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

IN RE: .  
GUANTANAMO BAY DETAINEE .  
. . Docket No. MS 08-442  
. .  
. . Washington, D.C.  
. . July 8, 2008  
. .  
. . . . .

TRANSCRIPT OF SCHEDULING CONFERENCE  
BEFORE THE HONORABLE SENIOR JUDGE THOMAS F. HOGAN  
UNITED STATES DISTRICT JUDGE

**APPEARANCES:**

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3 Room 6521, U.S. District Court  
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7 Proceedings recorded by machine shorthand, transcript  
8 produced by computer-aided transcription.  
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## 1 P R O C E E D I N G S

2 THE DEPUTY CLERK: Miscellaneous Number 08-442, In  
3 Re: Guantanamo Bay Detainee Litigation. This hearing is now  
4 in session.

5 THE COURT: All right. Good afternoon, Counsel,  
6 thank you for coming in. And we have also counsel by phone  
7 who are attending whose names have already been taken,  
8 representing their clients as well.

9 This was a scheduling conference in accordance  
10 with the resolution of the court at our executive session  
11 that the parties have been given copies of previously. This  
12 series of cases today that I wanted to discuss with counsel  
13 consist of approximately 125 cases, I believe. One of the  
14 things we need to discuss is the number of cases, but of  
15 detainees who are in Guantanamo Bay.

16 The decision was decided on June 12th, on  
17 June 18th, six days later, the chief judge of the District  
18 Court, Judge Lamberth, called a meeting of counsel in his  
19 chambers-type conference in our conference room, that I  
20 attended to get the sense of the parties as to organization  
21 of these cases and proceedings subsequent to Boumediene,  
22 even though they had just been decided six days earlier.

23 We held a subsequent meeting on the 25th of June,  
24 one week later, to attempt to resolve some of the issues  
25 between the parties or among the parties, as to proceedings

1 in these matters. Subsequently, the Court met in an  
2 executive session a week later approximately, and returned  
3 with the resolution by a majority of the judges appointing  
4 me as a coordinating judge, transferring cases to me at  
5 least for now to help organize them to move forward in as  
6 expeditious a way as possible, by Judge Leon having opted  
7 out, Judge Sullivan wanting to hold his own conference, but  
8 has informed me he will follow generally the procedures we  
9 adopt.

10           The Court has had an opportunity to review the  
11 correspondence the parties sent in to assist the Court in  
12 attempting to organize these cases. There are fundamental  
13 differences between the approach of the petitioners and the  
14 government that we hope to resolve today. I have gone  
15 through a list of issues as raised by the parties as well as  
16 by my judges, whom I canvassed. And as to these current  
17 cases before me, I've also put out a second order and other  
18 miscellaneous cases to those cases where the individuals are  
19 no longer detained. I'm awaiting status reports on those  
20 cases.

21           I propose today, I had asked the counsel to, if  
22 possible, to have two appointed speakers on each side  
23 because of the numerosity of counsel on the case. Those who  
24 do not get to address the Court, I will ask to file written  
25 statements with the Court, so all may have a chance to be

1 considered, if I have not considered your issues to date. I  
2 did try to take into account everything that's been sent to  
3 the Court to this time, and also the notes from the  
4 discussions that we've had.

5           Some of the issues, and I'll hear from counsel as  
6 to other issues they want to raise, are ones that we've  
7 discussed previously. To put this in context for those who  
8 are not privy to the earlier conversations that the Court  
9 has had and meetings with counsel from each side, we, at our  
10 meetings, the government has -- and I believe one of their  
11 letters was released that had been provided to counsel, some  
12 counsel I think, and had been released, but provided a  
13 system of updating returns and filing returns. They have  
14 not, for the detained individuals, on a time frame. And had  
15 included suggestions for certain overreaching or overall  
16 issues common to all the cases for the coordinating judge to  
17 decide.

18           Counsel petitioners have been concerned on any  
19 further delays, some of the petitioners having been  
20 incarcerated for six-plus years, going into six and a half  
21 at least, and others who have particular problems of illness  
22 and difficulties at this time and were concerned about any  
23 further delays, and felt I think essentially that each judge  
24 could handle the cases according to their own schedule and  
25 their own priorities individually, without the need for any

1 overall coordination that could result in further delay and  
2 not expedition. Particularly, they were concerned with  
3 delays not only in returns, the filing amended returns, but  
4 in any type of issues that would be considered overreaching  
5 issues that would be decided by one judge, rather than going  
6 forward with the individual cases on an individual basis to  
7 each judge, attempting to avoid any interim delays such as  
8 appeals from the rulings the coordinating court would make,  
9 et cetera.

10           It doesn't solve the problem if the government  
11 wishes to take appeals or the petitioners wish to take  
12 appeals if they lose a particular issue. But I have looked  
13 at those issues and think there is some things that the  
14 coordinating judge can do, and others that it would not be  
15 appropriate for the coordinating judge to do.

16           Let me just set down a couple of basic concepts I  
17 have, and then listen to counsel about it. One, the  
18 ultimate decisions as to each individual case, the ultimate  
19 claim of release I think goes to each judge on the  
20 individual cases. I'm not involved in that process at all  
21 and will not be, unless I have my own particular cases  
22 assigned to me.

23           The issue as to certain procedural areas I may be  
24 able to handle in some ways. It seems to me that there are  
25 some very straightforward matters we can handle generally,

1 and they will be issues of stays, lifting the stay of the  
2 docket cleanup, protective order issues. A discussion of  
3 the priority of cases, and I'll hear from counsel a little  
4 bit I assume again on that; there are certain categories of  
5 cases it seems to me that we can look at. The production of  
6 facts returns and updated returns, if they're committed,  
7 under what circumstances, when they'll be done, seems to be  
8 an overreaching issue I can handle. A 30-day notice of  
9 transfer, again, seems to be an issue that can be handled by  
10 a coordinating judge.

11           The issues of counsel retention and clearances,  
12 communications since all can be part of the protective order  
13 and part of what I can do. The handling of sensitive  
14 information, I can do some generally, but some of that may  
15 be individual, depending on the type of case. Issues as to  
16 discovery, I'm not as sanguine that I can make much headway  
17 in that, but I will hear from counsel about it. It seems to  
18 me some of that may be, if not a lot of it, somewhat  
19 individualized cases. But the government must produce as to  
20 evidence and the scope of it, whether it's everything that  
21 they have or produced earlier or not, whether exculpatory  
22 information is produced, and how access to other detainees'  
23 information, et cetera, are issues we need to discuss.

24           The law that will apply to the hearings,  
25 procedural, evidentiary rules, what rights they have,

1 it's -- again, I'm not satisfied that I can provide answers  
2 to all of those across the board. I think perhaps core  
3 legal issues and procedure that really goes to the  
4 substantive rights such as evidentiary issues may have to  
5 wait for the individual judges. But those are some of the  
6 issues we need to consider and discuss.

7           First, I would like to talk with counsel and hear  
8 what they have to say, but some of the things that I want to  
9 talk about is preliminary issues. We need to identify which  
10 petitioners are still at Guantanamo Bay, if that hasn't been  
11 done yet. We need to clarify all duplicate petitions and  
12 get that accomplished, and make sure we know whom we have  
13 here. Identify the 54 or more now the government has said  
14 are cleared for release, to determine whether or not the  
15 cases that have been dismissed prior to Boumediene can be  
16 reinstated by a simple application to reinstate. It would  
17 seem somewhat logical to visit the protective order matters  
18 about communications with client, access and filing  
19 mechanisms to make it simpler to file the security  
20 procedures, et cetera. And the clean up of certain motions  
21 that are still outstanding, we need to resolve and move  
22 these matters along.

23           One of the matters that came to my attention this  
24 morning was a motion to consolidate 17 Uighur petitioners in  
25 one case before a District Court judge. And I have



1 discussed with the affected judges, except for one. And we  
2 can look at that as well.

3           The bottom line is I think from what the chief  
4 judge has indicated, and I think all my judges in all the  
5 discussions that we have had together, and you can be  
6 assured I've had multiple phone calls and visits from all of  
7 my judges about this, is a commitment for this Court to move  
8 this matter expeditiously forward. There are things to be  
9 done to aid in that, not only what we can do, but if we  
10 can -- the petitioners who have cases in the Court of  
11 Appeals that are pending, perhaps assist in getting some of  
12 those decisions issued so that we would have guidance on  
13 some of the issues we're going to have to deal with here.

14           This Court will move forward on these cases in a  
15 timely fashion, keep the feet to the fire on both sides of  
16 this case to get these matters done and accomplished as soon  
17 as reasonably possible, in accordance with Boumediene.

18           I think the clearing up the docket and getting  
19 through some of these more administrative matters will help;  
20 at the same time, we want to move along with the substance.  
21 I don't look at any of these issues as needing to delay any  
22 other issues. We should be working on many fronts at the  
23 same time to move all these forward.

24           So with that short introduction, I would like to  
25 have counsel who have been nominated to address the Court,

1 and I have some questions and some issues to discuss with  
2 them. And then we'll I think be able to issue a scheduling  
3 order in certain areas by tomorrow, so this matter can  
4 continue to move forward.

5 So with that, is the government then the  
6 counsel -- who are going to address the Court for the  
7 counsel for the petitioners' constitutional rights?

8 MR. KADIDAL: Your Honor, thank you. My name is  
9 Shayana Kadidal, you know me from the closed sessions. I'm  
10 the Guantanamo litigation project at the Center for  
11 Constitutional Rights.

12 THE COURT: I appreciate it.

13 MR. KADIDAL: I'm one of the two appointed  
14 spokespersons, and the other is my colleague, Gitanjali  
15 Guterrez from the Center, who is also --

16 THE COURT: I appreciate that you actually have an  
17 agreement that someone can speak for you all.

18 MR. KADIDAL: I'm sorry?

19 THE COURT: I said I appreciate you have an  
20 agreement that someone can actually speak for you all.  
21 We'll have less than 20 or 30. I'm sure that's difficult,  
22 but I appreciate that.

23 MR. KADIDAL: Thank you. Just by way of  
24 background, Gitanjali was the first civilian habeas counsel  
25 to visit the base, and is a veteran of the proceedings

1 before Judge Green in 2004 and 2005. Should we begin?

2 THE COURT: Yes, sir, please.

3 MR. KADIDAL: Your Honor, you directed us to  
4 designate two speakers, myself and Gitanjali, we've been  
5 designated, but I want to reemphasize at the outset that  
6 there is no collective habeas position in these cases  
7 because there is no collective habeas case. As we  
8 emphasized during the two closed sessions, there are an  
9 extraordinary diversity of cases here, you know, some cases  
10 that will go forward primarily based on challenges to the  
11 legal standard that the government intends to use to justify  
12 detention; other cases where petitioners will intend to  
13 challenge the factual basis that the government puts  
14 forward. We remain convinced that the only thing that will  
15 come of trying to coordinate resolution of procedural and  
16 merit standards through a single judge is delay, and so I'm  
17 pleased to hear that you are not sanguine about the  
18 prospects for expediting these cases by coordinating those  
19 issues.

20 And again, I also want to reiterate at the outset  
21 that speed and fairness are the primary values that this  
22 process should serve, and rigid conformity on the legal  
23 standards applied in the course of resolving each case is  
24 not one of those primary values.

25 We have essentially kind of a three-part proposal

1 for you today on scheduling. The first item deals with  
2 factual returns, then after that, a proposal for status  
3 reports following production of factual or part of a factual  
4 returns, and then a proposal for some motion forward on the  
5 30-day notice orders issue. And with that, I think maybe an  
6 appropriate way to go forward would be for me to present  
7 those three proposals, and then hear from the government on  
8 its position and my colleague, Ms. Gutierrez, will address  
9 sort of any responses to the government's position.

10 THE COURT: Let me ask you a preliminary question:  
11 Are you aware of any -- and others can answer this, as I  
12 said, you're all welcome to file a written report with the  
13 Court as to this conference we're having today that I can  
14 consider, although we do want to move forward very rapidly  
15 so it will have to come in quickly.

16 Are you all familiar at all with any cases that  
17 are in a position to move the Court to the ultimate hearing  
18 or not? In other words, are the returns filed, the versus  
19 filed, no updates coming, you're ready to move; you don't  
20 need discovery in any other motions, but you're ready to  
21 move forward with the hearing? Because, I mean, people are  
22 talking about having immediate hearings, when they look at  
23 their cases, they say well, no, we want discovery, I want to  
24 know every time my clients are mentioned in any document in  
25 the United State's possession, that's going to take a while

1 to work out. But if there's some of them that's ready to  
2 go, we can see if we can't move ahead with some of these  
3 cases.

4 MR. KADIDAL: Sure, Your Honor. Well, I think we  
5 reported in one of the closed sessions that originally a  
6 status conference was scheduled for today in a case  
7 involving some Yemeni detainees, I think Sutherland &  
8 Asbill, that law firm, is a petitioner's counsel in that  
9 case. Two of their clients were cleared for release, and I  
10 think they attended to move forward, you know, relatively  
11 expeditiously, without asking --

12 I didn't make my question clear enough. Setting  
13 aside those that have been cleared for release, I think  
14 that's a category that I'm going to try to take care of when  
15 I talk with the government about it, but detained people who  
16 are being detained, being held or not cleared for release.  
17 You think there's anyone immediately available that wants to  
18 go for a hearing where everything is updated? I haven't  
19 asked the government they need to update any particular  
20 person you may nominate, but --

21 MR. KADIDAL: Sir, I think almost certainly  
22 they'll be cases like that. I don't know that I can give  
23 you an example off the top of my head.

