IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ABU WA'EL (JIHAD) DHIAB (ISN 722), *Petitioner*, v. BARACK H. OBAMA, *et al*., *Respondents*.	Civil Action No. 05-CV-1457 (GK)

RESPONDENTS' EMERGENCY MOTION TO EXTEND STAY OF ORDERS UNSEALING CLASSIFIED VIDEOS PENDING FINAL RESOLUTION OF APPEAL

The Solicitor General has authorized appeal of the Court's orders of October 3, 2014 (ECF No. 348) ("First Order") and October 9, 2014 (ECF No. 355) ("Second Order") which, collectively, require release of 32 classified videos that, among other things, record Petitioner being removed from his cell via Forced Cell Extraction (FCE) and then enterally fed. The Court stayed those orders, on Respondents' motion, until December 2, 2014, the deadline for Respondents to consider whether to appeal. Order of Nov. 7, 2013 (ECF No. 367). Now that the Solicitor General has authorized appeal and Respondents are filing, contemporaneously herewith, a notice of appeal, Respondents respectfully ask the Court to extend the stay until final resolution of the appeal,[1] for the same reasons Respondents sought the existing stay: (1) failure to extend the stay would cause irreparable injury by depriving Respondents of a meaningful opportunity to appeal the Court's Orders and by imposing an unnecessary and heavy burden on Respondents; (2) the balance of harms and the public interest heavily favor extending the stay;

[1] Respondents also request that the Court enter an immediate extension of the existing stay pending adjudication of this Motion and that, should the Court deny this Motion, the Court grant a week-long stay after such denial to permit Respondents to seek stay relief in the Court of Appeals and permit the Court of Appeals a reasonable time to act on Respondents' request. The Court has authority to stay its Orders pending Respondents' appeal of the Orders. *See* Fed. R. App. P. 8(a)(1)(A) (requiring a party to move first in the district court "for a stay of the judgment or order of a district court pending appeal"); *Akiachak Native Cmty. v. Jewell*, 995 F. Supp. 2d 7, 11 (D.D.C. 2014) (district court granting stay pending appeal after filing of notice of appeal).

and (3) Respondents have made out, at the least, a substantial case on the merits sufficient to weigh in favor of extending the stay. *See* Resp'ts Mot. for Stay Pending Possible Appeal ("Resp'ts First Mot. for Stay") (ECF No. 356) ; *see also People for the Am. Way Found. v. U.S. Dep't of Education*, 518 F. Supp. 2d 174, 177 (D.D.C. 2007) (collecting cases in the FOIA context and concluding that "courts have routinely issued stays where the release of documents would moot a defendant's right to appeal"). [2]

ARGUMENT

A stay pending appeal is appropriate where (1) the moving party has a substantial likelihood of success on the merits; (2) the moving party will suffer irreparable injury absent the stay; (3) the stay will not substantially injure the other parties interested in the proceeding; and (4) the public interest will be served by a stay. *Nken v. Holder*, 129 S.Ct. 1749, 1761 (2009). Where the movant has established substantial irreparable harm and the balance of harms weighs heavily in its favor, it need only raise "serious legal questions going to the merits" to obtain a stay pending appeal. *Population Inst. v. McPherson*, 797 F.2d 1062, 1078 (D.C. Cir. 1986) (quoting *Wash. Metro. Area Transit Comm'n*, 559 F.2d at 844). For the same reasons discussed in Respondents' First Motion for Stay and in its Reply in support of their First Motion for Stay ("Resp'ts Reply") (ECF. No. 364), extension of the stay is warranted here. And just as the Court previously stayed its Orders to permit a decision by the Government whether to appeal, the Court should now extend the stay pending resolution of the appeal that is being taken.

[2] Respondents have consulted concerning the relief requested in this motion with counsel for Press Applicants and Petitioner. Counsel for Press Applicants do not object to extension of the existing stay pending final resolution of the appeal on the condition that Respondents file their opening brief with the Court of Appeals by January 16, 2015. Counsel for Petitioner object to extending the existing stay.

