

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

_____)	
SUHAIL ABDU ANAM, <i>et al.</i> ,)	
)	Civil Action No. 04-cv-1194 (HHK)
Petitioners,)	
)	
v.)	
)	
BARACK H. OBAMA,)	
President of the United States, <i>et al.</i> ,)	
)	
Respondents.)	
_____)	

**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 respectfully submit this motion in response to the Court’s Order of February 10, 2009, which requires Respondents “to file any motion to modify any statement it has made . . . explaining its legal justification for detaining a petitioner, including the definition of ‘enemy combatant’ that it asserts the court should apply” by February 18, 2009.¹ (Docket # 376.)

As explained below, there are two interrelated reasons why the Court should not address that issue in the abstract and before reaching the merits of particular cases. First, the President has ordered a comprehensive, interagency review of the disposition of all of the detainees being held at the Guantanamo Bay Naval Base. That review will result in the release, transfer, prosecution, or other disposition of the detainees, including the three petitioners here. In that

¹ On February 12, 2009, pursuant to Local Civil Rule 7(m), the undersigned counsel for Respondents discussed this motion with opposing counsel for each of the Petitioners in this civil action by telephone, in a good faith effort to determine whether there is any opposition to the relief sought and, if there is opposition, to narrow the areas of disagreement. Counsel for all of the petitioners in this civil action stated that they oppose the relief sought in this motion.

process and a related review process that the President has ordered of prospective U.S. detention policy, the Executive branch will consider the proper legal bases of detaining any petitioners who are not transferred, released, or prosecuted at the completion of the reviews. Second, to the extent the Court is required to consider the legal basis for petitioners' detentions, the United States urges the Court to adjudicate such questions based on the specific facts of these cases at the merits stage, rather than attempting in the abstract to rule on the scope of detention authority at a preliminary stage. Evaluating the legal bases for detaining these petitioners at the merits stage of each particular case will potentially avoid unnecessarily ruling on important issues regarding the scope of the President's detention authority.² Such a prudential approach is particularly important in light of the Executive's ongoing review of these issues, a process that may reduce the number of detainees with petitions before the Court.

In support of Respondents' position, Respondents state as follows:

1. On January 22, 2009, the President issued Executive Order 13,492: Review and Disposition of Individuals Detained at the Guantanamo Bay Naval Base and Closure of Detention Facilities. See Exec. Order No. 13,492, 74 Fed. Reg. 4897 (Jan. 22, 2009). This Executive Order, *inter alia*, commands "a prompt and thorough review of the factual and legal bases for the continued detention of all individuals currently held at [Guantanamo Bay]." As an initial matter, that Review is to determine, on a rolling basis, whether each detainee can be transferred or released. This Court may not have to entertain the habeas petitions of detainees

² Respondents briefed similar positions at the invitation of Judge Bates in cases before him. (*See, e.g.*, Civ. Action No. 05-763, Docket # 151.) Judge Bates subsequently ordered "that by not later than March 13, 2009, respondents shall submit any refinement of their position on the appropriate definition of 'enemy combatant.'" (Civ. Action No. 05-763, Docket # 154 at 3.) To the extent that this Court requires the Government to further brief the appropriate definition of "enemy combatant" in advance of merits proceedings, Respondents respectfully request that the Court at the very least adopt a timeline no more expedited than that ordered by Judge Bates.

who are subject to such actions. As for detainees who cannot be released or transferred, the Review will consider whether they can be prosecuted for criminal conduct. To the extent any current detainees are not transferred, released, or subject to prosecution, the Review will determine another lawful disposition consistent with “the national security and foreign policy interests of the United States, and . . . the interests of justice.” *Id.* §§ 2(d), 4.

2. The President has also established, by another Executive Order, a deliberative process to address more generally questions concerning Executive detention authority and options. *See* Executive Order 13,493: Review of Detention Policy Options, 74 Fed. Reg. 4901 (Jan. 22, 2009). That Executive Order commands the creation of a Special Interagency Task Force to “conduct a comprehensive review of the lawful options available to the Federal Government with respect to the apprehension, detention, trial, transfer, release, or other disposition of individuals captured or apprehended in connection with armed conflicts and counterterrorism operations, and to identify such options as are consistent with the national security and foreign policy interests of the United States and the interests of justice.” *Id.* § 1(e). The Task Force is to provide preliminary reports the President and a final report within 180 days of the date of the Order.

3. Respondents may seek relief from the Court, as appropriate, in these three cases and others to permit sufficient time for the interagency review to go forward, a process that might obviate the need for the Court to reach the merits in these cases. Regardless of whether Respondents seek such relief, however, this Court should reserve legal rulings on the scope of the President’s detention powers until these three individual petitions reach the merits stage, if they reach that stage. That will permit the Executive Review process to go forward, allowing the

Government additional time to review these petitioners' cases to determine how they should proceed.

4. Reserving legal rulings on the scope of the Government's detention authority (i.e., any definition of "enemy combatant"), until presented with concrete facts in particular cases, is also consistent with the "prudent and incremental" approach these cases should receive. *See Hamdi v. Rumsfeld*, 542 U.S. 507, 539 (2004) (plurality). In *Hamdi*, the plurality contemplated that the boundaries of the "legal category of enemy combatant" would be defined not in the abstract, outside the context of the facts of a particular case, but instead by the courts "as subsequent cases are presented to them." *Id.* at 522 n.1. This case-by-case approach is consistent with longstanding practice of courts to decide only the narrow issues before them. It avoids holdings that are potentially unnecessary or unnecessarily broad concerning difficult and important questions. Particular cases may be subject to resolution without reaching broad questions about the scope of detention authority. Accordingly, attempting to resolve the issue now in the abstract, for all pending cases, poses the risk of ruling unnecessarily on the scope of the Executive's detention authorities at the same time that the Executive branch is considering such issues on a case-by-case basis. Such a risk is not justified by any potential benefits to the overall litigation because merits rulings will necessarily depend on the particular facts of a case.

WHEREFORE, Respondents respectfully request that the Court to reserve any ruling on the scope of the Government's detention authority until the Court reaches the merits of particular cases.

Dated: February 12, 2009

Respectfully submitted,

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