24 THE COURT: Well, that's just a question I had.  
25 I can get a report on that.

1 All right. I interrupted you, go ahead, sir.

2 MR. KADIDAL: Sorry. Okay. Well, let's begin  
3 with the returns. It's our position that the  
4 government's --

5 THE COURT REPORTER: Sir, I'm going to need you to  
6 please slow down.

7 MR. KADIDAL: I'm sorry, there was no one taking  
8 stenography during the closed sessions, so I'll try.

9 It's our position that the government's proposal  
10 for producing factual returns or amended factual returns, as  
11 the case might be in these cases, is -- would just involve  
12 absurd delay. The proposal that we heard involved a 60-day  
13 delay for the production of the first amended returns,  
14 followed by a production I suppose of a 25 returns every two  
15 weeks, which would put the final return or amended return in  
16 any of these cases being produced at the first week of  
17 December. That's sort of a six-month delay in producing  
18 records for men who are held for six years, I think is a  
19 absurd regime, and that that idea I think needs to be killed  
20 here today.

21 THE COURT: Let me ask you this: What -- go  
22 ahead, finish up first.

23 MR. KADIDAL: Sure. And our proposal essentially  
24 for having moved forward on the returns is that the  
25 government is in a position to produce the classified CSRT

1 and ARB records immediately, you know, presumably filing  
2 these things in a secure facility. And even though that  
3 they've failed to produce classified CSRT records, even in  
4 some cases where a protective order is already in place, we  
5 feel that they are -- should be able to do that by the end  
6 of next week, July 18th. That gives them about ten days.

7 Now, you know, in all previous Guantanamo habeas  
8 cases, the government has said that the return, the complete  
9 return, was a CSRT hearing record, so just to give you an  
10 example, in an August 31st, 2004 letter, the government  
11 urged the Court, then Judge Green, to wait for CSRT returns,  
12 quote, as a complete statement of the factual basis for a  
13 detainees' detention as an enemy combatant. And they argued  
14 that the small delay was necessary to prevent the need to  
15 supplement the returns later.

16 They said at the time that they -- at the end of  
17 August 2004, that they expected to have the majority of  
18 these returns done by the end of September, and anticipated  
19 filing the last of those returns by October 18th, 2004, so  
20 in a relatively short time frame starting from scratch.  
21 According to a transcript of proceedings before Judge Green  
22 in mid October 2004, they had, in fact, failed to produce  
23 returns even on that schedule in 38 of 66 cases.

24 So, you know, that's our starting point. But the  
25 government's position throughout this litigation has been

1 that the CSRT record ought to be the complete record. And,  
2 you know, very clearly I think that there shouldn't be any  
3 impediment to them filing those records in every case within  
4 ten days.

5 Now, in the DTA process, the government, as we  
6 pointed out to you during the close sessions, the government  
7 argued again and again that the record on review was a CSRT  
8 hearing record and even procured a stay on the entire DTA  
9 regime so that it could go to the Supreme Court to establish  
10 that the record in the DTA process ought to be the CSRT  
11 hearing record.

12 Now, in the one month since -- almost since  
13 Boumediene was decided, the government has never said that  
14 it doesn't have right now, today, in ever Guantanamo case,  
15 that CSRT record in hand. It would be astonishing if it  
16 weren't so. The government boasts repeatedly that it's put  
17 these people through CSRT's and that the CSRT's represent  
18 some kind of real process, and that materials were submitted  
19 to each CSRT panel and so forth. There's no reason that  
20 that hearing record shouldn't be filed in every habeas case  
21 by next Friday. And so, we think the starting point ought  
22 to be there. We should begin there and that should be the  
23 provisional return.

24 Now, you know, we don't insist that it ends there  
25 in every case, but it begins there, and that should begin



1 immediately. If the government says that it wants to amend  
2 that factual return, that provisional factual return, then  
3 they should, as we initially proposed before Your Honor and  
4 Judge Lamberth, we've in short ordered for leave to amend  
5 with the amendment itself attached before the individual  
6 District Court judges.

7 Now, I think it's very clear that the government  
8 has no outright right to amend. If you look to the  
9 statutory procedure outlined for section 2241 cases, 28 USC  
10 Section 2243, in paragraph seven says that, the return,  
11 quote, may be amended by leave of court. And we think  
12 that's the standard that ought to apply here. Each judge  
13 ought to determine on the facts that are put before them  
14 those motions for leave, you know, whether or not the  
15 amendment ought to be accepted. And that's something that I  
16 think each judge has discretion to consider.

17 So we begin with the CSRT hearing record, let a  
18 judge and counsel look at it, and let the government make a  
19 specific case why it has to be amended from the government's  
20 point of view. The trial judge obviously, ought to require  
21 that the government represent that they have something  
22 substantial to amend the return with, not that they will --  
23 not that the government will begin an investigation at that  
24 point in hopes of finding something. Again, we think that  
25 the amendment ought to be attached to those motions for

1 leave. And as we propose in our final letter to Your Honor,  
2 I think something like a 30-day period of time for those  
3 motions for leave to amend to be filed in every case would  
4 be a useful matter for this Court to impose in order to  
5 expedite the process of producing these returns.

6 Now, the government has implied that they want to,  
7 just for background I suppose, there are about 200 cases  
8 here, and we've heard from the government that in about a  
9 hundred of them some form of factual return has been filed.  
10 Meaning in about a hundred were waiting for the first  
11 factual return, whether it's provisional or not. Now, the  
12 government has implied that out of the hundred that it's  
13 already filed, that it intends to amend every single one of  
14 them to put its best case forward. And I think, you know,  
15 the individual judges that hear these cases ought to examine  
16 the judges motions for leave -- I'm sorry, the government's  
17 motion for leave, in order to determine whether or not  
18 there's anything of substance to add. This is the sort of  
19 scrutiny that the ordinary requirement of seeking leave  
20 enforces.

21 And from there, it would be useful from our  
22 perspective to have some kind of meet and confer process  
23 with the government on these cases. And I think, you know,  
24 that might require the government identifying one lawyer on  
25 their side of the fence that each petitioner's counsel can

1 confer with. It would also be useful to us I think, if the  
2 government certified that all the exculpatory information in  
3 its records is contained in whatever amendment they propose  
4 to make at that point.

5 Now, you know, Your Honor asked about cases that  
6 might be -- you know, where people might be willing to move  
7 forward to a hearing. Certainly I think there may be cases  
8 where there are individuals who are willing to stipulate to  
9 factual assertions that the government has made and attempt  
10 to move forward without even seeing the purported evidence  
11 that supports the stipulated facts. So, you know, those  
12 might form an entire category of cases that, you know, might  
13 be amendable for ready settlements or for quick hearings.

14 Now, in order to facilitate this whole process, we  
15 propose that both sides submit status reports a week after  
16 the CSRT record is put into place. We think it's probably  
17 easier if they are individual status reports, meaning not  
18 joint, just given the logistics of producing joint reports,  
19 that requires a little bit more conferring upfront.

20 Now, what we propose to include in those status  
21 reports on the government end, I think that they ought to  
22 include, you know, indication of intent to amend the return  
23 and in some sense of the substance of the amendment. Also,  
24 they ought to indicate whether or not the DTA record was  
25 assembled in that individual petitioner's case. We had I

1 think, about 170 DTA petitions filed. And again, the  
2 government had repeatedly said in that process that they  
3 were, you know, working night and day to produce the  
4 records.

5 I'll give you some examples from their briefs.  
6 The government said in an August 22nd brief and in the  
7 Bismullah case, "to be sure, the government is not sitting  
8 on its hands in the interim; many governmental entities are  
9 currently expending significant resources, actively  
10 gathering and reviewing material that might be treated as  
11 part of the record in this case." On August 31st, last  
12 year, they filed another brief saying that, "numerous  
13 governmental entities are engaged in a large scale  
14 production record -- sorry, large scale production effort,  
15 and that the relevant government entities are proceeding  
16 expeditiously with this process." And then finally, in June  
17 of this year, the government said in seeking to hold the DTA  
18 cases in advance that, "significant military intelligence  
19 resources have been devoted in preparing records and  
20 reviewing classified filings to facilitate the DTA review in  
21 this court."

22 So, you know, presumably there's something pretty  
23 significant there. And I think the status reports that the  
24 government would submit in a week from the 18th, that would  
25 be July 25th, and that they ought to indicate whether or not

1 the DTA record was, in fact, assembled in the individual  
2 petitioner's case, whether or not it was ever filed with the  
3 Court.

4 From our side, I think there are a number of sort  
5 of basic administrative issues that could be dealt with in  
6 these status reports, or at least some notice to Your Honor.  
7 So any clearance issues, any protective order issues, those  
8 sort of things, some rough indication of intent to seek  
9 discovery might be something that a large number of  
10 petitioners would be able to put into their status reports  
11 at that point. Perhaps reports on conditions of confinement  
12 to give Your Honor a sense of whether or not there might be  
13 challenges on that front, although again, we think that  
14 conditions of confinement claims really properly belong  
15 before the individual judges that these cases were assigned  
16 to, in part because they implicate the ability of the  
17 detainee to participate in their own habeas case.

18 And then finally, in our status reports, some  
19 sense of a direction that we anticipate the case will take.  
20 You know, whether it will be, you know, one of those cases  
21 where the challenges are primarily legal, primarily factual,  
22 some combination, you know, and so forth. So, that's our  
23 second proposal for status reports on July 25th, following,  
24 you know, a week after the government's submission of the  
25 kind provisional record, the CSRT and ARB records.

1           Now, I'd like to end with a proposal about the  
2 30-day notice orders. As Your Honor knows, there are  
3 pending appeals before the Circuit in -- I believe there are  
4 39 open appeals consolidated in the circuit in the Odah  
5 case, the first case number there is 05-5224; there may be  
6 some other cases with some of the same issues raised. It  
7 appears that the Court of Appeals will decide this issue in  
8 the first instance. And given that, we have a number of  
9 30-day notice orders already in effect in cases in the  
10 District. We feel that there isn't really any sort of  
11 substantial harm to the government for Your Honor to enter  
12 30-day notice orders in all cases where counsel, in cases  
13 before, you make a request for them in their status reports.

14           So, you know, we feel basically both that in the  
15 interest of consistency and sort of the notion of balance of  
16 harms, that they both favor a quick entry of notice orders  
17 in cases where petitioners want them. If the government  
18 wants to litigate out those issues further before the  
19 individual District Court judges perhaps they can do that,  
20 but, you know, in the interest of our clients are not being  
21 sent back to countries where they might face torture, are  
22 substantial and we feel that they outweigh any interest that  
23 the government has in not wanting to have an expedited  
24 process for entry of 30-day notice orders.

25           So, in short, our proposal is that in any case

1 where there isn't a 30-day notice order and counsel requests  
2 that a 30-day notice order be put in place in the status  
3 report or earlier, that Your Honor enter them and, you know,  
4 we would hope that any counsel who wanted that would at the  
5 latest put in those requests by the date of the status  
6 report, which again is July 25th.

7 THE COURT: Do you know if the petitioners in the  
8 cases that are on appeal, have they asked for an expedited  
9 ruling by the Court of Appeals in that area? One is a  
10 Kembuck case, is one of them. I think there are --

11 MR. KADIDAL: Right. I'm not certain what the  
12 status is of those appeals in terms of expedition.

13 THE COURT: It might help the Court if they could  
14 get a ruling. All right.

15 MR. KADIDAL: We've got the motion to govern  
16 further proceedings in front of us, which I think was filed  
17 today or -- the government's motion.

18 Well, I think since that sort of closes up our  
19 preliminary sort of three proposals, perhaps we can hear  
20 from the government at this point and maybe report back to  
21 you after they've spoken about the status of the appeals.

22 THE COURT: Did you have any notes or associates  
23 going to address at all, there's been some motions to vacate  
24 dismissals, some discussions where they can be automatically  
25 reinstated or have to be motions and argument on that, did

1 you have any position on that? These are cases that have  
2 been dismissed under Boumediene.

3 MR. KADIDAL: Right, right. So where the  
4 dismissals are on the basis of jurisdiction, I think that  
5 ought to be something that -- you know, I think ideally that  
6 would be something maybe that -- where the cases would be  
7 reinstated or the request for reinstatement might come  
8 through the status report. But since we're looking at  
9 something a couple of weeks off in the future, I think maybe  
10 we can put in some sort of coordinated requests for a number  
11 of cases to be reinstated. Does that sound --

12 THE COURT: I receive some of those motions,  
13 received motions to lift the stay as well, which I'll  
14 discuss with the government in a minute. And motions to  
15 give notice to transfer the 30-days notice, you've already  
16 talked about, I've received a motion for that. There's a  
17 motion to enjoin trial by the military commission, the Hamdi  
18 case, which is before Judge Robertson. It's been exempted  
19 from our group here. A motion to enter a new protective  
20 order for newly filed cases; we'll talk about that in a  
21 minute. And the motion to consolidate the Uighur cases.

22 MR. KADIDAL: Your Honor, hopefully I think we can  
23 probably stipulate actually, given that I think the  
24 government doesn't object to reopening most of those cases.  
25 And we can probably confer and iron out most of them within



1 a week or two.

2 I do want to mention one point, that a number of  
3 counsel whose clients are facing charges before military  
4 commission are -- were concerned that the courts press  
5 release was may be a little bit ambiguous about the question  
6 of whether or not the issue of whether habeas petitioners  
7 could -- or whether such -- I suppose in the Hamdi case, the  
8 petitioner there is seeking to enjoin for the progress of  
9 his military commission through habeas, and we would like  
10 some clarity as to whether or not that issue is being  
11 decided by Judge Robertson as a coordinating judge for all  
12 the military commission cases or just for Hamdi?

