ORAL ARGUMENT SCHEDULED FOR MAY 15, 2007

Nos. 06-1197 and 06-1397

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

HAJI BISMULLAH and HAJI MOHAMMAD WALI, as Next Friend of Haji Bismullah,
Petitioners,
v.
ROBERT M. GATES,
Respondent.

HUZAIFA PARHAT, *et al.*,
Petitioners,
v.
ROBERT M. GATES, *et al.*,
Respondents.

ORIGINAL ACTIONS UNDER THE DETAINEE TREATMENT ACT OF 2005

PETITIONERS' JOINT BRIEF IN SUPPORT OF PENDING MOTIONS TO SET PROCEDURES AND FOR ENTRY OF PROTECTIVE ORDER

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1),* Petitioners in *Bismullah v. Gates*, no. 06-1397, and Petitioners in *Parhat v. Gates*, no. 06-1197, submit the following certifications:

A. Parties and Amici

Petitioners in *Parhat* are Huzaifa Parhat, Abdusabour, Abdusemet, Hammad Mehmet, Jalal Jalaldin, Khalid Ali and Sabir Osman, each a prisoner incarcerated at the United States Naval Station at Guantánamo Bay, Cuba ("Guantánamo"), as well as Jamal Kiyemba, next friend of Abdusabour and Khalid Ali.

Petitioners in *Bismullah* are Haji Bismullah, a prisoner incarcerated at Guantánamo, and Haji Mohammad Wali, his brother and next friend.

Mr. Parhat, Abdusabour, Abdusemet, Mr. Mehmet, Mr. Jalaldin, Mr. Ali, Mr. Osman, and Mr. Bismullah are collectively referred to as "Petitioners."

Respondent in both actions is Robert M. Gates, Secretary of Defense of the United States of America.**

B. Rulings Under Review

The Petitions in *Parhat* and *Bismullah* are original actions, and the claims asserted therein have not been presented or reviewed by this Court or any other court.

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* Given the novelty of petitions filed under the Detainee Treatment Act of 2005, it is sometimes difficult to apply the standards set forth in the Federal Rules of Appellate Procedure and local Circuit Rules to the present cases. Petitioners have, to the greatest extent possible, endeavored to conform this brief to the relevant Rules.

** The *Parhat* Petition asserts an alternative original *habeas corpus* claim and therefore names Petitioners' immediate jailers as additional respondents. In light of this Court's ruling in *Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007), the *Parhat* Petitioners do not pursue their *habeas corpus* claims at this time, but reserve the right to do so if warranted in light of any further appellate review of *Boumediene*. Secretary Gates is the sole respondent as to Petitioners' Detainee Treatment Act claims, and is referred to as the "Respondent" throughout this brief.

C. Related Cases

The following cases involve or may involve some of the same parties, or may present similar legal and/or factual issues:

1. *Paracha v. Rumsfeld*, no. 06-1138 (D.C. Cir. filed Jan. 24, 2006), is a petition for relief under the Detainee Treatment Act of 2005.

2. *Abdulzaher v. Gates*, no. 07-1031 (D.C. Cir. filed Feb. 6, 2007), is a petition for relief under the Detainee Treatment Act of 2005.

3. *Mahnut v. Gates*, no. 07-1066 (D.C. Cir. filed Mar. 15, 2007), is a petition for relief under the Detainee Treatment Act of 2005. Each petitioner in *Mahnut* is a Uighur who was present in Afghanistan with the *Parhat* Petitioners herein, and who was arrested with them in Pakistan.

4. *Kiyemba v. Bush*, no. 05-1509 (D.D.C. filed on July 29, 2005), is a petition for a writ of habeas corpus and a complaint for additional relief. Each *Parhat* Petitioner, as well as one petitioner in *Mahnut v. Gates*, is a petitioner in *Kiyemba v. Bush*, and Respondent Gates, as well as others, are *respondents therein.*

5. *Kiyemba v. Bush*, consolidated appeals *sub judice* before this Court, nos. 05-5487-92, 06-5042 (oral argument held on September 11, 2006), is an interlocutory appeal from decisions rendered by the U.S. District Court for the District of Columbia in *Kiyemba v. Bush*, no. 05-1509 RMU.