A. The Government Would Suffer Certain and Immediate Irreparable Harm in the Absence of a Stay

1. Compliance with the Court's Orders Would Moot Respondents' Right to Appeal and Cause Irreparable Injury

Compliance with the Court's Orders would irreparably harm Respondents, as it would deprive them of a meaningful opportunity to contest on appeal this Court's Orders requiring public disclosure of classified information, the first such orders in any Guantanamo habeas proceeding, *see* Mem. Op. at 11 (Oct. 3, 2014) (ECF No. 349). Any disclosure compelled by the Court's Order, once made, could not be undone. The prospect of such compelled disclosure constitutes irreparable harm and militates in favor of a stay. *See John Doe Agency, et al. v. John Doe Corp.*, 488 U.S. 1306, 1308–09 (1989) (Marshall, J., in chambers) (issuing stay in FOIA action and observing that disclosure of documents would moot defendant's ability to appeal, thereby resulting in irreparable injury); *People for the Am. Way Found.*, 518 F. Supp. 2d at 177 (stay necessary "to avoid irreparable injury to [the government] by having to release documents prior to having the opportunity to seek meaningful appellate review").

Further, as explained in Respondents' First Motion for Stay, the injury of compelled disclosure before resolution of appeal would be magnified by increased risk of serious harms to national security and physical harm to service members arising from the likelihood of: (1) development of countermeasures to FCE tactics, techniques, and procedures; (2) disclosure of the physical layout of the camp infrastructure; (3) increased detainee resistance requiring more frequent FCEs; (4) use of the videos in propaganda by entities hostile to the United States; and (5) dilution of protections against public curiosity afforded U.S. service personnel in ongoing overseas contingency operations and future conflicts. *See* Resp'ts First Mot. for Stay at 4-5. In addition, Respondents have filed contemporaneously herewith, via the Court Information Security Officer and pursuant to the Protective Order, two classified declarations that further explain the likely harms of public disclosure.[3] The first is a classified declaration by Rear

[3] Public versions of the two declarations, with classified information redacted, are attached to this motion.

Admiral Sinclair M. Harris, Vice Director of Operations for the Joint Chiefs of Staff in which he expands on how public release of the FCE videos "could reasonably be expected to seriously harm national security, to include our defense against transnational terrorism by: (a) endangering the lives and physical safety of U.S. personnel, to include military, civilian and contractor personnel (b) adversely affecting security conditions in Afghanistan and Iraq and (c) aiding in the recruitment and financing of extremists and insurgent groups." Dec'l of RADM Harris ¶ 4. The second is a classified declaration by Rear Admiral Kyle J. Cozad, Commander of Joint Task Force–Guantanamo ("JTF-GTMO"), in which he expands on how public release of the FCE videos could aid in development of FCE countermeasures and potentially lead to increased FCEs, which will "significantly jeopardize the ability of JTF-GTMO to maintain a safe and secure detention facility." Dec'l of RADM Cozad ¶¶ 3-4. Failure to extend the stay would usurp the ability of Respondents to seek review of, and the Court of Appeals to consider, as appropriate, these important issues with respect to the serious harms that reasonably can be expected from public disclosure of the FCE videos.

2. Respondents Should Not be Required to Divert 1,200 Person-Hours to Redact Videos that May Never be Released

As explained in more detail in Respondents' First Motion to Stay, the necessary frame-by-frame redaction of "all identifiers of individuals in the video[s] (i.e., faces other than [Petitioner's], voices, names, etc.)," First Order at 2, will be a time-consuming, lengthy, and burdensome process. Such redactions will be carried out by the Department of Defense Security Classification/Declassification Review Team ("DoD SC/DRT"), which ensures that documents used in detainee-related habeas cases, other criminal and civil litigation in federal courts, military commission proceedings, and Periodic Review Boards are properly classified and declassified as needed for release to the public and to detainees and their counsel for use in such proceedings. *See* Declaration Regarding Redaction Process ("Redaction Process Dec'l") ¶¶ 3, 9, 16 (ECF No. 356-2). The DoD SC/DRT has a heavy workload—approximately 50,000 pages reviewed this

