

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

_____ )	
<b>IN RE:</b> )	
)	<b>Misc. No. 08-442 (TFH)</b>
<b>GUANTANAMO BAY</b> )	
<b>DETAINEE LITIGATION</b> )	<b>Civil Action No. CV 02-0828 (CKK)</b>
_____ )	

**PETITIONERS' RESPONSE TO RESPONDENTS'  
MOTION TO DISMISS "IMPROPER RESPONDENTS"**

Petitioners Fawzi Khalid Abdullah Fahad Al Odah, Fayiz Mohammed Ahmed Al Kandari, Khalid Abdullah Mishal Al Mutairi, and Fouad Mahmoud Al Rabiah ("Petitioners") hereby respond to the government's Motion to Dismiss Improper Respondents ("Motion").

1. On October 10, 2008, six years and five months after Petitioners filed their Complaint against all Respondents on May 1, 2002, counsel for the government sent counsel for Petitioners an e-mail requesting consent to its motion to dismiss all respondents other than the Secretary of Defense. In spite of the obvious tardiness of the request, Petitioners' counsel responded that Petitioners would consent to the motion if the government would "acknowledge that the Secretary of Defense is the proper respondent, that he is subject to the jurisdiction of the Court, and that he has the power and authority to grant the relief requested in our complaint." *See* E-mail from M. MacLean to S. Marconda (Oct. 10, 2008), attached hereto as Exhibit 1. The government never responded to counsel's request.

2. The government's motion acknowledges that the Secretary of Defense is the proper respondent and that he is subject to the jurisdiction of the Court. *See* Motion at 5. It may (or may not) acknowledge that the Secretary has the authority and the ability to order the relief requested in the Complaint where it says, "Any order of relief in these cases may be properly

*addressed* to the Secretary of Defense, in his official capacity, and no other respondents are required.” *See id* (emphasis added). It is notable that the government states that any order of relief may be addressed to, rather than will be performed or carried out by, the Secretary of Defense. The appendix to the motion, moreover, includes a footnote containing the following mystifying language:

Counsel for these Petitioner(s) conditioned their consent to Respondents’ motion on agreement by Respondents to several conditions which spoke to the legal authority of the Secretary of Defense, as the only proper respondent, to carry out the relief requested by Petitioners and to act on behalf of the government in the course of this litigation. Because such authority is dictated by the operation of law, Respondents consider such responses as effective refusal to consent to Respondents’ motion.

Motion, Appendix at 2. Respondents’ meaning is completely unclear, and Petitioners cannot ascertain whether or not the government agrees that the Secretary of Defense has the power and authority to grant the relief Petitioners have requested in this action.

3. If the government contends that the Secretary of Defense lacks the power and authority to grant the relief requested in the complaint, either because Petitioners are detained pursuant to the President’s executive authority, or because the Secretary of Defense is not their immediate custodian, or because some forms of relief may also require action by another executive department or agency, then the President or the United States and the Petitioners’ immediate custodians should remain respondents in this action, and the government’s motion should be denied. *See Clinton v. Jones*, 520 U.S. 681, 703-05 (1997) (holding that the President can be subject to court order in appropriate circumstances), and cases cited therein; *Rumsfeld v. Padilla*, 542 U.S. 426, 435 (2004) (holding that the detainee’s immediate custodian is a proper habeas corpus respondent). If this Court, on the other hand, grants the government’s motion to

dismiss, then the government should be estopped from later arguing that the Secretary of Defense lacks such power and authority to grant the relief requested.

**Conclusion**

For the reasons stated above, Petitioners respectfully request this Court to deny the government's "Motion to Dismiss Improper Respondents" or, if it grants the motion, to rule that the government is estopped from arguing in the future that the Secretary of Defense lacks the power or authority to grant the relief requested in Petitioners' complaint.