6. More than 200 original habeas corpus actions were commenced in the U.S. District Court for the District of Columbia by or on behalf of foreign nationals illegally imprisoned at Guantánamo. The following seven actions involve Uighurs who were present in Afghanistan with the *Parhat* Petitioners, and who were arrested as a group in Pakistan:

    a. *Qassim v. Bush*, 407 F. Supp. 2d 198 (D.D.C. 2005), appeal docketed, no. 05-5477 (D.C. Cir. Dec. 28, 2005) (dismissed as moot after the government sent the petitioners to Albania one business day before scheduled oral argument before this Court);

    b. *Kiyemba v. Bush*, no. 05-1509 RMU (D.D.C. filed July 29, 2005) (see above);

    c. *Kabir v. Bush*, no. 05-1704 JR (D.D.C. filed Aug. 25, 2005);

    d. *Mamet v. Bush*, no. 05-1886 EGS (D.D.C. filed Sept. 23, 2005) (dismissed by petitioners pursuant to Rule 41(a) of the Federal Rules of Civil Procedure after they were sent to Albania along with the Qassim petitioners);

e. *Razakah v. Bush*, no. 05-2370 EGS (D.D.C. filed Dec. 12, 2005);

f. *Mohammon v. Bush*, no. 05-2386 RBW (D.D.C. filed Dec. 21, 2005); and

g. *Thabid v. Bush*, no. 05-2398 ESH (D.D.C filed Dec. 14, 2005).

March 26, 2007

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TABLE OF CONTENTS

TABLE OF AUTHORITIES*

Page(s)

CASES

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* Authorities upon which we chiefly rely are marked with asterisks.

STATUTES

RULES

MISCELLANEOUS

JURISDICTION

This Court has jurisdiction pursuant to Section 1005(e)(2) the Detainee Treatment Act of 2005, Pub. L. No. 109-148, §§ 1001-1006, 119 Stat. 2680 (2005) ("DTA").

PRELIMINARY STATEMENT

Petitioners are prisoners at Guantánamo, each with a compelling case of actual innocence. No Petitioner is now, or has ever been, an "enemy combatant." Since filing petitions for relief in this Court, counsel for Petitioners have sought nothing more extraordinary than reasonable access to Petitioners and information necessary to pursue claims expressly authorized by Congress in the Detainee Treatment Act of 2005. Respondent has refused these requests, exploiting his complete control over Petitioners and the information in question to prevent these proceedings from moving forward. No progress has been made.

Petitioners must be given a fair chance to prove their innocence. As the first steps in that process, Petitioners ask the Court to: (i) order limited discovery (ii) enter the standard Guantánamo protective order developed by the U.S. District Court for the District of Columbia, (iii) appoint a Special Master, and (iv) set a schedule that will allow these cases to be resolved expeditiously on the merits.

The urgent need to resolve the merits of these Petitions before the end of the Court's present term cannot be overstated. Petitioners have been in U.S. captivity for several years. They all can show compelling evidence of their innocence. Yet most are inexplicably being held in solitary confinement, where they are literally going insane. As soon as possible after the May 15, 2007 hearing, Petitioners respectfully ask the Court to set a discovery and briefing schedule enabling the Court resolve the merits of the Petitions before the end of the present term.

STATEMENT OF THE CASE

A. Statement Of The Facts

1. Petitioner Haji Bismullah

Haji Bismullah has never been an enemy combatant, and he was not captured on the battlefield.[1] He was arrested while serving as a provincial official in the U.S.-backed Afghan government. Bismullah, his family, and his clan all have been strongly and consistently opposed to the Taliban. In 1996, when Bismullah was 15 years old, he and his family fled Afghanistan and the Taliban. They were refugees in Pakistan until late 2001, when Bismullah and his brothers answered Hamid Karzai's call to Afghan patriots to return to fight the Taliban. Thus, when Taliban and Al Qaeda combatants were fleeing the country, Bismullah and his brothers rushed into Afghanistan to fight alongside U.S. and coalition forces. *Bismullah* Petn. ¶¶ 3-5.

After the defeat of the Taliban, Bismullah and his family returned to their village and Bismullah was appointed chief of transportation for Greshk district. Under the Taliban, that government position was held by a member of a pro-Taliban clan. Members of that clan tried to reclaim the position during Bismullah's tenure, but Bismullah maintained the post until he was arrested by the U.S. military in early 2003. Bismullah's arrest apparently was based solely on a false accusation made by the former transportation chief and his brother that Bismullah was passing information on U.S. troop movements to the Taliban.[2] *Id.* 26-28

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[1] Petitioners are cognizant of the Court's direction that the Parties not brief the merits of the Petitions. Relevant facts and background are set forth here only as necessary to demonstrate the need for an effective protective order and targeted discovery.

[2] Shortly after Bismullah's arrest, the former transportation chief and his brother bragged in the local market that their accusations led to Bismullah's arrest, and they later looted his office and stole his official car, which they openly drove through the village.

Bismullah's arrest prompted an outpouring of protests by Afghan government officials, local councils and village elders attesting to his innocence. United States military and diplomatic officials in Afghanistan were advised repeatedly, both orally and in writing, that Bismullah had been arrested in error and were urged to release him. *Bismullah* Petn. ¶¶16, 24.

Although the U.S. military promised to reconsider the decision to arrest Bismullah, he was sent to Guantánamo. After more than a year in detention, he was brought before a military Combatant Status Review Tribunal ("CSRT"). The CSRT failed to follow its own procedures—including the duty to consider exculpatory information and to arrange witness testimony on the detainee's behalf—and as a result, wrongly classified Bismullah as an "enemy combatant." He now turns to this Court for relief.

