provision cited

by the government, paragraph II.A.2 of the Procedures, does not have any bearing on Part I of the Court's September 11, 2008 Order, the Protective Order, which contains no such exclusion.

It should be noted that the only reason military defense counsel were excluded from the Procedures is that they already have access to their clients through a separate order. The government's citation to paragraph II.A.4 of the Procedures, requiring that counsel with access to the detainees be admitted to this Court generally or *pro hac vice*, is similarly misleading because it applies to the Procedures only, and not the Protective Order.

Under the Protective Order, the term "Petitioners' counsel" is defined as "attorneys employed or retained by or on behalf of a petitioner for purposes of representing the petitioner in habeas corpus *or other litigation in federal court* in the United States." Protective Order I.B.11. Military defense counsel for Petitioners Fayiz Al Kandari and Fouad Al Rabiah are undeniably retained by or on behalf of Petitioners for purposes of representing Petitioners in litigation in Article I courts of the United States, including military commissions under the Military Commission Act of 2006 and the United States Court of Military Commission Review, currently located in Arlington, Virginia. They are also retained, if necessary, to represent Petitioners in any appeal to the United States Court of Appeals for the District of Columbia Circuit, an Article III court of the United States located in Washington, DC. Military defense counsel are therefore "Petitioners' counsel" as defined by the Protective Order, and are authorized to receive protected information in this case if they acknowledge and agree to be bound by the Protective Order, which they have done. They already have access to an abundance of classified information about Petitioners, and require access to the secure facility for habeas counsel so that Petitioners' military and habeas counsel can freely discuss Petitioners' cases among themselves. This access assists habeas counsel in the representation of Petitioners in these cases, not least because it

enables of counsel to avoid unwittingly taking action that would prejudice Petitioners' other cases.

Even if Petitioners were wrong in their interpretation of the Protective Order, this Court is obviously free to modify the Protective Order as it sees fit. The government argues that military defense counsel "may not be within the authority of the Court to control its proceedings and the conduct of counsel appearing before it." This position cannot be squared with the fact that military defense counsel have acknowledged the Protective Order, have signed the Memorandum of Understanding Regarding Access to Classified National Security Information, and have agreed to abide by all orders of this Court. This Court has undeniable authority to enforce its orders, particularly over individuals who have expressly subjected themselves to be bound by those orders. Indeed, protective orders requiring acknowledgements by non-attorneys receiving protected information are routine. *See, e.g., Pharmachemie, B.V. v. Pharmacia, Inc.*, Civ. Act. No. 95-40085-NMG, 1998 U.S. Dist. LEXIS 2192 (D. Mass. Jan. 30, 1998) (rejecting request to limit production of confidential information to counsel in case when other individuals receiving protected information are required to acknowledge protective order). There is absolutely no prejudice to the government in allowing military defense counsel to have access to materials at the secure facility.

Finally, the government asserts that it has reviewed the information that has so far been located by Petitioners' military defense counsel, and that the information is not exculpatory. Petitioners look forward to reviewing the government's explanation, due on Thursday, March 5, 2009, as to how the information discovered by military defense counsel does not tend materially to undermine the information presented to support the government's detention of Petitioner Al Rabiah. Regardless of how one interprets any particular document, Petitioners' military defense

counsel have access to sources of information not available to Petitioners' habeas counsel, and Petitioners' military counsel require access to the secure facility in order better to assist habeas counsel in responding to the government's classified allegations.

**Conclusion**

For the foregoing reasons, Petitioners Fayiz AL Kandari and Fouad Al Rabiah respectfully request this Court to grant their Motion for Order Allowing Military Defense Counsel Access to Classified Information.

March 4, 2009

Respectfully submitted,

/s/

---

DAVID J. CYNAMON (Bar #182477)  
david.cynamon@pillsburylaw.com  
MATTHEW J. MACLEAN (Bar #479257)  
matthew.maclean@pillsburylaw.com  
PILLSBURY WINTHROP  
SHAW PITTMAN LLP  
2300 N Street, N.W.  
Washington, D.C. 20037  
Telephone: (202) 663-8000  
Facsimile: (202) 663-8007  
*Attorneys for Plaintiffs-Petitioners*

**Certificate of Service**

I certify that on March 4, 2009, I caused the foregoing to be served on all opposing counsel through the electronic case filing system.

          /s/          

Matthew J. MacLean