UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FAWZI KHALID ABDULLAH
FAHAH AL ODAH, *et al.*

Petitioners

v. Civil Action No. 02-828 (CKK)

UNITED STATES OF AMERICA, *et al.*

Respondents

RESPONDENTS' OPPOSITION TO PETITIONERS' MOTION FOR ORDER ALLOWING MILITARY DEFENSE COUNSEL ACCESS TO CLASSIFIED INFORMATION

Respondents oppose the motion by Petitioners Fayiz Mohammed Ahmed Al Kandari and Fouad Al Rabiah for an order allowing their military commission defense counsel to have access to classified information in the secure facility established under the Court's Protective Order of September 11, 2008 (Dkt. 409, 08-MC-0442). Unless they enter their appearance in this *habeas* action, military commission defense counsel do not come within the definition of "petitioners' counsel" specified in Protective Order; they are excepting themselves from the authority of the Court over counsel in the proceedings before it; and Petitioners have not established a need for access sufficient to support the request. Accordingly, the motion should be denied.

ARGUMENT

A. Military Commission Defense Counsel Are Not "Petitioners' Counsel" Within the Meaning of the Protective Order.

The secure facility was created by this Court expressly for the purpose of serving these *habeas* proceedings.[1] The critical qualification for access to the secure facility is to be "Petitioners' counsel" as defined by the Protective Order:

> "[P]etitioners' counsel" includes 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, as well as co-counsel, interpreters/translators, paralegals, investigators and all other personnel or support staff employed or engaged to assist in the litigation.

Protective Order, ¶ I.B.11. To the extent there is any ambiguity regarding who may serve as counsel in these proceedings, the Procedures For Counsel Access To Detainees At The U.S. Naval Base In Guantanamo Bay, Cuba, appended to the Protective Order, clarify that counsel must be "attorneys employed or retained by or on behalf of a detainee for purposes of representing the detainee in the United States District Court for the District of Columbia *and admitted, either generally or pro hac vice, in this Court*." *See* Protective Order ¶ II.A.4 (emphasis added).

Without further discussion, Petitioners claim that it is "undeniable" that military commission defense counsel are within the definition. Analysis yields a contrary result. First, in the absence of entering an appearance in these *habeas* proceedings, military counsel do not qualify as "representing the petitioner in *habeas corpus* . . . litigation." There can be no debate on that subject. Further, military counsel have not been admitted, either generally or pro hac

---

[1] *See In re Guantanamo Detainee Cases*, 344 F.Supp.2d 174, 177 (D.D.C. 2004).

vice, in this Court for purposes of representing petitioners in the habeas proceeding.

Second, they are not "co-counsel . . . employed or engaged to assist in the litigation." As is evident, they are not "employed or engaged" by counsel of record and so are not subject to the control and oversight of counsel of record and, more importantly, counsel of record are not directly accountable for their conduct and actions.

Third, military commission defense counsel are not engaged in "other litigation" within the meaning of the Protective Order. In pertinent part, the Protective Order provides that "'[P]etitioners' counsel' includes attorneys employed . . . on behalf of a petitioner for purposes of representing the petitioner in . . . other litigation in federal court in the United States . . . ." The Protective Order does not define "other litigation," but the limitation "in federal court in the United States" cannot be read to include the military commissions. Indeed, military 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.").

But if the Protective Order is construed to include military commissions and military counsel, then the doors to the secure facility would be thrown open to all military commission defense counsel, without limitation, and to their "co-counsel, interpreters/translators, paralegals, investigators and all other personnel or support staff." And this would be so whether or not military commission defense counsel are working in concert with the actual *habeas corpus* counsel. Nothing in the Protective Order suggests that the Court intended this result when the

secure facility was created. Indeed, the Protective Order expressly limits its purpose and scope to the *habeas corpus* proceedings:

> This Protective Order establishes procedures that must be followed by petitioners and their respective counsel, all other counsel involved **in these matters**, interpreters/translators for the parties, personnel or support staff employed or engaged to assist **in these matters**, and all other individuals who, in connection **with these matters**, receive access to classified national security information or documents or other protected information

Protective Order, ¶ I.A.1. [Emphasis supplied.].

If there is any ambiguity about the notion that the purpose of access to the information in the secure facility is limited to the *habeas corpus* cases, such ambiguity is eliminated by the explicit limitation regarding the use of "protected information, which " shall be used only for purposes directly related to these cases **and not for any other litigation or proceeding**, except by leave of the Court." Protective Order, ¶ I.E.42 (emphasis supplied). This provision undeniably excludes the military commission proceedings. If "protected information," which by definition is not classified, cannot be used for purposes of the military commission proceedings, then unquestionably the classified information in the secure facility is not available for such use.

