

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

IN RE: GUANTANAMO BAY DETAINEE LITIGATION

Doc. 1624 Att. 1

AMMAR AL-BALUCHI,

Petitioner,

v.

ROBERT M. GATES, *et. al.*

Respondents.

: DECLARATION OF SCOTT L.
: FENSTERMAKER, ESQ.
: PURSUANT TO 28 U.S.C. §1746
:
: Civil Docket Number 08-cv-2083 (PLF)
: Misc. No. 0442-08

SCOTT L. FENSTERMAKER, ESQ. (hereinafter, the “Declarant”), an attorney practicing before the bar of this Court pursuant to Local Rule 83.2(g), hereby declares, under the penalties of perjury, pursuant to 28 U.S.C. §1746, the following:

1) Declarant is an attorney at law, practicing before this Court pursuant to Local Rule 83.2(g). Declarant is admitted in the courts of New York State, the United States District Courts for the Southern and Eastern Districts of New York, the United States Courts of Appeals for the Second and District of Columbia Circuits, and the United States Supreme Court.

2) Declarant files this declaration (a) in response to the Court’s December 15, 2008, December 26, 2008, and December 29, 2008 orders directing Declarant to provide Petitioner’s personal substantiation for the filing of the instant petition for a writ of *habeas corpus*, and (b) in support of his motion, attached hereto, seeking an order of this Court directing that Petitioner’s May 26, 2008 letter to Movant be filed under seal for this Court’s *ex parte* and *in camera* review.

3) Declarant has received six letters or postcards from Petitioner. These letters or postcards were dated September 19, 2007, February 2, 2008, February 11, 2008, May 26, 2008, July 7, 2008, and July 14, 2008. Copies of each of these letters or postcards are available for the

Court's *in camera* and *ex parte* review. In addition, Petitioner has apparently also sent Declarant two additional letters or postcards dated December 17, 2007 and December 26, 2007.¹ Declarant has not received Petitioner's December 17, 2007 and December 26, 2007 letters or postcards. In his May 26, 2008 letter, Petitioner directly authorized Declarant to file an action pursuant to the Detainee Treatment Act of 2005 in the United States Court of Appeals for the District of Columbia Circuit to challenge the legality of the government's detention of him.² By letter dated December 18, 2008, Declarant wrote Petitioner seeking an explicit statement regarding his desire to file a petition for a writ of *habeas corpus*. As described below, Respondents are currently rejecting all of Declarant's mail sent to his clients at Guantánamo Bay. It is unclear whether Petitioner has received Declarant's December 18, 2008 letter.

4) On July 1, 2008, Declarant received an e-mail from Andrew I. Warden, an attorney with the Department of Justice. Mr. Warden's July 1st e-mail is attached as Exhibit A. In Mr. Warden's e-mail, he explained that "[b]ecause you are not authorized to send or receive mail pursuant to any appropriately entered protective orders, the mail you recently sent to [Ahmed Khalfan Ghailani and Rahim al-Nashiri] would ordinarily be processed in accordance with the procedures established for non-privileged mail unless you request that the mail be returned to you. Because that mail is marked privileged, it has not been reviewed or otherwise processed at this point." Mr. Warden never mentioned any prohibition against Declarant sending non-privileged mail to detainees at Guantánamo Bay.

¹ The basis for Declarant's knowledge of Petitioner's December 17, 2007 and December 26, 2007 letters is privileged communications from Petitioner.

² Specifically, Petitioner wrote "on May 19th I've sent to the Court via the SJA (the "Staff Judge Advocate") a legal representation request in order to allow [Declarant] to file a 'DTA' Petition on my behalf, I was told that [Declarant would] get a copy of it or get notified, and I hope [Declarant would have] already been notified if not [Declarant] can simply show this letter to the Court." In this same letter, Petitioner lamented that "Mr. Fenstermaker, unfortunately there is no legal representation or legal assistance for brothers detained here."

