

1 UNITED STATES COURT OF APPEALS
2 FOR THE DISTRICT OF COLUMBIA CIRCUIT

3 HAJI BISMULLAH, a/k/a HAJI
4 BISMILLAH and a/k/a HAJI
5 BESMELLA, HAJI MOHAMMAD WALI,
6 Next Friend of HAJI BISMULLAH,

No. 06-1197

7 Petitioners,

8 v.

9 ROBERT M. GATES, SECRETARY OF
10 DEFENSE,

11 Respondent.

12 =====
13 HUZAIFA PARHAT, et al,

14 Petitioners,

15 v.

16 ROBERT M. GATES, SECRETARY OF
17 DEFENSE, et al,

18 Respondents.

No. 06-1397

19 Tuesday, May 15, 2007

20 Washington, D.C.

21 The above-entitled matter came on for oral
22 argument pursuant to notice.

23 BEFORE:

24 CIRCUIT JUDGES HENDERSON AND ROGERS
25 AND CHIEF JUDGE GINSBURG

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MOHAMMAD WALI, Next Friend of HAJI BISMULLAH:

JEFFREY I. LANG, ESQ.

ON BEHALF OF THE PETITIONERS, HUZAIFA PARHAT, ET AL

SABIN WILLETT, ESQ.

ON BEHALF OF THE RESPONDENTS, ROBERT M. GATES,
SECRETARY OF DEFENSE, ET AL:

DOUGLAS LETTER, ESQ.

C O N T E N T SORAL ARGUMENT OF:PAGE

Jeffrey I. Land, Esq. On Behalf of the Petitioners, Haji Bismullah, a/k/a Haji Bismillah and a/k/a Haji Besmella, Haji Mohammad Wali, Next Friend of Haji Bismullah	3, 59
Sabin Willett, Esq. On Behalf of the Petitioners, Huzaifa Parhat, et al	10, 61
Douglas Letter, Esq. On Behalf of the Respondents, Robert M. Gates, Secretary of Defense, et al	21, 62

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P R O C E E D I N G S

THE CLERK: Case number 06-1197, Haji Bismullah, a/k/a Haji Bismillah and a/k/a Haji Besmella, Haji Mohammad Wali, Next Friend of Haji Bismullah, Petitioners, v. Robert M. Gates, Secretary of Defense. Case number 06-1397, Huzaifa Parhat, et al, Petitioners v. Robert M. Gates, Secretary of Defense, et al. Mr Lang for Petitioner Bismullah, Mr. Willett for Petitioners Parhat, et al, Mr. Letter for the Respondent.

ORAL ARGUMENT OF JEFFREY LANG, ESQ.

ON BEHALF OF THE APPELLEES, HAJI BISMULLAH, A/K/A HAJI BISMILLAH AND A/K/A HAJI BESMELLA, AND HAJI MOHAMMAD WALI, NEXT FRIEND OF HAJI BISMULLAH

MR. LANG: May it please the Court. Good morning. My name is Jeffrey Lang. I'm with the Debevoise & Plimpton Law Firm, counsel to Haji Bismullah. I'll be splitting my, Mr. Willett and I will be splitting our time this morning. I will address the Petitioners' motion for access to Government information, and Mr. Willett will address the cross-motions for a protective order. We'd like to reserve, each of us, two minutes for rebuttal.

Control the records, control the lawyers, control the outcome. That's been the Government's strategy in these proceedings. I will address the Government's efforts to control the record. Mr. Willett will address the Government's efforts to control the lawyers, and we entrust to the Court on

1 another day the outcome.

2 The Government has conducted the very discovery that
3 we've requested in this case. The Department of Defense
4 regulations that created the CSRT, the Combatant Status Review
5 Tribunals in 2004 provides that upon the constitution of a
6 tribunal, that the tribunal's first task is to collect
7 information from the Government, to collect all information
8 reasonably available and in the possession of the Government,
9 relevant to the issue of whether the detainee should be
10 designated an enemy combatant. That information is collected
11 by the tribunal. It becomes a file in the CSRT record and is
12 defined as the Government information. That's what we
13 requested.

14 The Government information is then given to the
15 recorder, who reviews the Government information and decides,
16 selects the documents from the Government information to
17 present to the panel members for consideration. The
18 regulations require the recorder, among other things, to, to
19 review the Government information for all documents that
20 suggest that the detainee, not to be designated as an enemy
21 combatant, and those -

22 JUDGE ROGERS: Let me ask you. If the Government
23 information were to be lodged with the Court, that would
24 eliminate any need for, would that eliminate any need for
25 discovery?

1 MR. LANG: Not necessarily.

2 JUDGE ROGERS: And why not?

3 MR. LANG: Well the Government information, which we
4 submit represents the CSRT record, would certainly be the
5 starting point of the Court's analysis, and the starting point
6 for review. The Petitioners might in some instance have a
7 basis to seek leave to supplement the record, to take
8 additional discovery. We -

9 JUDGE ROGERS: But I thought you were saying the
10 universe that we're dealing with here is all of the
11 information that the tribunal has ordered to be collected.

12 MR. LANG: Well we have asked for all documents
13 relevant to that issue. The Government was supposed to have
14 collected it. Until we see what the Government collected, we
15 don't know that that actually, that the Government has
16 actually collected all those documents. If they have -

17 JUDGE ROGERS: I see.

18 MR. LANG: -- then, then at least for Petitioner
19 Bismullah, that should, that should eliminate the need for
20 discovery in our case. It could be that in other instances,
21 some Petitioners might be able to make a particularized need
22 for some other documents. The, and the Parhat Petitioners,
23 which Mr. Willett can address, I understand that interrogators
24 made concessions, acknowledged that the detainees should be
25 released. That, it may have taken place after a CSRT

1 proceeding, and they may make a particularized showing for
2 that specific record.

3 JUDGE ROGERS: Well what about the CSRT procedures
4 which themselves define what is the CSRT record?

5 MR. LANG: Well those, those regulations define what
6 the CSRT record is for purposes of the CRT, but the
7 Government, the military can't define or delimit the scope of
8 this Court's review. The DTA obliges the Court to review the
9 CSRT proceedings, one, to ensure that the tribunal conducted
10 those proceedings in accordance with the Department of
11 Defense's own regulations, and also, to ensure that the
12 determination is supported by a preponderance of the evidence.
13 The agency can't circumscribe the Court's review by narrowing
14 the record that will be lodged with the Court. And in fact,
15 you know, the Court's precedent makes very clear exactly what
16 the records on review should consist of, and that is, all
17 documents compiled or collected by the agency at the time the
18 decision was made, including documents that weren't relied
19 upon by the, by the decision maker.

20 The, the tribunal has collected the Government
21 information. The recorder reviews the Government information.
22 The personal representative reviews the Government
23 information. And then the order that created the CSRT itself
24 confirms the essential fact that the tribunal is deemed to
25 have access to and to have considered the Government

1 information. The order in July of '04 provides that the
2 tribunal, through its recorders deem to have access to and to
3 consider the Government information.

4 Now for the Court to conduct its review of the
5 tribunal's actions, the Court must have access to the same
6 information that the tribunal had access to. Now the
7 Government argues that the Court's review is limited to the
8 CSRT record, and then as Judge Rogers pointed out, the
9 Government further argues that the record is limited to those
10 documents that the Government decides should be in the record.
11 That is, the recorder selects documents to present to the
12 tribunal, and according to the Government, that is all that
13 the Court can look at. Not only that, but the Government not
14 only controls the record, the Government has the unilateral
15 right to call for a do-over. If the Government isn't
16 satisfied with the CSRT determination, the Government has the
17 ability to send back the decision and force a do-over. That
18 happened in the Ali case.

19 We found out just last week, we received the
20 unclassified version of the CSRT record for the first, for the
21 first time last week. And we found out that one of the
22 petitioners in this case had a do-over, was originally
23 determined to be a non-enemy combatant. That decision was
24 sent back to Guantanamo. Another hearing was held, additional
25 document, the recorder went back to the Government information

1 to look for additional documents, and a new, a new decision
2 was rendered, one that was acceptable to the Pentagon.

3 The Court's review can't be limited to just the
4 documents shown to the panel members, because the Court's
5 review is not limited to the votes cast by the panel members.
6 The Court reviews the tribunal's actions, what the tribunal
7 saw, what it considered, and what it decided. And as the
8 order rightly notes, the tribunal has access to and considers
9 all of the Government information. And importantly, what, the
10 Court's review should also encompass what the tribunal looked
11 at and decided not to rely on, because that, too, is subject
12 to review, and that, too, could be material and could be
13 grounds for vacating the enemy combatant determination.

14 JUDGE ROGERS: I assume we're going to hear the
15 argument that if we were to look at the CSRT record as the
16 Government has defined it and find that there was a
17 preponderance of evidence, our role is complete.

18 MR. LANG: I, the Government may argue that, Your
19 Honor. I submit that's not, that can't be right.

20 JUDGE ROGERS: Because?

21 MR. LANG: If the Government, the Government
22 information may contain exculpatory evidence that would
23 completely eviscerate whatever evidence may be in the
24 Government's record. The Government's record might contain
25 some evidence, it might contain an eyewitness, a purported

1 eyewitness, but the Government information may contain
2 overwhelming evidence completely disproving that that person
3 could have possibly seen what is reported to have been seen in
4 the CSRT record.