year so far, with continued expected increases in that burden—with tight, often court-ordered deadlines. *Id.* ¶¶ 7, 10. The DoD SC/DRT has determined that it will take a team of two individuals approximately 15 to 19 hours to redact each video[4] (that is, 30 to 38 person-hours per video, or approximately 1,200 person-hours to redact all 32 videos), a diversion of resources that could significantly reduce the unit's capacity to perform in a timely manner the tasks necessary to support the many other ongoing detainee-related (and other) proceedings and meet often tight, court-ordered deadlines. *Id.* ¶¶ 14-15, 17-20.

Administrative costs and burdens that, like these, cannot be recovered if an order is reversed on appeal can constitute irreparable harm. *See, e.g., Ledbetter v. Baldwin*, 479 U.S. 1309, 1310 (1986) (Powell, J., in chambers). The "possibility that adequate compensatory or other corrective relief will be available at a later date" determines whether money, time, and energy that must be expended in the absence of a stay are "mere injuries" or irreparable harms that support a stay. *Wisc. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985). Here, there would be no possibility of compensatory or corrective relief should Respondents successfully appeal. Further, it is in the public interest to "conserv[e] scarce fiscal and administrative resources." *Mathews v. Eldridge*, 424 U.S. 319, 348 (1976). And it is against the public interest to prematurely divert resources otherwise needed to make evidence available to detainee litigants. *See In re Guantanamo Bay Detainee Litigation*, 624 F. Supp. 2d 27, 37 (D.D.C. 2009) (noting harm if diversion of limited resources to make judicial records available to the public prevents making information available to petitioners for use in the litigation). For these reasons, the burden of redaction before any appeal can be resolved amounts to an irreparable injury, and the Court should extend the stay, pending resolution of the appeal, not only of the order to disclose, but also of those aspects of the orders requiring Respondents to carry out the redactions.

[4] The highly involved redaction process is explained more thoroughly in Respondents' First Motion for Stay at 6-7 and Respondents' Reply at 3-7.

Further, requiring redactions to be carried out during the appeal would be procedurally difficult. Petitioner appears to contemplate a process in which after DoD SC/DRT completes its redactions, Petitioner can object to specific redactions, which would then be resolved by this Court, if necessary. *See* Pet'r Opp. to Mot. to Stay at 5 (ECF No.363). Without conceding the propriety of such a plan, it would be difficult—and entirely wasteful should Respondents prevail on appeal—for counsel for the parties to engage in such negotiations and litigation while the relevant issues are being resolved on appeal. Further, even if the Court of Appeals were to uphold public disclosure of the videos, but with more redactions than the Court's Orders allow, then, under Petitioner's plan, absent a stay, the redaction process and any associated resolution of objections would need to be redone before any videos could be released, further increasing the burdens on the DoD SC/DRT. It would be more efficient to allow counsel to focus their efforts on resolving the appeal as quickly as possible. To that end, as previously noted, Resp'ts Reply at 2, Counsel for Respondents intend to confer with counsel for Press Intervenors and Petitioner and propose to the Court of Appeals an expedited briefing schedule that provides an appropriate amount of time for briefing these important issues at the nexus of national security and the First Amendment. Given the upcoming holidays, Respondents currently anticipate proposing that their opening brief be filed on January 16, 2015. While resolution of these issues proceeds, Respondents should not be required to bear the irreparable injury arising from the administrative burden and diversion of critical resources to perform a complicated, time-consuming task that will be unnecessary should Respondents prevail on appeal.

