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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

MOTION TO ENFORCE COURT'S ORDER OF OCTOBER 20, 2004, ON ACCESS TO COUNSEL AND FOR APPOINTMENT OF SPECIAL MASTER AND PROTECTIVE MOTION FOR MODIFICATION OF STAY PENDING APPEAL

Introduction and Summary

On October 20, 2004, this Court issued a Memorandum Opinion and Order ("Oct. 20 Memo") holding that plaintiffs-petitioners (the "Kuwaiti Detainees") have a right to counsel. Moreover, the Court ruled that defendants-respondents (the "government") may not vitiate the Kuwaiti Detainees' right to counsel by imposing restrictions on counsel's access to the Detainees that "inappropriately burden" the attorney-client relationship. Oct. 20 Memo at 13. The Court concluded that it has statutory authority "to craft the procedures necessary" to enforce the Kuwaiti Detainees' right of access to their counsel so they may "present the facts surrounding their confinement to the Court." *Id*. at 10.

The Kuwaiti Detainees are moving to enforce the Court's Oct. 20 Memo because the government has "inappropriately burden[ed]" the Kuwaiti Detainees' right of reasonable access to counsel in four ways: (i) denying them an Arabic-English dictionary with which to understand court filings and government notices; (ii) denying their counsel security clearance forms for experts to evaluate classified information pertaining to their detention; (iii) denying the use of

either of two expeditious methods approved by the Defense Department for the transmission of presumptively classified counsel notes from Guantanamo; and (iv) denying counsel access to Internet communications at Guantanamo which the government has made available to the press. The government either has given no reason for these decisions or given reasons that border on the absurd. Accordingly, the Court should enforce its Oct. 20 Memo.[1]

In addition, the Kuwaiti Detainees are moving for the appointment of a Special Master. *See* Fed.R.Civ.P. 53. Many of the issues the Kuwaiti Detainees raise in this motion might have been resolved by the parties without court intervention if the government had engaged in good faith negotiations over them. However, the government has steadfastly refused to engage in such negotiations over counsel access and detainee living conditions issues, perhaps because it believes it is insulated from judicial review regarding them. The Kuwaiti Detainees submit that it would conserve judicial and party resources if the Court appointed a Special Master to supervise negotiations between the parties over such issues and to make recommendations to the Court in those instances where the parties are unable in good faith to resolve them.

Finally, the Kuwaiti Detainees are incorporating a protective motion for modification of the stay pending appeal granted by the Court on February 3, 2005. Because the issues raised by this motion do not pertain to the Kuwaiti Detainees' substantive claims for relief, but rather to the ongoing representation and visits by counsel to which the government does not object, the Kuwaiti Detainees do not believe the Court's consideration of this motion is precluded by the stay. However, to the extent the government or the Court believe otherwise, the Kuwaiti Detainees move for a modification of the stay to permit the Court to resolve this motion.

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[1] In accordance with LCvR 7.1(m), counsel for the parties have previously discussed but been unable to resolve or narrow the issues raised by this motion.

ARGUMENT

I. THE GOVERNMENT HAS IMPERMISSIBLY BURDENED THE KUWAITI DETAINEES' RIGHT OF REASONABLE ACCESS TO COUNSEL

A. Denial of Arabic-English Dictionaries

The government has inappropriately burdened the Kuwaiti Detainees' right of reasonable access to counsel by refusing to permit counsel to provide them with a pocket-sized English-Arabic/Arabic-English dictionary. The Kuwaiti Detainees requested these dictionaries to help them understand legal material provided by counsel and facilitate counsel's work on these cases. Such legal materials include the opinions and orders issued by this Court, pleadings filed by their counsel and the government, and Defense Department published procedures for the upcoming Administrative Review Boards by which the government says it will determine whether the Kuwaiti Detainees still allegedly pose a danger to the United States and its allies requiring their continued detention.

The government's stated reason for denying these dictionaries is "force protection." In the words of government counsel:

> GTMO prohibits English translation dictionaries and other language aids from the camps for force protection reasons. GTMO is concerned that detainees may attempt to collect information by listening, for example, to guards, medical staff, or others in and around the camp, or to radio transmissions. Armed with this information, detainees may attempt to harm military forces or to cause disruptions within the camp. Because English dictionaries may assist detainees in any such information collection efforts, GTMO prohibits their release.

