

**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.)
))

MOTION TO COMPEL RESPONSIVE PLEADING AND RETURN FORTHWITH

Introduction and Summary

The United States has held the 12 plaintiffs/petitioners [the “Kuwaiti Detainees”] virtually *incommunicado* at the Guantanamo Bay Naval Base [“GTMO”] for two and a half years without filing a responsive pleading to plaintiffs’ amended complaint or making a return to their application for a writ of habeas corpus. Thus, to date, defendants [the “government”] have not denied the Kuwaiti Detainees’ allegations that (i) they were in Afghanistan or Pakistan as volunteers performing charitable work, (ii) they were seized against their will by local villagers seeking promised bounties or other financial rewards and then taken into custody by the United States, (iii) none of them was a combatant against the United States or a member or supporter of any terrorist group, and (iv) none of them has been charged with any wrongdoing or determined under the Military Order of November 13, 2001, to be a suspected terrorist.

It is outrageous that the government continues to imprison the Kuwaiti Detainees without denying their claims of innocence or certifying the true cause (if any) of their detention. It is also a violation of this Court's Order of July 23, 2004, commanding the government to file by July 30, 2004, "a written response to the Petitioners' underlying petitions for writs of habeas

corpus,” among other things. Finally, it is a violation of Fed. R. Civ. P. 12(a)(4)(A), under which the government was required to serve a responsive pleading “within 10 days after notice” of the court of appeals’ reversal of this Court’s order dismissing plaintiffs’ amended complaint.

The government’s failure to file a responsive pleading or make a return is particularly inexcusable in light of the government’s filing on July 30, 2004, of the Declaration of Brigadier General Martin J. Lucenti, Sr. [“Lucenti Dec.”]. The government filed this declaration in support of its proposal to “monitor” conversations between three of the Kuwaiti Detainees and their counsel and to subject information exchanged by all of the Kuwaiti Detainees and their counsel to “classification review.” Brigadier General Lucenti declared that his approval of the government’s proposal “was based on an individualized review of the intelligence files compiled on the detainees.” He further declared, “based on my individualized consideration of their files,” that the three Kuwaiti Detainees whose conversations with counsel would be monitored were more dangerous than the other nine, and he devoted three pages to a description of them. Clearly the government has sufficient information about all the Kuwaiti Detainees to file a responsive pleading to plaintiffs’ amended complaint and to certify the true cause, if any, of their detention.

It is vital that the government be ordered to file a responsive pleading and return immediately. Counsel have obtained their security clearances and have a cleared interpreter, and they are ready to go to GTMO to interview the Kuwaiti Detainees for the purpose of developing and presenting their claims to the Court. This process will be stillborn if counsel cannot inform the Kuwait Detainees, at a minimum, of the factual and legal basis upon which the government claims it is detaining them. The Kuwaiti Detainees are helpless to explain why they should be released from confinement if the government will not tell them why they are being detained. Therefore, the Court should grant plaintiffs’ motion.

Statement¹

1. Plaintiffs, the 12 Kuwaiti Detainees and their family members, filed this civil action on May 1, 2002. In their amended complaint plaintiffs allege that the Kuwaiti Detainees were in Afghanistan or Pakistan, some before and some after September 11, 2001, as volunteers for charitable purposes to provide humanitarian aid to the people of those countries. Amended Complaint [“Compl.”, annexed as Attachment A], ¶ 14. The family members allege that none of the Kuwaiti Detainees is or ever has been a combatant or belligerent against the United States, a member or supporter of al Qaida, the Taliban, or any other terrorist organization, and that none of the Kuwaiti Detainees has ever engaged in or supported any terrorist or hostile act against the United States. *Id.*, ¶ 15. They further allege that the Kuwaiti Detainees were seized against their will in Afghanistan or Pakistan after September 11, 2001, by local villagers seeking promised bounties or other financial rewards, and that, subsequently, they were taken into custody by the United States. *Id.*, ¶ 16. Since as early as January 11, 2002, the Kuwaiti Detainees have been imprisoned at GTMO. *Id.*, ¶¶ 19-21.