5 And in fact, the mere fact that the Government
6 exercises its right for a do-over and sends the recorder back
7 to the Government information to try to find more information,
8 that very fact suggest that the recorder doesn't always get it
9 right the first time. The problem, though, is that we aren't
10 at the CSRT hearing. This is our only chance to go back to
11 the well, if you will, of Government information and see if
12 there is anything else there that was omitted. It's the
13 Court's only opportunity to see what was before the CSRT.

14 Even if, as Judge Rogers' question raised, our
15 request is not strictly speaking for discovery. Our requests
16 is for the Court to have the complete record before it, the
17 starting point for the Court's analysis. Even if it,
18 administrative agency review is applied in this case, and
19 we're not, we don't concede that it does, but that really,
20 that really is for another day. But if the Court disagrees
21 and believes that the Government information is not part of
22 the record, then we submit under the Court's principles
23 announced in Esch and in James Madison, we'd be entitled to
24 discovery. In those cases, the Court made clear that if there
25 are questions raised as to the agency's process, then even a

1 Court exercising an appellate review capacity may have to act
2 as a fact finder and, and order discovery.

3 Finally, the Government noted in its reply brief
4 that, in its brief, I'm sorry, that the Petitioners seek
5 discovery so extensive, that it would end administrative
6 agency review as we know it. That is not possibly true.
7 First, the information that we request should have been
8 gathered by the Government two and a half years ago. But more
9 importantly, Haji Bismullah has been in Guantanamo for four
10 years. He doesn't want, we don't want to compel protracted
11 discovery. We're not looking to force the Government to
12 search through agency records. We want, he is a simple man
13 from southern Afghanistan. We don't expect the Government to
14 have information in the Department of Agriculture's files or
15 Commerce Department. We want a hearing as urgently as
16 possible so that Haji Bismullah can go home. We want nothing
17 more extraordinary, however, than a hearing on a fair record.
18 Thank you, Your Honor.

19 JUDGE GINSBURG: Thank you, Mr. Lang.

20 ORAL ARGUMENT OF SABIN WILLETT, ESQ.

21 ON BEHALF OF THE PETITIONERS, HUZAIFA PARHAT, ET AL

22 MR. WILLETT: Chief Judge Ginsberg, and may it
23 please the Court. Admiral Harris has a job to do. He's got a
24 secure military base to run. He's got military personnel and
25 prisoners and classified information to worry about. And

1 that's why for two-and-a-half years and 1,400 base visits,
2 we've had the most onerous protective order of my life.
3 That's why they search my bags. That's why they search every
4 scrap of paper before I go into Camp Echo and every scrap of
5 paper I bring out. It's why, if I want to talk to Mr. Lang or
6 Ms. Manning about a classified fact, we have to do it in
7 person, which is all fair enough, because Admiral Harris has a
8 job to do.

9 But we have a job to do, too, as Chief Judge
10 Ginsberg reminded our new colleagues this morning. Our job is
11 to support the Constitution. Our job is to work uprightly,
12 zealously, ethically and independently to put this case before
13 you so that in your search for truth, you may arrive at a just
14 result as to what happened in the CSRTs.

15 JUDGE ROGERS: Of course, I assume the Government's
16 going to argue that there are no constitutional rights at
17 stake here. We're just talking about statutory review.

18 MR. WILLETT: Yes, Your Honor. I don't argue, I
19 understand the law of the circuit on that, and I don't argue
20 for a constitutional right. But we've only to look at the
21 statute to answer the question of whether a lawyer is
22 necessary. The statute requires Your Honors to consider
23 whether a set of Department of Defense regulations were
24 complied with. Now how on earth is a prisoner at Guantanamo
25 going to make that case pro se?

1 JUDGE ROGERS: Well the Government isn't saying they
2 can't have lawyers.

3 MR. WILLETT: I'm sorry, Your Honor.

4 JUDGE ROGERS: The Government is not saying they
5 can't have lawyers. The Government is simply saying there are
6 procedures the lawyers have to follow. And my question to you
7 is, what procedures in the proposed protective order would
8 prevent a lawyer from doing his job so as to adequately enable
9 the Court to do its job in reviewing?

10 MR. WILLETT: Let me focus on four, Your Honor.
11 They are first, whether the lawyer can be engaged at all. And
12 this is the so-called Next Friend area, but it actually goes
13 beyond Next Friend cases to all cases. If we don't get a
14 signature on the form in the first eight hours, our
15 relationship is over, notwithstanding statutory text that
16 contemplates Next Friend suits, and notwithstanding two
17 judicial decisions, one from a magistrate judge and one from
18 Judge Roberts, that have rejected the Government's position on
19 this Next Friend issue.

20 This Next Friend issue would be resolved in a pre-
21 emptive protective order. Now even under their order, even a
22 Next Friend challenge means there's no access to your client
23 or even unclassified information. What you've got to do is
24 get your client to sign the form, which appears at page 134 of
25 your appendix. And I'm going to just read you the first

1 sentence of that form, because it's a case killer. You have
2 been found to be an enemy combatant by Combatant Status Review
3 Tribunal, period. That's the first sentence. Now Your Honors
4 will all say, read on. And in a place like this surrounded by
5 your learned predecessors on the wall, we would all read. But
6 in Camp Echo after five years of isolation, where your client
7 is feeling bitterly the effects of profound isolation on a
8 human being, the paranoia, the fear, the anxiety, he's not
9 going to read on. He's going to think this is a trick. This
10 form strangles a case in the cradle.

11 JUDGE GINSBURG: Mr. Willett, the, am I correct in
12 understanding that the Government's position is that you have
13 eight hours cumulatively, could be one or more meetings, in
14 which to obtain that consent?

15 MR. WILLETT: That's true, Your Honor.

16 JUDGE GINSBURG: And it's your position that you
17 need to visits of, as far as I can tell, unspecified duration?

18 MR. WILLETT: Well Your Honor, the original
19 protective order which was entered in 2004, a time when our
20 clients had experienced two years of isolation, not five, was
21 difficult enough. We had to obtain evidence of authorization
22 from them after a second meeting. That might be a form, or it
23 might be, as it was for one of my clients, a document the
24 client wrote out himself. Or it might be, at least I would
25 argue it might be, if the client orally authorizes me, and if

1 I sign a declaration that that event occurred.

2 But we all should ask, what has anything of this -

3 JUDGE GINSBURG: No, this is responsive. I'm asking
4 you whether your position is two visits of unspecified
5 duration, or is it something else?

6 MR. WILLETT: It's two visits, but I don't ever need
7 to have this form signed. I need evidence of authorization,
8 Your Honor, and there's a very big difference.

9 I ought to point out, what has this form to do with
10 base security? Where is there anything in the record, the
11 declarations, that somehow, if we don't have these forms,
12 we're going to have threats of violence? There's nothing.

13 JUDGE GINSBURG: Okay. So maybe I mistook your
14 position. Your objection is to the, to the sign-up form, or
15 that being the exclusive or required means, as opposed to the
16 durational limit on signing them up.

17 MR. WILLETT: Well, that's one of my objections. I
18 also, I think it's okay for us to give the Court an assurance
19 that we've indeed been retained and the client wants us to
20 pursue the case. That's fair. I think after a second meeting
21 made sense in 2004, and we're stuck with it, because that's
22 the position we've taken here, enter as a status quo order the
23 existing order.

24 Your Honor, you ask what else we have a problem with
25 in this protective order, and there are three more areas I

1 should touch on. The first is, the first of three is, what
2 the lawyer knows. The new rule is going to be that the
3 Government will decide what I need to know. You won't decide,
4 the statute won't decide, I certainly won't decide. The
5 Government will decide. And I will have to tell my client
6 that. As I said before, a Next Friend challenge, the mere
7 filing of a motion suspends any access, even to unclassified
8 information. The new definition of protected information
9 greatly expands what is secret, to include unclassified CSRT
10 records, which don't become available to us until they're
11 lodged with the Court. That was illustrated profoundly in
12 this case when as my colleague said, I'd been representing
13 Hamad (phonetic sp.) since July 29th, 2005, and I found out
14 this month that he's a do-over, because they've never
15 disclosed the unclassified record before.

16 We already struggle mightily against necessary
17 secrecy.

18 JUDGE ROGERS: Remind me. In the original order,
19 the District Court protective order, the need to know was
20 determined by which entity?

21 MR. WILLETT: Your Honor, there is need to know
22 language in the original order. There is then a presumption
23 that we have a need to know -

24 JUDGE ROGERS: That's right, it was a presumption,
25 okay.

1 MR. WILLETT: Which the Government can overcome.

2 JUDGE ROGERS: Yes.

3 MR. WILLETT: Another very important thing about
4 what we are able to know is that the new rules would preclude
5 us from knowing what our colleagues know in related cases.
6 And this is remarkably important in the Uighurs cases where
7 the Government's own document says that they are all
8 considered the same. There are four lawyers, for law firms
9 that represent various of these Uighurs. We collaborate all
10 the time. Where the information is classified, we can only do
11 it in a secure facility, or we can do it together face to
12 face, but we are able to do that. The order would eliminate
13 that.

14 The third issue, Judge Rogers -

15 JUDGE GINSBURG: Wait, excuse me, Mr. Willett.

16 Doesn't the statute eliminate that as a practical matter? The
17 statute says that our review is of claims with respect to an
18 alien, to be limited to the consideration of whether the
19 status determination was consistent with the standards and
20 procedures -

21 MR. WILLETT: Right.

22 JUDGE GINSBURG: -- specified by the secretary,
23 including the preponderance standard.

24 MR. WILLETT: Right. And what we've said with
25 respect to the Uighurs is that you're going to see CSRT

1 records which are identical. All the facts are the same.
2 They came up with inconsistent results on the base of the same
3 record. That is not the consistent application of the
4 regulation.

