IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

RAHIM ALI-NASHIR,	)	
Petitioner,	)	Misc. No. 08-442 (TFH)
v.	)	Civil Action No. 08-CV-1085 (UNA)
ROBERT M. GATES, *et al.*,	)	
Respondents.	)	

RESPONDENTS' REPLY IN SUPPORT OF MOTION TO RECONSIDER APPLICATION OF STANDARD HABEAS PROTECTIVE ORDER AND REQUEST FOR ENTRY OF PROPOSED PROTECTIVE ORDER PERTAINING TO TOP SECRET / SENSITIVE COMPARTMENTED INFORMATION

On August 18, 2008, the Respondents in this case and others involving high-value or "TS/SCI" detainees (Nos. 06-CV-1690, 08-CV-1207, 08-CV-1360) moved for entry of a protective order addressing counsel access and other procedures that, while similar in many respects with the protective order in place for most of the Guantanamo Bay detainee cases[1], also appropriately addresses the management of TOP SECRET / SENSITIVE COMPARTMENTED INFORMATION ("TS/SCI"). (Dk. 22.)

[1] *See In re Guantanamo Detainee Cases*, 344 F. Supp. 2d 174 (D.D.C. Nov. 8, 2004) ("Amended Protective Order"); Order Supplementing and Amending Filing Procedures Contained in November 8, 2004 Amended Protective Order in *In re Guantanmo Detainee Cases*, No. 02-CV-0299, *et al.* (D.D.C. Dec. 13, 2004); Order Addressing Designation Procedures for "Protected Information" in *In re Guantanamo Detainee Cases*, No. 02-CV-0299, *et al*. (D.D.C. Nov. 8, 2004.

Scott L. Fenstermaker, purportedly acting on behalf of petitioner Rahim Ali-Nashir,[2] has now filed a response. (Dk. 27.) The response requests that the Court maintain "judicial oversight" over implementation of counsel access procedures (Resp. at 2), but does not raise any specific objections to the proposed TS/SCI protective order. The largest part of the response is devoted to setting forth collateral disputes concerning whether Mr. Fenstermaker is authorized to act as counsel for Ali-Nashir or another detainee, Ahmed Khalfan Ghailani, both of whom are represented by other counsel in other proceedings.

Specifically, Ali-Nashir is the petitioner in another habeas petition in this Court, No. 08-cv-1207 (UNA), and also a Detainee Treatment Act (DTA) case filed in the D.C. Circuit, No. 08-1007 (D.C. Cir.). The response sets forth Mr. Fenstermaker's attempts to establish that he is authorized to represent Ali-Nashir in those proceedings. (Resp. at 4-6.) It also sets forth his efforts to establish that he is authorized to represent Ghailani in two separate proceedings. (Resp. at 6-8.) Ghailani is the petitioner in a DTA case filed in the D.C. Circuit, No. 08-1209 (D.C. Cir.), and a habeas petition filed in this Court, No. 08-cv-1190 (RJL). There have been disputes in the Ghailani DTA and habeas cases whether Fenstermaker or another attorney, David H. Remes, represents the petitioner. Judge Leon recently (August 20, 2008) determined, in the habeas case, that Remes represented Ghailani, struck Fenstermaker's notice of appearance, and barred Fenstermaker from further filings on Ghailani's behalf. No. 08-cv-1190 (RJL) (Dk. 14.) There continue to be disputes as to whether Fenstermaker or Remes represent Ghailani in the DTA case. *See Ghailani v. Gates*, D.C. Cir. No. 08-1209, "Supplemental authority in support of

[2] There is some confusion as to the petitioner's name. His name is given as Ali Nashir in this case, but as Al Nashiri in No. 08-cv-1207 (UNA) and D.C. Cir. No. 08-1007.

