

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

HANI SALEH RASHID ABDULLAH, <i>et al.</i>,)	
)	
Petitioners,)	
)	
v.)	No. 05-CV-0023 (RWR)
)	
GEORGE W. BUSH, <i>et al.</i>,)	
)	
Respondents.)	
<hr/>)	

**RESPONDENTS' MEMORANDUM OF POINTS AND AUTHORITIES IN
OPPOSITION TO PETITIONER'S MOTION TO COMPEL
AND FOR EXPEDITED CONSIDERATION**

The petitioner's Motion To Compel And For Expedited Consideration ("motion") is frivolous, unjustified, and should be denied.

BACKGROUND

On November 6, 2008, the Court entered a Case Management Order (dkt. No. 940 in 08-MC-0442) ("CMO"), to provide a general framework for litigation of the habeas cases before the Court which included a framework for how discovery should proceed. Immediately relevant to petitioner's motion, Paragraph I.E.1 of the November 6, 2008 CMO provided for discovery upon request of petitioner of a variety of information and required the Government to disclose such discovery within 14 days of receipt of petitioner's written request. Dkt. No. 940 in 08-mc-0442. Petitioner represents through counsel that pursuant to the November 6, 2008 CMO, he submitted a discovery request to the Government on November 7, 2008.

On November 18, 2008, the Government moved for clarification and reconsideration of the November 6, 2008 CMO, and, in the alternative, certification of the Court of Appeal and a stay of certain obligations under the CMO pending the resolution of the issues raised in its motion. Dkt. No. 1004 in 08-mc-442. The Motion for Clarification challenged the automatic discovery provisions applied to these wartime habeas cases and further detailed the impracticality of compliance with the November 6, 2008 CMO. The Court then stayed many of the Government's discovery obligations on November 21, 2008. *See* Order of November 21, 2008 (dkt no. 1026 in 08-MC-442) ("Stay"). Notably, the Stay provided that the due dates imposed by paragraph I.E of the CMO be stayed pending resolution of the issues raised in the Motion for Clarification. On December 16, 2008, the Court issued an Order amending the November 6, 2008 CMO, revising the discovery provisions under Paragraph I.E.1, and lifting the Stay. Dkt. 170 in 05-cv-0023 ("December 16 Order").

LEGAL ARGUMENT

Petitioner's motion lacks merit and should be denied. Petitioner asserts that his November 7 request somehow remained operative, requiring compliance with it immediately upon issuance of the December 16 Order. The Court's December 16 Order, however, established what information is discoverable and how discovery should proceed. Petitioner's reliance on the automatic discovery provision of the Court's November 6, 2008 CMO is therefore mistaken. Petitioner's assertion that his November 7 discovery request has any operative effect lacks common sense and is not practical. As an initial matter, petitioner's November 7 discovery request was submitted almost six weeks before the December 16 Order was issued, and neither party knew what automatic discovery would entail until issuance of the December 16 Order. What is more, under petitioner's theory, there is no way that the

Government could have practically complied with the discovery request. Indeed, by petitioner's view, the Government was not in compliance with the December 16 Order on the very day that the Order issued. The December 16 Order controls, and it clearly establishes that only after making a written request can petitioner receive the automatic discovery described in the Order. Dkt. 170 in 05-cv-0023.

Contrary to the assertions made in petitioner's motion, counsel conferred on this matter on the afternoon of December 22, 2008, after Government counsel telephoned petitioner's counsel to discuss another matter.¹ After the Government explained that it would provide the automatic discovery provided for by the December 16 Order upon receipt of a written request from petitioner, petitioner's counsel stated his intent to file a motion to compel immediately. Rather than simply make a written request pursuant to the Court's December 16 Order, petitioner has instead seen fit to burden counsel and the Court with a completely unnecessary and inappropriate motion.

Perhaps cognizant of the baselessness of his claim, petitioner's motion states that petitioner is submitting "a new discovery request covering all documents that are discoverable under section I.E.1 of the case management order as revised," and further states that "[h]e will withdraw this motion if the government agrees to comply in full within a reasonable time." Dkt. 173 in 05-cv-0023. Petitioner has yet to submit his new discovery request. The Government, nonetheless, is considering petitioner to have submitted a request pursuant to the Court's December 16 Order on the day that he filed his motion with the Court – December 22, 2008. The government is working deliberately to produce the requested discovery.

¹ Petitioner's counsel inexplicably states that he telephoned Government counsel on December 19, 2008.

Dated: December 29, 2008

Respectfully submitted,

GREGORY G. KATSAS
Assistant Attorney General

JOHN C. O'QUINN
Deputy Assistant Attorney General

/s/ David P. Avila _____

JOSEPH H. HUNT (No. 431134)
VINCENT M. GARVEY (No. 127191)
TERRY M. HENRY
ANDREW I. WARDEN
PAUL E. AHERN
DANIEL J. BARISH
DAVID P. AVILA
Attorneys
United States Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Avenue, N.W.
Washington, D.C. 20530
Tel: (202) 305-9936
Fax: (202) 616-8470
Attorneys for Respondents