2. The Parhat Petitioners

The Uighurs are a Muslim minority group from the Xinjiang Uyghur Autonomous Region of western China. Historically, they have been severely oppressed by the Chinese government. *Parhat* Petn. ¶¶ 35-38. Each *Parhat* Petitioner is a Uighur who left China to escape oppression. All eventually made their way to a Uighur village in Afghanistan. *Id.* ¶¶ 39-45.

In October 2001, U.S. air strikes flattened the village. Eighteen unarmed Uighurs fled the bombing. None of them fought against the United States or coalition forces, none carried or shot a gun, and none supported forces hostile to the United States. After weeks hiding in caves, they crossed into Pakistan. *Id.* ¶¶ 46-51.

The Uighurs were taken in by local villagers who gave them food and shelter. Their "hosts" then handed them over to Pakistani officials who sold them to the U.S. military for a bounty. The U.S. transferred the Uighurs to Guantánamo in June 2002. *Id.* ¶¶ 51-56.

September 11, 2001, and the subsequent U.S.-led war on terror changed the relationship between the U.S. and China. Before 9/11, the U.S. had been skeptical of China's efforts to legitimize its oppression of Uighurs by labeling Uighur political dissidents "terrorists." After 9/11, the United States needed China's support for the Iraq campaign. In August, 2002, Deputy Secretary of State Richard Armitage sought Chinese support for U.S. plans to invade Iraq. The Chinese demanded concessions. China wanted the Uighurs at Guantánamo—including the *Parhat* Petitioners—branded by the U.S. as "terrorists." Mr. Armitage agreed. One month later Chinese President Jiang Zemin assured President Bush that the Chinese would acquiesce in American war plans. *Id.* ¶¶ 1-4 & 73-80.

3. The CSRTs

For over two years after the first prisoners arrived at Guantánamo, they were held without hearings of any sort. Indeed, the government chose Guantánamo on the theory that men imprisoned there would have no legal rights whatsoever. *Rasul v. Bush*, 542 U.S. 466, 497-98 (2004) (Scalia, J., dissenting). After the Supreme Court ruled against the government in *Rasul* and *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), the Department of Defense hastily created the CSRTs. Just nine days after *Rasul* and *Hamdi*, the Department of Defense issued an "Order Establishing Combatant Status Review Tribunal" ("CSRT Order"). Appendix ("App.") 1-4. Three weeks later, the Secretary of the Navy issued a memorandum entitled "Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants detained at Guantanamo Naval Base, Cuba" ("CSRT Procedures"). App.5-34.

The Executive created the CSRTs on its own authority, and for its own benefit.[3] The CSRT Procedures established "non-adversarial proceeding[s]," purportedly "to determine whether each detainee . . . meets the criteria to be designated as an enemy combatant." App.8 §B.

The CSRTs *began* with the premise that each prisoner was an enemy combatant:

> Each detainee subject to this Order has been determined to be an enemy combatant through multiple levels of review by officers of the Department of Defense.

App.1 ¶a. From this starting point, the CSRTs conducted "non-adversary" hearings under rules and procedures that were, by design, unfair and, in practice, profoundly biased—and that virtually guaranteed enemy combatant designations.

a. The Enemy Combatant definition

The CSRT Procedures defined an "enemy combatant" as:

> an individual who was part of or supporting the Taliban or al Qaida forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces.

App.8 §B.

In practice, this definition was applied to capture clear non-combatants. The military's own records show that only five percent of the Guantánamo prisoners are even alleged to have been captured on a battlefield. App.184. The military does not accuse the majority of the

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[3] Neither the CSRT Order nor the CSRT Procedures refer to any Congressional grant of authority, or purports to implement any statute. On the contrary, the CSRT Order specifically states that it is directed to internal management issues. *See* App.4 § j ("This Order is intended solely to improve management within the Department of Defense concerning its management of enemy combatants at Guantanamo Bay Naval Base, Cuba, and it does not, and is not intended to, create any right or benefit, substantive or procedural, enforceable at law, in equity, or otherwise[.]").

Guantánamo population of having participated in even a single hostile act against anyone. App.184. Rather, up to eighty-six percent of the men in Guantanamo may have been sold to U.S. forces for a bounty by either Pakistan or the Northern Alliance. App.184-85.

b. The CSRT Participants

Each CSRT was composed of five uniformed military officers: the three-member Tribunal panel, the senior member of which was the Tribunal President, the Recorder, and the Personal Representative. App.8-9 §C. Every participant in the CSRT process, other than the detainee, was a member of the U.S. military serving under Respondent and others in the chain of military command who previously had asserted publicly that all prisoners at Guantánamo were enemy combatants—"the worst of the worst." App.186. Each had a powerful interest in avoiding contradiction of the previous determination, and in supporting his superiors' public statements.

