

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION**

DONALD VANCE, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	No. 06 C 6964
	)	
DONALD RUMSFELD, et al.,	)	Judge Andersen
	)	Magistrate Judge Keys
Defendants.	)	
	)	

**UNITED STATES’ MOTION TO SUPPLEMENT  
ITS OBJECTIONS TO THE MAGISTRATE JUDGE’S  
MEMORANDUM OPINION AND ORDER OF DECEMBER 21, 2007**

The United States respectfully requests that it be allowed to supplement its “Objections to the Magistrate Judge’s Memorandum Opinion and Order of December 21, 2007” (Docket No. 94) (“Objections”), which it filed on January 9, 2008, with the attached declarations of Captain Kirk A. Foster and Lieutenant David A. Melson (Exhibits A and B). As discussed below, these declarations elaborate upon and provide factual support for the United States’ argument that plaintiffs’ October 1, 2007, discovery motion (Docket No. 66) (“Discovery Motion”) should be denied based on the separation-of-powers doctrine. See Objections at 11-14.

In its Objections, the United States set forth three principal reasons why the Magistrate Judge, in his Memorandum Opinion and Order of December 21, 2007 (Docket No. 89) (“Order”), clearly erred in partially granting plaintiffs’ Discovery Motion. See Objections at 4-14. Perhaps the most significant error is that the Order, by forcing the United States’ military to conduct broad and far-ranging discovery in a foreign war zone, raises significant separation-of-powers concerns. See id. at 11-14. To help demonstrate this point, the United States offered a

few specific examples of how complying with plaintiffs' requested discovery would redirect the military's resources and disrupt ongoing operations in Iraq. See id. at 12.

We also indicated that we were unable to provide specific factual documentation of those representations with the Objections due to the precedence of other priorities in Iraq and the short time frame in which we had to file the Objections. Instead, the United States requested that it be allowed to supplement its Objections with such factual documentation. See id. at 12 n.10. The attached two declarations provide that factual documentation.

The first declaration is submitted by Captain Foster, who is currently serving as the Deputy Staff Judge Advocate within the Office of the Staff Judge Advocate, Multi National Forces - Iraq ("MNF-I"). See Exh. A, Foster Dec. (Jan. 17, 2008) ¶ 2. MNF-I is the highest level coalition command in Iraq. See id. The Office of the Staff Judge Advocate, MNF-I ("OSJA"), oversees all legal administration and legal operations of approximately 600 lawyers, support staff, and other legal assets throughout Iraq and would be tasked with collecting or supervising the collection of information necessary to respond to plaintiffs' discovery request if it is allowed to go forward. See id. ¶¶ 4, 7. Captain Foster is the second most senior attorney in the OSJA, immediately below Colonel Mark S. Martins, United States Army, who is the Staff Judge Advocate for MNF-I. See id. ¶ 3. The second declaration is that of Lieutenant Melson, who is a staff attorney within the OSJA. See Exh. B, Melson Dec. (Jan. 16, 2008) ¶ 2.

The attached declarations describe in detail how answering plaintiffs' proposed interrogatory would require military personnel currently serving in Iraq to divert a significant amount of time and attention away from their mission-related duties. See Exh. A ¶¶ 7-10; Exh. B ¶¶ 7-10. As Captain Foster explains, the Department of Defense has no resources, personnel,

or procedures in Iraq dedicated to responding to civil litigation discovery requests because all of the limited legal resources in Iraq are devoted exclusively to mission-related tasks in support of the war in Iraq. See id. ¶ 8. Therefore, were the OSJA or any other military unit in theater required to collect information necessary to respond to a discovery request in a civil action, military personnel currently serving in Iraq necessarily would be detracted from their mission-related assignments. See id. ¶ 9.

