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' OPPOSITION TO PETITIONERS' MOTION FOR PRODUCTION OF COMPLETE DECLASSIFIED FACTUAL RETURNS OR ADEQUATE SUBSTITUTES AND MOTION BY RESPONDENTS FOR AMENDMENT OR CLARIFICATION OF SCHEDULING ORDER

Respondents[1] respectfully oppose the motion by Petitioners that by January 30, 2009, they produce fully declassified factual returns or adequate substitutes of each and every document in their respective factual returns.

In addition, Respondents move for clarification or amendment of that part of this Court's Scheduling Order of January 7, 2009, requiring that their response to Petitioners' motion for declassification of factual returns "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." Respondents, who are preparing

[1] By operation of Rule 25(d), Federal Rules of Civil Procedure, Barack H. Obama, Robert M. Gates, Mike Mullen, and David M. Thomas, Jr., are substituted as Respondents in their official capacities as, respectively, President of the United States, Secretary of Defense, Chairman of the Joint Chiefs of Staff, and Commander, Joint Task Force, Guantanamo Bay.

declassified returns for each Petitioner, request that the foregoing obligation be amended or restated to the effect that Respondents be granted until February 20, 2009, to produce the declassified version of each factual return and provide their justification for the non-declassification of any items which Petitioners have identified as "high priority."

BACKGROUND

On September 11, 2008, this Court entered the Protective Order and Procedures for Counsel Access to Detainees at the United States Naval Base in Guantanamo Bay, Cuba. Protective Order, In re: Guantanamo Bay Litigation, No. 08-mc-00442 (Dkt #409) (Hogan, J.) ("Protective Order"). In this Order, the Court established specific procedures designed to prevent the inappropriate disclosure of classified material and to protect the national security of the United States. The instant civil action involves classified information requiring special security precautions and access to which requires a security clearance and a "need to know." *Id.*

As the Protective Order stipulates, information contained in classified documents must be treated as classified until it is *declassified* by the Executive Branch agency that is the original classification authority of the documents or information contained therein. *See* Protective Order ¶ 9 (emphasis added). The plain language of the Court's Protective Order requires that before Petitioner's counsel may disclose classified information to the Petitioner, counsel must seek a release (via the Privilege Review Team) from the appropriate government agency authorized to declassify that information. Protective Order ¶ 29. Thus, counsel may not disclose to the Petitioner even those statements made by Petitioner which are contained in classified government documents until those statements are reviewed and declassified by the appropriate national security agencies.

In this case, the appropriate national security agencies have not yet declassified the information counsel seeks to share with the Petitioner. The declassification process is, however, underway.

In September 2008, Respondents filed a classified factual return for each Petitioner. Each classified factual return contains a significant volume of classified information, including documents containing Petitioner's own statements intermingled with other information; therefore, under the governing Protective Order, Petitioner cannot see the classified factual return.

On December 12, 2008, Respondents served an unclassified[2] factual return for each Petitioner. Although Respondents designated the unclassified returns as "protected" within the meaning of ¶ 34 of the Protective Order, Respondents have authorized disclosure of the unclassified return not only to the Petitioner's counsel and their authorized staff but also to the Petitioner to whom it pertains and to his witnesses and others necessary to the preparation of his case who agree to abide by the terms of the Protective Order.[3] Moreover, as Petitioners correctly note, the Government has placed a body of information pertaining to these and other petitioners

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[2] An "unclassified" return is one in which all classified information has been redacted. These have been 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, but that process involves multiple, close reviews and the exercise of more sophisticated judgment than identifying the classified content of a document.

[3] Respondents have moved to confirm the designation of the unclassified returns as "protected information." (Dkt. # 1416, 08-mc-442; Dkt. # 425, 02-cv-828.) That motion is pending.

on the public record.[4] *See* Petitioners' Motion, pp. 1, 3. There is nothing that prohibits Petitioners' counsel from the use of publicly available information that they believe assists them in the preparation of their respective cases. The unclassified return, other disclosures made in the course of this and related litigation, and the disclosures placed on the public record constitute, therefore, a considerable body of information presently available to Petitioners.

ARGUMENT

I. Because the Government Is Currently Working to Produce Declassified Versions of Petitioner's Statements, Court Intervention is Unnecessary.

Even before Petitioners' Motion was filed, Respondents had initiated the process of preparing declassified versions of each Petitioner's statements. The Motion has, of course, also identified other items as being of "high priority" for the Petitioners, and declassification review of those items is now beginning. Under this review process, the government is working to declassify information that is determined by authorized declassification officials to no longer require security classification. Although the declassified documents will contain redactions of

[4] It is no doubt true that some information has been redacted from the unclassified returns that has, in another context or venue, been placed on the public record. That kind of anomaly or apparent inconsistency is a product, in part, of the huge effort being undertaken to meet the simultaneous obligations of approximately 200 individual cases, all involving extremely sensitive information that must be reviewed by a large number of persons in several separate agencies. While the Government has made a dedicated effort to make its overall handling of the detainee process as transparent as possible (a fact which Petitioners impliedly concede in their remarks about the availability of publicly available information), the Government is also engaged in the process of disclosing sensitive information to persons whom it believes, and is endeavoring to prove, are hostile to the interests of the United States and who have tried, or intended, to do it harm. These are circumstances that require care, a virtue which must prevail over speed. In the meantime, perfect consistency, however desirable, will not be achieved. If Petitioners and their counsel have detected inconsistencies between the public record and the government's redactions and classification processes, they are not prevented from bringing the details, not just the allegation of inconsistency, to the attention of Respondents.

some information, it is anticipated that the bulk of each Petitioner's own statements will remain unredacted, and Petitioners' counsel will be able to share those statements with each Petitioner.

