IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE: **GUANTANAMO BAY DETAINEE LITIGATION**	)	**Misc. No. 08-442 (TFH)**

RESPONDENTS' MOTION FOR ENLARGEMENT OF TIME TO RESPOND TO MOTION BY PRESS INTERVENORS FOR AN ORDER TO SHOW CAUSE WHY THE GOVERNMENT SHOULD NOT BE HELD IN CONTEMPT

Respondents hereby respectfully request an extension of time, up to and including November 17, 2009, to respond to the motion by the Associated Press, The New York Times Company and USA Today (the "press intervenors") for an order requiring the Government "to show cause why it should not be held in contempt for willfully failing to comply with the Court's June 1, 2009 Order" (Dkt. No. 1781) (the "June 1 Order"), Intervenors' Mot. at 1, which pertained to the filing of publicly-releasable factual returns in the *habeas corpus* actions brought Guantanamo detainees.[1] After devoting tremendous time and resources, the Government already has processed, and publicly filed, more than 150 classified factual returns pursuant to the June 1 Order. The press intervenors now ask the Court to compel the Government to process those returns again, with no justification other than their own misreading of the Order. Accordingly, no grounds lie here for a finding of contempt.

The Government anticipates, however, that it will respond to the press intervenors' motion in a two-fold fashion that necessitates the additional time requested herein. First, Respondents intend to demonstrate, by detailed reference to the proceedings that led to the

[1] Pursuant to Local Rule 7(m), Respondents have conferred with counsel for the press intervenors, who oppose this motion.

June 1 Order, that far from lying in contempt of the Court's Order the Government complied with the Order when it declassified and publicly filed the factual returns in over 150 cases.

Second, the Government intends to quantify for the Court the immense diversion of available governmental (and judicial) resources from the litigation of these cases that would result if the press intervenors' reading of the June 1 Order were adopted, and to demonstrate that the consequent delays in the resolution of these cases would be unwarranted by any countervailing benefit. To demonstrate the impact of the press intervenors' proposal, the Government has chosen a sample of factual returns and is processing them in the manner the press intervenors have requested, to document the time required by all of the agencies involved, and to catalog the number and nature of the redactions made from these returns of unclassified but nevertheless sensitive information. The Government anticipates using these data to present to the Court a more complete picture of the time and resources required to re-process all 150 or more returns, the impact that re-processing the returns would have on Respondents' ability to keep pace with their litigation obligations in these cases, and the unsuitability for public release of the information redacted from the returns. As appropriate, based on the results of the sampling process Respondents may also suggest possible alternatives to the relief requested by the press intervenors to the extent the Court concludes that more information should be placed on the public record than Respondents have already made available.

In light of the comprehensive nature of the Government's anticipated response to the press intervenors' motion, the necessity, in support thereof, to re-process a number of returns, and the ensuing need to prepare declarations memorializing the results – *i.e.*, the time and resources required to complete the sample returns, the nature and amount of unclassified but

sensitive information redacted from them, and the justifications for those redactions – the Government's request for a four-week extension of time should be granted.

BACKGROUND

The background of this dispute is well known to the Court and only briefly summarized here. After the Supreme Court in *Boumediene v. Bush*, 128 S. Ct. 2229 (2008), recognized for the first time a constitutional right of military detainees held during a time of armed conflict to challenge their detention, this Court as the coordinating Judge established a schedule for the Government to file factual returns in the *habeas* cases brought by Guantanamo detainees. Because the facts set forth in the returns consisted largely of classified information, each return was deemed classified in its entirety.[2]

Throughout the summer and fall of 2008, the Government prepared and submitted factual returns justifying the detention of more than 190 military detainees, according to the Court's schedule. The returns, being classified, were provided to the Court and the detainees' counsel but not filed on the public docket. However, this Court's original Case Management Order of November 6, 2008 (Dkt. No. 940), required the Government to file unclassified versions of the factual returns. In the course of preparing the unclassified returns, the Government discovered that, among other things, redaction errors resulting from processing such large volumes of classified information at once, and the massive release of formerly classified information, created a substantial risk that filing the unclassified returns on the public docket would result in harm to the national security. To rectify this situation, the Government moved the Court to

[2] This was a necessary determination because, for example, information that might be unclassified standing alone could, when placed in context or with other information in the return, reveal classified information.

designate the unclassified returns in their entirety as "protected information" under the Protective Order governing these cases, and maintain them temporarily under seal.[3] Among other things, the Government argued that meeting the needs of the ongoing litigation in more than 150 *habeas* cases and the effort to declassify documents for detainee use should take priority over reviewing the unclassified returns for redaction errors. The Government asked that the filing of publicly releasable returns be delayed until the litigation was sufficiently advanced that resources could be devoted to the effort.