13 THE COURT: No, he's deciding it for his own case,  
14 but I suspect that he's recognized this -- authoritative in  
15 his area, this case. But it's not -- he's not been  
16 appointed a coordinating judge for all cases involving  
17 trials by a military commission. He's deciding in his own  
18 case, but the court has voted to allow him to go ahead with  
19 his case, rather than have it come to me. And so he's going  
20 to decide that case and I suspect other judges will look to  
21 see what he's done.

22 MR. KADIDAL: Thank you, Your Honor.

23 THE COURT: All right. Thank you for the work in  
24 the case, I appreciate it. I didn't say at the beginning  
25 that the Court need to recognize the work of what we call

1 pro bono counsel, unless all counsel in these cases except  
2 for one group are not retained counsel. They're all  
3 volunteer counsel that have spent thousands of hours and  
4 millions of dollars of their own monies in the attempts to  
5 bring their clients before the Court to have a review of  
6 their status as detainees. And have operated in I think the  
7 best traditions of the lawyers here in the United States who  
8 do -- volunteer this type of work.

9 I know many firms have spent, as I've said,  
10 thousands of hours for which they're being uncompensated, to  
11 attempt to bring these clients before the Court for a review  
12 of their status. It has been much more work than I think  
13 anyone recognized because of the long time this has taken,  
14 both because of the appellate process, the Supreme Court  
15 process and the legislative process. And now hopefully  
16 we're at a position where we can move these cases forward.  
17 All right. Again, thank you.

18 I'll recognize the government; it's going to be  
19 the assistant attorney general in charge of the civil  
20 division.

21 MR. KATSAS: I'm Greg Katsas, I am the assistant  
22 attorney general. I will give you some thoughts from a  
23 management perspective of the civil division, and then turn  
24 the floor over to my colleague, Judry Subar of our federal  
25 programs branch, who has been working on the habeas cases

1 for some years and has intimate familiarity with them.

2           Judge Hogan, we agree with your two basic concepts  
3 that the ultimate release decision is for an individual  
4 judge, and further that the cases should proceed on as many  
5 different fronts as possible. Our proposal, which  
6 distinguishes on the one hand the process of producing  
7 factual returns as quickly as possible, which address the  
8 necessarily fact-intensive question of the basis for the  
9 detention of each individual detainee, have that process  
10 proceed on one track while simultaneously attempting to the  
11 maximum extent possible to bring as much legal clarity to  
12 the circumstances as we can through our proposal for  
13 briefing up any issues that any party views to be common and  
14 appropriately resolved on the front end.

15           We think that makes eminent good sense because it  
16 doesn't make a whole lot of sense to generate factual  
17 returns for some 200 or 300 cases, and at least in our  
18 opponent's view, begin a trial preparation process in some  
19 200 to 300 cases without any particularized sense of what  
20 the proceedings will ultimately look like.

21           And we find ourselves after the Boumediene  
22 decision with a perhaps unprecedented range of uncertainty.  
23 We don't have experience with respect to the conduct of  
24 habeas proceedings involving enemy combatants captured and  
25 held in wartime. These are not criminal trials; they are

1 not garden variety 2255s. The Supreme Court, in Boumediene,  
2 made clear that the details of the conduct of the  
3 proceedings remain an open question to be worked out by the  
4 District Court, and at the most general level, our proposal  
5 is designed to push that process as far as we can as early  
6 as we can in the process, so that all parties have as much  
7 guidance as we can to make the factual inquiry proceed  
8 within an appropriate procedural framework and in as  
9 streamline a way as possible.

10 Let me begin with the question of returns, and  
11 then turn to what we view as the parallel track of legal  
12 briefing on common issues. With respect to factual returns,  
13 you have our proposal, it is in the letter that had been  
14 confidential; it's now in the public domain. We have no  
15 objection to that. In essence, we are proposing to submit  
16 50 returns a month beginning in 60 days. We had said in 60  
17 days, but we are content to particularize that to  
18 approximately the beginning of September. And we explained  
19 to you what an enormous commitment of government resources  
20 is entailed by that sort of undertaking. And you have the  
21 details of that before you.

22 THE COURT: Let me make clear, help me understand  
23 this. Fifty returns -- you have a couple of hundred  
24 apparently, people you -- 100 of which I thought you already  
25 had returns on. So am I talking about 100 people you're

1 going to do returns on, so in two months you'll have all the  
2 returns?

3 MR. KATSAS: No, we're talking about 200 returns,  
4 because what we have for that hundred was returns produced  
5 in 2004 that effectively were combatant status review  
6 tribunal records. And the other side says well, that's  
7 fine, the government has argued for limited review on a  
8 combatant status review tribunal record; it should be stuck  
9 with that decision. And we have the CSRT records, we can  
10 produce them. So let me respond to that as best I can.

11 First of all, that view of things ignores four  
12 years worth of continuing and improving -- improved  
13 gathering of intelligence and information about detainees  
14 through military operations at Guantanamo Bay, through other  
15 operations of American intelligence agencies. The  
16 government should be entitled in 2008 to present its best  
17 case for holding each detainee as an enemy combatant in  
18 2008. In many cases, that will involve newly-developed  
19 evidence over the last four years.

20 In some cases, the process of updating might work  
21 in a detainee's favor, as we find that evidence we thought  
22 was reliable in 2004, we might look at with a more jaundiced  
23 eye in 2008. The point of the matter is this is very  
24 serious business, and the judgments that this Court will  
25 render should be based on the best most current evidence

1 that both sides have to offer.

2           So there's the temporal issue, the passage of  
3 time. There is a further issue with respect to very  
4 substantial intervening legal developments between the time  
5 that the combatant status review tribunal records were filed  
6 in 2004, until the present. Let me just give you a few  
7 examples of that. In 2004, at the time those records were  
8 filed, there was a combatant status review tribunal process.  
9 There was no -- there was no Detainee Treatment Act. The  
10 combatant status review tribunals were modeled on Article V  
11 Geneva Convention tribunals that the Supreme Court in Hamdi  
12 seemed to suggest would be sufficient in this context. And  
13 the defense department and the justice department went about  
14 doing their best to assemble those records and then defend  
15 the detention based on those records.

16           And we think based on Law circa 2004, both the  
17 administrative process was sufficient and a judicial review  
18 appellate in nature, whether through what later became the  
19 detainee treatment act or through habeas on a World War II  
20 model, would be sufficient. That was the landscape at that  
21 time. We have now learned, among other things from  
22 Boumediene, that we have -- we don't have an appellate-like  
23 model through the detainee treatment act. We don't have  
24 appellate-like habeas model along the lines of the World War  
25 II cases. We have habeas corpus that necessarily involves a

1 trial court taking some degree of its own evidence, and we  
2 will argue about the details of this, but the proposition  
3 favorable to us that the judicial review could start and end  
4 on a military record has been overtaken by legal events.

5 We also have the D.C. Circuit's intervention  
6 decision in Parhat, which makes clear that at least in some  
7 circumstances it might be insufficient for the government to  
8 rely on un-sourced intelligence documents, and we might have  
9 to put in some independent indicia of reliability. We will  
10 have to work out just what that entails, but I don't think  
11 it can be disputed that that is relevant guidance recently  
12 rendered that we need to take into account. It would be the  
13 height of irresponsible lawyering for us simply to file as a  
14 factual return in a -- in let's say Parhat's habeas case,  
15 the same record -- the same combatant status review tribunal  
16 record that we tried to defend in the D.C. Circuit, without  
17 at least going through the process of asking ourselves the  
18 questions that Parhat seems to require of us.

19 So both because of intervening factual development  
20 and intervening legal development, we feel very strongly  
21 that we ought to be entitled to defend these cases on the  
22 best record that we can produce today responding to the  
23 recent legal guidance that the Supreme Court and the D.C.  
24 Circuit have given us.

25 If you accept at least that proposition, then I

1 think the schedule we proposed is not only reasonable, but  
2 is from the government's view, quite aggressive, and  
3 frankly, strains our resources almost to the breaking point.  
4 The only view of things on which petitioners' time line can  
5 possibly make sense is if we are bound by stale tribunal  
6 records, which we think is wrong for the reasons I have  
7 suggested.

8 THE COURT: I did have a thought when you're  
9 talking about this, before you got to your development on  
10 the legal side, just on the factual side. If you were  
11 continuing to originally have whatever facts you had when  
12 you took custody of this individual, why should you be now,  
13 after the fact, allowed to amend those reasons to justify  
14 their original detention? Because that wasn't in the  
15 executives' mind when they originally picked these people  
16 up; they had whatever facts they had. You know, if they  
17 weren't sufficient, then they shouldn't have been picked up.

18 MR. KATSAS: Well, that's right, but we're not  
19 doing arbitrary and capricious review under the  
20 Administrative Procedure Act where we're sort of limiting a  
21 decision maker to his own rational. Although habeas is  
22 prospective in focus, it addresses future detention. This  
23 is serious business in the middle of a war, and we think for  
24 all of those reasons the most judicious and appropriate way  
25 of the Court looking at the question is whether there is a



1 sufficient factual and lawful basis for detention in 2008  
2 going forward, of detainees with -- prospectively in that  
3 time frame.

4 THE COURT: If I understand your presentation then  
5 correctly, is that in every case of someone who is still at  
6 Guantanamo, that you would you be filing -- you intend to  
7 file anyway, depending on what the Court does, a return for  
8 those who have not yet had a return.

9 MR. KATSAS: Right.

10 THE COURT: And it would be more than the CSRT  
11 filing; it would be supplementing that.

12 MR. KATSAS: What I'm saying is if in every case  
13 we preserve the need to ask ourselves difficult and  
14 time-consuming questions about whether the 2004 tribunal  
15 record reflects the best we can do now in light of further  
16 intelligence developed in the future and in light of the  
17 intervening guidance from the Courts, we may in particular  
18 cases ultimately make a judgment that the tribunal record is  
19 pretty good. In other cases, we might make a judgment that  
20 we can and should do better, but that's not a question that  
21 we can answer in gross before you today, until we have an  
22 expanded team of lawyers intensively working with the  
23 defense department and the intelligence agencies to see what  
24 we have as of today.

25 THE COURT: All right. So the prospect advanced

1 by petitioners of filing the CSRTs as a provisional  
2 statement in a week or two is you feel not sufficient, under  
3 your obligations representing your client, to get these  
4 cases at issue?

5 MR. KATSAS: I'm not sure how it would advance the  
6 ball much. We certainly take the position that that record  
7 shouldn't bind the government's defense if the case is going  
8 forward. And realistically, for the reasons that I have set  
9 out, we think it likely that in at least many of the cases,  
10 the best most current case we can provide in 2008 responsive  
11 to Boumediene and Parhat will look somewhat different from  
12 the tribunal records assembled in 2004. If that proposition  
13 is true, then the intermediate step of producing the  
14 tribunal records wouldn't seem to advance the ball very  
15 much.

16 One final point on returns, Judge Hogan, is, you  
17 know, to the extent that you view this as a close or  
18 difficult issue, it is exactly the kind of common procedural  
19 question that we think is appropriate for you to decide as  
20 coordinating judge and, you know, we're happy to have you  
21 decide it based on argument today. If you want to hear  
22 more, we're happy to submit further briefing on it. But the  
23 last point I'd like to leave you with on the question of  
24 returns is the debate that detainees' counsel and I are  
25 having on this point involves quintessentially a common

1 procedural question; namely, whether the government should  
2 be bound by its best tribunal case as of four years ago.

3 THE COURT: All right. Their request was the  
4 CSRTs, and then a week later file some type of status  
5 report. And if the returns, under your view, are going to  
6 be coming in seriatim over the next three months or so, or  
7 four --

8 MR. KATSAS: As soon as they are ready, consistent  
9 with the general parameters that we've set out. We're not  
10 proposing, in other words, to hold onto 50 returns until day  
11 60; we're proposing to generate them as quickly as we can.  
12 Post them as quickly as we can.

13 THE COURT: Two other matters on that occur to me.  
14 One is there would have to be some decision made on the  
15 priority of these returns.

16 MR. KATSAS: Right.

17 THE COURT: Which ones you're going to do.  
18 Whether it's the oldest case in this court and start moving  
19 forward; whether there are exceptions. There's always going  
20 to be some exceptions for people who maybe have special  
21 problems of illness, et cetera, perhaps their -- or whether  
22 you go with the longest-held detainee. But there are  
23 obviously -- it will have to have some direction of which  
24 returns you're going to focus on first.

25 MR. KATSAS: Exactly. We have given you what

1 seems to us a sensible proposal. Upon reflection, we think  
2 there should be a rational default rule. We think probably  
3 the first return should be key to a order filed in habeas  
4 cases, but we don't have a strong stake in the precise rule.  
5 We do think that whatever general algorithm the Court asks  
6 us to follow, have a degree of flexibility so that we don't  
7 end up in a position of if we come upon a particularly  
8 difficult return and get hung up for a bit, we're creating a  
9 backlog. We'd like some flexibility to have a rule of  
10 reason in terms of how we process the cases.

11           And then we've laid out for you a couple of  
12 exceptions to the general rule of we'll give you the first  
13 returns based on filing dates. The one that seems less  
14 controversial is that we differ returns of detainees who are  
15 no longer at Guantanamo Bay, we think is a legal matter,  
16 those cases are moot in any event. As a factual matter they  
17 are clearly less pressing and that judgment seems reflected  
18 within the structure of your two procedural orders, so I  
19 won't belabor it here.