Plaintiffs allege that the government has never stated publicly or informed them why or on what basis the Kuwaiti Detainees are being detained at GTMO. Compl., ¶ 18. Although President Bush issued the Military Order of November 13, 2001, entitled “Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism,” to ensure the detention and trial of any non-citizen as to whom the President has determined in writing there is reason to believe he is a member of al Qaida, or has engaged in, aided and abetted, or conspired to commit acts of international terrorism, or has harbored terrorists, plaintiffs allege the President has made no such determination with respect to any of the Kuwaiti Detainees. *Id.*, ¶¶ 9, 11, 17. Plaintiffs

¹ In accordance with LCvR 7.1(m), counsel for plaintiffs has consulted with counsel for defendants about this motion. Counsel for defendants has advised that defendants will oppose this motion.

also allege that the Kuwaiti Detainees have not been informed of the charges, if any, against them, and have been held virtually *incommunicado* at GTMO. *Id.*, preamble and ¶ 29.

Plaintiffs invoked this Court's jurisdiction under 28 U.S.C. §§ 1331 (federal question), 1350 (Alien Tort Claims), and 1361 (mandamus), and asserted a cause of action under the Fifth Amendment, the Administrative Procedure Act, the Alien Tort Claims Act, and the habeas corpus statutes. Compl., ¶ 1. Plaintiffs claimed that the government's detention of the Kuwaiti Detainees was denying the Kuwaiti Detainees due process in violation of the Fifth Amendment, engaging in tortious conduct against the Kuwaiti Detainees that was actionable under the Alien Tort Claims Act, and was arbitrary and unlawful within the meaning of the Administrative Procedure Act. *Id.*, ¶¶ 37-39. Plaintiffs sought preliminary and permanent injunctive relief and declaratory relief. *Id.*, ¶¶ 40-41. On May 8, 2002, plaintiffs moved for a preliminary injunction.

2. The government never filed a responsive pleading to plaintiffs' allegations. Instead, the government moved to dismiss plaintiffs' complaint and motion for lack of jurisdiction. This Court, concluding that the "exclusive avenue" for the relief plaintiffs were seeking was "a petition for writ of habeas corpus" and that, therefore, plaintiffs' amended complaint must be treated "as if it were styled as a petition for writ of habeas corpus," granted the government's motion and dismissed the case. 215 F.Supp.2d 55, 64, 65-73. The court of appeals affirmed, holding that, even if some of plaintiffs' claims "do not sound in habeas," they were "beyond the jurisdiction of the federal courts." 321 F.3d 1134, 1144-1145.

Plaintiffs unsuccessfully petitioned the court of appeals for rehearing and rehearing *en banc*. They also petitioned the Supreme Court for a writ of certiorari. At the same time, plaintiffs' representatives met Defense Department officials in an effort to secure the Kuwaiti Detainees' release from detention. At the request of those officials, plaintiffs' representatives

provided the Defense Department with detailed answers to their questions about the Kuwaiti Detainees. *See* Attachment B. However, this had no effect on the Kuwait Detainees' detention.

3. The Supreme Court granted certiorari and, on June 28, 2004, reversed the judgment of the court of appeals. The Supreme Court held that "[a]liens held at the base, no less than American citizens, are entitled to invoke the federal courts' authority under [28 U.S.C.] § 2241 (habeas corpus)." 124 S. Ct. 2686, 2696 (2004). In addition, the Supreme Court held that this Court had jurisdiction to consider plaintiffs' non-habeas claims for relief. *Id.*, at 2698-99. The Supreme Court remanded the case to this Court "to consider in the first instance the merits of petitioners' claims." *Id.*, at 2699.

4. On June 29, 2004, the day after the Supreme Court announced its decision, this Court held a telephone conference hearing with counsel for the parties in this case and *Rasul v. Bush*, Civil Action No. 02-299 (CKK). *See* Transcript of Proceedings, June 29, 2004. The Court announced that the purpose of the hearing was to discuss the "first order of business," namely, that counsel in the two cases be afforded access to the detainees at GTMO for the purpose of developing and presenting the detainees' claims to the Court. *Id.*, pp. 4, 7, 9-11. When government counsel advised that the government had not decided what its position would be on counsel access, the Court asked the government to state its position on July 2, 2004. *Id.*, p. 22.

