

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE: GUANTANAMO BAY DETAINEE LITIGATION

Doc. 314

IN RE:
GUANTANAMO BAY
DETAINEE LITIGATION

Misc. No. 08-442 (TFH)

Declaration Pursuant to
28 U.S.C. §1746

RAHIM ALI-NASHIR, *et. al.*

Petitioners,

08 cv 1085 (TFH)

v.

ROBERT M. GATES,

Respondent.

DECLARATION OF MATERIAL FACTS

SCOTT L. FENSTERMAKER, ESQ., an attorney at law practicing before this Court pursuant to Local Civil Rule 83.2(g), being duly sworn, declares and says, pursuant to 28 U.S.C. §1746:

1. I am retained counsel for Petitioner Rahim ali-Nashir, a detainee currently being held by Respondent at Guantánamo Bay, Cuba.¹

2. I file this declaration, pursuant to 28 U.S.C. §1746, in support of Petitioner's response to Respondent's application for a protective order.

3. Petitioner retained the undersigned as his legal representative in two letters, dated August 22, 2007 and October 1, 2007.² Copies of Petitioner's August 22, 2007 and October 1, 2007 letters are available for the Court's *in camera* inspection, should they assist this Court's determination of Respondent's application for a protective order.

¹ Petitioner herein has a duplicate petition for a writ of *habeas corpus*, 08 cv 1207 (TFH). Counsel for Mr. ali-Nashir in that matter is the Federal Defender for the District of Nevada. The Federal Defender for the District of Nevada does not join in this declaration or response.

² I received Petitioner's August 22, 2007 and October 1, 2007 letters on January 30, 2008 and in November, 2007 respectively.

4. In June of 2007, the United States Department of Justice (the “Justice Department”) provided the United States District Court for the Southern District of New York (the “Southern District”) with the mailing address to detainees held at Guantánamo Bay, Cuba. *See* Page 4 of Exhibit A hereto. In the Justice Department’s letter, it assured the Southern District that Petitioner herein (as well as other detainees at Guantánamo Bay) had “access to mail and are able to contact friends, relatives or attorneys.” *See* Page 3 of Exhibit A. Similarly, during oral argument before the court in the Southern District, the Justice Department assured the Southern District that detainees at Guantánamo Bay could contact counsel through the mails. *See* Exhibit B, Page 25 of oral argument transcript, lines 2 through 5.

5. Nowhere did the Justice Department inform the Southern District or the undersigned that mail sent by attorneys to this address or mail sent from detainees to attorneys would not be treated as privileged or that any correspondence utilizing this address required the waiver of the available privilege. I sent mail marked “privileged and confidential/attorney-client privilege” to this address for approximately one year, starting on June 27, 2007, without incident.

6. By letter dated August 10, 2007, I was detailed to the Pool of Qualified Civilian Defense Counsel (the “Pool”) by Colonel Dwight H. Sullivan, who was then the Chief Defense Counsel for the Office of Military Commissions. Civilian attorneys wishing to represent detainees before the military commissions must be a member of the Pool to do so. I had previously been a member of a predecessor Pool, which was disbanded upon the enactment of the Military Commissions Act of 2006, since the spring of 2005.

7. I have received correspondence from a number of former CIA prisoners currently being held at Guantánamo Bay, including Petitioner, Ahmed Khalfan Ghailani, Ammar al-Baluchi (aka, Ali Abdul Aziz Ali), Mohd Narir bin Lep, Abu al-Farraj al-Lybea (aka Abu Faraj al-Libi), Abu Zubaydah, Mohd Farik bin Amin, and Mustafa bin-Ahmed Hawsawi. Most of

these detainees contacted me to inquire about my services or to otherwise seek assistance in obtaining legal counsel unaffiliated with the government. Petitioner and Mr. Ghailani, on the other hand, clearly asked me to represent their legal interests. I wrote back to a number of these same detainees. In so doing, I have established a dialogue of sorts with Petitioner, Messrs. Ghailani, al-Baluchi and al-Libi.³

8. By letters dated February 2, 2008 and July 1, 2008, I notified various officials in the United States government that I represented Petitioner “in all matters relating to his detention in your custody.” The officials I notified included Colonel Steven David, the current Chief Defense Counsel for the Office of Military Commissions, Brigadier General Thomas W. Hartmann, the legal advisor to the Office of Military Commissions, and Susan J. Crawford, the convening authority to the military commissions. A copy of my February 2, 2008 and July 1, 2008 letters are attached hereto as Exhibit C.

