IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE:	)	Misc. No. 08-0442 (TFH)
GUANTANAMO BAY	)	
DETAINEE LITIGATION	)	Civil Action No. 04-1254 (HHK)

THE GOVERNMENT'S OPPOSITION TO PETITIONERS' MOTION FOR DISCOVERY

On November 18, 2008, counsel for the ten petitioners ("Petitioners" or "Detainees") in the above-captioned Guantanamo Bay habeas corpus case filed a motion for additional discovery ("Petitioners' Motion"), purportedly pursuant to paragraph I.E.2 of the Case Management Order ("CMO"). Petitioners seek an Order that would require the Government to respond to a total of thirty requests for production and twenty interrogatories. For reasons described below many of the CMO's obligations—including all obligations under paragraph I.E—have subsequently been stayed pending resolution of the Government's motion for clarification or reconsideration. As a result, the Government need not respond, and the Court need not consider, the Petitioners' discovery requests until the CMO is settled and the framework for proceeding in these cases is established. But even if the Court were to consider the Petitioners' requests, the requests would fail under the plain terms of the CMO. Although couched as a request under CMO ¶ I.E.2, the Petitioners seek, in essence, to extend the automatic discovery of CMO ¶ I.E.1 and, indeed, in some instances the petitioners seek disclosure exceeding even the automatic discovery that the CMO requires under paragraph I.E.1.

Background

On November 6, 2008, the Court entered a Case Management Order, Dkt. No. 940 (08-MC-0442), to provide a general framework for litigation of the habeas cases before the Court, including a framework for how discovery should proceed. The CMO provided for automatic discovery of documents or objects referenced in the factual return. CMO ¶ I.E.1(1). In addition, it requires the disclosure of certain material related only to the petitioner: "all statements, in whatever form, made or adopted by the petitioner that relate to the information contained in the factual return," CMO ¶ I.E.1(2), and "information about the circumstances in which such statements of the petitioner were made or adopted." CMO ¶ I.E.1(3).

Apart from these requirements for automatic disclosure the Court set forth standards that a petitioner must meet before any additional discovery may be authorized. Under paragraph I.E.2, the CMO requires that discovery requests:

> (1) be narrowly tailored, not open-ended; (2) specify the discovery sought; (3) explain why the request, if granted, is likely to produce evidence that demonstrates that the petitioner's detention; and (4) explain why the requested discovery will enable the petitioner to rebut the factual basis for his detention without unfairly disrupting of unduly burdening the government.

CMO ¶ I.E.2*(*citations omitted)

Petitioners filed their discovery motion, purportedly under paragraph I.E.2, on November 18, 2008.

Also on November 18, 2008, the Government moved for clarification and reconsideration of the CMO, and, in the alternative, certification and a stay of certain obligations under the CMO pending the resolution of the issues raised in its motion. *See* The Government's Motion For Clarification and Reconsideration of This Court's November 6, 2008 Case Management Order

and Supplemental Amended Orders or, in the Alternative, Motion For Certification For Appeal Pursuant to 28 U.S.C. § 1292(b) and to Stay Certain Obligations Pending Resolution of the Motion and Any Appeal, Dkt. No. 1004 (08-MC-442) ("Motion for Clarification"). The Motion for Clarification challenged the automatic discovery provisions applied to these wartime habeas cases as, among other things, broader even than the disclosure requirements afforded to domestic criminal defendants. Moreover, the Motion detailed the impracticality of compliance with the CMO, as explained through sworn declarations from Gordon England, the Deputy Secretary of Defense ("England Decl."), Robert Mueller, III, the Director, Federal Bureau of Investigation ("Mueller Decl.") and Michael V. Hayden, the Director of Central Intelligence (whose declaration was submitted *in camera* and *ex parte*). Among other topics, the Declarations addressed the vast amount of resources already committed to the Guantanamo Bay habeas cases, and how additional resource requirements were likely to impact on the primary missions of the Department of Defense ("DOD") and the FBI.

