IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SUHAIL ABDU ANAM, et al.,	
Petitioners,	**04-CV-1194 (HHK)**
- v -	
BARACK H. OBAMA, et al.,	
Respondents.	

PETITIONERS' RESPONSE TO RESPONDENT'S MOTION TO MODIFY THE FEBRUARY 10, 2009 ORDER TO DEFER BRIEFING OF THE DEFINITION OF "ENEMY COMBATANT" UNTIL THE MERITS PHASE OF THESE PROCEEDINGS

Petitioners Saeed al Sarim (ISN 235), Riyad Ataq al Haj (ISN 256), Jalal Salim bin Amer (ISN 564), Suhail Abdu Anam (ISN 569), Abdulaziz al Swidi (ISN 578), Emad Abdullah Hassan (ISN 680), Fahmy al Tawlaqi (ISN 688) and Mus'ab Omar al Mudwani (ISN 839) respectfully submit, by their undersigned counsel, this Response to Respondents' Motion to Modify the February 10, 2009 Order to Defer Briefing of the Definition of "Enemy Combatant" until the Merits Phase of these Proceedings ("Respondents' Motion").

The Government argues that it should not be required to define "enemy combatant" until the merits stage of these proceedings because (1) the definition of "enemy combatant" is best determined on a case-by-case basis and (2) the Executive Branch is undertaking a review of the detainees' files. *See* Respondents' Motion at 2-3. These arguments are unpersuasive. The definition of "enemy combatant" is a legal standard that should be determined at the outset of

these proceedings both as a matter of essential fairness and judicial efficiency. Additionally, at least two other Judges from this Court presiding over habeas petitions of Guantanamo detainees have recently denied similar motions and ordered Respondents to "submit any refinement of their position on the appropriate definition of 'enemy combatant'" by March 13, 2009. *Hamlily v. Obama*, No. 05-cv-0763 (D.D.C. Feb. 11, 2009); *Gherebi v. Obama*, No. 05-cv-2386 (D.D.C. Feb. 19, 2009). It is, therefore, clear that Respondents will not be able to avoid stating a position by resting on the prospect of the Executive's review.

I. The Definition of "Enemy Combatant" Is Legal Standard Which Should Be Clearly Set Forth At The Outset Of These Proceedings.

In most civil and criminal proceedings, well before a hearing or trial on the merits, the parties and the Court have a clear, uniform understanding of the key legal standard to be applied. *See Hamlily v. Obama*, No. 05-cv-0763 (D.C. Dist. Feb. 11, 2009) (order requiring briefing of "enemy combatant" definition prior to merits determination). The individual facts are then applied to that standard in order to reach a determination on the merits. This is a matter both of essential fairness and judicial efficiency. As a matter of fairness, Petitioners should be given the opportunity to challenge their detention based on a set legal standard, not as Respondents propose, a moving target that will differ from case to case. To permit otherwise would force Petitioners to litigate blindfolded and deny them a meaningful opportunity to provide a defense.

Additionally, defining the legal standard of "enemy combatant" at the outset of these proceedings will permit more efficient litigation. The Court will decide the standard once, and that decision will guide the parties and the Court through the remainder of the proceedings. What Respondents propose would instead require that the Court decide the issue ten times, once in each individual Petitioner's case.

II. The Executive Branch Review Process Should Not Be Permitted To Derail These Habeas Proceedings.

The Executive Branch review process ordered by the President on January 22, 2009, should not be permitted to interfere with the Supreme Court's mandate of eight months ago in *Boumediene v. Bush*, 128 S. Ct. 2229, 2275 (2008), that Petitioners have a right to prompt habeas review. The Executive Order anticipates that some detainees will be released or transferred, some will be prosecuted and others may be subject to some still unknown other type of disposition. *See* Respondents' Motion at 1. Respondents suggest that the review process "may reduce the number of detainees with petitions before the Court." *See* Respondents' Motion at 2. The prospect of this review should not be permitted to derail the habeas proceedings, particularly when the possible outcomes available under the review process remain vague and even Respondents admit that the review process may not resolve these cases entirely.

Additionally, Judge Bates has recently ruled in *Hamlily v. Obama*, that Respondents must "submit any refinement of their position on the appropriate definition of 'enemy combatant'" by March 13, 2009. *Hamlily v. Obama,* No. 05-cv-0763 (D.C. Dist. Feb. 11, 2009). Judge Walton has issued a similar order with submissions due on March 13 and oral argument scheduled for March 23, 2009. *See Gherebi v. Obama*, No. 05-cv-2386 (D.D.C. Feb. 19, 2009). It is, therefore, clear that Respondents' will not be able to avoid stating their position on this key legal standard. Accordingly, there is no reason why they should not also be required to submit any changes in their position on the definition of enemy combatant in this case.

For all the foregoing reasons the Court should deny Respondents' Motion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I filed and served the foregoing Response to Respondent's Motion to Modify the February 10, 2009 Order to Defer Briefing of the Definition of "Enemy Combatant" until the Merits Phase of these Proceedings upon the following counsel of record by the CM/ECF system on the 23th day of February, 2009:

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