9. During the late fall or early winter of 2007-2008, I contacted military personnel at Southcom, the Department of Defense’s unified command with responsibility over Guantánamo Bay.⁴ Shortly after contacting Southcom, I received a telephone call from Robert M. Loeb, an attorney at the Justice Department who apparently is involved in representing Respondent in some of the Guantánamo Bay-related litigation. In a telephone conversation occurring on January 11, 2008, two days after the Federal Defender filed her DTA petition on Petitioner’s behalf, Mr. Loeb informed me that I would not be permitted to travel to Guantánamo Bay to meet with my clients and the other detainees unless I filed a DTA petition and had obtained the

³ As described in greater detail below, my dialogue with these detainees may have ended as a result of Respondent’s announcement that he and his subordinates will no longer deliver my attorney-client communications to Guantánamo Bay detainees.

⁴ My call to Southcom was precipitated by an intermediary who contacted a faculty member at the United States Military Academy at West Point. The West Point faculty member suggested to the intermediary that I contact the Judge Advocate General’s office at Southcom. I am unaware of the identity of the West Point faculty member who provided this information.

appropriate security clearance. Mr. Loeb also informed me that I would have to present sufficient indicia of my authority to represent the detainees. I asked Mr. Loeb what indicia would be sufficient and he declined to elaborate. Mr. Loeb did not mention the Federal Defender's DTA petition during this conversation.

10. During the same period of time that I was contacting Southcom, I also contacted the Office of the Chief Defense Counsel for the Office of Military Commissions to determine if that office might be able to assist in my visiting the detainees who had contacted me, each of whom the government had announced its intention to charge with war crimes before the military commissions. Upon contacting the Office of the Chief Defense Counsel, I spoke with Michael Berrigan, who is the Deputy Chief Defense Counsel and, as such, is Colonel David's immediate subordinate.

11. Mr. Berrigan informed me that his office could not assist me in obtaining permission to travel to Guantánamo Bay to speak to the detainees. During this conversation, I asked Mr. Berrigan for a list of all of the civilian counsel who were members of the Pool. Mr. Berrigan informed me that he could not provide me this information because of "Privacy Act considerations." I then asked Mr. Berrigan if he could tell me how many attorneys were members of the Pool. Mr. Berrigan informed me that he could not. When I asked Mr. Berrigan why he could not disclose the number of attorneys in the Pool, he informed me that such information "would give [me] an unfair advantage in representing the detainees." I asked Mr. Berrigan how knowing the number of attorneys in the Pool would give me an unfair advantage in representing the detainees. In response, Mr. Berrigan hung up the phone. I immediately called Mr. Berrigan back but he did not answer. I left a message on his voicemail. Mr. Berrigan has never returned my telephone call.

12. In a conversation occurring in late December 2007 or early January 2008, I learned from an attorney representing several detainees held at Guantánamo Bay that the Federal Defender was apparently representing Petitioner. In January 2008, I telephoned the Federal Defender, through her attorney, Paul G. Turner, Esq., to apprise her of the litigation that I had filed on Petitioner's behalf in the Southern District, its dismissal and the pending appeal before the Second Circuit. *See Fenstermaker, et. al. v. Bush, et. al.*, 07 CV 2980. During this telephone conversation, Mr. Turner disclosed no information regarding the status of the underlying matter and claimed that he represented Petitioner.⁵ At the time I first contacted Mr. Turner, with the exception of Petitioner's October 1, 2007 letter, I had received no other correspondence from Petitioner. Because Petitioner's October 1, 2007 letter, when read alone, did not clearly designate me as his legal representative, I requested instruction from Mr. Turner as to how he would like me to proceed with respect to the matter before the Southern District, which was being appealed to the Second Circuit. Mr. Turner asked that I discontinue Petitioner's involvement in the matter pending before the Second Circuit.

13. On or about January 9, 2008, the Federal Defender for the District of Nevada (the "Federal Defender") filed an action, pursuant to the Detainee Treatment Act of 2005 (the "DTA"), in the United States Court of Appeals for the District of Columbia Circuit (the "DC Circuit") on Petitioner's behalf.

