

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

**RESPONDENTS' OPPOSITION TO PETITIONER'S MOTION TO COMPEL
COMPLIANCE WITH THIS COURT'S JANUARY 29, 2009 ORDER AND
CROSS-MOTION TO STAY THIS MOTION UNTIL THE COURT RULES ON
RESPONDENTS' MOTION TO AMEND THE PROTECTIVE ORDER**

Respondents respectfully submit this memorandum in opposition to the Motion to Compel Compliance with This Court's January 29, 2009 Order, filed by Petitioner Musa'ab Omar Al Madhwani (ISN 839), on February 19, 2009. (Dkt. No. 384.) Respondents also respectfully request that the Court stay consideration of the instant motion until Judge Hogan issues a ruling on Respondents' request to amend the protective order that is at issue here.

Petitioner seeks to compel Respondents to comply with this Court's order of January 29, 2009, which states that a January 15, 2009 Order by Judge Hogan is applicable to this case. (Dkt. No. 359.) Judge Hogan's Order held that Paragraph 29 of the Protective Order and Procedures for Counsel Access to Detainees at the United States Naval Base in Guantanamo Bay, Cuba (the "Protective Order") authorized counsel for a petitioner "to review with the petitioner statements in the exhibits to the Classified Factual Return for that petitioner that the

Privilege Review Team determines were made by that petitioner to agents of the United States Government.” (Case No. 08-mc-442, Dkt. No. 1521.)

On March 11, 2009, Respondents filed a Motion to Amend September 11, 2008, Protective Order and Counsel Access Procedures and January 9, 2009 Amended TS/SCI Protective Order and Counsel Access Procedures. (Dkt. No. 400.) That motion seeks to amend Paragraph 29 of the Protective Order and Paragraph 31 of the Counsel Access Procedures to allow petitioners’ counsel to share with the detainee only classified information that counsel learns from that detainee during the course of communications with the detainee via legal mail or legal visits. Rather than permitting a petitioner’s counsel to compile a detainee’s statements to government agents from classified materials into a new document and then disclose that document to the detainee following review by the Privilege Review Team, the proposed amendments would allow disclosure of such statements only if they were taken from declassified materials or if appropriate national security agencies approved the disclosure. Respondents believe that such amendments to the Protective Order and Counsel Access Procedures would address the national security risks as well as the separation of powers issue raised by the current judicial construction that permits the disclosure of sensitive national security information – over the Executive’s objection – to persons detained as Enemy Combatants. For these reasons, as set forth more fully in Respondents’ motion, which Respondents incorporate by reference herein, Petitioner’s Motion to Compel Compliance should be denied.

Because Judge Hogan’s January 15, 2009 Order was incorporated by this Court’s January 29, 2009 Order, the most sensible course of action is to wait until Judge Hogan issues a ruling on Respondents’ motion to amend the Protective Order before considering the instant motion. Accordingly, Respondents respectfully move to stay consideration of Petitioner’s Motion to

Compel Compliance with This Court's January 29, 2009 Order (Dkt. No. 384) until after Judge Hogan issues a ruling on Respondents' motion to amend the Protective Order and Counsel Access Procedures (Dkt. No. 400).

Dated: March 11, 2009

Respectfully submitted,

MICHAEL F. HERTZ
Deputy Assistant Attorney General

/s/ David P. Avila
JOSEPH H. HUNT (D.C. Bar No. 431134)
TERRY M. HENRY
PAUL E. AHERN
PAUL CIRINO
DAVID P. AVILA
Attorneys
United States Department of Justice
Civil Division, Federal Programs Branch
P.O. Box 883
Washington, DC 20044
Tel: (202) 305-9908
david.avila2@usdoj.gov