On November 21, 2008, the Court stayed many of the Government's discovery obligations under the CMO. *See* Order of November 21, 2008, Dkt. No. 1026 (08-MC-442) ("Stay"). Specifically, the Stay provides that the due dates imposed by paragraphs I.C, I.D, I.E, I.F, II.B, II.C, and III.A of the CMO be stayed pending resolution of the issues raised in the Motion for Clarification.

ARGUMENT

The Stay Suspended the Government's Discovery Obligations Under the CMO, and the Government are Not Required to Respond to Petitioners' Discovery Request Until the Framework for Proceeding is Resolved

In its Motion For Clarification, the Government explained its legal challenges to the CMO and addressed the burdens resulting from automatic discovery under CMO ¶ I.E.1 and discovery for good cause under CMO ¶ I.E.2. Motion for Clarification, Dkt. No. 1004 at 15-19 (08-MC-442). Further, the Motion for Clarification addressed the impact those burdens would have on government agencies. *See* Motion for Clarification, Dkt. No. 1004 at 15-19 (08-MC-442); England Decl. ¶ 9, 21; Mueller Decl. ¶ 16.[1] The Court's initial response to the Motion For Clarification has been the Stay Order. That Order provides that the "due dates imposed by paragraphs I.C, I.D, I.E, I.F, II.B, II.C, and III.A [of the CMO] be stayed pending resolution of the Motion [for Clarification]." Stay, Dkt. No. 1026 (08-MC-442). By staying the due dates under the entirety of paragraph I.E., the Court effectively stayed all of the Government's discovery obligations, including obligations to oppose or respond to Petitioners' request here. Given this stay, the Court certainly need not and should not address the Petitioners' discovery requests at this time.

Indeed, there are sound prudential reasons for this Court to decline to consider the Petitioners' broad-ranging discovery requests at this time. The CMO, and the challenge to that Order in the Motion for Clarification, are addressed to a general and comprehensive procedural

[1] As stated in the Motion for Clarification, the Government does not concede that any discovery is appropriate in these wartime habeas cases. However, if any discovery is to be allowed in this context, it should be pursuant to the restrictions set forth in paragraph I.E.2 of the CMO.

framework for litigating these wartime habeas cases. The obligations and deadlines set forth in the CMO are interrelated—especially so in the context presented here where, as detailed below, the Petitioners seek effectively to extend the CMO's automatic disclosure obligations in the guise of a paragraph I.E.2 request. Resolution of the issues raised in the Motion for Clarification might well result in changes to the overall procedural framework that include significant modifications to the regime for discovery outlined in paragraph I.E.1 and 2. Accordingly, until the issues raised in the Motion for Clarification are resolved, it would be inefficient for the Court to consider the Petitioners' request at this time. Moreover, given the nature of any disclosures that might be ordered in this case—by necessity involving the release of classified information—a prudent and incremental approach counsels against considering the Petitioners' requests until the litigation framework is settled. *See Hamdi v. Rumsfeld*, 542 U.S. 507, 539 (2004).

Petitioners' Requests Fail to Specify the Discovery Sought and Are Not Narrowly Tailored

Even if this Court were to consider Petitioners' requests under CMO ¶ I.E.2, it should deny Petitioners motion because the requests do not meet the standard for obtaining discovery under that paragraph. Far from being narrowly tailored or specifying the discovery sought, many of the Petitioners' requests simply seek to import the automatic disclosures required by the CMO, for information related to the petitioner, to another context entirely. That is, Petitioners here ask the Court to turn the automatic discovery involving the *petitioner's* statements into a requirement that the Government provide all information relating to *third-party* statements. Consider, for example, the language of paragraph I.E.1 of the CMO when compared to the Petitioners' requests, ostensibly pursuant to paragraph I.E.2:

> CMO ¶ I.E.1(2)
> [T]he government shall disclose to the petitioner . . . all statements, in whatever form, made or adopted by the petitioner that relate to the information contained in the factual return . . .
>
> Petitioner's Request for Discovery 1
> All statements, in whatever form . . . made or adopted by another individual that relate to any of the information contained in the Factual Return . . .
>
> CMO ¶ I.E.1(3)
> [T]he government shall disclose to the petitioner . . . information about the circumstances in which such statements of the petitioner were made or adopted . . .
>
> Petitioners' Request for Discovery 2
> All documents containing information as to the circumstances in which such statements were made or adopted.

