

IN THE UNITED STATES DISTRICT COURT  
 FOR THE DISTRICT OF COLUMBIA

|   |   |                             |
|---|---|-----------------------------|
| <b>FAWZI KHALID ABDULLAH FAHAD AL ODAH,</b> | ) |                             |
| <b>et al.,</b>                              | ) |                             |
| <b>Plaintiffs-Petitioners,</b>              | ) |                             |
|   | ) |                             |
| <b>v.</b>                                   | ) | <b>No. CV 02-0828 (CKK)</b> |
|   | ) |                             |
| <b>UNITED STATES OF AMERICA, et al.,</b>    | ) |                             |
|   | ) |                             |
| <b>Defendants-Respondents.</b>              | ) |                             |
|   | ) |                             |

---

**PLAINTIFFS-PETITIONERS' REPLY TO  
 OPPOSITION TO MOTION FOR WRIT OF INJUNCTION**

The Kuwaiti Detainees have moved for a writ of injunction to stop the government from doing three things that abridge their right of reasonable access to counsel: (i) having interrogators make religious slurs and other remarks against the Kuwaiti Detainees' counsel and take actions that undermine trust and confidence between counsel and the Kuwaiti Detainees, (ii) refusing to permit counsel to communicate expeditiously with the Kuwaiti Detainees when circumstances warrant, and (iii) threatening unilaterally to deny counsel the right to visit the Kuwaiti Detainees when the government accuses counsel of possibly violating the Court's Amended Protective Order. In its opposition, the government (i) says it does not permit and its interrogators have not made disparaging comments against counsel and that it has not acted to undermine trust and confidence between counsel and the Kuwaiti Detainees, (ii) acknowledges but unsuccessfully defends its refusal to allow expeditious communications between counsel and the Kuwaiti Detainees, and (iii) ignores the third issue. The Kuwaiti Detainees must briefly reply.

1. The government claims it "does not permit" its interrogators to make the religious slurs and statements against counsel that the Kuwaiti Detainees attributed to them, or to retaliate against

a detainee for having met counsel or being involved in habeas litigation.<sup>1</sup> Respondents' Opposition to Petitioners' Motion for Writ of Injunction ("Opp.") at 3. In addition, the government has submitted a declaration from Esteban Rodriguez, the Director of the Joint Intelligence Group of the Joint Task Force – Guantanamo Bay Naval Base, denying the Kuwaiti Detainees' allegations that its interrogators made vile religious slurs against counsel.<sup>2</sup> Exhibit 2 to Opp. at ¶¶ 3-4. Finally, the government denies that it reneged on its advice to counsel that they would be permitted to show DVDs prepared by the Kuwaiti Detainees' families to the Kuwaiti Detainees and it has submitted declarations purportedly supporting this denial. Opp. at 8 and Exhibits 3 and 4 thereto.

But first, as the Kuwaiti Detainees have demonstrated in prior filings with the Court (*see, e.g.,* Memorandum of Points and Authorities in Support of Plaintiffs-Petitioners' Motion for a Preliminary Injunction and Provisional Motion to Modify Stay, filed March 11, 2005), there is no automatic correlation between the government's policies for the treatment of detainees at Guantanamo and the treatment actually being meted out by military personnel and interrogators on the ground. Therefore, it does not follow that, because the conduct described by the Kuwaiti Detainees is 'against policy,' it has not happened. It appears often that high-ranking government officials either do not know what is going on or choose not to know. Second, although the

---

<sup>1</sup> Colonel John A. Hadjis avers that "[w]e have detailed standard operating procedures and training programs to ensure that the detainees are treated appropriately and that any violations of our procedures are investigated." Exhibit 1 to Opp. at ¶ 2. The government has never made public these procedures or provided a copy to counsel for the Kuwaiti Detainees. Clearly these are not the procedures set forth in Army Regulation 190-8 and the Military Police Manual of Internment/Resettlement Operations that expressly govern the detention of "enemy prisoners of war," "civilian internees," and "other detainees." *See* Memorandum of Points and Authorities in Support of Plaintiffs-Petitioners' Motion for a Preliminary Injunction and Provisional Motion to Modify Stay at 15-18.

