

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

<b>FAWZI KHALID ABDULLAH FAHAD AL ODAH,</b>	)	
<i>et al.,</i>	)	
<b>Plaintiffs,</b>	)	
	)	
<b>v.</b>	)	<b>No. CV 02-0828 (CKK)</b>
	)	
<b>UNITED STATES OF AMERICA, <i>et al.,</i></b>	)	
	)	
<b>Defendants.</b>	)	
	)	

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**EMERGENCY MOTION TO MODIFY ORDER OF AUGUST 17, 2004  
ISSUED BY CALENDAR AND CASE MANAGEMENT COMMITTEE**

Plaintiffs move to modify the Order of August 17, 2004, issued by the Court’s Calendar and Case Management Committee [“CCMC”], so that it authorizes Judge Colleen Kollar-Kotelly to rule on critical issues that were fully briefed, argued, and taken under advisement by her on August 16, 2004.<sup>1</sup> Specifically, plaintiffs request that Judge Kollar-Kotelly be authorized to rule promptly on defendants’ proposal to subject conversations between plaintiffs’ counsel and designated plaintiff-detainees at the Guantanamo Bay Naval Base to “real-time monitoring,” and related counsel access issues. Although defendants do not propose to apply monitoring to *any* of the other Guantanamo detainees, Judge Kollar-Kotelly apparently has deferred ruling on the matter because of the CCMC Order, which designates Senior Judge Joyce Hens Green to coordinate and manage the Guantanamo cases and, if necessary, to rule on “common” procedural and substantive issues.

The CCMC Order obviously was intended to streamline the litigation of the Guantanamo cases. However, coupled with defendants’ intransigence, it has become an instrument of delay.

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<sup>1</sup> In accordance with LCvR 7.1(m), plaintiffs’ counsel discussed this motion in advance of filing with defendants’ counsel. Defendants’ counsel advised that defendants will oppose this motion.

Because Judge Kollar-Kotelly has not yet ruled on defendants' proposal, plaintiffs' counsel have been unable to meet with the detainees, an essential first step in developing and presenting their claims to the Court. As a result, this Court has not even begun to "consider in the first instance the merits of petitioners' claims, " as mandated by the Supreme Court. *Rasul v. Bush*, 124 S. Ct. 2686, 2699 (2004).

The impact of the delay has been devastating for the plaintiff-detainees. They have been held in U.S. custody for almost three years, virtually *incommunicado*, thousands of miles from their homes and their families, without access to counsel or an impartial tribunal. To date, the government outrageously has refused to deny the allegations of their amended complaint or state the reasons (if any) for their detention. Whatever glimmer of hope may have trickled down to them after the Supreme Court's decision has been dashed by the inaction of the past three months. Every day of continued detention is a deprivation of the plaintiff-detainees' liberty and the infliction upon them of irreparable injury. Plaintiffs need emergency relief from this Court.

### **STATEMENT**

1. This case was filed on May 1, 2002, by 12 Kuwaiti nationals detained at the Guantanamo Bay Naval Base [the "Kuwaiti Detainees"] and their family members. This Court, per Judge Kollar-Kotelly, dismissed the case for lack of subject matter jurisdiction and the District of Columbia Circuit affirmed. However, on June 28, 2004, the Supreme Court reversed. The Supreme Court ruled that "[a]liens held at the base, no less than American citizens, are entitled to invoke the federal courts' authority under [28 U.S.C.] § 2241," and they are also entitled to pursue their non-habeas claims in this Court. *Rasul*, 124 S. Ct. at 2696, 2698-99. The Supreme Court remanded the case for this Court "to consider in the first instance the merits of petitioners' claims." *Id.*, at 2699.

The very next day Judge Kollar-Kotelly, *sua sponte*, held a telephone conference with counsel for the parties in this case and the *Rasul* case. *See* Transcript of Proceedings, June 29, 2004. Judge Kollar-Kotelly announced that the purpose of the conference was to discuss the “first order of business,” namely, that counsel be afforded access to the detainees at Guantanamo so they could develop and present the detainees’ claims to the Court. *Id.*, pp. 4, 7, 9-11. When counsel for defendants [the “government”] advised that the government had not decided what its position would be on counsel access, Judge Kollar-Kotelly asked the government to state its position on this issue on July 2, 2004. *Id.*, p. 22.