20           The other principle that we proposed is that  
21 defendants charged in military commission prosecutions  
22 should have their returns generated last. With respect to  
23 those defendants, there are two independent basis for the  
24 detention; one which is at issue in the general core habeas  
25 cases is the prior enemy combatant determination. A second

1 independent and sufficient basis for detention is based on  
2 that detainee's status as effectively a pretrial detainee  
3 facing a prosecution under Congressionally sanctioned  
4 procedures with built-in time lines. We see no reason in  
5 the necessary triage judgements that the Court will have to  
6 make not to put those cases at the back on the theory that  
7 while the military commission is running its course, there's  
8 really nothing for the habeas court to do.

9           We recognize, Judge Hogan, that that is likely a  
10 proposal on which there may be disagreement, but again, for  
11 purposes of today, the point I'd like to stress most to you  
12 is that that, to the extent there's disagreement, that is  
13 sort of a common procedural traffic cop sort of question  
14 appropriately resolved by you as coordinating judge, so we  
15 develop once and for all with as much rationality as  
16 possible the rules by which we will generate returns rather  
17 than having resource intensive satellite litigation before  
18 each individual judge on a wasteful enterprise like that.

19           THE COURT: All right.

20           MR. KATSAS: With respect to legal issues that we  
21 think you could beneficially resolve during the time that we  
22 are generating the factual returns and thereby facilitate  
23 the ultimate disposition of the cases, I think they fall  
24 into basically three categories which I'll address in turn.  
25 The least controversial one seems to be issues with respect

1 to the protective order. I think parties agree that  
2 protective order issues are appropriately decided by you as  
3 a coordinating judge.

4 I can tell you that from the government's  
5 prospective, at the present time we have no -- we have no  
6 desire to seek amendments to the protective order, other  
7 than those sought by the CSO in the vast majority of cases  
8 that do not involve high-value detainees. We do intend to  
9 seek modification of the protective order with respect to  
10 high-value detainees in order to provide an appropriately  
11 greater degree of protection to the sensitive  
12 compartmentalized information uniquely at issue in those  
13 cases. And we would be happy to produce a briefing schedule  
14 for keying up and resolving those issues at the Court's  
15 convenience.

16 I'll let the other side speak for themselves, but  
17 I think where we are on that is agreement that those are  
18 issues for you, perhaps disagreement on what the underlying  
19 HBD protective order should say.

20 The second set of issues where we think you can be  
21 extremely useful to the parties and to everyone's interest  
22 in prompt resolution of the cases is what I will call  
23 procedural framework issues; the issues that address how  
24 these cases, each one of these cases will, in fact, be  
25 tried. As I said at the outset, we face an unprecedented

1 degree of uncertainty with respect to the details of habeas  
2 rules. We have identified a lot of those issues in our  
3 submissions: What is the nature of the government's initial  
4 burden? Can we rely on summary testimony by a knowledge  
5 affiant? Can we rely on hearsay? What is the legal  
6 consequence of producing the return, does it shift the  
7 burden to the detainee to prove more persuasive evidence?  
8 What are the circumstances in which the detainee can get  
9 discovery? On and on and on.

10 But we recognize that there is a question about  
11 how many of those issues you can usefully resolve at the  
12 outset. And we recognize it may be that you can only  
13 usefully push the law so far at the outset, and leave more  
14 fine-grained disagreements about procedural questions to be  
15 ironed out in the -- within the details of specific cases.  
16 But even though there might come a point at which you  
17 exhaust how many legal questions you can usefully resolve at  
18 the outset, the most important point for you to focus on  
19 today is that that enterprise is at least worth trying.

20 We think, for instance, that it would provide very  
21 significant guidance to all concerned if we knew at the  
22 outset that the framework envisioned by Justice O'Connor in  
23 her controlling opinion in the Hamdi case in order to govern  
24 an enemy combatant status determination for an American  
25 citizen held in this country, would be the governing

1 framework for these 250 to 300 cases. That would be  
2 tremendously useful for us to know. I have a feeling that  
3 our opponents will dispute that proposition because if you  
4 look at what they have demanded in their private letters to  
5 you and Judge Lamberth, the degree of process that they  
6 envision, there's no relationship whatsoever to what Justice  
7 O'Conner envisioned in Hamdi.

8           It seems to me there is at least a pretty  
9 significant possibility that we can frame some broad legal  
10 issues about, for instance, whether the Hamdi framework is  
11 controlling, and perhaps on the other side will argue that  
12 Boumediene somehow implicitly overrules the Fifth Amendment  
13 holding of Hamdi; that's a pretty good legal issue for us to  
14 debate. We can do that now and your resolution of questions  
15 like that would immeasurably advance the overall planning,  
16 party planning for the cases and coordinating disposition of  
17 the cases.

18           You won't know how much you can usefully resolve  
19 at the outset until you see very specific concrete proposals  
20 from the parties with respect to what I'm calling procedural  
21 framework. Our proposal on this issue is that you order  
22 briefing consistent with -- consistent with the general  
23 order of the Court and your procedural order that you try to  
24 resolve common procedural issues as much as possible. Let  
25 us brief these issues up. We will give you our general



1 sense of the procedural framework of these cases, and the  
2 other side will have every opportunity to argue not only  
3 that our procedures are wrong on the merits, if they care to  
4 make those arguments, but just as importantly, they will  
5 have every opportunity to make an argument that we should  
6 resolve 200 times before 15 judges the question of whether  
7 Boumediene implicitly overrules Hamdi rather than do so once  
8 at the outset. They can make arguments like that, and you  
9 can decide commonality questions no less than you can decide  
10 merits questions.

11 In our judgement, the only issue before you today  
12 is whether the enterprise of trying to establish a  
13 procedural framework is one worth at least attempting, and  
14 we think the answer to that question is clearly yes.

15 That brings me to my final category of common  
16 issues that we think you can usefully address as the  
17 coordinating judge. For lack of a better word, I will call  
18 them collateral issues. There are essentially two of them,  
19 I think we've discussed them. One is the 30-day notice  
20 issue and one is the conditions of confinement issues. They  
21 are collateral in the sense that in our view, they do not  
22 address the core habeas question regarding the fact or  
23 duration of detention. They address notices, they address  
24 transfer issues, they address condition issues. We would  
25 argue those are much more at the periphery of habeas and;

1 therefore, you're taking those issues does not really  
2 intrude into the individual judge's prerogative to decide on  
3 the merits, the necessary fact -- question, whether we have  
4 a lawful basis for holding a particular detainee as an enemy  
5 combatant. They're collateral in that sense.

6           Just as important, they are also, in our view,  
7 common. The reason they are common is that we have what we  
8 think is a pretty good set of legal arguments that this  
9 Court respectfully has no jurisdiction to address those  
10 sorts of issues in light of portions of the Military  
11 Commissions Act that we think survives Boumediene, and in  
12 light of what the Supreme Court said about transfer issues  
13 in Munaf. We may or may not be right ultimately in our  
14 position, but there's no doubt that those are common issues  
15 and it seems to us issues best resolved once and for all at  
16 the outset, so that again, my precious limited civil  
17 division resources are not consumed litigating conditions  
18 issues and transfer issues over and over and over, when it  
19 may well turn out that we were right -- that that is not  
20 part of constitutional habeas.

21           I should note, you asked about the D.C. Circuit.  
22 The D.C. Circuit has involvement in both of these issues.  
23 With respect to 30-day notice, that issue is teed up in a  
24 D.C. Circuit case called Kiyemba. You have the docket  
25 number in our letter. We, within the last day or two, filed

1 a motion to govern future proceedings in Kiyemba, in which  
2 we suggested to the D.C. Circuit that they allow limited  
3 accelerated supplemental briefing in Kiyemba to take account  
4 of Boumediene and other legal developments since the cases  
5 were originally briefed, and if necessary, set the case for  
6 an expedited -- I believe it would be a second oral  
7 argument.

8           With respect to conditions issues, those are teed  
9 up in Belbacha, and we have a motion to govern future  
10 proceedings in the pipeline. We expect to file it in a  
11 matter of a few days, and we expect to take a very similar  
12 task in which we would ask the D.C. Circuit to give the  
13 parties a limited chance to address arguably intervening  
14 legal developments, and then to decide that appeal as  
15 expeditiously as possible.

16           And I think the fact that those pending actions in  
17 the D.C. Circuit would so profoundly affect the overall  
18 conduct of this litigation just underscores the point that  
19 it is something sensibly coordinated, certainly horizontally  
20 among the judges of this court, if you think appropriate  
21 vertically between you and your colleagues in the D.C.  
22 Circuit.

23           THE COURT: Judge Lamberth has, as you know,  
24 written to the circuit chief judge asking to see if they can  
25 expedite these cases. I was not aware you had filed

1 materials, at least in the one case, asking for additional  
2 briefing but on an expedited basis.

3 MR. KATSAS: We have motions to govern due in all  
4 of the many D.C. Circuit habeas and DTA cases that have been  
5 held for Boumediene, and so we are very much in the process  
6 of asking that court to ramp up and itself address what we  
7 regard as common questions that will be very helpful to  
8 everyone involved as these cases go forward.

9 Let me just check my notes to see if there's  
10 anything else; that is our affirmative proposal in a  
11 nutshell. Nothing else is leaping out at me, so I would  
12 just invite Judry to come up and elaborate and hopefully not  
13 correct, but if necessary, correct anything that I have  
14 said.

15 THE COURT: Thank you. I've got some specific  
16 questions on cases and numbers, maybe he has that  
17 information.

18 MR. SUBAR: I might, Your Honor. We'll do our  
19 best.

20 Just to fill in a few of the details with regard  
21 to some of the details that Mr. Katsas was talking about, to  
22 start out on the question of the filing of factual returns,  
23 Mr. Katsas explained why the proposal put forward by  
24 petitions isn't required by law and wouldn't be useful. I'd  
25 like to just point out briefly that petitioner's proposal

1 would also not be realistic and it wouldn't be well suited  
2 to achieve the goal that we share with them, which is the  
3 expeditious and fair resolution of these cases.

4           And that's simply because, as Mr. Katsas  
5 indicated, he has limited resources that he gets to our  
6 office, which has been assigned to the task of handling  
7 these cases. And without the resources to act more  
8 aggressively that the already aggressive proposal that we've  
9 put on the table, we just won't be able to make these cases  
10 move forward in the way that the Court and petitioner's  
11 counsel and the government as well all want to happen.

12           As we've indicated to the Court, as of the decision  
13 date with regard to the Supreme Court's Boumediene decision,  
14 there were just four people in our office assigned on a  
15 full-time basis to -- or essentially a full-time basis to  
16 work on these cases. There were others who helped out as  
17 their schedules and the needs of the litigation warranted.  
18 But were ramping as quickly as we can to have hopefully  
19 before too very long some 50 lawyers at the Justice  
20 Department working on this. But in order to get from here  
21 to there or I should say from there to there, from where we  
22 were a couple of weeks ago to the full complement of 50,  
23 because we're already fortunately headed in that direction,  
24 we have to find lawyers, we have to clear lawyers, we have  
25 to train lawyers, we have to get them up to speed. We have

1 to house lawyers, we have to find a way to put them in  
2 offices, put them at desks, plug in their computers, get  
3 them telephones, explain to them what's needed, and put them  
4 in positions where they'll be able to deal with this  
5 litigation. And if we don't have that, then a couple of  
6 hundred lawyers on petitioner's side clamoring for immediate  
7 filings of combatant status review tribunal records, even if  
8 they were available and even if it was otherwise warranted  
9 that we produce them, just wouldn't happen.

10           So even aside from the considerations that  
11 Mr. Katsas outlined with regard to the reasons that the  
12 government should be given some period of time to put the  
13 factual returns into a more appropriate form to allow the  
14 Court to resolve these cases, given those considerations and  
15 the ones that I've just mentioned, it's more appropriate  
16 that a proposal along the lines of the one that we've made,  
17 which is, as Mr. Katsas mentioned, as I just pointed out  
18 quite aggressive itself, is quite appropriate.

19           Moving on to the next set of points that  
20 Mr. Katsas addressed having to do with the resolution of  
21 some of the procedural framework issues governing these  
22 cases. First of all, with regard to the protective order  
23 issues, I think those can be addressed in the following  
24 fashion: We're prepared to speak with petitioner's counsel  
25 in very short order with regard to both the issues

1 implicated by the interest of the Court's security officers  
2 which I think the Court is aware of, and with regard to the  
3 issues raised -- in the cases that Mr. Katsas referred to as  
4 the high-value detainee cases.

5           With regard to the CSO issues having to do with  
6 filing requirements and so forth, we can sit down with  
7 petitioner's counsel and the CSOs fairly quickly, hopefully  
8 iron those out without the need for court involvement, other  
9 than final sign off on new parts of those, the order that  
10 pertained to filing. But if court involvement it turns out  
11 is necessary, we can come to you and seek that.

12           With regard to the high-value detainee issues, I  
13 don't know that we'll come to resolution with regard to  
14 those issues with counsel, but I'm reasonably confident that  
15 we can at least narrow the issues and then present them  
16 fairly quickly. And what I'd like to propose is that with  
17 regard to both of those issues, that we confer over the next  
18 week and if by Wednesday of next week we either have not  
19 come to resolution or whatever the status might be, we can  
20 give the Court an update and at that point suggest a  
21 briefing schedule, if one is needed, with regard to those  
22 points.

