

[ORAL ARGUMENT HELD MAY 15, 2007]

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

HAJI BISMULLAH and
HAJI MOHAMMAD WALI,
as Next Friend of Haji Bismullah,

Petitioners,

v.

ROBERT M. GATES,

Respondent.

Case No. 06-1197

HUZAIFA PARHAT, *et al.*,

Petitioners,

v.

ROBERT M. GATES, *et al.*,

Respondents.

Case No. 06-1397

**PETITIONERS' JOINT RESPONSE TO
RESPONDENT'S MOTION FOR LEAVE TO FILE DECLARATION
DESCRIBING PROCESS OF COMPILING CSRT RECORD**

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I. CONTROL THE RECORD, CONTROL THE LAWYERS, CONTROL THE OUTCOME

The government has tried to control the pending motions by controlling the Court's access to the facts necessary to resolve them. Having faced the Court's pointed questioning during oral argument, however, the government now offers the declaration of Rear Admiral James M. McGarrah ("McGarrah Declaration"). Petitioners support the disclosure of relevant facts related to the CSRT process—indeed, we believe full disclosure is critical to the integrity of the judicial process. In the interest of a prompt and fair hearing on the merits, Petitioners do not oppose Respondent's motion for leave¹ to file the McGarrah Declaration,² and respectfully request the Court to promptly resolve the motions; however, we urge the Court to order Admiral McGarrah to appear for deposition on the subject matter of his Declaration in connection with the merits of the claims in the Petitions.

The McGarrah Declaration's revelations are startling, and yet the document is replete with omissions, gaps, and lacunae. The government took sixteen days to draft the declaration, and it bears all the hallmarks of careful management by lawyers. Where detail might be troubling, generalities are provided; where the full picture might be damaging, only half is set out. Nevertheless, we now know:

- the Recorder did *not* obtain and review the Government Information in most, if not all, of the CSRTs, and instead these critical tasks were

¹ Respondent's Motion for Leave to File Declaration Describing Process of Compiling CSRT Record is not limited to whether good cause exists for filing the declaration. Rather, it squarely addresses the merits of the motions that were argued and submitted on May 15, 2007. Petitioners therefore respond as to those issues as well.

² Petitioners do not object to the *filing* of the McGarrah declaration, but each reserve the right to object to its *admissibility* as evidence.

performed by a Pentagon “Team” that pre-packaged the limited information sent to the Tribunal;

- the Personal Representative did *not* review the Government Information; and
- the Recorder did *not* present all exculpatory evidence contained in the Government Information to the Tribunal.

Three critical points arise from the McGarrah Declaration. First, it shows that the government has made numerous arguments and assertions that are flatly inconsistent with the actual facts. Indeed, in urging this Court to adopt “a strong presumption of regularity,” the government asked this Court to presume facts that were not true.

Second, the McGarrah Declaration demonstrates conclusively that Petitioners’ motions to compel should be granted. The government has exclusive control over the relevant evidence, and for too long has disclosed only the evidence that suits it. The McGarrah Declaration dramatically emphasizes the need for an order requiring the government to do what it has so vigorously resisted: allow Petitioners’ counsel access to all relevant facts. The revelations in the McGarrah Declaration powerfully show that the Court cannot meaningfully review these cases on less than all relevant facts.

Third, the McGarrah Declaration indicates that the CSRTs did not follow their own procedures, and is thus highly relevant to the merits. In order to decide this case, the Court will need to have a full understanding of how Petitioners’ CSRTs were conducted.

In order for counsel to effectively prepare and present Petitioners’ cases to the Court, we must have access to our clients, as well as to the complete facts. The government will allow us neither until the Court enters a protective order. *See infra* § IV. Petitioners respectfully urge the Court immediately to enter the district

court form of protective order, to require the government to produce the requested documents, and to enter a scheduling order for the prompt briefing and resolution of the merits.

II. THE MCGARRAH DECLARATION REFUTES THE GOVERNMENT'S PREVIOUS REPRESENTATIONS CONCERNING THE CSRT PROCEEDINGS.

The government consistently represented that Guantanamo prisoners were held as enemy combatants only after “multiple levels of review,” and that an extensive file about each detainee had been generated in connection with those prior determinations.³ The government explained that at the outset of each CSRT proceeding, the Recorder was supposed to examine the files “generated in connection with the initial determination to hold the detainee, and any subsequent review of that determination.” Respondent’s Reply In Support of Motion to Stay Proceedings and to Enter Proposed Protective Order at 4-5, *Parhat v. Gates*, no. 06-1137 (D.C. Cir. Jan. 10, 2007); *see also* App.10 § E(3) & App.17 § C(1) (Recorder is to review “information generated in connection with the initial determination to hold the detainee as an enemy combatant and in any subsequent reviews of that determination, as well as any records, determinations, or reports generated in connection with such proceedings”). Now we learn that in the fall of 2004, a massive research effort—involving up to 200 people—was *launched* in Washington. The inference is plain, and after five years, startling: in 2004, more