The petitioners opposed the Government's motion to maintain the returns entirely under seal, and various media organizations likewise moved to intervene for the purpose of opposing the Government's request. In its June 1 Order this Court denied the Government's motion, but it did so expressly without prejudice, and with respect to each individual return offered Respondents the choice, by July 29, 2009, either to

> (i) publicly file a declassified or unclassified factual return or (ii) file under seal with the petitioner's counsel and the appropriate Merits Judge an unclassified factual return highlighting with colored marker the exact words or lines the government seeks to be deemed protected, as well as a memorandum explaining why each word or line should be protected.

June 1 Order at 1-2. In other words, the Government was given the choice of either placing versions of the returns on the public record, or, in lieu thereof, justifying the continued maintenance of individual returns under seal.

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[3] The unclassified returns, of course, were provided to petitioners' counsel, and the Government specifically authorized them to be shown to the detainees. Respondents subsequently developed a process by which information in the returns could be declassified in a manner that, while not suitable for release to the general public, provided various participants in the litigation the most information possible. For example, documents have been declassified with the understanding that they will only be seen by the detainee-petitioner. The factual returns thus may contain information that otherwise could not be disclosed to other detainees or the public.

In each case, rather than prolong the dispute by seeking to maintain returns under seal, the Government instead chose option (i), and committed extraordinary resources to producing declassified, publicly releasable versions of the returns for public filing. Generally speaking, those returns redacted information of a classified nature as well as unclassified information that implicates significant national security or other interests. Through this massive interagency effort, Respondents succeeded in filing publicly releasable versions of the factual returns in more than 150 cases before the Court's deadline passed.

The press intervenors now move this Court to compel the Government also to process the returns according to option (ii) of the June 1 Order (more precisely, their interpretation of option (ii)), and impose sanctions on Respondents for not having done so by July 29, 2009.[4]

DISCUSSION

The press intervenors' argument relies on the premise that the Court's June 1 Order, rather than giving Respondents a clear choice between options (i) and (ii), required the Government to follow option (ii), as they construe it. The press intervenors' motion ignores the context in which the June 1 Order arose, is consequently lacking in merit, and Respondents intend to oppose it on several grounds. However, presenting a complete response, including a quantifiable assessment of the time and resources required to carry out the press intervenors' proposal, the ramifications for the progress of this litigation, and the benefits, if any, of following the press intervenors' approach, will require additional time to develop.

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[4] The press intervenors' motion is largely based upon the decision in *Al-Ghizzawi v. Obama*, No. 05-2378 (JDB), Order (D.D.C. Sept. 24, 2009) (Dkt. No. 266), which (sanctions aside) granted the relief sought here by the press intervenors in the case of one petitioner. The Government respectfully disagrees with the *Al-Ghizzawi* decision.

As Respondents will explain at length in their opposition, the Government complied with the Court's June 1 Order, and in so doing addressed the crux of this dispute, when it reprocessed the unclassified returns, corrected the redaction errors that had concerned the Government from the beginning, and filed publicly releasable versions of the returns that it no longer sought to maintain under seal. Respondents respectfully submit that the press intervenors' contrary reading of the Court's Order disregards both its text and the context in which the June 1 Order was issued.

The text of the June 1 Order is clear: by July 29, 2009, the Court required the Government *either* to prepare and file factual returns suitable for release to the public *or* provide a highlighted version of the unclassified return to the Merits Judge detailing the information that cannot be publicly disclosed, and why. June 1 Order at 1-2. The Order simply cannot be read to permit only the second of the two choices offered. Even if the disjunctive formulation of the two options ("either"/"or") was not plain, the Court's Order elaborates upon the procedures to be followed "[i]f the government *chooses* to file a highlighted return." *Id.* at 2 (emphasis added). The Court's reference to the Government's "choice" would be nonsensical if, as the press intervenors argue, the Court actually intended to require the Government to comply with a particular option.

The plain reading of the Order thus establishes a choice between creating returns suitable for public release – by correcting the redaction errors that originally precipitated the Government's request to maintain the returns under seal – or identifying the information in the unclassified returns that ought to have been redacted in the first instance, and justifying in light of these redaction errors the continued exclusion of individual returns from the public record. This reading comports with common sense and is supported by the context in which the Order

issued. The Court was well aware, as Respondents explained at length, that the Government had prepared unclassified returns and found errors, but had not yet expended the extensive resources required to correct those errors and protect sensitive national security and other information from unwarranted disclosure on the public record. *See, e.g.*, Intervenors' Mot., Exh. D at 36-38. Given the circumstances, it made eminent sense for the Court to offer Respondents a choice, based on the Government's own assessment of the resources required, either to start anew, reprocessing the unclassified returns to ensure their suitability for public release (option (i)), or to identify the information in individual returns that should have been protected and would therefore warrant maintaining them under seal (option (ii)).