October 27, 2008

Respectfully submitted,

/s/

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Attorneys for Plaintiffs-Petitioners



**EXHIBIT 1**

**MacLean, Matthew J.****From:** MacLean, Matthew J.**Sent:** Friday, October 10, 2008 8:09 PM

**To:** 'Marconda, Scott (CIV)'; Cynamon, David J.; snyderr@dodgc.osd.mil; echemeri@law.usc.edu; dkillmer@killmerlane.com; apemberton@cov.com; preichler@foleyhoag.com; cori@reprieve.org.uk; ggutierrez@ccr-ny.org; dschneider@fredlaw.com; jamesbeane@mac.com; stephmac@earthlink.net; rweaver@gsblaw.com; carol.bruce@bgllp.com; rick.murphy@sutherland.com; bmickum@spriggs.com; jdenbeaux@denbeauxlaw.com; rrachlin@drm.com; afryszman@cmht.com; jmason@paulweiss.com; rufus@margol-pennington.com; joneil@lavin-law.com; ketanji\_jackson@fd.org; nh@fbdlaw.com; Paul\_Rashkind@fd.org; steve\_sady@fd.org; scott\_tilsen@fd.org; billy\_nolas@fd.org; jeff\_ertel@fd.org; shereen\_charlick@fd.org; msmith@gfrlaw.com; csilverman@shb.com; gdaly1@bellsouth.net; bob@neklaw.net; lara\_quint@fd.org; bj.olshansky@gmail.com; acastle@hollandhart.com; zachary@reprieve.org.uk; kboris@rhwlawfirm.com; ddebruin@jenner.com; anant.raut@weil.com; cooperm@sullcrom.com; dvoorhees@hollandhart.com; neil.mcgaraghan@bingham.com; jcargabr@debevoise.com; egreenberg@gsblaw.com; remedies@gmail.com; peter.ryan@dechert.com; susan.manning@bingham.com; jholland1@mac.com; kpierson@hewm.com; jchomsky@igc.org; rickcys@dwt.com; egilson@snet.net; jmissing@debevoise.com; wpowell@hunton.com; wal@lesnevichlaw.com; cposa@manatt.com; michaelmone@ebelow.com; snodgrassj@dsmo.com; mcknightr@dsmo.com; mrayner@law.fordham.edu; brian.decker@dechert.com; pcurnin@stblaw.com; hcgorman@igc.org; aghappour@gmail.com; jgoldstein@rwu.edu; joolman@jenner.com; kadidal@ccr-ny.org; sclay@kilpatrickstockton.com; mary\_petras@fd.org; gclarke@milchev.com; rroberts@reedsmith.com; jacqueline.landells@cliffordchance.com; bgoodman@ccr-ny.org; pkebriaei@ccr-ny.org; linda@sleighandwilliams.com; tsullivan@jenner.com; brent.rushforth@hellerehrman.com; bjacob@schiffhardin.com; khuskey@law.utexas.edu; scott@fenstermakerlaw.com; lcgoodman@rcn.com; mfogler@brsfirm.com; emaclean@ccrjustice.org; wdixon@ccr-ny.org; jcohen@burnslev.com; paul\_turner@fd.org; jgmorgan@epmlaw.com; rmelliot@epmlaw.com; sfisher@gmf-law.com; brian\_mendelsohn@fd.org; Bill\_Marsh@Fd.org; andy\_hart@fd.org; timothy\_ivey@fd.org; darin\_thompson@fd.org; edward\_bryan@fd.org; Carlton\_Gunn@fd.org; craig\_harbaugh@fd.org; jacqueline\_johnson@fd.org; etirschwell@kramerlevin.com; clivess@mac.com; jblackman@cgsh.com; jimfalvey@yahoo.com; juliet.sarkessian@dechert.com; gjones@orrick.com; rkathawala@orrick.com; clui@orrick.com; drutowski@orrick.com; mtrinh@orrick.com; jberman@bermandowell.com; angela.c.vigil@bakernet.com; mohara@reedsmith.com; jbogan@kilpatrickstockton.com; john.chandler@sablauw.com; terry.walsh@alston.com; michael.ward@alston.com; dmarshall@davidsmarshall.com; carpentc@pepperlaw.com; pbellis@comcast.net; kghia@foleyhoag.com; aloewenstein@foleyhoag.com; jon.fee@alston.com; weiner@mwe.com; ssaifee@kramerlevin.com; agarrett@kilpatrickstockton.com; vjolly@kilpatrickstockton.com; lsachnoff@sachnoff.com; jnickovich@perkinscoie.com; wth@hangle.com; rstarr@hangle.com; gwoodward@schnader.com; cdbrown@shb.com; elubell@tllawgroup.com; noah@rashkind.com; rwilson@wcl.american.edu; sabin.willett@bingham.com; mburton@hollandhart.com; sbarker@hollandhart.com; sylvia\_royce@hotmail.com; brian.spahn@sablauw.com; gthunt@mdo.net; mberman@hartmannoherty.com; jhafetz@aclu.org; llustberg@gibbonslaw.com; Handoo, Osman A.; gregsmithlaw@verizon.net; julia.symon@cliffordchance.com

