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

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| IN RE:<br><br>U.S. DEPARTMENT OF STATE FOIA LITIGATION REGARDING EMAILS OF CERTAIN FORMER OFFICIALS | Misc. No. 15-1188 (___) |

**UNITED STATES DEPARTMENT OF STATE'S MOTION FOR DESIGNATION OF COORDINATING JUDGE AND MEMORANDUM IN SUPPORT**

**INTRODUCTION**

The United States Department of State ("State"), defendant in numerous Freedom of Information Act ("FOIA") cases in this district in which the emails of certain former officials are at issue, hereby requests the designation of a coordinating judge to allow the orderly and efficient resolution of common questions of law, fact, and procedure in those cases, pursuant to Local Civil Rules 40.5(e) and 40.6(a).

Numerous FOIA suits filed with this Court against State implicate the search and production of responsive, non-exempt documents that were provided to State by former Secretary of State Hillary Clinton and certain other former employees ("the recently provided documents"). State has been expending considerable time and effort to release to the public the approximately 53,000 pages of these documents provided by former Secretary Clinton. It has produced more than 25 percent them and, pursuant to a court order issued by Judge Rudolph Contreras, is committed to completing this enormous undertaking by the end of January 2016. State has identified more than 30 FOIA cases where a reasonable search would, or is likely to, include a search of all or some of the recently provided documents. *See* Schedule of Cases

(attached).[1] These cases are assigned to 17 different judges of this Court. They are not susceptible to traditional consolidation under Rule 42, because they involve a wide range of unrelated subject matters, are in different stages of proceedings, and are brought by a variety of plaintiffs. But, because they each implicate a search of the recently provided documents referenced above, different judges are being asked to impose a variety of search regimes, resulting in a hodgepodge of orders directing how State manages the search and production of the emails. The result is confusion, inefficiencies, and advantages given to some requesters at the expense of others. The appointment of a coordinating judge not only would avoid these results but would assist State in its efforts to complete production of the documents produced by former Secretary Clinton by the end of January 2016.

For example, in several cases, courts have ordered searches of the recently provided documents. The Department also has been required to file joint status reports in individual cases where individual judges could benefit from the broader context that coordinated management could provide. In addition, plaintiffs have sought orders relating to discovery and preservation in several cases. Having one judge coordinate these issues would ensure that conflicting orders are not entered and that scheduling orders take into account relevant demands on State, whose FOIA-processing resources are overextended, and the needs of other requesters, rather than focusing exclusively on the circumstances of each individual case.

At least two judges of this Court have noted this possibility and made inquiries regarding "consolidation." Tr. of Status Conference at 5, *Judicial Watch v. U.S. Dep't of State*, Civil No.

[1] In the event that further issues that warrant coordination arise, whether in cases on the attached Schedule or otherwise, State will, after conferring with the relevant plaintiffs, ask the coordinating judge to include them in the coordination process.

15-688 (D.D.C. July 9, 2015) (Judge Contreras querying "whether the government plans to do anything to consolidate these [cases] because it doesn't make a lot of sense for six different judges to be ordering six different things, to a certain extent"); Tr. of Status Hr'g at 5, 10 *et seq*., *Judicial Watch v. Dep't of State*, Civil No. 13-1363 (D.D.C. Jul. 31, 2015) (Judge Sullivan inquiring as to how many FOIA and Federal Records Act (FRA) cases there are involving the emails of former Secretary Clinton and the judges involved, and further noting that he might seek their views as to consolidation); *see also* Tr. of Status Conference at 45:15-20, *Judicial Watch v. Dep't of State*, Civil No. 13-1363 (D.D.C. Aug. 20, 2015) (Judge Sullivan noting the overlap concerning discovery in a number of related lawsuits pending before him and other judges on the Court).

The Court should exercise its inherent authority to designate, pursuant to LCvR 40.5(e), 40.6(a), a coordinating judge for resolution and management of common issues of law, fact, and procedure. In each case, the transferring judge would retain the case for all other purposes, including searches for responsive records other than the recently provided documents. Once designated, the coordinating judge would determine how best to prioritize demands for searches of the recently provided documents in the different cases; the schedules established by the transferring judges for records other than the recently provided documents would remain undisturbed and under the jurisdiction of those transferring judges. Once searches of the recently provided documents are completed in a particular case, it would be sent back to the judge to whom the case is assigned, for summary judgment or other necessary proceedings, as appropriate. State believes this coordinated approach, which is modeled on the designation of Judge Thomas F. Hogan to coordinate and manage proceedings in cases in this district involving

habeas petitioners detained at Guantanamo Bay, Cuba, will benefit FOIA requesters, State, and the Court by enabling the fair and efficient resolution of these cases.

**BACKGROUND**

In December 2014, former Secretary of State Clinton provided to State paper copies of approximately 30,000 emails ("Clinton emails") totaling more than 53,000 pages.[2] Decl. of John F. Hackett ¶ 10, *Leopold v. U.S. Dep't of State* ("*Leopold I*"), Civil No. 15-123 (RC) (D.D.C. May 18, 2015) (ECF No. 12-1) ("Hackett Decl. re Processing of Emails"). Secretary Clinton provided these records in response to a letter sent by the Department of State to former Secretaries requesting that, if former Secretaries or their representatives were "aware or [were to] become aware in the future of a federal record, such as an email sent or received on a personal email account while serving as Secretary of State, that a copy of this record be made available to the Department. . . . if there is reason to believe that it may not otherwise be preserved in the Department's recordkeeping system." *Id.* (citation omitted).

Judge Contreras has the case with the most comprehensive production schedule regarding the Clinton emails and is managing a monthly rolling production schedule for the entire collection of federal records provided by former Secretary Clinton. *Leopold I*, Civil No. 15-123. As of August 31, State has produced more than 25 percent of the Clinton emails pursuant to that schedule. The production of all the Clinton emails that are federal records is scheduled to be

[2] The number of pages provided by former Secretary Clinton was originally estimated as "approximately 55,000." Hackett Decl. re Processing of Emails ¶ 10. However, once the digitizing process was complete, State was able to provide a more precise count. *See* Def.'s Status Report at 1, *Leopold I* (D.D.C. Jul. 7, 2015) (ECF No. 20) (reporting that former Secretary Clinton provided 53,988 pages, of which approximately 1,533 were identified, in consultation with the National Archives and Records Administration, as "entirely personal correspondence, that is, documents that are not federal records," leaving approximately 52,455 pages).

completed by January 29, 2016. *See* Scheduling Order at 1-2, *Leopold I* (D.D.C. May 27, 2015) (ECF No. 17) (establishing monthly "Cumulative Pages Completed" targets to which State "shall aspire to abide" of 37% for the end of September, 51% for October, 66% for November, 82% for December, and 100% for January).