The context in which the Court issued the June 1 Order also belies any interpretation of the Order that would require the Government to comply with option (ii) after it already had filed the returns contemplated by option (i). The Court accepted the Government's representation that allocating the resources necessary to review the unclassified returns for errors or create declassified returns for public release would divert personnel from other essential tasks in this litigation. *See* Memorandum Opinion (Dkt. No. 1780) at 8. Given this understanding, it is at best implausible that the Court would require the Government to prepare and file two different versions of each return, one for the public record, and a different version for the individual Merits Judge. This interpretation is all the more implausible given this Court's understanding of the tasks confronting Merits Judges presiding over active litigation in scores of *habeas* cases. It is unlikely that the Court intended the Government to burden the Merits Judges with collateral litigation over the redactions made to each and every one of more than 150 highlighted returns. *See* Memorandum Opinion at 16 ("[P]ublic access to the returns would negatively impact these proceedings if providing the public with access consumes substantial Court resources.").

Respondents thus will show in their opposition to the press intervenors' motion that in preparing and filing more than 150 factual returns now on the public record, the Government fully complied with the Court's June 1 Order, and a finding of contempt is simply unwarranted. But the Government also intends to show that if the relief now requested by the press intervenors were granted, the ensuing diversion of governmental and judicial resources from the litigation of these *habeas* actions would severely impact the progress of most if not all active cases. In short, the relief sought by the press intervenors would disserve the interests of the petitioners, Respondents, and the Court alike in the prompt determination of these cases that the Supreme Court mandated in *Boumediene.*

The Government expended enormous resources from at least four different national security agencies to create publicly releasable returns in accordance with option (i). Complying with option (ii) would require an equally time- and resource-intensive review of each individual piece of information in each return to determine whether it is classified, releasable to the public, or unclassified but nevertheless too sensitive (for any of a number of reasons) to be publicly disseminated.[5] As a threshold matter, the law-enforcement and intelligence agencies involved would have to develop an agreed-upon set of procedures for inter-agency review, to promote consistency in the categorization of sensitive information, and to ensure that one agency does not inadvertently disclose information that might be considered unsuitable for public release by another. And once begun, the process would place extreme demands on a limited number of experienced classification professionals whose number cannot easily be augmented. Indeed, the

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[5] In creating the publicly releasable returns, agencies started with the classified returns, and in many cases the documents in a return were redacted for public release directly from the classified form, without the intermediate step of segregating classified information from information that might be unclassified but is not suitable for release to the public.

burden would be even greater in this context because option (ii) would require clearance personnel to separate the information in a given document into several different categories of sensitive but unclassified information, and then to explain by declaration why each piece of information in each category cannot be released.

Repeating this process for more than 150 returns, as the press intervenors contemplate, would place immense demands on the available personnel resources of the same agencies that are already working at full capacity, or more, to clear classified documents for inclusion in new factual returns (nine alone are due to be filed within the next 30 days), to clear documents for purposes of meeting Respondents' discovery obligations – which recently have been compounded by the requirement to conduct discovery of materials compiled by the Guantanamo Review Task Force – and to declassify documents for use by petitioners in merits proceedings. Respondents believe that a diversion of these resources commensurate to the task of preparing 150 public returns in the manner envisioned by the press intervenors would have a debilitating effect on their ability to timely file new returns, comply with their discovery obligations, and declassify documents for merits hearings, thus obstructing the progress of the litigation in most if not all the pending cases. Moreover, the burden placed on the judicial resources of this Court to adjudicate, on a line-by-line basis, the proposed redactions in more than 150 returns would be extraordinary, and likely result in still further delays in resolving these cases on their merits.

It is difficult at this time, however, for Respondents to quantify the necessary resources or the likely delays, as they have only started the task of processing a sample set of returns in the fashion that the press intervenors apparently have in mind. The Government has no interest in overstating the magnitude of the task, nor in withholding information from the public that could be released. Accordingly, Respondents have chosen a sample of classified factual returns and

have begun to process them in the manner the press intervenors have requested. Processing this sample set of returns will require, as described above, an interagency effort to develop standards and procedures allowing for the consistent identification, categorization, and protection of sensitive information while permitting the release of unclassified material that is suitable for public dissemination. In addition, the process will involve the preparation of needed declarations to document the time and resources consumed to re-process the sample returns, to detail the number and nature of those items or categories of information that are unclassified but too sensitive for public release, and to justify their continued redaction.

By processing a sample set of returns in the foregoing fashion, Respondents will gather data allowing them to present a consolidated response to the press intervenors' motion that fully apprises the Court of the likely consequences of following the press intervenors' course of action. The results of the sampling process may also suggest possible alternatives to that course that may vindicate the interests advanced by the press intervenors at lesser cost to the interests of the parties, and the Court. Respondents therefore respectfully request an extension of time, until November 17, 2009, to complete the proposed sampling process, to document the results, and based thereon to prepare a comprehensive response to the press intervenors' motion. Respondents submit that the benefits of this brief delay to provide a complete picture for the Court's evaluation of the questions presented by the press intervenors' motion far outweigh any costs in the interim.

CONCLUSION

For reasons stated above, the Respondents respectfully request an extension of time, to November 17, 2009, fully to evaluate the consequences of the relief the press intervenors' seek and to prepare a comprehensive response.

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Respectfully submitted,

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