

[ORAL ARGUMENT NOT YET SCHEDULED]

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

_____	x
	:
MAJID KHAN,	:
	:
Petitioner,	:
	:
v.	: No. 07-1324
	:
ROBERT M. GATES,	:
	:
Respondent.	:
	:
_____	x

**PETITIONER’S REPLY MEMORANDUM IN FURTHER SUPPORT
OF MOTION TO EXCEED PAGE LIMIT, AND IN OPPOSITION TO
RESPONDENT’S CROSS-MOTION TO HOLD IN ABEYANCE**

Petitioner Majid Khan, by and through his undersigned counsel, respectfully submits this reply memorandum in further support of his motion for permission to exceed the page limit for his presumptively classified motion to unseal his torture motions, and in opposition to the government’s cross-motion to hold his motion to unseal in abeyance. Khan’s motion should be granted, and the government’s motion should be denied, for the following reasons.

Preliminary Statement

The government’s opposition and cross-motion (“the government’s brief”) has little to do with the length of Khan’s motion to unseal or the legal arguments

set forth in that motion. The government's brief is intended to achieve one thing – delay. It is the latest chapter in the government's long-running effort to avoid judicial scrutiny of Khan's unlawful abduction, imprisonment and torture by U.S. officials. This transparent strategy has already included the government's denial of counsel access to Khan for more than a year; its refusal to disclose public versions of the Gutierrez and Dixon Declarations filed in support of Khan's torture motions (which, after nearly six months, is an indisputable violation of the SCI protective order)¹; the government's refusal to produce the record on review, or, at a minimum, the CSRT Record; and its refusal to process security clearance applications for Khan's counsel at Jenner & Block. No further delay is warranted.²

Accordingly, because Khan has met the legal requirement in this Circuit for permission to file an over-length brief, and because he has a substantial interest in litigating this challenge to his indefinite detention expeditiously, the Court should

¹ The government's attempt to prevent or delay the release of information in the declarations establishes, in part, the basis for Khan's motion to unseal pursuant to Executive Order 13,292 § 1.7(a).

² Regardless of whether the Court grants Khan's motion to exceed the page limit or the government's motion to hold Khan's motion to unseal in abeyance, the government is already obligated to prepare and disclose a public version of Khan's motion to unseal because that document was filed with the Court, under the terms of the SCI protective order, when it was physically submitted to the Court Security Office on May 9, 2008. *See* SCI PO § 8.A.

grant his motion to exceed the page limit and deny the government's motion to hold his motion to unseal in abeyance.

Argument

I. KHAN'S MOTION TO EXCEED THE PAGE LIMIT SHOULD BE GRANTED BECAUSE THERE ARE EXTRAORDINARY COMPELLING REASONS TO GRANT THE REQUESTED RELIEF

A motion to exceed the page limit may be granted where there are "extraordinary compelling reasons" for the requested relief. D.C. Cir. Rule 27(h)(3). That standard is plainly satisfied here.

In his motion to exceed the page limit, Khan argues that his extraordinary interests and those of the public in the matters at stake in his motion to unseal, and the complexity of the legal issues of first impression raised by the motion to unseal, constitute extraordinary compelling reasons to grant his request to file an over-length brief. In particular, Khan's motion to unseal alleges that the government's classification of *every detail* concerning his experience in the CIA Torture Program violates Executive Order 13,292, as well as the First Amendment, and that the government's attempt to maintain complete secrecy concerning him effectively deprives him of his right to challenge his detention, with meaningful legal assistance, under the Detainee Treatment Act of 2005 ("DTA").

Although the government opposes Khan's motion to exceed the page limit, it does not address D.C. Circuit Rule 27(h)(3), or dispute either the compelling

interests of Khan and the public in the matters at stake in Khan's motion to unseal, or the complexity of the issues involved. Khan's motion to exceed the page limit should be granted on that basis alone.