<sup>2</sup> During counsel's visit to Guantanamo May 9-13, 2005, one of the Kuwaiti Detainees who made these assertions, Fouad Mahmoud Al Rabiah, provided counsel with new information about them. This new information is deemed classified under the Revised Counsel Access Procedures and may not be disclosed on the public record unless and until it is cleared by the "privilege team." Nevertheless, counsel would be willing to disclose this information now to the Court *in camera*.

government has identified the interrogators who the Kuwaiti Detainees say made the remarks in question, the government did not submit declarations from them (which it could have done without using their real names). Instead, the government submitted a hearsay declaration from their superior, Esteban Rodriguez. That hearsay declaration has much less credibility than declarations from the interrogators themselves.<sup>3</sup> Third, in his hearsay declaration Mr. Rodriguez truncates the Kuwaiti Detainees' allegations against the interrogatories and says only that they reviewed and denied "these allegations" and that they claimed they did not make "disparaging" remarks about counsel. Exhibit 2 to Opp. at ¶¶ 3-4. This is far from a categorical denial of the assertions made by the Kuwaiti Detainees.

Moreover, although the government contends that it did not act to undermine trust and confidence between the Kuwaiti Detainees and their counsel when it refused to permit counsel to show DVDs to the Kuwaiti Detainees during counsel's trip to Guantanamo in March 2005, the supporting declarations the government has submitted show the opposite. Thus, government attorney Andrew I. Warden declares that, when he advised the Kuwaiti Detainees' counsel two days before their February trip to Guantanamo that military personnel might not have enough time to process and authorize the showing of the DVDs during that trip, he told the Kuwaiti Detainees' counsel: "In the future, please submit these materials several weeks in advance of your visit so we can ensure timely processing." Exhibit A to Exhibit 3 to Opp. Similarly, Lieutenant Commander Tony F. De Alicante, who serves as the Deputy Staff Judge Advocate for the Joint Task Force –

---

<sup>3</sup> The Kuwaiti Detainees and their counsel have good reason to be skeptical of the government's claims that it seriously investigates their allegations of misconduct. At a recent press conference dealing with allegations that military personnel at Guantanamo flushed a Koran down the toilet, Pentagon spokesman Lawrence T. Di Rita said that year-old allegations by detainees' counsel that this happened were not considered credible by the government and, therefore, not investigated. He was quoted as saying: "I'm not aware that we've ever had any specific, credible allegations to investigate. We certainly didn't investigate detainees' lawyers on television saying, 'This is what happened to my detainee,' he said." Carol D. Leonnig, *Desecration of Koran Reported Before*, Wash. Post, May 18, 2005, A12.

Guantanamo Bay, Cuba, declares that, on February 15, 16, and 17, while the Kuwaiti Detainees' counsel were visiting their clients at Guantanamo, he advised them that the DVDs they had brought with them were "still being reviewed" and that "redactions were being made to some of the DVDs." Exhibit 4 to Opp. at ¶ 6. He further declares that counsel told him "since they were leaving the next day, they would show the DVDs to their clients on their next (fifth) visit in March 2005." *Id.* Finally, he declares that he "did advise them that they should submit future requests in advance (I suggested three weeks), to permit us time to complete the necessary review." *Id.* Both Mr. Warden and Lieutenant Commander De Alicante contemplated not only that counsel would be showing to the Kuwaiti Detainees the DVDs they brought with them on their February trip, but also that they would be showing *additional* DVDs to the Kuwaiti Detainees "[i]n the future."