E-mail message from Andrew I. Warden to Jared A. Goldstein, February 8, 2005, annexed as Exhibit A. Thus, according to the government, the Kuwaiti Detainees cannot have dictionaries because dictionaries would enable them to understand what the guards, doctors, and others say in their presence and imperil the security of the detention facility.

The "force protection" concern articulated by the government is spurious. One can only wonder what sort of sensitive security information doctors might be discussing that they must keep from their patients. In any event, the appropriate way for any of these people to protect such information from disclosure is not to discuss it in front of the detainees. In fact, many detainees at Guantanamo speak and understand English. For that reason alone guards cannot and do not freely discuss potentially sensitive security information in front of the detainees, nor do they permit detainees to listen to any radio communications. It is also difficult to imagine how any non-English speaker could use a dictionary meaningfully to interpret oral conversations. Although prison administrators may be entitled to deference for their assessments of prison security, no deference is due to wholly implausible security concerns such as those voiced by the government here.

The Kuwaiti Detainees need Arabic-English dictionaries in furtherance of their recognized right of access to counsel and to this Court. One of the reasons the Court held that the Kuwaiti Detainees have a right to counsel is that they "face an obvious language barrier." Oct. 20 Memo at 12. It is not feasible or within the Kuwaiti Detainees' means for counsel to obtain translations of all the legal materials relevant to their cases. The Kuwaiti Detainees in any event are entitled to better understand the relevant legal materials in the language in which they are written. Arabic-English dictionaries will improve the quality and quantity of written communications between the Kuwaiti Detainees and their counsel, allowing counsel to develop the relevant facts and legal theories in support of the Kuwaiti Detainees' claims.

The Supreme Court has long held that the right of access to he courts encompasses a right to review relevant legal materials. *See Bounds v. Smith*, 430 U.S. 817, 828 (1977). Of course, the Kuwaiti Detainees cannot review the legal materials relevant to their cases if they cannot

understand them. As the Ninth Circuit declared, the right of access to the courts is not satisfied merely be providing access to legal materials because "[a] book and a library are of no use, in and of themselves, to a prisoner who cannot read . . . because they are uneducated, illiterate, or do not speak English." *Lindquist v. Idaho State Board of Corrections*, 776 F.2d 851, 855-856 (9th Cir. 1985). The denial of access to an Arabic-English dictionary also infringes on the Kuwaiti Detainees' right of meaningful access to counsel. The government has recognized that meaningful access to counsel requires that counsel visiting the Kuwaiti Detainees at Guantanamo be accompanied by Arabic-speaking interpreters. Meaningful access to counsel also requires that the Kuwaiti Detainees be able to understand what is contained in the legal materials counsel share with them.

The Court should not allow the government to prevent the Kuwaiti Detainees from understanding their legal situation and communicating with counsel for the purposes of developing and presenting their claims in this case. It should order the government to permit the Kuwaiti Detainees' counsel to provide them Arabic-English dictionaries.

B. Denial of Security Clearance Forms for Experts

The government has refused to provide the Kuwaiti Detainees' counsel with security clearance forms for experts. The government has filed "factual returns" to the Kuwaiti Detainees' applications for a writ of habeas corpus in an attempt to justify their indefinite imprisonment. These "factual returns" consist largely of classified interrogation and intelligence reports which are accessible to the Kuwaiti Detainees' counsel but not to their clients. It is counsel's obligation to evaluate this classified information. As the Court pointed out in its Memorandum Opinion Denying in Part and Granting in Part Respondents' Motion to Dismiss or for Judgment as a Matter of Law dated January 31, 2005 ("January 31 Opinion"), at 53:

"Although counsel are not permitted to share any classified information with their clients, they at least have the opportunity to examine all evidence relied upon by the government in making an 'enemy combatant' status determination and to investigate and ensure the accuracy, reliability and relevant of that evidence." The Kuwaiti Detainees' counsel have requested but been denied security clearance forms for experts they wish to hire to evaluate the classified information upon which the government allegedly relies in determining that their clients are "enemy combatants."