5 JUDGE GINSBURG: I was going to say, it says
6 consistent with the standards and procedures.

7 MR. WILLETT: Well Your Honor, I think any -

8 JUDGE GINSBURG: So any, so if there are two
9 instances where on essentially the same record -

10 MR. WILLETT: Yes.

11 JUDGE GINSBURG: -- the Government comes out
12 different ways, one of those could be inconsistent with the
13 standards or procedures.

14 MR. WILLETT: Right. But we can't know which -

15 JUDGE GINSBURG: Right. And it's up to the attorney
16 in that case to argue. But I don't see why he's arguing about
17 what happens in another case.

18 MR. WILLETT: Because by definition, a standard
19 isn't a standard unless it's consistent. And so if we could
20 put before you a -

21 JUDGE GINSBURG: But then the case in which it's
22 violated, it can be protested.

23 MR. WILLETT: But unless we can look at both cases,
24 we can't show you which case that was violated.

25 JUDGE GINSBURG: You don't get to do that in an

1 ordinary criminal process, do you?

2 MR. WILLETT: But we do have a lawyer and discovery
3 and a process in an ordinary criminal case. Here, we have
4 none of that. None of that adversary proceeding protection is
5 here. And it will gravely affect these cases. Indeed, we've
6 made the assertion and wish to make the record in the Parhat
7 petition that you had seven Petitioners who were irrationally
8 and arbitrarily treated because their cases are the same as
9 five who've been declared as non-combatants, and two we now
10 know to be do-overs. And who knows what the other facts are
11 we don't know yet.

12 There's another important limitation on our
13 functions as lawyers, and that's what we do. I'll tell you
14 about a very practical one, which is the order would eliminate
15 my right to bring legal mail into a meeting with a client. We
16 do this all the time. We bring them the petition, we bring
17 them whatever we can get of the CSRT from the Associated Press
18 FOIA, we go through it. They're curious about translation
19 errors. They have questions about the U.S. justice system.
20 All of that would be eliminated. And if anyone thinks that
21 problem is solved because I can send the document 30 days in
22 advance to Gitmo, along with lawyer in this case doing the
23 same thing, and that document is somehow going to get through
24 all this forest of special teams and wind up in the hands of
25 my Navy chief petty officer at the end, they haven't been to

1 Gitmo. We already do that with non-legal mail, and it's there
2 sometimes, but usually not.

3 The Government will reserve the right to cancel our
4 access unilaterally. The Government's going to say what
5 topics we can discuss, which in the Uighur cases would
6 crucially eliminate our ability to discuss with our clients
7 perhaps the most practically important thing, which is which
8 countries in 2007 make sense as potential sources of asylum.
9 Now you may say, that's not in the statute. But I never had a
10 case yet where a part of my job wasn't to try to settle the
11 case. If I can't talk about which countries are currently
12 favorable to Uighurs, I can't do part of my job. And there
13 are other aspects to it.

14 The last one, perhaps the one that's gathered the
15 most attention, is what the lawyer writes. They're going to
16 read our mail. We're going to have to tell our clients that
17 the mail is being read. They're going to censor our mail. I
18 don't know what regime of law that comes from, and I don't
19 know what's left of the attorney/client privilege, where it
20 exists.

21 Your Honor, we take seriously our oath, just as
22 these new lawyers do.

23 JUDGE ROGERS: Well the Government has an affidavit,
24 what's happened in the past with regard to mail where it was
25 only reviewed for contraband.

1 MR. WILLETT: Yes. Your Honor, all I can say about
2 that affidavit, apart from the fact that the affiant professes
3 no personal knowledge of any of those instances, is that the
4 Government never pursued its remedy with the Court to say that
5 there was a violation of the existing protective order.
6 Counsel before you and these petitioners, and these petitions,
7 have never been accused of any such thing. I've met Captain
8 McCarthy. He's been promoted since he's signed that
9 declaration. He didn't strike me as a shrinking violet, and
10 I'm sure if he thought I did something wrong, he would say so
11 in plain words. It's never happened. We absolutely depend on
12 the trust that we try to forge and that is so fragile today
13 through both mail and these visits, and which would be
14 desperately harmed by this regime.

15 Your Honors, I must emphasize what Mr. Lang said.
16 It's urgently important that we get to the merits on this case
17 and get a resolution. We are in year six, and if all the
18 stuff that's come into the Court over the transom, not this
19 general and that general or the other general and what they
20 really think, including something I saw from General Reeves
21 yesterday in the Wall Street Journal, only illustrates the
22 need to put in place the status quo order, appoint a special
23 master if you think it needs to be tweaked, and let them deal
24 with all of these nuances.

25 JUDGE GINSBURG: Thank you, Mr. Willett.

1 ORAL ARGUMENT OF DOUGLAS LETTER, ESQ.

2 ON BEHALF OF THE RESPONDENT

3 MR. LETTER: May it please the Court. I'm Douglas
4 Letter for the United States Department of Justice,
5 representing the Government in these cases. With me today at
6 counsel table is Robert Loeb (phonetic sp.), August Flenchey
7 (phonetic sp.) and Terry Henry (phonetic sp.), all also from
8 the Civil Division of the Justice Department.

9 Your Honors, the argument that you have heard today
10 primarily has a key problem in it, which is that the role that
11 these attorneys wish to carry out is not consistent with the
12 role that Congress has created for this Court, and therefore,
13 for the attorneys who are appearing on behalf of detainees
14 before this Court.

15 JUDGE ROGERS: Would you agree that in order to
16 determine whether or not the procedures were followed, the
17 Court should be aware of the information that the tribunal
18 gathered?

19 MR. LETTER: The tribunal gathered? Yes, most
20 definitely, Your Honor. And that is exactly what -

21 JUDGE ROGERS: Not the recorder.

22 MR. LETTER: I'm sorry?

23 JUDGE ROGERS: Not the recorder, but that the
24 tribunal initially gathered.

25 MR. LETTER: Yes, Your Honor. The rules require,

1 the internal rules require that the recorder gather the
2 record. As you can see from the appendix, there are all sorts
3 of obligations on the participants in the tribunal to gather
4 and preserve a record, and that record is then provided to
5 this Court, and that is exactly what we have argued is what
6 the Court is to -

7 JUDGE ROGERS: Just so I'm clear. The tribunal
8 orders the evidence be gathered. The recorder looks at it and
9 makes determinations as to what's relevant, and submits that
10 information to the three members of the tribunal. Now is the
11 Government saying it's the latter or the former that is
12 properly before this Court?

13 MR. LETTER: What is before this Court, and I will
14 give the full explanation, Your Honor. What's before this
15 Court is the record before the tribunal that is presented to
16 the tribunal and becomes part of the tribunal record. And
17 what the, the obligation of the recorder is, it's twofold. If
18 you see the appendix -

19 JUDGE ROGERS: Wait. What you're saying, because
20 time is short here. You're saying it's the latter and not the
21 former, and what counsel is seeking is the former. In other
22 words, you're saying what's properly before us is what the
23 recorder has presented to the three members of the tribunal,
24 not the greater evidence that may have been gathered.

25 MR. LETTER: Your Honor, I'm not quibbling with you.

1 The recorder doesn't present everything to the tribunal. For
2 example, the personal representative presents things to the
3 tribunal. The detainee, himself, if he chooses to
4 participate, presents material to the tribunal. So the record
5 before the CSRT is more than just what the recorder presents.
6 And what we have said is, you, the Court -

7 JUDGE GINSBURG: It's more because of what the
8 detainee may add?

9 MR. LETTER: I'm sorry, Your Honor?

10 JUDGE GINSBURG: Why is it more than what the
11 recorder presents?

12 MR. LETTER: Because the personal representative of
13 the detainee can present material. The, remember that if you
14 look at page 17 of this appendix -

15 JUDGE GINSBURG: It's still whatever was presented
16 to the tribunal.

17 MR. LETTER: Exactly, Your Honor.

18 JUDGE GINSBURG: From whatever source.

19 MR. LETTER: Yes.

20 JUDGE GINSBURG: And not what was withheld from the
21 tribunal.

22 JUDGE GINSBURG: Yes. That's -

23 JUDGE ROGERS: And that, that's my point.

24 MR. LETTER: Okay, I'm sorry. I misunderstood.

25 JUDGE ROGERS: In other words, the argument is being

1 made that discovery is needed because in order to determine
2 whether or not the procedures were followed, it may be, and
3 these are my words, not their words, the recorder made a
4 mistake. It overlooked some exculpatory evidence. And
5 therefore, that larger circle of evidence, as opposed to the
6 smaller circle of what the recorder presented to the three
7 members of the tribunal, should be part of the record before
8 this Court.

9 MR. LETTER: Right. And that is, Your Honor, that
10 is their position. And here's, there's several reasons why
11 that argument is incorrect. And remember, what they're
12 saying, I think what we're here now on, and I, I'll give my
13 answer and then I wanted to note that I think the argument
14 today has shifted very significantly from what it has been
15 presented in the motions briefing.

16 If you note at appendix page 17, the recorder has an
17 obligation to gather exculpatory material and provide that to
18 the tribunal. So unless there is evidence that the recorder
19 has not done his or her job, the exculpatory evidence should
20 be in the record.

