



to paragraph I.E.1 of the Case Management Order. *See* Joint Status Report at ¶ 1.d (Jan. 2, 2009). Petitioners subsequently agreed to the government's request for a further extension until January 30, 2009, for production of discovery under paragraph I.E.1(3) of the Case Management Order. *See* Minute Order (Jan. 21, 2009). Indeed, this Court's Scheduling Order was largely based on the schedule agreed upon by Petitioners and the government in their Joint Status Report. *See* Joint Status Report at ¶ V. Until now, Petitioners have agreed to every extension that the government has requested since Judge Hogan returned this case for consideration by the Merits Judge pursuant to the Case Management Order.

As set forth in the e-mail from Petitioners' counsel to the government's counsel on January 28, 2009, attached hereto as Exhibit A, Petitioners have tried to be as accommodating as possible to the government's latest request for an extension. Despite the fact that the government waited until this Court's deadline of January 23, 2009, to file its "Motion for Amendment or Clarification of Scheduling Order", and in spite of the fact that it waited until this Court's extended deadline of January 28, 2009, to inform Petitioners' counsel that it would fail once again to comply with an order of this Court, Petitioners' counsel engaged in an earnest discussion with the government's counsel to try to reach a resolution. Unfortunately, for the following reasons, Petitioners cannot consent to any further delay.

1. In its motion for extension of time, the government asserts that its failure to comply with this Court's orders was due to its "confusion and misunderstanding" concerning its obligation to produce declassified returns. *See* Motion at 2. This contention is not credible. The government has long been aware of the need for production of returns that the detainees themselves could actually read and respond to. Following the government's filing of its classified returns in September, 2008, counsel for Petitioners wrote to the counsel for the government asking when the government would file "unclassified versions of the proposed

amended factual returns.” *See* E-mail exchange between David Cynamon and Andrew Warden (Sep. 22, 2008), attached hereto as Exhibit B. The government responded, “We’re working on producing unclassified versions of the returns in all the cases. I don’t have an estimate when your[s] will be ready.” *Id.*

On November 6, 2008, Judge Hogan issued the Case Management Order, requiring the government to produce “an unclassified version of each factual return.” It was not until December 12, 2008, that the government produced what it refers to as the “unclassified returns.” As a review of the unclassified returns plainly demonstrates, and as the government itself has now essentially admitted, the unclassified returns are completely worthless. *See* Motion at 6 (“The purpose of this filing [of the ‘unclassified’ returns] is to demonstrate to the Court why Petitioners were dissatisfied with them ....”). Petitioners agree with the government’s characterization that the “unclassified” returns are “not a workable or meaningful model upon which the Respondents could base their response to the Court’s Scheduling Order.” *See id.*

In the government’s Motion to Confirm Designation of Unclassified Factual Returns as “Protected,” the government based its motion in part on its assertion that it was preparing “declassified” returns, and that it would make “such declassified materials available to petitioners’ counsel on a rolling basis as such materials become available.” *See* Motion to Confirm Designation of Unclassified Factual Returns at 11 (Dec. 30, 2008). It was no doubt based in part on the government’s assertion in its Motion to Confirm Designation that this Court ordered the government to file the “declassified” returns in Petitioners’ case by January 23, 2009, along with a justification for those items that the government would not declassify.

The Court’s Scheduling Order requiring filing of declassified returns by January 23, 2009, is unambiguous. In an e-mail exchange with government counsel on January 22, 2009, attached hereto as Exhibit C, Petitioners’ counsel wrote, “our motion does not excuse the

government from complying with the Court's order to produce those portions of the return that the government believes should be declassified by tomorrow, along with a justification for redaction of those portions that the government does not believe should be declassified.”

Counsel for the government responded, in relevant part, “We are aware of the requirements of the Scheduling Order ...” *See id.* All parties understood exactly what they were required to do, and when they were required to do it.

2. The government’s failure to comply with the Court’s orders will be highly prejudicial to Petitioners. As Petitioners’ counsel has explained to counsel for the government, and as is set forth in counsels’ e-mail exchange of January 28, 2009, Petitioners’ only opportunity to meet with their counsel before their traverses are due on March 30, 2009, will be the week of March 1, 2009. Before then, counsel will need time to translate the returns into Arabic and to conduct investigation into allegations that have been classified. For example, as is set forth in Petitioners’ Motion for Production of More Complete Declassified Returns, counsel for Petitioners expect to have the opportunity to interview possible witnesses relevant to Petitioners’ cases, but have been unable to do so because of restrictions on use of classified information.<sup>1</sup> The time for Petitioners’ counsel to conduct such investigation is running out quickly. Merely translating the returns into Arabic will take several days at least - or even longer if Petitioners’ counsel are required to use translators who are cleared under the protective order.