Yet, when the government informed counsel on March 11, 2005, two days before their March trip to Guantanamo, that they would not be permitted to show the DVDs to any but one of the Kuwaiti Detainees, the reason he gave had nothing to do with the time available to process the DVDs or their content. The reason he gave was that they were "home movies" and that, *in the government's opinion*, counsel did not need to present any additional introductory materials to ten of the eleven Kuwaiti Detainees at Guantanamo. Exhibit C to Plaintiffs-Petitioners' Motion for Writ of Injunction.

The government knew or should have known that counsel would rely on the acknowledged statements to them by Mr. Warden and Lieutenant Commander De Alicante and would inform the Kuwaiti Detainees that they would be seeing the February family DVDs in March and that they would be seeing additional family DVDs in the future. The government's last-minute refusal to allow counsel to show the DVDs to the Kuwaiti Detainees during their March trip plainly was designed to undermine the Kuwaiti Detainees' sense of trust and confidence in their counsel.

In any event, because the government agrees that the remarks and actions of which the Kuwaiti Detainees complain are contrary to government policy and wrong, it should not object to the Court's issuance of a writ of injunction preventing such remarks and actions. It is noteworthy in that regard that the government insisted that the Court enter a protective order containing detailed prohibitions against the unauthorized release of classified information by counsel in the Guantanamo Bay cases even though counsel already had signed forms binding themselves on pain of criminal penalties from engaging in such unauthorized releases. The government argued that such an order was necessary to ensure compliance and allow for the swift entry of contempt against counsel who violated its provisions. The Court should proceed in an even-handed manner and issue a writ of injunction prohibiting the government from making religious slurs and other negative remarks against counsel or acting in a manner that undermines trust and confidence between the Kuwaiti Detainees, even though the government says it has policies and procedures in place that prohibit such conduct.<sup>4</sup>

2. The government argues that counsel for the Kuwaiti Detainees have had more trips to Guantanamo than any other counsel to the Guantanamo detainees, and that it had ample opportunity during those trips to advise the Kuwaiti Detainees about their upcoming ARBs. *Opp.* at 25-27. Therefore, the government claims it was under no obligation to extend counsel's March trip to Guantanamo or afford them expedited access to the Kuwaiti Detainees to discuss the ARBs. *Id.* at 27-29.

However, the government's arguments are specious. First, one of the reasons counsel has made almost monthly trips to visit their clients at Guantanamo since December 2004 is that the

---

<sup>4</sup> Contrary to the government's contention (*Opp.* at 19), such an injunction would not be "intractably overbroad." It would simply prohibit the government, through military personnel and interrogators, from making religious slurs or other negative remarks against counsel and from taking actions that it knows or should know would undermine trust and confidence between the Kuwaiti Detainees and counsel.

government has refused to make available to them any other reasonable and timely means of communication.<sup>5</sup> Although the Revised Procedures for Counsel Access to Detainees at the U.S. Naval Base in Guantanamo Bay, Cuba (“Counsel Access Procedures”), dated November 8, 2004, specifically authorize (at ¶ VIII) telephone communications between counsel and the detainees at Guantanamo, the government has *never* authorized a single telephone call between counsel and any of the Guantanamo detainees. Moreover, although the Counsel Access Procedures mandate (at ¶ IV.A.3) that legal mail from counsel to a detainee must be forwarded by the “privilege team” to military personnel at Guantanamo “[w]ithin two (2) business days” of receipt by the “privilege team,” and that this mail must be delivered by military personnel to the detainee “[w]ithin two (2) business days” of receipt by military personnel, the Kuwaiti Detainees routinely receive legal mail from counsel no earlier than *three weeks* after it has been delivered to the “privilege team.” Similarly, although the Counsel Access Procedures mandate (at ¶ IV.B.2) that military personnel collect legal mail “within one (1) business day” of being notified by the detainee that it is prepared for mailing, and that this mail must be mailed to counsel “[w]ithin two (2) business days” of receipt from the detainee, counsel learned on their May 9-13, 2005, trip to Guantanamo that they had not received legal mail from the Kuwaiti Detainees that had been given to military personnel at Guantanamo *six weeks* earlier.