21 JUDGE ROGERS: How would that ever be determined?

22 MR. LETTER: Your Honor, in that instance, it is no
23 different from your normal administrative agency record. This
24 Court every day relies on, and indeed, as this Court and the
25 Supreme Court have a presumption, that Government officials do

1 their job and they put together the agency record.

2 JUDGE ROGERS: That's a totally different construct
3 where you have notice and comment, you have, there are
4 publicly filed comments. They're all available and the
5 parties can look at them. Here we don't have that. It's a
6 non-adversarial proceeding. Who knows what evidence was
7 gathered?

8 MR. LETTER: Well remember, Your Honor, agency
9 records are not always public. There are plenty of times when
10 there is privileged information. There may be, for instance,
11 commercially privileged information that only some
12 participants in a proceeding know about. What this Court has
13 said is that when there is an instance of the side challenging
14 the validity of the record, in those very rare instances,
15 comes forward with evidence to say something is missing, then
16 this Court employs appropriate remedies at that stage. But
17 we're nowhere near that here. There is -

18 JUDGE GINSBURG: Then how can they assert that
19 something is missing if they don't know what's present?

20 MR. LETTER: Well again, that same argument could be
21 made in a normal administrative record situation. But here,
22 remember that if the detainee, the detainee had an opportunity
23 to participate and the detainee can tell his attorney, there
24 are things, I think there are things missing here. If this
25 Court -

1 JUDGE GINSBURG: Mr. Letter, I don't know where the
2 analogy to administrative review comes from. It's throughout
3 your brief, I understand, but where in the statute do you see
4 that this is supposed to mimic APA review?

5 MR. LETTER: your Honor, we said that it is
6 analogous to APA review for a couple of -

7 JUDGE GINSBURG: Well, do you have any APA review
8 that involves a standard of preponderance of the evidence?

9 MR. LETTER: I don't think that's the -

10 JUDGE GINSBURG: I don't think so.

11 MR. LETTER: -- norm.

12 JUDGE GINSBURG: I don't think so.

13 MR. LETTER: But Your Honor, the analogy, there's
14 some analogy to the APA, but then I'm going to give you what I
15 think is the closest analogy.

16 JUDGE GINSBURG: But the APA cases are substantial
17 evidence cases, right? You don't have to have the
18 preponderance for the record. You can produce enough to
19 justify the result. It doesn't matter that there's more
20 justification for a different result. Under a preponderance
21 standard, that's exactly what matters.

22 MR. LETTER: And the, Your Honor, the analogy to the
23 APA we were merely saying is the situation where you don't
24 normally have discovery, you are limited to an agency record.
25 And that part we say is -

1 JUDGE GINSBURG: I understand that's why you like
2 it, but I don't see why it's applicable.

3 MR. LETTER: It's analogous because Congress
4 assigned the review to this Court, not to a district court,
5 nor as this Court has pointed out in various cases, when that
6 happens, there's a presumption that what Congress was doing
7 was to expect this Court to look at the record. In addition,
8 as we pointed out in our brief, and quite a few members of
9 Congress, when they were rejecting the prior scheme, made
10 quite clear that they expected this Court to conduct review on
11 the basis of the CSRT record. And in fact, as Judge Rogers in
12 her dissent and as members of the -

13 JUDGE ROGERS: One judge's view in a dissent.

14 MR. LETTER: Yes. But members of the Supreme Court,
15 when they denied, sir, also, they -

16 JUDGE ROGERS: No, but the distinction would be that
17 Congress didn't expect that we were going to hold evidentiary
18 hearings and invite new testimony and things like that.
19 That's a different issue. But in order to meet our
20 obligations under the statute, wouldn't we have to know that
21 (indiscernible)?

22 MR. LETTER: Yes, Your Honor. And two other points
23 though on that. I think the most analogous situation is that
24 the, situation that this Court is by now quite familiar with,
25 the review of the foreign terrorist organization designation

1 decisions. There, as this Court is aware, the Secretary of
2 State puts together -

3 JUDGE GINSBURG: Substantial evidence.

4 JUDGE ROGERS: Yes.

5 MR. LETTER: -- a record.

6 JUDGE GINSBURG: It's a substantial evidence
7 statute.

8 MR. LETTER: But the, I believe it is not just
9 substantial evidence. I think it, the statute as I recall,
10 talks about arbitrary and capricious. And there, the point is
11 that the Secretary of State puts together a record, and as
12 this Court has made quite clear, it is not part of the review
13 function of this Court to add to that record, despite the fact
14 that there may be things missing from it, that there, there
15 may be hearsay in it. It's, in fact this Court has noted that
16 there is often hearsay in it, but that is not a reason for
17 this Court to switch to a different system.

18 JUDGE GINSBURG: I realize that the Petitioners'
19 argument as its boldest does entail discovery and
20 supplementation of the record. But putting that aside, there
21 is contained within that, or maybe it's, say an alternative
22 argument, that the record of review here is not limited to,
23 it's not, if it really doesn't bring in new material never
24 before seen, neither is it limited to the matters presented to
25 the tribunal, as opposed to the larger, somewhat perhaps

1 larger universe called Government information, already in the
2 hands of the Government nothing new. And so the question is,
3 what is the record? The record of, is it a transcript of a
4 hearing plus the recorder's submissions and the other
5 submissions, or is it the materials from which the recorder
6 selected what to present?

7 MR. LETTER: Again, Your Honor, I need to make sure
8 what you're asking me. When you say, what the recorder has
9 selected. Not selected from what has been presented to the
10 CSRT.

11 JUDGE GINSBURG: No, no, no, no. Presented from
12 what's in his possession to present, in order to present it to
13 the, selected from his universe of documents to present to the
14 CSRT.

15 MR. LETTER: It is what, again, not just what the
16 recorder selects, it -

17 JUDGE GINSBURG: I understand that. You can forget
18 that.

19 MR. LETTER: Yes, it is what the recorder selects,
20 because remember, the recorder is supposed to present
21 exculpatory evidence. Beyond that, the Government might have
22 a massive amount of evidence that a detainee is indeed -

23 JUDGE GINSBURG: I don't see how there can be any
24 meaningful review. Maybe you can tell me. How we can, any
25 meaningful review of the determination if we don't know what

1 we don't know, but you know.

2 MR. LETTER: And again, this is where I think this
3 is very similar to the situation with administrative records.
4 This Court all the time is faced with assertions that things
5 are missing, that there must be more stuff there, and the
6 Court says, has set up a regime in order to operate -

7 JUDGE GINSBURG: Well those claims are made with
8 respect to things that are, often with respect to things that
9 are not in the present possession of the Government. And
10 they're made in the context of substantial evidence review.
11 So here we're talking about a claim to, access to things that
12 are in the possession of the Government, indeed of the
13 recorder, and that would alter the perception of whether there
14 was a preponderance of evidence.

15 MR. LETTER: Well several points, Your Honor.
16 First, by the way, I do need to point out, remember that it's
17 the CSRTs that do the preponderance of the evidence, apply -

18 JUDGE GINSBURG: Yes.

19 MR. LETTER: -- a preponderance of the evidence
20 standard.

21 JUDGE GINSBURG: Well so do we.

22 MR. LETTER: Well I'm not, this Court is merely to
23 determine whether what the CSRT did is consistent with the
24 standards and procedures set by the secretary. So -

25 JUDGE GINSBURG: Including the requirement that the

1 conclusion of the tribunal be supported by a preponderance of
2 the evidence. Now you want to say a preponderance of the
3 evidence put before the tribunal.

4 MR. LETTER: Right.

5 JUDGE GINSBURG: They say it's, should be at least a
6 preponderance of the evidence that the recorder has looked at
7 as compiled.

8 MR. LETTER: And again, the recorder, if the, the
9 only thing that could be helpful to the detainee would be
10 exculpatory information.

11 JUDGE GINSBURG: And I understand. The recorder has
12 an obligation to present that.

13 MR. LETTER: That's right.

14 JUDGE GINSBURG: But this is a, what you're
15 describing is a complete, a wholesale, complete departure from
16 any kind of adversarial system -

17 MR. LETTER: Yes.

18 JUDGE GINSBURG: -- right? Now clearly, this is not
19 a normal adversarial system.

20 MR. LETTER: Correct.

21 JUDGE GINSBURG: But it's not necessarily a complete
22 departure from it, either. I mean, the potted plants over on
23 your right are not necessarily relegated to simply picking
24 apart the reasoning of the tribunal.

25 MR. LETTER: But again, that's why, as I say, this

1 case is much more similar to the FTO context. And yes, this
2 is, remember that this, and this is the key problem I think
3 with the entire position by the counsel in their briefs and
4 today. What the Defense Department did here was largely
5 replicate, it was based on determinations that are normally
6 made internally by the Army under Rule 190.8 to determine
7 whether people are enemy combatants.

8 JUDGE ROGERS: Better not invoke that.

9 MR. LETTER: I'm sorry?

10 JUDGE ROGERS: You better not invoke 190-8.

11 MR. LETTER: Well but Your Honor, remember the
12 Supreme Court in Hamdi, the plurality and -

13 JUDGE ROGERS: No. But there it was saying, you
14 know, those procedures might suffice.

15 MR. LETTER: Yes.

16 JUDGE ROGERS: But we don't have all those
17 procedures here. I remember the original Government brief
18 that said we had even more here but -

19 MR. LETTER: Yes.

20 JUDGE ROGERS: -- I respectfully disagreed with
21 that.

22 MR. LETTER: Well I understand that you disagree,
23 Your Honor. However, we can, we could demonstrate. If you go
24 down, in fact -

25 JUDGE ROGERS: Well I mean, for example, who has the

1 burden of proof for it? But could I, I do hope you're going
2 to talk about the protective order at some point.