During a second telephone conference hearing on July 2, 2004, government counsel announced that the government would "permit" counsel access to the detainees in this case and *Rasul*, subject to "terms and conditions" to be worked out expeditiously in "a special administrative order." *See* Transcript of Proceedings, July 2, 2004, p. 4. The Court encouraged the parties to try to reach an agreement on the "terms and conditions" for counsel access and expressed concern that, unless the mandate of the Supreme Court were issued early, it would not

have jurisdiction to resolve any differences until the end of July. *Id.*, pp. 4-5, 7-8. Plaintiffs' counsel said plaintiffs would move the Supreme Court to expedite the issuance of its mandate and called upon government counsel to consent to that motion. *Id.* pp. 5, 15.

Not hearing from the government, plaintiffs moved in the Supreme Court for expedited issuance of its mandate, and the Supreme Court granted the motion and issued its mandate to the court of appeals on July 16, 2004. The court of appeals, on July 19, 2004, recalled its prior mandate, vacated its prior judgment, reversed this Court's dismissal of this case, and remanded the case to this Court for further proceedings in light of the Supreme Court's opinion.

From July 2, 2004, through July 23, 2004, the government repeatedly represented that it would provide plaintiffs with the proposed "terms and conditions" for counsel access to the detainees at GTMO and repeatedly failed to do so. However, government counsel did say that the "terms and conditions" would include "monitoring" of conversations between counsel and the detainees. After several complaints by plaintiffs about the government's delay, the Court held a third telephone conference hearing in this case on July 23, 2004. *See* Transcript of Proceedings, July 23, 2004.

Following the hearing, the Court issued its Order of July 23, 2004. Attachment C. In this Order the Court directed the government to file three things by 12:00 P.M. on July 30, 2004: first, all proposed terms and conditions for counsel access to the detainees; second, which proposed procedures, including monitoring, would apply to each detainee; and third, "a written response to the Petitioners' underlying petitions for writs of habeas corpus, specifically addressing, among other things, the legal merits of the Government's entitlement to monitor any of Petitioners' conversations with counsel, if that is their proposal."

Although the Court previously had treated plaintiffs' amended complaint as a petition for a writ of habeas corpus (*see* 215 F.Supp.2d at 62-64), plaintiffs had not actually filed such a petition. For purposes of clarifying the record, plaintiffs filed on July 27, 2003, an application for the issuance of writs of habeas corpus or in the alternative for an order to show cause why writs should not be issued, returnable on July 30, 2004. Also for purposes of clarifying the record plaintiffs filed a motion renewing their initial motion for a preliminary injunction. The Court, in an Order issued on July 28, 2004, advised the parties that the government would not be required to respond to plaintiffs' renewed motion for a preliminary injunction by July 30, 2004. However, the Court made no change in its Order of July 23, 2004, requiring the government to file a written response to plaintiffs' "underlying petitions for writs of habeas corpus" by July 30.

The government, on July 30, 2004, filed a "Response to Complaint in Accordance with Court's Order of July 25 [sic], 2005 ["Gov't Response"]." This "Response" dealt exclusively with the government's proposed terms and conditions for counsel access to the detainees, including a proposal for monitoring certain counsel-detainee conversations and for conducting a *post hoc* "classification review" of notes taken by counsel during conversations with the detainees. Notwithstanding the Court's Order of July 23, 2004, the government did not respond to plaintiffs' "underlying petitions for writs of habeas corpus."² Instead, the government unilaterally asserted that "the access provided by the military will allow counsel to meet with the detainees, and counsel may then wish to convert their next-friend petition into a direct petition or otherwise amend their petition. Respondent would respond to any such amended petition at an appropriate juncture." Gov't Response, pp. 30-31 n. 14.

² The government did include an argument about why plaintiffs' claim under the Alien Tort Claims Act should not be entertained by the Court. Gov't Response, p. 30 n. 14. But nowhere did it respond to the allegations in plaintiffs' amended complaint or to plaintiffs' application for writs of habeas corpus.