³ *See, e.g., Rasul v. Bush*, Nos 334, 343, Brief for the Respondents (U.S. Mar., 2004) at 4 (“individuals taken into U.S. control ... undergo a multistep screening process ... commanders in the field, using all available information, make a determination as to whether the individual is an enemy combatant”); *id.* at 5 (prisoners are then “sent to a centralized holding in the area of operations where a military screening team reviews all available information ... [a]ny recommendations for transfer to Guantanamo are further reviewed by a Department of Defense review panel ... Upon their arrival in Guantanamo, detainees are subject to an additional assessment by military commanders regarding the need for their detention. That assessment is based on information obtained from the field, detainee interviews, and intelligence and law enforcement sources.”).

than two years into the imprisonment of most prisoners, the government was starting from scratch to build a case for detention.

During oral argument on May 15, 2007, the government told the Court that the Recorder compiled and selected the materials presented to the CSRT Tribunals: “[I]t is what the Recorder selects.” See Transcript of Oral Argument at 29, *Bismullah v. Gates*, Nos. 06-1197 and 06-1397 (May 15, 2007) (“Tr.”); see also Brief for Respondent Addressing Pending Preliminary Motions at 9, *Bismullah v. Gates*, Nos. 06-1197 and 06-1397 (Apr. 9, 2007) (“The Recorder thus obtained and examined the Government Information[.]”). The Court heard nothing of “Case Writers” in Washington preparing the unclassified summaries of evidence and researching the Government Information, McGarrah Decl. ¶ 5(a); nothing of Washington “civilians and contractors” who pre-packaged the files sent to Guantanamo, compare *id.* ¶¶ 2-6 with Tr. at 38 (representing that various federal agencies provided information “to the Recorder”); nothing about some person other than the Recorder managing the “coordination” with government agencies, McGarrah Decl. ¶ 5(c); nothing about the “instances where the Team was not permitted to use certain documents as government Evidence or to make copies of them,” *id.* ¶ 10(b); nothing about a process in which “Government Information” was disregarded based on an unknown, and possibly uninformed, person’s determination that it was “not relevant or only marginally relevant,” *id.* at ¶ 11(a).⁴

Most significantly, on May 15 no one told the Court that exculpatory evidence was withheld, either by the mysterious “Case Writers,” or by the

⁴ We do not suggest that Mr. Letter or anyone else at the Department of Justice knowingly or intentionally made misrepresentations to this Court. We do not know how it came to be that the government said one thing to the Court, and Admiral McGarrah another. We note however, that the Department of Justice has a duty to investigate the relevant facts thoroughly, as well as to act at all times with candor and good faith before this Court.

Recorder himself. McGarrah Decl. ¶ 13. Quite the opposite: “*if* the recorder has done what he or she was required to do,” the government said, “the recorder has presented to the panel any exculpatory information.” Tr. at 33 (emphasis added).

A. The Recorder neither obtained nor examined the Government Information.

Under the CSRT Procedures, the Recorder was obliged to “obtain and examine the Government Information to obtain and examine the Government Information.” App. 17 § C(1). Indeed, the Tribunal, through its Recorder, is deemed to have access and to have considered the Government Information. App.2 § g(7) (“The Tribunal, through its Recorder, *shall have access to and consider* any reasonably available information.”) (emphasis added).

Respondent represented that the Recorder personally performed the routine task of collecting files containing the Government Information:

Petitioners’ assertion that their DTA claims will require discovery . . . is also based on a faulty understanding of the CSRT recorder’s role. The recorder’s role of gathering “reasonably available information” in the government’s files that “bear[s] on the issue” of whether the detainee is an enemy combatant is routine and subject to the strongest presumption of regularity.” That role does not encompass an investigation, but simply collecting files “generated in connection with the initial determination to hold the detainee, and any subsequent review of that determination.

Respondent’s Reply In Support of Motion to Stay Proceedings and to Enter Proposed Protective Order at 4, *Parhat v. Gates*, no. 06-1137 (D.C. Cir. Jan. 10, 2007). *See also* Respondent’s Opp. To Motion to Compel at 5 n.5, *Bismullah v. Gates*, no. 06-1197 (D.D. C. Aug. 21, 2006) (“Recorder simply compiles relevant material that is reasonably available in government files (see CSRT Procedures, Encl. 1 § E(3) (defining ‘Government Information’).”).