And in parallel fashion, by Interrogatory 1, Petitioners demand that the Government:

> Identify and describe: (a) all statements, made or adopted by another individual that relate to any of the information contained in the Factual Return . . . ; and (b) all documents containing information as to the circumstances in which such statements were made or adopted.

See Petitioners' Requests For Discovery, Interrogatory 1.[2] Apart from these blanket requests repeating the language of paragraph I.E.1, the Petitioners offer no rationale for seeking such broad-ranging discovery. These requests would not be viable under any reading of the CMO as

[2] The balance of Petitioners' requests—Request 3 and Interrogatory 2—find no precedent elsewhere in the CMO. They seek information about "any" or "all" "fees, bounties, or other monetary or non-monetary remuneration or consideration given to third parties for the apprehension, transfer in the Government's custody, or investigation of each Petitioner, including but not limited to payments, gifts, loans, promises of leniency, preferential treatment, release, reduction in charges, or improvements in conditions of detention given to third parties." Such requests are, in some respect, an attempt to obtain discovery in these wartime habeas cases that is akin to that required by *Giglio v. United States*, 405 U.S. 150 (1972), in the criminal context.

it stands. If the Court had intended Petitioners to receive this type of third-party statement discovery, it would simply have extended the provisions of CMO ¶ I.E.1 to reference third-party statements. The Court did not do that. Rather, the CMO expressly limits such discovery, absent a showing of good cause, to disclosures related to the *petitioner's* statements. For reasons discussed in the Motion for Clarification, even this requirement is overbroad, but there certainly is no basis in the CMO for extending the automatic discovery of the requested information to third-party statements, absent the particularized showings required by CMO ¶ I.E.2.

In paragraph I.E.2, the CMO places the burden on the petitioner to meet four distinct requirements, encompassing precise standards, before discovery may be authorized "for good cause." *See* CMO ¶ I.E.2. The first two requirements under CMO ¶ I.E.2 are that petitioners (a) specify the discovery sought and (b) offer a request that is narrowly tailored and not open-ended. Here, Petitioners' third-party-statement requests are expansive, open-ended "form" document requests and "form" interrogatories. On their face, petitioners' form requests do not meet the first two CMO standards.

Petitioners' here have issued open-ended requests. Instead of focusing the inquiry and limiting their requests as contemplated by paragraph I.E.2 , the Petitioners have used qualifying language ("any," "all") that actually broadens the scope of their requests. More problematically, they tied this broad language to broad categories of information. *See* Request 1 and Interrogatory 1 (seeking information relating to "all" statements" "related to *any* information in the factual return" *emphasis added*.) Similarly, in their inducement requests, Petitioners fail to specify with any particularity what statements they seek.

Apart from their failure to narrowly tailor their request, the requested discovery would

pose extreme burdens on the government. Given that Petitioners' have issued open-ended requests and given that they have issued five distinct requests for each of ten Petitioners involving a number of other individuals, it is difficult to even estimate the number of hours required to find potentially responsive documents and attempt to comply with these requests. *See* England Decl. ¶ 11-14; Mueller Decl. ¶ 5-12. Even if affected agencies were able to efficiently produce potentially responsive documents, other personnel would still need to review those documents to determine which, if any, are responsive. *See* England Decl. ¶15; Mueller Decl. ¶ 14-15. As explained in detail by Deputy Secretary of Defense England, thousands of hours would be required to find documents potentially responsive to broad requests, culling through the documents. England Decl. ¶ 14. Similarly, FBI Director Robert Mueller has explained in detail the challenges associated with his agency's conduct of electronic searches for potentially responsive documents, and the manpower requirements, on top of that, needed to review the documents. Mueller Decl. ¶ 6, 14-15.

