

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

FAWZI KHALID ABDULLAH)	
FAHAD AL ODAH, <i>et al.</i>,)	
)	
Petitioners,)	Civil Action No. CV 02-0828 (CKK)
)	
v.)	
)	
UNITED STATES, <i>et al.</i>,)	
)	
Respondents.)	
_____)	

REQUEST FOR STATUS CONFERENCE

Petitioners respectfully request this Court to schedule a status conference at its earliest convenience, this week or next, to discuss Respondents' continuing failure to comply with the amended Case Management Order entered by Judge Hogan on December 16, 2008, and this Court's Scheduling Order entered January 7, 2009, as described in the e-mail dated February 2, 2009, from Matthew MacLean to David White, attached hereto as Exhibit 1.¹

The Scheduling Order requires prior leave of Court for any substantive motions beyond those set forth in the Order itself. Petitioners have no desire to burden the Court (or themselves) with yet more motion practice. At the same time, however, the government's noncompliance with the Court's orders regarding the production of declassified returns and the production of all exculpatory evidence in its possession undermines this Court's ability to provide Petitioners with a meaningful habeas remedy, as required by the Supreme Court. Petitioners respectfully submit that the most efficient way to deal with this problem is for the Court to hold a conference with

¹ Petitioners request the conference this week, if the Court's calendar permits, because experience has shown that a long lead time is required for any action by the government, even pursuant to a court order.

counsel for the parties to hear both sides' position on these issues and then to fashion an appropriate remedy and procedure going forward.

Certificate of Compliance with LCvR 7(m)

Counsel for Petitioners met and conferred by e-mail and telephone with counsel for the government on February 2 and 3, 2009. Counsel for the government indicated that he will be in the office and available for a conference if he has advance notice of the time. However, he indicated that the government opposes the request for a conference as set forth in the e-mail from David White to Matthew MacLean, attached hereto as Exhibit 2.

February 3, 2009

Respectfully submitted,

/s/

DAVID J. CYNAMON (Bar #182477)
david.cynamon@pillsburylaw.com
MATTHEW J. MACLEAN (Bar #479257)
matthew.maclean@pillsburylaw.com
PILLSBURY WINTHROP
SHAW PITTMAN LLP
2300 N Street, N.W.
Washington, D.C. 20037
Telephone: (202) 663-8000
Facsimile: (202) 663-8007
Attorneys for Plaintiffs-Petitioners

-----Original Message-----

From: MacLean, Matthew J.

Sent: Mon 2/2/2009 7:01 PM

To: 'David.White2@usdoj.gov'

Cc: Cynamon, David J.

Subject: RE: Al Odah v. United States, 02-cv-0828 - rolling production of declassified returns

David,

Thanks for taking my phone call. We discussed the three items addressed in my e-mail below.

1. As to Judge Kollar-Kotelly's order for rolling production of declassified factual returns as they become available, you indicated that "piecemeal" production was "not practical," and that you did not think anything would be available until Friday. You said that you would try to get me "some things." You also said that the documents you showed me last week were not the final versions, and that they are not yet cleared for release.

As I said to you, whether and when the documents are cleared for release is entirely within your (the government's) control, and it is not faithful to the Court's order to withhold them until Friday when you could release them today with a single phone call. The issue of whether or not it is "practical" is irrelevant. The Court's order was an accommodation to you to give you the time you said you need. You cannot pick and choose which parts of the order you follow and which you do not.

2. We also discussed our supplemental memorandum, being filed today, identifying two documents from the government's production on Friday that we would like to add to our list of "priority items" in our motion for production of declassified returns. You indicated that the government would object to declassification of anything produced in discovery, but that you do not object to the filing of our memorandum adding the two documents to our motion.

3. As to the government's production on Friday, I reiterated my comment below that the production is ridiculously meager. We agreed to your requests for delays until January 30 as to two categories of discovery: disclosure of the circumstances of the petitioners' statements, and exculpatory evidence. We were given assurances by your colleagues that the purpose of the delay was to give the government time to make a complete production. What we got instead was a handful of reports recounting statements of our own clients, containing little information regarding the circumstances of their interrogations. There was essentially no exculpatory evidence provided, including categories of evidence that we specifically brought to your attention.

In our phone conversation, you replied that the government has conducted a search of documents, and that you have produced the documents found in that search relating to circumstances in which statements were made. I note that you have not produced any interrogator notes or video or audio recordings. The government has never denied that such documents exist. Additionally, the reports

themselves appear to contain code phrases, addressed in our supplemental memorandum, relating to the interrogation techniques used. You have not provided any means for deciphering what specific techniques are covered by each of these code phrases.

