

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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MAHMOAD ABDAH, <i>et al.</i>	)	
	)	
Petitioners,	)	
	)	
v.	)	Civil Action No. 04-CV-1254 (HHK)
	)	
GEORGE W. BUSH, <i>et al.</i> ,	)	
	)	
Respondents.	)	
	)	

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**RESPONDENTS' MEMORANDUM IN OPPOSITION TO PETITIONERS'  
MOTION TO COMPEL ACCESS TO UNREDACTED FACTUAL RETURNS**

**PRELIMINARY STATEMENT**

Petitioners' motion for access to information redacted for national security reasons from the classified factual returns submitted by respondents in this case should be denied. This case has been stayed "for all purposes pending resolution" of the appeals in this matter, which pertain to petitioners' challenges to their detention at Guantanamo Bay as enemy combatants. The plain meaning of this stay order, which was entered in response to a motion in which respondents urged that any contemplated disclosure of the redacted classified information in the factual returns "be stayed . . . regardless of whether the Court stays other proceedings in these cases,"<sup>1</sup> defeats petitioners' assertion that the requested relief falls outside the stay.

Furthermore, petitioners offer no legitimate grounds for departing from the stay. Petitioners do not seek access to the redacted information for use in this case, nor could they, given that the case is stayed "for all purposes." And petitioners' assertion that access to the

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<sup>1</sup> See Motion for Certification of January 31, 2005 Interlocutory Orders for Appeal Pursuant To 28 U.S.C. § 1292(b) and for Stay of Proceedings Pending Appeal (dkt. nos. 103, 104) at 22-23 & n.13.

information is needed for use outside this case in military proceedings making determinations with respect to issues not involved in this case, is baseless. In any event, the Court should not compel disclosure of unredacted factual returns where, as here, the order concerning access to the redacted information, upon which petitioners' motion is based, as been appealed to D.C. Circuit. The Court should not act further with respect to the appealed order and impose harms that would be occasioned by the disclosure of the redactions pending appropriate guidance from the D.C. Circuit, especially when the intended use for which disclosure is sought is not with respect to this case.

Petitioners' motion, therefore, should be denied.

### **BACKGROUND**

This case is one of more than a dozen habeas petitions on behalf of more than 60 Guantanamo detainees, challenging petitioners' detention as enemy combatants, that were pending within just a few weeks of the Supreme Court's decision in *Rasul v. Bush*, \_\_\_ U.S. \_\_\_, 124 S. Ct. 2686 (2004), and that were formerly coordinated by Senior Judge Joyce Hens Green. Pursuant to her charge to coordinate and manage the Guantanamo detainee cases under the September 14, 2004 Resolution of the Executive Session, Judge Green established a schedule in this and the other then-pending cases for the filing by respondents of factual returns indicating the factual bases for the detention of each petitioner.<sup>2</sup> Judge Green also scheduled briefing on the legal issues pertaining to the petitions, *i.e.*, on respondents' motion to dismiss or for judgment as

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<sup>2</sup> A factual return for a petitioner in a Guantanamo detainee case typically has consisted of the record of proceedings before the Combatant Status Review Tribunal ("CSRT") that confirmed petitioner's status as an enemy combatant properly subject to detention. Factual returns include both classified and unclassified material.

a matter of law. Judge Green also entered a protective order applicable to the cases that permitted the government to share classified information in the factual returns with petitioners' counsel who obtained appropriate security clearances.<sup>3</sup>

Respondents provided petitioners' counsel access to classified versions of the factual returns. The Director of Central Intelligence, in his capacity as head of the United States intelligence community, had delegated to originating agencies the responsibility to review the classified factual returns prior to their submission to petitioners' counsel and redact information that would tend to reveal intelligence sources and methods, in accordance with the duty to protect such sources and methods pursuant to Executive Order 12958, as amended by Executive Order 13292, 68 Fed. Reg. 15315 (Mar. 28, 2003), and 50 U.S.C. § 403-3(c)(7).<sup>4</sup> In a number of the classified factual returns, such redactions were made; declarations identifying the redactions and articulating the basis for such redactions accompanied each factual return in which redactions were made. As indicated in the declarations, in general, the redactions involve intelligence sources, methods or activities, as well as certain information collected from those resources, that pertain to individuals other than the petitioner-detainee to whom the factual return pertains, or the redactions involve information that is source-identifying, and in any event, does not support a determination that the detainee is *not* an enemy combatant. See Respondents' Response to

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<sup>3</sup> See November 8, 2004 Amended Protective Order and Procedures for Counsel Access to Detainees at the United States Naval Base in Guantanamo Bay, Cuba, 344 F. Supp. 2d 174 (D.D.C. 2004).

