**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

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| **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 ISSUANCE OF SECURITY FORMS AND TO EXPEDITE SECURITY CLEARANCES FOR TWO SUPPORT PERSONNEL**

Fawzi Khalid Abdullah Fahad Al Odah, *et al*., plaintiffs, move to compel defendants [the "government"] to issue security forms and expedite security clearances for one legal assistant and one secretary.[1] Plaintiffs request this relief to enable counsel, once they have been able to meet with the plaintiff-detainees [the "Kuwaiti Detainees"] at Guantanamo, to comply to the fullest extent with the October 12, 2004, deadline set by this Court for the filing of reply briefs addressing why writs of habeas corpus and other relief requested on behalf of the Kuwaiti Detainees should be granted. The reasons for this motion are as follows:

1. The government has proposed "Procedures for Counsel Access to Detainees at the US Naval Base in Guantanamo Bay, Cuba," including a proposal to subject all communications between plaintiffs' counsel and three designated Kuwaiti Detainees to "real-time monitoring." *See* Exhibit A to Response to Complaint in Accordance with Court's Order of July 25, 2004 (filed July 30, 2004), ¶¶ IV, V; Letter from Thomas R. Lee, Deputy Assistant Attorney General, Civil Division, Department of Justice, to Honorable Joyce Hens Green, Senior United States

[1] In accordance with LCvR 7.1(m), plaintiffs' counsel asked government counsel prior to filing this motion whether the government would oppose it. Government counsel responded that the government cannot agree to the relief plaintiffs seek and will oppose this motion.

District Judge, dated September 1, 2004. This means a military "privilege team" would eavesdrop on and videotape the meetings between plaintiffs' counsel and those three detainees.

Plaintiffs contend that "real-time monitoring" would vitiate the attorney-client privilege and effectively deny the designated Kuwaiti Detainees the right to counsel on their habeas and non-habeas claims. *See* Memorandum of Points and Authorities in Opposition to Defendants' "Response to Complaint" (filed August 4, 2004), pp. 9-13. Plaintiffs have also argued that such monitoring is not necessary because their counsel has offered to treat *all* information obtained from the three designated Kuwaiti Detainees as classified and not to disclose it to *anyone* (except the Court) without giving the government a reasonable opportunity to oppose such disclosure and, if necessary, seek an order from the Court to prevent it. *Id*., pp. 19-20.

During the hearing before Judge Colleen Kollar-Kotelly on the monitoring and other counsel access issues, Judge Kollar-Kotelly spent a great deal of time exploring plaintiffs' offer and her own version of it with the parties' counsel. *See* Transcript of Proceedings, August 16, 2004, pp. 14-15, 20-33, 36-53, 59-71, 76-80. Judge Kollar-Kotelly took this issue and other counsel access issues under advisement, and there has been no ruling on the matter to date. It is, of course, necessary that the monitoring issue be resolved so that counsel can visit the Kuwaiti Detainees and be able to reply by October 12, 2004, to the government's responses to their habeas petitions, as the Court has ordered.

2. In anticipation of the possibility that the Court would rule that the government may not subject communications between plaintiffs' counsel and the three designated Kuwaiti Detainees to "real-time monitoring," provided plaintiffs treat all information obtained from those detainees as classified, plaintiffs counsel orally requested security clearance forms from the

Court Security Office for one legal assistant and one secretary.[2] *See* electronic mail from Neil H. Koslowe to David B. Salmons, dated August 18, 2004, annexed as Attachment A. The reason for this request was that plaintiffs' counsel realized that, if they were going to be required to treat as classified all information obtained from the designated Kuwaiti Detainees, they would need the assistance of these two individuals for word processing, storing, organizing, and retrieving the information, and these individuals would have to have appropriate security clearances. A representative of the Court Security Office said she would provide additional security clearance forms only with the approval of David B. Salmons, who at the time was lead counsel for the government in this case. *See* Attachment A.

Plaintiffs' counsel sent an electronic mail to Mr. Salmons on August 18, 2004, asking him to approve the request for additional security clearance forms. Attachment A. However, Mr. Salmons never responded. Another attorney for the government, Andrew Warden, spoke to plaintiffs' counsel a few days later and said he would look into the matter. Neither he nor any other government attorney ever approved the request.

