

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

JOINT STATUS REPORT

Pursuant to this Court’s Order of December 16, 2008, the parties in *Al Odah v. United States*, 02-cv-0828 (CKK), hereby submit this joint status report.¹

I. Status of Compliance With Case Management Order

a. From September 5 to September 18, 2008, the government filed classified amended returns as to each of the Petitioners. The government provided unclassified versions of the amended factual returns on December 12, 2008. Petitioners object that the unclassified returns are inadequate because they are so heavily redacted that they do not provide Petitioners with adequate notice of the allegations against them, adequate opportunity to rebut the evidence supporting those allegations, or adequate opportunity to participate meaningfully in litigation decisions. Petitioners further object to the government’s designation of the entire unclassified returns as “protected” under the Protective Order without sufficient basis for doing so.

¹ Currently pending before the Court is Respondents’ Motion to Dismiss without prejudice or, alternatively, to Hold in Abeyance the habeas petitions of Petitioners Fouad Mahmoud Al Rabiah (ISN 551) and Fayiz Mohammed Ahmed Al Kandari (INS 552). See Resp’ts’ Mot. to Dismiss, dkt. no. 407 (Nov. 26, 2008). Respondents’ position is that the schedule should not be set on these two cases until the Court has ruled on the motion. Petitioners disagree with Respondents’ position.

Respondents: The motion to confirm designation of Unclassified Returns as “Protected” information was filed on December 29, 2008. As stated in the motion, each unclassified return may be disclosed to the individual petitioner to whom it pertains and may also be disclosed to petitioner’s witnesses provided they comply with the terms of the Protective Order of September 11, 2008. On December 30, 2008, Judge Hogan, in 08-MC-442, ordered that petitioners file their consolidated response to the motion by January 7, 2009.

b. The government has filed its Statement of Legal Justification for Detention, Docket #402 (Nov. 18, 2008). Petitioners will address their objections to the government’s statement in their motions for judgment under ¶ III.A of the Case Management Order (“CMO”).

c. Petitioners’ position is that the government has not disclosed to the Petitioners “all reasonably available evidence in its possession that tends materially to undermine the information presented to support the government’s justification for detaining the [Petitioners]” and has not certified that it has disclosed the exculpatory evidence under ¶ I.D of the CMO as amended.

The government has filed a Notice Pertaining to Production of Exculpatory Evidence, Docket #403 (Nov. 20, 2008), stating that it has disclosed the exculpatory evidence “encountered in developing returns by the attorneys preparing them.” To comply with ¶ I.D. of the CMO as amended, Respondents are reviewing records for “evidence contained in any information reviewed by attorneys preparing factual returns for all detainees” and “any other evidence the government has discovered while litigating habeas corpus petitions filed by detainees at Guantanamo Bay.”

The government has requested an extension until January 30, 2009, to comply with the requirement to produce exculpatory evidence under ¶ I.D of the CMO as amended. Petitioners have agreed to that extension as discussed during a meet and confer on December 29, 2008.

d. On November 6, 2008, Petitioners requested the discovery required under ¶ I.E.1 of the CMO, which encompasses the discovery required under ¶ I.E.1 of the CMO as amended. The government has not provided the requested discovery. In a meet and confer on December 29, 2008, the government alerted Petitioners' counsel to its position that it is not required to respond in any way to Petitioners' request on November 6, 2008, because ¶ I.E.1 of the CMO was amended by this Court's order on December 16, 2008. While petitioners disagree with the government's position, in order to avoid an unnecessary dispute, Petitioners re-submitted their discovery request on December 29, 2008, using the language of ¶ I.E.1 of the CMO, as amended. Petitioners agree to allow the government until January 12, 2009, to respond to their discovery request.

Respondents: The Government's factual return in each case satisfies its obligations under ¶ I.E.1(1) and ¶ I.E.1.(2) of the CMO as amended. The government is working diligently to assemble and prepare the balance of the information required by ¶ I.E.1(3); however, the resources required to obtain this information and the clearance issues inherent in its disclosure may render the Government unable to produce all of this information by the due date. Should the Government conclude that it cannot meet its obligations by January 12, 2009, it will meet and confer with petitioners regarding an enlargement of time and, if necessary, file an appropriate motion.²

² On December 30, 2008, the Government moved in certain cases [see, e.g., 04-cv-1194] to extend to January 30, 2009, the time to provide discovery under ¶ I.E.1(3) of the CMO as amended.

e. Because the government has not yet disclosed all exculpatory evidence pursuant to the amended CMO and has not certified that it has done so under the terms of the amended CMO, Petitioners' time to file traverses to the government's amended factual returns has not yet begun to run.

II. Schedule for Motions, Filings, and Other Disclosures Assuming No Further Alterations to Case Management Order.

Dec. 30, 2008 -Government's production of exculpatory evidence under CMO ¶ I.D. As explained in ¶ I.c., supra, Petitioners have agreed to Respondents' request to have until January 30, 2009, to provide this information.

Dec. 30, 2008 - Government's production of discovery requested under CMO ¶ I.E.1. Respondents have never agreed that December 30, 2008, was the deadline. In any event, Respondents' deadline to respond to Petitioners' new request for discovery under ¶ I.E.1 of the amended CMO is January 12, 2009, and, as noted in ¶ I.d., supra, if the government is unable to produce the materials by that date Respondents may request additional time up to January 30, 2009, within which to respond.

Jan. 13, 2009 - Petitioners' traverses under CMO ¶ I.G.

Jan. 27, 2009 - Motions for judgment on the record.