3 MR. LETTER: I'll be happy to, Your Honor. If I
4 may, one more response to Chief Judge Ginsberg. Chief Judge
5 Ginsberg, if there are circumstances when the Court has reason
6 to question whether all the exculpatory information that the
7 recorder gathered was presented, then this Court could remand,
8 and for a, for -

9 JUDGE GINSBURG: Why would we have any reason to
10 doubt the recorder's (indiscernible)?

11 MR. LETTER: And normally, you should have no doubt.
12 There would be no evidence -

13 JUDGE GINSBURG: That's right, because we can't see
14 it.

15 MR. LETTER: This Court can see anything it wants.

16 JUDGE GINSBURG: Oh, I see what you're saying. We
17 can see the Government, why would we want to see the
18 Government information if nobody's objecting to it, objected
19 that the tribunal was given a partial view.

20 MR. LETTER: But if this Court believes -

21 JUDGE GINSBURG: Wouldn't it facilitate judicial
22 review? Isn't a very limited judicial here to let counsel for
23 the detainees look at what the recorder has and say, no
24 problem. Or alternatively, if only you presented this might
25 it come out at trial.

1 MR. LETTER: Because remember, if the recorder, and
2 there is a presumption of regularity, if the recorder has done
3 what he or she was required to do, the recorder has presented
4 to the tribunal any exculpatory information. So that should
5 be in the record.

6 As far as the -

7 JUDGE GINSBURG: What is the, what's the, is this
8 purely a matter of statutory interpretation on your part, or
9 is there a functional objection to letting counsel for the
10 detainees see the non-presented information? They're all
11 cleared, by hypothesis.

12 MR. LETTER: Well there are a couple of questions,
13 Your Honor. Remember, counsel will see all of the exculpatory
14 information. Because remember -

15 JUDGE GINSBURG: Well, yes, assuming the recorder's
16 doing his job. My question is, what's the nature of the
17 objection to their seeing something beyond what you want them
18 to see?

19 MR. LETTER: Well again, there, I'm not sure how
20 many more I say it.

21 JUDGE GINSBURG: You're not concerned that their
22 wasting their time.

23 MR. LETTER: If there is exculpatory information, it
24 should all be there. So I -

25 JUDGE GINSBURG: It should be, I understand that.

1 MR. LETTER: Right. So all the --

2 JUDGE GINSBURG: But so what is the objection to
3 allowing an advocate to say there was something that should
4 have been presented?

5 MR. LETTER: Well I'm having trouble contemplating
6 how this would work. Mr. Willett would then have a deposition
7 of the recorder and say, did you present all of the
8 exculpatory information?

9 JUDGE GINSBURG: Well maybe I have a misconception.
10 Maybe I have a misconception. Here's my conception. There's
11 a box of materials or a file, let's call it. It's got a
12 hundred pages in it relevant to this detainee. In preparation
13 for the CSRT, the recorder goes through it, synthesizes the
14 information, conscientious to include reference to a synopsis
15 of whatever seems to be exculpatory, presents that to, writes
16 up a five-page report, and presents that to the tribunal.
17 Writes another five-page report recording the decision. Now
18 the, under your approach, counsel for the detainee sees the
19 five-page report that was presenting to the tribunal and the
20 five-page post-op report.

21 MR. LETTER: No, Your Honor. I'm sorry.

22 JUDGE GINSBURG: So it's less than that?

23 MR. LETTER: There's a misperception. The tribunal
24 has documents. It's not simply a five-page summary that the
25 recorder puts together. If you look at these records, you'll

1 see that the recorder presents documents to the tribunal, and
2 so those documents -

3 JUDGE GINSBURG: The 100 pages in my example.

4 MR. LETTER: Yes. Those are in the record.

5 JUDGE GINSBURG: So they synopsis is written after
6 the decision, is that right? The recorder writes something
7 summarizing the decision, does he not?

8 JUDGE ROGERS: Yes, and he gives it to the detainee.

9 MR. LETTER: I'm trying to remember. The recorder
10 writes something that summarizes the evidence, not the
11 decision.

12 JUDGE GINSBURG: All right, so write that for the
13 tribunal?

14 MR. LETTER: Yes. And that is part of the -

15 JUDGE GINSBURG: That's my example. That's the
16 five-page synopsis.

17 MR. LETTER: Right. But what goes into it, all of
18 the material that went into that is also in the record.

19 JUDGE GINSBURG: Yes, that's the hundred pages.

20 MR. LETTER: Yes.

21 JUDGE GINSBURG: Okay, now it comes up here -

22 MR. LETTER: Yes.

23 JUDGE GINSBURG: -- on an objection, and we see the
24 hundred pages plus the five pages.

25 MR. LETTER: Yes, because they're all, when you say

1 plus the five, the five, you'll see other material, too.
2 You'll see the record of the president of the tribunal
3 swearing in people, the -

4 JUDGE GINSBURG: Fascinating.

5 MR. LETTER: But that's all there.

6 JUDGE GINSBURG: But the point is that the, that
7 the, either the, well I thought the tribunal didn't see all of
8 the underlying documents compiled by the recorder. Am I
9 correct about that?

10 JUDGE ROGERS: Yes. He decides some aren't
11 relevant, for example.

12 JUDGE GINSBURG: The recorder doesn't put everything
13 in front of the tribunal, right?

14 MR. LETTER: If it's exculpatory, yes. Otherwise -

15 JUDGE GINSBURG: That's his mandate.

16 MR. LETTER: Yes. Yes. And so if the recorder has
17 not presented that to the tribunal, the tribunal, itself,
18 could remand the matter, internally remand it, and that
19 happened.

20 JUDGE GINSBURG: But if that doesn't happen. They
21 think that, they have no reason to doubt the recorder in the
22 ordinary case.

23 MR. LETTER: Right.

24 JUDGE GINSBURG: They assume that whatever is
25 exculpatory has been included. They make an adverse decision,

1 adverse to the detainee, and the detainee seeks review here.
2 What do we see?

3 MR. LETTER: You see everything that was actually
4 presented to the tribunal.

5 JUDGE GINSBURG: But does that include the hundred
6 pages on which the, from which the recorder began, or just the
7 report that he wrote to the tribunal plus what happens in the
8 hearing?

9 MR. LETTER: What you might not see is, as I said,
10 the agent, the various agencies, relevant agencies have
11 information. They provide that to the recorder. The recorder
12 then presents that to the tribunal. The agencies don't
13 necessarily give the recorder all information that they have,
14 because that's not necessary. As is pointed out, the recorder
15 is supposed to present to the tribunal the material that is
16 required to determine that the detainee is an enemy combatant.
17 However, for exculpatory, the recorder is required to present
18 more, and is required to present all of the material.

19 So what says the, if you look at appendix on page
20 15, it says that the, it sets out what will be in the record,
21 and it says -

22 JUDGE ROGERS: Right, but it's talking about what
23 the recorder has presented to the three members of the
24 tribunal. And you're, I mean, we're talking about different
25 things. I thought the box with the hundred documents was

1 helpful, but I think the point is, why wouldn't the Court on a
2 substantial evidence review get to see all of the evidence,
3 and why shouldn't counsel see that evidence as well, since
4 counsel is trying to help the Court carry out its function?

5 MR. LETTER: Because again, none of that evidence,
6 if evidence wasn't presented to the tribunal, then this Court
7 has no reason why under the statute you would want to see it.
8 The only question is, is there exculpatory material missing.
9 There should not be.

10 JUDGE GINSBURG: There shouldn't be. But you would
11 think that, that's just sort of an unreviewable determination
12 by the recorder.

13 MR. LETTER: But as I say, in going through the
14 tribunal record, that material isn't, if the recorder has in
15 bad faith chosen to, hidden exculpatory material, that's the -

16 JUDGE GINSBURG: I think we can assume that that's
17 not going to be a problem. But the problem is going to be one
18 of perspective and adversary zeal and that sort of thing,
19 rather than bad faith.

20 MR. LETTER: But, and again though, that's the job
21 of the tribunal itself is to examine whether there is such
22 material, and if the tribunal thinks that there is, there
23 should be more material and has questions, the tribunal itself
24 then asks for more information, as happened on many occasions.

25 So I guess, I'm sorry if there's a misconception

1 here. There isn't some massive body of information that this
2 Court and the attorneys are not going to see. That simply
3 doesn't exist.

4 JUDGE ROGERS: Mr. Letter, in due respect, I mean,
5 reading the language that we've been given, there is something
6 called Government information, which I'm saying is the big
7 circle. Then there's something that's called the information
8 that the recorder, which is a smaller circle, presents to the
9 tribunal.