5) The mail to which Mr. Warden referred was sent to an address provided to Declarant by an Assistant United States Attorney with the Office of the United States Attorney during the course of related litigation in the United States District Court for the Southern District of New York. *See* 05 CV 7468 (RMB) (SDNY). This address was provided to Declarant and the District Court Judge in the SDNY to further the government's effort to assure the SDNY that Declarant had the ability to write detainees at Guantánamo Bay in his capacity as an attorney and to provide legal information and advice to them.

6) Prior to receiving Mr. Warden's July 1st e-mail, Declarant had been using the address to which the above mail was sent for over 12 months in communicating with Guantánamo Bay detainees, including Petitioner herein. During this 12-plus-month period, Declarant had written numerous letters addressed to many detainees using this address. Each of these letters was marked privileged. Declarant also received numerous letters and postcards from many detainees in response to these letters. Mr. Warden's July 1st e-mail was the first indication that Declarant's correspondence was not being treated as privileged (other than the fact that some of the letters and postcards Declarant received from detainees contained redactions, which Declarant understands is permissible even with legal mail sent pursuant to applicable protective orders, including the *Khan* protective order, through the so-called legal mail system in place at Guantánamo Bay).

7) After receiving Mr. Warden's July 1, 2008 e-mail, Declarant responded by sending the e-mail attached hereto as Exhibit B. In that e-mail, Declarant stated, among other things, "[y]ou are free to process my mail to my clients in whatever fashion you like, *so long as they get it*. I will reserve my arguments regarding the privileged nature of the correspondence

for the appropriate forum.” (Emphasis added). Mr. Warden never responded to this communication.

8) On July 31, 2008, Declarant received a package from the Office of the Staff Judge Advocate at Guantánamo Bay. That package included 16 envelopes and a memorandum from Major Greg Musselman, JAGC, USA. A copy of Major Musselman’s memorandum is attached as Exhibit C. In his memorandum, Major Musselman explained that the Office of the General Counsel of the Department of Defense advised the Office of the Staff Judge Advocate at Guantánamo Bay to return the 16 envelopes to Declarant without delivery to their intended recipients.

9) The envelopes in question constitute essential attorney-client correspondence to Rahim al-Nashiri and Ahmed Khalfan Ghailani, two of the five Guantánamo Bay detainees who had asked Declarant to serve as their counsel. This correspondence was addressed and postmarked as follows:

- a. Ahmed Khalfan Ghailani, June 24, 2008
- b. Ahmed Khalfan Ghailani, June 24, 2008
- c. Ahmed Khalfan Ghailani, June 28, 2008
- d. Ahmed Khalfan Ghailani, June 28, 2008
- e. Ahmed Khalfan Ghailani, June 30, 2008
- f. Ahmed Khalfan Ghailani, June 30, 2008
- g. Ahmed Khalfan Ghailani, July 7, 2008
- h. Ahmed Khalfan Ghailani, June 28, 2008
- i. Ahmed Khalfan Ghailani, June 24, 2008
- j. Rahim al-Nashiri, June 17, 2008

- k. Ahmed Khalfan Ghailani, June 21, 2008
- l. Ahmed Khalfan Ghailani, June 21, 2008
- m. Ahmed Khalfan Ghailani, June 21, 2008
- n. Ahmed Khalfan Ghailani, May 28, 2008
- o. Rahim al-Nashiri, June 17, 2008
- p. Rahim al-Nashiri, June 17, 2008³

10) On August 26, 2008, Declarant received another package from the Office of the Staff Judge Advocate at Guantánamo Bay. That package included seven envelopes containing correspondence addressed to Mr. Ghailani which were undelivered to Mr. Ghailani. The envelopes in question constituted essential attorney-client correspondence to Mr. Ghailani. This correspondence was postmarked as follows:

- a. August 6, 2008
- b. August 6, 2008
- c. July 25, 2008
- d. June 30, 2008
- e. August 2, 2008
- f. July 7, 2008
- g. July 7, 2008

11) On August 26, 2008, Declarant received yet another package from the Office of the Staff Judge Advocate at Guantánamo Bay. That package included seven envelopes containing correspondence addressed to Messrs. al-Nashiri and Ghailani. These envelopes were undelivered to their intended recipients. The envelopes in question constituted essential