<sup>4</sup> See *Sims v. CIA*, 471 U.S. 159, 168-69 (1985) (§ 403-3 accords DCI sweeping authority to protect sources and methods from disclosure).

Petitioners' Motion for Access to Unredacted Factual Returns and to Compel Compliance with Order on Protected Information Procedures at 6-7 (dkt. no. 76).

Petitioners moved the Court for access to the redacted information, and respondents' opposed, *see* dkt. no. 76.

While petitioners' motion was pending, on January 19, 2005, Judge Leon granted respondents' motion to dismiss or for judgment in its entirety in two of the Guantanamo detainee cases, concluding that constitutional protections do not extend to aliens outside sovereign United States territory, such as petitioners, and that petitioners also have no viable claims under U.S. statutory law or international law or treaties. *See Khalid v. Bush*, No. 04-CV-1142 (RJL), *Boumediene v. Bush*, No. 04-CV-1166 (RJL), 2005 WL 100924 (D.D.C. Jan. 19, 2005). The *Khalid* and *Boumediene* cases are currently on appeal to the D.C. Circuit. *See* No. 05-5062 (D.C. Cir.).

On January 31, 2005, Judge Green entered an order (and memorandum opinion) in eleven other of the pending Guantanamo Bay detainee cases, including this one, denying in part and granting in part respondents' motion to dismiss or for judgment as a matter of law. *See* Memorandum Opinion Denying in Part and Granting in Part Respondents' Motion to Dismiss or for Judgment as a Matter of Law, No. 02-CV-0299, *et al.*, 2005 WL 195356 (D.D.C. Jan. 31, 2005). Contrary to the prior decision of Judge Leon, Judge Green determined, *inter alia*, that constitutional "due process" protections apply to aliens detained at Guantanamo Bay and that the CSRT proceedings the military has used to confirm detainees' status as enemy combatants do not satisfy these due process requirements. *Id.* at \*8-\*31. More specifically, the Court determined that detainees should be permitted access, if not directly, at least through counsel, to all material

evidence, even classified evidence, upon which the CSRT relies in affirming the detainee's status as an enemy combatant. *Id.* at \*22-\*26. In an apparent first step towards proceeding down that path, Judge Green granted petitioners' motion for access to the classified information that had been redacted from the factual returns submitted to petitioners' counsel. *See* Order Granting November 8, 2004 Motion to Designate "Protected Information" and Granting November 18, 2004 Motion for Access to Unredacted Factual Returns (dkt. no. 100) at 2. The basis for granting the motion, however, was only that Judge Green believed the redacted information "is relevant to the merits of this litigation." *Id.*

In her order on respondents' motion to dismiss or for judgment, Judge Green requested additional briefing from the parties with respect to how this case should proceed in light of the memorandum opinion. In response, on February 3, 2005, respondents filed a motion seeking certification of the January 31, 2005 orders for interlocutory appeal and a stay of all the Guantanamo Bay detainee cases pending at that time, consistent with the need for these cases to proceed in a coordinated fashion. *See* Motion for Certification of January 31, 2005 Interlocutory Orders for Appeal Pursuant To 28 U.S.C. § 1292(b) and for Stay of Proceedings Pending Appeal (dkt. nos. 103, 104). In the section of the motion requesting a stay, respondents urged:

[F]ailure to stay the Court's order contemplating disclosure of classified information previously withheld from petitioners' counsel in order to protect especially sensitive intelligence sources and methods would irreparably damage the government by denying it the opportunity for appellate review prior to imposition of the harms occasioned by the disclosure. Thus, the order requiring disclosure of the information must be stayed . . . regardless of whether the Court stays other proceedings in these cases.

*Id.* at 22-23 & n.13. Petitioners, on the other hand, requested the Court to permit them to pursue immediate factual development and discovery in the case, as well as to litigate claims regarding

the detainees' conditions of confinement and issues regarding counsel access at Guantanamo Bay. *See* Petrs' Joint Submission on How These Cases Should Proceed (dkt. nos. 105, 107). Judge Green rejected petitioners' proposed approach. Instead, she immediately certified her January 31, 2005 decision on respondents' motion to dismiss or for judgment for appeal, and she stayed proceedings in the eleven cases in which the January 31, 2005 order was entered, "for all purposes pending resolution of all appeals." *See* Order Granting in Part and Denying in Part Respondents' Motion for Certification of Jan. 31, 2005 Orders and for Stay (dkt. no. 106).