10 MR. LETTER: Right.

11 JUDGE ROGERS: And the tribunal can make its
12 decision solely on what the recorder presents.

13 MR. LETTER: But again, no. Remember that the
14 detainee and the personal representative present material, so
15 that's not what the recorder has presented. It is brought,
16 the tribunal has more than simply what the recorder presents
17 but -

18 JUDGE ROGERS: If the representative or the detainee
19 ask that certain evidence be presented.

20 MR. LETTER: Yes. And -

21 JUDGE ROGERS: Then we get into this question about,
22 well it wasn't reasonably available.

23 MR. LETTER: Correct.

24 JUDGE ROGERS: We're going to hear some arguments
25 about that.

1 MR. LETTER: Fine, Your Honor. The -

2 JUDGE HENDERSON: May I ask you before you get to
3 that, though?

4 MR. LETTER: Yes, Your Honor.

5 JUDGE HENDERSON: This record on page 9 or appendix
6 16, I don't know what, doesn't the tribunal see more than what
7 evidence is submitted because of this line, if the evidence is
8 submitted or considered by the tribunal -

9 MR. LETTER: I'm sorry, which, can you tell me which
10 number -

11 JUDGE HENDERSON: D.

12 MR. LETTER: -- are you looking at:

13 JUDGE HENDERSON: D.

14 MR. LETTER: D?

15 JUDGE HENDERSON: At the top of the page. Copies of
16 all documentary evidence presented and summaries of all
17 witnesses if classified material is part of the evidence
18 submitted or considered by the tribunal. So how does the
19 tribunal consider classified material that is not submitted to
20 it? I mean, that seems to me to indicate that the tribunal
21 has evidence submitted to it and can consider something other
22 than the evidence submitted, if it's classified.

23 MR. LETTER: Your Honor, I believe that that is
24 surplus words. If there is classified material that is
25 brought to the tribunal, my understanding is, it is submitted

1 to the tribunal. I don't, I'm not aware of any situation
2 where the tribunal would have taken account material, and then
3 it would not be part of the record before the tribunal. So I
4 think this is just inartfully worded.

5 JUDGE HENDERSON: So you think, or considered,
6 doesn't -

7 MR. LETTER: I don't -

8 JUDGE HENDERSON: -- expand it in any way?

9 MR. LETTER: I'm not aware of anything where the
10 tribunal would consider material that would not then be
11 submitted as part of the record.

12 As far as the protective order, several points.
13 First -

14 JUDGE ROGERS: Let me ask you just as a threshold
15 matter. This is an evolving situation as your own amended
16 protective order demonstrated. Is it the Government's
17 understanding that it's going to come back to this Court and
18 the parties are supposed to come back to this Court each time
19 there is a dispute about something, or is this it subject only
20 to the Government's determination?

21 MR. LETTER: Your Honor, we would expect that there
22 will be very few disputes in the future about things, and
23 that's one of the reasons for the protective order that we
24 propose.

25 JUDGE ROGERS: But the protective order says, of

1 course it's subject to the continuing jurisdiction of this
2 Court. So even if the terms are applied in haec verba, there
3 may be situations where counsel says, my inability to discuss
4 with my client certain things has prevented me from
5 effectively representing this case in this Court.

6 MR. LETTER: And the counsel could then, when the
7 counsel is challenging the, whether the enemy combatant
8 determination should be upheld, counsel can raise that very
9 issue before that specific panel. We think there will be very
10 few or almost no instances when this will arise, because the
11 protective order more clearly, much more clearly than the
12 prior protective order that had serious problems and has been
13 rejected really by Congress, this one attempts to make much
14 more clear what the role of the attorneys for the detainee is.

15 JUDGE ROGERS: Well here's what I'm getting at, as
16 I'm sure you caught from my question to counsel for the
17 Petitioners. There are some provisions in the protective
18 order that limit what counsel can discuss with his client, and
19 as counsel today suggested, are relevant to representation in
20 this Court. I mean, that's the type of limitation that your
21 affidavit doesn't support for good cause shown, particularly
22 in light of this recent amendment that you've made. That
23 suggest that maybe some of these other limitations aren't
24 necessary as they once were back in August before these new
25 procedures were adopted at Guantanamo.

1 MR. LETTER: And if the Government determines, the
2 Defense Department determines that at a later point, certain
3 things, certain procedures are not necessary any more, than
4 those obviously will be changed and clear -

5 JUDGE ROGERS: But when you've had a protective
6 order that as counsel suggests, counsel have not been the
7 problem except in these instances that the commander now says
8 they've taken care of, why shouldn't we proceed in that
9 situation, since these are security-cleared counsel, and
10 they're coming to the Court? I mean, how can this Court pre-
11 judge what it is that they ought to be able to talk to their
12 clients about, even in connection with trying to get them to
13 sign this form?

14 MR. LETTER: Several answers to that question, Your
15 Honor. Let me, can I start right off with the most narrow
16 answer about the form? Mr. Willett, I think it was, was
17 talking about, his argument on that form is just absolutely
18 wrong. The protective order talks about, such as the form.
19 If Mr. Willett comes in with an affidavit saying that he has
20 spoken to a particular detainee, and that detainee has
21 authorized him to represent him, then there is nothing in the
22 protective order that says that will not be honored. And in
23 fact, we have honored that kind of thing. So Mr. Willett's
24 argument is just absolutely wrong on that. And -

25 JUDGE GINSBURG: If honored under the existing

1 order.

2 MR. LETTER: I'm sorry?

3 JUDGE GINSBURG: You've honored it under the
4 existing protective order.

5 MR. LETTER: But as I say, the new protective order,
6 it says, such as, so -

7 JUDGE GINSBURG: Well frankly, I don't see that he
8 preserved that argument, and maybe he can show me where he did
9 on rebuttal. But there's a sentence in the brief about the
10 form, and it doesn't take quite the shape that the argument
11 here does.

12 MR. LETTER: Your Honor, I had the same thought.
13 The protective order, Your Honor, the prior protective order
14 has, had major problems, but one of the most serious and
15 obvious problems is that it is not clearly out of date,
16 because it was developed in District Court for a completely
17 different system of litigation.

18 JUDGE ROGERS: But see, just the Chief Judge's
19 comment makes me think. When you're dealing with a protective
20 order in the District Court, there's a lot of back and forth
21 in chambers, in the courtroom. Now we're in a very formal
22 posture in the Court of Appeals, and the type of flexibility
23 that exist in the District Court doesn't exist. Now the
24 Government is saying this Court should enter a protective
25 order subject to all of these formalities of appellate review.

1 And what I'm trying to get at is why, when we look at, the
2 Government says, we have to say that good cause has been
3 shown. The only affidavit that you've submitted is talking
4 about the mail situation. And of course, you know, times have
5 changed since then.

6 MR. LETTER: And well, but the affidavit, we did
7 submit a declaration of Admiral Harris indicating that times
8 had not changed for everything except the counsel visit. But
9 times change in a very key way. Congress changed the system.
10 So again, Mr. Willett says, he wants to be able to talk to his
11 client and apparently use the legal mail to discuss with his
12 client asylum. Well that's not what is assigned to this
13 Court. What this Court is to do is to look at the very narrow
14 question of -

15 JUDGE ROGERS: Wouldn't we be happy to know that we
16 no longer have this case on our docket because the case has
17 been settled?

18 MR. LETTER: And there is absolutely nothing in the
19 protective order that prevents Mr. Willett from talking to the
20 Defense Department, talking to the Government, and using the
21 regular mail system, not -

22 JUDGE ROGERS: No, he has to talk to his client.

23 MR. LETTER: He can use the regular mail. And this
24 is another problem with the argument -

25 JUDGE ROGERS: The mail system though now is so long

1 and drawn out. The world could have changed by the time the
2 detainee gets the letter, much less the detainee's letter gets
3 back to counsel.

4 MR. LETTER: There's absolutely no evidence of that,
5 Your Honor.

6 JUDGE ROGERS: Yes, there is. 15 days, and it's
7 three days of delivery. This is all in the protective order
8 on legal mail.

9 MR. LETTER: First of all, that's the maximum, but I
10 don't think 15 days for sending something to Cuba is, would be
11 extraordinary. Also -

12 JUDGE ROGERS: You know better than I, it's not 15.
13 At any rate, it's longer than that. But I'm just asking, why
14 should this Court presumptively assume that when counsel have
15 obeyed the protective order when they had even broader duties
16 than they have now, that we have to limit in the way that you
17 have proposed here?

18 MR. LETTER: Two points, Your Honor. First, they
19 did not obey.

20 JUDGE ROGERS: Well -

21 MR. LETTER: And that's --

22 JUDGE ROGERS: -- not these counsel, they say.

23 MR. LETTER: But our understanding was that this
24 Court wanted a protective order, a discussion about a
25 protective order that would govern all the cases. We put in -

1 JUDGE ROGERS: We said that?

2 MR. LETTER: Our -

3 JUDGE ROGERS: I thought you filed the motion.

4 MR. LETTER: We filed the motion and we believe that
5 that sets out a system that this Court can use to cover all of
6 the cases. If any specific panel wants to do something
7 different in a case, obviously, that panel can -

8 JUDGE ROGERS: But their argument is, if those
9 attorneys violated the order, why didn't the Government
10 proceed against them as it had authority to do it? It didn't
11 do that, so.

12 MR. LETTER: But Your Honor knows that's a silly
13 argument. Just, we chose not to go. We chose not to try to
14 get attorneys placed in contempt, because we didn't think that
15 that was an appropriate remedy at that stage.

16 JUDGE ROGERS: But now you're telling us that if an
17 attorney discusses certain things with his client, we should
18 find good cause. And the affidavit on mail doesn't even
19 suggest that some of these things it would concern national
20 security. And now we're talking not only about classified
21 information, we're talking about protected information, which
22 is anything that doesn't, you know, Government designates as
23 protective.