14. On January 30, 2008, before successfully completing my efforts to remove Petitioner as a party in the Second Circuit matter, I received Petitioner's August 22, 2007 letter to me. Petitioner's August 22, 2008 letter was postmarked January 28, 2008 by the United States

⁵ I did not learn until later that Mr. Turner's claim, at this stage, that he represented Petitioner was, at best, misleading, and arguably false.

Postal Service for delivery to me. In his letter, which included substantial redactions,⁶ Petitioner clearly asked that I serve as his legal representative. After having Petitioner's August 22, 2007 letter translated into English, I immediately contacted Mr. Turner who, in a very heated conversation, ordered me to cease all contact with Petitioner and instructed that I undertake no action of any kind on Petitioner's behalf. During this conversation, Mr. Turner declined to explain how his purported apparent court appointment superseded Petitioner's written instructions, which clearly predated Mr. Turner's court appointment.⁷

15. On February 1, 2008, I e-mailed Mr. Turner regarding our conversation. In this e-mail, I solicited Mr. Turner to join me as Petitioner's co-counsel. A copy of Petitioner's two letters, dated August 22, 2007 and October 1, 2007, were attached to the e-mail in pdf form.

16. On or about April 6, 2008, I sent a letter to Mr. Turner and again attached copies of Petitioner's August 22, 2007 and October 1, 2007 letters to me. My April 6, 2008 letter to Mr. Turner represented the second time I provided Mr. Turner with copies of Petitioner's August 22, 2007 and October 1, 2007 letters to me. Mr. Turner again refused to acknowledge Petitioner's request that I serve as his legal representative.

17. On or about April 7, 2008, I sent two letters to Petitioner. Each of these two letters, and their English equivalents, are available for the Court's *in camera* review. In these letters, among other things, I informed Petitioner of Mr. Turner's activities as Petitioner's

⁶ Because of the identity of Petitioner, and the nature of the redactions in his August 22, 2007 letter, it is almost certain that the Central Intelligence Agency was heavily involved in both the editing of Petitioner's letter, and the timing of the release of this letter, occurring as it did approximately two weeks after the Federal Defender filed her DTA petition on Petitioner's behalf.

⁷ Again, at this time, I was unaware that the Federal Defender was not court-appointed. The Federal Defender was, at that stage, seeking court appointment as Petitioner's counsel. Petitioner was merely the Federal Defender's "prospective" client. I have reason to believe that the Federal Defender never alerted the DC Circuit that Petitioner had apparently sought other counsel, only to be frustrated by Respondent's dilatory and arguably obstructionist mail delivery practices.

lawyer. I further explained Petitioner's right to counsel of his choice and sought his direction with respect to his desires for Mr. Turner's involvement in Petitioner's defense. I do not know whether Petitioner has ever received these two letters. I have not received a response from him to these two letters. I sent copies of these letters to Mr. Turner.

18. On or about April 21, 2008, I wrote Mr. Turner and informed him of my having filed a notice of appearance in the DTA petition matter pending before the DC Circuit.⁸ I provided Mr. Turner with copies of my cover letter to that court and the notice of appearance.

19. Shortly after I filed my notice of appearance in the DC Circuit matter, I again sought to enlist Mr. Turner and the Federal Defender to join me as counsel on behalf of Petitioner. They refused. I thereafter filed a motion to substitute myself as counsel of record for Petitioner.

20. In response to that motion, Mr. Turner disclosed for the first time that he and his colleagues visited Petitioner at Guantánamo Bay in May of 2008.

21. Ahmed Khalfan Ghailani is another detainee held at Guantánamo Bay that Respondent claims was detained in the highly classified CIA program of off-shore detentions. I currently represent Mr. Ghailani.⁹ Copies of Mr. Ghailani's six letters to me are available for the Court's *in camera* review.

22. In early April of 2008, Colonel David asked that I provide him, in his capacity as Chief Defense Counsel ("CDC") for the Office of Military Commissions, some substantiation of my claims that I represent Petitioner and Messrs. Ghailani and Hawsawi, another detainee. By letter dated April 5, 2008, I provided Colonel David with that information.

⁸ I had not immediately filed my notice of appearance in Petitioner's DTA action because I was awaiting admission to practice before that court.

⁹ As described further below, my notice of appearance in Mr. Ghailani's petition for a writ of *habeas corpus* has been stricken by the Honorable Richard J. Leon of this Court. See 08 CV 1190 (RJL). Judge Leon also ordered that I not file any further papers on behalf of Mr. Ghailani in this Court.

