

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

IN RE: GUANTANAMO BAY DETAINEE LITIGATION

Doc. 933 Att. 1

RAHIM ALI-NASHIR, et. al.

Petitioners,

v.

ROBERT M. GATES, et. al.

Respondents.

: DECLARATION OF SCOTT L.

: FENSTERMAKER, ESQ.

: PURSUANT TO 28 U.S.C. §1746

: Civil Docket Number 08-1085

: Civil Docket Number 08-1207

: Misc. No. 08-0442 (TFH)

SCOTT L. FENSTERMAKER, ESQ., an attorney practicing before 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) I am an attorney-at-law, practicing before this Court pursuant to Local Rule 83.2(g). I am 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 Circuit and the District of Columbia Circuit, and the United States Supreme Court.

2) I am familiar with the facts stated below and file this declaration in support of Petitioner's motion for an Order of this Court permitting me to submit a consolidated reply to Respondents' filing, captioned "Respondents' Response to 'Petitioner's Response to the October 3, 2008 Order to Show Cause and Motion for Miscellaneous Relief'" (*see* 08-cv 1085, document 57), and the Federal Defender for the District of Nevada's ("Federal Defender") "Response to 'Petitioner's Response to the October 3, 2008 Order to Show Cause and Motion for Miscellaneous Relief'" (08-cv-1207, referenced in document 48), and "Response (sic) the Court's October 27, 2008 Order to Show Cause" (08-cv-1207, referenced in document 50). This declaration is also submitted in support of Petitioner's motion for an Order of this Court

expanding the page limit for reply submissions as set forth in Local Rule 7(e) to 40 pages. This declaration is further submitted in support of Petitioner's request for an Order of this Court directing that the Federal Defender's two submissions, styled "Response to 'Petitioner's Response to the October 3, 2008 Order to Show Cause and Motion for Miscellaneous Relief,'" and "Response (sic) the Court's October 27, 2008 Order to Show Cause" be served on me, and that, until further notice, all submissions by the Federal Defender in this action be served upon me so that I, as Petitioner's retained counsel, am afforded an opportunity to respond in all matters affecting Petitioner's legal interests.

3) By letter dated May 27, 2008, Petitioner wrote to me and affirmed that he had retained me as his attorney. Petitioner further stated his explicit rejection of the Federal Defender as his attorney and provided an explanation for that rejection. I received Petitioner's May 27, 2008 letter on October 1, 2008. I received Petitioner's initial letter retaining me as his legal representative, dated August 22, 2007, on January 30, 2008.

4) Although Petitioner has apparently notified the Federal Defender of his rejection of her and has asserted that I am his legal representative, the Federal Defender has refused to respect Petitioner's wishes. In furtherance of her effort to circumvent Petitioner's choice of counsel, and as demonstrated below, it has been the practice of the Federal Defender to ignore serving or otherwise providing me with copies of court filings. Included in these filings for which no service was made are submissions filed in the United States Court of Appeals for the District of Columbia Circuit ("DC Circuit") seeking to strike my filings in Petitioner's Detainee Treatment Act ("DTA") matter therein (08-1007), as well as submissions filed in this Court for the purpose of challenging my authority as Petitioner's legal representative.

5) On or about August 25, 2008, the Federal Defender filed a motion seeking to strike all of my pleadings in Petitioner's DTA matter pending before the DC Circuit. Although her motion to strike directly challenged my authority to act on Petitioner's behalf, the Federal Defender never saw fit to serve me with a copy of her motion papers. Nor did the Federal Defender provide me with any other courtesy notice of that filing. I learned of the existence of her motion through a government filing in a separate matter (*see* 08-misc-0442 in this Court). Shortly thereafter, when I filed a motion seeking to have consideration of the Federal Defender's motion to strike my pleadings held in abeyance pending proper service of that motion, the Federal Defender retorted, claiming that "[s]ince Mr. Fenstermaker is not authorized counsel he has no standing to assert a general right to be served with pleadings in this case." Repeated requests to the Federal Defender for copies of those papers, as well as her papers filed herein (*see* filings referenced in documents 48 and 50 of 08-cv-1207), have been ignored. In the instances where the Federal Defender did address my requests, she cited various protective orders in place to justify her refusal to serve me. In stark contrast, the government has at least acknowledged the existence of the dispute between the two counsels by serving me with copies of its papers without similar difficulty. To my knowledge, the government has never neglected to serve me with copies of all papers.


6) In the instant matter, the Federal Defender filed submissions styled "Response to 'Petitioner's Response to the October 3, 2008 Order to Show Cause and Motion for Miscellaneous Relief,'" and "Response (sic) the Court's October 27, 2008 Order to Show Cause." These filings were submitted pursuant to the Court's attempt to determine which *habeas* petition is authorized by Petitioner through identifying which attorney Petitioner has retained to represent him. Although these submissions relate directly to a challenge to my authority and to the Court's

determination as to which attorney is properly engaged, by her failure to serve me at all, it would appear that the Federal Defender would have this Court ignore Petitioner's letters to me and their import in this Court's counsel-selection decision, as well as any arguments Petitioner's retained counsel may make on his behalf. I have never been served with copies of either of these documents. I cannot therefore respond to the Federal Defender's claims contained therein.

7) In their response, Respondents have opposed Petitioner's request for a hearing at which Petitioner could testify as to his choice of counsel. Respondents argue that such a hearing is unnecessary and poses a risk to national security. In my reply, I intend to argue that Respondents' opposition is entirely consistent with the government's continuing campaign to interfere with Petitioner's attorney-client relationship with me, while promoting the establishment of one between Petitioner and the Federal Defender.¹ Through a consolidation of the facts relating to the Federal Defender's actions and the government's persistent conduct in isolating Petitioner and other detainees from me and their direct contact with the federal courts, I intend to demonstrate that the government and the Federal Defender have sought to prevent this Court from learning Petitioner's choice to select me as his attorney.

8) I declare 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
November 4, 2008

By: 
Scott L. Fenstermaker, Esq.

¹ My reply will contain support from Respondents' actions with respect to other detainees who have contacted me seeking my assistance as well.