The process of declassification, however, is not as simple as Petitioners suggest.[5] There are national security and counter-intelligence implications in informing the enemy of what you know, what you think you know (or even what you do not know), and what you think is important. For example, an enemy would be greatly interested in knowing whether the United States is relying on what the enemy knows to be false, or planted, information. And a declassification officer must assume that disclosure to one detainee is disclosure to all detainees, and that disclosures helpful to the enemy's intelligence and counter-intelligence efforts will find their way into the hands of persons having intentions and interests inimical to the United States. The possible intelligence value to the enemy of such information cannot be denied or ignored. This is only one of the subtle and difficult problems that must be addressed in the declassification process.

Respondents acknowledge that Petitioners' motion endeavors (though counsel object to having to undertake the task as being in conflict with their obligations to their clients[6]) to establish a priority among those documents which they wish the national security agencies to declassify. This priority gives the Respondents a reasonable basis upon which to proceed and will conduce to the benefit of all parties.

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[5] *See* Petitioners' Motion, p. 4: "Either a detainee did what he is accused of doing, or he did not. If he did it, he already knows he did it and there is no justification for withholding the information from him. If he did not do it, then the information is false and is of no national security value at all."

[6] *See* Petitioners' Motion, fn. 1, p. 4.

Because the declassification process may make available to Petitioners the information which they are seeking, there is no need for judicial intervention at this time. The declassification of Petitioner's statements relied upon in the factual returns, as well as the high priority items now identified, is well underway, and Respondents are working diligently to complete that process. At a minimum, this process should be permitted to run its course before the court intervenes, for the production of the declassified versions of the documents will narrow, if not eliminate, the present dispute.

II. It is the Province of the Executive Branch to Classify and Control Access to National Security Information

As Commander in Chief, the President holds the authority to classify and control access to national security information. U.S. Const., Art. II, § 2; *Department of Navy v. Egan*, 484 U.S. 518, 527 (1988). The responsibility for assessing potential harm to national security and the need for protecting such information lies with the Executive. *See Center for National Security Studies v. U.S. Dep't of Justice*, 331 F.3d 918, 928 (D.C. Cir. 2003) (Executive's judgment in the area of national security information should be accorded deference). In light of the common-sense solution of awaiting production of the declassified Petitioners' statements, a process already well under way, the Court should deny Petitioners' motion.

III. The Court Should Amend or Clarify its Scheduling Order to Require Respondents to Provide Explanation for Un-Declassified "High Priority" Items When the Declassified Return is Provided to Petitioners.

As explained above, Respondents are preparing and will produce to Petitioners the declassified factual returns. The principal dispute between Petitioners and Respondents, at least presently, is the timing of the completion of this process. Petitioners have asked the Court to

require that what they call "complete" declassified returns be produced by January 30, 2009. Respondents are asking that the Court grant Respondents until February 20, 2009, for production of the declassified returns and justification for redacting from the returns those "high priority" items that have not been declassified.

The Court's Scheduling Order directs that Respondents' submit, as an exhibit to their response to the instant motion, the "declassified return and relevant attachments," along with a justification for each high-priority item that Respondents have not declassified. Strictly read, the Scheduling Order appears to require the Respondents to produce, in response to the motion, the very thing that Petitioners are seeking, except a week earlier.[7] This is the provision from which Petitioners seek relief.

Respondents believe there may be a misunderstanding by the Court of what the Respondents have done to date – a misunderstanding for which Respondents are responsible due to the ambiguity of terminology. The "unclassified" factual returns provided by Respondents on December 12, 2009, as explained above, are not the "declassified" returns which Petitioners are seeking to be produced and which Respondents will produce. *See* fn. 2, *supra*. Respondents respectfully suggest that it would be an inefficient application of resources to submit a justification for each high-priority item not disclosed in the "unclassified" return. Rather, the justification process should await the production of the "declassified" return.

Respondents expect, and intend, the declassified returns to disclose more information than the unclassified returns and that at least some of the information Petitioners are seeking to

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[7] The Scheduling Order requires that the response to the instant motion, accompanied by the declassified return, be filed by January 23, whereas Petitioners' Motion seeks production of the declassified return by January 30.

be declassified as their high-priority items will be disclosed. Efficiency would be served by the Court and the parties dealing with the items still in dispute after the declassified returns are prepared. In short, Respondents ask that they not be required to justify non-disclosure in the "unclassified" returns, because many items will be declassified and will not require examination and resolution by the Court. Respondents, as stated above, are asking to be granted until February 20, 2009, for that purpose.

CONCLUSION

For the foregoing reasons, Petitioner's motion for production of the declassified returns by January 30, 2009, should be denied, and Respondents should be granted until February 20, 2009, to produce the declassified return and to provide their justification for the redaction from the returns of those "high priority" items that have not been declassified.[8]

Dated: January 23, 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

[8] Respondents have conferred with Petitioners' counsel with respect to the requests made in this opposition and motion. Petitioners object.

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