IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FAWZI KHALID ABDULLAH FAHAD AL ODAH, *et al.* Petitioners, v. UNITED STATES OF AMERICA, *et al.*, Respondents.	Civil Action No. 02-CV-0828 (CKK)

REPLY MEMORANDUM IN SUPPORT OF RESPONDENTS' MOTION TO QUASH PETITIONERS' NOTICE OF DEPOSITION AND FED. R. CIV. P. 34 REQUEST

Although petitioners' August 10, 2004, brief is styled an opposition to the Government's motion to quash, in substance it alternates between being (1) a supplemental brief on the underlying access-to-counsel issue and (2) a motion for the required leave to propound discovery that petitioners never originally sought. What the brief fails to do, however, is refute respondents' argument that the requested deposition and document production are not appropriate.

Petitioners, first of all, seek to blink away the procedural constraints and burdens that control the propriety of discovery in this type of case at this stage in the case. For all of petitioners' rhetoric about the role and significance of the writ of habeas corpus, they ignore the main point of Harris v. Nelson, 394 U.S. 286 (1969): that the proponent of discovery in a habeas case bears the burden of coming into court to demonstrate his entitlement to discovery in the first instance, rather than the onus being on the opponent to seek relief from the court. The Supreme Court in Harris explained that in an ordinary case under the Federal Rules of Civil Procedure,

discovery "may be served without leave of court," and that "the 'adverse party] must then take the iniative to contest the interrogatories and a hearing in court on his objections is required." Id. at 297. However, the Court observed that in the special circumstances of habeas cases, "this procedure can be exceedingly burdensome and vexatious." Id. The Court thus flatly refused to "provide [habeas petitioners] with an instrument of discovery which could be activated on their own initiative, without prior court approval." Id. at 297-98.[1]

The considerations that animated the Court in Harris v. Nelson are even more pronounced in the unique context of this case. In Harris, the Court referred to "[t]he burden upon courts, prison officials, prosecutors, and police, which is necessarily and properly incident to the processing and adjudication of habeas corpus proceedings," which it said would be "vastly increased" by open discovery. Harris, 394 U.S. at 297. Here, of course, that burden falls not on domestic prison officials and police, but on the U.S. Armed Forces discharging their constitutionally entrusted function of providing for the national defense. Moreover, petitioners here seek a deposition upon oral examination of a high-level military commander, a form of discovery few would dispute is more burdensome and intrusive than the four written interrogatories which were at issue in Harris.[2]

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[1] Petitioners stress that the Court in Harris did authorize district courts to allow some discovery in certain circumstances, but ignore that the only discovery the Court suggested might be permissible (with advance leave) was on the ultimate merits question in a habeas case of whether the petitioner is confined illegally. Harris, 394 U.S. at 300. Here, petitioners seek discovery on interlocutory issues concerning the terms and conditions on their access to counsel as this litigation proceeds.

[2] See Wilson v. Harris, 378 F.2d 141, 142 (9th Cir. 1967), rev'd sub nom. Harris v. Nelson, 394 U.S. 286 (1969).

In short, petitioners here engaged in the self-help that the Court in Harris v. Nelson said is not allowed in a habeas case: they served discovery "on their own initiative, without prior court approval," arrogating for themselves the more comfortable position of responding to a motion to quash instead of justifying their discovery in advance. This attempt to flip the assignment of burdens set by Harris, and echoed by the Rules Governing Section 2254 Cases in Federal District Courts, which require an applicant for discovery to show good cause justifying discovery and which may be applied in this case,[3] should not be countenanced.[4]

Petitioners also claim to locate an "absolute right" to deposition discovery in 28 U.S.C. § 2246. Opposition to Respondents' Motion to Quash (dkt. no. 52, filed Aug. 10, 2004) at 8 (hereinafter "Pets.' Mem."). Of course, to the extent that Rule 6(a) of the Rules Governing Section 2254 Cases in Federal District Courts, which requires court approval for discovery after a showing of good cause, is applied in this case, that rule would supersede the requirements of

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[3] See Rule 6(a) of the Rules Governing Section 2254 Cases in Federal District Courts ("A party shall be entitled to invoke the processes of discovery available under the Federal Rules of Civil Procedure if, and to the extent that, the judge in the exercise of his discretion and for good cause shown grants leave to do so, but not otherwise."); id. Rule 1(b) ("In applications for habeas corpus in cases not covered by subdivision (a), these rules may be applied at the discretion of the United States district court.").

[4] Although petitioners do not appear to dispute that Harris v. Nelson is applicable, they go out of their way to refer to their "non-habeas" claims. See Pets.' Mem. at 1 n.1, 4. As we explained in our opening brief, and as stands unrebutted by petitioners, to the extent that petitioners properly claim an entitlement to discovery under the Federal Rules of Civil Procedure arising out of any "non-habeas" claims (a point respondents dispute), such discovery, if ever appropriate, must at the very least await a Rule 26(f) meeting of the parties. See Memorandum of Points and Authorities in Support of Respondents' Motion to Quash (dkt. no. 50, filed Aug. 6, 2004) at 5-6 n.2 (hereinafter "Resps.' Mem.").

