

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

HAJI BISMULLAH, et al.,	)	
Petitioners	)	
	)	No. 06-1197
v.	)	
	)	
ROBERT M. GATES,	)	
Secretary of Defense,	)	
Respondent.	)	
	)	
HUZAIFA PARHAT, et al.,	)	
Petitioners,	)	
	)	No. 06-1397
v.	)	
	)	
ROBERT M. GATES,	)	
Secretary of Defense,	)	
Respondent.	)	

**DECLARATION OF THE HONORABLE GORDON R. ENGLAND, DEPUTY  
SECRETARY OF DEFENSE, DEPARTMENT OF DEFENSE, WASHINGTON, DC**

Pursuant to 28 U.S.C. § 1746, I, Gordon R. England, hereby declare that to the best of my knowledge, information, and belief, the following is true, accurate, and correct:

1. I am the Deputy Secretary of Defense. I served as Acting Deputy from May 16, 2005 to January 4, 2006, when I was recess appointed by the President as Deputy Secretary. I was confirmed by the Senate on April 6, 2006 as the 29<sup>th</sup> Deputy Secretary of Defense. Prior to that, I served as the Secretary of the Navy, beginning in September 2003.
2. As the Deputy Secretary of Defense, I serve as the Designated Civilian Official responsible for overseeing the detainee review processes at Joint Task Force-Guantanamo (JTF-GTMO). This includes the Combatant Status Review Tribunals (CSRTs) and the Administrative Review Board (ARBs) proceedings.
3. On July 20, 2007, the Court issued its opinion in the above styled cases. Subsequently, a panel of this Court ordered the Government to produce the record, as defined in Bismullah on September 13, 2007, in Paracha v. Gates, No. 06-1038, and other panels have likewise ordered the production of a Bismullah record in other cases on other dates. I understand the Court to have determined that the "record on review" under the

Detainee Treatment Act is not limited to the record actually presented to and considered by the CSRT in making its enemy combatant determination, but rather includes all information the CSRT is "authorized to obtain and consider" under the Secretary of Defense's CSRT procedures (i.e., the "Government Information," which is defined as "such reasonably available information in the possession of the U.S. Government bearing on the issue of whether the detainee meets the criteria to be designated as an enemy combatant.")

4. As reflected in the Declaration of RADM (ret.) James M. McGarrah, previously submitted in this case, in the 2004-2005 time frame, when the Office for the Administrative Review of the Detention of Enemy Combatants (OARDEC) conducted the CSRTs for 558 Guantanamo detainees, the Recorders (the term Recorder is meant to include the teams that assisted the Recorders), in searching for and gathering material for the CSRTs, relied primarily upon searches of relevant DoD databases, specifically the Joint Detainee Information Management System and the I2G Investigative Information Database (formerly called I2MS). Recorders also went beyond these databases and pursued gathering information from other sources. The "Government Information" with respect to a detainee, however, was not amassed into a single, reproducible file. Nor are there reliable records of the precise materials that were in fact examined by a Recorder in every case. Thus, it is not possible to recreate easily or with any precision the information that was reviewed by the Recorders in performing their duties.

5. Accordingly, in order to attempt to comply with the Bismullah ruling and assemble the "Government Information" for any particular detainee, DoD is having to undertake new searches and assembly of materials from which "Government Information" can be taken. The Director of OARDEC has directed six DoD intelligence agencies, the Office of Military Commissions, and five Combatant Commands to identify, assemble and provide information from which the "Government Information" for certain individuals detained at U.S. Naval Base Guantanamo Bay, Cuba can be derived. OARDEC has conducted the same search of its own files for original documents falling within this definition. The particular components tasked for such searches were selected after an assessment was made that their organization may hold potentially responsive documents on the detainees at issue. Searches were initially undertaken with respect to six detainees currently held as enemy combatants at U.S. Naval Station, Guantanamo Bay, Cuba who have filed petitions under the Detainee Treatment Act so that the Department could assess the likely impact of a tasking to gather all available "Government Information" with respect to the Detainee Treatment Act review cases on the mission of each command, agency and office during a time of war.