The Clinton emails may be reasonably likely to contain records responsive to FOIA requests at issue in more than 30 other cases in this district.[3] All the Clinton emails responsive to the requests in those cases will be processed under FOIA, and the non-exempt portions will be released as part of the productions of the full collection in *Leopold I*. These emails are being posted on the Department's website in a keyword-searchable format. Individual searches to identify specific records that are responsive to specific FOIA requests may still be necessary, and have been ordered in certain cases. Performing such searches now and reviewing the search results for documents responsive to individual FOIA requests, however, requires State to divert resources away from its ongoing effort to review and publicly release in searchable format the non-exempt portions of the entire Clinton email collection in accordance with the *Leopold I* production schedule. Hackett Decl. re Processing of Emails at 4, n.2. In some cases, State has nonetheless been ordered to conduct such searches; in others, the searches will be done after the production of the full collection is complete; and in others, the issue has not been addressed or resolved. With no way for the judges making decisions in individual cases to take into account the cumulative effect of search and production orders and to balance all the equities of the

[3] The Clinton emails are also reasonably likely to contain records responsive to hundreds of FOIA requests not currently in litigation. Decl. of John F. Hackett at 13, n.1, *Associated Press v. Dep't of State*, Civil No. 15-345 (RJL) (D.D.C. July 21, 2015) (ECF No. 11-1) ("Hackett Decl. re FOIA Workload").

different plaintiffs and State, these various approaches have led to uncoordinated and piecemeal schedules for searches, status reports, and production of records from the Clinton emails. Moreover, the uncoordinated schedules make it difficult for State to group together searches for records responsive to FOIA requests that address similar topics, which could allow a quicker overall response to those requests while easing the burden on State.

The difficulty of complying with these divergent court requirements and deadlines is exacerbated by the fact that State's resources for processing FOIA requests are strained to the limit. In FY 2014, State received nearly 20,000 FOIA requests, an increase of more than 300 percent over the fewer than 6,000 new requests received in FY 2008. Hackett Decl. re FOIA Workload ¶ 10. At the end of Fiscal Year 2014, State had 10,965 FOIA requests pending; since then, as of July 15, 2015, State has received approximately 16,517 new requests and is currently engaged in 87 FOIA litigation cases in multiple districts, many of which involve court-ordered document production schedules. *See id.* (reporting 86 active FOIA litigation cases as of July 21, 2015). This dramatic increase in workload has occurred while funding for State's operating account, which funds Department operations around the world, including the FOIA program, has decreased in real terms.[4] *Id.* For instance, State spent approximately $16.5 million in FY 2013 and $15.9 million in FY 2014 on FOIA personnel costs associated with processing requests outside of litigation. *Id.*

[4] Appropriated funding for Diplomatic and Consular Programs Ongoing Operations, from which State's FOIA program is funded, has been reduced by 15.9% since sequestration in FY 2013. At the same time, annual Federal pay raises and overseas inflation are increasing annual operating costs by at least 3% annually. Hackett Decl. re FOIA Workload ¶ 10.

In addition to the Clinton emails, State has received non-state.gov emails from certain former employees—Cheryl Mills, Jacob Sullivan, Huma Abedin, and Philippe Reines—who served at State during former Secretary Clinton's tenure. State sent letters to these individuals earlier this year asking them to make available to State any federal records that they may have in their possession, such as emails concerning official government business sent or received on a personal email account while serving in their official capacities with State, if there is any reason to believe that those records may not otherwise be preserved in State's recordkeeping system.[5] The documents provided in response by these individuals may in theory be reasonably likely to contain records responsive to numerous FOIA requests that are in active litigation, and many of the documents produced by these individuals may overlap with the Clinton emails that are the subject of Judge Contreras's rolling production schedule. Because these documents have to be processed (including being scanned, if necessary, and put into electronically searchable form) before they can be efficiently searched—a process that has been completed for only some of the provided documents—it is difficult to establish search schedules. The volume of records has further strained State's FOIA resources. Adjudication of issues related to the processing and search of these records by separate judges presents concerns similar to those that have already arisen with respect to the Clinton emails.

All these issues are further complicated by the different procedural postures of the various cases. For example, some of them have just recently begun and have no production dates set for the recently provided records; some are currently in the document-production stage; some

[5] Ms. Mills, Ms. Abedin, Mr. Sullivan, and Mr. Reines have indicated that they have produced to State all potential federal records in their possession.

have been reopened after they originally concluded; and some were in the midst of summary judgment briefing when these documents began to arrive at State. In addition, individual plaintiffs have asked for various forms of miscellaneous relief, including orders requiring State to provide discovery or other information related to the Clinton emails and emails of the former employees, and orders related to preservation. Many of these requests for relief from the Court are the same or very similar across several cases. In some cases these requests have been granted, in whole or part, and in others, rejected. And in some cases, the issues are not yet ripe.

## ARGUMENT

### I. THE COURT HAS THE INHERENT AUTHORITY TO TRANSFER THESE CASES TO RESOLVE COMMON ISSUES OF LAW, FACT, AND PROCEDURE

District courts have both express and inherent authority to coordinate proceedings on cases pending before them in the interest of justice and in the service of judicial economy. It has long been recognized that there is a "'power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants.'" *Air Line Pilots Ass'n v. Miller*, 523 U.S. 866, 879, n.6 (1998) (quoting *Landis v. N. Am. Co.*, 299 U.S. 248, 254-55 (1936)). One specific codification of this authority is Fed. R. Civ. P. 42, a provision that recognizes not only the notion of formal consolidation, but also the power of the Court to "join for hearing or trial any or all matters at issue in the actions," and to "issue any other orders to avoid unnecessary cost or delay." Fed. R. Civ. P. 42(a)(1), (3).[6]

[6] The district courts' inherent authority to manage their dockets goes beyond the measures expressed in Rule 42. As the Federal Judicial Center's Manual for Complex Litigation (Fourth) explains, even when cases sharing common issues are pending in different judicial districts, "judges can coordinate proceedings in their respective courts to avoid or minimize duplicative activity and conflicts." MOORE'S FED. PRACTICE, MANUAL FOR COMPLEX LITIGATION (FOURTH) 227 (2004).

This court's local rules include provisions premised on similarly broad principles of inherent authority as to case management issues. Under LCvR 40.5(e), this court's Calendar and Case Management Committee has the authority to refer "two or more cases assigned to different judges" to "one judge" for a "specific purpose . . . in order to avoid duplication of judicial effort," so long as the assignment is "with the consent of the judge to whom the cases will be referred" and the "scope of authority of said judge" is identified. The Calendar and Case Management Committee can also advise a judge to "transfer directly all or part of any case on the judge's docket to any consenting judge." LCvR 40.6(a). More broadly, LCvR 40.7(h) recognizes the authority of the Chief Judge to "take such other administrative actions, after consultation with appropriate committees of the Court, as in his/her judgment are necessary to assure the just, speedy and inexpensive determination of cases, and are not inconsistent with these Rules."