Petitioners in this case then sought reconsideration of Judge Green's stay order, arguing that the Court should permit factual investigation and development in the case and proceedings regarding detainee living conditions. *See, e.g.,* Petrs' Motion for Reconsideration of Order Granting Stay Pending Appeal at 9-10 (dkt. no. 110). Judge Green again rejected petitioners' approach, however, denying the motion for reconsideration

in light of the substantial resources that would be expended and the significant burdens that would be incurred should this litigation go forward, and . . . [in] recognition that a reversal of the Court's January 31, 2005 rulings would avoid the expenditure of such resources and incurrence of such burdens . . . .

*See In re Guantanamo Detainee Cases* (Order Denying Motion for Reconsideration of Order Granting Stay Pending Appeal), No. 02-CV-0299, *et al.*, 2005 WL 326862 (D.D.C. Feb. 8, 2005) (Green, J.) (dkt. no. 111).

On February 9, 2005, pursuant to Judge Green's certification, respondents filed a petition for interlocutory appeal of the January 31, 2005 decision with the D.C. Circuit, *see* 28 U.S.C. § 1292(b), and requested that the appeal proceed on an expedited basis. Further, petitioners filed a cross-petition for interlocutory appeal with the D.C. Circuit and petitioners in *Al-Odah*, No. 02-

CV-0828 (CKK), appealed Judge Green's stay order.<sup>5</sup> On March 10, 2005, the D.C. Circuit accepted the interlocutory appeal and established a briefing schedule for the appeal that concludes at the end of June 2005.<sup>6</sup> On March 14, 2005, respondents filed a notice of appeal with respect to Judge Green's January 31 order regarding access to classified information redacted from the factual returns. *See* Exhibit A.

In light of the pending merits appeals, several of the cases pending at the time of Judge Green's decision, but that Judge Green did not stay, have also been stayed pending appeal. *See Mustapha*, No. 05-CV-22 (JR) (dkt no. 7); *Deghayes*, No. 04-CV-2215 (RMC) (dkt. no. 7); *Al Marri*, No. 04-CV-2035 (GK) (dkt. no. 26).

### **ARGUMENT**

#### **I. The Relief Requested by Petitioners is Inconsistent With the Stay in This Case.**

Petitioners' motion for access to the redacted information in the factual returns in this case is based on a misrepresentation of Judge Green's orders in this case. Petitioners base their request for access on the assertion that "Judge Green neither certified for appeal nor stayed her Order granting Petitioners' counsel access to the unredacted factual returns." *Petr's Motion* at 2. In fact, however, once Judge Green issued her January 31, 2005 orders, she stayed the case "for all purposes pending resolution of all appeals." The plain meaning of the stay order, which imposed the stay "for all purposes," defeats any argument that a production of information resulting from the January 31 order regarding the redacted information is not stayed.

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<sup>5</sup> In addition, as noted above, petitioners in *Khalid*, No. 04-CV-1142 (RJL), and *Boumediene*, No. 04-CV-1166 (RJL), appealed Judge Leon's decision.

<sup>6</sup> The Court also established a briefing schedule in *Khalid* and *Boumediene* that also runs through June 2005.

Indeed, requiring respondents to now produce the redacted national security information would be inconsistent not only with the plain language of the Court's stay order, but also with the clear import of the Court's actions in granting the stay at first and then refusing to lift the stay after petitioners moved for reconsideration. The Court's January 31 order regarding the redacted information did nothing more than state that it was granting petitioners' motion. It did not set a date or schedule for compliance with the order, which would have been perhaps eventually expected given that the decision applied not just in this case, but in eleven cases involving factual returns regarding 54 petitioner-detainees. It defies reason to believe that compliance with an order requiring the "unredaction" of 54 factual returns was to be, or was expected to be, instantaneous. Indeed, respondents did not undertake to make the redacted information available, but rather moved to stay the cases, noting for the Court their key concern that the contemplated disclosure of the redacted classified information in the factual returns "be stayed . . . regardless of whether the Court stay[ed] other proceedings in these cases." *See* Motion for Certification of January 31, 2005 Interlocutory Orders for Appeal Pursuant To 28 U.S.C. § 1292(b) and for Stay of Proceedings Pending Appeal (dkt. nos. 103, 104) at 22-23 & n.13. In response, the Court stayed all proceedings in the cases "for all purposes pending resolution of all appeals." The grant of such a stay, thus, clearly included any obligation to make the redacted national security information in the factual returns available to petitioners' counsel pending the appeals.<sup>7</sup>

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<sup>7</sup> Thus, that Judge Green did not certify the January 31 order regarding the redacted information cannot override, nor is it inconsistent with, her decision to stay proceedings "for all purposes," including, for the reasons discussed in the text, with respect to the disclosure of the redacted national security information in the factual returns.



