

**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.)
))

**AL ODAH PETITIONERS' UNOPPOSED MOTION FOR CLARIFICATION
OF OCTOBER 20, 2004 DECISION**

On October 20, 2004, this Court issued a Memorandum Opinion in which it rejected the government's proposal to impose real-time monitoring on communications between three detainees and their counsel. The Al Odah petitioners request that this Court clarify a statement appearing on page 21 of the Opinion, which discusses the framework proposed by the Court at the August 16, 2004 hearing and adopted by the Court in its Opinion. Specifically, petitioners seek clarification of the Court's statement that each petitioner would be allowed to meet with counsel who would be barred from disclosing information learned from the petitioner to "anyone, *including law firm colleagues or support staff*" without first obtaining approval by the government or the Court for the disclosure. Mem. Op. 21. Petitioners' counsel construes this statement to refer to disclosures to law firm colleagues or support staff *who have not received security clearances for work on this litigation*, and petitioners request clarification that this is what the Court intended. The government's counsel has informed petitioner's counsel that the government does not oppose this motion.

Petitioners' counsel did not understand the Court's proposal at the August 16 hearing to restrict disclosure to properly cleared support staff and law firm colleagues. Such a restriction was not sought by the government, was not agreed to by petitioners' counsel, and would be

unworkable. As the Court correctly notes, petitioners' counsel agreed at the August 16 hearing to work within the Court's proposed framework. To be sure, this Court began its description of the proposed framework by stating: "Assume that the attorney/client privilege attaches and so you have one attorney. . . . [L]et's deal with one attorney, not the law firm, the paralegals, the associates, or anybody else . . ." Tr. of Aug. 16, 2004, Hearing at 14. Petitioners' counsel understood this statement to mean only that the Court was beginning with the assumption that petitioners' communications with counsel were privileged and that the Court was addressing only the narrow question of whether a privilege exists and not the scope of who was covered by the privilege. Accordingly, petitioners' counsel did not understand their agreement to work within the Court's proposal to preclude sharing information among law firm employees who have received security clearances for the purpose of working on this case.

Petitioners' proposal to this Court did not include a limitation on disclosures within petitioners' law firm. Instead, petitioners proposed that counsel would not disclose any information obtained from the detainees to "third persons" without first providing the government the opportunity to review the information. *See* Al Odah Petitioners' Mem. at 19. This Court likewise characterized its proposed framework as limiting disclosures to "third parties." Tr. at 61. As the Courts have uniformly ruled, law firm support staff and associates are within the attorney-client privilege and therefore do not constitute third parties. *See, e.g., Linde Thomson Langworthy Kohn & Van Dyke, P.C. v. Resolution Trust*, 5 F.3d 1508, 1514 (D.C. Cir. 1993); *FTC v. TRW, Inc.*, 628 F.2d 207, 212 (D.C. Cir. 1980); *United States v. Kovel*, 296 F.2d 918, 921 (2d Cir. 1961).

The government's proposed conditions on monitoring likewise would not have restricted counsel's ability to share information within a law firm among staff with security clearances. While the government's proposal limited petitioners' access to "counsel," that word was defined to include "co-counsel, interpreters, translators, paralegals, investigators and all other personnel

or support staff employed or engaged to assist in the litigation.” Ex. A to Government’s “Response to Complaint in Accordance with Court’s Order of July 25, 2004, at Pt. II.B. The proposed protective order to which the government has agreed similarly makes clear that the government anticipates that petitioners’ counsel may share classified information with properly cleared colleagues and support staff.

To the extent that the Court intended to restrict counsel’s ability to rely on law firm colleagues and support staff who have obtained security clearances, petitioners ask this Court to reconsider because such a restriction would prevent petitioners’ counsel from effectively representing their clients. Such a limitation would mean that each petitioner would be represented by a solo practitioner with no support staff. Petitioners’ lead counsel, Tom Wilner, cannot type and has little ability to use computer word processing. If he were barred from working with a secretary, it would not be possible to prepare any filings or other documents that reflected information obtained from petitioners. Petitioners’ ability to receive effective assistance of counsel would therefore be lost. Indeed, the courts have routinely recognized that effective assistance of counsel requires that counsel rely on colleagues and support staff. As

Judge Friendly stated:

[T]he complexities of modern existence prevent attorneys from effectively handling clients’ affairs without the help of others; few lawyers could now practice without the assistance of secretaries, file clerks, telephone operators, messengers, clerks not yet admitted to the bar, and aides of other sorts. “The assistance of these agents being indispensable to his work and the communications of the client being often necessarily committed to them by the attorney or by the client himself, the privilege must include all the persons who act as the attorney’s agents.”

Kovel, 296 F.2d at 921 (quoting 8 Wigmore, Evidence, § 2301). Not only are support staff “indispensable,” but “an attorney’s effectiveness depends upon his ability to rely on the assistance of various aides.” *Von Bulow v. von Bulow*, 811 F.2d 136, 146 (2d Cir. 1987).

In the October 20 Opinion, this Court concluded that petitioners are entitled to counsel and that communications with counsel are entitled to the protections of the attorney-client privilege. As the courts have held, the attorney-client privilege encompasses communications between a client's counsel and counsel's agents, such as law firm associates and support staff. Thus, to limit counsel's ability to communicate with law firm staff would not only undermine counsels' ability to represent their clients, it would also impose substantial limitations on the attorney-client privilege. We do not believe that this Court had such a limitation in mind because the framework adopted by the Court sought to address the government's national security concerns without sacrificing the attorney-client privilege. Restricting counsel's ability to share information with support staff, which was sought by neither the government nor petitioners, would serve no legitimate purpose. Any concern about the divulgence of information beyond those protected by the attorney-client privilege is addressed by the requirement that support staff obtain security clearances and by counsels' agreement not to divulge any information received from petitioners to any third parties.

Respectfully submitted,

/s/

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