The impractical and unworkable nature or these tasks is driven by the fact that Petitioners' opted for the open-ended approach to discovery and not the more specific approach required by the CMO. Additionally, and as will be addressed further below, the lack of specificity in Petitioners' requests suggests that Petitioners did not focus their requests on information that would be material to the key issues before the court in these habeas proceedings.[3]

[3] To the extent that Petitioners' requests are drafted in the same overly broad, non-tailored style that might be commonplace for discovery under the Federal Rules of Civil Procedure, they have no place in these in these constitutional habeas cases. *See Bracy v. Gramley*, 520 U.S. 899, 904 (1997) ("A habeas petitioner, unlike the usual civil litigant in federal court, is not entitled to discovery as a matter of ordinary course.") Petitioners have failed

The Requests are Not Likely to Produce Evidence Relating to the Lawfulness of Detention

The third requirement under CMO ¶ I.E.2 is for materiality, requiring that Petitioner explain why the request, if granted, is likely to produce evidence that demonstrates the petitioner's detention is unlawful. CMO ¶ I.E.2(3). Petitioners have failed to meet their burden of demonstrating materiality because they have made absolutely no showing that any of their requested discovery is likely to demonstrate the unlawfulness of their detention.

With respect to their requests seeking the disclosure of third-party statements, the circumstances of those statements, and "inducements" related to those statements, the Petitioners seek disclosure of material "related" to information in the factual return. The request does not specify which statements the Petitioners seek, and the sole justification for seeking such information is that "statements made by third parties in Guantanamo cases have been shown in the past to be unreliable." Petitioners' Motion at 1. This is not a showing of materiality—it is simply speculation. Indeed, this is exactly the type of fishing for evidence that "might" be helpful that the CMO sought to avoid. Granting such a request, based on pure speculation that it might yield material information, would effectively nullify paragraph I.E.2 of the CMO.

Similarly, Petitioners' have failed to show materiality with respect to their requests concerning the circumstances of a detainee's apprehension (Request 3 and Interrogatory 2). Their stated rationale for such requests is that the Petitioners wish to "evaluate fully the facts

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to make specific discovery requests narrowly tailored to information in the factual returns filed by the Government and their requests fail to meet the plain terms of CMO ¶I.E.2. Tellingly, one Petitioner, Uthman (ISN 027), sought this discovery before the Government filed his factual return. The Petitioners also seek discovery related to Petitioner Said (ISN 069),who has been transferred from the custody of the United States. *See* Dkt. No. 212 (04-CV-1254). To the extent the Petitioners seek any discovery related to this Petitioner, the request is thus moot.

surrounding the Petitioners' apprehension." Petitioners' Motion at 1. The Petitioners offer no showing that their request will yield information demonstrating that their detention is unlawful. At best, the Petitioners demand broad-ranging disclosure so that they can determine whether any of the discovery is material—which turns paragraph I.E.2 on its head. Moreover, the Petitioners make no showing that information related to the capture of any individual Petitioner is material for proving the lawfulness of his detention. Suffice to say that the circumstances of a detainee's capture do not necessarily relate to the determination that he is an enemy combatant as set forth in an individual factual return. Without any showing that such information is material to an individual detainee, the Petitioners have utterly failed to meet their paragraph I.E.2 burden.

The materiality requirement under paragraph I.E.2 is a critical limiting principle for discovery in these habeas proceedings. *See Hamdi*, 542 U.S. at 532, 535. Petitioners' approach to discovery here is broader even than the discovery that would be authorized in a criminal proceeding, and thus necessarily inappropriate for these constitutional habeas cases. *Id*. Indeed, the CMO's materiality requirement is particularly important in this context, in which Petitioners seek information that implicates important national security concerns. The Petitioners have not demonstrated how any of their far-ranging requests would be likely to produce information demonstrating the unlawfulness of their detention, and thus their motion should be denied.

Petitioners' Requests Unfairly and Unduly Burden the Government

The fourth and final requirement under CMO ¶I.E.2 places the burden on petitioners to show that, on balance, their need for discovery outweighs the unfair disruption and undue burden their requests cause. Here, Petitioner's assume that there will be no burden to the government because the CMO already requires broad-ranging discovery. *See* Petitioners' Motion at 2 ("the

Government will *necessarily* have to review the information requested in responding to its existing discovery and exculpatory evidence obligations.") The Government is, however challenging the CMO precisely because of the impractical burdens involved in complying with those requirements. Dkt. No. 1004 at 1, 9 (08-MC-442); England Decl. ¶ 9, 21; Mueller Decl. ¶ 16.