motion to strike filings by Scott L. Fenstermaker," filed August 28, 2008. There also continue to be disputes whether Fenstermaker or Federal Public Defender Paul Turner represent Ali-Nashir in his DTA case. *See Al-Nashir v. Robert Gates*, D.C. Cir No. 08-1007, "Motion filed by Abd Al-Rahim Hussain Mohammed Al-Nashir to strike pleadings of Scott Fenstermaker," filed August 25, 2008. Likewise, it remains unsettled whether Ali-Nashir is represented by Fenstermaker in this habeas case, or by Turner in No. 08-cv-1207 (UNA), as Ali-Nashir cannot go forward with two such cases at the same time. It appears it will be necessary for this Court to settle the matter of which habeas case is authorized by Ali-Nashir, as it will be necessary for the Court of Appeals to determine which attorney represents him in the DTA case.

Given these disputes, it is not surprising that Fenstermaker's primary concern with the proposed protective order is with restrictions on privileged access to detainees which, in his view, prevents the detainees from choosing their counsel from among all attorneys who may wish to represent them. (Resp. 11-17.) In this regard, Fenstermaker addresses those portions of the proposed protective order requiring counsel to present verification of their authorization to represent the detainee prior to qualifying for privileged mail communications channels with represented detainees. (Resp. 12-13.) Notably, however, those provisions in the proposed TS/SCI protective order are the same or similar to the provisions in the general protective order that applies in all the other, non-TS/SCI, detainee cases.

For example, Fenstermaker takes issue with the provision in the TS/SCI protective order requiring counsel, in order to obtain privileged access to a detainee, to present verification of their authorization to represent the detainee, and maintains that the Court, and not the Respondents, should be the final arbiter of whether the verification was adequate. (Resp. 12-13.)

But the verification requirement is, in fact, in the original Amended Protective Order, issued November 8, 2004, at Exhibit A, § III.C.1. The proposed TS/SCI protective order contains a similar provision requiring counsel to "present the Department of Justice adequate evidence of authorization to represent the detainee or the next-friend petitioner." Proposed Order, at Exhibit A, ¶ 1.1. There is no reason why attorneys claiming to represent high-value or TS/SCI detainees should have privileged access to them without the same verification required of attorneys representing the other detainees. Further, the Court retains its role of determining, when necessary, whether a particular verification is sufficient to establish representation of a detainee.

Fenstermaker also proposes amending the current detainee mail system under the protective orders applicable to both detainee populations whereby incoming and outgoing mail between a represented detainee and his qualifying counsel is privileged, while all other correspondence is not and is subject to review by Guantanamo authorities. Fenstermaker proposes to require the expansion of the privileged "legal mail" channel to include correspondence between detainees and any attorney who wishes to correspond with them, regardless of whether they represent the detainee in a matter and regardless of the attorney's security clearance status. (Resp. 14.) Again, however, the procedures with which Mr. Fenstermaker takes issue are ones that are and have been applicable to correspondence with all the detainees as provided in the original Amended Protective Order, at Exhibit A, § IV ("Procedures for Correspondence between Counsel and Detainee"). Fenstermaker's challenge is therefore to the generally applicable protective order, and not the specific provisions of the proposed TS/SCI order. The provisions that Fenstermaker challenges have worked, and continue

to work, quite well enough to counsel against modifying the protective order regime in the manner that Fenstermaker requests. To make such modifications at this stage would interfere with settled expectations and could create considerable confusion.

The only objection Fenstermaker raises that applies to the additional protections of the TS/SCI order is his assertion that the natural consequence of the Government's position is that the TS/SCI detainees can never be released because they have knowledge of information that is classified. (Resp. at 10.) Respondents do not seek, by this motion, to establish that the TS/SCI detainees can never be released. But again, this does not really differentiate the present situation from that involving non-TS/SCI detainees. The protective order applicable to such detainees governs communication between detainees and their counsel given the potential access of such detainees to classified information. Yet, as the Court is well aware, many such detainees have been transferred out of United States custody.

CONCLUSION

For the reasons set forth above, the Court should grant respondents' motion and enter the proposed TS/SCI protective order.

Dated: September 11, 2008

Respectfully submitted,

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