Feb. 5, 2009 - Responses to motions for judgment on the record.

III. Description of Anticipated Problems During Compliance With CMO Schedule

a. Because the government's unclassified factual returns provided on December 12, 2008, were received too late to have them translated in time for Petitioners' attorneys' most recent visit to Guantanamo on December 15, 2008, only one of the four Petitioners has yet had an opportunity to review his unclassified return. For the remaining three Petitioners, their first opportunity to review the government's unclassified returns will not be until their attorneys' next visit to Guantanamo on January 12-14, 2009.

b. Moreover, the unclassified returns are so heavily redacted that the Petitioners themselves will not be able to discern many of the allegations against them and will not be able

to respond meaningfully to most of the evidence against them. Indeed, the bulk of the unclassified evidence provided to the Petitioners consists of their own statements denying any wrongdoing, and does not support the allegations in the government's narrative statement. Moreover, most of the allegations themselves are redacted from the unclassified versions of the returns, making it impossible for Petitioners to participate in the preparation of their cases.

Accordingly, Petitioners will not be capable of filing traverses "containing the relevant facts and evidence" in response to the government's returns until they have had a meaningful opportunity to see the allegations and evidence against them. *See Hamdi v. Rumsfeld*, 542 U.S. 507, 533 (2004) (requiring "a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker"). Petitioners intend to file a motion for production of more complete unclassified factual returns. After their motion is ruled upon and adequate unclassified returns are produced, Petitioners' counsel will require time to confer with Petitioners before filing a traverse. Petitioners' counsel meet with Petitioners in Guantanamo approximately once every month. Petitioners therefore request that their traverses be due thirty days after the later of (a) the government's compliance with any ruling on Petitioners' motion for production of unclassified returns and (b) the government's compliance with any ruling on Petitioners' motion for discovery.³

IV. Proposals to Change the Case Management Order as to Matters Specific to Facts of Individual Cases.

a. Petitioners expect to file a motion for specific, narrowly-tailored discovery pursuant to ¶ I.E.2 of the CMO. Discovery requested will include specific requests pertaining to the following categories of information, and petitioners may submit additional requests depending upon the government's production of exculpatory evidence:

³ Petitioners may request additional time if necessary to allow them to meet with their counsel and review discovery and unclassified traverses in their native language prior to filing their traverses.

1. Information concerning Petitioners' captures. Petitioners' counsel have reason to believe that none of the Petitioners was captured in combat. With respect to Petitioner Fouad Al Rabiah, Petitioners' counsel have reason to believe he was sold for a bounty to a Northern Alliance tribal leader, who in turn sold him for a bounty to U.S. forces. With respect to Petitioner Fawzi Al Odah, Petitioners' counsel have reason to believe he was not captured at all, but was imprisoned after requesting a Pakistani border guard to put him in contact with the Kuwaiti embassy in Pakistan.
2. Objects and documents in the possession of Petitioners at the time of their capture. Particularly with respect to Petitioner Fayiz Al Kandari, Petitioners' counsel have reason to believe such items would include exculpatory evidence, as will be addressed in Petitioners' motion for discovery.
3. Information concerning certain witnesses against Petitioners whose credibility is in question, including information concerning the circumstances under which their interrogations were conducted and purported statements concerning certain photographs and documents. (The identities of the witnesses and the content of their statements remain classified, and will be addressed in Petitioners' motion for discovery).
4. Information concerning certain interrogators who questioned Petitioners. Particularly with respect to Petitioner Fouad Al Rabiah, Petitioners' counsel have reason to believe he was tortured by interrogators, and have specific information relating to the identities of certain interrogators.
5. Information concerning a CIA report referenced in the book, *The Dark Side*, by Jane Mayer, reportedly concluding that Petitioner Fouad Al Rabiah was wrongfully held in Guantanamo.
6. Information concerning the provenance of certain classified documentary evidence contained in Petitioners' classified returns. (The content of the documents remains classified or protected, and will be addressed in Petitioners' motion for discovery).
7. Information concerning polygraph and voice stress examinations purportedly conducted on Petitioners Fawzi Al Odah and Fouad Al Rabiah.
8. Depositions of certain interrogators and witnesses who will be identified in connection with the requests above.

b. As stated above, Petitioners have not yet had the opportunity to see many of the allegations and most of the evidence against them. Petitioners expect to file a motion for

production of more complete unclassified versions of their factual returns. Depending on the exculpatory evidence provided by the government and the government's responses to Petitioners' discovery requests and any further discovery requirements imposed by the Court, Petitioners may also move for production of unclassified versions of those disclosures as well.

V. Final Proposed Schedule for Submission of Motions, Filings, and Other Disclosures

The parties jointly request the following schedule:

- Jan. 9, 2009 - Petitioners' motion for production of more complete unclassified returns.
- Jan. 12, 2008 - Government's production of discovery requested under CMO ¶ I.E.1. As explained in ¶ I.d., supra, if the government is unable to complete its response by that date, Respondents may move for additional time up to January 30, 2009.
- Jan. 23, 2009 - Petitioners' motion for additional discovery.
- Jan. 30, 2009 - Government's production of exculpatory evidence under CMO ¶ I.D.
- 30 days after compliance with rulings on Petitioners' motions - Petitioners' traverses under CMO ¶ I.G.
- 14 days after filing Petitioners' traverses - Motions for judgment on the record.
- 7 days after filing of motions for judgment on the record - Responses to motions for judgment on the record.

January 2, 2009

Respectfully submitted,

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