23           With regard to the other procedural framework  
24 issues that Mr. Katsas outlined that can be litigated while  
25 we're in the process of updating the factual returns, we'd

1 like to propose the following: Those, as Mr. Katsas  
2 indicated, are a set of issues that are largely legal in  
3 nature that we can be briefing up over the next several  
4 weeks. We'd like to propose, rather than having a system  
5 where one party goes first and then we have a ping-ponging  
6 back and forth of briefs that could entail three or four  
7 rounds, that we have simultaneous briefing beginning two  
8 weeks from tomorrow for opening briefs, two weeks after that  
9 for responses. And then the matter would be before Your  
10 Honor to resolve the questions with regard to those  
11 procedural framework issues. And that would allow Your  
12 Honor hopefully enough time to resolve those issues in  
13 advance of the filing of the first set of new factual  
14 returns. So that's it with regard to procedural framework  
15 issues.

16           With regard to the collateral common issues, as  
17 Mr. Katsas and Your Honor just discussed, some of those  
18 issues are before the Court of Appeals and hopefully the  
19 Court of Appeals will resolve those in a way that gives this  
20 Court and the parties direction. Meanwhile, those issues  
21 are -- some of those issues are being briefed up right now.  
22 We would suggest and respectfully request that rather than  
23 having those issues resolved by the various different judges  
24 in whose cases the issues arise, that Your Honor, as  
25 coordinating judge, bring them together, the 30-day notice



1 issues and conditions issues. And to the extent necessary  
2 by virtue of the particulars of any given motion and what  
3 the Court of Appeals may or may not do on whatever schedule  
4 it might follow, that Your Honor resolve those issues as may  
5 be appropriate.

6           Given the history of this litigation, we can  
7 anticipate that there very well may be additional motions  
8 that get filed relating to conditions of confinement or  
9 other collateral points like that. We'd like to make a  
10 couple of proposals that we think would help the Court and  
11 the parties as well, so that we avoid getting bogged down in  
12 figuring out multiple briefing schedules with paper, I  
13 suppose at this point, electronics floating around here and  
14 there without sufficient direction. And those two proposals  
15 are as follows: First of all, as we indicated in the letter  
16 that went to Your Honor and Chief Judge Lamberth, we think  
17 that it would be appropriate that with the exception of  
18 ultimate dispositive motions and perhaps with the exception  
19 also of motions for extension of time, that before motions  
20 be filed that the Court follow a practice that's followed in  
21 some other courts with some regularity; and that is to  
22 require the parties to confer briefly with the Court before  
23 the filing of such a motion. We think that that could, in  
24 addition to the ordinary meet and confer requirements of the  
25 local rules, add to the streamlining of the briefing of

1 motions and their resolution, and perhaps even hopefully  
2 eliminate the need to litigate some points.

3           The other suggestion is that the Court set up a  
4 process whereby representatives of the petitioner's,  
5 representatives of the government confer with the Court by  
6 telephone. I suppose it could be in person, but by  
7 telephone might be more expeditious, on a periodic basis  
8 just to see what's happening in the litigation. That's our  
9 suggestion on that.

10           And the final point that I'd like to address has  
11 to do with something that both Your Honor and petitioner's  
12 counsel mentioned, and that had to do with the docket clean  
13 up question; questions of duplicate petitioners and figuring  
14 out whether cases are still on the docket, should be  
15 dismissed, whether cases that have been dismissed are  
16 appropriate for reinstatement. We would propose to confer  
17 with petitioner's counsel on that and to get back to the  
18 Court by July 21st, which is a week from Monday. We would  
19 hope to be in a position to have all the outstanding  
20 questions in that regard answered; we're not sure that we'll  
21 be able to do that, but we propose to get back to the Court  
22 by that date, either with answers or with an indication as  
23 to how much more time it looks like the parties would need  
24 to resolve those issues, if any, that would still be  
25 outstanding at that point.

1           So I think with that, Your Honor, that's our  
2 proposal.

3           THE COURT: Let me ask you first as to some of  
4 these potential categories, we were told before, and it may  
5 have changed in number now, there were approximately 54  
6 people cleared for release that have not been released.

7           MR. SUBAR: That's correct, Your Honor.

8           THE COURT: Seventeen of those would be the  
9 Uighurs that are part of a motion to consolidate that was  
10 filed today; is that your understanding?

11          MR. SUBAR: That is my understanding.

12          THE COURT: I don't know if they're all cleared  
13 for release, I shouldn't say it that way, but --

14          MR. SUBAR: I'm sorry, Your Honor?

15          THE COURT: I'm not sure actually that all the  
16 Uighurs are cleared for release.

17          MR. SUBAR: That could be, I'm not certain of the  
18 exact numbers.

19          THE COURT: But some of them will be part of that  
20 54.

21                I received a motion to consolidate all the Uighurs  
22 cases today before a District Court judge. As the  
23 government indicated, Mr. Henry was called and said he had  
24 no position; is that correct?

25          MR. SUBAR: That's correct, Your Honor. Our

1 position at this point is that as a general proposition we  
2 don't necessarily oppose that idea. I'm not sure if  
3 Mr. Katsas has anything to add to that.

4 MR. KATSAS: No, I don't think we -- we don't  
5 necessarily oppose it. A couple of points, though. I think  
6 the motion mistakenly characterizes the D.C. Circuit opinion  
7 in Parhat as having definitively resolved against us  
8 dispositive legal questions that, if resolved against us,  
9 would compel a release of all of the Uighurs. In fact, the  
10 D.C. Circuit expressly reserved the broader legal questions  
11 and ruled against us based on an asserted unreliability of  
12 particular proof documents.

13 We don't object in principle if in the 17 Uighur  
14 cases the proposal is to brief up the potentially  
15 dispositive legal issues that the D.C. Circuit expressly  
16 reserved. So in that sense, we are comfortable with the  
17 proposal and think it's consistent with our general approach  
18 of trying to do things once rather than many times.

19 We would simply ask that if the cases were  
20 consolidated, that we sort of think about the consequences,  
21 if any, of that for how we go about generating returns. I  
22 just wouldn't want a situation which as a consequence of  
23 consolidation, we have 17 Uighur returns due on the front  
24 end of things, and that doesn't count towards our pacing of  
25 50 per month.

1           THE COURT: Right. I think that I understand that  
2 issue, but it seems to me that it does fit in with the  
3 premises the government has been interested in in trying to  
4 resolve these other than individual trials, these  
5 preliminary matters. I can't promise you what the judge  
6 would do who would be assigned these cases and how he would  
7 approach them obviously.

8           I went through the motion, I have called each of  
9 the judges. One was out and I couldn't reach him, who has  
10 one case. All the judges that have these cases, which are  
11 Judge Huvelle, Judge Sullivan, Judge Walton and Judge  
12 Urbina -- I didn't reach Judge Robertson who has one case --  
13 all the other judges consent to their assignment to one  
14 judge for all purposes at this time. Whether or not that  
15 judge would order amended return or returns, I don't know.  
16 And what the issues are going to be raised, I'm not sure.  
17 The petitioners felt that they're all in the same boat as  
18 the Court of Appeals individual was. I think some have been  
19 cleared for release and some others may not, so there may be  
20 some differences between the group. But it does seem  
21 they're a group of rather unusual individuals who are tied  
22 together by the same nationality and apparently political  
23 beliefs that make them somewhat unique in this process.  
24 There's a long history of the Uighurs here in this court for  
25 Judge Robertson, and then being released for the Court of

1 Appeals to decide on his case.

2           So I'm going to grant that motion for  
3 consolidation of the Uighurs cases filed herein today. Let  
4 me get the motion out so I can refer to it. The motion by  
5 all 17 Uighurs currently detained in Guantanamo Bay for  
6 consolidation of their petitions for habeas corpus in civil  
7 action number 0515-09, 0516-02, 0517-04, 0523-70, 0523-86  
8 and 0523-98, is granted. They asked for expedited  
9 consideration, I'm not sure what that means. That means in  
10 my -- granting is granting, the consolidation would be up to  
11 the judge that's assigned to consider how he'll proceed in  
12 these cases.

13           The judges I've discussed this with have all  
14 agreed that Judge Ricardo Urbina will be assigned this case  
15 in accordance with local Rule 40.5(c)(2), having the  
16 majority of these cases with the earliest case number. So  
17 Judge Urbina will have the 17 Uighur cases I've just  
18 designated for his consideration to do with which as he  
19 wants.

20           Let me ask a couple of other questions. We are  
21 going to identify, would this be this 21st date or another  
22 date, as to the others not -- excluding the Uighurs that are  
23 cleared for release, those individual cases or  
24 petitioners --

25           MR. SUBAR: I'm sorry?

1           THE COURT: Do we have the identity of the  
2 petitioners who are cleared for release, the numbers which  
3 are approximately 54, some will be those Uighurs, but  
4 whatever number there would be after you subtracted the  
5 Uighurs, do we have that, who they are precisely?

6           MR. SUBAR: Yes, we do.

7           THE COURT: Is it changing somewhat? I mean, are  
8 more being released?

9           MR. SUBAR: A couple of people who I believe were  
10 on that list were released, were released recently.

11          THE COURT: All right.

12          MR. SUBAR: But the number is fairly close to --

13          THE COURT: What I wanted to ask you, and I'll ask  
14 the plaintiff's counsel and petitioner's counsel is, does it  
15 make sense to consolidate those who have been cleared for  
16 release between a particular judge to move those forward?

17          MR. SUBAR: It probably does, Your Honor.

18          THE COURT: I mean, we don't need returns on  
19 those, I take it. I mean, I take it the issue is finding a  
20 country they need to go to?

21          MR. SUBAR: That's the issue that the executive  
22 branch is struggling with.

23          THE COURT: All right. Well, maybe we can assist  
24 them to find a place. All right.

25          As to the issue, and I think I understand the

1 assistant attorney general, I just want to be clear, the  
2 government's proffer is not to file returns in cases where  
3 they have no returns yet filed, and you believe that's  
4 approximately a hundred cases.

5 MR. SUBAR: Approximately, that's right.

6 THE COURT: And to file amended returns on all  
7 other cases where you've already filed returns, presumed  
8 in most -- in all or most of those cases?

9 MR. SUBAR: That's right. We don't know exactly  
10 the number yet, but that's correct.

11 THE COURT: Okay. And because you're saying that  
12 the intervening legal consequences and additional knowledge  
13 that's come to light, you believe that it is appropriate to  
14 file these amended returns and not rely upon the original  
15 reports that you used in these cases?

16 MR. SUBAR: That's correct, Your Honor. If I may  
17 just underscore two points; one, is to do anything else  
18 wouldn't be particularly realistic. And number two, the  
19 position that we've explained to the Court, we think would  
20 be more consistent with the Supreme Court's Boumediene  
21 decision which said that the DTA process is not an adequate  
22 substitute habeas corpus.

23 THE COURT: Right.

24 MR. SUBAR: The Supreme Court said forget about  
25 the DTA, what the petitioners here are saying essentially is



1 remember the DTA process that we argued to the Supreme Court  
2 wasn't adequate, well we hereby embrace it and we ask the  
3 court to tell the government to follow it and to use the  
4 CSRT record that was used in it. We say no, no, no, let's  
5 pay closer attention to what the Supreme Court had to say,  
6 and prepare appropriate factual returns that are up-to-date  
7 and, as Mr. Katsas indicated, in some cases might well  
8 eliminate issues that would otherwise have to be litigated  
9 if we went forward on the basis of the old returns.

10 THE COURT: There's been an effort by the  
11 government to ramp up after Boumediene to the 50 lawyers  
12 approximately suggested that are going to be required to  
13 handle this on your schedule. Is there a concomitant  
14 commitment by the Department of Defense or the CIA or the  
15 State Department, other agencies that have to supply this  
16 information to file these returns to wrap up similarly? I  
17 mean, I'm going to get motions that you can't get them  
18 because you haven't heard from your clients about these  
19 materials, et cetera?

20 MR. SUBAR: There is a similar effort underway and  
21 a similar commitment. I can't say that the numbers are  
22 identical; the needs are different, but yes. The answer to  
23 your question is yes.

24 THE COURT: I'm afraid that I'll hear that, you  
25 know, 25 lawyers have asked the CIA for various information.

1 They're going to come back and tell me, well, one person is  
2 assigned to this and we can't get --

3 MR. KATSAS: Judge, the other affected agencies  
4 are all well aware of DOJ's view of what this will take and  
5 what the scheduling is. And they have represented to us  
6 that they will make commitments that enable us to litigate  
7 these cases on that time frame.

8 THE COURT: Okay. All right. On the motion to  
9 give notice, 30 days notice for a transfer, my review of the  
10 record indicates that most of the judges have granted these  
11 motions at the District Court level that have been asked to  
12 do so.

13 MR. SUBAR: Yes, but not all. Some have denied  
14 it.

15 THE COURT: Right. And that the government has  
16 appealed that, that it's been sitting up there for some time  
17 because of the stays granted. And I think that it's  
18 appropriate that I address that shortly.

19 Now, do you have any issues with my granting  
20 motions to lift all stays that have been entered in all  
21 these cases?

22 MR. SUBAR: The motion -- as to the motions to, as  
23 simply stay the proceedings pending Boumediene, no, we have  
24 no objecting to the lifting of the stays.

25 THE COURT: All right. I'm going to enter an

1 order granting the motion. There's one motion, but I'm  
2 going to make it applicable to all cases that it's  
3 applicable to, and that is the cases that were stayed here  
4 in this court. And the Circuit still has a couple of cases  
5 they haven't sent mandates back on; I'm not sure I can  
6 operate in those cases. Now, there was a motion that came  
7 in today to hold an immediate hearing and produce matters in  
8 seven days. There's still no mandate back in that case.

9           So the motion to lift stay, I'm going to grant and  
10 make it applicable to all cases that have been stayed  
11 pending Boumediene in this case, so the parties can move  
12 ahead as we enter appropriate scheduling orders.