The government's denial of security clearance forms for experts is purely a tactical maneuver. In its first letter denying the forms government counsel said: "[W]e do not believe it appropriate at this stage of the case to provide security clearance forms for use by experts." Letter from Terry M. Henry to Neil H. Koslowe, January 28, 2005, at 2 (annexed as Exhibit B). In its second letter denying the forms government counsel noted that the Court, on February 3, 2005, stayed proceedings in this case pending the government's appeal from the Court's decision denying in part the government's motion to dismiss and said that, "[g]iven this present posture," the government would not reconsider its denial of the security clearance forms for experts. Letter from Andrew I. Warden to Neil Koslowe, dated February 10, 2005, at 1 (annexed as Exhibit C). Government counsel repeated: "[W]e continue to believe that it is not appropriate at this stage of the case to [provide] security clearance applications for use by experts." *Id*. Thus, the government has arrogated to itself the decision when the Kuwaiti Detainees' counsel should employ experts in this case and it has decided that now is not the "appropriate" time.

The Court should not permit the government to leverage its control over security clearance forms impermissibly to dictate when the Kuwaiti Detainees' counsel should engage experts. Regardless of the stay granted by the Court, the Kuwaiti Detainees should be allowed to evaluate now the classified information allegedly relied upon by the government to justify their

detention so there will not be delays in the future if the stay is modified or vacated or if the government does not prevail on appeal. The purpose of a stay is to *preserve* the status quo, not to give one party (here, the government) a litigation advantage. As the Fourth Circuit has remarked, "Our system of law universally frowns on a party who would use the stay as both a sword and a shield." *In re A.H. Robins* Co., 828 F.2d 1023, 1026 (4th Cir. 1987). Accordingly, the Court should order the government to provide the Kuwaiti Detainees' counsel with security clearance forms for experts.

C. Denial of Expeditious Methods to Transmit Attorney Notes from Guantanamo

The government refuses to allow the use of either of two expeditious methods for the transmission of notes taken by the Kuwaiti Detainees' counsel in Guantanamo to a secure facility maintained by the government in Crystal City, Virginia. As a result, counsel's ability to work on the Kuwaiti Detainees' cases has been significantly impaired.

The Court decided in its Oct. 20 Memo (at 21-22) that notes taken by the Kuwaiti Detainees' counsel at Guantanamo should be deemed classified and may be transmitted only by secure means to and from secure facilities. The Court anticipated that the parties would have "significant discussions" concerning the transmission of those notes. Oct. 20 Memo at 22 n. 17. However, the government elected not to bargain in good faith on this issue. Accordingly, the Court, in its Revised Procedures for Counsel Access to Detainees at the U.S. Naval Base in Guantanamo Bay, Cuba at VI.B ("Counsel Access Procedures"), annexed as Exhibit A to Amended Protective Order and Procedures for Counsel Access to Detainees at the United States Naval Base in Guantanamo Bay, Cuba ("Amended Protective Order") dated November 8, 2004, provided that the notes must be sealed in the presence of counsel and, within two business days following completion of counsel's visit to Guantanamo, transmitted to a secure facility in Crystal

City, Virginia, "in the manner of classified materials." The government has construed the phrase "in the manner of classified materials" to mean that counsel's notes should be sent to the secure facility by certified mail from the United States Post Office at Guantanamo.[2]

This procedure has caused interminable delays in counsel's receipt of their notes from their meetings with the Kuwaiti Detainees. At a minimum, the notes have arrived at the secure facility more than two weeks after being sent, and some notes have taken more than a month to arrive.[3] These delays have impaired the ability of the Kuwaiti Detainees' counsel to conduct follow-up investigations, to discuss the detainees' conditions with their families and the media, and to prepare and file court submissions concerning the circumstances of their detention.[4]

The Kuwaiti Detainees' counsel have proposed, but the government has rejected, two alternative means to transmit counsel notes from Guantanamo more expeditiously, both of which are permitted under existing Defense Department regulations or practices. First, counsel proposed that private couriers – such as Federal Express or counsel themselves – be allowed to deliver the notes in sealed packages to the secure facility. Defense Department regulations expressly permit "[c]ouriers and authorized persons" to hand-carry "secret" materials from one location to another. 32 C.F.R.§ 2001.45(b)(2), (c)(2)(i). In accordance with these regulations,

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[2] The government also permits military personnel at Guantanamo to transmit counsel notes to the secure facility over a secure facsimile transmission line. However, it takes four minutes to transmit a single page over that line and counsel or counsel's representative, accompanied by a military escort, must be present for the entire transmission. Other detainees' counsel have encountered substantial delays and disruptions attempting to have their notes transmitted by this facsimile transmission line. Indeed, an interpreter for the Kuwaiti Detainees' counsel who observed the attempted facsimile transmission of approximately 30 pages of notes taken by counsel for other detainees reported that, after several frustrating hours, the effort was abandoned and his military escort vowed never again to accompany counsel or counsel's representative to the facsimile transmission facility.

