

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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

**JOINT STATUS REPORT**

Pursuant to this Court's Order of April 7, 2009, Supplementing the Court's January 7, 2009 Scheduling Order, the parties hereby submit this joint status report. Counsel for the parties exchanged numerous e-mails and conferred by telephone on Wednesday, April 8, 2009, but were unable to agree upon a schedule for the motions and other briefing required by the Order.

Accordingly, each side sets forth below its proposed schedule and the reasons for its proposal:

**1. Motions**

a. Motions in limine.

(1) Petitioners currently anticipate that they will file motions in limine to exclude the following categories of evidence:

- i. documents identified in Petitioners' Motion for Production of Complete Declassified Factual Returns or Adequate Substitutes that Petitioners have not been allowed to see;
- ii. partially redacted documents in classified returns referenced in Petitioners' Consolidated Traverses;

- iii. documents and testimony reflecting alleged statements of Petitioner Fouad Al Rabiah resulting from torture, threats, and other coercive interrogation techniques;
- iv. documentary evidence as to which the government has not established an adequate foundation establishing relevance or connection to Petitioners;
- v. all alleged photographic identifications.

(2) Respondents currently do not anticipate that they will file any motions in limine to exclude evidence.

(3) Schedule for motions in limine:

Petitioners' Proposed Schedule and Rationale: Motions in limine shall be filed by April 27, 2009. Any opposition shall be filed by May 4, 2009. Any reply may be filed by May 7, 2009. If on April 27, 2009, the government identifies exhibits or witnesses not previously identified in its factual returns, Petitioners may file additional motions in limine relating to such witnesses and exhibits by May 1, 2009, and any opposition shall be filed by May 8, 2009.

This schedule will ensure that the motions will be substantially briefed before the status conference on May 5, 2009, so that merits hearings can be scheduled without significant additional delay. Respondents' counsel oppose this schedule in part because Respondents must file their statement of facts and other items required by the Court's January 7, 2009 scheduling order on April 27. However, since Respondents do not intend to file any motions in limine, the April 27 deadline will not conflict with their other obligations. Moreover, motions in limine are targeted and will not require extensive briefing.

Respondents' Proposed Schedule and Rationale: Motions in limine to exclude specific types of evidence shall be filed by May 12, 2009. Any opposition shall be filed by May 19, 2009. Any reply may be filed by May 26, 2009.

Petitioners in essence propose that the parties file ten motions on or before April 24, 2009, the day upon which Respondents must also file detailed pre-hearing materials.

Respondents propose to set these matters seven days after the status conference, some two to three weeks later than Petitioners propose. Respondents are mindful of the need to move these cases quickly but also of the need to proceed cautiously and incrementally and not so quickly as to inhibit either party's ability to present its case. Petitioners' timeline does not give Respondents sufficient time to evaluate these cases and to meet the filing deadlines in a reasonable manner. Respondents believe that these issues should be addressed at the status hearing set by the Court before filing and see no reason to disturb the Court's orderly procedure for hearing these cases.

b. Motions Concerning Hearsay Evidence

Pursuant to the Case Management Order ("CMO"), the Court "may admit and consider hearsay evidence that is material and relevant to the legality of the petitioner's detention if the movant establishes that the hearsay evidence is reliable and that the provision of nonhearsay evidence would unduly burden the movant or interfere with the government's efforts to protect national security."

Petitioners' Proposed Schedule and Rationale: Motions for admission of any hearsay evidence shall be filed by April 27, 2009. Any opposition shall be filed by May 4, 2009. Any reply may be filed by May 8, 2009.

As stated above, this schedule will enable the Court to set dates for merits hearings at the May 5 status conference. The April 27 filing deadline does not impose an undue burden on Respondents. The CMO was issued almost five months ago, and the provision concerning hearsay evidence is common to all pending cases. Respondents have had more than ample time

to determine their position on this issue and to prepare appropriate motions.

Respondents' Proposed Schedule and Rationale: Motions for admission of any hearsay evidence shall be filed by May 12, 2009. Any opposition shall be filed by May 19, 2009. Any reply may be filed by May 26, 2009.

See Respondents' rationale stated in section 1 a (3) above.

c. Motions Concerning Rebuttable Presumption.

Pursuant to the CMO, the Court "may accord a rebuttable presumption of accuracy and authenticity to any evidence the government presents as justification for the petitioner's detention if the government establishes that the presumption is necessary to alleviate an undue burden presented by the particular habeas corpus proceeding. . . . If the Merits Judge determines that a presumption is warranted, the petitioner will receive notice of the presumption and an opportunity to rebut it."

Petitioners' Proposed Schedule and Rationale: Motions in support of a rebuttable presumption as to the accuracy or authenticity of any evidence presented by the government shall be filed by April 27, 2009. Any opposition shall be filed by May 4, 2009. Any reply may be filed by May 8, 2009. The rationale for this schedule is the same as stated above with respect to hearsay evidence.

Respondents' Proposed Schedule and Rationale: Motions in support of a rebuttable presumption as to the accuracy or authenticity of any evidence presented by the government shall be filed by May 12, 2009. Any opposition shall be filed by May 19, 2009. Any reply may be filed by May 26, 2009.

See Respondents' rationale stated in section 1 a (3) above.

d. Motion for Judgment on the Pleadings.

Petitioners intend to seek the Court's permission to file a motion for judgment on the pleadings in favor of Petitioner Khaled Al Mutairi, on the ground that the allegations set forth in the narrative portion of the Amended Factual Return, even if assumed to be true, do not establish legal or factual authority for his detention.