Responding to the type of requests Petitioners' make here would result simultaneously in undue burdens and dangerous disruption to government agencies. As explained in detail in the Motion for Clarification, having to provide automatic discovery relating to detainee's own statements—more limited discovery than these Petitioners seek here—will result in extensive and grave problems implicating core national security concerns. Dkt. No. 1004 at 15-17 (08-MC-442); England Decl. ¶11-14; Mueller Decl. ¶5-15. Automatic discovery under CMO ¶ I.E.1 would impose unprecedented obligations and would also impose unnecessary burdens that create a risk of disclosure of secret information relating to methods used in conducting interviews and acquiring information. Dkt. No. 1004 at 17-19 (08-MC-442); Mueller Decl. ¶ 16-17. Here, Petitioners seek discovery that is far beyond, and more extensive than, the discovery that is already beyond what the Government will be able to practically provide. See Dkt. No. 1004 at 15-19 (08-MC-442).

Contrary to Petitioners' blanket assertion to the contrary, their broad-ranging requests, untethered from any showing of materiality, would pose a significant burden and disrupt the activities of national security agencies. The agencies from which they seek discovery include the FBI, whose mission it is to investigate criminal offenses against the United States, and the Department of Defense, which is principally charged with fighting this war. Dkt. No. 1004 at 15

(08-MC-442). As explained in the Motion for Clarification, there are extensive practical "difficulties and burdens for such organizations in determining whether they possess responsive material let alone [producing it]-all while prosecuting multiple armed conflicts and preventing further attacks on the homeland. . . " Dkt. No. 1004 at 15 (08-MC-442); *see e.g.* Mueller Decl. ¶ 15 ("[I]t is expected that the review would be performed by agents and analysts assigned to the FBI's Counterterrorism Division, taking them away from daily operational duties.")

On a more specific level, Petitioners' have failed to carry their burden with respect to the third-party statements they seek. The Government has demonstrated that requests related to all of a petitioner's own statements will unduly disrupt and burden the national security agencies, so the balance under CMO ¶ I.E.2(4) must be struck in favor of the Government, and against Petitioners' even more burdensome request relating to third-party statements.

With respect to their other requests, Petitioners' also fail to meet their burden under paragraph I.E.2(4). They fail to show that the information they seek relating to bounties, capture, and inducements even relates to the lawfulness of their detention. *See supra* at p. 8-9. On the other hand, the burden associated with such non-material discovery may significantly impair intelligence and military operations. For these requests, the balance of interests under CMO ¶ I.E.2(4) cuts decisively in favor of the Government and its agencies, and against any interest the Petitioners have been able to demonstrate in obtaining the information.

Finally, Petitioners' requests threaten to disrupt permanent functions, with ramifications that extend beyond these habeas proceedings. That is, the third-party statements likely to be of greatest relevance to Petitioners' cases are statements by individuals acting as sources. As explained by FBI Director Mueller in his Declaration in support of the Motion for Clarification:

> Disseminating human source information could reasonably lead to the disclosure of [their] identities because the information provided by human sources is singular in nature. The disclosure of singular information could endanger the life of the source or his/her family or friends, or cause the source to suffer physical or economic harm or ostracism within the community. These consequences, and the inability of the FBI to protect the identities of its human sources, would make it exceptionally more difficult for the FBI and other U.S. intelligence agencies to recruit human sources in the future.

Mueller Decl. ¶ 20. For this additional reason, the balance under CMO ¶ I.E.2(4) favors the Governments' interests rather than the broad-ranging discovery Petitioners seek.

CONCLUSION

For the reasons set forth above, this Court need not consider Petitioners' request for discovery until the issues raised with respect to the CMO are resolved. Further, to the extent the Court considers Petitioners' motion, that motion should be denied because Petitioners have failed to meet the standards and requirements of paragraph I.E.2 of the CMO.

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