[3] In one instance the notes of counsel for other detainees were irretrievably lost in the mail.

[4] Under section VII of the Counsel Access Procedures, the Kuwaiti Detainees' counsel may submit their notes to a Defense Department "privilege team" for declassification. Once these notes are declassified, counsel may disclose them to the detainees' families and to the media.

couriers such as Federal Express should be authorized to deliver the counsel notes to the secure facility. Alternatively, the Kuwaiti Detainees' counsel have received security clearances at the "secret" level; they are at least as trustworthy as Federal Express delivery personnel and they should be authorized to deliver the notes. Nonetheless, government counsel rejected this proposal without giving a reason, saying only that "the government cannot agree to permit detainees' counsel to courier presumptively classified materials from Guantanamo Bay to the secure facility." *See* Exhibit B at 2.

The Kuwaiti Detainees' counsel next proposed that they be permitted to transmit electronically scanned copies of their notes from Guantanamo to the secure facility over the Secret Internet Protocol Router Network ("SIPERnet") employed by the Defense Department for e-mail transmission of classified communications. The government denied this request, too, stating that counsel notes cannot be sent over the SIPERnet "for a variety of reasons, including the extreme difficulties associated with attempting to maintain such materials as privileged within the attorney-client relationship."[5] Exhibit C at 1. However, the government has failed to identify a single "extreme difficulty" associated with maintaining the privileged nature of counsel notes transmitted over the SIPERnet and the Kuwaiti Detainees know of none. The recipients of the electronically-scanned notes would be the same Court Security Officer and staff who presently receive the classified notes sent by e-mail.[6] The Court's Amended Protective Order, at ¶ 28, prohibits the Court Security Officer and her staff from revealing any information

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[5] The government mentioned that it had made available a secure facsimile transmission line for the transmission of counsel notes. However, as noted above (p. 7 n. 2), that line is not a practicable method of transmitting more than a few pages of notes. On a typical trip to Guantanamo, the Kuwaiti Detainees' counsel take 150 pages or more of notes.

[6] The same individuals receive any counsel notes transmitted over the secure facsimile transmission line.

contained in documents they handle and expressly provides that the attorney-client and work product privileges are not waived or otherwise limited if they handle privileged documents.

The Kuwaiti Detainees' counsel should not suffer weeks or month-long delays in the receipt of their own notes of conversations with their clients. The Court should order the government to allow counsel to courier those notes to the secure facility or to transmit them to the secure facility over the SIPERnet.

D. Denial of Access to the Internet

The government has gone to great lengths to make high-speed Internet communications facilities available to the press and media at Guantanamo. Both on the "Leeward" side of Guantanamo, next door to the lodging in which counsel for the Kuwaiti Detainees stay during their trips there, and on the "Windward" side of Guantanamo, where all principal facilities are located, there are media centers with computers and high-speed Internet connections available.

Inexplicably, the government refused to permit the Kuwaiti Detainees' counsel to have access to the high-speed Internet connection in the "Leeward" media center, although counsel had paid a private Internet service $200 to use that connection during their most recent trip to Guantanamo. Military personnel at Guantanamo sought to explain the denial on the ground that the military was concerned about damage to its computers. But counsel would have used their own laptop computers, not the military's computers, and there is no basis for concern that counsel would damage the military's computers. Government counsel also suggested that the Kuwaiti Detainees' counsel pay $30 to obtain dial-up Internet service in their lodging rooms. The Kuwaiti Detainees' counsel paid the $30 but, after two-and-a-half hours of trying, were unable to connect to the Internet through this dial-up service. Subsequently, a representative of the company that supposedly provides the dial-up service acknowledged to the Kuwaiti

Detainees' counsel that the company was having "problems" and that subscribers were not able to connect to the Internet using its service.

The ability of the Kuwaiti Detainees' counsel adequately to represent their clients is impermissibly burdened by the government's policy of denying counsel access to high-speed Internet service at Guantanamo. Telephone service from Guantanamo to the United States is sporadic and difficult, and without reliable access to the Internet, counsel are disabled from communicating with their home offices and co-counsel about events transpiring during their visits at Guantanmo. They also are disabled from working on non-Guantanamo matters that inevitably arise during these typically week-long visits. There is no reason why the government should be allowed to favor the press over counsel for the Kuwaiti Detainees. The Court should order the government to allow the Kuwaiti Detainees' counsel to have access to the high-speed Internet connection available at the media center on the "Leeward" side of the base.