During a second telephone conference on July 2, 2004, government counsel announced the government had decided to afford counsel in this case and *Rasul* access to the detainees, subject to “terms and conditions” to be worked out in “a special administrative order.” *See* Transcript of Proceedings, July 2, 2004, p. 4. Government counsel emphasized that the terms and conditions for counsel access, including security clearances, “are things that obviously have been worked out in connection with the attorney access in the Hamdi and the Padilla cases as well as in connection with other cases like Walker Lynn [sic] and Moussaoui. So at this point it’s not unique to the Guantanamo Bay litigation \* \* \* [and] [o]ur hope is to move forward without having to intervene the court in these issues and to work with [plaintiffs’ counsel] in terms of reaching a consensus as quickly as possible.” *Id.*, p. 10.

Pursuant to the government’s request, plaintiffs’ counsel applied for and received security clearances to enable them to visit the Kuwaiti Detainees at Guantanamo. Plaintiffs also sought a U.S. security clearance for a respected Kuwaiti attorney with the highest security clearance from the Kuwaiti Government who has represented the plaintiff Kuwaiti family members from the outset of this litigation and who could help establish a relationship of trust and confidence

between the Kuwaiti Detainees and plaintiffs' counsel. Finally, plaintiffs contacted several Arabic-speaking interpreters who already have U.S. security clearances and who could accompany plaintiffs' counsel during their visits to Guantanamo.

2. From July 2, 2004, through July 23, 2004, the government represented that it would provide plaintiffs with the proposed terms and conditions for counsel access to the detainees at Guantanamo and repeatedly failed to do so. At plaintiffs' request, Judge Kollar-Kotelly held a third telephone conference on July 23, 2004. During this conference government counsel informed Judge Kollar-Kotelly and plaintiffs that among the government's proposed terms and conditions would be monitoring of all conversations between counsel and some or all of the detainees. *See* Transcript of Proceedings, July 23, 2003, pp. 6, 21-22. Judge Kollar-Kotelly issued an order later that same day, directing the government to file by 12:00 P.M. on Friday, July 30, 2003, (i) all proposed terms and conditions for counsel access to the detainees, (ii) an explanation of which proposed procedures, including monitoring, would apply to each of the Kuwaiti Detainees, and (iii) a written response to the Kuwaiti Detainees' underlying petitions for writs of habeas corpus, specifically addressing, among other things, the legal merits of the government's proposal to monitor counsel-detainee conversations.<sup>2</sup> The order expedited the briefing and hearing of the counsel access issues. Moreover, Judge Kollar-Kotelly advised the

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<sup>2</sup> Notwithstanding this order the government did not file a written response to plaintiffs' underlying petitions for writs of habeas corpus. Plaintiffs' counsel raised this matter with Senior Judge Green during a meeting with counsel for the parties in the 13 pending Guantanamo cases on August 27, 2004. Plaintiffs' counsel said plaintiffs were prepared to file a motion to compel the government to respond to their underlying petitions unless the government did so or was ordered to do so immediately. Senior Judge Green advised plaintiffs' counsel that, to the extent plaintiffs contend that the government violated Judge Kollar-Kotelly's order, they should file their motion directly with Judge Kollar-Kotelly. Plaintiffs filed a Motion to Compel Responsive Pleading and Return Forthwith with Judge Kollar-Kotelly later that same day, accompanied by a Motion to Expedite Consideration of the Motion to Compel. To date, however, there has been no ruling by the Court on either motion.

parties that she would “hopefully issue an order, either that day [of the hearing] or shortly thereafter \* \* \*.” Transcript of Proceedings, July 23, 2004, p. 36.

3. On July 30, 2004, the government filed its proposed terms and conditions governing counsel access to the Guantanamo detainees. Among these was a proposal to subject conversations between counsel and designated detainees to “real-time monitoring,” under which a military “privilege team” would eavesdrop on and videotape the conversations. Another was to perform a “classification review” of all documents exchanged by counsel and the detainees, including an examination of any notes taken by counsel during conversations with the detainees. The government advised the Court that, after conducting individualized reviews of the intelligence files for all 12 Kuwaiti Detainees, it proposed to apply “real-time monitoring” to three of the Kuwaiti Detainees and “classification review” to all of them.

Plaintiffs filed papers vigorously opposing the government’s “real-time monitoring” and “classification review” proposals, among others. These papers included a declaration from Lawrence Fox, former chairman of the American Bar Association Ethics Committee, who concluded that the government’s proposals would render the attorney-client relationship meaningless. The hearing on the validity of the government’s proposals was held on August 16, 2004, and lasted several hours. *See* Transcript of Proceedings, August 16, 2004. At the close of the hearing Judge Kollar-Kotelly took the issues under advisement.