Although the government did not respond to plaintiffs' amended complaint or applications for writs of habeas corpus on July 30, 2004, it did file with its "Response" the Declaration of Brigadier General Martin J. Lucenti, Sr., Deputy Commander, Joint Task Force Guantanamo Bay, Cuba, to support its proposals for monitoring and classification review. *See* Attachment D. In this declaration, Brigadier General Lucenti said he conducted "an individualized review of the intelligence files compiled on the detainees" to determine which ones should be subject to monitoring and which ones should not. Lucenti Decl., ¶ 12. He further said, "based on my individualized consideration of their files," that three of the Kuwaiti Detainees would be subject to monitoring under the government's proposal because they were very dangerous, but that classification review of attorney notes would be necessary with respect to all 12 Kuwaiti Detainees "because each of these detainees is in possession of highly classified information." *Id.*, ¶¶ 16-17. Finally, Brigadier General Lucenti gave a lengthy description of the alleged ties between the three Kuwaiti Detainees proposed for monitoring and terrorist groups. *Id.*, ¶¶ 18-20.

Argument

I. The Government's Failure To File A Responsive Pleading And Return Violates This Court's Order Of July 23, 2004, Fed. R. Civ. P. 12(a)(4)(A), And The Habeas Corpus Statute

The Court's Order of July 23, 2004, is not ambiguous. The Court commanded the government to "file in writing with the Court by 12:00 noon on Friday, July 30, 2004," three things: (i) "all proposed procedures with respect to access to counsel that the Government intends to apply to the Guantanamo Bay detainees and to Petitioners in this case," (ii) "which proposed procedures will apply to each Petitioner, including proposed monitoring of any of Petitioners' conversations with counsel," and (iii) *a written response to the Petitioners'*

underlying petitions for writs of habeas corpus, specifically addressing, among other things, the legal merits of the Government’s entitlement to monitor any of Petitioners’ conversations with counsel, if that is their proposal (emphasis added).” Clearly, the “written response to the Petitioners’ underlying petitions for writs of habeas corpus” means something different from the “proposed procedures” for counsel access to all the GTMO detainees, “which proposed procedures will apply to each Petitioner,” and a brief on the “legal merits of the Government’s entitlement to monitor any of Petitioners’ conversations.” A “written response to the Petitioners’ underlying petitions for writs of habeas corpus” means exactly what it says. Although plaintiffs had not, in fact, filed petitions for writs of habeas corpus at the time the Court issued the Order of July 23, 2004, the Court obviously was referring to plaintiffs’ amended complaint, which the Court previously said it would treat “as if it were styled as a petition for writ of habeas corpus.” 215 F.Supp.2d at 64. To ensure there would be no misunderstanding, plaintiffs filed on July 27, 2004, an application for the issuance of writs of habeas corpus or in the alternative for an order to show cause why writs should not be issued, returnable on July 30, 2004. The application incorporated by reference the allegations in plaintiffs’ amended complaint. Nonetheless, the government did not respond to plaintiffs’ amended complaint on July 30, 2004, nor did it make a return to plaintiffs’ application for the issuance of writs of habeas corpus.

The government’s failure to respond to plaintiffs’ “underlying petitions for writs of habeas corpus” was not the result of oversight or misunderstanding. On the contrary, the government asserted that: “the access provided by the military will allow counsel to meet with the detainees, and counsel may then wish to convert their next-friend petition into a direct petition or otherwise amend their petition. ***Respondent would respond to any such amended petition at an appropriate juncture*** (emphasis added).” Gov’t Response, pp. 30-31 n. 14. Thus,

the government arrogated to itself the authority to rewrite the Court's Order of July 23, 2004. As rewritten by the government, the government was *not* commanded to file a written response to plaintiffs' underlying petitions for writs of habeas corpus "by 12:00 noon on Friday, July 30, 2004," but rather was commanded to do so "*at an appropriate juncture*" to be chosen by the government, depending on whether plaintiffs' amended their petitions in the future.

The government has no authority to rewrite or ignore this Court's orders. Indeed, in its Order of July 23, 2004, the Court warned that "this timetable is firm. No extensions will be granted." If the government wanted to delay a written response to plaintiffs' underlying petitions for writs of habeas corpus, it should have moved for reconsideration or modification of the Order of July 23, 2004. It did not do so.

The Court's Order of July 23, 2004, demanding that the government expeditiously file a written response to plaintiffs' underlying petitions for writs of habeas corpus is consistent with Fed. R. Civ. P. 12(a)(4)(A). Rule 12(a)(4)(A) provides that, if a party files a motion to dismiss instead of an answer to a complaint and the motion to dismiss is denied, the party must file a "responsive pleading" to the complaint "within 10 days after notice of the court's action." Here, the government was notified that the court of appeals, on July 19, 2004, recalled its prior mandate, vacated its prior judgment, reversed this Court's prior grant of the government's motion to dismiss, and remanded for further proceedings to this Court. The ten-day period prescribed by Rule 12(a)(4)(A) for the filing of a "responsive pleading" by the government began to run from that date, and the government's failure to do so violates that Rule.