6. In addition, a number of outside agencies, including the CIA, FBI, State Department, and Department of Homeland Security, as well as the National Security Agency (NSA) within DoD, were separately tasked in the context of this litigation with searching for and assembling information from which "Government Information" can be derived. DoD shares the concerns expressed in some of those outside agencies' declarations regarding the disclosure of highly sensitive information.

7. The current search undertaken to comply with the requirements of the Bismullah decision, has created an immense burden on the Department of Defense. Documented accounts from the DoD components and commands demonstrate undue burden to war-time missions and objectives, compromise of resources necessary for the war effort, and diversion of significant manpower from the war time mission.

8. For example, one of the components tasked to search for potentially responsive material is the Criminal Investigation Task Force (CITF). CITF's primary mission is to investigate non-U.S. citizen detainees captured during the Global War on Terrorism and suspected of illegal activities in conjunction with their affiliation to al Qaida and other enemies of the United States. The objective is to either refer the cases to the DoD Office of Military Commissions for criminal prosecution or to identify detainees who should be released and/or transferred from DoD control. Information obtained as the result of these investigations is also provided to the U.S. intelligence community.

9. To comply with the search-related tasking on the initial set of six cases, CITF created special working groups that included subject matter experts, law enforcement agents and intelligence analysts. The working group developed search terms, protocols and parameters. To date, CITF agents and analysts have spent nearly 2000 total manhours to comply with this tasking. At bottom, CITF reports that it was rendered ineffective for normal operations with respect to about thirty percent of CITF staff, personnel, and resources during the search process. The effect was highly disruptive. Long term repetition of these efforts, that is, extrapolating such efforts to all Detainee Treatment Act review cases (currently involving approximately 130 detainees), would render CITF ineffective as an investigative task force.

10. Other DoD components tasked to conduct searches (aside from NSA, which is addressing this matter in its own declaration in this litigation) also have reported not an insignificant resource toll in the matter. Currently, it is estimated that gathering of such materials has expended several hundred manhours, although efforts are still underway to determine whether additional search-related work from the components is necessary. Long term repetition of such efforts with respect to these components points to a significant burden on these components' abilities to carry out duties associated with their primary mission. For example, the Joint Task Force-Guantanamo reported that future impact of a wide-scale document gathering effort could impact its primary mission of conducting detention and interrogation operations in support of the Global War on Terrorism by, among other things, diverting personnel otherwise involved in interrogations and analysis from those duties to the gathering of information to support litigation requirements.

11. The above-related examples do not include the work performed by OARDEC, which is discussed in detail below.

12. OARDEC is an organization within the DoD that is responsible for several processes involving detainees at Guantanamo Bay, Cuba. Specifically, OARDEC conducts CSRTs and annual ARBs for detainees at Guantanamo Bay, Cuba. The ARB is an annual review

to determine the need to continue the detention of an enemy combatant. The ARB recommends whether an individual should be released, transferred or continue to be detained. This process has resulted in approximately 200 detainees being approved for transfer or release from U.S. custody.

13. OARDEC is responsible for working with each of the DoD components tasked to ensure that a complete and comprehensive search for "Government Information" was accomplished. It is then the responsibility of OARDEC to review the information collected by the components to determine what information is "Government Information" that should be produced in compliance with the Bismullah decision.

14. OARDEC is working or coordinating with each DoD agency and command, and outside agencies, on the gathering of documents. Many of the agencies and commands have different data systems and information in them is retrieved differently and sent to OARDEC in different formats. Some agencies have required OARDEC to review documents at their facility; others have provided documents to OARDEC. OARDEC is also conducting a review of the CSRT tribunal files for the cases to gather any appropriate original documents for the record on review.