³ Multiple copies of the letters were sent to the detainees the same day because Declarant sent copies of the letters to three separate addresses for the detainees.

attorney-client correspondence to Messrs. al-Nashiri and Ghailani. This correspondence was addressed and postmarked as follows:

- a. Mr. Ghailani, July 22, 2008
- b. Mr. Ghailani, July 22, 2008
- c. Mr. al-Nashiri, July 22, 2008
- d. Mr. al-Nashiri, July 22, 2008
- e. Mr. Ghailani, July 25, 2008
- f. Mr. Ghailani, July 25, 2008
- g. Mr. Ghailani, August 2, 2008

12) On September 11, 2008, Declarant received two packages from the Office of the Staff Judge Advocate at Guantánamo Bay, both containing undelivered mail. These packages contained a total of five envelopes containing correspondence addressed to Mr. Ghailani. With one exception, the envelopes in question constituted essential attorney-client correspondence to Mr. Ghailani and included copies of publicly filed court documents. This correspondence was postmarked as follows:

- a. August 6, 2008
- b. August 2, 2008
- c. August 6, 2008
- d. August 6, 2008
- e. August 18, 2008

13) Of significance, one of the five envelopes returned in these two packages contained solely non-privileged material. According to the July 1, 2008 e-mail of Andrew I. Warden (*see* Exhibit A), only Declarant's privileged mail was to be returned. No explanation

was provided as to why Declarant's non-privileged mail to Mr. Ghailani was returned or why documents publicly filed in Mr. Ghailani's *habeas* matter (08-1190 (RJL)) were returned.

14) On September 29, 2008, Declarant received four packages from the Office of the Staff Judge Advocate at Guantánamo Bay. These packages contained a total of six pieces of returned mail. Among the papers returned in these envelopes are court filings in Messrs. al-Nashiri's and Ghailani's court actions, including a decision of Judge Richard J. Leon of this Court in Mr. Ghailani's *habeas* matter. The government has never explained why the written decision of a United States District Judge in the addressee's *habeas* action merited rejection and return. This correspondence was addressed and postmarked as follows:

- a. Ahmed Khalfan Ghailani, August 22, 2008
- b. Ahmed Khalfan Ghailani, September 8, 2008
- c. Rahim al-Nashiri, July 22, 2008
- d. Ahmed Khalfan Ghailani, August 22, 2008
- e. Ahmed Khalfan Ghailani, August 17, 2008
- f. Ahmed Khalfan Ghailani, August 17, 2008

15) On November 10, 2008, Declarant received a package from the Office of the Staff Judge Advocate at Guantánamo Bay, Cuba. In that package were four envelopes containing correspondence from Declarant to Petitioner and Ahmed Khalfan Ghailani, two of Declarant's Guantánamo Bay-based clients. These envelopes were all undelivered to their intended recipients. These letters were dated and addressed as follows:

- a. Petitioner, June 28, 2008
- b. Petitioner, June 28, 2008
- c. Ahmed Khalfan Ghailani, July 22, 2008

d. Ahmed Khalfan Ghailani, April 5, 2008⁴

16) On November 14, 2008, Declarant received a package from the Office of the Staff Judge Advocate at Guantánamo Bay, Cuba. In that package was one envelope containing correspondence from Declarant to Petitioner. The envelope addressed to Petitioner contained a letter from Declarant to Petitioner dated October 9, 2008. Also included in this package was a note from Captain Hanna Yang, a staff attorney with the Office of the Staff Judge Advocate at Guantánamo Bay. That note claimed that the envelope had been delivered to Petitioner and that Petitioner had refused it. Captain Yang provided no evidence from Petitioner substantiating her claim that he refused receipt of Declarant's letter.

