IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

DECLARATION OF TERRY M. HENRY

Pursuant to 28 U.S.C. § 1746, I, Terry M. Henry, hereby declare:

1. I currently serve as an Assistant Director in the United States Department of Justice ("DOJ"), Civil Division, Federal Programs Branch, and have served in that position since August 2008. Prior to that I was assigned as a Trial Attorney, and later as a Senior Trial Counsel, in the Federal Programs Branch. As part of my current duties, I serve as counsel for Respondents, and also coordinate and supervise other DOJ attorneys representing Respondents in the Guantanamo Bay detainee *habeas* corpus litigation pending in this Court.

2. I submit this declaration in support of Respondents' Opposition to the Motion by Press Intervenors for an Order To Show Cause Why the Government Should Not Be Held in Contempt. The information contained in this declaration is based on my personal knowledge or information provided to me in my official capacity.

3. Following the Supreme Court's decision in *Boumediene v. Bush*, the Government prepared and submitted to the Court and detainees' counsel more than 190 classified factual returns, according to the schedule established by the Court. Pursuant to the Court's original Case Management Order of November 6, 2008 (Dkt. No. 940), Respondents also prepared unclassified versions of the returns, intended for filing on the public record.

4. We discovered, however, that in the course of the effort to prepare so many unclassified returns at once within the short, 14-day period prescribed by the Court's Order and Respondents' requested, approximately three-week extension of that period, errors had been made in a number of returns such that classified information contained in the returns had not been redacted. The situation presented a substantial risk that similar errors, still undiscovered, had been made in other returns and that filing the putatively unclassified returns on the public docket would result in a disclosure of classified information on the public record. To prevent the harm to national security that could have resulted from publicly filing the returns, Respondents moved the Court on December 29, 2008, to designate the unclassified returns in their entirety as "protected information" under the Protective Order governing these cases until the *habeas* cases had advanced to a stage where Respondents' litigation resources could be devoted to the task of ensuring that the unclassified returns had been appropriately prepared for filing on the public docket. Most petitioners, and various intervening media organizations, opposed the motion.

5. In its Order of June 1, 2009, the Court denied the Government's motion, but did so without prejudice. The Order further provided with respect to each individual return in cases that were not stayed or in which Respondents' motion was not opposed, that Respondents, by July 29, 2009, must either

> (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.

6. When the Court issued its June 1 Order Respondents' counsel understood both of these options (and still understand them) in light of the motion and context that originally gave rise to the Order, that is, Respondents' request to maintain the unclassified returns as "protected information" and off the public docket pending further review at a later stage in the litigation. Viewing the Order against that backdrop, Respondents' counsel saw the first option, to "publicly file a declassified or unclassified factual return," as providing them the choice to create and file returns suitable for public release by identifying and correcting the redaction errors that precipitated Respondents' request to maintain the returns under seal. Respondents' counsel understood the second option – to file a return under seal with the Court while highlighting any information the government seeks to protect – as an alternative permitting them to maintain the individual returns under seal and off the public record (as requested in their December 29, 2008 motion) by identifying the information in the returns that should have been redacted in the first instance, and justifying the continued exclusion of the individual returns from the public record.

7. Respondents' counsel did not understand the Court's Order then, and do not understand it now, to have required by July 29, 2009, that Respondents publicly file returns from which only classified information had been redacted, or, if we sought to redact any sensitive but unclassified information from the returns as "protected," that we file the returns under seal with justifications for excluding the information so designated from the public record. Notwithstanding the recent decisions in *Al Ghizzawi v. Obama*, No. 05-2378 (JDB), Order (D.D.C. Sept. 24, 2009) (Dkt. No. 266), and *Ali v. Obama,* No. 09-0745, Memorandum Opinion (D.D.C. Nov. 9, 2009) (Dkt. No. 1335), we respectfully continue to view the June 1 Order as having given Respondents the choice of either placing suitably declassified or unclassified

versions of the returns on the public record, or, alternatively, justifying the filing and maintenance of previously prepared individual returns under seal.

