[ARGUMENTS HELD ON MAY 15, 2007]

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

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

OPPOSITION TO MOTION TO FILE DECLARATION

The government opposes petitioners' motion to file the declaration of Stephen Abraham, Lieutenant Colonel, U.S. Army Reserve. First, the declaration – which addresses the conduct of CSRT proceedings in only a handful of unnamed cases – is not relevant to these cases. Second, even assuming the statements in the Abraham declaration to be true and relevant, the declaration lends no support to petitioners' request to depose Admiral McGarrah or to petitioners' claim that CSRT procedures were violated.

1. First, while petitioners' counsel attempt to apply and attribute the assertions in the Abraham declaration to CSRTs across-the-board, in fact, the assertions in the declaration address only limited aspects of the CSRT process with respect to only a

few unspecified petitioners. *See, e.g.*, Abraham Decl. ¶ 4 (describing one CSRT); *id.* ¶ 13 (describing "one" interaction relating to "a review of information" obtained from other agencies); *id.* ¶ 20 (acknowledging that he was not "personally involved" in assigning CSRT panels and it "was not apparent to me how assignments to CSRT panels were made"). Importantly, Abraham's declaration does not indicate that he was involved in the CSRT process with respect to any of the petitioners in *Bismullah* or *Parhat*. It is therefore not relevant to whether the procedures were followed in these cases and does not lend support to petitioners' motions for depositions or discovery.

As we have explained in our previous pleadings, there is a strong "presum[ption] that public officials have 'properly discharged their official duties'" that applies in these circumstances and precludes discovery. *Bracy v. Gramley*, 520 U.S. 899, 908-909 (1997). This presumption can be overcome only by identifying infirmities in a petitioner's own case and not in other cases. That is true even in the habeas context involving United States citizens. *Ibid.* (to establish "good cause" for discovery in habeas proceeding alleging judicial bias, petitioner must "point[] not only to" bias "in other cases, but also to additional evidence * * * that [the judge] was actually biased *in petitioner's own case*"); *see United States v. Gale*, 314 F.3d 1, 6 (D.C. Cir. 2003) (no discovery in case to investigate alleged *Brady* violation that prosecution had not turned over material relating to expert witness who had been

convicted of perjury in another case because there was "no serious claim of perjury in Gale's trial"). A fortiori, the presumption of good faith precluding discovery applies in the context of this Court's limited review under the Detainee Treatment Act of the military's enemy combatant determinations made in an ongoing war. Petitioners do not have constitutional rights, and even if they did have such rights, they are entitled to at most the procedures spelled out in *Hamdi v. Rumsfeld*, 542 U.S. 507, 538 (2004) (plurality op.).

Such procedures do not include broad discovery based solely on the allegations that mistakes were made in other detainees' cases. Indeed, in *Hamdi*, the Supreme Court rejected a much narrower request for government materials - a request made by the district court for in camera review of particular information relevant to Hamdi's own case. *Id.* at 513-14. The Court concluded that this "quite extensive discovery" failed to strike "the proper constitutional balance" even when a United States citizen is detained as an enemy combatant. *Id.* at 528, 532. The Court recognized that a "trial-like process" would "unnecessarily and dangerously distract[]" the military during a time of war, "intrude on the sensitive secrets of national defense," and "result in a futile search for evidence buried under the rubble of war." *Id.* at 531-32. Depositions were not even contemplated, yet the Court unequivocally eschewed the discovery procedures envisioned by the district court "in light of their limited 'probable value' and the burdens they may impose on the military." *Id.* at 533

(quoting *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)); *see also id.* at 534 (contemplating only that "a knowledgeable affiant" would "summarize" records on the detainee). Likewise, this Court should reject plaintiffs' discovery requests, as well as their motion to file the irrelevant Abraham declaration.

2. In any event, without conceding the truth of the statements in the Abraham declaration, none of these statements establishes a violation of the CSRT procedures, much less demonstrates "bad faith or improper behavior," as would be required to "inquir[e] into the mental processes of" Admiral McGarrah. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 420 (1971); *see* Opp. to Mot. for Depo. at 2-4.

a. First, although the Abraham declaration insinuates that the CSRT process was improperly slanted, there is absolutely nothing in the declaration to substantiate this innuendo. To be sure, as the declaration observes, a tribunal determination that a detainee was no longer an enemy combatant would be "scrutin[ized]" by Admiral McGarrah. Abraham Decl. ¶ 20. But such scrutiny in no way shows bias or a violation of the CSRT rules. To the contrary, such review of all CSRT decisions is *required* by the CSRT procedures, which specify that the CSRT Director (*i.e.*, at the time, Admiral McGarrah) "shall review the Tribunal's decision." CSRT Procedures, enc. 1, § I(8).