13           The motion to vacate dismissals, have you all  
14 taken a position or are you going to take a position on  
15 July 21st on that? Is that what your proposal was?

16           MR. SUBAR: It probably makes sense for us to  
17 confer on that issue to a certain degree. As a general  
18 proposition, we won't oppose that. The question, the main  
19 question in my mind is whether there are some cases in that  
20 category as to which the detainees have been transferred out  
21 of Guantanamo Bay and; therefore, in our view, the cases  
22 should remain dismissed. If the petitioners in those cases  
23 agree with that, then that's fine. There might be some  
24 cases where there's disagreement. But as a general  
25 proposition, we wouldn't have a problem with that. It might

1 be premature for the Court to enter an order in that regard.

2 THE COURT: I agree. I think I would have to have  
3 a list of those cases. And I think for the record I should  
4 have probably a motion to vacate the dismissal on the  
5 record, then I can grant the motion. I'm not sure I can do  
6 a blanket reinstating of all cases without something in the  
7 file, particularly if any get contested because the  
8 government feels they should not be reinstated, no longer in  
9 the possession of -- the individuals no longer in the  
10 custody of the United States.

11 I am concerned on the timing and a couple -- on  
12 the sequencing of the cases. I think it's important if this  
13 Court, as the coordinating judge sets a schedule, we keep to  
14 it, that other judges are judge, individually, may set some  
15 other schedules because of the Uighur case or Judge Leon.  
16 But that as a overall coordinating judge, I hope we can  
17 coordinate those as well among ourselves.

18 But I'm concerned about time and extensions. And  
19 whatever I decide, I would anticipate the parties will  
20 follow and that motion for extension will be rarely granted.  
21 And that any type of extension would have to be approved by  
22 the court. It makes no sense to set a schedule and to make  
23 continuances.

24 It does seem to the Court, and I haven't heard  
25 from the plaintiffs, I'm going to let them hear my thinking

1 now so they can answer that at the same time they're going  
2 to answer the government's issues, that there should be some  
3 type of priority or sequencing of these cases. Without  
4 that, we leave it to counsel to rush to each judge and  
5 insist their case is the most worthy of being heard first,  
6 whether they've been here a year or six years, or held for  
7 six years or held for six months. There are some exceptions  
8 perhaps that are necessary that can be taken on a case by  
9 case basis, but I don't understand the position of the  
10 petitioners that it's a free for all and whoever gets to the  
11 Court first wins. I think that is an invitation to chaos  
12 and an improper way to hand the cases by the Court.

13           So I'm going to consider setting a priority of  
14 cases as to how the returns will be done and as to how they  
15 will be keyed up for decision with some exceptions that may  
16 be necessary.

17           The protective order, I do think the parties can  
18 consult on both protective orders, on the regular protective  
19 order to a high-value order, and bring to me their  
20 suggestions as soon as possible. I do know the CSOs are  
21 pressed beyond belief; that is, court security officers.  
22 They're a small organization and justice that was only meant  
23 to handle CEPA cases, only a few in the country, and  
24 suddenly they've been pressed into service, handling  
25 hundreds of cases, hundreds of clearances all at once. They

1 need help, they need more money, they need more budget. The  
2 chief judge has been working on that to the top of the  
3 Justice Department, to help to move these matters forward.  
4 There are security issues in getting clearances for various  
5 types of individuals; whether there are more lawyers,  
6 whether there are law clerks, whether they're translators.  
7 We had discussed that in meetings and we've been familiar  
8 with those issues. We're going to do the best we possibly  
9 can to move them along.

10           One thing that will help us, changing the filing  
11 procedure and it should be in the amended order to reflect  
12 that, the parties can work on. Regular filing should not  
13 have to be taking over to the CSO and handed to them and  
14 they sit on it for weeks and, you know, stamp it in and  
15 bring it over here. I assume that with electronic filing we  
16 may be able to circumvent some of that. Classified one  
17 obviously we have to continue with and confidential ones.  
18 But I think the parties can work on that with the CSO very  
19 well.

20           The cleared for release group, I think the  
21 petitioners should seriously consider allowing those to be  
22 keyed up before one judge that can evaluate those and  
23 perhaps encourage their quick release. The already released  
24 cases do not seem to me to be in the forefront. And the  
25 military commissions cases, we'll see what Judge Robertson

1 will do, but we'll have to think about whether they should  
2 be the first ones to get returns and to be keyed up for a  
3 hearing when they may be going to trial and military  
4 commission. And whether I decide that or not, we'll have to  
5 see. After whether or not conditions of confinement also  
6 would be excluded by the Military Commissions Act.

7           The 30 day notice of transfer I've talked about a  
8 little bit. I'm probably going to order some immediate  
9 briefing on that because it's a concern and there's some  
10 case law on that; some goes both ways, frankly.

11           Let me hear from plaintiffs for a few minutes on  
12 their responses. The government really has not changed  
13 their position substantially from their earlier one. You  
14 can talk about the return progress and their timing and your  
15 concerns, and how that goes forward. And then also  
16 obviously on any common issues you think we can present or  
17 not, as well as the administrative issues. I think you  
18 agree on administratively there are certain things we can  
19 do.

20           MR. KADIDAL: Thank you, Your Honor. As I think I  
21 said at the outset, we don't have any objection to Your  
22 Honor expediting treatment of administrative issues, I mean  
23 including all the ones that you mentioned. I think  
24 hopefully we can stipulate with the government on a number  
25 of those.

1           Let me just very briefly respond to some of the  
2 things that were said that touched on my initial  
3 presentation, and then turn things over to my colleague.  
4 First of all, Mr. Katsas asked how the CSRT record could  
5 advance the ball here. I think that's quite obvious, it's  
6 essentially the basis for our knowing what the allegation  
7 is. You know, there are men here who have been held for six  
8 years plus, who have really no substantive clue about why  
9 they're being detained. And beyond that, this would provide  
10 the predicate for a factual investigation, including an  
11 investigation potentially on the ground in some of these  
12 countries where people are detained, and also would allow  
13 petitioners to formulate discovery.

14           Now, in terms of some of the other things that  
15 Mr. Katsas said, I thought I heard him saying in regard to  
16 the returns, I thought I heard him concede that -- that the  
17 government can't walk in in a habeas case with a multiple  
18 hearsay affidavit and depend on that when the returns were  
19 being discussed. And then when the question of briefing of  
20 common legal issues was being discussed, I thought I heard  
21 the opposite; that this Court somehow needs to decide  
22 whether or not these hearings can go forward on paper.

23           Now, of course, the government's whole notion that  
24 somehow briefing these common legal issues will expedite  
25 matters is tied to their, you know, we think rather dilatory



1 schedule for producing returns. It's only worth Your Honor  
2 trying to resolve those issues in the way that they suggest  
3 if there are loads and loads of time available before we see  
4 any substantive sort of final factual returns. In a lot of  
5 ways, I think given the posture of these cases, the notion  
6 of amending these or the government getting broad leave from  
7 this Court to amend every single return that they filed  
8 already is much like a situation where a party seeks a last  
9 minute very substantial extension on the eve of trial.  
10 Typically, judges are very skeptical about that and want to  
11 see a very specific basis for why that extension ought to be  
12 granted. I think we're in that sort of setting.

13 In terms of resources, I realize, you know, that  
14 generally courts don't see it as their province to tell  
15 parties how to staff cases. But we heard here today that  
16 the justice department had four lawyers assigned to these.  
17 We at the Center for Constitutional Right, a little -- five  
18 lawyers in our office. So I think, you know, we may be  
19 seeking to get this transcript today sealed from the eyes of  
20 the foundations that fund us.

21 But one thing that was reported in the media, we  
22 have no way of knowing if this is true, but it's consistent  
23 with what I've heard, is these cases are being staffed on a  
24 volunteer basis; that civil division lawyers are being given  
25 the option to opt out for personal, philosophical or moral

1 reasons. You know, when we have a case crisis in our  
2 office, and they have happened frequently during the  
3 pendency of these Guantanamo case, we just make people do  
4 it. And I think that's the attitude that the Court ought to  
5 take to Justice Department staffing.

6 Now, I take it, that these four lawyers are  
7 responsible or were responsible up to the date of the  
8 Boumediene decision for processing the records in 170-odd  
9 cases, I think is the number that we had pending. You know,  
10 that for me raises another sort of question, which is really  
11 how much do the lawyers have to do with the process of  
12 producing the returns as opposed to people in DOD or the  
13 intelligence agencies. I think, you know, that should play  
14 into this Court's thinking about the long delays that the  
15 government has asked for in producing records.

16 Let me very quickly address a few other stray  
17 points. On the high-value detainee or as we call them CIA  
18 detainees, or as Mr. Truitt called in the closed session,  
19 the torture detainees, I think we really don't have enough  
20 of those cases filed yet to try to do that, coordinated  
21 process. There are two right now.

22 THE COURT: We two before us. I think there's  
23 seven in the Circuit they're going to be sending back down.

24 MR. KADIDAL: Right. Seven DTA actions. I think  
25 we ought let those habeas petitions get filed and let people

1 think about strategic concerns in their own cases before we  
2 sit down again to address that, that protective order issue  
3 in whatever fashion it needs to be addressed. Although our  
4 position, of course, which was briefed I believe to Judge  
5 Walton in Magee Conn's case was that the conventional habeas  
6 protective order which mentions in its definition of  
7 classified information top secret and SCI information are  
8 included in that definition. We think that's perfectly  
9 adequate to deal with these cases.

10           On the Military Commissions cases; that is, the  
11 cases of habeas petitioners who have pending military  
12 commission charges against them, I think those folks ought  
13 to be allowed to be heard by this Court separately, but I  
14 will point out one thing, which is that Hamdi counsel I  
15 believe has briefed the issue of whether or not the habeas  
16 court ought to be the one that make the determination  
17 whether someone is an enemy combatant, which itself is a  
18 jurisdictional predicate for the military commission having  
19 jurisdiction over that person. So that's an argument that I  
20 think is pretty substantial sounding to me and probably  
21 needs to be addressed here.

22           There's a lot of mention in Mr. Katsas'  
23 presentation of the Hamdi case. I'll just say very briefly  
24 that that case involved a classic sort of battlefield  
25 detainee, someone bearing arms engaged in hostile activities

1 against the U.S. We know from an analysis of the 512  
2 transcripts of CRT proceedings, that somewhere around four  
3 percent of people at Guantanamo were actually captured on  
4 the battlefield. We don't think Hamdi is terribly relevant  
5 to the vast majority of the cases out there.

6           And finally on the transfer issue, if there is  
7 indeed no habeas jurisdiction over questions of transfer, it  
8 is surprising that there are, you know, a number of  
9 extradition habeas cases on the books, all of which were  
10 cited to the Court in Munaf and Omar. Justice Scalia, it  
11 has been pointed out to me, cited the same section of the  
12 1679 Habeas Corpus Act that I cited to you in the closed  
13 sessions. And, you know, again, if we are indeed in the  
14 common law or constitutional habeas world as the government  
15 put it in discussing this transfer issue, I think there's  
16 clear precedent there for a 30-day notice order. And the  
17 Circuit acknowledged the existence of the 30-day notice  
18 orders in the -- I believe the Parhat case.

19           I'll just mention that our motion to govern is due  
20 on Monday in the 30-day notice order appeals, and we are  
21 asking for expedition. And finally, Mr. Subar the notion of  
22 pre-motion conferences. I'll just point out briefly that  
23 that's not in the rules of this District; there is already a  
24 requirement to confer, and we have no issue with the Court  
25 enforcing that requirement. Now, while the government may

1 think conferring between counsel is burdensome, they would  
2 have to respond by letter to every request for a promotion  
3 conference, at least that's been the norm in the case I've  
4 worked on with a requirement like this. So I don't think it  
5 really makes the process more efficient to essentially have  
6 the Court decide a promotion twice, which is what we would  
7 see with that sort of promotion conference requirement.

8 Now, if what we want is fewer ECF filings,  
9 especially given that, you know, those have been doubled up  
10 because we file a Notice of Filing whenever there's, you  
11 know, something that goes to the CSO, and then we have to  
12 file the actual document once it's cleared. Well then, we  
13 could institute a process as exists in the Court of Appeals  
14 where one of the parties collects all the briefs when the  
15 reply is done or the final reply, only then are they filed  
16 with the Court. If that's something that's thought to be  
17 necessary, but we don't think the promotion conference idea  
18 makes much sense.

19 THE COURT: I think that's suggestion is  
20 worthwhile to explore with the government, and as I  
21 understood, we were going to get a report back on July 21st  
22 on a couple of these issues, in clearing the docket up, et  
23 cetera, and that's one of the things you can consider that  
24 may be helpful.

25 All right. At the same time, we're going to get a

1 report identifying the petitioners in limine or duplicate  
2 entries et cetera by then that you all are going to work on.

3 MR. KADIDAL: Thank you. Let me turn things over  
4 to my colleague, Ms. Guterrez.

5 MS. GUTIERREZ: Your Honor, thank you for the  
6 opportunity to speak to you today, a day in court in the  
7 Guantanamo cases is a treasured moment, and on behalf of  
8 both myself and my colleagues we thank you also for the  
9 opportunity for those of us who couldn't speak today, to be  
10 able to provide you with written submissions. And I'm sure  
11 that our colleagues will do so on a number of these points.

12 These have always been habeas cases, they've never  
13 been administrative reviews. They were habeas cases in 2000  
14 when they were filed; they were habeas cases in 2004 and  
15 2005, when the factual returns were initially filed, and  
16 they are habeas cases today in 2008. And as the Supreme  
17 Court has said, as the government has said, as we have and  
18 as Your Honor has said, expedition is really a priority in  
19 these cases.