The Tribunal was obligated to call "reasonably available" witnesses and request production of "reasonably available" relevant evidence. App.10 §E(2). Ultimately, the Tribunal was to determine whether the preponderance of the evidence presented to it supported the conclusion that the detainee is an enemy combatant. App.34.

The Recorder acted as investigator, prosecutor and clerk of the Tribunal. The Recorder was tasked with: (i) obtaining and examining reasonably available information bearing on the detainee's enemy combatant status ("Government Information"); (ii) preparing an unclassified summary of the Government Information; (iii) determining whether any of the Government Information supported the detainee's enemy combatant designation; (iv) determining whether any of the Government Information suggested that the detainee should not be classified as an enemy combatant; (v) presenting to the Tribunal evidence in the Government Information sufficient to support the detainee's classification as an enemy combatant, as well as evidence

suggesting that the detainee should not be classified as such; and (vi) preparing a record of the proceedings for approval by the Tribunal President. App.14-15 §1(H); App.17-18.

Detainees were entitled only to the assistance of a non-lawyer "Personal Representative" who was explicitly not the detainee's advocate. App.19-21. The Personal Representative was obliged to explain that no confidential relationship existed with the detainee, and that any information provided could be divulged at the hearing.[4] App.19-21.

c. The Government Information

One of the Recorder's most critical duties was to collect relevant information in the government's possession—the so-called "Government Information." App.10 §E(3). Under the CSRT procedures, the Recorder had a "duty" to collect and present the Tribunal with information and materials "sufficient to support the determination that the detainee is an enemy combatant." App.17 §H(4). In addition, the Recorder was supposed to separately compile and provide to the Tribunal "any evidence to suggest that the detainee should not be designated as an enemy combatant." App.14 §H(4). The Recorder was not required to attest to the accuracy or completeness of information presented to the Tribunal. Nobody was responsible for reviewing the Recorder's decisions and actions to confirm that the Recorder: (i) verified that the government agencies produced all responsive information, or (ii) provided the Tribunal all information suggesting that the detainee was not an enemy combatant, or (iii) gave accurate and complete summaries and descriptions of Government Information.

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[4] A study of CSRT proceedings found that in 78% of 102 CSRTs studied, the detainee and the Personal Representative met only once, and in the majority of cases, for only an hour or less. App.154. Thirteen percent of meetings lasted twenty minutes or less. App.154.

d. The Evidence

The detainee was not allowed to see the evidence against him or even to hear particularized charges. He was read a "summary of unclassified evidence," that was little more than a short list of conclusory allegations, and virtually impossible to rebut. *See, e.g.*, App.14 §H.

The detainee's right to present evidence was hollow. He had no assistance of counsel, and little understanding of the evidence against him, the CSRT process, or the language and customs of his captors. Without access to documents and information in the government's possession, and with no realistic way to obtain evidence himself, there was in any case virtually nothing he could present.[5] *See, e.g.*, App.223-24.

A detainee's purported right to call witnesses on his behalf was equally hollow. Although the CSRT was obliged to make reasonable efforts to contact a detainee's witness, App.14 §G(9)(b), in practice, every request by a detainee for testimony from a witness who was not also a Guantánamo detainee was denied.[6] App.142, 168. Even when the detainee requested that another prisoner at Guantánamo be allowed to testify for him, that request was denied half of the time. App.168.

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[5] A detainee is given at most thirty days notice of his CSRT hearing. Limited by the sporadic and censored Guantánamo mail system, a detainee has no realistic opportunity to obtain evidence in this time period, particularly from remote locations overseas.

[6] Bismullah was told on November 3, 2004 that his CSRT would be held on November 20, 2004. He asked that his brother, Haji Mohammed Wali, testify. The Tribunal approved his request on November 4, but then merely submitted a request to the State Department, asking that the State Department submit a request to the Afghanistan Embassy to locate and ask Haji Mohammed Wali to participate in Bismullah's CSRT hearing. On November 20, 2004, during the CSRT hearing, the Tribunal announced that it had not received a response from the State Department, and therefore determined that Mohammed Wali was not reasonably available, and denied the request. The Tribunal made no effort to contact Wali directly despite the fact that he was acting as a spokesperson for an Afghan provincial governor at the time and was regularly quoted in Western media and could be located through a simple internet search.

e. The CSRT hearing record

After the Tribunal reached its conclusion, the Recorder was required to prepare a Record of Proceedings, including: (i) a statement of the time and place of the hearing, persons present, and their qualifications; (ii) the Tribunal Decision Report cover sheet; (iii) the findings of fact upon which the Tribunal decision was based; (iv) copies of documents presented to the Tribunal and summaries of all witness testimony; and (v) a dissenting member's summary report, if any. App.18 §C.

