

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,)
)
 Respondent.)

)
HUZAIFA PARHAT, et al.,)
)
 Petitioners,) No. 06-1397
)
 v.)
)
ROBERT M. GATES,)
)
 Respondent.)

DECLARATION OF GENERAL MICHAEL V. HAYDEN, USAF,
DIRECTOR, CENTRAL INTELLIGENCE AGENCY

I, MICHAEL V. HAYDEN, hereby declare and state:

1. I am the Director of the Central Intelligence Agency (CIA) and have served in this capacity since 30 May 2006. In my capacity as Director, I lead the CIA and manage the Intelligence Community's human intelligence and open source collection programs on behalf of the Director of National Intelligence (DNI). I have held a number of positions in the Intelligence

Community, including Principal Deputy Director of National Intelligence, from April 2005 to May 2006; Director, National Security Agency/Chief, Central Security Service (NSA/CSS), Fort George G. Meade, Maryland, from March 1999 to April 2005; Commander of the Air Intelligence Agency and Director of the Joint Command and Control Warfare Center, both headquartered at Kelly Air Force Base, Texas, from January 1996 to September 1997; and Director, Intelligence Directorate, U.S. European Command, Stuttgart, Germany, from May 1993 to October 1995.

2. I am a four-star general in the United States Air Force and have held senior staff positions at the Pentagon, the National Security Council, and the U.S. Embassy in Sofia, Bulgaria, as well as serving as Deputy Chief of Staff for United Nations Command and U.S. Forces Korea. I entered active duty in 1969 as a distinguished graduate of the Reserve Officer Training Corps program.

3. I make the following statements based upon my personal knowledge and information provided to me in my official capacity.

4. This unclassified declaration is submitted in support of the Government's petition for rehearing. It describes for the Court the damage to the national security that reasonably can be expected to result from compliance with the Court's 20 July 2007 decision.

I. Purpose Of This Declaration

A. The Bismullah Decision

5. Through the exercise of my official duties, I have been advised of this litigation. I am familiar with the Court's 20 July 2007 decision in this matter. Among other things, I understand that the Court held that the "record on review" under the Detainee Treatment Act (DTA) is not limited to the Record of Proceedings that was presented to, and considered by, the Combatant Status Review Tribunal (CSRT) in making its enemy combatant determinations. Rather, I understand that the Court held that the "record on review" is comprised of all information the CSRT is "authorized to obtain and consider" under DoD regulations, which is defined as "such reasonably available information in the possession of the U.S. Government bearing on the issue whether the detainee meets the criteria to be designated as an enemy combatant."

6. I also understand that the Court's definition of "Government Information" is binding on all appeals of CSRT determinations brought pursuant to the DTA, not simply this case. I am informed that if most detainees appeal their CSRT determination, a fair reading of the Court's decision will require review and potential discovery to the Court and detainee counsel of a vast number of the CIA's most sensitive classified documents on counterterrorism intelligence and operations.

Included in this total are tens of thousands of highly classified documents.¹

7. I also am familiar with the U.S. Government's petition for rehearing that is being filed with this declaration. I understand that the Government's petition argues that the "record on review" is properly limited to the evidence that was actually presented to, and considered by, the CSRT in making its enemy combatant determination, as opposed to the voluminous group of documents that the CSRT was "authorized to obtain and consider" under DoD procedures.

8. This unclassified declaration is submitted in support of the Government's petition for rehearing. This declaration explains, to the greatest extent possible on the public record, the extremely grave damage to the national security that reasonably could be expected if the "Government Information" is provided to the Court and detainee counsel.

9. The details explaining the full scope of the damage to the national security are classified. Therefore, they are described in my classified declaration, which will be submitted to the Court in camera and ex parte. Because of its

¹ I understand that the CIA has made classified information available to detainee counsel in previous habeas cases in the district courts. The amount of information that will be made at issue by the Bismullah decision, however, is far more voluminous and far more sensitive than that information that has been made available before.

sensitivity, the classified declaration will be delivered to a DOJ Security Officer who will assist in its delivery.

B. CIA Information at Issue

10. The breadth of discovery apparently required by the Court's decision will include information about virtually every weapon in the CIA's arsenal to combat the terrorist threat to the United States. The documents will disclose clandestine intelligence activities, including counterterrorism operations, foreign intelligence information and assistance, information provided by sensitive sources, and technical collection activities.