The McGarrah Declaration reveals that the Government Information was never collected, and the Recorder thus never obtained and examined the Government Information. Instead, a “Case Writer” had “primary responsibility”

for “researching ” and “collecting” information from limited government sources. McGarrah Decl. ¶ 5. This Case Writer apparently compiled information that he or she thought sufficiently important to present to the Tribunal—but Admiral McGarrah explains that the Case Writer’s “file of information gathered as a result of these inquiries . . . did not necessarily include all material that might be considered to meet the definition of ‘Government Information.’” *Id.* ¶ 11. The Recorder generally reviewed only the information provided by the “Team,” rather than the Government Information. *Id.* ¶ 6.

B. The Recorder did not present all exculpatory evidence to the Tribunal

The CSRT Procedures require the Recorder to present all exculpatory evidence to the Tribunal. App.17, § B(1) (“In the event the Government Information contains evidence to suggest that the detainee should not be designated as an enemy combatant, the Recorder *shall* also provide such evidence to the Tribunal.”) (emphasis added); App.14 §H(4) (same).

At oral argument, the government conceded that “*if* the recorder has done what he or she was required to do, the recorder has presented to the panel any exculpatory information.” Tr. 33 (emphasis added); *see also id.* at 24 (“If you note at Appendix page 17 [CSRT Procedures], the recorder has an obligation to gather exculpatory material and provide that to the tribunal. So unless there is evidence that the recorder has not done his or her job, the exculpatory evidence should be in the record.”).

The government also urged the Court to reject Petitioners’ challenges to the CSRT proceedings—including claims that the Recorder failed to present exculpatory evidence to the Tribunal—based on the “strongest sort of presumption of regularity.” According to Respondent “[t]he recorder’s role of gathering ‘reasonably available information’ in the government’s files that ‘bear[s] on the

issue’ of whether the detainee is an enemy combatant is routine and subject to the strongest presumption of regularity.” Respondent’s Motion to Stay Proceedings at 4 , *Parhat v. Gates*, no. 06-1397 (Jan. 10, 2007). Respondent argued that Petitioners could overcome this presumption only through a “strong showing of bad faith or improper behavior.” See, e.g., Respondent’s Motion to Govern Further Proceedings and Opp. To Petitioners’ Mtn. to Govern at 9-10, *Parhat v. Gates*, no. 06-1397 (Mar. 9, 2007). This “strongest sort of presumption of regularity” would have led the Court to presume a set of facts that, according the McGarrah Declaration, were untrue.

Admiral McGarrah testified that at least for CSRTs conducted after September 1, 2004,⁵ exculpatory evidence was not always provided to Tribunals. McGarrah Decl. ¶ 13. First, Admiral McGarrah testified that “duplicative” exculpatory information “might” have been omitted from the “Government Evidence” presented to the Tribunal. *Id.* ¶ 13(a). Second, he testified that exculpatory information “may be excluded from the Government Evidence—if,” in the estimation of either the “Team” or the Recorder, “it did not relate to a specific allegation being made against the detainee.” *Id.* ¶ 13(b). But the CSRT procedures do not provide for any such exceptions. If information was (1) in the possession of the U.S. government, (2) was “reasonably available,” and (3) “suggest[ed] that the detainee should not be designated as an enemy combatant,” the Recorder was required to present it. App.17, § B(1); App.14 §H(4). The apparently routine—and previously unknown—withholding of exculpatory evidence from the Tribunals was a flat violation of the CSRT procedures.

⁵ See generally App.152 (timeline of hearing dates for 102 CSRTs studied (of 558 conducted)).

C. The Personal Representative did not review the Government Information.

The Personal Representative was required to review the Government Information—indeed, the CSRT hearing could not be scheduled until he or she had done so. App. 12 § G(4) (“The Director, CSRT, will schedule a Tribunal hearing for a detainee within 30 days after the detainee’s Personal Representative *has reviewed* the Government Information[.]”) (emphasis added). Respondent represented that the Personal Representative in fact reviewed the Government Information, and thus acted as a check on the Recorder. *See also* Brief for Respondent Addressing Pending Preliminary Motions at 67, *Bismullah v. Gates*, Nos. 06-1197 and 06-1397 (Apr. 9, 2007) (“[T]he detainee’s personal representative may also review all of the government information, and may independently present evidence ‘to the CSRT on the detainee’s behalf.’ . . . Thus the notion that the Recorder alone was responsible for placing exculpatory material in the record is not true.”).

As an additional check, the Personal Representative also reviews all of the government information, and may independently present evidence “to the CSRT on the detainee’s behalf.”

Respondent’s Opp. To Motion to Compel at 19, *Bismullah v. Gates*, no. 06-1197 (D.C. Cir. Aug. 21, 2006)

In fact, the Government Information was never collected, and therefore never reviewed by the Personal Representative (nor by the Recorder, the “Case Writer” or the other members of the “Team”). McGarrah Decl. ¶ 11 (the file that was “gathered” did not include all Government Information). The Personal Representative did not even have access to the information in the government databases or files; the Personal Representative had merely the “*ability* to request additional information.” *Id.* ¶ 6 (emphasis added).