Petitioners' Proposed Schedule and Rationale: This motion, if permitted, shall be filed by April 24, 2009. Any opposition shall be filed by May 8, 2009. Any reply may be filed by May 15, 2009.

This schedule will enable the parties to fully brief the issue and the Court to rule on it before the merits hearing, while avoiding any significant delay in scheduling the merits hearing.

Respondents' Proposed Schedule and Rationale: Should the Court permit Petitioners to file a motion for judgment on the pleadings, such motion shall be filed by May 12, 2009. Any opposition shall be filed by May 19, 2009. Any reply may be filed by May 26, 2009.

See Respondents' rationale stated in section 1 a (3) above.

**2. Stipulations**

Petitioners' Proposed Schedule and Rationale: On or before May 4, 2009, the parties shall exchange stipulations proposed by each side. On or before May 11, 2009, each side shall respond to the other side's proposed stipulations and state as to each proposed stipulation whether it can be stipulated. The parties shall meet and confer thereafter and report to the Court by May 15, 2009, what stipulations have been reached, if any.

This schedule would give the parties an opportunity to propose stipulations after Respondents have filed their statement of facts on April 27 and to report to the Court by

mid-May, which would enable the Court to move forward with merits hearings promptly.

Respondents' Proposed Schedule and Rationale: On or before May 26, 2009, the parties shall exchange stipulations proposed by each side. On or before June 2, 2009, each side shall respond to the other side's proposed stipulations and state as to each proposed stipulation whether it can be stipulated. The parties shall meet and confer thereafter and report to the Court by June 9, 2009, what stipulations have been reached, if any.

Respondents believe that it is not productive to schedule negotiation of stipulations until after the resolution of the numerous motions that are to be filed in this case.

**3. Standard for Determining Legality of Detention**

Petitioners' Proposed Schedule and Rationale: Petitioners shall respond to Respondents' Memorandum Regarding the Government's Detention Authority Relative to Detainees Held at Guantanamo Bay by April 17, 2009. Respondents may reply by April 27, 2009.

This is a straightforward issue that should not require extensive briefing.

Respondents' Proposed Schedule and Rationale: Petitioners shall respond to Respondents' Memorandum Regarding the Government's Detention Authority Relative to Detainees Held at Guantanamo Bay by May 12, 2009. Respondents may reply by May 19, 2009.

See Respondents' rationale stated in section 1 a (3) above.

**4. Redacted Information in Classified Factual Returns**

As part of their motions in limine, addressed above, Petitioners shall move to exclude redacted classified documents that are referenced in their Consolidated Traverse or for other appropriate relief, including the possibility of a presumption.

Petitioners' Proposed Schedule and Rationale: Such motion shall be filed by April 27,

2009. Any opposition shall be filed by May 4, 2009. Any reply may be filed by May 7, 2009. The rationale for this schedule is as stated above with respect to motions in limine. Petitioners have proposed a stipulation that would resolve the issue. If a stipulation cannot be agreed upon, this schedule will enable the Court to resolve the issue promptly.

Respondents' Proposed Schedule and Rationale: Respondents are considering Petitioners' stipulation with respect to these materials. Should a motion nevertheless become necessary, such motion shall be filed by May 12, 2009. Any opposition shall be filed by May 19, 2009. Any reply may be filed by May 26, 2009.

**5. Executive Order 13,492**

Respondents' Position: The Court has ordered that, to the extent materials related to Petitioners have been collected or assembled (or will be collected or assembled) in connection with Executive Order 13,492, they will be produced to Petitioners' counsel provided that they were not previously reviewed or produced by Respondents' counsel in connection with any of their disclosures and discovery obligations under the CMO, as amended, or the Court's subsequent discovery orders. Respondents consider it important to inform the Court that, at this point in time, the precise contours of the collection or assembly of materials pursuant to Executive Order 13,492, and, therefore, the extent or timing of searches that would need to be conducted to obtain the materials required by the Court's order, are not known. Respondents are pursuing the issue, however. Respondents will, therefore, move the Court by separate motion to file a supplemental status report in which to report to the Court on their obligations under Executive Order 13,492 and how those obligations might effect the schedule set forth in this joint status report. Respondents will request that the time in which to report to the Court on this

issue be set for April 24, 2009. Respondents believe that Petitioners' position on this issue oversimplifies the E.O. review process and Respondents' obligations to this Court under its previous orders.

Petitioners' Position: Petitioners object to the inclusion of this issue in the Joint Status Report. The Court's Order of April 7, 2009, does not request any response by the parties about this matter, but rather imposes an "immediate and ongoing" obligation on Respondents. To the extent Respondents seek relief from that obligation, they should do so by motion, not via a status report that the Court has requested to address other matters. Moreover, Petitioners will oppose such a motion. Paragraph 5 of the Court's Order imposes an obligation only "to the extent that materials have been collected or otherwise assembled" by the interagency review team. It should be a simple and quick matter for Respondents to determine whether the interagency review team (which is headed by another official at the Department of Justice) has assembled files for any or all of the Petitioners. If files have not yet been assembled, then Respondents do not yet have any obligation to do anything. If and when files are assembled, there is no requirement that Respondents undertake any additional, independent search or collection effort; rather, Respondents simply must produce any materials in those files that were not previously reviewed or produced in this case. If Respondents are not willing to undertake even that effort, they can produce the entire file so that Petitioners can determine which materials, if any, have not previously been produced.

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April 10, 2009            Respectfully submitted,

/s/ David J. Cynamon

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