The Record of Proceedings is *not* the record that was before the CSRT. The Recorder does *not* submit an evidentiary record to the Tribunal in advance or even during the course of the CSRT hearing. The Recorder is not required to provide to the Tribunal actual copies of documents in the Government Information. App.17 §C6. Instead, the Recorder may "present the Government Evidence orally. . . ." App.17 §C6. Where oral presentation or summaries are substituted for actual evidence, the Recorder is not required to index the source of the information. The Record of Proceedings does not include any relevant documents or information in the government's possession, or even in the Recorder's possession, not presented to the Tribunal.

4. The Detainee Treatment Act of 2005

These cases are a novel form of action recently created by Congress for men such as Petitioners who are imprisoned as enemy combatants at Guantánamo. *See* DTA § 1005(e)(2). Generally, this Court hears two kinds of cases: appeals from the district courts, and petitions for review of agency determinations taken pursuant to a proper delegation of authority from Congress. This case is neither. Cases arising under the DTA are brought in the first instance in this Court. Congress directed this Court, rather than a trial court, to decide the facts and law necessary to resolve these cases.

Specifically, Congress gave this Court jurisdiction "to determine the validity of any final decision of a CSRT that an alien is properly detained as an enemy combatant." *Id.* § 1005(e)(2)(A). Under the statute, the Court is to consider "whether the status determination of the Combatant Status Review Tribunal with regard to [the Petitioner] was consistent with the standards and procedures specified by the Secretary of Defense for Combatant Status Review Tribunals (including the requirement that the conclusion of the Tribunal be supported by a preponderance of the evidence and allowing a rebuttable presumption in favor of the Government's evidence)." *Id.* § 1005(e)(2)(C)(i).

The statute does not specify any procedures for the Court's "consideration" of these issues. Many of the Court's usual rules and procedures for appeals and administrative review cases are, on their face, inapplicable. Others are inappropriate given the unique procedural posture of these cases. Thus, the Court must not only consider the factual and legal merits of claims arising under the DTA, but must also decide how those cases are to be litigated. Pursuant to the Court's March 14, 2007 Orders, the merits of Petitioners' claims will be addressed separately. This brief addresses the procedural motions pending before the Court in Petitioners' cases.

B. Procedural history

1. *Bismullah v. Gates*

On June 9, 2006, Bismullah filed the first substantive challenge under the DTA. Bismullah's security-cleared counsel promptly requested access to the complete record of Bismullah's CSRT and other relevant information in the government's possession. Bismullah's counsel also requested that Bismullah be allowed to see a copy of the DTA petition which had been filed under direction from Bismullah's next friend, his brother Wali, and was based entirely on publicly available information and interviews with Bismullah's family and supporters.

Respondent refused, citing the absence of a protective order. Respondent also refused to consent to entry of the standard protective order crafted by the United States District Court for the District of Columbia in consultation with the government and lawyers for the detainees, which has governed attorney access to detainees and related classified material for over two years.[7]

On August 7, 2006, Petitioners filed a Motion to Compel, asking that the Court, among other things: (1) grant Bismullah's counsel access to the classified CSRT record and to other information in the government's possession, and (2) afford Bismullah an opportunity to confer with counsel and to review the petition filed in his name.

On August 25, 2006, Respondent moved for entry of a new and very different proposed protective order. As discussed below, this new proposed protective order is unnecessarily restrictive and will improperly interfere with Petitioner's ability to prosecute this action. Bismullah opposed, moved for entry of the standard protective order, and urged the Court to appoint of a special master. All of the motions are fully briefed.

2. ***Parhat v. Gates***

On December 4, 2006, the *Parhat* Petitioners filed a petition for relief under the DTA. After filing suit, they promptly moved for entry of the same protective order entered by the district court in their case, and in hundreds of Guantánamo cases. On December 23, 2006, the

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[7] To this day, Respondent has not permitted counsel for Bismullah, who hold the proper security clearance, to review the classified CSRT record for Bismullah or correspond with him via the legal mail system established for Guantanamo detainees in 2004. The unclassified CSRT record found in the Appendix at 211-235 was produced in response to FOIA litigation brought by the Associate Press. Respondent allowed counsel to visit Bismullah twice, pursuant to a non-precedential letter agreement but would not let counsel show Bismullah any documents, including his Petition and other court filings. Since August, Respondent has refused to allow his counsel any contact with Bismullah.

Parhat Petitioners filed a motion asking the Court to set a timetable and appropriate procedures for considering their claims. Among other things, they urged the Court to order Respondent to produce relevant documents and information, appoint a special master to resolve factual disputes and set a schedule to govern proceedings.

Respondent made two motions still at issue. On December 20, 2006, Respondent filed a Motion to Assign Separate Docket Numbers, and Treat Filing as Seven Separate Petitions for Review.[8] Respondent filed a Cross-Motion to Enter Proposed Protective Order on December 29, 2006. All of these motions are fully briefed.