---

<sup>5</sup> Although the government claims it has gone out of its way to facilitate counsel’s visits to Guantanamo (Opp. at 2), counsel have encountered numerous difficulties and problems on almost every visit. During their most recent visit to Guantanamo May 9-13, 2005, counsel for the Kuwaiti Detainees were prohibited for the first time from entering or using the public library at the base. That library houses, in addition to books, about a dozen computer terminals available for up to 30 minutes, which allow access to the Internet, and a copy machine. Counsel have no other access to the Internet or to a copy machine while on the side of the base where the prison holding their clients is located. The government gave no reason for this new prohibition, although counsel observed civilian teenagers, third-country contractors, and others without security badges going in and out of that library. As a result, counsel had no access to their e-mails and no means of copying documents during their daytime hours at Guantanamo. *See* Letter of Neil H. Koslowe to Andrew I. Warden, dated May 16, 2005, annexed as Exhibit A to this Reply.

Second, as the ARB written procedures make clear, the key document in the ARB proceedings is the “written unclassified summary” provided to the detainee, which contains the “primary factors favoring continued detention of the enemy combatant and the primary factors favoring release or transfer.” *See* Exhibit 6 to Opp., Enclosure 3, ¶ 3(a) and Enclosure 4, ¶ 1(f-k). Although counsel for the Kuwaiti Detainees were aware in late January 2005 that the Kuwaiti Detainees would have their ARB proceedings anytime after February 1, 2005, none of the Kuwaiti Detainees had received his written unclassified summary as of counsel’s March 2005 trip to Guantanamo. The ARB procedures provided that these summaries are made available to the detainees only after their home countries are informed that the ARBs will take place. *Id.* at Enclosure 4, ¶ 1(d). Therefore, it was only when counsel was informed by the Government of Kuwait on March 17, 2005, at the end of counsel’s trip to Guantanamo, that the Kuwaiti Detainees’ ARB proceedings were scheduled to start the following week, that counsel could have gotten access to the written unclassified summaries. That is why counsel attempted to extend their trip or return the following week – attempts the government thwarted for no good reason.

Regardless of whether counsel have a “right” to participate in the ARBs themselves (*see* Opp. at 25), this Court has held the Kuwaiti Detainees have a right of access to counsel generally. That right is eviscerated if counsel are denied a meaningful opportunity to advise the Kuwaiti Detainees about such a process as the ARBs. That is precisely what the government accomplished but what the Court should enjoin.

3. Finally, the government simply ignores the last issue raised by the Kuwaiti Detainees in their motion, which is that the government has no authority to suspend processing of or deny counsel requests to visit their clients at Guantanamo on the pretext that counsel may have violated the Court’s Amended Protective Order or the Counsel Access Procedures. Instead, the government

argues that the government's groundless charges were "resolved" and counsel did not suffer "real prejudice" (Opp. at 30).

To the contrary, this issue is vital to the Kuwaiti Detainees' right of access to counsel. The Amended Protective Order is crystal clear that the Court shall deal with allegations that its provisions have been violated. The government may not arrogate to itself the power to deny counsel access to their clients by manufacturing baseless charges against them. The Court should make that clear by issuing the writ of injunction requested by the Kuwaiti Detainees.

Respectfully submitted,

\_\_\_\_\_/s/ Neil H. Koslowe\_\_\_\_\_  
Thomas B. Wilner (D.C. Bar #173807)  
Neil H. Koslowe (D.C. Bar #361792)  
Kristine A. Huskey (D.C. Bar #462979)  
Jared A. Goldstein (D.C. Bar #478572)

SHEARMAN & STERLING LLP  
801 Pennsylvania Avenue, N.W.  
Washington, D.C. 20004  
Telephone: (202) 508-8000  
Facsimile: (202) 508-8100  
Attorneys for Plaintiffs-Petitioners

Dated: May 20, 2005