4. In the meantime, the government had moved on July 22, 2004, to consolidate all the Guantanamo cases before Judge Kollar-Kotelly, pursuant to Fed. R. Civ. P. 42(a). The motion was considered by Judge Kollar-Kotelly pursuant to LCvR 40.5(d) and denied on July 26, 2004. Judge Kollar-Kotelly held that “the different circumstances of each Petitioner’s capture and the individualized reasons offered for that Petitioner’s confinement will require individualized

adjudication.” Memorandum Opinion of July 26, 2004, pp. 3-4. Judge Kollar-Kotelly also did “not find that the interests of judicial economy will be furthered by consolidation.” *Id.*, p. 4. Judge Kollar-Kotelly noted that, “[a]lthough Petitioners may use similar legal arguments to press for similar relief, the individualized analyses necessary to consider the propriety of that detention will be no more efficiently undertaken by one judge than by several.” *Id.*

5. Despite Judge Kollar-Kotelly’s denial of the government’s motion to consolidate, the government, on August 4, 2003, filed a Motion for Joint Case Management Conference, Entry of Coordination Order and Request for Expedition. The government claimed it was not seeking to overturn Judge Kollar-Kotelly’s order denying consolidation, nor was it necessarily seeking to remove from the individual judges to whom the Guantanamo cases have been assigned the authority to decide those cases. Instead, the government claimed it was seeking to minimize overlap and promote the efficient handling of the Guantanamo cases.

The CCMC issued its Order on August 17, 2004, granting the government’s motion in part. The order, issued “pursuant to [CCMC’s] authority under LCvR 40.5(e),” recited that “Senior Judge Joyce Hens Green will be designated to coordinate and manage all proceedings in these matters and to the extent necessary, rule on procedural and substantive issues that are common to the above-captioned cases.” At a meeting with counsel for the parties in the Guantanamo cases on August 23, 2004, Senior Judge Green explained that she did not yet have chambers, a telephone number, a secretary, or a law clerk, and that she had not had the opportunity to speak to all the individual judges to whom the Guantanamo cases are assigned or to decide with them who would rule on which issues. At a second meeting with counsel for the parties on August 27, 2004, Senior Judge Green advised that it would be weeks before she would be prepared to rule on whatever issues she and the other judges decided she should resolve.

6. Since the issuance of the CCMC Order of August 17, 2004, Judge Kollar-Kotelly has not ruled on the counsel access issues in this case that were fully briefed, argued, and submitted for disposition on August 16, 2004. Furthermore, on August 27, 2004, Judge Kollar-Kotelly declined to hold a hearing requested by counsel for petitioners in *Habib v. Bush*, Civil Action No. 02-CV-1130 (CKK), on one of the counsel access issues briefed and argued in this case. Judge Kollar-Kotelly advised the parties through her law clerk that she had conferred with Senior Judge Green and that she would defer to the process being administered by Senior Judge Green.

7. On September 1, 2004, the government sent a letter to Senior Judge Green and the parties in the 13 Guantanamo cases announcing that, after evaluating all the detainees in these cases, the military has determined that “real-time monitoring” of counsel-detainee conversations would not be necessary with respect to any of the detainees other than the three Kuwaiti Detainees. Thus, the issue of monitoring arises *only* in the present case.

Accordingly, on September 2, 2004, plaintiffs wrote a letter to Senior Judge Green, pointing out that the monitoring issue was not an issue “common” to all 13 Guantanamo cases, and urging that the Court rule on this and the related counsel access issues that had been submitted to Judge Kollar-Kotelly. However, no ruling on those issues has been made.

## **ARGUMENT**

### **The CCMC Should Modify Its Order To Authorize Judge Kollar-Kotelly To Rule On The Monitoring And Related Counsel Access Issues Submitted To Her**

Plaintiffs do not seek broad reconsideration of the CCMC Order of August 17, 2004. Plaintiffs have great admiration for Senior Judge Green and are confident of her ability to coordinate and manage the 13 Guantanamo cases once she has been provided with the resources every judge needs to perform his or her job and has had an opportunity to become fully familiar with the legal issues in these cases. Plaintiffs also do not challenge the authority conferred by

the CCMC Order upon Senior Judge Green to decide, where necessary, future procedural and substantive issues that are “common” to the Guantanamo cases. Rather, plaintiffs seek only to modify the CCMC Order to authorize Judge Kollar-Kotelly to rule on the counsel access issues that were submitted to her *prior* to the entry of the CCMC Order and that feature an issue – “real-time monitoring” – that is *not* common to the 13 Guantanamo cases.

