IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MAHMOAD ABDAH, *et al.*, **Petitioners,** **v.** **GEORGE W. BUSH, *et al.*,** **Respondents.**	**Civil Action No. 04-1254 (HHK)**

PETITIONERS' REPLY MEMORANDUM IN SUPPORT OF MOTION TO COMPEL ACCESS TO UNREDACTED FACTUAL RETURNS

Petitioners seek to compel Respondents to comply with orders of this Court dating back to August 2004. These orders require Respondents to provide Petitioners' counsel with unredacted copies of the classified factual returns on which Respondents base Petitioners' detention. The Court has found that the redacted information "is relevant to the merits of this litigation." Ex. A at 2.

Respondents succeeded in defying these access orders through January 31, 2005, when Judge Green, acting for the Court, denied Respondents' motion to dismiss and issued a stay pending appeal. Respondents now argue that the stay bars Petitioners – and the Court – from enforcing the access orders and obviates Petitioners' need for the unredacted classified returns.

The stay does not control the Court. The Court controls the stay. The Court should not let Respondents use the stay to give further effect to their defiance. Petitioners' counsel need access to the unredacted classified returns to help prepare their clients for ongoing Annual Review Board hearings and to ready their clients' cases for the day the stay is lifted.

To comply with the access orders, Respondents need only deposit the unredacted returns in the Secure Facility, where security-cleared counsel may inspect them. Although Respondents reiterate their substantive objections to providing counsel with access to the unredacted returns, these are objections that the Court has already rejected.

1. Respondents Have Stonewalled this Court for Six Months.

A brief review of the events of the past six months may aid consideration of the motion.

Initial Order. On August 31, 2004, Respondents proposed a schedule for filing the returns. Under this schedule, Respondents would produce unclassified versions of the returns by the week of October 18, 2004, and classified versions of the returns upon entry of a protective order. Respondents explained that the returns would consist of the "administrative record" of the deliberations of the Combatant Status Review Tribunal, which would "supply the complete factual record" justifying the conclusion that a detainee is an "enemy combatant." Ex. B at 1. Respondents represented that this process would yield Petitioners' counsel "a complete statement of the factual basis for a detainee's status as an enemy combatant." *Id.* at 2.

First order to compel. Respondents, however, did not honor their own schedule. Instead, in the days that followed, they produced the unclassified returns only sporadically. On September 20, 2004, the Court issued an order formally compelling Respondents to comply with the schedule. Ex. C at 8.

Second order to compel. As of October 13, 2004, Respondents had filed barely more than half of the unclassified returns. At a hearing that day, Respondents again promised to produce the unclassified returns, and they further assured the Court that as soon as the protective order was entered, they would "begin filing … the complete factual return record, including the

classified material" and Petitioners' counsel would "have the benefit of the *full* combatant status review tribunal record." Ex. D at 20, 49 (emphasis added).

As of October 29, 2004, however, Respondents still had not produced the unclassified versions of all returns. In an opinion sharply critical of Respondents, the Court ordered Respondents to produce all outstanding unclassified returns by November 3, 2004 and to submit, without any further delay, the classified versions of the returns already submitted in redacted, unclassified form. Exs. E, F.

Third order to compel. On November 5, 2004, Respondents filed the classified returns with the Court under seal for *in camera* review. In their filing, Respondents stated that the returns "may contain information that is classified but not suitable for disclosure to petitioners' counsel," and that upon entry of the protective order they would make available to Petitioners' counsel "versions of these factual returns ... suitable for disclosure to counsel." Ex. G at 1. When the Court entered the protective order on November 8, 2004, Respondents began making redacted versions of the classified returns available to Petitioners' counsel at the Secure Facility.

On November 18, 2004, Petitioners filed a second motion to compel, this time specifically to require Respondents to provide cleared counsel with access to the complete, unredacted classified returns. Respondents opposed the motion. On January 31, 2005, Judge Green, finding that the redacted information not disclosed to Petitioners' counsel "is relevant to the merits of this litigation," ordered Respondents to provide Petitioners' counsel with access to the unredacted versions of the classified returns that Respondents had filed under seal with the Court on November 5, 2004. Ex. A at 2.

Respondents still have not complied with the January 31, 2005 order. They have ignored that order as they ignored this Court's earlier orders.

2. The Stay Does Not Justify Respondents' Continued Stonewalling.

Respondents argue that the relief requested by Petitioners on this motion is "inconsistent" with the stay issued by Judge Green on January 31, 2005. Opp. Mem. at 7–9. Respondents invite the Court to view the stay as binding, immutable and absolute. But a court cannot be bound by its own orders. This Court's hands are not tied.

Respondents suggest that the Court did not intend for them to comply with its January 31, 2005 order because "[i]t did not set a date or schedule for compliance with the order." Opp. Mem. at 8. This dog won't hunt. A court may assume that parties will comply promptly with its orders. *See Maness v. Meyers*, 419 U.S. 449, 458 (1975). Respondents were already overdue.

The Government is not expected "to play ducks and drakes with the judiciary." *Baker v. Carr*, 369 U.S. 186, 268 (1962) (Frankfurter, J., joined by Harlan, J., dissenting). That, however, is exactly what Respondents are doing here.

3. Petitioners Are Entitled to the Unredacted Returns.

Respondents argue that Petitioners have failed to justify requiring Respondents to produce the redacted information. Opp. Mem. at 9–13. This argument is upside-down. The Court has granted Petitioners' motion to compel, finding that the information they seek "is relevant to the merits of this litigation." Ex. A at 2. It is not for Petitioners to justify requiring Respondents to comply with this Court's orders; it is for Respondents to justify defying those orders.

Petitioners' counsel need access to the unredacted classified returns to help prepare their clients for ongoing Annual Review Board hearings and to ready their clients' cases for the day the stay is lifted. Counsel remain obligated to pursue their clients' interests while Respondents' appeals wend their way upward, which requires that counsel know about their clients

what Respondents know. To freeze counsel in their tracks would do violence to judicial economy by creating needless delay when the proceedings resume.

Respondents' obligation to produce the redacted information is unaffected by the fact that they have recently appealed Judge Green's order. "The taking of an appeal does not by itself suspend the operation or execution of a district-court judgment or order during the pendency of the appeal." 16A Charles Alan Wright et al., *Federal Practice and Procedure – Jurisdiction* § 3954 (3d ed. 2004). Although Respondents continue to press their separation-of-powers arguments, Opp. Mem. at 10–13, they do so in the wrong forum. Their recourse is in the Court of Appeals.

CONCLUSION

For the foregoing reasons, the motion should be granted. Petitioners respectfully request oral argument on this motion.

Dated: Washington, D.C.
March 24, 2005

Respectfully submitted,

COVINGTON & BURLING

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