**Cc:** Subar, Judry (CIV); Henry, Terry (CIV); Warden, Andrew (CIV); Mason, Kathryn (CIV)**Subject:** RE: Meet & Confer wrt 08-0442 Motion to Dismiss Improper Respondents

Scott,

Thanks for your message. Speaking only for the petitioners in *Al Odah v. United States*, 02-cv-0828, we are willing to consent to your motion if the government will acknowledge that the Secretary of Defense is the proper respondent, that he is subject to the jurisdiction of the Court, and that he has the power and authority to grant the relief requested in our complaint.

10/27/2008

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

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**From:** Marconda, Scott (CIV) [mailto:Scott.Marconda@usdoj.gov]

**Sent:** Friday, October 10, 2008 2:42 PM

**To:** Cynamon, David J.; snyderr@dodgc.osd.mil; echemeri@law.usc.edu; dkillmer@killmerlane.com; apemberton@cov.com; preichler@foleyhoag.com; cori@reprieve.org.uk; ggutierrez@ccr-ny.org; dschneider@fredlaw.com; jamesbeane@mac.com; stephmac@earthlink.net; rweaver@gsblaw.com; carol.bruce@bgllp.com; rick.murphy@sutherland.com; bmickum@spriggs.com; jdenbeaux@denbeauxlaw.com; rrachlin@drm.com; afryszman@cmht.com; jmason@paulweiss.com; rufus@margol-pennington.com; joneil@lavin-law.com; ketanji\_jackson@fd.org; nh@fbdlaw.com; Paul\_Rashkind@fd.org; steve\_sady@fd.org; scott\_tilsen@fd.org; billy\_nolas@fd.org; jeff\_ertel@fd.org; shereen\_charlick@fd.org; msmith@gfriaw.com; csilverman@shb.com; gdaly1@bellsouth.net; bob@neklaw.net; lara\_quint@fd.org; bj.olshansky@gmail.com; acastle@hollandhart.com; zachary@reprieve.org.uk; kboris@rhwlawfirm.com; ddebruin@jenner.com; anant.raut@weil.com; cooperm@sullcrom.com; dvoorhees@hollandhart.com; neil.mcgaraghan@bingham.com; jcargabr@debevoise.com; egreenberg@gsblaw.com; remedies@gmail.com; peter.ryan@dechert.com; susan.manning@bingham.com; jholland1@mac.com; kpierson@hewm.com; jchomsky@igc.org; rickcys@dwt.com; egilson@snet.net; jmissing@debevoise.com; wpowell@hunton.com; wal@lesnevichlaw.com; cposa@manatt.com; michaelmone@ebelaw.com; snodgrassj@dsmo.com; mcknightr@dsmo.com; mrayner@law.fordham.edu; brian.decker@dechert.com; pcurrin@stblaw.com; hcgorman@igc.org; aghappour@gmail.com; jgoldstein@rwu.edu; jcolman@jenner.com; kadidal@ccr-ny.org; sclay@kilpatrickstockton.com; mary\_petras@fd.org; gclarke@milchev.com; rroberts@reedsmith.com; jacqueline.landells@cliffordchance.com; bgoodman@ccr-ny.org; pkebriaei@ccr-ny.org; linda@sleighandwilliams.com; tsullivan@jenner.com; brent.rushforth@hellerehrman.com; bjacob@schiffhardin.com; khuskey@law.utexas.edu; scott@fenstermakerlaw.com; lcgoodman@rcn.com; mfgogler@brsfirm.com; emaclean@ccrjustice.org; wdixon@ccr-ny.org; jcohen@burnslev.com; paul\_turner@fd.org; jgmorgan@epmlaw.com