IN RE: GUANTANAMO BAY DETAINEE LITIGATION Doc. 1872

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

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| IN RE:<br><br>GUANTANAMO BAY<br>DETAINEE LITIGATION | Misc. No. 08-442 (TFH) |

**PRESS INTERVENORS' OPPOSITION TO**
**GOVERNMENT'S MOTION FOR ENLARGEMENT OF TIME**

The Government's motion for additional time establishes that it has not complied with the Court's June 1, 2009 Order. That Order upheld the public's right of access to the pleadings in these habeas cases by directing the Government to file factual returns with only classified information removed, or to obtain *court* permission to withhold unclassified information. It rejected the Government's unilateral right to withhold non-classified material from court records without judicial oversight. In seeking more time, the Government concedes that it did no such thing. It continues to withhold from court records, unilaterally, unclassified information.

In seeking further delay, the Government strains to recast the very premise of the access motions that were litigated over the past year, and to deny the plain meaning and rationale of the June 1 Order deciding those motions. Its only excuse for wanting more time is to develop evidence showing just how onerous it will be to comply with the June 1 Order, an order it neither appealed nor sought to amend. This belated concern about the burden of compliance puts the cart before the horse. The Government must first explain how its conduct comports with the June 1 Order, something it already was asked by Judge Bates to do and could not. It needs no more time. The Order is not ambiguous and the Government has no credible claim of compliance.



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The Court should deny the application for an extension of time and grant the pending motion by The Associated Press, The New York Times Company, and USA Today (collectively, "Press Intervenors") for an order requiring the Government to show cause why it should not be held in contempt.

## BACKGROUND

The Government has been dragging its feet for years to avoid disclosing to the public its basis for holding without charge hundreds of detainees at Guantanamo Bay. When the detainees' legal right to file habeas cases was recognized, it was also understood that the public must have some access to the Factual Returns filed by the Government because they are critical to understanding the Government's actions. As this Court put it, the returns "are fundamental to these proceedings." June 1, 2009 Mem. Op. (Dkt. 1780) at 15.

Provision was thus made from the outset for unclassified versions of the returns to be available in the Court's files. The Protective Order entered on September 11, 2008 permits the Government to file documents containing classified information under seal, but also requires it to submit a version of each sealed document "appropriate for filing on the public record." September 11, 2008 Protective Order (Dkt. No. 409) ¶ 48a. Lest there be any doubt that this requirement applies to the Factual Returns, the Government has been under specific order to file unclassified, redacted returns since November 6, 2008.[1]

The Protective Order makes clear that the Government must seek court permission any time that it wants to withhold non-classified information from its court filings, and the June 1

[1] On November 6, 2008, the Court entered an order directing the Government to file Unclassified Factual Returns (Dkt. No. 940). For Returns that had already been filed, the Government was to file the unclassified versions within 14 days, and for "cases in which the government ha[d] yet to file a factual return," it was ordered to "file an unclassified version of the return within 14 days of the date on which [it] is to file the factual return." *Id.* at 2, 3.

Order denied the Government's request for blanket permission to keep all of the Factual Returns entirely under seal. Consistent with the procedures already contained in the Protective Order, and imposing no novel obligations, the June 1 Order directed the Government either to file returns for public inspection with only classified information withheld, or to seek court permission to withhold any specific, identified items of sensitive information that are not classified.

The Government now suggests it never understood its obligations under the Protective Order, did not appreciate the nature of the relief being requested by the Press Intervenors, and misread the plain language of the Court's Order. Its contentions are indefensible.

**DISCUSSION**

The excuse offered by the Government for failing to respond to the motion in a timely manner is the need to develop evidence that would demonstrate the substantial burden that would be required to comply with the June 1 Order. *See* Gov't Motion for Extension of Time (Dkt. 1871) at 8-10. Its arguments about delay seek only to distract the Court and to avoid addressing the central issue raised by the motion for an order to show cause: whether the Government has failed to comply with the June 1 Order. The potential burden of compliance has no bearing on this issue.[2]

The Press Intervenors are not asking the Government to undertake some *new* task; they seek compliance with an order issued months ago—an order the Government did not appeal or seek to amend. The initial issue to be addressed is whether the Government *complied* with that order, not how onerous compliance might be.

[2] Of course, the Government's motion goes on for pages explaining in detail the very burdens it says it needs time to document. To the extent the burden of compliance is relevant to the Press Intervenors' instant motion, the Government's contentions are already before the Court. The opportunity to provide still further detail does not justify further delay.

The Court in any event has long been aware of the Government's concerns about the time and resources involved in preparing the Factual Returns. *See* Transcript of July 8, 2008 Hearing at 89 (filed July 29, 2008, Dkt. No. 208). The Court has made clear, however, that it would not countenance a strategy of delay, instructing the Government to

> get the message across to its people in the other branches of the government affected by this as well as to their own people, that the time has come to move these [cases] forward . . . . [W]e can't abide by hearing "we don't have enough resources. We have other commitments .". . . [D]elays I think would reflect badly and would cause the Court to become perhaps not only concerned, but suspicious of the necessity for further delay. . . .