Even if your search of documents had been thorough, it does not alone satisfy your obligation under the Case Management Order. The Case Management Order requires the government to disclose the circumstances under which statements of the petitioners were made or adopted, not just to produce what documents you can find. If the documents you have found don't disclose those circumstances (which they don't), then you might have to look at interrogator notes, video recordings, or audio recordings. If you can't find those, you might have to interview the interrogators, or at least identify them to us so that we can interview them.

As to exculpatory evidence, you said that the government is still in the process of compiling the materials, but that they are not cleared to give to us yet, and you don't know when they will be. We specifically discussed, as an example, evidence casting doubt on the credibility of supposed witnesses. You acknowledged that such evidence exists and has not been produced, but could not give me a date by which it would be produced.

This is simply an unacceptable situation. We agreed to a delay until January 30, and the Court adopted that deadline. You did not give us or the Court any indication that you would not meet the deadline. For the reasons we have explained over and over again, we need that information now so that we can meet our deadlines and get our clients the review they deserve after seven years of captivity. The government is in direct violation of the Scheduling Order.

We must get obtain leave of Court before we file a motion to compel or a motion for sanctions, so we will try to arrange for a conference with the judge tomorrow. You indicated that you would send me your available times for such a call.

Matt

-----Original Message-----

From: MacLean, Matthew J.

Sent: Mon 2/2/2009 1:40 PM

To: 'David.White2@usdoj.gov'

Cc: Cynamon, David J.

Subject: Re: Al Odah v. United States, 02-cv-0828 - rolling production of declassified returns

David,

You have not replied to my e-mail below. Please reply right away and let us know the status of your compliance with the court's order for a rolling production of declassified documents.

Additionally, I called you earlier today to discuss the government's disclosure of the circumstances of statements allegedly made by Petitioners, and the government's disclosure of exculpatory evidence. I am sure you know already that we are entirely unsatisfied with the extremely meager production provided to us over the weekend. We agreed to the government's requests for delays until January 30 on the understanding that there would be a good faith effort to make a full production. Instead, you have produced only a handful of interrogation reports for each of the detainees, including little new information about the circumstances of their alleged statements.

Your recent production includes no information whatsoever about other detainees who have allegedly made statements against our clients, including information in the government's possession that we have learned about ourselves and brought to the attention of you and your colleagues. It also does not contain the CIA report addressing Fouad Al Rabiah that we brought to your attention. It contains no information responsive to our discovery requests, including information that would plainly fall within the definition of exculpatory evidence.

Nevertheless, there are two documents in the packet for Fouad Al Rabiah (ISN 551) that we would like to add to our list of priority items to declassify. We will file a memorandum with the Court today addressing those documents. Please let us know if you consent to us adding the documents to our list of priority items. For the purpose of identifying the documents without revealing any arguably classified information, they are the first two documents listed in the Index of Enclosures for Fouad Al Rabiah.

Please call on my cell phone, 703-470-9276.

Matthew J. MacLean

Sent from my BlackBerry Wireless Handheld

From: MacLean, Matthew J.
To: 'White, David (CIV)'
Cc: Cynamon, David J.
Sent: Fri Jan 30 13:42:43 2009
Subject: Al Odah v. United States, 02-cv-0828 - rolling production of declassified returns

David,

In light of Judge Kollar-Kotelly's order requiring the government to produce declassified portions of the returns on a rolling basis as they become available "beginning on this day," please immediately produce

the declassified documents that you showed me on Wednesday and any other declassified documents that have been prepared.

I understand that a number of the declarations and other documents in our returns have already been declassified in connection with other cases, and those should be produced to us today as well.

I also look forward to receiving the government's production of exculpatory evidence, and its discovery response under paragraph I.E.1(3) of the Case Management Order, both of which are due today. It is my understanding from our discussions on Wednesday that you intend to make those productions on time.

Matthew J. MacLean | Pillsbury Winthrop Shaw Pittman LLP

Tel: 202.663.8183 | Fax: 202.663.8007
2300 N Street, NW | Washington, DC 20037-1122

Email: matthew.maclea@pillsburylaw.com <<mailto:matthew.maclea@pillsburylaw.com>>
Bio: www.pillsburylaw.com/matthew.maclea <<http://www.pillsburylaw.com/matthew.maclea>>
www.pillsburylaw.com <<http://www.pillsburylaw.com/>>

From: DCD_ECFNotice@dcd.uscourts.gov [mailto:DCD_ECFNotice@dcd.uscourts.gov]
Sent: Friday, January 30, 2009 12:23 PM
To: DCD_ECFNotice@dcd.uscourts.gov
Subject: Activity in Case 1:02-cv-00828-CKK AL ODAH, et al v. USA, et al Order on Motion for Order

This is an automatic e-mail message generated by the CM/ECF system. Please DO NOT RESPOND to this e-mail because the mail box is unattended.