; rmelliot@epmlaw.com; sfisher@gmf-law.com; brian\_mendelsohn@fd.org; Bill\_Marsh@Fd.org; andy\_hart@fd.org; timothy\_ivey@fd.org; darin\_thompson@fd.org; edward\_bryan@fd.org; Carlton\_Gunn@fd.org; craig\_harbaugh@fd.org; jacqueline\_johnson@fd.org; etirschwell@kramerlevin.com; clivess@mac.com; jblackman@cgsh.com; jimfalvey@yahoo.com; juliet.sarkessian@dechert.com; gjones@orrick.com; rkathawala@orrick.com; clui@orrick.com; drutowski@orrick.com; mtrinh@orrick.com; jberman@bermandowell.com; angela.c.vigil@bakernet.com; mohara@reedsmith.com; jbogan@kilpatrickstockton.com; john.chandler@sablaw.com; terry.walsh@alston.com; michael.ward@alston.com; dmarshall@davidsmarshall.com; carpentc@pepperlaw.com; pbellis@comcast.net; kghia@foleyhoag.com; aloewenstein@foleyhoag.com; jon.fee@alston.com; rweiner@mwe.com; ssaiffee@kramerlevin.com; agarrett@kilpatrickstockton.com; vjolly@kilpatrickstockton.com; lsachnoff@sachnoff.com; jnickovich@perkinscoie.com; wth@hangle.com; rstarr@hangle.com; gwoodward@schnader.com; cdbrown@shb.com; elubell@tlawgroup.com; noah@rashkind.com; rwilson@wcl.american.edu; sabin.willett@bingham.com; mburton@hollandhart.com; sbarker@hollandhart.com; sylvia\_royce@hotmail.com; brian.spahn@sablaw.com; gthunt@mdo.net; mberman@hartmandoherty.com; jhafetz@aclu.org; llustberg@gibbonslaw.com; MacLean, Matthew J.; Handoo, Osman A.; gregsmithlaw@verizon.net; julia.symon@cliffordchance.com

**Cc:** Subar, Judry (CIV); Henry, Terry (CIV); Warden, Andrew (CIV); Mason, Kathryn (CIV)

**Subject:** Meet & Confer wrt 08-0442 Motion to Dismiss Improper Respondents

10/27/2008

Counsel:

Respondents intend to file a motion to dismiss improper respondents in each of your cases. An improper respondent is anyone other than the Secretary of Defense in his official capacity. The basis of the motion is similar to those previously filed before Judges Leon and Sullivan (see e.g., 04-cv-1166-RJL Dkt#128). Please advise if you oppose the motion by noon October 14, 2008, ET. Thanks.

r/

Scott M. Marconda  
U.S. Department of Justice  
Civil Division, Federal Programs Branch  
20 Massachusetts Ave, NW, Rm 5130  
Washington, DC 20530  
Tel: 202-305-8900

10/27/2008



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

_____	)	
<b>IN RE:</b>	)	
	)	<b>Misc. No. 08-442 (TFH)</b>
<b>GUANTANAMO BAY</b>	)	
<b>DETAINEE LITIGATION</b>	)	<b>Civil Action No. CV 02-0828 (CKK)</b>
_____	)	

**[DRAFT] ORDER**

THIS MATTER having come before the Court on the government’s “Motion to Dismiss Improper Respondents”, it appearing to the Court that the motion should be denied, it is hereby ORDERED the government’s motion is denied.

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

\_\_\_\_\_  
The Honorable Thomas F. Hogan  
United States District Judge