24 MR. LETTER: Because again, and this is where the
25 detainee counsel have failed to understand. This is a

1 different case from what was in the District Court. So if
2 they want to talk to their client about asylum, about
3 transfer, about conditions of confinement, Congress has barred
4 those claims. Congress has instead said, this Court reviews
5 the CSRT determination, and what we have said is, we're
6 setting up a legal mail system so that counsel can communicate
7 with their client in an appropriate way that balances security
8 and the interest of this Court, and the system that Congress
9 set up in order to accomplish the limited mechanism that
10 Congress, judicial review mechanism that this, that Congress
11 set up. It's not the habeus regime any more. Congress
12 rejected that.

13 JUDGE ROGERS: No, I think we all understand that.

14 MR. LETTER: Right.

15 JUDGE ROGERS: But let me ask you on access to
16 classified information.

17 MR. LETTER: Yes, Your Honor.

18 JUDGE ROGERS: Are you satisfied that this
19 protective order protects the privilege that the attorney has?
20 In other words, whatever information, now that the presumption
21 has shifted from the District Court protective order, that any
22 information he provides to the Government in an effort to
23 demonstrate his need to know will be held confidential?

24 MR. LETTER: The classified, the protective order
25 insofar as it regards classified information is clearly

1 appropriate for several reasons, Your Honor. One, there will
2 be -

3 JUDGE ROGERS: No.

4 MR. LETTER: I'm sorry.

5 JUDGE ROGERS: I'm not questioning the Government's
6 authority to, you know, determine who has access to classified
7 information. My question was, the attorney, there's no
8 presumption that the attorney has a need to know, as there was
9 in the District Court protective order. Now the attorney must
10 demonstrate through the Government, his need to know. My
11 question is, where in this protective order, unlike the
12 District Court protective order, is there protection of
13 confidentiality to the information that is provided in
14 connection with demonstrating a need to know?

15 MR. LETTER: Your Honor, we are not expecting the
16 detainee counsel to be coming to us saying, we have a need to
17 know, because detainee counsel will get almost all of the
18 information. There is, if you look at the files that are
19 involved in these cases, for example, you will see that the
20 information, the classified information that is not provided
21 to detainee counsel is tiny. And all of that information is
22 provided to the Court. So if the Court sees that there is
23 information that they think should be provided to detainee
24 counsel, that's something that then can be examined. But the
25 detainee counsel here are making something out of almost

1 nothing.

2 In addition -

3 JUDGE GINSBURG: Well excuse me, Mr. Letter. This
4 is, I think, what you were just talking about is covered in
5 footnote 13 of your brief, is that right?

6 MR. LETTER: Yes.

7 JUDGE GINSBURG: But it's nowhere, I mean, there you
8 have a standard. We anticipate that only a small amount of
9 information will be redacted from the CSRT records,
10 information that pertains to individuals other than a
11 particular detainee or information pertaining to highly-
12 sensitive sources.

13 MR. LETTER: Yes.

14 JUDGE GINSBURG: But that's nowhere in your proposed
15 order, is it? You're just telling us that's how you'll
16 administer this.

17 MR. LETTER: Right. We are -

18 JUDGE GINSBURG: Do you have any objection to
19 incorporating that?

20 JUDGE ROGERS: Which was in the District Court
21 order.

22 JUDGE GINSBURG: I'll take it in your words, in this
23 brief. Do you have any objection to making that part of the
24 document that we're administering?

25 MR. LETTER: No. We would have no problem with

1 making that part of the protective order at all.

2 JUDGE GINSBURG: The only thing that counsel would
3 not have a need to know is information that pertains to
4 individuals other than the detainee or pertains to highly-
5 sensitive sources.

6 MR. LETTER: Your Honor, we still, the executive
7 would have to reserve the ability on if the intelligence
8 agencies tell us that in certain instances, that there is
9 particularly sensitive information, that it is not going to be
10 provided to counsel. We would have to reserve that ability.

11 JUDGE GINSBURG: But that's what you're doing in
12 this footnote.

13 MR. LETTER: If it does, I think you said sensitive
14 sources, I recall.

15 JUDGE ROGERS: Highly-sensitive sources.

16 JUDGE GINSBURG: Or relates to a different detainee.

17 MR. LETTER: All I'm saying, Your Honor, is I think
18 we would have to reserve that there might be something that is
19 highly sensitive that isn't source information that might not
20 be provided. But certainly, we can work with the Court on
21 that and come up with appropriate language.

22 JUDGE ROGERS: Let me ask you something about the
23 limits on counsel talking about protected information or
24 classified information. The District Court protective order
25 had, I'll call it an exception, but for information that's

1 already in the public domain. Counsel hadn't put it there,
2 but somehow it got into the public domain. Now this
3 protective order doesn't have any such protection for counsel.

4 MR. LETTER: Your Honor, my understanding of the
5 protected information would be information that is privileged-
6 type information. So if it's out in the public domain, I
7 don't think it could be privileged any more. So I don't think
8 that that's, that would be a problem in reality.

9 JUDGE ROGERS: So if they talk about it, it's not a
10 problem.

11 MR. LETTER: I don't think so, Your Honor, no. If I
12 may point out one other thing -

13 JUDGE ROGERS: Let me say, if the Government here,
14 as I understood from the definition of protective order, it
15 said that, I mean protective information, if it said that
16 anything related to the CSRT proceeding is protected
17 information, there could be no conversation by counsel with
18 other counsel about that.

19 MR. LETTER: Counsel cannot talk with other counsel
20 about the classified information.

21 JUDGE ROGERS: Or protected information. That's the
22 way the protective order reads.

23 MR. LETTER: We could certainly be open to discuss
24 that, because I don't think, again if it's privileged
25 information, it needs to be privileged for a specific case, it

1 may be there has to be. But in the main, that wouldn't be.

2 JUDGE ROGERS: What is your thought about having a
3 special master deal with the protective order and just the
4 type of things that we're doing today? I mean, unless this
5 Court is going to sit every afternoon and review these things,
6 it's going to be a very inefficient process.

7 MR. LETTER: Your Honor, I will answer that in one
8 moment. May I just add one more thing about the classified
9 information? Remember that again, I think this shows a keen
10 misunderstanding by the detainee counsel. They have argued
11 that they should have access to all classified information.
12 Remember that the norm that this Court faces all the time is,
13 in cases like Jifry, People's Mojahedin, Holy Land Foundation,
14 any number of cases that we've cited, private counsel had no
15 access, none, to classified -

16 JUDGE ROGERS: But in that case, Jifry, they were
17 saying, you know, we shouldn't rely on it. There should be no
18 reliance on that. Slightly different situation.

19 MR. LITTLE: Actually, counsel's brief is wrong on
20 that. I handled the Jifry case. In Jifry, they asked for
21 access to the information. It was both. Counsel's brief is
22 wrong.

23 JUDGE GINSBURG: Was that an FTO case? I'm not -

24 MR. LITTLE: I'm sorry?

25 JUDGE GINSBURG: Was that an FTO?

1 MR. LITTLE: No, Your Honor. That's the case -

2 JUDGE ROGERS: AA case.

3 MR. LITTLE: -- J-I-F-R-Y. That's the case about
4 revocation of pilot's licenses for national security reasons.
5 And there, this Court rejected a due process argument and
6 said, counsel, even though counsel has no access to no
7 classified information, this Court can take into account and
8 uphold the merits of what the Government has done. So counsel
9 make it seem like this is an odd situation, that a tiny bit of
10 classified information will not be provided to them. This is
11 instead quite the opposite.

12 JUDGE ROGERS: Is your definition of tiny tied to
13 highly-sensitive sources or highly-sensitive information?

14 MR. LITTLE: Yes, Your Honor. If, and again, they
15 vary depending on the case. But if you look at these specific
16 cases, the redactions, and again which go to this Court, so
17 the independent Article III judiciary is a check, you can see
18 that the redactions are extremely minimal.

19 JUDGE GINSBURG: Mr. Letter, time is our enemy here.

20 MR. LITTLE: Judge Rogers asked me, I'm sorry.

21 JUDGE GINSBURG: Do you want to have the question
22 outstanding -

23 JUDGE ROGERS: Yes, I do want an answer to my
24 question -

25 MR. LITTLE: As far as -

1 JUDGE ROGERS: -- about this changing scene as it
2 goes on -

3

4 MR. LITTLE: Right. Your Honor, we do not --

5 JUDGE ROGERS: -- and objections and -

6 MR. LITTLE: We do not believe a special master is
7 necessary up front, because again, the system that should
8 govern in this Court should be a very, very different system
9 from what was present in the District Court.

10 JUDGE ROGERS: But I'm thinking, I understand that
11 point, not surprising. But what about these objections, and
12 maybe in this case, it should be exceptions, and the
13 Government says, I mean, just back and forth. The types of
14 things a district court would deal with routinely.

15 MR. LETTER: Right. And again, let me point out.
16 If the Court is asking, should we have a special master right
17 now simply to talk with the Government about various ways that
18 we can tinker with the protective order, we would not have a
19 problem with that. We certainly would be happy to meet with a
20 special master instead of meeting with the judges to talk
21 about tinkering of the protective order. What we do, would
22 very much object to, is instead, such as what was happening in
23 the District Court, where the special master was then later
24 interpreting the protective order in ways that we think was
25 exactly incorrect.

1 But again, getting to, back to your question, Your
2 Honor, because the role of this Court is, has now been so
3 clearly limited by Congress and the scope of the record is so
4 limited, once we have the protective order in place, there
5 should be very little of this type of dispute because we won't
6 be going back and forth on issues about, can they talk about
7 transfer or asylum in their legal mail.