B. Military Commission Defense Counsel Are Outside the Court's Authority and Control Over the Conduct of these Proceedings.

The failure of military counsel to abide by the explicit terms of the Protective Order also raises practical problems regarding the authority of the Court to supervise the military counsel. If the military commission defense counsel do not enter their appearance in this proceeding, they may not be within the authority of the Court to control its proceedings and the conduct of counsel appearing before it. This Court has explicit authority, including its contempt and disciplinary powers (*see, e.g.*, LCvR 83.16 and Rule 11, F.R.Civ.P.), as well as inherent

authority to maintain control over proceedings conducted before it and to discipline conduct committed in its presence. *See* LCvR 83.13(b). But if an attorney does not enter an appearance, does not appear before the Court, and does not directly participate in the proceedings, the power of the Court may be more limited. For example, the Rules of this Court state that its disciplinary procedures " . . . shall apply to all attorneys admitted to membership in the Bar of this Court, to all attorneys permitted to practice before this Court under LCvR 83.2, and to all attorneys who appear before this Court or who participate in proceedings, whether admitted or not." LCvR 83.12(b). The scope of the disciplinary Rules, therefore, may not reach military commission defense counsel.

Nor is it sufficient to say that military defense counsel are as much under the authority of the Court as co-counsel, staff, and others that fall within the definition of "Petitioners' counsel" set out in the Protective Order. Those persons are, by definition, employed by or engaged by counsel of record; therefore, counsel of record are directly accountable and responsible to the Court for their conduct. Military commission defense counsel are not employed by or engaged by counsel of record, and so accountability and responsibility of counsel of record is not so clearly established.

To avoid these potential problems, particularly given the sensitive national security and classified information involved in this case, the Court must maintain appropriate supervision over all attorneys who have access to classified information and resolve any uncertain questions regarding the scope of the Protective Order in favor of the Government. *Cf. Boumediene v. Bush*, 128 S. Ct. 2229, 2276 (2008) (highlighting Government's interest in "protecting sources and methods of intelligence gathering," and noting the Court's "expect[ation] that the District

Court will use its discretion to accommodate this interest to the greatest extent possible"). Unless the military commission defense counsel enter their appearance as counsel of record, they are not clearly accountable and responsible to the Court. Given the sensitivity of the classified information that military commission counsel seek to access, and the stated concern of the Court in the Protective Order that such access must be limited, military counsel must comply with all terms of the Protective Order in order to receive access to classified information.

C. The Alleged Exculpatory Evidence Found by Military Commission Defense Counsel Does Not Support the Asserted Need to Grant Them Access to the Secure Facility.

Petitioners claim that their need to include military commission defense counsel is established by the assertion that they "have already uncovered vital classified exculpatory evidence in government electronic systems that counsel for the government failed to disclose." Petitioners' Motion, p. 2. This assertion is an overstatement of what has been "uncovered" and assumes that the government had a duty to disclose those documents.

Respondents will provide a more detailed statement regarding this matter as required by this Court's Order of February 12, 2009. It is sufficient to state here that Respondents' counsel have examined the subject documents and have found that they do not refer to Petitioners, they do not refer to any assertions made by Respondents about Petitioners, and they do not "tend[ ] materially to undermine the information presented to support the government's justification for detaining the petitioners." Case Management Order, as amended, December 16, 2008 (Dkt. 420), ¶ I.D.1. In short, the "uncovered" documents do not support a need to allow military commission defense counsel to have access to the secure facility.

CONCLUSION

For the foregoing reasons, the Court should deny Petitioners' motion that military defense counsel be granted access to classified information.

Dated: March 2, 2009

Respectfully submitted,

MICHAEL F. HERTZ
Acting Assistant Attorney General

/s/ *Timothy B. Walthall*
JOSEPH H. HUNT (D.C. Bar No. 431134)
VINCENT M. GARVEY (D.C. Bar No. 127191)
TERRY M. HENRY
ANDREW I. WARDEN
PAUL E. AHERN
TIMOTHY B. WALTHALL
Attorneys
United States Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Avenue, N.W.
Washington, DC 20530
Tel: 202.514-4107
Fax: 202.616.8470

Attorneys for Respondents