

**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.)
))

**REPLY TO DEFENDANTS' OPPOSITION TO PLAINTIFFS'
EMERGENCY MOTION TO MODIFY ORDER OF AUGUST 17, 2004**

The Coordination Order Setting Filing Schedule and Directing the Filing of Correspondence Previously Submitted to the Court, entered by Senior Judge Joyce Hens Green on September 20, 2004, in all the Guantanamo cases, and the Resolution of the Executive Session of this Court that was annexed to that Order, make it very clear that, as plaintiffs have requested in their Emergency Motion, the “real-time monitoring” issue in this case may be decided promptly by Judge Colleen Kollar-Kotelly. Contrary to the government’s contention (Respondents’ Opposition to Petitioners’ Emergency Motion to Modify Order of August 17, 2004 (“Opp.”), p. 2), the monitoring issue is not subject to the “coordination process” being managed by Senior Judge Green, and a ruling on it should not be deferred for “coordination” even if a ruling on other counsel access issues raised by plaintiffs should be deferred.

1. The government wants to subject all communications between counsel and three of the Kuwaiti Detainees to “real-time monitoring.” This monitoring would allow a military “privilege team” to eavesdrop on and videotape all conversations between counsel and those three Kuwaiti Detainees. Plaintiffs have challenged the validity of such monitoring. *See* Memorandum of Points and Authorities in Opposition to Defendants’ “Response to Complaint”

(“Kuwaiti Memo”). They have also challenged other terms and conditions for counsel access to the Guantanamo detainees that the government has proposed. All the challenged counsel access issues were fully briefed, argued, and taken under advisement by Judge Kollar-Kotelly on August 16, 2004.

2. The monitoring issue now before Judge Kollar-Kotelly is unique to this case in two ways. First, as plaintiffs pointed out in their opening papers, the government has informed Senior Judge Green and the parties in all the Guantanamo cases that it wants to monitor *only* the three designated Kuwaiti Detainees in this case. It does not want to monitor any other detainees in the 13 pending Guantanamo cases. Accordingly, this issue will not arise in any of the other Guantanamo cases and is not common to more than one of the Guantanamo cases.

Second, plaintiffs have argued that one reason why monitoring is not necessary to protect the government’s national security concerns is that plaintiffs’ counsel have offered to treat *all* information they obtain from the three designated Kuwaiti Detainees as classified and not to disclose that information to *any* third parties (other than this Court) unless the government, after a reasonable opportunity to review any information proposed to be disclosed, fails to object to such disclosure. *See* Kuwaiti Memo, pp. 19-20. No other detainees or their counsel have made such an offer to the government. Therefore, should the Court rule in plaintiffs’ favor on monitoring, the ruling would affect *only* the plaintiffs and their counsel in the present case. It would not affect anyone else.

3. The Court’s Resolution of the Executive Session, dated September 15, 2004, states in paragraph 2 that all Guantanamo cases are transferred to Senior Judge Green for “coordination and management.” The Resolution states in paragraph 3 that Senior Judge Green “will rule on procedural issues that are common to those cases” to the extent possible and as consented to by

the individual judges to whom the cases are assigned. It further states in paragraph 4 that, with regard to substantive issues, Senior Judge Green will confer with the individual judges concerning “common” substantive issues, and either one of those judges or Senior Judge Green will address specified substantive issues that are “common” to all the Guantanamo cases, to the extent possible and provided consent is given by the individual judges. Even then, an individual judge who does not agree with a decision on “common” substantive issues made in this manner may decide the issue differently in his or her own case as he or she sees fit. These provisions of the Resolution are confirmed by Senior Judge Green in her Coordination Order.

4. As already noted, plaintiffs have challenged other terms and conditions put forth by the government for counsel access to the detainees at Guantanamo. These include the government’s plan to subject meetings between counsel and the detainees to *post hoc* “classification review” of notes and documents; the requirement that counsel obtain an “Acknowledgment of Representation” after the initial visit with the detainee; the prohibition against more than one attorney visiting one detainee at one time; the requirement that the detainees or their counsel pay the costs of getting security clearances; the plan to review all attorney-client mail; the restriction on the dissemination of *non*-classified information obtained from the detainees; the withholding of “top secret” security clearances from some of the detainees’ counsel; and the refusal to grant access to non-U.S. citizens who are counsel to the detainees and have security clearances from countries allied with the United States. *See* Kuwaiti Memo, pp. 9-25.

The government wants to apply these terms and conditions to all the detainees and their counsel, and perhaps in that sense plaintiffs’ challenge to them raises an issue that is “common” to all the Guantanamo cases. But except for the petitioner in *Rasul v. Bush*, Civil Action No. 02-

CV-0299 (CKK), who joined with plaintiffs in this case in challenging some (but not all) of those terms and conditions, none of the detainees in the other Guantanamo cases have challenged these terms and conditions by formal motion or brief. In that sense, plaintiffs' challenge to these terms and conditions is not "common" to all the Guantanamo cases.

Under paragraph 3 of the Court's Resolution of the Executive Session and Senior Judge Green's Coordination Order, it would appear that, in this circumstance, Senior Judge Green should decide in the first instance which, if any, of plaintiffs' other challenges to the government's terms and conditions for counsel access are "common" to more than one of the Guantanamo cases and may be addressed and decided by her or another individual judge. Nonetheless, this process should not interfere with Judge Kollar-Kotelly's authority promptly to rule on the *non*-common monitoring issue.

Respectfully submitted,

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