That Judge Green additionally rejected petitioners' attempt to obtain reconsideration of the stay order cements that any obligation on respondents to make the redacted information in the factual returns available to petitioners' counsel is stayed. As explained above, petitioners sought reconsideration of the stay, arguing, for the second time, that, *inter alia*, factual development should be allowed to go forward in the case. Of course, the January 31 order granting the motion regarding the redacted information was based on Judge Green's view that the redacted information was "relevant to the merits of this litigation;" thus, the production of such information would be an event pertaining or related to the merits of this case regarding petitioners' detention going forward. Judge Green, however, rejected that the merits or factual development in the case should go forward: she denied petitioners' motion for reconsideration. Any obligation of respondents to make the redacted information in the factual returns available to petitioners' counsel, clearly therefore, has been stayed.

**II. Petitioners Offer No Legitimate Basis Warranting Modification of the Stay or Justifying Compelled Disclosure of the Information at Issue.**

Even aside from the fact that any obligation to produce the information redacted from the factual returns to petitioners' counsel has been stayed, petitioners offer no legitimate justification for now requiring the production of such information. Petitioners cannot claim a need for the information in order to pursue factual development in this case; Judge Green has stayed proceedings in this case with respect to factual development, and otherwise, pending resolution of the appeals. Indeed, petitioners cannot claim a need for the information in order to address a live issue in this case at all. Nor do petitioners assert any such need or justification for disclosure of the redacted information. This fact alone should end the matter.

Petitioners' only argument is that access to the redacted information is "crucial" in light of submissions to be made by counsel in upcoming Administrative Review Board ("ARB") proceedings. Petrs' Motion at 2. Petitioners, however, articulate no basis to support their assertion that such access is "crucial;" in fact, both the nature of the ARB proceedings and the redacted information to which petitioners seek access attest that access would be neither crucial nor warranted.

The purpose of ARB proceedings is to assess, at least annually, whether it is in the interests of the United States that individual enemy combatants at Guantanamo be released or transferred, or continue to be detained, based on a weighing of factors such as the threat a detainee is believed to pose to the United States or its allies in the ongoing armed conflict against al Qaeda and its supporters, and the detainee's continuing intelligence value. *See* Memorandum dated September 14, 2004, re: Implementation of Administrative Review Procedures for Enemy Combatants Detained at U.S. Naval Base Guantanamo Bay, Cuba, *available at* <<<http://www.defenselink.mil/news/Sep2004/d20040914adminreview.pdf>>>.

The case before the Court, on the other hand, concerns whether petitioners have been legitimately determined to be enemy combatants and, thus, may be detained for the duration of hostilities.

The ARB issues and the issues in this case are not the same; indeed, the ARB determination involves a more complex weighing of factors by the Military that is not justiciable.<sup>8</sup> *See Dist.*

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<sup>8</sup> Indeed, the D.C. Circuit has specifically held that the Executive Branch's determination regarding the existence of a national security risk is not justiciable. *See People's Mojahedin Org. of Iran v. United States Dep't of State*, 182 F.3d 17, 23 (D.C. Cir. 1999) (determination by the Secretary of State that "the terrorist activity of the organization threatens the security of United States nationals or the national security of the United States" was "nonjusticiable."). Thus, the balancing of national security risk and needs involved in a determination concerning the appropriateness of the continued detention of an enemy combatant is a matter entirely

*No. 1, Pacific Coast Dist., Marine Engs. Beneficial Ass'n v. Maritime Admin.*, 215 F.3d 37, 42 (D.C. Cir. 2000) (Executive's "judgments on questions of foreign policy and national interest . . . are not subjects fit for judicial involvement"). Thus, access to the redacted materials is not needed for issues involved in this case or for issues that are even reviewable in court.