3. Finally, this Court cannot allow the government repeatedly to flout the Court’s orders with impunity. The government has now twice disobeyed this Court’s orders to file declassified returns, and this is not the first time in this case that the government has waited until the deadline before granting itself an extension. *See, e.g.,* Motion for Partial and Temporary

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<sup>1</sup> Due to time constraints, Petitioners were not able to make a classified filing today, but can provide further information about the relevance of particular classified documents to the preparation of traverses if the Court requests.

Relief from Court's July 11, 2008 Scheduling Order (August 29, 2008) (filed at literally the last minute on the date the government's factual returns in this case were due). If this Court turns a blind eye to such tactics, its orders will continue to have no meaning to the government.

The government has now been given two opportunities to provide declassified returns and to justify its reasons for not declassifying the allegations and documents in Petitioners' factual returns, once on January 23, 2009, and once on January 28, 2009. It should not be given a third bite of the apple. To mitigate the prejudice to the Petitioners and to vindicate the authority of the Court, the Court should order that all declassified materials should be produced to Petitioners as soon as they become available but no later than February 6, 2009, and that any allegations and documents not declassified by February 6, 2009, shall be stricken from the government's factual returns and may not be relied upon as a basis for Petitioners' detentions.

The government asserts that "production of the declassified return by today has been simply impossible." Motion at 2. Setting aside the fact that the government did not raise this position until five days *after* the initial deadline, Petitioners respond that the government has yet to contend with the impossible. For Petitioners to respond to allegations they cannot see, on the other hand, is truly impossible.

### **Conclusion**

To mitigate the prejudice caused to the Petitioners by the government's repeated failures to comply with this Court's orders, and to vindicate the authority of the Court, Petitioners respectfully request this Court (1) to deny the government's motion for a further extension of time, (2) to order the government to produce declassified portions of the returns on a rolling basis as they become available; and (3) to strike all allegations and documents that are not declassified and produced by February 6, 2009. A proposed order is submitted herewith.

January 29, 2009

Respectfully submitted,

/s/

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*Attorneys for Plaintiffs-Petitioners*



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

From: MacLean, Matthew J.  
Sent: Wednesday, January 28, 2009 5:34 PM  
To: White, David (CIV)  
Cc: Walthall, Timothy (CIV); Cynamon, David J.  
Subject: RE: 02-828

David,

It was very good meeting you today. This message recounts our discussion today by telephone and our subsequent discussion in person at your office. Because our discussion in your office included classified information, I will be very careful not to say anything in this e-mail that is arguably classified, so please understand if my message seems circumlocutory in some places.

In this morning's call, you and Tim Walthall indicated that you did not believe you would be in a position to comply with Judge Kollar-Kotelly's order to produce declassified returns today along with a justification for the portions of the return that the government does not believe should be declassified. You requested our agreement to a delay until February 6, 2009, to produce the government's version of the declassified return. You indicated that the declassified returns would include most of the interrogation reports, largely unredacted, including many of the sources of those reports, but that some documents would remain largely or fully redacted. You said that all documents from a particular agency would remain classified.

I responded that we have been very cooperative in agreeing to requested delays in the past, but that we would be placed in a very difficult position if we were to agree to the delay you are now requesting. (I also pointed out that the Court's scheduling order is largely based upon the schedule that your colleagues agreed to at our meeting on December 29, 2008). Our only opportunity to meet with our clients before their factual returns are due on March 30 will be the week of March 1. Before then, we will need time to have the declassified returns translated and to conduct appropriate investigations, including interviews of any witnesses that we may be able to contact (one potential witness, for example, is identified in our motion). Additionally, because there will clearly be a dispute over at least some documents that the government intends to keep classified, the Court will need time to resolve that dispute. I explained, therefore, that we could not agree to any delay unless we were able to reach an agreement as to exactly what we would receive at the end of the delay.

You indicated that you could show me examples of what would and would not be produced in declassified form, but that it would have to be done at a secure location. We continued the discussion at your office this afternoon where we could review classified documents. You showed me a sample of documents from the classified return of one of the four detainees in this case, and also pointed out which documents would not be declassified. Most of the documents that you said will not be declassified originated from a particular agency, and are easily identifiable by document number.