This Court exercised this authority when it designated Judge Hogan to coordinate and manage proceedings in more than a hundred actions by or on behalf of almost 200 military detainees at Guantanamo Bay, Cuba. Order at 1-2, *In re Guantanamo Bay Detainee Litig.*, Misc No. 08-442 (TFH) (D.D.C. July 2, 2008) (ECF No. 1) ("Guantanamo Coordination Order") (citing LCvR 40.5(e), 40.6(a)) (attached). The coordination order in that case transferred each such case from the judge to whom it was assigned to Judge Hogan "for the purpose of coordination and management" and to "identify and delineate both procedural and substantive issues that are common to all or some of [the] cases and, to the extent possible, rule on procedural issues that are common to the cases"; the transferring judge retained the case for all other purposes. *Id.* at 2. Judge Hogan established a schedule for briefing of procedural and

substantive issues and the staggered filing of factual returns in the cases. *See* Scheduling Order, *In re Guantanamo Bay Detainee Litig.* (D.D.C. July 11, 2008) (ECF No. 53). Judge Hogan also entered a case management order that decided a variety of procedural and substantive issues common to the cases: (1) the common discovery to which each petitioner was entitled and the schedule by which it must be provided; (2) the procedures by which petitioners could file motions for additional discovery (to be heard and decided by the transferring judge); (3) the burden of proof the government had to satisfy to prevail; and (4) and procedures and schedules for filing of motions for judgment on the record. *See* Case Management Order at 3, *In re Guantanamo Bay Detainee Litig.* (D.D.C. Nov. 6, 2008) (ECF No. 940) (attached). The transferring judges modified these standard procedures and schedules where necessary in specific cases.[7] In this way, the Court addressed these issues far more efficiently and consistently than it could have without a coordinating judge. The same type of coordination and management would provide similar benefits to the dozens of cases at issue here.

## II. TRANSFER OF COMMON ISSUES TO A COORDINATING JUDGE WOULD ALLOW FOR MORE EFFICIENT RESOLUTION OF COMMON ISSUES OF LAW, FACT, AND PROCEDURE IN THE CASES HERE

The Court should exercise its inherent authority to designate a coordinating judge for resolution and management of common issues of law, fact, and procedure for the cases involving the recently provided documents. Once designated, the coordinating judge would determine how best to prioritize the search demands of the different cases and address other common issues. It is impossible to anticipate all the common issues that might arise across cases, but proceedings to date have made it clear that, at minimum, the following issues would benefit from coordination:

[7] Two judges opted out of the coordination process entirely.

**A. Scheduling Searches of the Clinton Emails**

As discussed above, State is currently processing the Clinton emails for public release, consistent with the FOIA and according to the schedule set forth in Judge Contreras' Scheduling Order in *Leopold*, which calls for production to be complete by January 29, 2016. When this process is complete, the non-exempt portions of the Clinton emails that are subject to the FOIA will be publicly available on State's FOIA website. As noted above, that website is keyword searchable, which will allow FOIA requesters (as well as members of the general public) to locate documents of interest. However, it may still be necessary for State to conduct searches of the Clinton emails for records responsive to other FOIA requests.

Although State has reached agreement with plaintiffs in several cases regarding the scheduling of case-specific searches,[8] the issue has given rise to disputes in several others,[9] and will likely do so in still more. These searches have the potential to interfere with each other, as well as to jeopardize State's ability to complete release of the collection by January 29, 2016. And there are likely efficiencies to be realized if State can group searches for records responsive to FOIA requests that address similar topics together, which would ease the burden on State

[8] *See, e.g.*, Minute Order, *Judicial Watch v. U.S. Dep't of State*, Civil No. 15-687 (JEB) (D.D.C. Aug. 3, 2015) (parties agreed that production schedule for Clinton emails would be in accordance with the production schedule ordered by the Court in *Leopold I*); *Judicial Watch v. Dep't of State*, Civil No. 15-321 (CKK) (Department agreed to conduct particularly narrow search of Clinton emails before schedule ordered by Court in *Leopold I*).

[9] *See, e.g.*, Minute Order, *Citizens United v. U.S. Dep't of State*, Civil No. 15-441 (CRC) (D.D.C. Aug. 4, 2015) (rejecting Plaintiff's proposed production schedule and ordering that the release of responsive records in the emails provided by former Secretary Clinton follow the production schedule ordered by the Court in *Leopold I*); Joint Status Report at ¶¶ 8, 13, *Judicial Watch v. Dep't of State*, Civil No. 15-692 (APM) (D.D.C. July 29, 2015) (plaintiffs proposing a more immediate search of the Clinton emails; defendant proposing a search after the production in *Leopold I* is complete).

while allowing a quicker overall response to those requests. For this reason, resolving issues related to searches of the Clinton emails involves weighing the facts and procedural posture of the various cases against each other, increasing the likelihood of divergent and inconsistent schedules absent coordination. A coordinating judge could weigh all the competing demands and establish a consistent schedule for searches of the Clinton emails, or determine to allow the completion of the posting of all the emails before individual searches are conducted, while leaving challenges to withholdings from the Clinton emails to be litigated in the individual cases after they are returned to their original judges.

**B. Scheduling Searches of the Emails Provided by Other Individuals**

As described above, State has recently received documents from other former employees. These submissions may contain documents potentially responsive to several FOIA requests at issue in pending cases; as with the Clinton emails, cases implicating these documents (either instead of or in addition to the Clinton emails) are at different procedural stages, from near inception to summary judgment briefing. In each case where State has searched, or plans to search, the state.gov email accounts of one or more of these individuals, a schedule will need to be established to allow State to also search the non-state.gov emails of those particular individuals.[10]

[10] In some of these cases, the searches were complete before these records came into State's custody and control; indeed, in some cases, summary judgment briefing had already begun when documents were received. Nonetheless, given the unique circumstances here, State proposes that in each such case, it search the non-state.gov emails of those individuals whose state.gov email accounts were searched, should the plaintiff so desire, according to a schedule established by the coordinating judge.

Processing these documents for searching and potential release consistent with FOIA is an involved process. For example, to ready former Secretary Clinton's emails for processing and release, State first undertook multiple steps, including an initial review to screen out documents that are entirely personal and thus are not federal records,[11] a five-step scanning and digitizing process,[12] and a process to load the documents into a searchable system (which is necessary to allow State to conduct a search for documents potentially responsive to a specific FOIA request). This processing must be completed before searches of the recently provided records for potentially responsive documents can be run, and State has limited resources available to complete the processing. The coordinating judge, with knowledge of each case at issue, could balance the competing concerns between the various plaintiffs, keeping in mind State's available resources.

**C. Requests for Information, Discovery, Preservation, and Other Orders**

Plaintiffs in various cases have made requests for information and discovery about the use of personal email by former State Department officials.[13] Other plaintiffs have sought orders

[11] Several individuals have informed State that they were over-inclusive in what they provided to State; it is possible that some of the provided documents are not federal records. *See, e.g.*, Tr. of Status Hr'g at 66:4-67:3, *Associated Press v. Dep't of State*, Civil No. 15-345 (RJL) (D.D.C. July 29, 2015).

[12] Most of the documents received to date have been received in paper form. Because the document review platform that State uses to process FOIA requests cannot ingest most forms of electronic data, most potentially responsive documents must first be printed and then scanned into the system, even if documents are received electronically. Hackett Decl. re FOIA Workload ¶ 14. Even those that do not have to be scanned will still have to go through four of the five steps in the process.

[13] These requests have been made in a variety of contexts, including status reports, orally at status conferences, and in formal discovery motions. *See, e.g.*, Pl.'s Mot. to Allow Time for Limited Disc., *Judicial Watch v. U.S. Dep't of State*, Civil No. 14-1242 (RCL) (D.D.C. Aug. 21,

relating to preservation.[14] Many of these requests seek the same or similar relief, resulting in similar arguments being made across various cases and risking conflicting rulings on such issues. Coordinating such issues would allow them to be litigated more efficiently and consistently, while leaving truly case-specific requests to the individual judge before whom the remainder of the cases remains.

