

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

Plaintiffs,

v.

UNITED STATES OF AMERICA,
et al.,

Defendants.

Civil Action No. 02-CV-0828 (CKK)

MAMDOUH HABIB, *et al.*

Petitioners,

v.

GEORGE WALKER BUSH,
President of the United States,
et al.,

Respondents.

Civil Action No. 02-CV-1130 (CKK)

**NOTICE OF SUPPLEMENTAL
COUNSEL ACCESS PROCEDURES**

On September 27, 2004, the Court entered a Minute Order, apparently prompted by a letter from counsel for petitioners in *Al Odah*, requiring the government to file a notice indicating whether any changes are being made to the Counsel Access Procedures previously supplied to the parties;¹ whether such changes would impact the real-time monitoring of the three detainees

¹ The "Procedures For Counsel Access To Detainees At The US Naval Base in Guantanamo Bay, Cuba," were originally attached as Exhibit A to Respondents' response to the *Al Odah* complaint (filed July 30, 2004) and were otherwise supplied to counsel in the Guantanamo Bay detainee cases. They are attached hereto as Exhibit A, for the Court's

in *Al Odah* currently subject to this requirement; which other Counsel Access Procedures will be affected by the changes; and when the Government expects to publish these procedures and provide them to the Court, including Judge Green. *See* Minute Entry (filed September 27, 2004).

The government responds as follows:

On Friday, September 24, 2004, the government, in connection with its circulation to petitioners' counsel in the Guantanamo Bay detainee cases of a draft protective order by electronic mail, also circulated a copy of two supplementary procedures, finalized that same day, entitled, "Procedures for Handling Mail Between Detainees and Habeas Counsel," and "Procedures for Handling Materials Brought Into or Out of the Meeting Between Detainees and Habeas Counsel." The government intended, and so explained to petitioners' counsel, that the procedures were to govern any future mail or document exchanges between habeas counsel and petitioner-detainees.

Copies of the supplementary procedures, with one additional amendment forbidding the inclusion of staples and paper clips in documents, are attached for the Court's information as Exhibits B and C, and will be circulated to counsel in all the Guantanamo Bay cases today. The attached procedures are intended to apply to mail and document exchanges between petitioners' counsel and petitioner-detainees henceforth.²

reference.

² The government also provides guidelines that address such matters as travel information and travel document recommendations, use of cell phones and laptop computers at the facility, appropriate dress, meeting room arrangements, etc. These are updated periodically and provided to counsel shortly before a scheduled visit to Guantanamo Bay.

The supplementary procedures do not alter DoD's process for real-time monitoring of communications with the three detainees in *Al Odah* who are currently subject to that process. Instead, the procedures clarify the Counsel Access Procedures previously provided the Court and otherwise address the handling of mail and the exchange of documents, as explained below, providing, *inter alia*, a "how-to" with respect to matters addressed in the original Counsel Access Procedures. In that sense, the supplementary procedures must be factored into the Court's consideration of the classification review process and other mail/document exchange procedures on which the parties have already provided briefs, and the supplementary procedures are tendered to the Court for that purpose.

The Counsel Access Procedures previously provided the Court referenced the handling of "legal mail." *See* Exhibit A, § VI. The supplementary procedures define "legal mail," *i.e.*, materials related to representation of the detainee, and distinguish it from non-legal mail, *e.g.*, communications between the detainee and friends or family, and set forth labeling requirements for both types of materials and an appropriate address to which such materials can be routed so as to permit, in the case of legal mail, review by the Department of Defense ("DoD") Privilege Team,³ or, in the case of non-privileged, non-legal mail, review by military personnel pursuant to standard operating procedures applicable to mail delivered to or sent from Guantanamo Bay

³ As defined in the Counsel Access Procedures previously provided to the Court, the Privilege Team is a team comprised of one or more DoD attorneys and one or more intelligence or law enforcement personnel who have not taken part in, and, in the future, will not take part in, any court, military commission, or combatant status tribunal proceedings concerning the detainee. If required, the Privilege Team may include interpreters/translators, provided that such personnel meet these same criteria.

detention facilities. *See* Exhibit B, § II.A., III.A., B.2.⁴ The supplementary procedures also set out procedures for Privilege Team review and for delivery of reviewed documents to counsel or the detainee, as may be appropriate and consistent with any classification determination by the Privilege Team. *See* Exhibit B, § II.A.6., A.7., B., III.A.4., B.2.; Exhibit C, § II.A.4., B., III.A.2., B. In this vein, and consistent with the Counsel Access Procedures previously supplied to the Court, *see* Exhibit A, § XI., the supplementary procedures provide that documents, such as notes or correspondence, reflecting information learned from a detainee must be treated and handled as classified pending Privilege Team review to determine if the information, in fact, is classified. *See* Exhibit B, § II.A.4., III.B.4.; Exhibit C, § III.B.3.