After reviewing the documents that you said will be declassified, I expressed that I was generally pleased with those particular documents. With a couple of exceptions, which we discussed, I did not have strong objections to the relatively small amount of material redacted. (As to one document, I



objected to the redaction of the source of the interrogation, and you indicated that you would discuss it with the agency involved and try to reach a resolution). However, I expressed my strong objection to the government's position that it would not declassify any documents from one particular agency, and I pointed out specific examples showing why we would need declassified versions of those documents in order to respond to the allegations against our clients.

You asked what we would need in order to reach an agreement for a delay. I responded that any agreement for a delay would have to include the following elements:

1. An enforceable stipulation that the declassified versions of documents produced would be substantially equivalent to the declassified versions of the documents you showed to me today, including declassification of the interrogation sources;
2. Identification, today, of any documents as to which the government does not intend to produce declassified versions; and
3. An agreement that today (or tomorrow at the latest based on the CSO's schedule), the government will submit to the Court its justification for retaining the classification of any documents that it does not intend to declassify, specifically including all documents from the particular government agency.

Point 3 is largely addressed to the government's position that all documents from a particular agency should remain classified. Notwithstanding the merits of the government's position (of which I am highly doubtful), the position itself is simple enough that it should not be very difficult at all to identify the documents as to which it applies and to present the position to the Court. Because there is no doubt that our dispute over these documents will have to be decided by the Court, you should present your position right away so that the Court has the opportunity to decide it quickly.

You indicated that you probably will not be able to identify all of the documents that the government intends not to declassify, but that you will see what you can do. You also indicated that you probably will not be able to submit the government's justification for its position that all documents from a particular agency should remain classified. (My own impression, which you did not necessarily agree with, is that you are personally doing your best, but that some of the agencies involved have not been treating this matter with an appropriate level of urgency).

I am available to talk further if your position changes. I see that you filed a notice indicating that you filed something today under seal, but I have not yet seen what it is.

Although we have not been able to reach an agreement today, I do think that our discussion was moving in the right direction, and I think it would be valuable to continue to have similar discussions. For the future, it would be better to have these discussions at least a few days before a deadline instead of on or after the deadline. For example, we briefly discussed your response to our motion for discovery, which is due next Friday. It sounds like you have not taken a close look at our motion yet, which makes me concerned that you might be asking for another delay next week. If you

intend to request a delay, we should discuss it sooner rather than later. Of course, we are probably not going to make any headway in such a discussion unless the government will reconsider its position that it will not produce any discovery unless it is required by court order. As with the declassified returns, it will be very difficult for us to agree to a delay unless we know what we will be getting at the end of the delay. If your position is that you will oppose all discovery requests regardless of their merits, then we expect that you will file your response on time.

We also briefly discussed the government's pending production of exculpatory evidence and the remainder of the government's "automatic" discovery responses. Those disclosures are due this Friday, and you indicated that you believe you will make the production on time. As we have said before, and as we discussed with your colleagues in our meeting on December 29, 2008, our discovery requests identify a number of items that would clearly fall within the definition of exculpatory evidence, and are therefore due this Friday. In case you have not already done so, I would ask that you review our discovery motion to ensure that all exculpatory evidence is produced on time.

Matthew MacLean  
202-663-8183

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

From: White, David (CIV) [<mailto:David.White2@usdoj.gov>]  
Sent: Tue 1/27/2009 8:28 PM  
To: MacLean, Matthew J.  
Cc: Walthall, Timothy (CIV)  
Subject: 02-828

Matt: I would like to speak with you at the earliest convenient time Wednesday morning. Let me know when you will be available and I will call you.

Thanks.

David White

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

From: Warden, Andrew (CIV) <Andrew.Warden@usdoj.gov>  
To: Cynamon, David J.  
Cc: Henry, Terry (CIV) <Terry.Henry@usdoj.gov>  
Sent: Mon Sep 22 20:40:09 2008  
Subject: RE: Unclassified Amended Factual Returns

David:

We're working on producing unclassified versions of the returns in all the cases. I don't have an estimate when your will be ready.

Best,

Andrew

Andrew I. Warden  
U.S. Department of Justice  
Civil Division, Federal Programs Branch  
20 Massachusetts Ave, NW  
Washington, DC 20530  
Tel: 202-616-5084  
Fax: 202-616-8470

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From: Cynamon, David J. [<mailto:david.cynamon@pillsburylaw.com>]  
Sent: Monday, September 22, 2008 5:08 PM  
To: Warden, Andrew (CIV)  
Cc: Henry, Terry (CIV)  
Subject: Unclassified Amended Factual Returns

Following up on my e-mail last week, when do you expect that unclassified versions of the proposed amended factual returns will be filed in Al Odah, 02-828?

