

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. )  
\_\_\_\_\_ )

**REPLY MEMORANDUM BY RESPONDENTS REGARDING  
ALLEGED EXCULPATORY DOCUMENTS FOUND ON  
"SIPRNET" BY MILITARY COMMISSION DEFENSE COUNSEL**

Respondents submit this Reply to emphasize that the task that the Court set for Respondents in connection with the SIPRNET documents was to answer two questions, namely, (1) why an allegedly exculpatory document found by military commission defense counsel was not located in the Government's search for exculpatory documents, and (2) whether potentially exculpatory documents are likely to be found by searching the SIPRNET. *See* Order, February 12, 2009 [Dkt. 474]. In addition, this Reply seeks to correct certain of Petitioners' assertions that seriously misrepresent Respondents' positions and actions as well as the facts of this case.

Respondents explained in their Memorandum filed March 13, 2009 (Corrected Memorandum filed March 16) [Dkt 508, 515] why five SIPRNET documents actually turned over to Respondents were not located in the Government's search for exculpatory documents, and that explanation is not challenged by Petitioners. Respondents informed the Court that the SIPRNET documents were not exculpatory and the SIPRNET is not likely to uncover more exculpatory documents. Petitioners do not refute either of these conclusions.

**A. Documents Discovered by Military Commission Defense Do Not Support the Notion That a Search of the SIPRNET for Exculpatory Documents Is Warranted.**

Petitioners argue that each of the documents discovered by military defense counsel "raises the possibility of a mistaken identification of Al Rabia as Abu Abdullah al-Kuwaiti . . . ." <sup>1</sup> Response, p. 2. [Dkt. 513] But the five documents that were discovered only on the SIPRNET (see Exhibits A, B, C, G, and H) as well as two of the other documents (Exhibits E and F) support no such inference. None of the documents suggests confusion of identity between Al Rabia and the person referred to in the document. And none of the documents undermines any allegation made against Al Rabia in the Amended Factual Return. If Petitioner Al Rabia could have identified such an allegation, he surely would have done so. In the end, these documents do no more than lend corroboration to a fact that is not disputed in the Amended Factual Return: there are persons other than Al Rabia known as Abu Abdullah al-Kuwaiti. Accordingly, having found none themselves, Petitioners have presented nothing to show that "potentially exculpatory documents are likely to be found by searching [the SIPRNET]."

**B. The JIG/OARDEC Consolidated Database Is the Source Which the Court Has Ordered to Be Searched for Arguably Exculpatory Material.**

Petitioners erroneously contend that Respondents have an obligation to search beyond the compilation of documents assembled by the Joint Intelligence Group ("JIG") and the Office for

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<sup>1</sup> Petitioners also make the remarkable suggestion that each of the documents "raises . . . the possibility that allegations against Al Rabiah are the result of an effort on the part of the informants to protect the real Abu Abdullah al-Kuwaiti, who may remain at large." Response, p. 2. Petitioners do not explain how this theory, not heretofore advanced, is supported by the documents discovered by military defense counsel or any other statement or document on, or off, the record of this civil action.

the Administrative Review of the Detention of Enemy Combatants ("OARDEC") for the purpose of preparing the factual returns in the habeas cases. Response, pp. 2-3. The Case Management Order, as amended on December 16, 2008 [Dkt. 420], specifically identified that compilation to be the universe of materials searched for documents responsive to ¶ I.D.1 and ¶ I.E.1 of the Order. This Court's orders, while directing additional searches, have not changed the scope of the documents to be searched except for specific items mentioned in the Order of February 12. *See* Orders of January 7 and February 12, 2009. [Dkt. 433, 474]

As previously noted, however, Respondents do acknowledge that in preparing the factual returns and in doing the exculpatory searches they missed the one document discovered by military defense counsel that is arguably exculpatory.<sup>2</sup> Respondents' Memorandum, p. 9; *see* Exhibit D. [Dkt. 508, 515] But that fact does not challenge the completeness and integrity of the compilation itself and, therefore, does not serve as a basis to expand the search beyond the JIG/OARDEC compilation. Nor, as Petitioners imply, does it necessarily draw into question the good faith of the government's efforts in the habeas cases. For example, Petitioners note that Judge Sullivan recently entered a show cause order against government counsel in *Batarfi v. Obama*, No. 05-CV-409 (EGS) (March 13, 2009). On March 19, 2009, Judge Sullivan vacated his order based upon the explanation provided by Government counsel.