8. When the Court issued its June 1 Order, Respondents' counsel conferred immediately with the affected agencies – those that originated the various intelligence reports, declarations, and other information included in the returns – to determine the appropriate course of action. Respondents concluded that the option of publicly filing declassified returns best addressed the crux of the dispute involved, accomplishing the Court's and intervenors' desire to have publicly filed versions of the returns, as well as maximizing appropriate disclosure of information on the public record. Thus, we developed a plan with the affected agencies for reprocessing each of the more than 150 returns for appropriate declassification and public release, and for then filing them on the public record in each respective case.

9. Respondents determined to follow this course notwithstanding that option one presented the more burdensome and difficult course for the affected agencies. Complying with the second of the two options under the Court's Order would have entailed the relatively straightforward process of reviewing the existing versions of the unclassified returns, and highlighting sufficient information that had not been redacted, but which was not publicly releasable, to justify maintaining the returns under seal. Because the highlighted returns would have been filed under seal, the risks associated with such a course would have been minimized.

10. On the other hand, to prepare returns appropriate for *public* filing pursuant to option one, it was necessary to start anew with the classified versions of the returns that had been originally filed. Each return – including both the return exhibits and narrative – had to undergo a painstaking and tremendously time-consuming review by multiple law-enforcement and

intelligence agencies to ensure that each piece of classified or otherwise sensitive piece of information contained therein was properly identified and redacted. The process was further complicated by the agencies' decision not simply to prepare unclassified versions of the returns – requiring only that classified information be redacted – but to prepare declassified versions in order to enhance the amount of information made available to the public. Under the circumstances of the factual returns filed in these *habeas* cases, declassification – the process of determining that it is no longer necessary in the interest of national security to continue to designate previously classified information as classified – required an extraordinary process of interagency review, consultation, and (especially where a decision to declassify was made) consensus, in order to complete.

11. Notwithstanding the burdens associated with this tremendous interagency effort, Respondents prepared and filed publicly releasable versions of more than 150 factual returns by the Court's July 29 deadline. The various law-enforcement and intelligence agencies involved in this process are submitting declarations that quantify the time each one of them devoted to this effort. In addition to the time and resources expended by these agencies, I estimate, conservatively, that in aggregate the attorneys on the DOJ *habeas* litigation team, who helped to coordinate the interagency review of individual returns and themselves reviewed returns to ensure the consistent redaction of information among agencies and returns, invested, with paralegal staff who assisted with logistics, between 1,500 and 2,000 hours' time to ensure the timely and appropriate completion of this project.

12. As stated above, Respondents continue to believe that their interpretation of the June 1 Order is correct, and that the position advanced by the Press Intervenors is inconsistent

with both the text of the Order and the context in which it originated. Respondents undertook the extraordinary effort described above, preparing more than 150 publicly available returns in less than two months' time, in order comply with the June 1 Order as they understand it, not to flout the Order, as the Press Intervenors maintain. Further, in the event the Court were to conclude that Respondents have misinterpreted the June 1 Order and that they should prepare and file returns in a manner other than previously implemented by Respondents, Respondents' counsel would again take all necessary and appropriate steps to comport with Respondents' obligations under the Court's decision or seek appropriate alternative relief.

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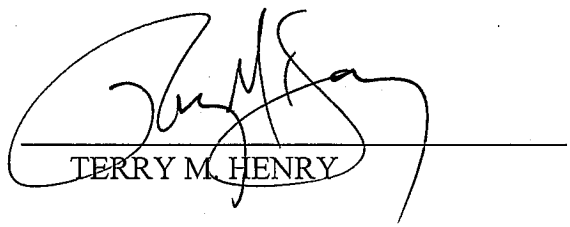
I declare under penalty of perjury that the foregoing is true and correct.

Dated: November 17, 2009



TERRY M. HENRY