Coupled with the government’s pervasive tactic of intransigence and obstruction, the CCMC Order has become an instrument of inaction and delay with respect to counsel access to the Kuwaiti Detainees. Notwithstanding the government’s assurance to Judge Kollar-Kotelly on July 2, 2004, that it would issue its terms and conditions for counsel access to the Guantanamo detainees expeditiously, the government dragged its feet for weeks. It was finally necessary for Judge Kollar-Kotelly to issue an order on July 23, 2004, to compel the government to file those terms and conditions on July 30, 2004. Judge Kollar-Kotelly established an expedited briefing and hearing schedule to consider the validity of the government’s proposed terms and conditions for counsel access, especially the proposal for “real-time monitoring,” and she warned that no extensions would be permitted. In addition, Judge Kollar-Kotelly promised a ruling on the counsel access issues either the same day as the hearing (August 16, 2004), or shortly thereafter. Yet, Judge Kollar-Kotelly has not ruled on those issues, apparently in deference to the CCMC Order and Senior Judge Green.

The purpose and logic of the CCMC Order do not support its application to issues that were fully briefed, argued, and submitted for ruling *before* that Order was filed, such as the counsel access issues submitted to Judge Kollar-Kotelly in this case on August 16, 2004. The words of the CCMC Order also do not support its application to an issue that is not “common” to

all the Guantanamo cases, such as the “real-time monitoring” issue featured among the counsel access issues submitted to Judge Kollar-Kotelly in this case on August 16, 2004.

First, the CCMC Order was issued on the authority of LCvR 40.5(e), which states that, if the CCMC finds that “two or more cases assigned to different judges should be referred for a specific purpose to one judge in order to avoid a duplication of judicial effort,” it may enter an order of referral. LCvR 40.5(e) stipulates that, “[u]nless otherwise provided, such an order shall not transfer any cases nor affect the assignment of future cases.” Therefore, the CCMC Order did not displace Judge Kollar-Kotelly from this case. It would not be inconsistent with the purpose and logic of the Order to modify it expressly to authorize Judge Kollar-Kotelly to rule on issues submitted to her for disposition prior to the entry of that Order.

Second, the CCMC Order provides that Senior Judge Green is authorized to rule, if necessary, on procedural and substantive issues that are “common” to all 13 Guantanamo cases, The government has formally advised the Court that its “real-time monitoring” proposal will apply *only* to three of the 12 Kuwaiti Detainees. It will not apply to *any* of the other detainees in the pending Guantanamo cases. Accordingly, it would not be inconsistent with the purpose and logic of the CCMC Order to modify it to authorize Judge Kollar-Kotelly to rule on the monitoring and related counsel access issues already submitted to her.

Third, the month-long delay (so far) in the disposition of the monitoring and related counsel access issues has imposed a terrible hardship on the Kuwaiti Detainees and prevented the Court from carrying out the mandate of the Supreme Court. As Judge Kollar-Kotelly told the parties one day after the Supreme Court announced its decision in this case, access to counsel is “*the first order of business* (emphasis added)” on remand, and is essential to enable the Kuwaiti Detainees to develop and present their habeas and non-habeas claims to the Court. Without such

access, the Kuwaiti Detainees are unable to pursue their claims for relief, the merits of which this Court has been ordered “to consider in the first instance.” *Rasul*, 124 S. Ct. at 2699.

The delay in ruling has effectively denied the Kuwaiti Detainees access to counsel at Guantanamo. Consequently, the Kuwaiti Detainees remain in detention without the ability to present their claims to this Court, even though to date, more than *two and a half years* after they were deprived of their liberty and transferred against their will to Guantanamo, the government has never denied the allegations of their complaint that there is no legal justification for their imprisonment.<sup>3</sup> This is no mere academic problem. This is irreparable injury being suffered by real people. Plaintiffs urge the Court to prevent further injury and authorize Judge Kollar-Kotelly to rule on the counsel access issues submitted to her on August 16, 2004.

### CONCLUSION

The Court should grant plaintiffs’ motion and authorize Judge Kollar-Kotelly to rule on the counsel access issues taken under advisement by her on August 16, 2004.

Respectfully submitted,

/s/ Thomas B. Wilner

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<sup>3</sup> Under 28 U.S.C. § 2243 a return to a writ of habeas corpus or order to show cause must be made “within three days unless for good cause additional time, not exceeding twenty days, is allowed.” Under Fed. R. Civ. P. 12(a)(4) (A) a party has “10 days” to answer a complaint once it has been notified that a motion to dismiss the complaint was denied. The government has failed to comply with both these deadlines.