11. First, the majority of the documents that appear to be discoverable under the Court's definition of "Government Information" relate to the counterterrorism operations of the CIA. These documents disclose the classified details of the CIA's counterterrorism operations and also would reveal the CIA's sensitive intelligence sources and methods.

12. Second, much of the information that is potentially discoverable was provided to the CIA by foreign intelligence services or discloses the specific assistance provided by the CIA's foreign partners in the global war on terror. If the CIA is compelled to comply with the Court's decision, the CIA will be obligated to inform its foreign liaison partners that a court order requires that the CIA provide this information to the

Court and detainee counsel. There is a high probability that certain liaison services will decrease their cooperation with the CIA because of the extent that their information has become enmeshed in U.S. legal proceedings.

13. Third, some information discoverable under the Court's decision originated with, or pertains to, clandestine human intelligence sources. These individuals provide information or assistance to the CIA only upon the condition of absolute and lasting secrecy. Revealing this information--even to the Court or to cleared counsel--would expressly violate these agreements, and would irreparably harm the CIA's ability to utilize current sources and to recruit sources in the future.

14. Finally, the documents include a large amount of information about the CIA's technical intelligence collection abilities and activities. Disclosure of the nature and extent of these activities would significantly diminish the CIA's ability to gather foreign intelligence.

C. Damage to the National Security

15. I recognize that the Court has not ordered that any classified information be publicly disclosed. Nevertheless, exceptionally grave damage to the national security reasonably can be expected to result from compliance with the Court's decision for three reasons.

16. First, certain information, such as that provided by foreign liaison services and human sources, is of a nature that even disclosure only to the Court and detainee counsel is reasonably likely to result in damage to the national security. This is so because information provided by these sources cannot be disclosed to the Court and detainee counsel without violating the CIA's assurances of confidentiality. If this information were disclosed outside intelligence channels, including to the Court or to detainee counsel, some sources would need to be informed and, as a result, they would restrict or altogether cease cooperation with the CIA. This outcome would severely restrict the U.S. Government's ability to collect intelligence and wage the war on terrorism.

17. Second, I am advised that over 100 appeals have been filed under the provisions of the DTA. I also understand that each detainee typically is represented by several attorneys. With over 300 detainees at Guantanamo Bay, Cuba, it appears that compliance with the Court's decision will require disclosure to several hundred--perhaps more than one thousand--private attorneys who are not employees of the U.S. Government and who are not trained in handling classified information. With so many untrained individuals allowed access to such sensitive information, I believe that unauthorized disclosures, even if inadvertent, are not only probable, but inevitable. The

regulations controlling access to classified information recognize that limiting the number of people with access is a necessary step in safeguarding sensitive information. The Court's decision would eviscerate the U.S. Government's carefully conceived plan to keep its most highly sensitive information compartmentalized and would increase the likelihood of public disclosure.

18. Finally, because of the kind of information at issue in these cases, Department of Defense teams will have to review every potentially discoverable document to determine if it contains information relevant to a detainee's status as an enemy combatant, and then CIA subject matter experts must conduct a line-by-line review to determine whether or not the document can be provided to detainee counsel or if it must be provided only to the Court. The burden of searching for, collecting, and reviewing such a number of documents will divert CIA counterterrorism personnel from their primary goal of protecting the country from terrorist attacks.

II. Conclusion

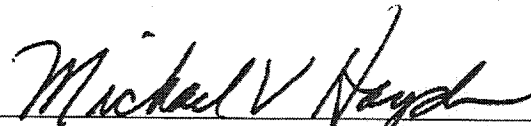
19. I have described, to the greatest extent possible on the public record, the bases for my judgment that compliance with the Court's decision reasonably can be expected to cause exceptionally grave damage to the national security. For a

complete description of my determination, I respectfully refer the Court to my classified declaration, which will be submitted in camera and ex parte, filed with the Government's petition.

* * * *

I hereby declare under penalty of perjury that the foregoing is true and correct.

Executed this 6th day of September, 2007.



General Michael V. Hayden, USAF
Director
Central Intelligence Agency