Careful scrutiny of a CSRT's no-longer-an-enemy-combatant determination is not only consistent with CSRT procedures, but it is critical to national security. *See*

Hamdi, 542 U.S. at 531 (recognizing "the weighty and sensitive governmental interests in ensuring that those who have in fact fought with the enemy during a war do not return to battle against the United States"). Such a decision, once finalized, is likely to lead to the release of an individual who has previously been determined to warrant detention as an enemy combatant in one or more rounds of initial screening.[1] Indeed, despite the best efforts of the Department of Defense, numerous individuals who have been released have rejoined the battle, putting the lives of American civilians and soldiers in jeopardy. *See* S. Rep. No. 110-90, at 13 (June 26, 2007) (minority views) ("[a]t least 30 detainees who have been released from the Guantanamo Bay detention facility have since returned to waging war against the United States and its allies"). If anything, the internal scrutiny of the process described by Abraham tends to suggest a vital, robust process rather than a process designed to reach only a preordained result. The actual CSRT results – where 38 of 558 CSRTs resulted in determinations that detainees no longer met the criteria for designation as enemy combatants – indicate an impartial process designed to "determine whether each detainee * * * meets the criteria to be designated as an enemy combatant." CSRT Procedures, enc. 1, § B.

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[1] Thus, when such a determination was made, "the CSRT Director would notify the intelligence agencies and provide them an opportunity to submit additional information relating to the detainee or to reconsider any of their prior decisions that had prevented the Recorder from using their material as Government Evidence at the CSRT." McGarrah Decl. ¶ 15.

b. Second, Abraham's criticisms of the intelligence agencies and the process for obtaining information from them reflects a fundamental misunderstanding of how the CSRT process is supposed to work. Abraham complains about not having unfettered "access" to other agencies' files and not being able to "see[] *all* information" possessed by another agency. Abraham decl. ¶¶ 9, 11, 13 (emphasis added); *see id.* ¶ 12 (did not review "all available information"); *id.* ¶ 11 (did not review "a complete compilation of information"); *id.* ¶ 13 (misstating he was "tasked to review all available materials"); *id.* ¶ 14 (expecting to be told whether additional information "existed"); *id.* ¶ 16 (did not review "all available information"). Similarly, petitioners object that the Recorders did not themselves review all the files possessed by intelligence agencies. Mot. at 3, 4.

But nothing in the CSRT procedures remotely requires the Recorder to conduct a *de novo* search for the information held by other agencies or to double-check the work performed by other agencies in responding to requests for relevant information. Instead, the CSRT procedures explain that the Tribunal may "request [from other agencies] the production of such reasonably available information" that "bears on the issue of whether the detainee" is an enemy combatant. CSRT Procedures, enc. 1, § C(3). Thus, while the Tribunal may *request* relevant information from another government agency, the Recorder does not search through that agency's files for relevant, reasonably available materials – instead, the intelligence agency conducts

the search for responsive materials.[2]

In the circumstances described by Admiral McGarrah and unfairly criticized by Abraham, intelligence agencies identified potentially relevant, reasonably available information by conducting "broadly based [searches based] on [detainee] names and other available identifying information." McGarrah Decl. ¶ 10.b. Common sense tells us that this is the most reasonable way to locate relevant materials pertaining to a detainee. In fact, these searches were *broader* than necessary because they turned up "voluminous responsive documents, many of which were found not relevant" to an enemy combatant determination. *Ibid.* It is a review of these responsive documents that Abraham describes in his declaration. *See* Abraham Decl. ¶ 11 (explaining that he was "permitted to see * * * information * * * specifically prepared in advance of my visit"); *id.* ¶ 11 (explaining that he was "allowed * * * access to * * * prescreened and filtered" information); *id.* ¶ 12 ("the information provided to me was all that I would be shown"); *id.* ¶ 13 (describing

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[2] Normally, an agency would simply provide documents responsive to a request for relevant and reasonably available material. *See* McGarrah Decl. ¶ 10.b. Even in those instances where the Recorder's team "did not directly obtain" information from those agencies due to the sensitive nature of the information, the Recorder's task was not transformed into a requirement to conduct a *de novo* search through the agency's files in the first instance; instead, the Recorder's team simply "review[ed] the organization's information responsive to their request" at a different location – the offices of the agency. *Ibid.* The agency – not the Recorder – still was charged with searching its own files to locate those responsive materials. *See* CSRT Procedures, enc. 1, § E(3).