The government's opposition to Khan's request to exceed the page limit appears to be directed almost entirely to Khan's contention that his motion to unseal involves "legal issues of first impression." The government claims that Khan's request for permission to file an over-length brief should be denied because "[p]etitioners' legal arguments are largely identical to those presented by the news organizations [in their prior motion to unseal]," and "this Court's resolution of the motion filed by the news organizations may address legal issues presented by petitioners that are identical to the issues presented by the new organizations." Gvt. Opp'n at 2. That argument is meritless and should be rejected.

The government's claim that the legal issues involved in Khan's motion to unseal are "identical" or "largely identical" to those involved in the news organizations' motion to unseal is a gross mischaracterization of each filing. While the government correctly notes that Khan's motion to unseal is based on the government's improper classification of his torture motions, it is flatly wrong in its assertion that the only unique claim Khan asserts is based on the First Amendment. *See id.* at 2 n.1. As indicated above, Khan's argues that his torture motions are not properly classified under Executive Order 13,292. Khan also contends that based

on his legal status in the United States and his substantial, voluntary ties to this country, he has a First Amendment free speech right to declare and debate publicly what happened to him in the CIA Torture Program, which is unlawfully infringed by the government's refusal to disclose his torture motions. Khan further argues that the First Amendment is a structural limitation on the power of the Executive to classify the information in his torture motions.

By contrast, the news organizations do not contend that the information in Khan's torture motions is improperly classified under Executive Order 13,292. Nor do they argue that Khan has First Amendment free speech rights or that the First Amendment is a structural limitation on the government's classification authority. They contend that under the First Amendment and the common law, the public has a qualified right to inspect and copy the sealed materials, which may only be overcome by a compelling state interest that is narrowly-tailored. The news organizations concede that national security is a compelling state interest that can warrant sealing of court records, and they seek a judicial determination of whether any such interest justifies sealing every detail concerning Khan's torture. See N.Y. Times Reply Mem. at 1. The news organizations simply do not know

what the sealed information includes, and therefore cannot assert, as Khan does, that it is improperly classified.³

Not only are the legal issues different, but the government has already acknowledged *and relied on* the material distinction between the news organizations' situation and Khan's situation in its opposition to the news organizations' motion to unseal:

Importantly, [the news organizations' motion] concerns *access* to classified information, rather than preventing the *release* of classified information by someone already in possession of it. Here, Khan has not sought to release classified information. Instead, the news organizations are seeking to access the classified information Khan has provided to his attorneys.

Gvt. Opp'n to N.Y. Times Motion at 13 (emphasis in original). The government further represented in opposition to the news organizations' motion that "*[i]f Khan sought release of classified information, this Court could address the issues that would arise at that time.*" *Id.* (emphasis added). Now, however, the government apparently seeks to retract that statement and deny Khan the right to seek disclosure of information that he already knows.

³



The government is also wrong to suggest that Khan's motion to exceed the page limit should be denied because his motion to unseal seeks the same relief as the news organizations' motion. The government's argument in this regard is essentially that consideration of Khan's motion is unnecessary or wasteful because the Court may at some point in the future grant the news organizations' motion to unseal, thereby mooting Khan's motion. That is not correct.

If anything, permitting Khan to file an over-length motion to unseal would *conserve* judicial resources. That would be particularly so if the Court were to deny the news organizations' motion; in that case, the Court would otherwise have to conduct a separate inquiry to consider Khan's unique claims under Executive Order 13,292 and the First Amendment. Full briefing and consideration of Khan's motion to unseal alongside the news organizations' motion would allow the Court to consider at one time all issues for or against disclosure. It would also prevent piecemeal litigation. For if Khan's motion to exceed the page limit were denied, he would have to file two separate motions to unseal on different bases (one based on Executive Order 13,292, and one based on the First Amendment). That, of course, would require multiple opposition briefs and reply briefs, and possibly multiple oral arguments and/or rulings by the Court. It would likely generate further stay requests by the government, which would have to be addressed.