* * *

State respectfully requests that designation of a coordinating judge occur immediately due to a number of scheduled conference and reports due in different cases. State will be separately filing a notice of this filing in each case in this district that implicates the search of the recently provided documents and, in most such cases, a motion to stay those portions of each case addressing those documents until the Coordination Motion is decided, and, if it is granted,

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2015) (ECF No. 22); Joint Status Report at ¶ 13, *Judicial Watch v. U.S. Dep't of State*, Civil No. 14-1511 (ABJ) (D.D.C. June 19, 2015) (ECF No. 13) (plaintiff seeking discovery); Tr. of Status Conference at 41:22-42:16, *Judicial Watch v. U.S. Dep't of State*, Civil No. 13-1363 (EGS) (D.D.C. Aug. 20, 2015) (requesting deposition or examination of State official); Joint Status Report, *Gawker Media, LLC, et al. v. U.S. Dep't of State*, Civil No. 15-363 (KBJ) (D.D.C. Aug. 3, 2015) (ECF No. 13) (requesting that Department and Mr. Reines provide sworn affidavits). In addition, counsel for plaintiffs in numerous other cases have sought similar types of information from counsel for State; some have indicated they may raise these issues with the Court.

[14] *See, e.g.*, Mot. for Status Conference at ¶ 13, *Judicial Watch v. U.S. Dep't of State*, Civil No. 14-1242 (RCL) (D.D.C. May 1, 2015) (ECF No. 13) (plaintiff raising issue of "possible spoliation"); Minute Order, *Judicial Watch v. U.S. Dep't of State*, Civil No. 13-1363 (EGS) (D.D.C. Aug. 7, 2015) (directing Department to request that former Secretary Clinton, Ms. Mills, and Ms. Abedin not delete any federal records, electronic or otherwise, in their possession or control, and provide assurances on this point to Department ); Pl.'s Status Report, *Judicial Watch v. U.S. Dep't of State*, Civil No.12-2034 (RW) (D.D.C. Aug. 13, 2015) (ECF No. 22) (raising issue of preservation of certain emails). In addition, counsel for plaintiffs in numerous other cases have informed counsel for State that they may seek similar relief.

until the coordinating judge issues an order determining how to proceed in the coordinated cases.[15]

## CONCLUSION

For the reasons set forth above, the Court should grant this motion and transfer the common legal, factual, and procedural issues to a member of this Court to serve as a coordinating judge.[16]

Date: September 2, 2015

Respectfully submitted,

BENJAMIN C. MIZER
Principal Deputy Assistant Attorney General

ELIZABETH J. SHAPIRO
Deputy Branch Director

MARCIA BERMAN
Assistant Branch Director

*/s/ Robert J. Prince*
ROBERT J. PRINCE (D.C. Bar No. 975545)
United States Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Ave., N.W.
Washington, DC 20530
Tel: (202) 305-3654
robert.prince@usdoj.gov

*Counsel for Movant*

[15] The motion State will file in *Leopold I* will not seek a stay of the scheduling order governing the production of the emails provided to State by former Secretary Clinton.

[16] The government has reached out to the plaintiffs in the scheduled cases to determine their position with respect to this motion. Their respective positions are set forth in the attached Schedule of Cases.

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

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|---|---|
| IN RE:<br><br>U.S. DEPARTMENT OF STATE FOIA LITIGATION REGARDING EMAILS OF CERTAIN FORMER OFFICIALS | Misc. No. 15-1188 (___) |

**UNITED STATES DEPARTMENT OF STATE'S**
**MOTION FOR DESIGNATION OF COORDINATING JUDGE**

**SCHEDULE OF CASES**

| **Case** | **Civil No.** | **Plaintiff Position** |
|---|---|---|
| *Accuracy in Media v. U.S. Dep't of Defense, et al.* | 14-1589 (EGS) | Does not oppose |
| *Associated Press v. U.S. Dep't of State* | 15-345 (RJL ) | Needs to see motion before taking position |
| *Bauer v. Central Intelligence Agency, et al.* | 14-963 (APM) | Opposes |
| *Canning v. U.S. Dep't of State* | 13-831 (RDM) | Takes no position (plaintiff George Canning); unable to obtain separate consent (plaintiff Jeffrey Steinberg) |
| *Citizens United v. U.S. Dep't of State* | 15-374 (EGS) | Opposes |
| *Citizens United v. U.S. Dep't of State* | 15-441 (CRC) | Opposes |
| *Citizens United v. U.S. Dep't of State* | 15-518 (ABJ) | Opposes |
| *Citizens United v. U.S. Dep't of State*[1] | 15-1031 (EGS) | Opposes |

[1] Because this is a relatively new case, the Department of State has not yet made a final determination as to whether or not a reasonable search will include the recently provided documents.

| **Case** | **Civil No.** | **Plaintiff Position** |
|---|---|---|
| *Competitive Enterprise Institute v. U.S. Dep't of State* | 15-553 (RDM) | Opposes |
| *Freedom Watch v. National Security Agency, et al.* | 12-1088 (CRC) | Does not oppose, "but only if the designated coordinating judge was not appointed to the District Court for the District of Columbia by President Clinton or President Obama, given, at a minimum, the appearance of a conflict of interest since Hillary Clinton and the Obama State Department are at issue" |
| *Gawker Media v. U.S. Dep't of State* | 15-363 (KBJ) | Takes no position |
| *Joseph v. U.S. Dep't of State, et al.* | 14-1896 (RJL) | Did not convey a position; wants more time to discuss logistics and think about questions related to the coordination motion |
| *Judicial Watch v. U.S. Dep't of State, et al.* | 12-893 (JDB) | |
| *Judicial Watch v. U.S. Dep't of Defense, et al.* | 14-812 (KBJ) | |
| *Judicial Watch v. U.S. Dep't of State* | 12-2034 (RW) | |
| *Judicial Watch v. U.S. Dep't of State* | 13-1363 (EGS) | |
| *Judicial Watch v. U.S. Dep't of State* | 13-772 (CKK) | |
| *Judicial Watch v. U.S. Dep't of State* | 14-1242 (RCL) | |
| *Judicial Watch v. U.S. Dep't of State* | 14-1511 (ABJ) | |
| *Judicial Watch v. U.S. Dep't of State* | 15-1128 (EGS) | |
| *Judicial Watch v. U.S. Dep't of State* | 15-321 (CKK) | |
| *Judicial Watch v. U.S. Dep't of State* | 15-646 (CKK) | |

| **Case** | **Civil No.** | **Plaintiff Position** |
|---|---|---|
| *Judicial Watch v. U.S. Dep't of State* | 15-684 (BAH) | Did not convey a position; wants more time to discuss logistics and think about questions related to the coordination motion |
| *Judicial Watch v. U.S. Dep't of State* | 15-687 (JEB) | |
| *Judicial Watch v. U.S. Dep't of State* | 15-688 (RC) | |
| *Judicial Watch v. U.S. Dep't of State* | 15-689 (RDM) | |
| *Judicial Watch v. U.S. Dep't of State* | 15-691 (APM) | |
| *Judicial Watch v. U.S. Dep't of State* | 15-692 (APM) | |
| *Leopold v. U.S. Dep't of State* | 14-1760 (TSC) | Opposes |
| *Leopold v. U.S. Dep't of State* | 15-123 (RC) | Opposes |
| *O'Brien v. U.S. Dep't of State* | 14-119 (RC) | Opposes |
| *Veterans for a Strong America v. U.S. Dep't of State* | 15-464 (RMC) | Takes no position |