Similarly, the Court's order that the government expeditiously file a written response to plaintiffs' underlying petitions for writs of habeas corpus is consistent with the habeas corpus statute. That statute, at 28 U.S.C. § 2243, provides that a writ of habeas corpus or order to show

cause “shall be returned within *three days* unless for good cause additional time, not exceeding twenty days, is allowed (emphasis added).” In that return the government must “certify[] the true cause of the detention.” Congress plainly understood that where, as here, personal liberty at stake, the government must explain the basis for detention with extraordinary speed. The Court understood this, too. Only the government has failed to understand.

Finally, the Court’s order demanding that the government respond to plaintiffs’ underlying petitions for writs of habeas corpus by July 30, 2004, served an important purpose in this initial stage of the remand proceedings. As the Court made clear on June 29, 2004, the “first order of business” on remand is to afford the Kuwaiti Detainees access to their counsel so that counsel can develop and present their claims to this Court. Transcript of Proceedings, June 29, 2004, p. 4. It would appear the Court insisted upon the government’s expeditious written response to plaintiffs’ underlying petitions for writs of habeas corpus contemporaneous with its expeditious consideration of the government’s proposed terms and conditions for counsel access because the Court realizes that such access would serve little purpose if the Kuwaiti Detainees were not told by the government the factual and legal basis for their detention. Yet that is precisely the dilemma the Kuwaiti Detainees and their counsel face in the absence of a written response by the government to plaintiffs’ amended complaint and petition for the issuance of writs of habeas corpus.

In sum, the government has violated this Court’s Order of July 23, 2004, Fed. R. Civ. P. 12(a)(4)(A), and 28 U.S.C. § 2243. The Court should compel the government to bring itself into compliance with that Order, the Rule, and the habeas corpus statute.

II. The Government Has Sufficient Information To File A Responsive Pleading And A Return

It is impossible to believe that the government has held the Kuwaiti Detainees virtually *incommunicado* for more than two and a half years without knowing the factual and legal basis for their detention. Considering that the government probably has interrogated the Kuwaiti Detainees numerous times, it must have a wealth of information about them and the circumstances that led to their confinement at GTMO. This information should enable the government to say more about the reasons for the detention of the Kuwaiti Detainees than the mantra that they are “enemy combatants.”

But it is not necessary to speculate about the extent of the government’s information concerning the Kuwaiti Detainees. In his declaration, Brigadier General Lucenti says he has conducted “an individualized review of the intelligence files compiled on the detainees,” and this review enabled him to devote three pages of his declaration to a detailed portrayal of three of the Kuwaiti Detainees and to conclude that those three require monitoring but the other nine do not. Lucenti Decl., ¶¶ 12, 17-20. Furthermore, the “individualized review” enabled Brigadier General Lucenti to assert that “each of these detainees is in possession of highly classified information.” *Id.*, ¶ 16. Moreover, the family members of the Kuwaiti Detainees provided to the Defense Department, at the Defense Department’s request, detailed information about each of the Kuwaiti Detainees. *See* Attachment B. The government plainly has ample information to explain why it has detained the Kuwaiti Detainees for more than two and a half years.

Whatever else the government may be doing with the Kuwaiti Detainees, the Court must make it the government’s top priority immediately to use all available information to file a responsive pleading to plaintiffs’ amended complaint and a return to plaintiffs’ application for

the issuance of writs of habeas corpus. This Court has been ordered by the Supreme Court “to consider in the first instance the merits of petitioners’ claims.” 124 S. Ct. at 2699. The Court cannot undertake this task without the assistance of counsel for the Kuwaiti Detainees in developing and presenting those claims. Counsel for the Kuwaiti Detainees cannot provide such assistance without knowing, at a minimum, the factual and legal basis upon which the government is holding the Kuwaiti Detainees. Therefore, the Court should order the government to provide those bases forthwith.

Conclusion

For these reasons the Court should grant plaintiffs’ motion to compel the government to file a responsive pleading and return forthwith.

Respectfully submitted,

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