

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

**RESPONDENTS' MOTION FOR EXTENSION OF TIME TO COMPLY WITH
SCHEDULING ORDER AND FOR LEAVE TO FILE
DECLASSIFIED FACTUAL RETURNS ON FEBRUARY 6, 2009**

Respondents respectfully request an extension of time to and including February 6, 2009, by which to comply fully with the Court's Scheduling Order of January 7, 2009, and by which to produce the declassified factual returns demanded by Petitioners' motion that complete factual returns be produced by January 30, 2009.

The extraordinary circumstance supporting this request for extension regarding the requirements of the Scheduling Order is simply that, for the reasons stated below, compliance within the terms of the Scheduling Order is impossible at this time. Respondents can, however, comply by February 6, 2009, and they believe that compliance by that date will not place a significant burden on the ability of Petitioners to prepare their case and meet their own obligations to this Court and will not otherwise interfere with the timely resolution of these cases.

As an initial matter, counsel for respondents apologizes to the Court for wholly misunderstanding and failing to grasp the import of the Court's January 7, 2009, Scheduling

Order as it pertained to a declassified version of the factual return. While in hindsight, and in light of the Court's January 26, 2009, Minute Order, it is apparent that the Court contemplated a declassified version of the complete factual return filed on January 23, 2009, in connection with a response to petitioner's motion for a more complete unclassified return, respondents' counsel failed fully to appreciate that fact. While it is clear to counsel now that the Court apparently intended to have a response to petitioner's motion that would permit it to pass on the legitimacy of any decision by respondents not to declassify particular documents, such a procedure – in which a response to a motion for a declassified return is to include the complete declassified return – has not been the norm in the Guantanamo litigation. Further, it did not seem to be contemplated by petitioner's motion, which sought production of a declassified return by January 30, 2009. It is counsel's confusion and misunderstanding that contributed, at least in part, to respondents' inability to complete declassification of the factual return by January 23, and counsel sincerely regret and apologize for that miscomprehension of the Court's directive.

In light of that now manifest situation and for the additional reasons explained below, production of the declassified return by today has been simply impossible. Nonetheless, in an attempt to resolve this matter in a fashion acceptable to petitioners and that will minimize the need for the Court's involvement, respondents' counsel has undertaken significant and extraordinary efforts to confer meaningfully with petitioners' counsel on the issues raised by petitioners' motion, as explained below. In light of those efforts, which, as noted, will accommodate petitioners in large measure, while very likely reducing the number of difficult issues that the Court will need to resolve in connection with petitioners' motion, respondents respectfully request additional time to comply with the Court's orders.

I. Declassified Returns Will be Produced by February 6.

Respondents, of course, fully intend to produce complete declassified factual returns, by which is meant that for each of the four Petitioners in this case the narrative and all exhibits will be reviewed for declassification, and that information which can be declassified consistent with national security will be declassified. The declassification review does not mean that the factual returns will be entirely declassified. There will be some information that will remain classified or otherwise not releaseable to petitioner. But an extensive amount of information will be made available.

In an effort to reach an agreement with Petitioners with respect to a date satisfactory for them by which the declassified returns will be produced, their counsel was invited to examine a number of documents pertaining to one of the petitioners that have reached a nearly final state of review. The review by Petitioners' counsel occurred at the offices of Respondents' counsel on Wednesday, January 28. Petitioners' counsel acknowledged that if the declassified versions of the returns for all four Petitioners were substantially equivalent to what he was shown, a substantial part of the issues articulated in their Motion would be satisfied. The declassified documents for the remaining petitioners will, in fact, be prepared according to the same procedures used in the documents examined by counsel.

Petitioners' counsel stated, however, that he was concerned with the continued classification of one category of information applicable to each of the Petitioners. He insisted that the justification for this category of information must be filed immediately in accordance with the Order of the Court. With regard to the government's basis for this continued redaction, undersigned counsel explained to him that as to this category, the justification could be

submitted only to the Court, *ex parte, in camera*. With regard to the timing, undersigned counsel explained that the justification was being prepared with the goal of submitting it as soon as possible. This submission will be made as soon as it is ready within the next few days and, in any event, no later than February 6.