3. The Court's stay of *Bismullah* and *Parhat*

On December 15, 2006, the Court stayed consideration of *Bismullah* until the resolution of the consolidated appeals in *Al Odah v. United States* and *Boumediene v. Bush*. On February 5, 2007, the Court entered a similar order in *Parhat*.

Two weeks later, this Court decided those cases. *See Boumediene v. Bush*, 476 F.3d 981, 994 (D.C. Cir. 2007), *petition for cert. filed* March 5, 2007 (No. 06-1195). On March 14, 2007, the Court directed the parties in both *Bismullah* and *Parhat* to file briefs on the pending motions. Oral argument is set for May 15, 2007.

SUMMARY OF THE ARGUMENT

Petitioners are not enemy combatants—and no independent tribunal, on a fair review of the allegations and evidence, could conclude otherwise. But an independent tribunal has never been able, or willing, to review the allegations and evidence in their case. Until now.

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[8] Given certain recent statements, it is not clear to Petitioners whether Respondent intends to renew this motion. If Respondent's forthcoming brief urges the Court to break *Parhat* into seven cases, Petitioners will address the matter in reply.

Congress enacted, and the President signed into law, the Detainee Treatment Act of 2005, which guarantees each detainee the right to pursue expeditious, independent—and surely meaningful—judicial review. For review to be truly meaningful it must be expeditious, because imprisonment under the extreme conditions at Guantánamo is causing life-threatening injury. Moreover, meaningful review must allow for substantive review of the evidence and hold the potential for relief.

Respondent takes a very different view. Respondent argues that the CSRT determination that Petitioners can be indefinitely imprisoned as enemy combatants should be treated like a routine administrative agency decision. Respondent thus contends that the Court cannot consider evidence outside of the CSRT hearing record—and that Petitioners have no legitimate interest in any documents or information other than the CSRT hearing record. Respondent is flatly wrong.

Under the DTA, Petitioners, through their counsel, have a right to review information relevant to Petitioners, to their CSRT proceedings, and to their enemy combatant status—information that they have never before been allowed to see. Petitioners have requested, for example, documents about each Petitioner and the circumstances of their apprehension, which documents plainly will demonstrate their innocence. The documents, both classified and unclassified, obviously are not only relevant but are essential to this Court's disposition of the Petitions. Moreover the documents are readily available, and can be provided with minimal imposition to Petitioners' counsel, who already have received security clearances.

The right to reasonable discovery is not conditioned on first establishing the admissibility of documents that may be discovered. In these proceedings of first impression, the Court should not resolve, on an early procedural motion, the standard of review that may ultimately be applied. Indeed, the discovery record may be important to the Court's ultimate determination of the proper standard of review in these proceedings. Here, reasonable discovery is critical because it will show that the CSRT

hearings by design and in practice failed to develop a complete, accurate, or fair record. In short, the CSRT hearing records here are wholly inadequate for meaningful judicial review.

Respondent seeks to rewrite the protective order that has been in place in the district court for two years. But Respondent's proposed order goes well beyond preserving the confidentiality of classified information and protecting national security. It is designed to inhibit the ability of detainees to pursue their claims by, among other things, denying access to relevant information and severely interfering with the detainees' attorney-client relationship. Petitioners propose entry of the protective order that currently governs access to detainees and information in scores of cases, including cases involving most of these petitioners and both sets of counsel.

Finally, Petitioners submit that the Court should appoint a special master to oversee procedural issues and to resolve, if necessary, any ancillary factual matters. A variety of such issues may arise over the course of these proceedings—for example, the administration of the protective order, discovery issues, and disputes relating to Guantánamo visits and legal mail service. Some will require immediate attention. Petitioners submit that the appointment of a special master pursuant to Rule 48(a) of the Federal Rules of Appellate Procedure is warranted. Subject to the scope of the Court's delegation, the special master will have the authority to make recommendations, but in each case subject to the Court's approval.

ARGUMENT

A. PETITIONERS ARE ENTITLED TO REASONABLE DISCOVERY

A significant portion of the briefing to date in these matters stems from Respondent's denial of a simple, reasonable request. Respondent has refused to provide access to documents and information directly related to Petitioners' claims on the theory that CSRT determinations constitute administrative agency action and that judicial review under the DTA is therefore limited to the record of the hearing before the CSRT. On this basis, Respondent has argued that

Petitioners have no legitimate interest in relevant documents and information in Respondent's possession, other than the CSRT hearing records.[9]

As an initial matter, Respondent's characterization of the review in these proceedings is wrong. Even if the Court were to determine at the appropriate time that adjudication of some of Petitioners' claims should be focused on the CSRT hearing record, Petitioners are still entitled to reasonable discovery because a strong basis exists to believe that the Court ultimately will admit additional evidence. Even in a standard agency record review case, the law is clear that a record may be supplemented where necessary to permit effective judicial review. In view of the biased nature of the CSRT process and Petitioners' total exclusion from development of the hearing record, many factors justify enlarging the record here. Moreover, the DTA expressly grants Petitioners a statutory right to raise a category of claims—distinct from challenges to the sufficiency of the evidence—concerning the consistency of Petitioners' CSRTs with applicable standards and procedures. Because the record of the CSRT hearing does not disclose Respondent's compliance (or non-compliance) with these procedures, the Court necessarily must admit new evidence to adjudicate those claims. Review of those claims "on the record" is impossible because there is no record to review.