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

IN RE:

U.S. DEPARTMENT OF STATE FOIA LITIGATION REGARDING EMAILS OF CERTAIN FORMER OFFICIALS

Misc. No. 15-1188 (___)

**PROPOSED ORDER**

More than 30 cases arising under the Freedom of Information Act (FOIA) are pending in this District that implicate the search and production of responsive, non-exempt documents subject to the FOIA that were provided to State by former Secretary of State Hillary Clinton and certain other former employees ("the recently provided documents"). These matters("Coordinated Cases") are listed in the Schedule of Cases attached to the Defendant's motion for designation of a coordinating judge ("Coordination Motion"). Upon consideration of the Coordination Motion , it is hereby:

**ORDERED** that the Coordination Motion is **GRANTED**. It is further

**ORDERED** that Judge _____ is designated to resolve and manage issues of law, fact, and procedure arising in the Coordinated Cases from the search and production of responsive records within the recently provided documents. It is further

**ORDERED** that in each Coordinated Case, the transferring judge will retain the case for all other purposes.

_____ _____

Date Chief Judge Richard W. Roberts

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

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|---|---|
| **IN RE:**<br><br>**GUANTANAMO BAY DETAINEE LITIGATION** | **Misc. No. 08-442 (TFH)**<br><br>**Civil Action Nos.**<br><br>**02-CV-0828, 04-CV-1136, 04-CV-1164, 04-CV-1194, 04-CV-1254, 04-CV-1937, 04-CV-2022, 04-CV-2035, 04-CV-2046, 04-CV-2215, 05-CV-0023, 05-CV-0247, 05-CV-0270, 05-CV-0280, 05-CV-0329, 05-CV-0359, 05-CV-0392, 05-CV-0409, 05-CV-0492, 05-CV-0520, 05-CV-0526, 05-CV-0569, 05-CV-0634, 05-CV-0748, 05-CV-0763, 05-CV-0764, 05-CV-0765, 05-CV-0833, 05-CV-0877, 05-CV-0881, 05-CV-0883, 05-CV-0886, 05-CV-0889, 05-CV-0892, 05-CV-0993, 05-CV-0994, 05-CV-0995, 05-CV-0998, 05-CV-0999, 05-CV-1048, 05-CV-1124, 05-CV-1189, 05-CV-1220, 05-CV-1234, 05-CV-1236, 05-CV-1244, 05-CV-1347, 05-CV-1353, 05-CV-1429, 05-CV-1457, 05-CV-1458, 05-CV-1487, 05-CV-1490, 05-CV-1497, 05-CV-1504, 05-CV-1505, 05-CV-1506, 05-CV-1509, 05-CV-1555, 05-CV-1590, 05-CV-1592, 05-CV-1601, 05-CV-1602, 05-CV-1607, 05-CV-1623, 05-CV-1638, 05-CV-1639, 05-CV-1645, 05-CV-1646, 05-CV-1649, 05-CV-1678, 05-CV-1704, 05-CV-1725, 05-CV-1971, 05-CV-1983, 05-CV-2010, 05-CV-2083, 05-CV-2088, 05-CV-2104, 05-CV-2112, 05-CV-2185, 05-CV-2186, 05-CV-2199, 05-CV-2200, 05-CV-2249, 05-CV-2348, 05-CV-2349, 05-CV-2367, 05-CV-2370, 05-CV-2371, 05-CV-2378, 05-CV-2379, 05-CV-2380, 05-CV-2381, 05-CV-2384, 05-CV-2385, 05-CV-2386, 05-CV-2387, 05-CV-2398, 05-CV-2444, 05-CV-2477, 05-CV-2479, 06-CV-0618, 06-CV-1668, 06-CV-1674, 06-CV-1684, 06-CV-1688, 06-CV-1690, 06-CV-1691, 06-CV-1725, 06-CV-1758, 06-CV-1759, 06-CV-1761, 06-CV-1765, 06-CV-1766, 06-CV-1767, 07-CV-1710, 07-CV-2337, 07-CV-2338, 08-CV-0864, 08-CV-987** |

**ORDER**

On July 1, 2008, the United States District Court for the District of Columbia resolved by Executive Session to designate the undersigned to coordinate and manage proceedings in all

cases involving petitioners presently detained at Guantanamo Bay, Cuba, so that these cases can be addressed as expeditiously as possible per the Supreme Court's decision in *Boumediene v. Bush*, No. 06-1195, slip op. at 66 (June 12, 2008). Pursuant to LCvR 40.6(a) and 40.5(e), all cases involving Guantanamo Bay detainees that have been filed and that may be filed in the future will be transferred from the Judge to whom they are assigned to the undersigned for the purpose of coordination and management.[1] The transferring Judge will retain the case for all other purposes. The undersigned will identify and delineate both procedural and substantive issues that are common to all or some of these cases and, to the extent possible, rule on procedural issues that are common to the cases.

Accordingly, it hereby is **ORDERED** that:

1. The parties shall appear for a conference on the record to discuss and schedule anticipated proceedings in these cases. The conference shall take place on **Tuesday, July 8, 2008 at 2:00 p.m. in the Ceremonial Courtroom**, which is located on the Sixth Floor of the E. Barrett Prettyman Courthouse, 333 Constitution Avenue, N.W., Washington, D.C. 20001.

2. One counsel for each petitioner presently detained at Guantanamo Bay shall be present at the conference, either in person or by telephone, and shall have authority to resolve procedural and scheduling matters.[2] All petitioners' counsel, however, shall confer beforehand and designate no more than two lead counsel to represent them during the conference. Likewise, counsel for the United States also shall designate two lead counsel to represent them during the

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[1] Excluded from reassignment are all cases over which Judge Richard J. Leon currently presides as well as *Hamdan v. Bush*, No. 04-CV-1519 (Robertson, J.). In addition, cases in which the petitioner is detained in a country other than Cuba also are excluded from reassignment at this time.

[2] Because of the Court's limited resources and space, for the purpose of this conference only one counsel for each petitioner shall be permitted to appear.

conference. Counsel who are unavailable to appear in person should contact Judge Thomas F. Hogan's chambers to make arrangements to appear by teleconference.

3. As an initial matter, the parties shall be prepared to identify a date by which they will confer for the purpose of identifying all petitioners who currently have cases pending before the Court and eliminating any duplicate petitions that have been filed on behalf of a single individual. The Court expects this process to clarify the correct identity of petitioners and avoid possible duplication by, for example, eliminating the number of petitioners proceeding under a "Doe" surname. The parties also shall be prepared to identify a date by which they will file a status report summarizing the status of each case.