Due to the enormous scope of their responsibilities, each member of Captain Foster's small staff of only twenty or so individuals already works eighty-four to ninety-eight hours per week to provide all types of legal support to the multi-national joint and combined force that is engaged in counter-insurgency operations throughout Iraq, and to handle any and all legal matters that arise on a contingency basis out of the activities of the 160,000 troops and approximately same amount of contractors in Iraq. See id. ¶¶ 4-6, 9, 10. Those matters include advising senior military officials on all aspects of international law, humanitarian law, and the Laws of Armed Conflict, conducting and reviewing investigations into alleged violations of rules of engagement, supervising efforts to rebuild the Iraqi judicial system, reviewing all funds expended by MNF-I subordinate commands for the reconstruction of Iraq and humanitarian programs, and providing legal oversight of detention operations in Iraq. See id. ¶ 6. More examples of the numerous mission-related legal services provided by Captain Foster's staff are described in his declaration. See id.

Needless to say, collecting information in response to a civil discovery request is time-consuming in the best of circumstances. Based on Captain Foster's knowledge and experience, doing so in Iraq likely would demand hundreds of hours of his staff's time. See id. ¶ 10. This, in

turn, would place an extreme strain on the ability of his staff to carry out all of its countless mission-related functions. See id.

This is further confirmed by Lieutenant Melson, who is one of the military attorneys on Captain Foster's staff and likely would be assigned to plaintiffs' discovery request if it is allowed to proceed. See Exh. B ¶¶ 2, 4. In his declaration, Lieutenant Melson describes some of the quite substantial logistical and operational complications for the United States military's ongoing operations in Iraq that answering plaintiffs' proposed interrogatory in this specific case would entail. See id. ¶¶ 5-10. For example, identifying the unknown individuals, such as the military personnel assigned to a particular guard shift at Camp Cropper at a particular time, would require military personnel currently serving in Iraq to search the records of various military units that were deployed in Iraq at the time plaintiffs were arrested and detained. See id. ¶ 7. As Lieutenant Melson explains, it is both possible and likely that those records (assuming they exist) are not preserved in a readily searchable format but are available only in physical, paper form, requiring that they be searched manually. See id. These records also may well be insufficient on their face for the purpose of identifying which particular individuals were assigned to a particular task on a particular date, so that contacting individual soldiers to determine if they had any involvement with either plaintiff may become necessary. See id. ¶ 8.

Because the Order directly challenges the United States' previous representations regarding the practical consequences of complying with plaintiffs' requested discovery, see Order at 25-26, which, as we have shown, implicate extremely weighty separation-of-powers concerns, see Objections at 11-13; Docket No. 76 at 6-10, it is critical that the Court consider the United States' evidence that refutes the Magistrate Judge's finding in this regard. And because the mere process of obtaining the declarations of Captain Foster and Lieutenant Melson itself raised

similar separation-of-powers concerns, as it required the attention of active duty military personnel in Iraq, the United States could not secure these declarations before filing its Objections. The United States therefore respectfully requests that the Court permit it to supplement its Objections with the attached declarations.

Despite the separation-of-powers issues implicated in obtaining these declarations, the United States endeavored to do so before plaintiffs were required to file their response to its Objections, which is currently due today. In the meantime, defense counsel informed plaintiffs' counsel of the United States' intent to file this motion three days before doing so. But because defense counsel did not receive the final, executed declarations with enough time left to draft this motion and provide plaintiffs' counsel with an adequate opportunity to review the motion before filing it, it is unknown whether plaintiffs oppose this motion. Nevertheless, plaintiffs would not be prejudiced if the Court granted this motion because the parties have agreed to extend the briefing schedule on the United States' Objections by one week (as memorialized in a separate "Unopposed Motion to Revise Briefing Schedule" filed on this same date). This will afford plaintiffs an opportunity to decide if they oppose the motion to supplement and/or respond substantively to the United States' supplemental information.

For the reasons stated above, the United States respectfully requests that the Court permit it to supplement its Objections with the declarations of Captain Foster and Lieutenant Melson.

Respectfully submitted,

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