B. In Light of the Certain and Immediate Harm to Respondents, the Balance of Harms and the Public Interest Warrant Extending the Stay

Given the entirely irreparable and severe nature of the harm Respondents will suffer if they are denied a chance to meaningfully appeal the Court's Order, the balance of harms and the public interest heavily favor granting the stay. Any potential harm of a stay to Press Applicants, or the public, would be minimal, because a stay would merely postpone the moment of

disclosure if Respondents' appeal is unsuccessful. *See Providence Journal Co. v. Fed. Bureau of Investigation*, 595 F.2d 889, 890 (1st Cir. 1979) (finding that "the total and immediate divestiture of appellants' rights to have effective review" outweighed the "minimal" potential harm of "merely postpone[ing] the moment of disclosure"). And a stay would protect the public's strong interest in ensuring that national security is not harmed by unwarranted disclosure of classified information. *See In re Guantanamo Bay Detainee Litig.*, 624 F.Supp. 2d 27, 36-37 (D.D.C 2009) (finding that "any positive role [of public access to habeas proceedings] would be severely diminished if the public gains access to classified information").

C. Respondents Have, at Minimum, Raised Serious, Substantial, and Difficult Legal Questions to be Litigated on Appeal

Respondents have, at a minimum, "raised serious legal questions going to the merits, so serious, substantial, and difficult as to make them fair grounds of litigation . . . ." *Population Inst. v. McPherson*, 797 F.2d at 1078 (quoting *Washington Metro. Area Transit Comm'n, v. Holiday Tours, Inc.*, 559 F.2d 841, 844 (D.C. Cir. 1977)).[5] As explained in Respondents' First Motion for Stay and their Reply, the Court's Orders are appealable at least as a collateral order because they "(1) conclusively determine[ ] the disputed question, (2) resolve[ ] an important issue completely separate from the merits of the action, and (3) [are] effectively unreviewable on appeal from a final judgment."[6] *Ameziane v. Obama*, 699 F.3d 488, 493 (D.C. Cir. 2012) (reviewing order requiring disclosure of information deemed sensitive by government); *see also* Rsp'ts First Mot. for Stay at 9, Resp'ts Reply at 9-11. Further, with respect to the First Order, the Court has acknowledged that never before in any Guantanamo detainee habeas litigation has a court ordered public disclosure of classified information over the Government's objection.

[5] Indeed, Respondents have demonstrated a strong likelihood of success should they choose to appeal the Court's Orders, *see* Rsp'ts First Mot. for Stay at 9-16; Resp'ts Reply at 7-11, although such a showing is not necessary to warrant a stay where, as here, there is substantial irreparable harm and the balance of harms and the public interest weighs heavily in favor of a stay, *see Population Inst.*, 797 F.2d at 1078.

[6] There are possible avenues for appellate review of the Courts' Orders other than the collateral order doctrine, including a petition for a writ of mandamus. *See* Resp'ts Reply at 11, n. 10.

Mem. Op. at 11. And, as Respondents have explained in their prior stay briefing, there is no qualified public right of access to classified information entered into evidence relating to a motion for a preliminary injunction in a habeas proceeding; the opinions upon which the Court primarily relied to find such a right addressed the sealing of *unclassified* information, and at least two of those opinions expressly allowed the Government to withhold from the public and, in one case, even from security-cleared counsel for detainees, classified information when the Government objected to such disclosure. *See* Resp'ts First Mot. for Stay at 9-12; Resp'ts Reply at 7-8. Finally, even if a qualified right of public access to these classified materials existed, the Court failed to provide sufficient deference to Respondents' evidence of the serious harm to national security likely to result from disclosure and should have, before ordering disclosure, afforded the Government an opportunity to augment its declaration with additional evidence—such as the evidence contained in the classified declarations discussed above in Section A.1. Resp'ts First Mot. for Stay at 12-16; Resp'ts Reply at 8-9; *Ameziane*, 699 F.3d at 497 (Courts are not "free . . . to substitute their own policy judgments for those of the executive" nor "to toss the [Executive Branch's] [d]eclaration aside merely because it disagree[s] with its premise[s]."). For these reasons, there are serious and substantial legal questions going to the merits of the Court's Orders, and a stay of the Court's Orders is warranted.

CONCLUSION

For these reasons, the Court should extend the existing stay of its Orders of October 3, 2014 and October 9, 2014 pending final resolution of Respondents' appeal of those Orders.

December 2, 2014

Respectfully submitted,

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