4. All future filings shall be captioned to identify the Miscellaneous Number established solely for the purpose of consolidating the proceedings before the undersigned as well as under the Civil Action Number originally assigned to the petition. Accordingly, the parties shall adhere to the above case-caption format for the purpose of filing all documents in these cases, although the only Civil Action Numbers that will be identified on any given filing will be the numbers applicable to that particular filing. For example, if the petitioner in Civil Action No. 09-0111 files a document that applies only to his case, the case caption should be formatted as follows, with the "XXX" representing the initials of the appropriate judge:

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|---|---|
| **IN RE:**<br><br>**GUANTANAMO BAY DETAINEE LITIGATION** | **Misc. No. 08-442 (TFH)**<br><br>**Civil Action No. 09-0111 (XXX)** |

If, however, a filing applies to all cases, then it shall be filed exactly as indicated in the caption above, which lists all applicable Civil Action Numbers as well as the required Miscellaneous

Number.

5. Pursuant to LCvR 5.1(b), counsel shall not direct correspondence to the undersigned. All communications with the Court shall be by motion or other such appropriate filing in accordance with the proper filing procedures.

6. The Court expects professionalism, courtesy and civility to govern the parties' conduct at all times during these proceedings. Given counsels' competence and experience, the Court is confident that this objective will be accomplished without judicial intervention.

**SO ORDERED.**

July 2, 2008

*/s/ Thomas F. Hogan*
Thomas F. Hogan
United States District Judge

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

**IN RE:**

**GUANTANAMO BAY DETAINEE LITIGATION**

**Misc. No. 08-442 (TFH)**

**Civil Action Nos.**

**02-CV-0828, 04-CV-1136, 04-CV-1164, 04-CV-1194, 04-CV-1254, 04-CV-1937, 04-CV-2022, 04-CV-2035, 04-CV-2046, 04-CV-2215, 05-CV-0023, 05-CV-0247, 05-CV-0270, 05-CV-0280, 05-CV-0329, 05-CV-0359, 05-CV-0392, 05-CV-0492, 05-CV-0520, 05-CV-0526, 05-CV-0569, 05-CV-0634, 05-CV-0748, 05-CV-0763, 05-CV-0764, 05-CV-0833, 05-CV-0877, 05-CV-0881, 05-CV-0883, 05-CV-0889, 05-CV-0892, 05-CV-0993, 05-CV-0994, 05-CV-0995, 05-CV-0998, 05-CV-0999, 05-CV-1048, 05-CV-1124, 05-CV-1189, 05-CV-1220, 05-CV-1236, 05-CV-1244, 05-CV-1347, 05-CV-1353, 05-CV-1429, 05-CV-1457, 05-CV-1458, 05-CV-1487, 05-CV-1490, 05-CV-1497, 05-CV-1504, 05-CV-1505, 05-CV-1506, 05-CV-1509, 05-CV-1555, 05-CV-1590, 05-CV-1592, 05-CV-1601, 05-CV-1602, 05-CV-1607, 05-CV-1623, 05-CV-1638, 05-CV-1639, 05-CV-1645, 05-CV-1646, 05-CV-1649, 05-CV-1678, 05-CV-1704, 05-CV-1725, 05-CV-1971, 05-CV-1983, 05-CV-2010, 05-CV-2083, 05-CV-2088, 05-CV-2104, 05-CV-2112, 05-CV-2185, 05-CV-2186, 05-CV-2199, 05-CV-2200, 05-CV-2249, 05-CV-2349, 05-CV-2367, 05-CV-2371, 05-CV-2378, 05-CV-2379, 05-CV-2380, 05-CV-2381, 05-CV-2384, 05-CV-2385, 05-CV-2386, 05-CV-2387, 05-CV-2398, 05-CV-2444, 05-CV-2477, 05-CV-2479, 06-CV-0618, 06-CV-1668, 06-CV-1674, 06-CV-1684, 06-CV-1688, 06-CV-1690, 06-CV-1691, 06-CV-1758, 06-CV-1759, 06-CV-1761, 06-CV-1765, 06-CV-1766, 06-CV-1767, 07-CV-1710, 07-CV-2337, 07-CV-2338, 08-CV-987, 08-1085, 08-CV-1101, 08-CV-1104, 08-CV-1153**

## SCHEDULING ORDER

Based upon the parties' representations during the hearing held on July 8, 2008, the

filings the Court received following the hearing, and the entire record herein, the Court enters the following schedule to initially govern this consolidated proceeding.

1. **Status Reports**. By July18, 2008, the parties shall each file concise reports summarizing the status of each case. If applicable, counsel involved with multiple cases (versus multiple petitioners in a single case) may, solely for the purpose of submitting a single status report, consolidate their cases.

2. **Joint Report**. By July 21, 2008, petitioners and the government shall submit a joint report that:

A. includes a proposed amended protective order and a separate proposed protective order for use in cases involving "high-value detainees";

B. identifies duplicate petitions that were filed on behalf of a single individual, and addresses which of the duplicate petitions should be dismissed;

C. identifies petitioners currently detained at Guantanamo Bay, Cuba, whose cases were dismissed on jurisdictional grounds, and addresses whether the Court should vacate such dismissals;

E. identifies petitioners who are cleared or authorized for release and the type of such release—e.g., whether the petitioner is authorized for release and the government is simply seeking a receiving country or whether the petitioner is authorized for release to detention in another country—and addresses any objection to consolidation of such cases before one Judge of this Court;

F. identifies all *Boumediene*-related motions to dismiss and motions to stay that are still pending, and addresses whether such motions are moot;

G. identifies all pending motions that are ripe for decision, and suggests the

appropriate time to address such motions and whether they are amenable to common resolution by the undersigned;

H. identifies the cases in which a stay was entered, and addresses whether the Court should lift all such stays;

I. identifies the cases in which an appeal or a petition for certiorari is pending; and

J. includes proposals on how the undersigned should conduct regular status conferences.

K. reports on any agreement for the government to provide unclassified portions of the CSRT records to petitioners who have had their CSRT reviews by July 31, 2008.

3. **Simultaneous Briefing on Procedural Framework Issues**. By July 25, 2008, counsel for petitioners and the government shall each file one brief addressing the following issues relating to the procedural framework in which these cases will be resolved and whether such issues are amenable to common resolution:

A. the scope of discovery;

B. the standard for obtaining an evidentiary hearing;

C. the standard governing hearsay evidence;

D. the application of confrontation and compulsory process rights; and

E. the relevant standards of proof and burdens of production and persuasion, and any burden shifting.

Counsel for petitioners and the government shall file responses by August 1, 2008.

4. **Factual Returns**. Beginning with the earliest filed petitions of petitioners currently held at Guantanamo Bay, Cuba, the government shall file factual returns and motions to amend

factual returns on a rolling basis at a rate of at least 50 per month.[1] The first 50 factual returns and motions to amend factual returns are due by August 29, 2008. If the government wishes to amend a factual return, it shall move to amend and attach to its motion the proposed amended factual return. The Court will allow amendment only where the government establishes cause for the amending. Additionally, if the government believes that an individual factual return is significantly more complicated than others or a particular detainee's circumstances present unique issues that require more time to complete the return such that processing the return would delay the overall processing, the government shall move for an exception to the sequencing described above. As with amendments, the Court will only allow exceptions where the government establishes cause. Similarly, any petitioners who have extraordinary circumstances may move before this Court for an exception to the sequencing described above.