17) On or about December 12, 2008, Declarant received a package from the Office of the Staff Judge Advocate at Guantánamo Bay, Cuba. In that package were two envelopes containing correspondence from Declarant to Petitioner. These envelopes were all undelivered to their intended recipient. The letters contained in these envelopes were both dated October 9, 2008 and contained the exact same substance as the letter which the Office of the Staff Judge Advocate at Guantánamo Bay claimed Petitioner had previously refused. The package contained no explanation why these two letters were not delivered to Petitioner when the letter discussed in paragraph 16 above was allegedly delivered to the detainee, but supposedly refused.

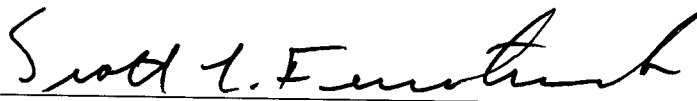
18) Declarant has never been permitted to travel to Guantánamo Bay to visit Petitioner and has not been permitted to visit with the other detainees who have requested his assistance, including Messrs. Ghailani, al-Hawsawi, and al-Nashiri. The Department of Defense

⁴ The letter to Mr. Ghailani dated April 5, 2008 contained a client copy of a letter dated March 31, 2008.

has not acted on Declarant's March 2008 application for the security clearance necessary to visit his clients at Guantánamo Bay.⁵

19) Declarant declares under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Dated: New York, New York
February 15, 2009

By: 
Scott L. Fenstermaker, Esq.

⁵ Movant has learned from a military attorney assigned to the Office of the Chief Defense Counsel of the Office of Military Commissions that Movant has been cleared for a Top Secret clearance, but that the Department of Defense has not "activated" it because it is taking the position that Movant does not represent any Guantánamo Bay detainees.

EXHIBIT A

Scott Fenstermaker

From: Warden, Andrew (CIV) [Andrew.Warden@usdoj.gov]
Sent: Tuesday, July 01, 2008 11:43 AM
To: scott@fenstermakerlaw.com
Subject: Guantanamo Bay mail

Mr. Fenstermaker:

I am one of the attorneys representing the government in the Guantanamo Bay habeas litigation. We have been informed by Joint Task Force Guantanamo that you recently sent letters to Abd al-Rahim al-Nashiri (ISN 10015) and Ahmed Ghailani (ISN 10012). As you may be aware, there are two systems by which detainees send and receive mail at Guantanamo. First, most mail sent to Guantanamo detainees is processed in a non-privileged fashion. That is, the mail is screened and reviewed by military authorities before delivery to the intended recipient. Second, a system for privileged legal mail between detainees and eligible counsel exists under the auspices of various protective orders entered by the U.S. District Court for the District of Columbia and the United States Court of Appeals for the District of Columbia Circuit. That system is available only in cases in which the protective orders have been entered and is subject to requirements and restrictions set out in the orders.

Because you are not authorized to send or receive privileged mail pursuant to any appropriately entered protective orders, the mail you recently sent Messrs. Al-Nashiri and Ghailani would ordinarily be processed in accordance with the procedures established for non-privileged mail unless you request that the mail be returned to you. Because that mail is marked privileged, it has not been reviewed or otherwise processed at this point. Please let me know how you would like to proceed.

Best regards,

Andrew I. Warden
U.S. Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Ave, NW
Washington, DC 20530
Tel: 202-616-5084
Fax: 202-616-8470

EXHIBIT B

Scott Fenstermaker

From: Scott Fenstermaker [scott@fenstermakerlaw.com]
Sent: Tuesday, July 01, 2008 2:41 PM
To: 'Warden, Andrew (CIV)'
Subject: RE: Guantanamo Bay mail

Mr. Warden,

Thank you for your July 1st e-mail informing me of the dual-track mail system with respect to Guantanamo Bay detainees. As you are likely aware, I have been corresponding with a number of detainees at Guantanamo Bay since the summer of 2007. You are also likely aware that I am counsel of record for both Mr. Ghailani and Mr. al-Nashiri in pending court matters in the Southern District of New York, 98 CR 1023 (KTD) (Ghailani), United States District Court for the District of Columbia, 08 -1085 (al-Nashiri) and docket number unknown (Ghailani), and the United States Court of Appeals for the District of Columbia Circuit, 08-1007 (al-Nashiri) and 08-1209 (Ghailani). In addition, I am counsel of record for Mr. Ghailani in his military commissions matter and will be shortly counsel of record in Mr. al-Nashiri's military commissions' matter.

