IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE:	Misc. No. 08-CV-442 (TFH)
GUANTANAMO BAY DETAINEE LITIGATION	Civil Action Nos. 06-CV-1690, 08-1085, 08-1207, 08-1360

RESPONDENTS' OPPOSITION TO PETITIONERS' MOTION TO INTERVENE

Respondents hereby oppose the motion to intervene filed by petitioners Mohamed Al-Zarnouqi and Mashour Abdullah Muqbel Alsabri (hereinafter "Intervenors"). Intervenors have moved to intervene in the above-captioned cases – all of which involve high-value detainees previously detained in the custody of the Central Intelligence Agency as part of a still highly classified program – for the limited purpose of raising objections to respondents' proposed protective order. In light of the prevalence of highly classified information in the above-captioned cases (*i.e.*, TOP SECRET/ SENSITIVE COMPARTMENTED INFORMATION ("TS//SCI"), respondents have proposed a special protective order and counsel access regime appropriately tailored for the handling and management of such information. Intervenors – who have habeas cases of their own (*Al-Zarnouqi v. Bush*, 06-CV-1767) – object to one provision of respondents' proposed order that, in the context of these unique and highly sensitive cases, eliminates a presumed need-to-know among cleared habeas counsel.

As explained in detail in respondents' motion for entry of the TS//SCI protective order, the presumed "need to know" contained in the standard Guantanamo habeas protective order, *see*

Protective Order ¶ 28,[1] which permits counsel in related Guantanamo detainee cases to share and discuss classified information among themselves, is not appropriate in the unique context of these cases, which involve TS//SCI information. *See* Respondents' Motion To Reconsider Application Of Standard Habeas Protective Order And Request For Entry Of Proposed Protective Order Pertaining To TS/SCI Information (dkt. no. 264) at 16-18.[2] Moreover, for the reasons explained below, intervenors objections to respondents' proposed protective order are without merit, premature, and do not warrant resolution by the Court in the present context.

ARGUMENT

Intervenors primary contention is that they will be placed at a litigation disadvantage if they are not permitted to have access to TS//SCI information that counsel for high-value detainees may possess or learn. Contrary to intervenors' suggestion, however, respondents have never proposed a protective order framework in which counsel for the high-value detainees are absolutely prohibited from sharing classified information with other counsel with appropriate security clearances in other Guantanamo cases. Instead, respondents have proposed an appropriate regime in which the determination whether counsel can share TS//SCI information would be made by the Executive Branch on a case-by-case basis. Respondents' approach properly balances the Executive's compelling interest in the protection of highly-classified

[1] Since the filing of petitioner's motion, the Court entered a revised protective order in the consolidated cases in Misc. Action No. 08-MC-442. *See* Protective Order and Procedures For Counsel Access To Detainees At The United States Naval Base In Guantanamo Bay, Cuba (dkt. no. 409). All citations herein are to the current protective order. Although petitioner's motion cites to paragraph 29 of the former protective order for the "need to know" provision, the revised protective order (¶ 28) did not change or modify that provision.

[2] Respondents will not repeat those arguments here and respectfully refer to Court to respondents' motion.

national security information with intervenors' interests. Further, respondents' approach is consistent with the Supreme Court's direction in *Hamdi v. Rumsfeld*, 542 U.S. 507, 538-539 (2004) (plurality), that district courts proceed in a "prudent and incremental" fashion in wartime habeas cases, as well as the Supreme Court's recent pronoucement in *Boumediene v. Bush*, 128 S. Ct. 2229, 2276 (2008), that district courts accommodate the government's interest in protecting the sources and methods of intelligence gathering "to the greatest extent possible." Respondents TS//SCI protective order also conforms with the information sharing provisions of the protective order accepted by the Court of Appeals in Detainee Treatment Act cases involving high-value detainees. *See* Stipulation to Immediate Entry of Khan Protective Order (filed in *Al-Nashiri v. Gates*, No. 08-1007 (D.C. Cir.)) & Ex. A, B ¶ 5.H. (copy attached as Exhibit 5 Respondents' Motion to Reconsider) ("Except as provided herein, Petitioner's Counsel may not disclose any classified or protected information to any person including counsel in related cases brought by Guantanamo Bay detainees in this court or any other court.")

Intervenors, on the other hand, propose an untenable regime in which counsel for the high-value detainees will have unfettered discretion to exchange highly classified TS//SCI information with potentially hundreds of counsel for other detainees. Intervenors' argument essentially boils down to the speculative claim that they have a need to know all of the classified information possessed by the high-value detainees and they have the authority to determine the circumstances under which that information is shared among hundreds of other attorneys. Such an approach finds no legal support, *see, e.g., Dep't of Navy v. Egan*, 484 U.S. 518, 527-30 (1988) (authority to control access to classified information is constitutionally vested in the President as head of the Executive Branch and Commander in Chief and should not be intruded upon by the

