

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

IN RE:)
GUANTANAMO BAY) Misc. No. 08-0442 (TFH)
DETAINEE LITIGATION) Civil Action No. 04-1254 (HHK)
_____)

**REPLY MEMORANDUM
IN SUPPORT OF PETITIONERS' MOTION FOR ADDITIONAL DISCOVERY**

Petitioners' discovery motion sought two narrowly delineated categories of materials: (a) recordings, transcripts and translations of prior statements of the petitioners and (b) recordings, transcripts and translations of statements by other detainees on which the Government relies to justify the continued detention of petitioners. In its opposition to petitioners' motion, the Government argues that the request is too broad, too burdensome and insufficiently justified. The arguments have no merit, and the Court should grant the motion.

1. *Petitioners' own statements.* Section I.E.1 of the CMO requires the Government to produce all statements "in whatever form" made or adopted by a petitioner on which the Government relies to justify detention. As Judge Bates held on January 22, 2009, in Civil Action 05-1646, this requires production not only of the written English language summary of any statement that the Government includes in its return, but also any underlying recordings and transcripts of such statements, including those in Arabic. (The Government has failed to provide such materials in this proceeding, and petitioners expect to file a motion to compel compliance with the CMO if the Government in this case refuses to follow Judge Bates' order.) The additional discovery sought by Requests 1 and 2 simply requires production of

recordings/transcripts of any other statements made by the petitioners while in custody, not just those on which the Government relies. This is a very specific and narrowly-defined category of materials. Presumably, the Government has a file that contains petitioners' statements (assuming it has made reasonable efforts to maintain the evidence concerning each petitioner), and it should be an easy matter to make them available in this case. Certainly any statements made at Guantanamo should be listed on a log and subject to easy retrieval.

The relevance of these materials is obvious. The prior statements are very likely to concern the circumstances of and reasons for a petitioner's detention. Of course, not having seen these materials, it is not possible for petitioners' counsel to know exactly what is contained in the statements, or to show how they would assist in demonstrating that the writ should be granted. It is possible to conclude, however, that the requested materials containing the petitioners' own statements are almost certain to include information relevant to the disposition of this case.

2. *Statements by other detainees on which the Government relies.* The need for the discovery sought by Requests 3 and 4 is even greater than for the first two requests. Requests 3 and 4 seek the original source material of any statement by another detainee "on which the Government relies to justify its continued detention of Petitioners." The Government asserts (p. 9) that it has already included in its returns the "statements of other detainees" on which it relies, but it in fact has provided English language summaries or paraphrases, which are at best third level hearsay, and may well be even more remote. (*See Mot.* at 1-2.)

Any statements by third parties were presumably made in a language other than English, and if such statements are relied on by the Government to justify detention, then it is obviously of critical importance for petitioners and the Court to be able to examine the original tapes, transcripts, and translations, and not to be forced to rely on secondary or tertiary (or more remote) sources. There is an obvious risk that there will be inaccuracies in the English summary of an English translation of a statement made in a foreign language, especially if the summary was prepared by someone with no knowledge of the foreign language. This by itself justifies disclosure of the underlying source material.

Accordingly, for the reasons stated above, the Court should grant petitioners' request for additional discovery.

February 2, 2009

/s/ S. William Livingston
S. William Livingston
D.C. Bar. No. 59055
Alan A. Pemberton
D.C. Bar. No. 367108
COVINGTON & BURLING LLP
1201 Pennsylvania Ave., N.W.
Washington, DC 20004-2401
(202) 662-6000 (phone)
(202) 778-6000 (fax)
wlivingston@cov.com
apemberton@cov.com

David H. Remes
D.C. Bar No. 370372
APPEAL FOR JUSTICE
1106 Noyes Drive
Silver Spring, MD 20910
(202) 669-6508 (phone)
remesdh@gmail.com

Marc D. Falkoff
D.C. Bar No. 491149
NORTHERN ILLINOIS UNIVERSITY
COLLEGE OF LAW
DeKalb, IL 60614
(347) 564-5043 (phone)
(815) 753-9301 (fax)
mdf19@columbia.edu