

IN THE UNITED STATES DISTRICT COURT FOR THE  
DISTRICT OF COLUMBIA

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AL HALMANDY, <i>et. al.</i> ,	)	
	)	
Petitioner,	)	
	)	
v.	)	Civil Action No. 05-2385 (ESH)
	)	(Jawad, ISN 900)
BARACK OBAMA,	)	
President of the United States, <i>et al.</i> ,	)	
	)	
Respondents.	)	
_____	)	

**RESPONDENTS' MOTION FOR AN EXTENSION OF TIME TO  
COMPLY WITH THE COURT'S APRIL 27, 2009 ORDER**

Respondents hereby respectfully submit this motion for an extension of time until June 26, 2009, to produce the materials required by the Court's April 27, 2009 Order (dkt. no. 238). Pursuant to the April 27, 2009 Order, the Government is required to produce by May 26, 2009, a numbered statement of material facts upon which the Government intends to rely in its case-in-chief. Additionally, under the April 27, 2009 Order, the Government is required to produce all of the statements it intends to rely upon, in whatever form, as well as the circumstances under which each statement was made. Lastly, the April 27, 2009, Order requires the Government to produce all "reasonably available evidence" that tends to materially undermine the evidence that it intends to rely on in its case-in-chief. In its April 27, 2009 Order, the Court defined all

“reasonably available evidence” to include evidence discovered during the ongoing review of Guantanamo cases ordered by the President on January 22, 2009.<sup>1</sup>

The Government is working diligently to assemble and prepare the materials required by the Court’s April 27, 2009, Order. However, as the Government has reviewed materials in its attempt to comply with the Court’s Order, it has become apparent that this habeas action has the potential to improperly interfere or overlap with the pending criminal prosecution of Petitioner. The Government is now in the process of reevaluating the evidence set forth in its factual return and additional information that it has recently identified as potentially responsive to the Court’s Order, in light of the criminal prosecution case. Accordingly, the Government needs an additional 30 days to work out these issues, and to get responsive classified documents cleared for production.<sup>2</sup>

On January 30, 2008, charges against Petitioner Mohammed Jawad, a/k/a Saki Bacha (ISN 900), for attempted murder in violation of 10 U.S.C. §§ 950t, 950v(b)(15) and intentionally causing serious bodily injury in violation of 10 U.S.C. § 950b(b)(15) were referred to a military commission for prosecution. On January 22, 2009, the President issued Executive Order 13,492: Review and Disposition of Individual Detained at the Guantanamo Bay Naval Base and Closure of Detention Facilities. *See* Exec. Order No. 13, 492, 74 Fed. Reg. 4897 (Jan. 22, 2009). At that time, the Government’s interlocutory appeal of a pre-trial ruling by the military

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<sup>1</sup> The Government has moved for reconsideration of this Court’s April 27, 2009 Order, and other similar orders, regarding discovery of the Guantanamo Review Task Force materials. The Court should stay the Government’s obligation to review Guantanamo Review Task Force materials during the pendency of the Government’s motion for reconsideration.

<sup>2</sup>Pursuant to Local Rule 7(m), the Government conferred with counsel for Petitioner via e-mail on May 26, 2009. Counsel for Petitioner oppose the motion.

commission was pending before the Court of Military Commission Review. Petitioner's military commission case, including the Government's interlocutory appeal, was continued for 120 days to permit the Government to conduct a prompt and thorough review of the factual and legal bases for the continued detention of individuals currently held at the U.S. Naval Base at Guantanamo Bay. Exec. Order No. 13,492, 74 Fed. Reg. 4897 §§ 2(d), 4. The President contemporaneously ordered a "comprehensive review of the lawful options available to the Federal Government with respect to the apprehension, detention, trial, transfer, release, or other disposition of individuals captured or apprehended in connection with armed conflicts and counterterrorism operations that are consistent with the national security and foreign policy interests of the United States and the interests of justice." *See* Exec. Order No. 13,493: Review of Detention Policy Options, 74 Fed. Reg. 4901 (Jan. 22, 2009). This review has included a careful examination of the military commission process and of other available options, including prosecution in Article III courts, for criminally prosecuting individual detainees who had been charged, or, upon review, would be charged, with law of war or criminal law violations.

The President recently announced that individuals, such as Petitioner, who are charged with law of war violations or violations of American criminal laws will be prosecuted before either reformed military commissions or federal Article III courts. *See* Statement of President Barack Obama on Military Commissions (May 15, 2009), *available at* [http://www.whitehouse.gov/the\\_press\\_office/Statement-of-President-Barack-Obama-on-Military-Commissions/](http://www.whitehouse.gov/the_press_office/Statement-of-President-Barack-Obama-on-Military-Commissions/); President Barack Obama, Address on National Security at the National Archives (May 21, 2009), *available at* <http://www.nytimes.com/2009/05/21/us/politics/21obama.text.html>. In light of the President's announcement, moving forward with Petitioner's habeas case presents

unique challenges, and the potential for improper interference or overlap with Petitioner's criminal prosecution. Proceeding with the habeas action during the pendency of Petitioner's criminal prosecution creates the potential for inconsistent rulings regarding disclosure of classified information. *See Al Odah v. Bush*, 2009 WL 22275 at \*4 (D.D.C. Jan. 6, 2009) (J. Kollar-Kotelly) (concluding that "[a]bstention [] eliminates the potential for conflicting findings or rulings that would arise if the Petitioners' habeas cases and military commissions proceed simultaneously."). The habeas proceedings before this Court "may [] produce rulings on the production of discovery and/or exculpatory information that diverge from those of the [criminal prosecution]." *Id.* This would potentially allow Petitioner to circumvent the discovery limitations inherent in criminal prosecutions to advance his defense in the prosecution case. Similarly, parallel litigation of discovery issues in both forums would permit Petitioner to use information obtained during the course of his criminal prosecution, that would not otherwise be available to Petitioner, in this habeas action.

Given the possibility that this habeas action might improperly interfere with the criminal prosecution by producing inconsistent rulings and allowing Petitioner to circumvent the discovery limitations in each forum, the Government needs additional time to reevaluate the evidence set forth in its factual return and additional, potentially responsive, information that has only recently been identified. An extension of 30 days will allow the Government to continue to confer with its client agencies in an effort to put forth a case-in-chief that will not improperly interfere or overlap with Petitioner's criminal prosecution or will at least minimize such potential interference or overlap. A 30-day extension will also permit the Government to complete the

clearance process for classified documents it has identified as responsive to the Court's April 27, 2009 Order.

For these reasons, the Government respectfully requests that the deadline for its compliance with its obligations under the Court's April 27, 2009 Order be extended by 30 days, and a new deadline be set for Friday, June 26, 2009 to produce a number statement of materials facts, as well as automatic and exculpatory discovery.<sup>3</sup>

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<sup>3</sup> The Government also respectfully requests that all subsequent deadlines be extended an additional 30 days and new deadlines be set as follows: (1) on or before June 29, 2009, the Government shall file a written updated certification, signed by counsel, that indicates the scope of its search for exculpatory evidence and the results of that search; (2) on or before July 10, 2009, the Government shall produce an unclassified version of the statement of material facts; (3) on or before July 10, 2009, Petitioner shall file a proposed plan that specifies whether Petitioner intends to proceed by seeking additional discovery, by filing a traverse, or by briefing a motion for expedited judgment on the record; and (4) on July 16, 2009, the parties shall appear before the Court for a status conference.

Date: May 26, 2009

Respectfully submitted,

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