**SO ORDERED**.

July 11, 2008

/s/
Thomas F. Hogan
United States District Judge

[1] At this time pending further order of the Court, the government need not file factual returns or motions to amend factual returns for the approximately 20 detainees charged with war crimes under the Military Commissions Act of 2006.

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

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|---|---|
| **IN RE:**<br><br>**GUANTANAMO BAY DETAINEE LITIGATION** | **Misc. No. 08-0442 (TFH)**<br><br>**Civil Action Nos.**<br><br>**02-cv-0828, 04-cv-1136, 04-cv-1164, 04-cv-1194, 04-cv-1254, 04-cv-1937, 04-cv-2022, 04-cv-2046, 04-cv-2215, 05-cv-0023, 05-cv-0247, 05-cv-0270, 05-cv-0280, 05-cv-0329, 05-cv-0359, 05-cv-0392, 05-cv-0492, 05-cv-0520, 05-cv-0526, 05-cv-0569, 05-cv-0634, 05-cv-0748, 05-cv-0763, 05-cv-0764, 05-cv-0877, 05-cv-0883, 05-cv-0889, 05-cv-0892, 05-cv-0993, 05-cv-0994, 05-cv-0998, 05-cv-0999, 05-cv-1048, 05-cv-1189, 05-cv-1124, 05-cv-1220, 05-cv-1244, 05-cv-1347, 05-cv-1353, 05-cv-1429, 05-cv-1457, 05-cv-1458, 05-cv-1487, 05-cv-1490, 05-cv-1497, 05-cv-1504, 05-cv-1505, 05-cv-1506, 05-cv-1555, 05-cv-1592, 05-cv-1601, 05-cv-1607, 05-cv-1623, 05-cv-1638, 05-cv-1645, 05-cv-1646, 05-cv-1678, 05-cv-1971, 05-cv-1983, 05-cv-2010, 05-cv-2088, 05-cv-2104, 05-cv-2185, 05-cv-2186, 05-cv-2199, 05-cv-2249, 05-cv-2349, 05-cv-2367, 05-cv-2371, 05-cv-2378, 05-cv-2379, 05-cv-2380, 05-cv-2384, 05-cv-2385, 05-cv-2386, 05-cv-2387, 05-cv-2444, 05-cv-2479, 06-cv-0618, 06-cv-1668, 06-cv-1684, 06-cv-1690, 06-cv-1758, 06-cv-1761, 06-cv-1765, 06-cv-1766, 06-cv-1767, 07-cv-1710, 07-cv-2337, 07-cv-2338, 08-cv-0987, 08-cv-1085, 08-cv-1101, 08-cv-1104, 08-cv-1153, 08-cv-1185, 08-cv-1207, 08-cv-1221, 08-cv-1223, 08-cv-1224, 08-cv-1227, 08-cv-1228, 08-cv-1230, 08-cv-1232, 08-cv-1233, 08-cv-1235, 08-cv-1236, 08-cv-1237, 08-cv-1238, 08-cv-1360, 08-cv-1440, 08-cv-1733, 08-cv-1805** |

## CASE MANAGEMENT ORDER

Upon review of the parties' briefs in response to the Court's order of July11, 2008, and the record herein, and to provide the petitioners in these cases with prompt habeas corpus review, *see Boumediene v. Bush*, 128 S. Ct. 2229, 2275 (2008), while "proceed[ing] with the caution" necessary in this context, *Hamdi v. Rumsfeld*, 542 U.S. 507, 539 (2004) (plurality), and not "disregard[ing] the dangers the detention in these cases was intended to prevent," *Boumediene*, 128 S. Ct. at 2276, the Court enters the following Case Management Order to

govern proceedings in the above-captioned cases.[1]

**I.**

**A.** **Factual Returns**.[2] In accordance with the Court's order of July 29, 2008, as amended by the Court's order of September 19, 2008, the government shall file returns and proposed amended returns containing the factual basis upon which it is detaining the petitioner. *Cf. Hamdi*, 542 U.S. at 533 (holding that a "citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification").

**B.** **Legal Justification**. The government shall file a succinct statement explaining its legal justification for detaining the petitioner. If the government's justification for detention is the petitioner's status as an enemy combatant, the government shall provide the definition of enemy combatant on which it relies. In cases in which the government already filed a factual return, the legal justification is due within 7 days of the date of this Order. In all other cases, the government shall include the legal justification with the factual return.

**C.** **Unclassified Factual Returns**. Within 14 days of the date of this Order, the government shall file an unclassified version of each factual return it has filed to date. In cases in which the government has yet to file a factual return, the government shall file an unclassified version of the return within 14 days of the date on which the government is to file the factual return.

**D.** **Exculpatory Evidence**.

**1**. The government shall disclose to the petitioner all reasonably available evidence in its possession that tends materially to undermine the information presented to support the government's justification for detaining the petitioner. *See Boumendiene*, 128 S. Ct. at 2270 (holding that habeas court "must have the authority to admit and consider relevant exculpatory evidence that was not introduced during the [CSRT] proceeding"). In cases in which the government already filed a factual return, disclosure of such exculpatory evidence shall occur within 14

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[1] While the framework detailed in this Order governs proceedings in all cases consolidated before this Court, the judges to whom the cases are assigned for final resolution ("Merits Judges") may alter the framework based on the particular facts and circumstances of their individual cases. Additionally, the Merits Judges will address procedural and substantive issues not covered in this Order.

[2] When used in this Order, the term "factual return" refers to factual returns and proposed amended factual returns filed pursuant to the Court's order of July 29, 2008, as amended by the Court's order of September 19, 2008.

days of the date of this Order. In all other cases, disclosure shall occur within 14 days of the date on which the government files the factual return. By the date on which disclosure is to occur under this paragraph, the government shall file a notice certifying either that it has disclosed the exculpatory evidence or that it does not possess any exculpatory evidence.

**2**. If evidence described in the preceding paragraph becomes known to the government after the date on which the government was to disclose exculpatory evidence in a petitioner's case, the government shall provide the evidence to the petitioner as soon as practicable.

**E. Discovery**.

**1**. If requested by the petitioner, the government shall disclose to the petitioner: (1) any documents or objects in its possession that are referenced in the factual return; (2) all statements, in whatever form, made or adopted by the petitioner that relate to the information contained in the factual return; and (3) information about the circumstances in which such statements of the petitioner were made or adopted. *Cf. Harris v. Nelson*, 394 U.S. 286, 300 n.7 (1969) ("[D]istrict courts have the power to require discovery when essential to render a habeas corpus proceeding effective."). In cases in which the government already filed a factual return, requested disclosure shall occur within 14 days of the date on which the petitioner requests the disclosure. In all other cases, requested disclosure shall occur within 14 days of the date on which the government files the factual return or within 14 days of the date on which the petitioner requests disclosure, whichever is later.