conversation "following a review of information" provided by the agency). In sum, contrary to Abraham's apparent belief, under the CSRT procedures, once the intelligence agency had "produc[ed] * * * [the requested] reasonably available information" that "bears on the issue of whether the detainee" is an enemy combatant (CSRT Procedures, enc. 1, § C(3)), there is no additional requirement that the Recorder review "all available information" (Abraham Decl. ¶ 12) to confirm that the agency has properly responded to the request for information. Ultimately, as the Abraham declaration itself acknowledges, it is the relevant intelligence agency that must review its records to identify responsive material. *See* Abraham Decl. ¶ 16 (acknowledging that the material provided to the Recorder and staff was "left * * * to the discretion of the organizations providing the information" and what "information was not included * * * was typically unknown").

The Abraham declaration also intimates that the CSRT procedures were violated because, after this review of material provided by an intelligence agency, the agency would not *also* provide "a written statement that there was no exculpatory information." Abraham Decl. ¶ 12; *see* Mot. at 4 (contending that intelligence agencies "refused to say whether they had exculpatory information").

But the CSRT procedures do not require a certification in these circumstances, and for good reason: it is impossible, or at least extraordinarily burdensome, to certify that negative. Accordingly, the CSRT procedures required only that agencies come

forward with *reasonably available* material in their files that was responsive to the request for information. CSRT Procedures, enc. 1, § E(3). A certification was required only when this agency search for reasonably available material identified relevant material that it would not provide in response to a request. CSRT Procedures, enc. 1, § E(3)(a) ("[f]or any relevant information *not provided in response to a Tribunal's request*, the agency holding the information shall provide either an acceptable substitute for the information requested or a certification to the Tribunal that none of the withheld information would support a determination that the detainee is not an enemy combatant") (emphasis added). Importantly, the Abraham declaration does not state that any agency advised him that its searches had turned up reasonably available information that was relevant, but would nonetheless *not* be provided for his review. Thus, Abraham has not alleged a violation of the CSRT procedures in any case, let alone the case at hand.

Indeed, the declarations together describe a review of material by the CSRT Recorder that was *more* comprehensive than what is required by CSRT procedures. Whereas the rules call for the production for the Recorder's review of only *relevant* material in response to information requests (CSRT Procedures, enc. 1, § E(3)), certain agencies' "searches were broadly based on names and other available identifying information" and turned up "voluminous responsive documents, many of which were found *not relevant*" by the Recorder's staff. McGarrah Decl. ¶ 10.b

(emphasis added). Thus, the Recorder's staff was reviewing the results of broadly based, overinclusive searches for relevant material in agency files, material that either supported or tended not to support a detainee's enemy combatant status. Such a comprehensive search readily satisfies even the obligation of a criminal prosecutor under the Due Process Clause in obtaining exculpatory material from other agencies – where reasonableness is the key in conducting such a search. *See United States v. Brooks*, 966 F.2d 1500, 1502 (D.C. Cir. 1992) (in *Brady* context, "objective" test employed to determine whether files of other agencies much be searched for exculpatory material).

The onerous search that Abraham sought to perform, on the other hand – whereby he sought access to *all* agency files even after a reasonable search had been performed – was unnecessary and unwise. "'[M]ere speculation that a government file may contain" relevant material is no basis for requiring a search in the *Brady* context, where the constitutional rights of U.S. Citizens are at issue. *Brooks*, 966 F.2d at 1504 ("'[m]ere speculation that a government file may contain *Brady* material' was not enough to require an *in camera* examination" by court); *United States v. Joseph*, 996 F.2d 36, 41 (3d Cir. 1993) ("[w]e will not interpret *Brady* to require prosecutors to search their unrelated files to exclude the possibility, however remote, that they contain exculpatory information"); *United States v. Merlino*, 349 F.3d 144, 154 (3d Cir. 2003) (declining to find *Brady* violation when prosecution

reviewed 300 tapes in the possession of another agency, found only a small amount of exculpatory material, then declined to review additional 2000 tapes; explaining that "[i]t is one thing to require honest searches, reasonable in scope, of unrelated files for specific identifiable information, but quite another to send prosecutors on open-ended fishing expeditions"). A fortiori, such speculation would not have warranted a further search here, where a process was being conducted to determine whether aliens lacking any constitutional rights are wartime enemy combatants. *See generally Hamdi*, *supra*, p. 3-4.