23. I received communication from Lt. Col. Michael Acuff, who Colonel David apparently assigned to serve as Mr. Ghailani's Appointed Military Counsel on April 24, 2008. Lt. Col. Acuff informed me that he was Mr. Ghailani's assigned counsel.

24. Shortly thereafter, I met with Lt. Col. Acuff and with Colonel David for several hours on May 13th at their offices in Washington, DC and during a lunch meeting with Lt. Col. Acuff. During my meetings with Colonel David and Lt. Col. Acuff on May 13th, I learned that Lt. Col. Acuff had also been assigned to serve as Associate Detailed Military Defense Counsel for Khalid Sheikh Mohammed, another detainee facing military commissions' charges as a result of his alleged role as the "mastermind" of the September 11th attacks. The United States government claims that Mr. Mohammed was the "Chief of External Operations" for al-Qaeda subsequent to September 11, 2001. This information alerted me to Appointed Military Counsel's potential conflict of interest. A more in-depth investigation of the underlying facts led me to conclude that Appointed Military Counsel's representation of Mr. Ghailani was indeed conflicted.

25. After Appointed Military Counsel and the CDC refused to resolve this conflict satisfactorily, I notified Ms. Crawford and General Hartmann of my concerns regarding Appointed Military Counsel's apparent conflict of interest. In response, General Hartmann informed me by letter that it was his and Colonel David's position that I no longer represented Mr. Ghailani.¹⁰ *See Fenstermaker Declaration, Exhibit D.* General Hartmann did not explain the basis for his claim that I no longer represented Mr. Ghailani.

26. In May of 2008, I received a letter from Abu Faraj al-Libi, another one of the former CIA prisoners currently held at Guantánamo Bay. Mr. al-Libi's letter was dated April 7,

¹⁰ By letter dated July 21, 2008, General Hartmann's deputy, Michael C. Chapman sent me a similar letter informing me that the CDC did not recognize me as attorney to Petitioner herein. *See Fenstermaker Declaration, Exhibit D.*

2008. Mr. al-Libi sought my assistance in obtaining counsel independent of the United States government. I responded to Mr. al-Libi by letter dated May 30, 2008. I do not know whether Mr. al-Libi received my May 30th letter.

27. On June 5, 2008, five defendants facing military commissions' charges as a result of their alleged involvement in the September 11th terrorist attacks were arraigned at Guantánamo Bay before a military commission judge. One of these five defendants, Ammar al-Baluchi (aka, Ali Abdul Aziz Ali), complained to the military commissions' judge that he had been trying to communicate with me, apparently for the purpose of securing my services as his attorney. *See*

http://us.ft.com/ftgateway/superpage.ft?news_id=fto060920081244373936&page=2. Mr. al-Baluchi also accused the government of obstructing his communications with me. I have received four letters from Mr. al-Baluchi. Based on the letters I received from Mr. al-Baluchi, I have reason to believe that Mr. al-Baluchi has written me at least six, and perhaps more, letters. I requested a copy of the transcript of the June 5, 2008 arraignment proceedings and was denied a copy by the Deputy Clerk of Court for the Office of Military Commissions.

28. On July 1, 2008, I received an e-mail from Andrew I. Warden, an attorney with the Justice Department. Mr. Warden's July 1st e-mail is attached as Exhibit E. In Mr. Warden's e-mail, he explains 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 [Mr. Ghailani and Petitioner] 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." (Emphasis added).

29. The mail to which Mr. Warden refers was sent to the address provided to me by the Justice Department. *See* ¶ 4. This address was provided to me pursuant to the government's

effort to assure the court in the Southern District that I had the ability to write detainees at Guantánamo Bay and provide legal information and advice to them and that they had the ability to write to attorneys to secure independent legal representation. *See* Exhibits A and B.

30. After receiving Mr. Warden's July 1, 2008 e-mail, I responded by sending the e-mail attached hereto as Exhibit F. In that e-mail, I 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).

31. On July 25, 2008, David H. Remes, Esq. filed a motion in Mr. Ghailani's *habeas* matter, 08 CV 1190 (RJL), seeking to have my notice of appearance stricken and that I be barred from filing any documents on Mr. Ghailani's behalf. In support of his motion, Mr. Remes filed affidavits from Colonel David and Lt. Col. Acuff, along with an e-mail that Colonel David sent to me. Noticeably absent was any filing or direct statement by Mr. Ghailani.