15. Once documents are made available to OARDEC, either by DoD components or by outside agencies, OARDEC must then review the documents to eliminate documents not relevant to the detainee and not relevant to the detainee's enemy combatant status. Where materials are supplied to OARDEC in electronic form, OARDEC is responsible for developing appropriate search terms, protocols, and parameters for searching through the materials via electronic means and conducting such review. In addition, some agencies provide documents in a format that is not electronically searchable, so OARDEC is responsible for re-formatting those documents before they can conduct their search. Not all agencies provide documents in electronic form; in such cases OARDEC is responsible for manually reviewing the documents. Once OARDEC's review is completed and a set of material for potential production to the Court and detainee counsel is gathered from a component or agency, OARDEC then forwards these documents to the originating agency for a "need to know" analysis to determine the propriety of disclosure of the documents to the court or detainee's counsel.

16. The burden to OARDEC has been substantial and continues to constitute a significant burden to the mission and objectives of OARDEC at both its Washington, DC Headquarter offices and its offices at Guantanamo Bay, Cuba. The combined efforts by OARDEC for all agencies, offices and commands so far have involved more than 270 manhours just with respect to the gathering of information for the Paracha matter. To conduct the work accomplished so far, which is not complete even with respect to the Paracha matter, much less the other cases, OARDEC has had to re-prioritize its work or delay other pressing responsibilities, including preparing for or conducting CSRTs for recently arrived Guantanamo detainees, ARBs, and new CSRTs based on newly obtained evidence (see OARDEC Instruction 5421.1 (issued May 7, 2007)). OARDEC has experienced a decrease of production of the ARBs and CSRTs over the last four weeks. This is due to the fact that OARDEC has had to take 18 of the 20 personnel assigned to

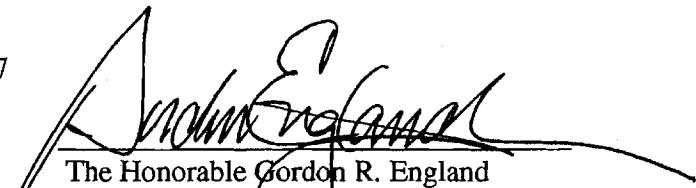
the production of ARB and CSRT case files and reassign them to the current gathering and review effort. A long-term and significant increase in these gathering efforts, which would be the result of effectuating such efforts for all Detainee Treatment Act review cases (currently involving approximately 130 detainees), would lead to an exponential increase in the burden on OARDEC's ability to carry out its other duties and a requirement for significantly increased staffing to carry out the assembly of Government Information called for under Bismullah.

17. Aside from the burdens discussed above, additional burdens are involved in DoD's attempt to comply with the Court's order regarding production of Government Information to the Court and counsel. Prior to the regime created through the Court's order in Bismullah, with respect to Guantanamo detainees with habeas cases or DTA review petitions and where so ordered by a court, only the "Government Evidence," that is, the record considered by the CSRT in making the enemy combatant determination (with certain exceptions), was provided to the Court and properly cleared and otherwise qualified petitioner's counsel. The required disclosure of the "Government Information" per the Bismullah decision, however, will typically require a much broader potential production of materials to the Court and petitioner's counsel. As indicated above, this broader set of typically classified materials must be reviewed by appropriate DoD components and outside agencies to determine "need to know," that is, the suitability of disclosure of such information to the Court and counsel. Although a precise assessment of such burdens with respect to DoD components (other than NSA) cannot be made at this time, given that such work on the cases in process is not complete, the process promises to be burdensome and time-consuming.

18. Although DoD is committed to devoting all necessary resources to complying with any court order, it is important to note that our components are still engaged in active combat around the world in the Global War on Terrorism. Compliance with the Bismullah court order that requires the gathering of information as has been described here will require DoD to pull resources away from the warfighting and intelligence gathering missions that are essential to fighting the Global War on Terrorism. We cannot overstate the importance of ensuring that our components can focus on their primary missions.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true, accurate, and correct.

Dated this the 7<sup>th</sup> day of September 2007

  
The Honorable Gordon R. England  
Deputy Secretary of Defense  
Department of Defense  
Pentagon, Washington, DC