*Id*. at 89-91. The request for still more time does indeed "reflect badly" and raises suspicions.

Indeed, the Government's motion for an extension of time itself exposes how obviously incorrect a position the Government is advancing about the supposed meaning of the June 1 Order. It seeks to recast the Order as extending the options of either (i) publicly filing any "versions" of the returns the Government considers "suitable for release to the public" or (ii) "justifying the continued maintenance of individual returns under seal." Gov't Motion at 4. But of course, the Order does no such thing. It rejected the Government's unilateral right to decide what *un*classified information would not be shown to the public. Under the Order's first option, the Government must file a "declassified or unclassified" return, a specification that permits only the withholding of classified information, and not anything the Government considers "unsuitable" for public consumption. Nor is the second option aimed at keeping individual returns *entirely* under seal as the Government suggests. It simply enforced the procedure already in the Protective order that requires the *Court* to determine whether unclassified information may be withheld from the Court's records.

The linguistic legerdemain employed by the Government to create the illusion that some possible basis still exists for it to file returns that unilaterally withhold unclassified information

—after losing a motion addressing just this point—only underscores the emptiness of its position. Its contentions are inconsistent with (a) the Protective Order that the June 1 Order was enforcing, (b) the Press Intervenors' motion for public access to non-classified information, (c) the positions debated at oral argument, and (d) the plain meaning of the June 1 Order itself.

- The Protective Order creates the two options for filing public documents that the June 1 Order enforces. It allows the Government to redact "classified" information without court review (even providing a mechanism in paragraph 47 for the Government to "classify" and withhold information provided directly by the detainees), and alternatively requires the Government to file a motion and obtain court permission to withhold non-classified information it wishes to "protect" from public disclosure. *See* ¶¶ 34-49.
- The Press Intervenors' motion, in turn, made plain that it did not challenge the withholding of classified material, but *did* object to the Government's request to withhold unclassified material without court review. *See, e.g.*, Press Intervenors' Mem. (Dkt. 1526-2) at 17 n.7. The Press Intervenors' stressed their request for "access to *unclassified* information" only. Reply Mem. (Dkt. 1592) at 2 (emphasis in original). The entire dispute was over the Government's request to keep unclassified information secret.
- The Government itself argued in opposing the Press Intervenors' motion that it sought only to prevent the inadvertent disclosure of classified information. *See, e.g.*, Gov't Response to Press Applicants' Mot. (Dkt. 1567) at 10. Indeed, the Government argued that judicial relief was not necessary because declassified returns eventually would be filed— never asserting an intent to withhold non-classified material.
- During oral argument, the Court also made clear its understanding that the dispute involved the potential inadvertent release of classified information. *E.g.*, March 26, 2009 Hearing Tr. 43:10-43:12 ("Court: [t]he Government here is trying to prevent . . . inadvertently disclosing classified information in what they call unclassified returns, where they miss something?"). The Government at no time asserted a need to withhold non-classified information and did not seek permission to do so, as the Protective Order requires.
- In resolving the competing motions, the June 1 Order is plain that the Government must either file publicly a "declassified or unclassified" return, or seek permission to withhold non-classified materials from the public, just as the Protective Order requires. The terms "declassified" and "unclassified" were explicitly defined in the motion papers (*e.g.*, Gov't Mot. to Confirm "Protected" Designation (Dkt. 1416) at 4 n.8), so there can be no dispute about the meaning of these terms in the Court's Order.

It is impossible to understand how the Government can now advance some other version of the meaning of the Protective Order, the issues in dispute in the extensively briefed access motions, and the interpretation of the Court's Order.

During oral argument the Court specifically warned the Government *not* to make such after-the-fact revisionist arguments, expressing concern,

> that we're not in a Catch-22 where the Government says we will declassify these as expeditiously as possible and make them public, and when that occurs then you make them "protected."

March 26, 2009 Hearing Tr. at 38:4-38:6. The Government denied this would happen, *id*. at 38:7, indicating that the returns would be made fully public once classified material was removed:

> Our end state, Your Honor, is to file the fully declassified publicly releasable versions of the returns on the public record.

*Id*. at 37:5-37:7.

As demonstrated in the Press Intervenors' motion for an order to show cause, and as the Government's request for more time only confirms, this has not happened. There has been a clear and obvious failure to comply with the June 1 Order. No further time and no further facts are needed for the Court to order the Government to show cause why it should not be held in contempt.

## CONCLUSION

For each and all the foregoing reasons, the motion for more time should be denied and the order to show cause requested by the Press Intervenors should be entered.

Dated: October 21, 2009

Respectfully submitted,

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