20 I just want to go through six points briefly, both  
21 points the Court addressed and also points raised by the  
22 government. Your Honor, there are cases that are ready to  
23 do go now. As you've identified, these may fall into two  
24 different categories; both the set of petitioners who have  
25 been cleared for release, although these individuals may

1 need judicially supervised negotiations in order to  
2 administer a release to a safer country. Some of these  
3 cases may also need factual returns filed because  
4 individuals are being held in detention based upon the  
5 United States finding of their enemy combatant status. And  
6 so there's questions of whether collateral consequences may  
7 exist in the habeas cases. There are also cases of  
8 individuals where the petitioners counsel are prepared to  
9 move forward on summary judgment motions, and there should  
10 not be any delay in those cases.

11           With respect to generating factual returns, both  
12 returns in cases where no government information has been  
13 filed as well as the amended returns, I'll just briefly  
14 speak to those cases where no information has been filed.  
15 The government today has not denied that it could provide a  
16 CSRT or annual review board, or some cases, the, quote,  
17 government information that was compiled for a Detainee  
18 Treatment Act case. This information or these files, no  
19 matter what you call them, are files purporting to justify  
20 the security concerns or the basis for the detention of our  
21 clients. And this information is in the hands of the  
22 government now, these files, and there's no reason at all  
23 why this information cannot be provided to petitioner's  
24 counsel by the end of next week.

25           And they could simply call that information

1 whatever they want in the past; however, it was categorized  
2 in 2004, but today it should be provided by the end of next  
3 week. The CSRTs in 2004 were prepared in the context of  
4 habeas litigation. These cases were not Administrative  
5 Procedures Act cases; they were not administrative review  
6 cases. But in the habeas litigation, the coordinated habeas  
7 litigation before Judge Green, these were certainly provided  
8 as initial factual returns.

9           With respect to the government's desire to amend  
10 factual returns based on intervening legal and factual  
11 developments, we just want to briefly make a few points  
12 about that. First, with respect to the idea that there has  
13 been factual developments that justify a detention that  
14 occurred in 2002 as ongoing, we would ask and point out that  
15 the government needs to move to amend and they need to show  
16 cause in order to do that under the governing habeas  
17 jurisprudence. The government, if it's identifying new  
18 factual information; one, it should be new substantive  
19 information. If it deals with things like affiliations with  
20 an organization that in 2008 has been designated as a  
21 terrorist organization, it is difficult to see how that  
22 could be relevant to justifying a detention that occurred in  
23 2002.

24           So with respect to that kind of factual  
25 information, we'd ask that the government be held to the



1 task to move to amend those petitions, and to actually  
2 assert to the Court that there is substantive information  
3 that's been discovered that relates to their detention in  
4 2002, not 2008.

5           The legal developments that have been pointed to,  
6 the Parhat decision, the decision in Boumediene, again,  
7 these have always been habeas cases. And to the extent that  
8 Parhat rejected the government's reliance on unsourced  
9 intelligence or summaries of intelligence information,  
10 petitioners in some case would like the opportunity to meet  
11 and confer, and as my colleague Mr. Kadidal mentioned, it  
12 may be possible in some cases to stipulate to the source of  
13 the information, and to narrow the issues for litigation so  
14 that a complete amended factual return is not necessary.  
15 And those cases should not be delayed at all due to the need  
16 for amended returns in other cases.

17           The government also has acknowledged today that in  
18 some cases they may find an amended return is unnecessary.  
19 And it would be manifest injustice to tell any one of our  
20 clients two months from now that the information that is  
21 sitting in a file in government offices now is not provided  
22 in July because the government wanted to take two months to  
23 think about it. And so now they're telling us in August or  
24 September or October, here's the information we've been  
25 sitting on for two months. The government should be held to

1 task and required to notify petitioner's counsel preferably  
2 by the end of next week, whether they intend to amend or  
3 move to amend the factual return of any particular case.

4           To the extent that the government is concerned or  
5 that the Court is concerned about the priority of sequencing  
6 or in trying to figure out where the government should put  
7 its resources, we would submit that the individualized  
8 circumstances of the cases, either addressed by this Court  
9 or the individual judge will organically and naturally help  
10 delineate the cases. Amended factual returns will not be  
11 required in every case. Some cases are ready to move now.  
12 In other cases, many of these cases we anticipate may settle  
13 and negotiations now supervised by each individual judge  
14 will remove those cases from the priority sequencing. So  
15 allowing the individual judges to move forward in the cases  
16 will both help sequence the cases that need an amended  
17 factual return as well as save the judicial resources and  
18 the resources of the parties in engaging in full-fledged  
19 habeas hearings.

20           We've discussed quite a bit about the pending  
21 motions, both in addition to lifting the stays, there are  
22 cases to reinstate -- or motions to reinstate the dismissed  
23 cases. The government, to our knowledge so far, has  
24 consented to motions to reinstate cases where the detainees  
25 are still detained and perhaps in the back and forth today

1 or with Your Honor, we can have the government consent to  
2 motions to reinstate for those individuals still detained.  
3 As I mentioned earlier, there are still concerns about  
4 collateral consequences for some individuals who have been  
5 transferred as a result of their status, their designation  
6 by the United States as enemy combatants. And we may need  
7 to deal with those on a case by case basis.

8 Other pending motions which Your Honor has  
9 identified are really individualized motions or address  
10 categories of cases; the Uighurs, those who have been  
11 charged to military commissions. And again, the parties are  
12 identifying the legal issues in those motions that are  
13 appropriate for consolidation, rather than looking at all  
14 200 cases as a group, but identifying discreet legal issues  
15 for particular cases.

16 THE COURT: Right.

17 MS. GUTIERREZ: And I would say that there are a  
18 number of counsel here if there are other particular motions  
19 that you have questions about today.

20 THE COURT: Okay.

21 MS. GUTIERREZ: The government also has asserted  
22 that some of the questions, the legal questions about how  
23 the proceedings will look, are appropriate for a  
24 coordinating judge. And based on the decision both in Hamdi  
25 and the Supreme Court's mandate in Boumediene, that would be

1 with respect inappropriate. We agree that how the  
2 proceedings will look will be determine by the District  
3 Court judges, but this should not be -- in a coordinating  
4 proceeding, it should be by each individual judge based on  
5 the individual facts of the case.

6 The District Court judges have a plethora of  
7 experience with habeas cases, both dealing with executive  
8 detention as well as postconviction. Habeas proceedings are  
9 not an unknown beast the way the questions were coming up  
10 around potential DTA petitions; this is a tried and true  
11 familiar process for all the parties involved. The national  
12 security concerns that the government is raising, the Court  
13 is perfectly competent to deal with and has in the past.

14 The individualized questions about the nature of  
15 the process due each individual, the type of questions  
16 around discovery, should be determined by the individual  
17 facts of each case. As in Hamdi and its reliance on  
18 Matthews v. Eldridge not all detainees were picked up on a  
19 battlefield. There is a difference perhaps in the amount of  
20 process due to individuals picked up on a battlefield and  
21 individuals picked in a country far away from Afghanistan.

22 The number of years of detention have an impact.  
23 The nature of the evidence against an individual, how it was  
24 obtained, where it came from, whether it came from a foreign  
25 country or the United States, whether the information is

1 secret, even to the petitioner's counsel or whether it has  
2 been disclosed, all of these kinds of fact-intensive  
3 questions will go to the amount of process that's now due to  
4 an individual in habeas proceeding. Broad brush procedures  
5 at this point are entirely inappropriate for a  
6 diversely-situated man, both in terms of the legal questions  
7 raised by the case as well as the factual questions.

8 We, I think, have clearly identified issues that  
9 would be appropriate for coordination, that will expedite  
10 consideration of these cases, including dealing with the  
11 stays and dismissals, the docket clean up, questions around  
12 the protective order clearances and access. And all parties  
13 seem to be willing to work on that. And we have done so in  
14 the past with Judge Green and it was facilitated quite well.

15 In closing, the discussion we've had today has  
16 been yet again in most respects an abstract discussion of  
17 what will happened to the individual men in Guantanamo. In  
18 2008, now is the time to drill down into the facts of the  
19 individual cases and to move beyond these abstract  
20 discussions of law. The question is not what is an enemy  
21 combatant; the question is whether, for example, Mr. Parhat  
22 is an enemy combatant, whether my individual client is an  
23 enemy combatant. The question is not abstractly whether  
24 hearsay can be considered by a habeas judge or a judge in a  
25 habeas proceeding, but whether evidence extracted from an

1 individual by the CIA using coercion can be used in this  
2 particular case before a particular judge to justify  
3 executive decision.

4           The conditions motions that have been talked about  
5 in the abstract relate to things like a client's  
6 deteriorating psychological state that is preventing him  
7 from being able to engage in attorney-client meetings and  
8 actively participate in the challenge to his detention, his  
9 conditions of confinement, his mental health treatment. For  
10 example, in one case before Judge Sullivan, is being dealt  
11 with hopefully right now on an expedited basis. These kinds  
12 of questions must be answered in individual habeas  
13 proceedings.

14           And I will echo my colleague Mr. Kadidal's empathy  
15 with the government, that as a nonprofit NGO, we do  
16 appreciate the government's difficulties with hiring and  
17 office space, but with respect to my colleagues across the  
18 table, we are dealing with imprisonment. I recognize the  
19 logistical difficulties for the government, but our clients  
20 are sitting in cells in Guantanamo and have been for eight  
21 years, and have a right now for their cases to be heard.

22           Boumediene stated in unequivocal terms that there  
23 will be a burden of delay as a result of these and it must  
24 not be borne by the detainee; it must be borne by the  
25 government. As a practical matter, these delays are

1 impacting and deteriorating our attorney-client  
2 relationships, and preventing our ability to meet with  
3 clients to review information and factual returns, and to  
4 present challenges to the court. It's impacting our  
5 clients' psychological state which has been seen in the  
6 suicide and suicide attempts that have occurred to  
7 Guantanamo.

8           The right to an individualized habeas review of  
9 imprisonment must be meaningful, and the delays in these  
10 cases are running the risk that after three Supreme Court  
11 decisions, six years of imprisonment, factual returns and  
12 government information and annual review boards, that after  
13 all of this, the writ of habeas corpus is on the verge of  
14 being rendered meaningless. We would ask this Court to set  
15 a very expedited schedule for the production of any  
16 additional information that the government feels it needs to  
17 provide, so that the individual judges can move forward in  
18 an expedited manner. Thank you.

19           THE COURT: All right. Thank you very much. The  
20 discussion is helpful to the Court, and I'm going to make  
21 some observations at this time. I'm going to consolidate  
22 these in the order, but since I've given leave for anyone  
23 who was here and couldn't speak for the detainees and those  
24 on the telephone, I'm going to not issue it today, but I  
25 will wait until you have an opportunity, you can file

1 something electronically with the Court if you wish to make  
2 a position or support the positions that have already been  
3 evidenced here today for your clients, hopefully by  
4 tomorrow. So I will not issue an order until you have time  
5 to do that, and probably then until Thursday.

6           There's several categories of issues that we've  
7 looked at, and starting with the administrative ones, would  
8 seem to have some agreement; that is, we have to address the  
9 security clearance issues, we've talked a little bit about  
10 that in the protective order. As I understand, the parties  
11 are going to consult on amending the protective order if you  
12 need to or not, or if it needs to be amended, so that this  
13 filing can go forward with the CSOs on a more expeditious  
14 and easy basis for the parties. And I'm going to let you  
15 all do that and get back to me, and I'm going to set some  
16 dates in a minute.

17           The factual returns to be updated and new ones to  
18 be filed that haven't been filed, I have a concern about the  
19 government having carte blanche to file an amended return  
20 without some showing it's necessary after all these years.  
21 I do have some empathy perhaps for the government's position  
22 that legal developments have changed what they thought was  
23 necessary, and they want to supplement what they had. At  
24 the same time, it does fall on the face of logic as I  
25 indicated, to me that these returns were supposedly adequate



1 when they were made, and that's what they were being held  
2 on, and then to supplement seems to be asking for  
3 retroactive information that later require information that  
4 makes the detention originally held not proper. And that's  
5 to be debated.

6 But what I'm going to do is set a plan for these  
7 returns to be done and for the amended returns to be filed  
8 by a motion for leave to file with the attached amendment  
9 highlighting the difference between that and the original  
10 filing if there's -- so that it's clear what the need is and  
11 what -- to the Court whenever they use it.

12 And I'm going to reserve whether I'll decide all  
13 of those or whether they will be done by the judges. But it  
14 does concern me as to the amended returns and adding  
15 additional information that was later required at the same  
16 time the government has a position that they may have  
17 someone they have much more information about, making them  
18 much more dangerous than they knew before. And the  
19 obligations are to advise the Court of that.

20 On the protective orders and cleaning of the case  
21 dockets, et cetera, there was a suggestion that they'll be  
22 back on the 21st with the report on those areas, as I  
23 understood it. That was the suggestion, I understand, that  
24 you made.

25 MR. SUBAR: I'm not sure that was precisely the

1 suggestion, but that works for us.

2 THE COURT: I thought it was -- you said Monday, a  
3 week, is that the date I had?

4 MR. SUBAR: With regards to the duplicate issues  
5 and so forth, that's right. If Your Honor is folding the  
6 protective order issues in as well.

7 THE COURT: Yeah, I think we should so we can move  
8 those along. So I'm going to make those due on the 21st,  
9 and then you can get to me on those, so we can move ahead.