As a consequence of the discovery of the one document acknowledged above, the JIG/OARDEC compilation was searched for references to "Abdullah Al Kuwaiti," "Abdallah Al

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<sup>2</sup> Whether that document is sufficient to negate the particular allegation against Petitioner Al Rabia must be determined following a merits proceeding, Petitioners' exaggerations notwithstanding. As is shown by the Amended Factual Return, with exhibits, there is a substantial basis for the allegation made against Al Rabia.

Kuwaiti," "El Kuwaiti," and "Elkuwaiti." No documents were discovered (that had not been previously disclosed) that tended materially to undermine the grounds supporting detention of Petitioner Al Rabia or any of the other petitioners in this action.

In addition, Petitioners make a number of representations regarding Respondents' alleged failure to produce documents, which remarks are not relevant to the issue of the SIPRNET but to which the Respondents must respond.<sup>3</sup> First, Respondents note that they have produced the relevant parts of a report by the Department of Justice's Office of the Inspector General<sup>4</sup> which pertain to the treatment of a detainee referred to in the Petitioners' memorandum. Response, p. 3. Substantial information is provided about that issue in the document provided.

Petitioners also allude to "classified declarations" submitted by petitioner's counsel in the case of *el Gharani v. Bush* and which relate to certain "lists" that include the names of two of the Petitioners here. Response, p. 3-4. The declarations, in fact, were prepared for petitioner el Gharani's counsel and attached as "unclassified" exhibits to his Preliminary Traverse [*see* Dkt. No. 168, 05-CV-429]; these were not declarations or documents prepared by or for the Government. The declarations do not materially undermine an allegation against the two petitioners in this case; indeed, the declarations do not even pertain to petitioners. Rather they are documents prepared and assembled for the express purpose of advocating a position in favor of the petitioner in the *el Gharani* case. The declarations do not constitute exculpatory evidence

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<sup>3</sup> Respondents also note that a number of documents have been produced to Petitioners' counsel relating to the credibility of various detainees whose statements are relied upon to support the grounds for detention of prisoners. This fact is not mentioned by Petitioners.

<sup>4</sup> A Review of the FBI's Involvement in and Observations of Detainee Interrogations in Guantanamo Bay, Afghanistan, and Iraq (U), Office of the Inspector General Oversight and Review Division, May 2008.

that Respondents are required to produce under the Case Management Order, as amended December 16, 2008, but rather simply represent information that petitioners' counsel appear to be using to create a chain of speculative inferences they allege to be relevant to the case.

In addition, Petitioners imply, erroneously, that Respondents have failed to produce documents pertaining to the credibility of a detainee whose statements are used to support the grounds of detention of each of the petitioners. Response, p. 3. In fact, Respondents produced with each of the factual returns a document prepared by the Department of Defense in 2004 that notes the credibility issue relating to this detainee. Respondents produced six additional documents pertaining to the credibility of this same detainee on February 12, 2009. The so-called OARDEC report evidently quoted by Judge Leon in *El Gharani v. Bush*, No. 05-CV-429 (RJL) (January 30, 2009) (classified opinion) includes an observation that information provided by the detainee should be verified before being utilized. The report and the quoted observation do not compare, in either detail or substance, to the disclosures made in this case.

### **Conclusion**

For the foregoing reasons, the Court should not order a search of the SIPRNET databases in these cases.

Dated: March 20, 2009

Respectfully submitted,

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