David J. Cynamon | Pillsbury Winthrop Shaw Pittman LLP

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**From:** White, David (CIV) [mailto:David.White2@usdoj.gov]  
**Sent:** Thursday, January 22, 2009 3:01 PM  
**To:** MacLean, Matthew J.  
**Cc:** Barish, Daniel (CIV); Cynamon, David J.; Walthall, Timothy (CIV)  
**Subject:** RE: Al Odah v. United States, 02-cv-0828 (CKK)

We are aware of the requirements of the Scheduling Order, our response to which will probably be the subject of another email before we file anything. I wish I could give you more definitive information right now, but I can't. We are working to disclose information, but timing and content are always in issue.

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**From:** MacLean, Matthew J. [mailto:matthew.maclea@pillsburylaw.com]  
**Sent:** Thursday, January 22, 2009 2:51 PM  
**To:** White, David (CIV)  
**Cc:** Barish, Daniel (CIV); Cynamon, David J.; Walthall, Timothy (CIV)  
**Subject:** Re: Al Odah v. United States, 02-cv-0828 (CKK)

Our motion seeks production of the entire declassified return by January 30, not just the portions that the government wants to declassify. If you agree to the full relief requested in our motion, then I suppose there is no need for you to file an opposition. But our motion does not excuse the government from complying with the Court's order to produce those portions of the return that the government believes should be declassified by tomorrow, along with a justification for redaction of those portions that the government does not believe should be declassified.

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Sent from my BlackBerry Wireless Handheld

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**From:** White, David (CIV)  
**To:** MacLean, Matthew J.  
**Cc:** Barish, Daniel (CIV); Cynamon, David J.; Walthall, Timothy (CIV)  
**Sent:** Thu Jan 22 14:02:39 2009  
**Subject:** RE: Al Odah v. United States, 02-cv-0828 (CKK)

Matthew: We will be filing our opposition to your motion tomorrow. I am not presently in a position to propose a production schedule, but the declassified returns will not be produced tomorrow. I note that your motion asked for them by 1/30.

David

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**From:** MacLean, Matthew J. [mailto:matthew.maclea@pillsburylaw.com]  
**Sent:** Thursday, January 22, 2009 1:53 PM  
**To:** White, David (CIV)  
**Cc:** Barish, Daniel (CIV); Cynamon, David J.  
**Subject:** Al Odah v. United States, 02-cv-0828 (CKK)

David,

On Friday you and I discussed your request for our consent to delay the government's deadline to file declassified factual returns tomorrow. We discussed the logistical difficulties that the petitioners will face if production of declassified returns is delayed for too long, and you indicated that you would send me a

proposed schedule for production of declassified documents. I said that we would consider your suggested schedule and let you know if we would consent.

We have not received your proposed schedule, so we assume that the government plans to produce its declassified factual returns tomorrow. Please let me know right away if the government is not going to meet the Court's deadline.

**Matthew J. MacLean | Pillsbury Winthrop Shaw Pittman LLP**

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**From:** White, David (CIV) [mailto:David.White2@usdoj.gov]  
**Sent:** Tuesday, January 13, 2009 12:36 PM  
**To:** Cynamon, David J.; MacLean, Matthew J.  
**Cc:** Barish, Daniel (CIV); Walthall, Timothy (CIV)  
**Subject:** 02-cv-828: ISN 213, 232, 551 Discovery

See attached letter.

David White  
202-514-3146

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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

**[DRAFT] ORDER**

This matter having come before the Court on Respondents’ Motion for Extension of Time to Comply with Scheduling Order and for Leave to File Declassified Factual Returns on February 6, 2009. It appearing to the Court that the motion should be denied, it is hereby

ORDERED that Respondents’ motion is denied, and it is further

ORDERED that the government shall produce all declassified documents on a rolling basis as they become available, and in any event no later than February 6, 2009. Any allegation or document not declassified and produced by February 6, 2009, shall be stricken from the returns, and may not be relied upon by the government to support Petitioners’ detentions.

Date: \_\_\_\_\_

\_\_\_\_\_  
The Honorable Colleen Kollar-Kotelly  
United States District Judge