c. Finally, the remaining statements presented in the declaration do not reveal any violation of the CSRT procedures. For example, in several places, the declaration characterizes information supporting an enemy combatant determination as "generalized," "outdated," "'generic,'" "indirect," "passive," and lacking a "source of the information." Abraham Decl. ¶¶ 8, 22. Such contentions, of course, can be reviewed by this Court directly in assessing the Government Evidence in the record before the CSRT in each particular case, and a declaration making general and derisive characterizations of the evidence is of no moment in conducting that review. If the information is inadequate in a particular case, the Court can remand that case to the agency. In no event would the evidentiary insufficiency justify broad-based discovery in all DTA cases before this Court.

The Abraham declaration also states that, in reviewing the "large amounts of

information" they received, "information that was gathered was discarded by the case writer or the Recorder because it was considered to be ambiguous, confusing, or poorly written"; the declaration characterizes such decisions as "arbitrar[y]." Abraham Decl. ¶ 17. But there is nothing improper or arbitrary about the recorder sifting through the material produced and declining to present ambiguous, confusing, or poorly written material to the CSRT. Notably, Abraham does not contend that any discarded material was favorable to a detainee or even relevant. Presumably, in light of his other allegations, if Abraham had ever seen evidence favorable to a detainee being discarded, he would have said so in his declaration. Moreover, Admiral McGarrah unequivocally declared that when the Recorders and their staff reviewed the Government Information, "all material that might suggest the detainee should not be designated as an enemy combatant was identified and included in the materials presented to the CSRT" unless the material was merely duplicative or not relevant to an asserted basis of a detainee's enemy combatant status. McGarrah Decl. ¶ 13. Accordingly, even if, in a particular case, some "confusing" information was not included in the CSRT record, that omitted information would *not* be helpful to the detainee because it would either be irrelevant or would tend to show that a detainee *was* an enemy combatant.

Finally, the declaration characterizes the Recorders and their staff as lacking "significant personal experience in the field of military intelligence." Abraham Decl.

¶ 6. But Abraham's own personal opinion regarding the experience and qualifications of the Recorders in no way supports a determination of impropriety or bad faith by the government or even a technical violation of the CSRT procedures. The CSRT procedures do not require that the Recorder have "military intelligence" experience. *See* CSRT Procedures, enc. 2, § A ("Qualifications of the Recorder"). Instead, the focus of the process is on ensuring that the status of the detainee was given a fresh look by neutral officers not involved in the apprehension, detention, or interrogation of the detainees. CSRT Procedures, Enc. 1, § C(2) (Recorder shall be "a commissioned officer" who "shall not have been involved in the apprehension, detention, interrogation, or previous determination of status of the detainees"); *see Hamdi*, 542 U.S. at 537-38 ("properly constituted military tribunal" with a "neutral decisionmaker" could satisfy due process requirements, but no mention of a requirement that tribunal members have military intelligence experience). That Recorders and staff were not always steeped in detainee-related intelligence matters does not mean that those individuals could not perform their role in providing a fresh look at the enemy combatant determination.

At bottom, Abraham and petitioners' counsel have lost sight of what the CSRT process is all about. In the middle of a war, in which thousands of Americans have already lost their lives, the Defense Department for several months dedicated over two hundred personnel to providing an unprecedented amount of process to

status determinations for aliens held outside this country – process that included voluminous government-wide searches of unprecedented rigor for information relevant to these determinations. Even if Abraham were correct that none of his colleagues was as qualified as he is (a proposition the government continues to deny), his declaration casts no shadow on the validity of the CSRTs or the legality of petitioners' detention. This Court should deny petitioners' motion to file the declaration and should reject the inappropriate discovery that petitioners are seeking.

CONCLUSION

For the foregoing reasons, the Court should deny petitioners' motion to file the Abraham declaration.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 6, 2007, I caused copies of the foregoing "OPPOSITION TO MOTION TO FILE DECLARATION" to be served upon counsel of record by causing copies to be sent by regular mail and by e-mail transmission to:

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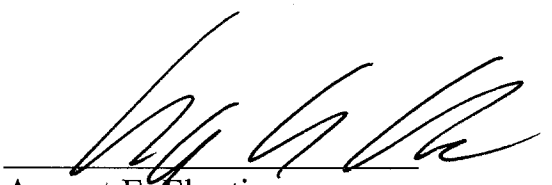

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