32. On July 31, 2008, I received a package from the Office of the Staff Judge Advocate at Guantánamo Bay. That package included 16 envelopes containing correspondence addressed to my two clients who are being held at Guantánamo Bay, Petitioner and Mr. Ghailani. Along with the 16 envelopes was a memorandum from Major Greg Musselman, JAGC, USA. A copy of Major Musselman's memorandum is attached as Exhibit G. 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 me. The office of the General Counsel for the Department of Defense has never contacted me regarding my mail to Guantánamo Bay detainees.

33. The envelopes in question constituted essential attorney-client correspondence to Petitioner and Mr. Ghailani, my two clients detained at Guantánamo Bay. This correspondence

was addressed and postmarked as follows, which included legal documents I filed on behalf of Petitioner and Mr. Ghailani:

- a. Mr. Ghailani, June 24, 2008
- b. Mr. Ghailani, June 24, 2008
- c. Mr. Ghailani, June 28, 2008
- d. Mr. Ghailani, June 28, 2008
- e. Mr. Ghailani, June 30, 2008
- f. Mr. Ghailani, June 30, 2008
- g. Mr. Ghailani, July 7, 2008
- h. Mr. Ghailani, June 28, 2008
- i. Mr. Ghailani, June 24, 2008
- j. Petitioner, June 17, 2008
- k. Mr. Ghailani, June 21, 2008
- l. Mr. Ghailani, June 21, 2008
- m. Mr. Ghailani, May 28, 2008
- n. Petitioner, June 17, 2008¹¹

34. On August 26, 2008, I received another package from the Office of the Staff Judge Advocate at Guantánamo Bay. That package included 7 envelopes containing correspondence addressed 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

¹¹ Letters were sent to the detainees the same day because I send all correspondence to all detainees to three separate addresses.

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

35. On August 26, 2008, I received yet another package from the Office of the Staff Judge Advocate at Guantánamo Bay. That package included 7 envelopes containing correspondence addressed to my two clients who are being held at Guantánamo Bay, Petitioner and Mr. Ghailani. The envelopes in question constituted essential attorney-client correspondence to Petitioner and Mr. Ghailani. This correspondence was addressed and postmarked as follows:

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

36. I have been using the address to which the above mail was sent for the past 14 months in communicating with Guantánamo Bay detainees. During this 14-month period, I have written numerous letters addressed to many detainees using this address. Each of these letters was marked "privileged and confidential/attorney-client privilege." I have 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 I received that my correspondence was not being treated as

privileged (other than the fact that some of the letters and postcards I received from detainees contained redactions, which I understand is permissible even with legal mail sent pursuant to applicable protective orders) or that I would otherwise have to waive the privilege in order to communicate with Guantánamo Bay detainees, including my clients, Petitioner and Mr. Ghailani.

37. On August 19, 2008, the Honorable Richard J. Leon granted Mr. Remes' motion, ordered that my notice of appearance be stricken, and that I be barred from filing any documents on Mr. Ghailani's behalf in this court.

38. On August 26, 2008, I received a letter, dated May 26, 2008, from Ammar al-Baluchi. In his letter, Mr. al-Baluchi asked that I file a DTA petition on his behalf. In addition, Mr. al-Baluchi informed me that he asked his military attorney, Lt. Commander Brian Mizer, to contact me on his behalf. Lt. Commander Mizer has never contacted me. In his letter Mr. al-Baluchi lamented that "Mr. Fenstermaker, unfortunately there is no legal representation or legal assistance for brothers detained here."


39. I have never been permitted to travel to Guantánamo Bay to meet with Petitioner, Mr. Ghailani, or any of the six other detainees who have asked to meet with me.

40. I applied for a top secret security clearance in March of 2008. I am a Distinguished Graduate and Graduate with Honors of the United States Air Force Academy. I am a graduate of the United States Air Force's prisoner of war training. I am an honorably discharged veteran of the United States Air Force. I have never been convicted or accused of a crime. I have never been arrested. To my knowledge, I have never been suspected of criminal activity. I currently have a secret security clearance.

41. Subsequent to my notifying the government of my attorney-client relationship with Petitioner in February of 2008, no one from the Department of Defense or any other agency

took any steps to provide me with information regarding the security clearance application process or any information regarding visiting detainees at Guantánamo Bay, until I applied for my security clearance in March of 2008.

42. I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.


Scott L. Fenstermaker, Esq.

Dated: New York, New York
August 29, 2008