II. THE COURT SHOULD APPOINT A SPECIAL MASTER

The Court should appoint a Special Master to supervise negotiations between the parties over counsel access and detainee living conditions issues and make recommendations to the Court if the parties are unable to resolve those issues. Fed.R.Civ.P. 53(a)(1)(C) as amended in 2003 gives the Court broad authority to appoint a Special Master to perform handle non-trial duties that cannot be addressed effectively and timely by the Court. The Advisory Committee Notes suggest that the "administration of an organization" is an example of such a duty.

It is likely that, as this case proceeds, there will be a variety of issues that arise concerning counsel access to and living conditions of the Kuwaiti Detainees. Without oversight by the Court or a Special Master, the Kuwaiti Detainees are convinced the government will not negotiate the resolution of such issues in good faith. To avoid having repeatedly to litigate these

issues before the Court, the Kuwaiti Detainees urge the Court to appoint a Special Master to deal with and possibly resolve them in the first instance and make recommendations to the Court when there is no other recourse.

III. IF NECESSARY, THE COURT SHOULD MODIFY ITS STAY TO CONSIDER AND RESOLVE THIS MOTION

Although the Court, in its Order Granting in Part and Denying in Part Respondents' Motion for Certification of January 31, 2005 Orders and for Stay dated February 3, 2005, ordered that the proceedings in this and ten other Guantanamo Bay cases are stayed for all purposes pending resolution of all appeals, this stay should not preclude the Court from considering and resolving this motion. Under the Oct. 20 Memo the Kuwaiti Detainees have a continuing right to counsel and a continuing right of reasonable access to counsel. The government does not contend otherwise, and it has continued to permit counsel to visit with the Kuwaiti Detainees at Guantanamo notwithstanding the stay. If the government suddenly abrogated the Kuwaiti Detainees' right of access to counsel, the Court would be empowered to provide immediate relief to the Kuwaiti Detainees despite the stay. Similarly, because the issues the Kuwaiti Detainees raise in this motion pertain to their right of reasonable access to counsel, the Court is empowered to grant it now despite the stay.

However, if the government argues or the Court believes the stay is an impediment to the Court's consideration of this motion, the Kuwaiti Detainees ask the Court to modify the stay to permit it to consider and resolve the motion now. As the Court has observed, "the same court that imposes a stay of litigation has the inherent power and discretion to lift the stay," especially where circumstances are such that maintenance of the stay is "inappropriate." *Marsh v. Johnson*, 263 F.Supp.2d 49, 52 (D.D.C. 2003). Circumstances are such that the Court should exercise its discretion to modify the stay to consider and resolve this motion.

The Court imposed a stay pending resolution of the government's attempt to appeal the Court's denial in part of the government's motion to dismiss this and ten other Guantanamao Bay cases. The Court's denial in part of the government's motion to dismiss was based on its holding that the detainees at Guantanamo Bay have enforceable rights under the Fifth Amendment and the Geneva Conventions. *See* January 31 Opinion. But the present motion does not depend upon whether the Kuwaiti Detainees have rights under the Fifth Amendment and the Geneva Conventions or deal with any of the issues resolved by the Court in the January 31 Opinion. Rather, the present motion seeks to enforce the Oct. 20 Memo of this Court. The Court grounded its Oct. 20 Memo upon statutory authority, and the government never sought an appeal from the Oct. 20 Memo.

Therefore, consideration and resolution of this motion will not alter the January 31 Order, impede the government's pending effort to appeal that Order, or otherwise affect the substantive issues in this case. For this reason the stay should be modified, if necessary, to permit the Court to consider and resolve this motion.

CONCLUSION

For the reasons discussed above, this Court should enter the accompanying order requiring that the government (i) allow the Kuwaiti Detainees to receive Arabic-English dictionaries; (2) provide the Kuwait Detainees' counsel with security clearance forms for its experts; (3) make available alternative methods of expeditiously transmitting counsel notes from Guantanamo to the secure facility; (4) allowing the Kuwaiti Detainees' counsel to have access to high-speed Internet services at the media center in Guantanamo; and (5) appointing a Special Master to deal with future counsel access issues.

Respectfully submitted,

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