10 The dates as to these amended returns and returns  
11 being filed, we have very strong differences between the  
12 parties whether or not the government is now requesting to  
13 file the immediate information they already have in their  
14 possession without waiting to amend it or add to it from  
15 these reports that they get, the annual reviews of the  
16 original detention hearings, is something I'm going to look  
17 at. It would be good to advise the defendants of why their  
18 being held and give them advance notice on that information  
19 so they can begin to prepare their case. And when they get  
20 their final return in, then they can be fairly ready to  
21 proceed.

22 At the same time, I don't want to distract the  
23 government from getting this work done, although I expect  
24 the government to add whatever resource is necessary to do  
25 it. The constitutional rights organization indicated that

1 they were a few lawyers, I understand that, but they have --  
2 reminds of me of the Verizon add, they have about 200  
3 lawyers standing behind them. So they have a little  
4 assistance, like Verizon always standing behind you. So  
5 they have a courtroom full of lawyers and some on the phone.

6           The briefing on some of these issues I'm going to  
7 look at a little bit more. It has some appeal to me that  
8 whether or not the military commission individuals who are  
9 brought before the commission petition should at least go to  
10 the end of the line for the returns to be filed, if not  
11 stayed. And the conditions of confinement, I'll have to  
12 look at that a little bit, whether I can do that or the  
13 judges feel more comfortable with that as to the military  
14 commission law taking the jurisdiction away from us on those  
15 issues. Right now, about 20 have been charged or are  
16 planning to be charged, they may have some others, I don't  
17 know, coming in.

18           One of the things we didn't mention that I recall  
19 is there are 34 new cases to be brought as I understand it,  
20 coming in from the Federal Public Defender's office shortly.  
21 And we'll have to incorporate them in this group. And I  
22 assume they'll all get counsel, so we'll have counsel for  
23 every one in these cases.

24           I'd also want to consider the -- I hope by the  
25 21st the parties will have met and considered on the

1 dismissal issue, whether that some cases can be  
2 automatically reinstated by the filing of a motion to  
3 dismiss with opposition by the government, and that can be  
4 granted, or there's some that are going to be contested, but  
5 then can be -- the motions can be filed by the petitioner's  
6 counsel and then I can rule upon them. That's going to  
7 concern.

8           The cases where the individuals are no longer at  
9 the Guantanamo Bay, I have a report coming in next Monday, I  
10 believe it is I asked for that. It seems logical to me if  
11 they're no longer there, that they can await these other  
12 cases to go first for people who are still being confined at  
13 Guantanamo Bay, although I realize there's some subset of  
14 those who may be confined in other countries for whatever  
15 reasons, whether we can reach those or not, that's a whole  
16 other area we'll have to get into. But I expect now that  
17 I'm going to try to reach and manage those cases  
18 immediately, except for identify them, see what's in those  
19 files and then see where we go on those.

20           Hopefully the Court of Appeals will address some  
21 of these issues the government is going to file for the  
22 expedited treatment of those, and we can get some guidance  
23 in some of these; otherwise, I will go ahead and rule upon  
24 some of these perhaps, and they can be part of the appeal  
25 either way. That is the notice to transfer question and

1 applicably the Military Commissions Act, the conditions of  
2 confinement, because I think that needs to move forward.

3           It seems to me that we should have a priority case  
4 the government works on with some exceptions. There have to  
5 be particular exceptions for certain individuals, perhaps  
6 have been mentioned, people who may have illness problems,  
7 mental or physical illness problems; There may be other  
8 individuals I'm not aware of. For instance, there are the  
9 group that are cleared for release. I think I can give  
10 myself and another judge to probably handle those and move  
11 those ahead, as soon as we find out who all those are.

12           It's logical to me that we go on a first-in,  
13 first-out basis; that is, those cases that have been pending  
14 here the longest. To do otherwise penalizes those people  
15 who filed in 2004, I think were the first filings, and gives  
16 someone who filed in 2008, who was maybe been there as long,  
17 maybe not as long, priority over the 2004, for no reason  
18 other than that their lawyers yelled louder than the other  
19 lawyers. So I think that we should have some logical way of  
20 handling it. And it seems to me that is my first in, first  
21 out, and the government would get the returns of those who  
22 were here longest, except as indicated, there may be  
23 specific exceptions to those that are very complicated or  
24 take a longer time for some reason, that can go by a case by  
25 basis. The Court can be advised of those problems and I can

1 look at that with the effective parties.

2           The timing the government requests, I'm going to  
3 look at that. I think I'm going to ask I suspect to keep  
4 the government's feet to the fire and move these along on a  
5 faster basis. I had originally indicated -- originally  
6 thought, wrongfully as it turns out, that there would not be  
7 many returns amended, that we had returns all ready to go,  
8 that the updated ones will be done in a couple of months  
9 because I didn't think there were that many. It turns out  
10 now that it's going to probably be an updated return in most  
11 cases. But I agree with petitioners that we should find out  
12 which ones are going to be updated shortly or not. And if  
13 they aren't going to be updated and they don't need  
14 discovery, they may be keyed up, as I said at the beginning  
15 of this, for immediate hearing before the effective judge.  
16 The ultimate decision will be made by the individual judge I  
17 agree these are individualized factual cases; that is, each  
18 case is somewhat individual.

19           And I think as we looked at itself by the  
20 particular judge as to eventually getting to the merits. I  
21 also, as I said at the beginning, I'm not convinced all the  
22 legal issues, the government is looking for a ruling across  
23 the board, are amenable to that. I will take a look at  
24 that, but I'm not sure it's amenable to that. And I may ask  
25 for more information on those as we go forward.

1           Briefing some of those actually may not hurt  
2 because then they could be all briefed at issue, and if each  
3 judge is going to sign them, at least they'll be keyed up  
4 for each judge to decide them already without waiting longer  
5 and getting different schedules from different judges. So  
6 if we put them all together and brief these, if I don't  
7 consider them, at least they can go back to the judges who  
8 are going to consider them and they will be all briefed  
9 without waiting.

10           I don't think as a practical matter we're going to  
11 get to a hearing on the merits immediately unless there are  
12 cases the parties can stipulate to and are ready to proceed  
13 for a habeas hearing through a summary judgment or motion  
14 for judgment on the pleadings that is ready to go. I do  
15 think that the ones that scheduled for -- been found cleared  
16 for release can be moved along hopefully, despite I'm sure  
17 logistical problems, and I hope that we can put others in  
18 line to be heard in the reasonable near future.

19           The Supreme Court was careful to put out about a  
20 statement that is all new territory, that the District Court  
21 is going to have to improvise. That there's -- we'll have  
22 to recognize the executive -- and burdens in this area. At  
23 the same time, we have to have a prompt resolution of these  
24 matters. There have been people held for six years without  
25 a final ruling on their habeas case. Whether they're

1 released or not, I have no idea what the judge will do  
2 obviously, but at least they can get to a hearing and get it  
3 done hopefully under guidance.

4           Obviously, I'm going to be available to handle the  
5 protective order issues, have the parties keyed up as I said  
6 for security problems so I can help on those and getting  
7 clearances and how many clearances each firm will get. I'm  
8 not inclined to look favorable to law clerks in private  
9 practice, interns, summer associates getting clearances. We  
10 have too much else to do; we're first starting with our law  
11 clerks to get them cleared, and that's well on the way. But  
12 if there are other lawyers that need it because they have  
13 taken on new cases, et cetera, we can consider that.

14           Also, there are access problems I have understood,  
15 and I'm still working on issues with that. Judge Kay has  
16 worked on that for a long time, he can still help me on  
17 that. But I certainly need to have those problems brought  
18 to our attention.

19           I had asked in my order, to go back to the order I  
20 issued for a minute, on the second page I had suggested that  
21 the parties should be prepared to identify a date by which  
22 they'll file a status report summarizing the status of each  
23 case. And I think that you'll find all the judges want to  
24 know the status of these cases. And by that I mean  
25 obviously exactly what is the situation, whether there's a



1 return filed or not, whether there's some special problem  
2 with the individual involved, whether there's access  
3 problems to the individual, whatever it may be on the  
4 petitioner's side as well as on the government's side as  
5 what they see the status of the case.

6           Finally, it has been less than a month since the  
7 Supreme Court ruled. We had jurisdiction in these unique  
8 cases, never before in the history of this country have we  
9 had such type of cases brought to the Court. And it is our  
10 desire to move these along. At the same time, recognizing  
11 that we have challenges on both sides to recognize and the  
12 Court has to deal with these in a proper fashion.

13           So I'm going to put an order together. The  
14 government is going to have to get the message across to its  
15 people on the other branches of the government affected by  
16 this as well as to their own people, that the time has come  
17 to move these forward, not perhaps in the normal course of  
18 business, but looking upon this as an extraordinary  
19 situation where the United States have held these  
20 individuals for much -- maybe very solid reasons, I don't  
21 know the merits of any of these -- very solid reasons, who  
22 may be very dangerous individuals, most of them anyway, who  
23 now have been -- decided to have constitutional rights of  
24 some type minimally to a habeas petition review of their  
25 status. And we need to plan to get that done for all that

1 are held. And I don't know where we'll eventually end up or  
2 how many there will be.

3 But we can't abide by hearing; we don't have  
4 enough resources. We have other commitments. I think the  
5 government has to understand, they're going to set aside  
6 every other case that's pending before them in their  
7 division, and address these cases first. Put them on notice  
8 that I expect the corresponding agencies to do the same;  
9 that they're now in a court process, the Supreme Court has  
10 spoken, has asked strongly that these be handled promptly,  
11 they be given a promptly resolution, after years of  
12 litigation mainly in the higher courts. And that we  
13 recognize these individuals having been held without a court  
14 hearing now up to six and half years. And I intent to see  
15 that that's done.

16 So whatever ruling I put out, I expect the  
17 government will engender through their best efforts and  
18 necessary resources and their companion agency as well as  
19 their own agency, the Justice Department. I recognize  
20 there's a lot of work they do in a lot of areas, but they  
21 are committed to have to handle this. The 50 lawyers may  
22 not be enough, they may have to have more as time goes  
23 forward. They may have to have more support staff in the  
24 other divisions to move this ahead. And I think the people  
25 who were involved in this on all the levels of government

1 should understand that. And the -- that delays I think  
2 would reflect badly and would cause the Court to become  
3 perhaps not only concerned, but suspicious of the necessity  
4 for further delay, which could -- to the detriment of the  
5 government in how we proceed with these cases and take them  
6 to trial.

7           So the purpose of the Court is to try to  
8 coordinate this in as expeditious of a fashion as possible,  
9 not to have delay. The plaintiffs perhaps understandably  
10 are very concerned about further delays for their client,  
11 and are suspicious of the government -- may not be moving as  
12 fast as they could. I am going to try to make all efforts I  
13 can to have the government move appropriately in accordance  
14 with a good process and fair process to both sides.

15           So what I'm going to do is issue an order after I  
16 get a chance. If anyone wants to, who's a petitioner who is  
17 not heard today, to file something with me to bring up to my  
18 attention something that I've not considered. If the  
19 government thinks they need to supplement anything they can  
20 do it, but it will have to be by tomorrow close of business.  
21 And then I will attempt to issue an order on Thursday or  
22 Friday of this week, controlling immediate litigation for  
23 the immediate future at least.

24           Let me suggest one other thing. I would like to  
25 be able to set up some status calls using this room, having

1 other lawyers come in. I query if the lawyers can think  
2 about other ways we could do status calls for overall  
3 issues, as well as those if there's an individual matter  
4 brought to my attention by an individual case. I am not  
5 opposed to doing telephone conference calls on the record,  
6 where the counsel can do it from their office, the  
7 government can do it from their office, if that's necessary.

8 I would like to orchestrate a rather frequent  
9 review of what the issues are with the parties. That can be  
10 either done by a consolidated report from the plaintiff's  
11 petitioners and from the government, or by a telephone  
12 conference with everyone who wants to get on the telephone  
13 and they get a summary report from each side. But I'm going  
14 to ask when you meet to talk over about the protective order  
15 and which cases are going to be reinstated, et cetera, that  
16 you put on your list future status calls and the context  
17 about every two weeks, to see where we are in these cases  
18 and what the problems are. Maybe I can handle somethings by  
19 phone and move these matters along without the necessity for  
20 filing formal pleadings and taking more time up than it's  
21 worth.

22 I find the things that delay cases most are  
23 motions practice. Somebody files a motion, somebody waits  
24 and gets an extension of time to file the response, somebody  
25 waits and gets an extension of time to file the reply. And

1 60 days have gone by and nothing has happened with the case  
2 because everyone has a motion pending. I'm not talking  
3 about a summary judgment, I'm talking about some type of  
4 interim motion. That delays a case.

5           If you get on the phone with the Court and say I  
6 have this problem, and the other side tells you their side,  
7 I may be able to decide that and move this along in certain  
8 areas. I'm talking about not major rules that affect every  
9 case, but certain discreet problems. And I'll be available  
10 as the coordinating judge to do that when other judges may  
11 not be available.

12           There will be about 14 days in August when I won't  
13 be available, but it will be a two-week period. It will not  
14 be more than that, so otherwise I'm here.

15           So with that advice to you, I'm going to wait to  
16 hear if there's anything else coming in on this, and I'm  
17 going to issue an original, a first attempt at a scheduling  
18 order. And then we'll see where that goes and we may amend  
19 it in a couple of weeks after we see what else comes in from  
20 the parties. This is all new area for everybody, so I'm  
21 open to suggestions on moving forward. But what I say on  
22 deadlines is I want the parties to follow. And you're going  
23 to have to come in with awful good reasons to change the  
24 deadline when I set one.

25           All right. Thank you for coming in today.