**2**. The Merits Judge may, for good cause, permit the petitioner to obtain limited discovery beyond that described in the preceding paragraph. *Cf. Bracy v. Gramley*, 520 U.S. 899, 904 (1997) ("A habeas petitioner, unlike the usual civil litigant in federal court, is not entitled to discovery as a matter of ordinary course."). Discovery requests shall be presented by written motion to the Merits Judge and (1) be narrowly tailored, not open-ended; (2) specify the discovery sought; (3) explain why the request, if granted, is likely to produce evidence that demonstrates that the petitioner's detention is unlawful, *see Harris*, 394 U.S. at 300 ("[W]here specific allegations before the court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is confined illegally and is therefore entitled to relief, it is the duty of the court to provide the necessary facilities and procedures for an adequate inquiry."); and (4) explain why the requested discovery will enable the petitioner to rebut the factual basis for his detention without unfairly disrupting or unduly burdening the government, *cf. Hamdi*, 542 U.S. at 533 (holding that "citizen-detainee

seeking to challenge his classification as an enemy combatant must receive . . . a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker"); *id*. at 534 ("[E]nemy-combatant proceedings may be tailored to alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict."). The Merits Judge will set the date by which all discovery must be completed.

**F.** **Classified Information**. If any information to be disclosed to the petitioner under Sections I.D or I.E of this Order is classified, the government shall provide the petitioner with an adequate substitute and, unless granted an exception, provide the petitioner's counsel with the classified information, provided the petitioner's counsel is cleared to access such information under Section D of the Protective Order entered in the petitioner's case. If the government objects to providing the petitioner's counsel with the classified information on the basis that, in the interest of national security, the information should not be disclosed, the government shall move for an exception to disclosure and provide the information to the Merits Judge in camera for a determination as to whether the information should be disclosed and, if not disclosed, whether the government will be permitted to rely on the information to support detention. *See Boumediene*, 128 S. Ct. at 2276 ("[T]he Government has a legitimate interest in protecting sources and methods of intelligence gathering; and we expect that the District Court will use its discretion to accommodate this interest to the greatest extent possible."); *CIA v. Sims*, 471 U.S. 159, 175 (1985) ("The Government has a compelling interest in protecting . . . the secrecy of information important to our national security . . . ." (citation omitted)).

**G.** **Traverse**. In response to the government's factual return, the petitioner shall file a traverse containing the relevant facts and evidence supporting the petition. *See Boumediene*, 128 S. Ct. at 2273 ("If a detainee can present reasonably available evidence demonstrating there is no basis for his continued detention, he must have the opportunity to present this evidence to a habeas corpus court."); *cf. Hamdi*, 542 U.S. at 533 (holding that a "citizen-detainee seeking to challenge his classification as an enemy combatant must receive . . . a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker"). Traverses are due within 14 days of the date on which the government files notice relating to exculpatory evidence under Section I.D.1 of this Order. The Merits Judge may, for good cause, permit the petitioner to amend or supplement a filed traverse.

**II.**

**A.** **Burden and Standard of Proof**. The government bears the burden of proving by a preponderance of the evidence that the petitioner's detention is lawful. *Boumediene*, 128 S. Ct. at 2271 ("The extent of the showing required of the government in these cases is a matter to be determined.").

**B.** **Presumption in Favor of the Government's Evidence**. The Merits Judge may accord a rebuttable presumption of accuracy and authenticity to any evidence the government presents as justification for the petitioner's detention if the government establishes that the presumption is necessary to alleviate an undue burden presented by the particular habeas corpus proceeding. *See Hamdi*, 542 U.S. at 534 ("[E]nemy-combatant proceedings may be tailored to alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict. . . . [For example,] the Constitution would not be offended by a presumption in favor of the government's evidence, so long as that presumption remained a rebuttable one and a fair opportunity for rebuttal were provided."); *Boumediene*, 128 S. Ct. at 2276 ("Certain accommodations can be made to reduce the burden habeas corpus proceedings will place on the military without impermissibly diluting the protections of the writ."). If the Merits Judge determines that a presumption is warranted, the petitioner will receive notice of the presumption and an opportunity to rebut it.

**C.** **Hearsay**. On motion of either the petitioner or the government, the Merits Judge may admit and consider hearsay evidence that is material and relevant to the legality of the petitioner's detention if the movant establishes that the hearsay evidence is reliable and that the provision of nonhearsay evidence would unduly burden the movant or interfere with the government's efforts to protect national security. *See Hamdi*, 542 U.S. at 533-34 (noting that, in enemy-combatant proceedings, "[h]earsay . . . may need to be accepted as the most reliable available evidence"). The proponent of hearsay evidence shall move for admission of the evidence no later than 7 days prior to the date on which the initial briefs for judgment on the record are due under Section III.A.1 of this Order. The party opposing admission shall respond to the motion within 3 days of its filing. If the Merits Judge admits hearsay evidence, the party opposing admission will have the opportunity to challenge the credibility of, and weight to be accorded, such evidence.

**III.**

**A.** **Judgment on the Record**.

**1.** **Initial Briefs**. Within 14 days of the filing of the traverse, or within 14 days of the date of this Order in cases in which the petitioner already filed a traverse, the petitioner and the government shall each file a brief in support of judgment on the record. Each brief shall address both the factual basis and the legal justification for detention, *see Boumediene*, 128 S. Ct. at 2269 ("The habeas court must have sufficient authority to conduct a meaningful review of both the cause for detention and the Executive's power to detain."), and be accompanied by a separate statement of material facts as to which the party contends there is no genuine dispute. The statement of material facts shall cite to the specific portions of the record that support the party's contention that a fact is not in dispute and shall not contain argument. Initial briefs shall not exceed 45 pages, excluding the statement of material facts.

2. **Response Briefs**. Within 7 days of the filing of initial briefs, the parties shall file response briefs. Each response brief shall be accompanied by a factual response statement that either admits or controverts each fact identified in the opposing party's statement of material facts as one to which there is no genuine dispute. The factual response shall cite to the specific portions of the record that support the party's contention that a fact is disputed. The Court may treat as conceded any legal argument presented in an initial brief that is not addressed in the response brief and may assume that facts identified in the statement of material facts are admitted unless controverted in the factual response. Response briefs shall not exceed 35 pages, excluding the factual response.

3. **Reply Briefs**. Reply briefs may be filed only by leave of court.

4. **Hearing**. The Merits Judge may allow oral argument.

**B. Evidentiary Hearing**.

1. **Basis for a Hearing**. If, after reviewing the parties' briefs for judgment on the record, the Merits Judge determines that substantial issues of material fact preclude final judgment based on the record, the petitioner is entitled to an evidentiary hearing. *Cf. Stewart v. Overholser*, 186 F.2d 339, 342 (D.C. Cir. 1950) ("When a factual dispute is at the core of a detention challenged by an application for the writ it ordinarily must be resolved by the hearing process.").

2. **Prehearing Conference**. Counsel shall appear for a prehearing conference to discuss and narrow the issues to be resolved at the hearing, discuss evidentiary issues that might arise at the hearing, identify witnesses and documents that they intend to present at the hearing, and discuss the procedures for the hearing.

3. **Petitioner's Presence**. The petitioner will not have access to classified portions of the hearing. Through available technological means that are appropriate and consistent with protecting classified information and national security, the Merits Judge will attempt to provide the petitioner with access to unclassified portions of the hearing.

**SO ORDERED**.

November 6, 2008

/s/
Thomas F. Hogan
United States District Judge