Additionally, any assertion that access to the redacted materials is needed for ARB proceedings is soundly refuted by the nature of the redacted materials. As demonstrated by the sworn declarations submitted with any factual returns pertaining to petitioners in which redactions were made, the information redacted relates to individuals other than the petitioner-detainee to whom the factual return pertains, or the redactions involve information that, in any event, does not support a determination that the detainee is *not* an enemy combatant. *See supra* at 3-4. Thus, the redacted information would not, by its nature, tend to augur in a petitioner's favor with respect to whether the petitioner continued to pose a threat or possess intelligence value. And Judge Green's unelaborated and categorical assertion in her January 31 order that the redacted information was logically relevant to the merits of this case, *i.e.*, to enemy combatant

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inappropriate for judicial review. There simply would be no "judicially discoverable and manageable standards" for resolving the propriety of the Executive Branch's decision in this circumstance. *See Baker v. Carr*, 369 U.S. 186, 217 (1962); *see also Nat'l Fed'n of Fed. Employees v. United States*, 905 F.2d 400, 405 (D.C. Cir. 1990) (APA claim challenging decisions concerning closure and realignment of military bases was nonjusticiable due to lack of judicially manageable standards because it would "necessarily involve second-guessing the Secretary's assessment of the nation's military force structure and the military value of the bases within that structure"; "We think the federal judiciary is ill-equipped to conduct reviews of the nation's military policy."); *Industria Panificadora, S.A. v. United States*, 63 F. Supp. 1154, 1160 (D.D.C. 1991) ("[D]ecisions which affect our national security involve policy decisions beyond the scope of judicial expertise. 'To attempt to decide such a matter without the necessary expertise and in the absence of judicially manageable standards would be to entangle the court in matters constitutionally given to the executive branch.'" (citation omitted)), *aff'd on other grounds*, 957 F.2d 886 (D.C. Cir. 1992).

status, hardly supports petitioners' position that a stay, entered and then reaffirmed by the Court, should be lifted so that considered determinations of delegates of the Director of Central Intelligence to prevent inappropriate disclosure of intelligence sources and methods can be overridden and access to redactions, not shown to be supportive of an ARB determination in favor of petitioner, can be provided.

In any event, requiring respondents to now produce the redacted national security information in the factual returns would be inconsistent with the fact that the need or propriety of such production will be addressed in the pending appeals. The propriety of Judge Green's order regarding access to the redacted information in the classified returns has been appealed directly to the D.C. Circuit, and the Court of Appeals has accepted the interlocutory appeal pertaining to the merits of this case. These pending appeals will determine whether petitioners may avail themselves of due process rights under the Constitution (though they are aliens determined to be enemy combatants and are held outside the United States), and, if so, the type of process to which they may be entitled with respect to the determination of their enemy combatant status, as well as the proper scope of a court's inquiry into the status issue. The scope of the government's obligation, if any, to make classified national security information available to the detainees' counsel would likely be part of any such determination; at the very least, a decision from the Court of Appeals, even just on the merits appeal, could very well substantially alter the legal context that led to Judge Green's decision to permit access to the redacted information and call that decision into question. This would include whether it was appropriate to require, over a decision of the Executive to the contrary, the disclosure of classified, national security information to lawyers of detainees determined to be enemy combatants during the course of

ongoing hostilities, based on nothing more than a blanket finding of minimal logical relevance and without consideration of less drastic alternatives such as *in camera* review with the assistance of detailed explanations by government of potential harms of disclosure and consideration of the materiality of the information in the circumstances of a particular case. *Cf. Hamdi v. Rumsfeld*, \_\_\_ U.S. \_\_\_, 124 S. Ct. 2633, 2652 (2004) (any required fact-finding in district court in enemy combatant context must be both “prudent and incremental”); *Stillman v. CIA*, 319 F.3d 546, 548 (D.C. Cir. 2003) (court should not “plunge ahead” to decide a right of access to classified information in the abstract, where alternatives exist so that the question can be avoided). The Court should not take action to change the status quo in this case on this highly significant issue, based on nothing more than petitioners’ desire to use the redacted information outside of this case, prior to giving the Court of Appeals the opportunity to speak to the appropriate course of proceedings in this matter, including with respect to the propriety of counsel’s access to the redacted information.

Accordingly, petitioners have failed to demonstrate any substantial basis justifying compelled disclosure of the redacted information in the face of the stay.

### **CONCLUSION**

For the foregoing reasons, respondents respectfully request that petitioners’ motion to compel access to unredacted factual returns be denied.

Dated: March 14, 2005

Respectfully submitted,

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