The supplementary procedures also provide procedures for the redaction or exclusion of certain types of information or materials from counsel-detainee document exchanges. As noted above, staples, paper clips, and non-paper materials are prohibited.⁵ *See* Exhibit B, § II.A.1.; Exhibit C, § II.A.2. This is to facilitate review of the materials and to prevent materials that might create a security risk to the Guantanamo Bay facilities if misused, from coming into the hands of detainees. In addition, the supplementary procedures authorize the Privilege Team, consistent with the Counsel Access Procedures previously provided to the Court, *see* Exhibit A, § X.A., to redact classified information counsel may attempt to convey to a detainee, where that information was not learned by counsel from a detainee, *see* Exhibit B, § II.B.3.; Exhibit C,

⁴ Analogous information is provided for privileged and non-privileged materials brought into or out of counsel-detainee meetings. *Compare* Exhibit A, § VIII, *with* Exhibit C, § II.A., III.A., B.3.

⁵ This provision, by oversight, was not included in the copies of the supplementary procedures circulated on September 24, 2004.

§ III.B.3., and to redact information coming from a detainee “that reasonably could be expected to result in immediate and substantial harm to the national security,” *see* Exhibit B, § III.B.3.; Exhibit C, § III.B.2..⁶

Finally, the supplemental procedures prohibit the communication and permit the redaction of “information relating to any ongoing or completed military, intelligence, security, or law enforcement operations, investigations, or arrests, or the results of such activities, by any nation or agency or current political events in any country that are not reasonably related to counsel’s representation of that detainee; or security procedures at GTMO (including names of U.S. Government personnel and the layout of camp facilities) not reasonably related to counsel’s representation;” as well as information on the status of other detainees. *See* Exhibit B, § II.B.2., III.3; Exhibit C, § II.A.2., B.2. The purpose of these provisions is to preserve security and stability among the detainee population, the Guantanamo Bay facility, and those associated with the facility, without intruding upon information sharing that may be needed for purposes of appropriate representation of the detainee.

Some illustrative examples make the need for these provisions clear. For example, to protect the security of military personnel at Guantanamo Bay, the names of guards and other personnel associated with the facility are not shared with the detainee population; sharing such information, information concerning security procedures, or information concerning the status of detainees with detainees or otherwise could create force protection issues and affect good order

⁶ For obvious reasons, and consistent with the original Counsel Access Procedures, the supplementary procedures provide that this latter category of information may be reported to the Commander- Joint Task Force Guantanamo Bay for possible forwarding to appropriate law enforcement, intelligence, or military officials.

in the facility. Information concerning current political events or military activities could cause unrest among detainees, if, for example, they were informed that forces of a certain nation were conducting activities in the area surrounding a shrine or other place of interest to a detainee. Such information, if spread, might also be used by detainees to target other detainees for persecution or harm because of their nation's cooperation in the ongoing hostilities. Information concerning law enforcement or intelligence investigations or operations, if spread among detainees, could permit detainees to thwart interrogations or cause cooperating detainees to decline further cooperation, thereby harming the investigations or operations. Accordingly, the communication of these types of information, to the extent not reasonably related to the habeas representation, must be foreclosed.⁷

For these reasons, as well as those previously expressed in the briefing and argument on counsel access procedures, the supplemental procedures, like the Counsel Access Procedures previously submitted to the Court, protect governmental interests while reasonably accommodating counsel-detainee communications.

Dated: September 29, 2004

Respectfully submitted,

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⁷ These same examples also illustrate why petitioner-plaintiffs' previously argued proposal to effectively create a closed universe of communication between counsel and detainees fails sufficiently to protect necessary camp security and national security interests.

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