In sum, Respondents will be able to submit complete declassified factual returns by February 6, 2009, and by the same date to submit the justification for any remaining classification of those things which Petitioners' have identified as their "high priority" items. Based on Petitioners' counsel's response to the form of the documents reviewed on January 28, Respondents believe that the specific items remaining in dispute (other than the specific category mentioned above) will be limited in number. As to that category, only a portion will relate to Petitioners' high priority items. There will not be a substantial amount of information in dispute upon production of the declassified returns.

Petitioners' counsels' next trip to visit their clients at the Guantanamo Bay Naval Station is scheduled for March 1. Respondents believe, respectfully, that a production date of February 6 will not hinder Petitioners' counsel in their preparation for that trip.

II. Respondents Cannot Comply With the Strict Terms of the Scheduling Order By January 28, 2009, But Can Fully Comply by February 6.

As noted *supra*, the Scheduling Order required Petitioners' to file their motion for complete declassified factual returns by January 9 and required Respondents to file their response by January 23. The Order required that the response "must include the declassified return and relevant attachments as an exhibit, and shall provide a justification for each item that was identified in Petitioners' Motion that Respondents have determined not to declassify." Petitioners' motion itself requested that the declassified factual returns be produced by January

30, 2009. By Minute Order of January 26, this Court ordered that Respondents comply with the terms of the Scheduling Order by January 28.

Respondents are presently engaged in declassification review of well over 150 factual returns. A number of the same persons and agencies involved in that review, however, are also simultaneously involved in the review of exculpatory documents and “automatic discovery” responses to be filed in response to paragraphs I.D.1 and I.E.1 of the Case Management Order entered by Judge Hogan in the consolidated *habeas* cases. Much of that production, in scores of cases including this one, is due on January 30. The available resources are being stretched to their limits, making compliance with the January 28 deadline not possible.

On December 12, 2008, Respondents produced “unclassified” returns for these four petitioners. Such returns have also been produced since December 12 for over 150 other petitioners. But the “unclassified” return bears little resemblance to the “declassified” returns being prepared, and there are critical distinctions. An “unclassified” return is one in which all classified information has been redacted. These were prepared as a preliminary measure to provide information to the detainees as quickly as possible. A “declassified” return is one in which formerly classified information has been determined by authorized declassification officials to no longer require security classification. The government is working toward preparation of returns declassified to the fullest extent possible consistent with national security obligations, but that process involves multiple, close reviews as to whether specific information can be safely treated as no longer classified, a process that involves the exercise of more careful and sophisticated judgment, requiring far more time for decision, than identifying the classified content of a document.

On January 28, 2009, Respondents submitted to the Court through the Court Security Officer the “unclassified” returns served on counsel on December 12. The purpose of this filing is to demonstrate to the Court why Petitioners were dissatisfied with them and also to demonstrate the impracticability and the inefficiency of justifying their redactions. The “declassified” returns, as explained above and as demonstrated to Petitioners’ counsel, will disclose extensively more information that may be shared with the detainee than the unclassified returns and will result in only a limited number of disputes to be resolved. In short, the “unclassified” return was not a workable or meaningful model upon which the Respondents could base their response to the Court’s Scheduling Order.

Respondents’ regret any failures to comply with the requirements of the Scheduling Order and the inadequacy of their initial response, but Respondents have indeed been working diligently on resolving this matter and producing the documents necessary in these cases. The fact of the matter is that Petitioners will be provided on February 6 more information than they were expecting. And they will have a meaningful and productive set of documents that will greatly enhance the resolution of these cases and will not unnecessarily burden this Court with disputes over disclosure or not of relevant information.

CONCLUSION

For the foregoing reasons, the Court should grant Respondents’ request for extension of time to February 6, 2009, by which to comply with the Scheduling Order and to serve and file the declassified factual returns on February 6, 2009.

Dated: January 28, 2009

Respectfully submitted,

MICHAEL F. HERTZ
Acting Assistant Attorney General

/s/ David H. White

JOSEPH H. HUNT (D.C. Bar No. 431134)
VINCENT M. GARVEY (D.C. Bar No. 127191)
TERRY M. HENRY
ANDREW I. WARDEN
PAUL E. AHERN
TIMOTHY B. WALTHALL
DAVID H. WHITE
Attorneys
United States Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Avenue, N.W.
Washington, DC 20530
Tel: 202.514.3146
Fax: 202.616.8470

Attorneys for Respondents