At an unreported conference held on August 23, 2004 among the parties' counsel in all the pending Guantanamo cases and Senior Judge Joyce Hens Green, plaintiffs' counsel raised the matter of the government's refusal to approve the issuance of additional security clearance forms for the two support staff. Plaintiffs' counsel pointed out that it would be necessary to have

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[2] Four of plaintiffs' counsel already have received security clearances to enable them to meet with the Kuwaiti Detainees at Guantanamo, and plaintiffs have contacted Arabic-speaking interpreters who also already have security clearances to enable them to meet with those detainees at Guantanamo. Plaintiffs requested security forms for five additional attorneys. The reason for that was the government proposes that only one attorney may visit a detainee at a time (*see* Exhibit A to Response to Complaint in Accordance with Court's Order of July 25, 2004, ¶ III.D.2). Because plaintiffs' counsel represent 12 Kuwaiti detainees and did not know how long they would be permitted to visit with the detainees, they wanted to be sure they had a sufficient number of security-cleared attorneys to meet with all the detainees in a short period of time. However, in this motion plaintiffs seek only the issuance of two additional security clearance forms and expedited security clearances for the two support personnel.

support staff security cleared if the Court ruled that, in lieu of "real-time monitoring," plaintiffs' counsel would have to treat all information obtained from the three designated Kuwaiti Detainees as classified. Plaintiffs' counsel added that, although the Court had not yet ruled on the matter, it was important that the security clearance process for the support staff get underway immediately so that counsel's visit with the Kuwaiti Detainees would not be delayed if the Court ruled in plaintiffs' favor. However, government counsel said the government would not approve the issuance of additional security clearance forms or process support staff for security clearance because the government remained opposed to plaintiffs' alternative to "real-time monitoring." *See* Respondents' Statement Regarding Restrictions on Attorney Access to Petitioner-Detainees (submitted to Senior Judge Green on August 27, 2004), p. 5 n. 4 (annexed as Attachment B).

3. On September 20, 2004, Senior Judge Green issued a Coordination Order Setting Filing Schedule and Directing the Filing of Correspondence Previously Submitted to the Court. Among other things, Judge Green ordered that, "pursuant to 28 U.S.C. § 2243," the government must file and serve on or before October 4, 2004, "responsive pleadings showing cause why Writs of Habeas Corpus and the relief sought by Petitioners should not be granted." Judge Green further ordered that plaintiffs must filed and serve on or before October 12, 2004, "reply briefs" to the government's responsive pleadings. This schedule was confirmed today in an Order entered by Judge Kollar-Kotelly.

Although plaintiffs do not know what type of responsive pleadings the government will file, Judge Greens' explicit reference to 28 U.S.C. § 2243 and her alternative characterization of the pleadings as "formal responses" to plaintiffs' applications for writs of habeas corpus and other relief (*see* Coordination Order, p. 7) suggest that the responsive pleadings will include what

is typically included in a "return" to a show cause order under 28 U.S.C. § 2243. That means the responsive pleadings may include facts or alleged facts.

But whatever the government includes in its responsive pleadings, 28 U.S.C. § 2243 provides that "[t]he applicant or the person detained may, under oath, deny any of the facts set forth in the return or allege any other material facts." Thus, in the "reply briefs" Judge Green and Judge Kollar-Kotelly have ordered the Kuwaiti Detainees to file on or before October 12, 2004, the Kuwait Detainees may deny any facts the government includes in its responsive pleadings that they are in a position to dispute under oath, and they may also allege any other material facts. Plaintiffs' counsel will not be able to include such denials or allegations in the reply briefs for the Kuwaiti Detainees until they meet with the Kuwaiti Detainees, and they plan to do that as soon as the Court resolves the "real-time monitoring" issue.

Consequently, plaintiffs' counsel face right now the dilemma they feared they would face since mid-August. Should the Court rule, properly we believe, that the government may not subject communications between plaintiffs' counsel and the three designated Kuwaiti Detainees to "real-time monitoring," provided plaintiffs' counsel treats all information obtained from those detainees as classified, plaintiffs' counsel will be stymied in their ability to satisfy that *proviso* until one legal assistant and one legal secretary are security cleared. If the process of such clearance does not begin until after the Court rules on the monitoring issue, it may not be complete before October 12, 2004, which is the deadline for filing reply briefs on behalf of the Kuwaiti Detainees. Thus, there is a danger that plaintiffs' counsel will not be able to include in those reply briefs denials of facts the government may allege in their responsive pleadings on October 4 or allegations of material facts on behalf of the three designated Kuwait Detainees.

4. The grant of this motion cannot prejudice the government. Surely the issuance of two security clearance forms is no burden upon the government. And although performing security clearances for two individuals involves some expenditure of time and resources by the government, the government will have to expend that time and those resources if the Court rules in plaintiffs' favor on the "real-time monitoring" issue. As between ordering such a modest expenditure of time and resources by the government that may turn out to be unnecessary and protecting the statutory habeas rights of the three designated Kuwaiti Detainees, it is clear the Court should protect the Kuwaiti Detainees' habeas rights under 28 U.S.C. § 2243 and order the government to provide security clearance forms and expedite security clearance for one secretary and one legal assistant who work for plaintiffs' counsel.

Respectfully submitted,

_____/s/ Thomas B. Wilner_____
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