In any event, at this stage in the proceedings, the Court need not determine the standard of review to be applied in the merits phase. The Court need only consider the *possibility* that its review will be based on documents beyond the CSRT hearing record. Unless the Court believes that there is no conceivable basis upon which to admit a single piece of other evidence in support

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[9] To ensure protection of classified and confidential information, Petitioners have only sought access for counsel who have the appropriate security clearance and therefore can have access to classified information relating to Guantanamo detainees.

of any claim, it should require the government to provide the reasonable discovery requested by Petitioners.

1. Regardless of the Scope of Review, Petitioners are Entitled to Reasonable Discovery.

A party's right to discovery is not subject to proving in advance that the documents requested will be admissible. FED. R. CIV. P. 26(b)(1). Discovery need only appear reasonably calculated to lead to the discovery of admissible evidence. *Id.* Respondent's argument that the scope of the Court's review in these proceedings should be subject to administrative agency review principles does not overcome this basic precept of federal practice. Moreover, even in the administrative law context, this Court has been willing to look beyond the agency-developed record *based on documents revealed through discovery. See, e.g., Commercial Drapery Contractors, Inc. v. United States*, 133 F.3d 1, 7 (D.C. Cir. 1998) (discovery revealed bad faith in the agency proceeding, warranting enlargement of the record on review). Hence, far from being irrelevant, the limited discovery Petitioners request may serve to inform the review that should apply in these proceedings.

Even where the point of departure for judicial review is an administrative agency record,[10] courts allow admission of extra-record evidence where necessary to facilitate effective judicial review. *See, e.g., Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 420 (1971); *Esch v. Yeutter*, 876 F.2d 976, 991 (D.C. Cir. 1989). This and other Courts allow discovery to enable a party to demonstrate that the agency record merits enlargement. *See Natural Resources*

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[10] Petitioners do not concede that review of any claims is limited to the CSRT hearing record, but the Court need not reach that determination yet. As present, the Court need only determine if a conceivable basis exists for the admission of evidence outside that record. If so, the Court must permit discovery.

Defense Council v. Train, 519 F.2d 287, 292 (D.C. Cir. 1975) ("plaintiffs are entitled to an opportunity to determine, by limited discovery, whether any documents which are properly part of the administrative record have been withheld"); *Public Power Council v. Johnson*, 674 F.2d 791, 793 (9th Cir. 1982) (Kennedy, J.) ("Although the agency may prevail as to its position of what should constitute the record upon review, there are compelling reasons to allow discovery at this stage, reserving for the panel on the merits the ultimate determination of what should constitute the record before the court."). Thus, even assuming *arguendo* that review on the CSRT hearing record is proper for some claims, Petitioners are entitled to discovery both: (1) to establish the grounds for supplementing the record, and (2) to obtain admissible evidence for presentation to the Court.

In *Esch v. Yeutter*, this Court explained that admission of extra-record information is particularly appropriate where—as here—the procedural validity of agency action is in dispute. 876 F.2d 976, 991 (D.C. Cir. 1989). The Court recognized a host of circumstances countenancing use of extra-record evidence to that end, including:

> (1) when agency action is not adequately explained in the record before the court; (2) when the agency failed to consider factors which are relevant to its final decision; (3) when an agency considered evidence which it failed to include in the record; (4) when a case is so complex that a court needs more evidence to enable it to understand the issues clearly; (5) in cases where evidence arising after the agency action shows whether the decision was correct or not....

Id. Notably, the Court held that "[c]onsideration of all relevant factors includes at least an effort to get both sides of the story." *Id.* at 993. Since *Esch*, the Court has articulated additional related bases meriting enlargement of the record, including: (1) the agency's deliberate or negligent exclusion of documents that may have been adverse to its decision, (2) the court's need for additional background information to ensure that the agency considered all of the relevant factors, and (3) the agency's failure "to explain administrative action [so] as to frustrate effective

judicial review." *James Madison Ltd. by Hecht v. Ludwig*, 82 F.3d 1085, 1095 (D.C. Cir. 1996); *see also Kent County v. EPA*, 963 F.2d 391, 396 (D.C. Cir. 1992) (exclusion of evidence adverse to the agency's position); *Commercial Drapery Contractors, Inc. v. United States*, 133 F.3d 1, 7 (D.C. Cir. 1998) (extra-record evidence is appropriate when there has been a strong showing of bad faith or improper behavior on the agency's part, or "when the record is so bare that it prevents effective judicial review"). The decision to allow extra-record evidence is a matter of the Court's discretion. *See Beach Communications, Inc. v. FCC*, 294 U.S. App. D.C. 377 (D.C. Cir. 1992) (court has discretion to supplement the record where it "needs more evidence to enable it to understand the issues clearly").