8 JUDGE ROGERS: No, I understand. If your order were
9 to be entered -

10 MR. LITTLE: Yes.

11 JUDGE ROGERS: -- that eliminates a lot. The
12 question is, is your order, have you given us good cause as to
13 why we should enter this order?

14 MR. LITTLE: And as we said, if a, the type of
15 protect order that the Petitioners want and was in the
16 District Court raises very serious separation of powers
17 problems.

18 JUDGE ROGERS: But I was careful in my question to
19 counsel to ask, what is it in the protective order that would
20 hinder their ability to act as counsel in order to assist this
21 Court in its review. That's the extent of my question.

22 MR. LITTLE: And I think that question, I was very
23 pleased when I heard the way you framed that question, because
24 I think that's exactly right. And we've already talked about
25 the classified information certainly will not hinder this

1 Court in carrying out its function. The form, as I say, as
2 Judge Ginsberg pointed out, isn't really before us. Their
3 argument about that they can't send legal mail about asylum,
4 that has nothing to do with this Court. And then the last
5 think I think I heard was basically Mr. Willett saying that
6 Captain McCarthy must be lying, because he hasn't told Mr.
7 Willett anything about violations by Mr. Willett. The
8 affidavit speaks for itself, and Captain McCarthy -

9 JUDGE ROGERS: What I was focusing on, though, was
10 mail in the sense of the back and forth with counsel. And in
11 order to try to gain the trust of their clients
12 (indiscernible) or their potential clients.

13 MR. LITTLE: Yes.

14 JUDGE ROGERS: Go ahead.

15 MR. LITTLE: And as Your Honor, some of the
16 questioning from Chief Judge Ginsberg pointed out, we believe
17 that the one visit with eight hours, which can include
18 several, one visit to Guantanamo but the eight hours can be
19 several visits, what, it's not, I wasn't sure whether
20 Petitioners were now changing and saying they didn't like the
21 two visits, which they were limited to in the District Court,
22 or whether they were arguing for unlimited or not. I'm not
23 sure.

24 The key issue here is, apparently, Petitioners want,
25 the counsel want a right to go to Guantanamo even, for

1 example, in situations were the detainee has said, and this
2 has happened, I don't want to meet with him. I don't want
3 that attorney. I don't want to have this case. The
4 Petitioners' counsel say, we should still get to go to
5 Guantanamo and keep trying to convince people. We've tried to
6 limit that. Plus, remember they can communicate outside the
7 legal mail system whenever they want.

8 JUDGE GINSBURG: Thank you, Mr. Letter.

9 MR. LETTER: Thank you.

10 JUDGE GINSBURG: Mr. Lang, Mr. Willett,
11 (indiscernible) time. We'll give them each one minute.

12 ORAL ARGUMENT OF JEFFREY LANG, ESQ.

13 ON BEHALF OF THE APPELLEES, HAJI BISMULLAH, A/K/A HAJI
14 BISMILLAH AND A/K/A HAJI BESMELLA, AND HAJI MOHAMMAD WALI,
15 NEXT FRIEND OF HAJI BISMULLAH

16 MR. LANG: I'm Jeffrey Lang. I'll speak very
17 briefly on the request for access to information, if I may.

18 JUDGE GINSBURG: Please. One minute.

19 MR. LANG: Thank you. I want to make very clear
20 that there's no misunderstanding as to the collection of
21 Government information. And returning to Chief Judge
22 Ginsberg's questions earlier, the originating agencies produce
23 all relevant documents in their possession on the issue of
24 whether a detainee should be designated an enemy combatant.
25 They're able to withhold documents if there is an issue of

1 classified information or extra-sensitive information. They
2 can substitute the relevant document with a lesser classified
3 or unclassified summary. But they otherwise produce to the
4 tribunal all relevant information.

5 The recorder, in Judge Ginsberg's example, that box
6 of documents is not presented to the tribunal. The recorder
7 reviews that box of documents and whittles it down to those
8 documents the recorder believes are appropriate to show the
9 panel members. So the box of documents is not presented. It
10 is the five documents that the recorder believes is
11 appropriate to show to the panel members.

12 The record that's prepared under the CSRT regs
13 consist of the, a statement of the time and place, the
14 decision, the report, and then copies of those documents that
15 are shown to the panel members. Only those documents that are
16 shown to the panel members. And summaries of the recorder's
17 understanding of the panel members' findings of fact. The
18 rest of that box of documents is not shown to the panel and is
19 not reproduced as part of the record. It's not lodged with
20 the Court, and it's not shown to us.

21 The Government also urges a presumption, but that's
22 a different type of presumption. The presumption the
23 Government urges would swallow up the rule that, the basis of
24 this Court's review, which is to determine whether the
25 tribunal conducted the proceedings consistent with the

1 standards and procedures.

2 JUDGE GINSBURG: Mr. Lang, one moment real quickly.
3 Thank you.

4 MR. LANG: Thank you, Your Honor.

5 ORAL ARGUMENT OF SABIN WILLETT, ESQ.

6 ON BEHALF OF THE PETITIONERS, HUZAIFA PARHAT, ET AL

7 MR. WILLETT: Your Honors, at page 101 of the
8 appendix, you must sign Exhibit D in an ex friend case. There
9 is no exception. What Mr. Letter referred to was the Exhibit
10 C that applies in a direct representation case.

11 I think all the back and forth and all the
12 concessions that we heard about the order illustrate why you
13 should enter immediately the existing protective order that
14 took months to hash out in front of Judge Green and then
15 appoint a special master to hear any concerns.

16 I would point out as well, Judge Rogers, you are
17 correct. Both classified and protected information we are
18 restricted from sharing. That's at page 123 of the appendix.
19 And last, to Judge Ginsberg, at page 20 of our reply, you will
20 see the objection to the form and the requirement that we
21 obtain a signature.

22 JUDGE GINSBURG: Yes. The reply brief is a little
23 late to be phrasing an objection.

24 MR. WILLETT: Well at the time, Your Honor, we
25 didn't have the concession on base visits, and we had to use

1 our pages as we could.

2 JUDGE GINSBURG: Thank you, Mr. Willett.

3 Did you have one question?

4 ORAL ARGUMENT OF DOUGLAS LETTER, ESQ.

5 ON BEHALF OF THE RESPONDENT

6 JUDGE ROGERS: Yes. Could I ask Mr. Letter one
7 question? I'm sorry, I forgot this.

8 MR. LETTER: Yes, Your Honor.

9 JUDGE ROGERS: It's on retention of the record. Is,
10 under the protective order as the Government has proposed it,
11 is the Government going to retain a full copy of the record in
12 these cases as distinct from the 90-day disposal provision?

13 MR. LETTER: I need to be exactly sure what you're
14 asking me. These cases, meaning the cases that then come
15 before this Court?

16 JUDGE ROGERS: Yes. In other words, depending on
17 what this Court decides, the record, whatever submissions are
18 made, the pleadings, et cetera.

19 MR. LETTER: Right. My understanding is that, I
20 don't know if there is some hundred year limit or whatever,
21 but my understanding is, yes, that we preserve those records,
22 I think virtually in perpetuity. So for example, in the FTO
23 cases where we submit a classified, a full classified record
24 to this Court, at a certain point, the clerk's office gives it
25 back to us and we retain it, because sometimes, it has

1 actually come up several years later. So yes, Your Honor, we
2 will retain a full copy.

3 JUDGE ROGERS: And just in this context, since all
4 notes of counsel, et cetera, that would make any reference to
5 classified or protected materials are covered, would the
6 Government's retention of the record include those documents,
7 as well?

8 MR. LETTER: If they are, if they're documents -

9 JUDGE ROGERS: Formal pleadings.

10 MR. LETTER: Formal pleadings, yes.

11 JUDGE ROGERS: No, not formal.

12 MR. LETTER: Oh, I'm sorry.

13 JUDGE ROGERS: Sorry. Yes. In other words, counsel
14 notes, et cetera, and classified and protective, protected
15 information.

16 MR. LITTLE: Oh, I'm sorry. The notes, for
17 instance, that are in the -

18 JUDGE ROGERS: They can't take away the -

19 MR. LITTLE: Right.

20 JUDGE ROGERS: As I read the protective order, they
21 have to destroy everything 90 days after denial of cert.

22 MR. LITTLE: And I think the point there was so that
23 we wouldn't have, you know, access to their, their notes, et
24 cetera, for whatever. If -

25 JUDGE ROGERS: No. But I mean, you have this system

1 if you put them in one envelope, then you put them in another
2 envelope, then you put them in another envelope.

3 MR. LETTER: Right. And we don't, we don't -

4 JUDGE ROGERS: You don't keep those.

5 MR. LETTER: We don't look at them. They are -

6 JUDGE ROGERS: The question is, do you keep it as
7 part of the record of the case?

8 JUDGE GINSBURG: You want to know -

9 MR. LETTER: I don't think, I'm sorry.

10 JUDGE GINSBURG: Do you want to consult your
11 associates and let us know?

12 MR. LETTER: Yes. We can definitely do that. Yes,
13 Your Honor.

14 JUDGE ROGERS: Thank you.

15 JUDGE GINSBURG: Copy counsel, of course. Thank
16 you, gentlemen. Case is submitted.

17 (Recess.)

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DIGITALLY SIGNED CERTIFICATE

I certify that the foregoing is a correct transcription of the electronic sound recording of the proceedings in the above-entitled matter.



Stephanie N. Collins
DEPOSITION SERVICES, INC.

May 17, 2007