courts "[f]or reasons . . . too obvious to call for enlarged discussion"); Executive Order 12958, as amended, § 6.1(z) ("'Need-to-know' means a determination made by an authorized holder of classified information that a prospective recipient requires access to specific classified information in order to perform or assist in a lawful and authorized governmental function."), but it is especially inappropriate in cases involving high-value detainees, given the potential that information involved in the cases could require classification or treatment at a TS//SCI level – based upon the possibility of "exceptionally grave damage" to national security and, beyond that, the determination that the information is so exceptionally sensitive that normal criteria for access and handling of even TOP SECRET information are not sufficient. *See* Declaration of Marilyn A. Dorn (Oct. 26, 2006) ¶¶ 8-10 (attached as Exhibit 1 to Respondents' Motion to Reconsider). Even the cases relied up by intervenors do not support their claim for a sweeping presumption permitting boundless sharing of classified information. Instead, *United States v. Hamdan* and *United States v. Moussaoui* support respondents' position that a fact-based, cases-by-case analysis is the appropriate way in which to resolve requests to obtain such information. *See United States. v. Moussaoui*, 382 F.3d 453 (4th Cir. 2004) (engaging in case specific analysis addressing discovery from potential witnesses); *United States v. Hamdan*, Ruling For Motion On Stay And For Access To High Value Detainees at http://www.defenselink.mil/news/Mar2008/d20080314hamdanruling.pdf (engaging in case specific analysis and modifying proposed system of interrogatories to account for national security concerns).

More generally, intervenors prematurely seek to resolve what is essentially a third party discovery issue though collateral litigation over a protective order. The premise of intervenors'

motion is that they may need to obtain information from the high-value detainees in order to litigate the merits of their habeas cases. Even accepting this as a possibility in at least some Guantanamo habeas cases, there are several reasons why the Court should not resolve the issue of access to information provided by high-value detainees in a "one size fits all" fashion across all the habeas cases at this juncture. First, respondents have not filed an amended factual return in intervenors' habeas case. Because intervenors did not file their habeas petition until October 2006, making them some of the most recent Guantanamo detainees to file habeas cases, the amended factual return for intervenors has not come due pursuant to the Court's July 11, 2008 scheduling order. Until the parties and the Court have a concrete factual record explaining the basis for intervenors' detention, it is entirely speculative whether intervenors have any need for access to information within the possession of high-value detainees. Second, the Court is currently considering the parties' competing submissions addressing procedural framework and discovery standards. Accordingly, it would not be appropriate at this time for the Court to resolve what is in essence a premature dispute regarding third party discovery though litigation regarding the terms of the TS//SCI protective order in these cases.

Intervenors also complain that not including a presumed need to know provision in the TS//SCI Protective Order applicable to all habeas cases will lead to undue unnecessary litigation delay. To be sure, discovery disputes may arise in the Guantanamo habeas cases, as in nearly any civil case,[3] but that is not an appropriate basis for the Court to adopt a protective order

[3] It is also certainly possible that disputes will arise among petitioners regarding discovery issues. For example, intervenors suggest that they seek to obtain information from high-value detainees about such detainees' involvement with al Qaida, but those detainees may object to providing such potentially inculpatory information.

regime that greatly expands the circle of individuals with access to highly classified information in a fashion that undermines the Executive's authority to safeguard that information. In the unique and especially sensitive circumstances of these cases, which involve TS//SCI information and for which the normal criteria for access and handling of even TOP SECRET information are not sufficient, a regime whereby need to know is not presumed, but rather permission to share such information is sought and provided as appropriate on a case-by-case basis, is necessary and appropriate. Intervenors cite no case in which a court has determined that litigation efficiency should trump the Executive's constitutional responsibility to safeguard national security information. Indeed, the *Hamdan* and *Moussaoui* cases confirm this very point – it would have been far more efficient for those courts to brush aside the national security issues presented, but the courts did not do so.

Finally, intervenors mistakenly construe respondents' proposed provision in the TS//SCI protective order regarding need to know requirement in the TS//SCI protective order as overbroad. Respondents proposal does not prevent counsel for high-value detainees from sharing or exchanging unclassified or protected information with counsel for other Guantanamo detainees. Respondents' proposed TS//SCI protective order contains the same provisions governing the sharing of protected information that are contained in the standard protective order, which permit the sharing of such protected information. *See* Protective Order ¶ 38. Further, there is no restriction in the TS//SCI protective order that would prohibit counsel for high-value detainees from sharing other unclassified information with other counsel.

While respondents' proposed elimination of a presumed need to know would limit counsel for high-value detainees from disclosing without authorization highly classified

information to counsel in other Guantanamo habeas cases, as discussed above and for the reasons stated in respondents' motion to reconsider, this limitation is appropriate and reasonable in light of the prevalence of TS/SCI information in the above-captioned cases and the potential for "exceptionally grave danger" to national security from inappropriate disclosure of such information. The need to know provision of the proposed TS//SCI protective order does not, however, prevent intervenors' counsel from requesting authorization to seek or obtain information from high-value detainees in appropriate circumstances on a case-by-case basis.

CONCLUSION

For the reasons stated above, intervenors' motion to intervene should be denied and the Court should enter respondents' TS//SCI protective prder.

Dated: September 18, 2008

Respectfully submitted,

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