You are free to process my mail to my clients in whatever fashion you like, so long as they get it. I will reserve my arguments regarding the privileged nature of the correspondence for the appropriate forum. I have sent numerous letters and packages to Messrs al-Nashiri and Ghailani, and a number of the other so-called "high value" detainees in the past in the same fashion as the correspondence to which you refer. Until now, no one has ever objected to my correspondence or its privileged nature. The timing of your objection raises a number of issues, particularly in light of the recent actions of the Office of the Chief Defense Counsel to the military commissions.

Your refusal to process my correspondence to these detainees would raise numerous constitutional issues, including, among others, right to counsel, due process and speedy trial concerns. Furthermore, in light of the Office of the Chief Defense Counsel's interference with my relationship with Mr. Ghailani, I will consider any such interference as a cooperative effort between the Justice Department and the Department of Defense. Such effort would not only raise constitutional concerns, but ethical concerns as well.

In case the above was not clear, I am counsel of record for Mr. Ghailani in a pending criminal indictment in the United States District Court for the Southern District of New York. Should you refuse to forward my mail to him, I will immediately take steps to alert that court and ask for a conference in which I will request permission to file the appropriate motions objecting to your holding my client incommunicado.

Let me know if you have any questions.

Scott L. Fenstermaker, Esq.

From: Warden, Andrew (CIV) [mailto:Andrew.Warden@usdoj.gov]
Sent: Tuesday, July 01, 2008 11:43 AM
To: scott@fenstermakerlaw.com
Subject: Guantanamo Bay mail

Mr. Fenstermaker:

I am one of the attorneys representing the government in the Guantanamo Bay habeas litigation. We have been informed by Joint Task Force Guantanamo that you recently sent letters to Abd al-Rahim al-Nashiri (ISN 10015) and Ahmed Ghailani (ISN 10012). As you may be aware, there are two systems by which detainees send and receive mail at Guantanamo. First, most mail sent to Guantanamo detainees is processed in a non-privileged fashion. That is, the mail

is screened and reviewed by military authorities before delivery to the intended recipient. Second, a system for privileged legal mail between detainees and eligible counsel exists under the auspices of various protective orders entered by the U.S. District Court for the District of Columbia and the United States Court of Appeals for the District of Columbia Circuit. That system is available only in cases in which the protective orders have been entered and is subject to requirements and restrictions set out in the orders.

Because you are not authorized to send or receive privileged mail pursuant to any appropriately entered protective orders, the mail you recently sent Messrs. Al-Nashiri and Ghailani would ordinarily be processed in accordance with the procedures established for non-privileged mail unless you request that the mail be returned to you. Because that mail is marked privileged, it has not been reviewed or otherwise processed at this point. Please let me know how you would like to proceed.

Best regards,

Andrew I. Warden
U.S. Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Ave, NW
Washington, DC 20530
Tel: 202-616-5084
Fax: 202-616-8470


EXHIBIT C

TO:
THE LAW OFFICES OF
SCOTT L. FENSTERMAKER PC
300 PARK AVENUE, 17TH FLOOR
NEW YORK, NEW YORK 10022

FROM:
OFFICE OF STAFF JUDGE ADVOCATE
JTF GTMO SJA
APO AE 09360

Enclosed are sixteen (16) envelopes which were submitted to our office via regular mail and opened upon receipt for serialization and delivery. These envelopes were opened according to our standard procedure because they were not marked with the required warning statement indicating that their contents were privileged. Once opened, several of the cover letters reflected the words "Privileged and Confidential, Attorney-Client Privilege". Following this discovery, these materials were immediately returned to their respective envelopes and held in our office for safekeeping. Guidance as to what to do with these materials was sought through the Office of General Counsel (OGC), which directed that they be returned to you. The envelopes are enclosed with this letter.

Sincerely,


GREG MUSSELMAN
MAJ, JA, USA

Assistant Staff Judge Advocate