§ 2246.[5] In any event, the clause in § 2246 saying that "evidence may be taken orally or by deposition" refers not to discovery depositions or to interlocutory proceedings, but to "taking evidence" in the ultimate hearing on the merits of the habeas petition. See Harris, 394 U.S. at 299. Nor are petitioners aided by § 2246's next sentence ("If affidavits are admitted any party shall have the right to propound written interrogatories to the affiants, or to file answering affidavits."), which is inapposite because petitioners have not served any written interrogatories.[6]

Not only do petitioners improperly invert the procedural burdens, they also fail to demonstrate that the requested discovery is necessary or appropriate. Nowhere in their opposition do petitioners dispute: (1) that discovery ill fits the briefing schedule that the Court set in its July 23, 2004, Order, following a teleconference in which petitioners did not request or mention discovery (see Resps.' Mem. at 5); (2) that Brigadier General Lucenti's testimony has no bearing on the legal issue of whether pettioners possess an unqualified right to counsel (id. at 6);[7] and (3) that courts in terrorism-related cases have approved, without discovery, reasonable restrictions incident to custody that serve the interests of national security, including monitoring of communications with counsel (id. at 7-8).

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[5] See Bleitner v. Welborn, 15 F.3d 652, 653-54 (7th Cir. 1994) (§ 2254 Rules "have the force of a superseding statute") (citing Rules Enabling Act, 28 U.S.C. § 2072(b)).

[6] We do not mean to imply that written interrogatories would necessarily be appropriate in the unique circumstances of this case, an issue that can be saved for another day.

[7] This fact, among others, distinguishes this case from Cherrix v. True, 177 F. Supp. 2d 485 (E.D. Va. 2001), cited by petitioners, a habeas case brought by a prisoner seeking testing of DNA evidence, where a deposition was justified as the "essential first step of identifying what evidence should be tested." Id. at 494 (emphasis added).

It is neither fair nor accurate to say that the Government "opened the door" to discovery by submitting a declaration explaining and justifying the Government's procedures for monitoring conversations with counsel. Pets.' Mem. at 8. After all, that characterization, like petitioners' "sword/shield" metaphor (Pets.' Mem. at 10), ignores that the Government was merely complying with the Court's briefing order. See Order of July 23, 2004 (dkt. no. 38). However, petitioners insist that they need to take Brigadier General Lucenti's deposition in order to question him about the viability of their "alternative proposal" that national security issues can be obviated by counsel's assurance not to disclose information obtained from detainees. Pets.' Mem. at 5-6. Because decisions about how to best protect national security information are the exclusive province of the Executive, see, e.g., Students Against Genocide v. Dep't of State, 257 F.3d 828, 835 (D.C. Cir. 2001), discovery on this point would serve no useful purpose. In any event, the Government explained at some length in a recent filing why petitioners' proposal is insufficient and unworkable. See Respondents' Reply Mem. in Further Support of Response to Complaint (dkt. no. 51, filed Aug. 9, 2004) at 20-22 (hereinafter "Reply Mem."). Brigadier General Lucenti's testimony would not add anything to that explanation, which petitioners appear to have ignored, nor would it be relevant to whether the counsel access that is being provided suffices to meet petitioners' litigation needs. The Government also has already thoroughly answered petitioners' argument that petitioners are somehow being treated differently from other detainees who are supposedly being granted counsel access without the same conditions and limitations (Pets.' Mem. at 6-7). See Reply Mem. at 17-19.

Finally, petitioners rest on summary judgment decisions in employment discrimination and other cases where courts "routinely" allow deposition discovery under Fed. R. Civ. P. 56(f).

Pets.' Mem. at 7. At the risk of stating the obvious, this case is neither "routine" nor before the Court on a summary judgment motion. No ruling that finally disposes of the merits of petitioners' claims is imminent, the controlling standard is not whether there are genuine disputed issues of material fact, and Rule 56(f) is wholly inapplicable.[8] Rather, what is pending is a preliminary, interlocutory issue in a special type of habeas corpus case that uniquely calls upon the Court to balance petitioners' right to litigate against the Government's grave interest in maintaining national security. Discovery is neither indispensable nor appropriate to resolution of the counsel-access issue currently before the Court.

CONCLUSION

For the foregoing reasons as well as those stated in respondents' opening memorandum, respondents respectfully request that their motion to quash petitioners' discovery requests be granted.

Dated: August 11, 2004

Respectfully submitted,

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[8] Even under Rule 56(f), deposition discovery is not automatic or self-executing. Rather, as one of the cases petitioners cite shows, it is available only by order of court, after the party seeking the discovery carries his burden to show "(1) what facts are sought and how they are to be obtained, (2) how those facts are reasonably expected to create a genuine issue of material fact, (3) what effort [he] has made to obtain them, and (4) why [he] was unsuccessful in those efforts." Messina v. Mazzeo, 854 F. Supp. 116, 141 (E.D.N.Y. 2004). Again, in this case petitioners engaged in self-help without seeking the required advance leave to serve discovery, and even now have failed to demonstrate a bona fide need for the discovery sought.

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