NOTE TO PUBLIC ACCESS USERS Judicial Conference of the United States policy permits attorneys of record and parties in a case (including pro se litigants) to receive one free electronic copy of all documents filed electronically, if receipt is required by law or directed by the filer. PACER access fees apply to all other users. To avoid later charges, download a copy of each document during this first viewing. However, if the referenced document is a transcript, the free copy and 30 page limit do not apply.

U.S. District Court

District of Columbia

Notice of Electronic Filing

The following transaction was entered on 1/30/2009 at 12:23 PM EDT and filed on 1/30/2009

Case Name: AL ODAH, et al v. USA, et al

Case Number: 1:02-cv-828 <<https://ecf.dcd.uscourts.gov/cgi-bin/DktRpt.pl?19482>>

Filer:

WARNING: CASE CLOSED on 04/26/2006

Document Number: 453

<https://ecf.dcd.uscourts.gov/doc1/04502402343?magic_num=43952008&de_seq_num=2781261&caseid=19482>

Docket Text:

ORDER granting Respondents' [451] Motion for an Extension of Time. Respondents shall file their Opposition to Petitioners' Motion for More Complete Declassified Factual Returns no later than February 6, 2009, which shall include as attachments the copies of the declassified factual returns and an explanation for why Respondents have not declassified any items identified in Petitioners' Motion. Beginning on this day and continuing until February 6, 2009, Respondents shall produce declassified portions of the returns on a rolling basis to Petitioners as they become available. Respondents' failure to include the declassified returns and relevant attachments as exhibits, or provide a justification for each item that was identified in Petitioners' Motion that Respondents have determined not to declassify, may result in sanctions, including possible exclusion of allegations or documents going forward. Signed by Judge Colleen Kollar-Kotelly on January 30, 2009. (lcckk1)

1:02-cv-828 Notice has been electronically mailed to:

Judry Laeb Subar judry.subar@usdoj.gov

David J. Cynamon david.cynamon@pillsburylaw.com

Robert D. Okun robert.okun@usdoj.gov, John.mannarino@usdoj.gov, barbara.burnett@usdoj.gov

Terry Marcus Henry terry.henry@usdoj.gov

Jeanette Melendez Bead jbead@lskslaw.com, ldean@lskslaw.com

Timothy Burke Walthall timothy.walthall@usdoj.gov

David Hugh White david.white2@usdoj.gov

Brian David Boyle brian.d.boyle@usdoj.gov

Alexander Kenneth Haas alexander.haas@usdoj.gov

Andrew I. Warden andrew.warden@usdoj.gov

Daniel M. Barish daniel.barish@usdoj.gov

Osman Ahmad Handoo osman.handoo@pillsburylaw.com

Matthew J. MacLean matthew.maclean@pillsburylaw.com, Ronald_Lee@aporter.com

Paul Edward Ahern paul.ahern@usdoj.gov

Robert J. Prince robert.prince@usdoj.gov

August Edward Flentje august.flentje@usdoj.gov

Sean W. O'Donnell, Jr sean.o'donnell@usdoj.gov

Jonathan S. Needle jonathan.needle@usdoj.gov

Kathryn Celia Mason Kathryn.Mason@usdoj.gov

Kristina Ann Wolfe kristina.wolfe@usdoj.gov

Patrick D. Davis patrick.davis2@usdoj.gov

CHARLES B. GITTINGS, JR cbgittings@yahoo.com

1:02-cv-828 Notice will be delivered by other means to::

ABDULAZIZ SAYER OWAIN AL SHAMMARI

ABDULLAH SALEH ALI AL AJMI

ADIL ZAMIL ABDULL MOHSSIN AL ZAMIL

HAMAD MADAI SAAD

MESFER SALEH ALI AL AJMI

MOHAMMED FUNAITEL AL DIHANI

MUBARA F. S. M. AL DAIHANI

NASSER NIJER NASER AL MUTAIRI

NAYEF N. N. B. J. AL MUTAIRI

SAAD MADAI SAAD HAWASH AL-AZMI

SAYER O. Z. AL SHAMMARI

WALID Z. A. AL ZAMEL

The following document(s) are associated with this transaction:

Document description:Main Document

Original filename:suppressed

Electronic document Stamp:

[STAMP dcecfStamp_ID=973800458 [Date=1/30/2009] [FileNumber=2060942-0]
[5ca950316c671352ca391c36e9bf37a7527d0ffb689de3c07b487a8de43fde7f0bf5
eb7533d3b23594d5cb5f9148fb8790ab2098f21ac42076a604a21964139c]]

-----Original Message-----

From: White, David (CIV) [mailto:David.White2@usdoj.gov]

Sent: Tue 2/3/2009 3:31 PM

To: MacLean, Matthew J.

Cc: Walthall, Timothy (CIV)

Subject: Conference - 2nd Message

Given the work that is being done here to meet the production schedule for this week, there is no need for a conference. You will be wasting the Court's time and interfering with my ability to do the very thing you want done. Feel free to attach this email to your motion.

David White