The government's further suggestion that Khan should be precluded from filing a motion to unseal because he did not join the news organizations' motion is specious. As indicated above, the legal issues presented by the motions to unseal are not the same, and the government itself has acknowledged Khan's right to move separately for disclosure of information within his personal knowledge. The news organizations' motion also was not directed to Khan and did not involve his personal interests in obtaining disclosure. While the news organizations' motion seeks access to sealed information in order to ensure good governance, Khan's motion seeks disclosure of information that he already knows in order to pursue a vigorous challenge to his indefinite detention under the DTA. Indeed, in a contest of competing interests, Khan's individual interest in challenging a deprivation of his liberty would likely trump the news organizations' more generalized interests. Moreover, the full extent of the government's improper classification of Khan's torture motions was unclear until the government filed the Hilton Declaration in opposition to the news organizations' motion. As discussed at length in Khan's motion to unseal, that Declaration is facially insufficient to support the government's classification determinations under Executive Order 13,292, and is ripe for challenge by Khan.⁴

⁴ The government's citation to Fed. R. App. P. 27(a)(3)(A) is inapposite. While Khan may have been permitted to file a pleading in response to the news

II. THE GOVERNMENT'S CROSS-MOTION TO HOLD IN ABEYANCE SHOULD BE DENIED BECAUSE FURTHER DELAY WOULD CAUSE KHAN SUBSTANTIAL PREJUDICE

For all of the preceding reasons, the government's cross-motion to hold Khan's motion to unseal in abeyance should be denied. The government's cross-motion should also be denied because further delay will substantially prejudice Khan's right to challenge his indefinite detention, with meaningful legal assistance, under the DTA.

As set forth in his motion to unseal (at p. 5), Khan's need for disclosure is not academic. He cannot adequately challenge his "enemy combatant" designation without independently investigating the facts and circumstances surrounding his abduction, imprisonment and torture, none of which is possible as a practical matter absent disclosure. Khan's inability to present a vigorous defense also might prevent the Court from fulfilling its statutory mandate to determine whether his "enemy combatant" status is supported by a preponderance of the evidence. At a minimum, delaying briefing of Khan's motion to unseal would delay the Court's resolution of this case.

In addition, in the context of a DTA proceeding, where, again, Khan challenges a deprivation of liberty, an indefinite delay would be substantive, not

organizations' motion, he was not required to do so. The government cites no authority – and we are not aware of any – instructing otherwise.

procedural. Delay means more indefinite detention, and that is the harm *itself* that Khan filed this action to remedy. Such harm is so grievous that even an adjudicated criminal alien who has never made an entry into the United States, and has no right to be here – unlike Khan – must be released into the United States when faced with the prospect of indefinite detention. *See Clark v. Martinez*, 543 U.S. 371, 386 (2005); *cf. also Braden v. 30th Jud. Ct. of Ky.*, 410 U.S. 484, 490 (1973) (noting interest of society and prisoner in preserving habeas as a swift and imperative remedy to indefinite confinement); *Yong v. INS*, 208 F.3d 1116, 1120 (9th Cir. 2000) (rejecting indefinite stay in habeas case). Indeed, the need for prompt judicial review is never greater than where, as here, a petitioner was abducted, imprisoned and tortured, and has been afforded no judicial review. *Cf. Jones v. Shell*, 572 F.2d 1278, 1280 (8th Cir. 1978) (habeas is reduced to sham if trial courts do not act promptly).

Finally, the Court should deny the government's alternate request for permission to file their opposition to Khan's motion to unseal 21 days after the Court resolves Khan's motion to exceed the page limit. The government does not allege that it cannot file its brief within the required time limit. Nor have they offered any reason why an additional 21 days would be necessary to prepare their filing. In sum, their request is arbitrary and should be denied as such.

Conclusion

For these reasons, Khan's motion to exceed the page limit should be granted and the government's motion to hold in abeyance should be denied.

Dated: Washington, DC
May 20, 2008

Respectfully submitted,

Counsel for Petitioner:



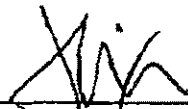
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CERTIFICATE OF SERVICE

I hereby certify that on May 20, 2008, I caused the foregoing memorandum to be filed and served on counsel listed below by causing an original and seven copies to be personally delivered to the Court Security Office.

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