Given the nature of the CSRT process, there is every reason to believe that limited discovery will show that even if the court ultimately decides it will apply a record review standard, the "record" should not be merely the "Record of Proceedings" created by the Recorder. First, as set forth above, the CSRT Record of Proceedings may not include all of the evidence considered by the Tribunal, or it could include evidence not considered. Moreover, the hearing record comes nowhere close to presenting "both sides of the story." *Esch*, 876 F.2d at 991. Quite the opposite, Petitioners were entirely excluded from development of the evidentiary record before the Tribunals, and were not even given a meaningful opportunity to respond to the government's secret evidence. Even without the benefit of discovery, Petitioners have well-supported bases to question the reliability of the CSRT hearing records developed by Respondent.

Respondent's suggestion that the Court respect the integrity of the CSRT process is particularly incongruous given that, on a handful of occasions when the CSRT did not return an enemy combatant determination, Respondent manipulated the process by ordering a second

CSRT convened—and, in at least one case, a third—until the sought-after enemy combatant determination was obtained. *Parhat* Petn. ¶¶135-37. Now Respondent urges this Court to respect the integrity of the CSRT record and decision (or perhaps, in some cases, the second or third). Petitioners submit that the respect this process merits its self-evident. In these original actions, neither Petitioners nor the Court should be saddled with an inadequate and patently biased evidentiary record.[11] It is therefore essential that the Court enable Petitioners to discover specific additional evidence that will be important to the Court's effective review.

2. Petitioners are entitled to discovery in support of their claims that the CSRT proceedings were not conducted consistent with applicable procedures.

Under the DTA, Petitioners have the right to challenge their CSRT determinations on several grounds including that: (i) the CSRT determination is not supported by sufficient evidence, and (ii) the CSRT determination ensued from a proceeding that was not consistent with the CSRT standards and procedures. In adjudicating at least the second category of claims, the Court must look beyond the CSRT hearing record. The CSRT Order and Procedures set out detailed pre-hearing, hearing and post-hearing procedures. Respondent's compliance (or non-compliance) with the entire body of CSRT standards and procedures cannot be determined from the hearing record. *See supra* §A.3.c; App.15 § I(4).

In *McNary v. Haitian Refugee Center, Inc.* 498 U.S. 479, 496-99 (1991), the Supreme Court recognized the distinction between an individual's challenge to an administrative agency's decision and a claim that challenges the administrative agency's procedures. In *McNary,* the

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[11] Indeed, the Court has made clear that the extent of deference afforded to an administrative agency's adjudicatory record rests at least in part on the overall integrity of the administrative process. *See, e.g., Esch v. Yeutter*, 876 F.2d 976, 991 (D.C. Cir. 1989).

petitioner commenced an action in the Seventh Circuit seeking relief from an INS deportation order, among other things, "based on the claim that such [administrative agency] procedures do not allow applicants to assemble adequate records." *Id.* The Court observed that "administrative or judicial review of an agency decision is almost always confined to the record made in the proceeding at the initial decisionmaking level." *Id.* at 496. In that case, however, the Court recognized that the petitioner had asserted a colorable claim, but, based on the nature of the claim, the agency record unlikely would be sufficient to allow for meaningful review of the claim:

> [E]ven in the context of a deportation proceeding, it is unlikely that a court of appeals would be in a position to provide meaningful review of the type of claims raised in this litigation. To establish the unfairness of the INS practices, respondents in this case adduced a substantial amount of evidence, most of which would have been irrelevant in the processing of a particular individual application.

Id. at 497.

The CSRT procedures consist of thirty pages of memos and model forms. App.5-34. Together, the procedures establish the framework of the CSRT process—a process that includes much more than the CSRT hearing. In fact, the majority of the CSRT procedures address pre-hearing aspects of the CSRT, such as the collection of evidence bearing upon the detainee's status as an enemy combatant, the selection of evidence to be presented at the hearing, pre-hearing advice to the detainee about the nature of the CSRT process and the opportunity to contest his status as an enemy combatant, efforts to secure witness testimony, assistance (if any) to the detainee in obtaining exculpatory evidence, and advice to the detainee about the right to seek federal judicial review of the legality of his detention. The CSRT determination is not just the result of the hearing itself, but rather the culmination of all of the standards and procedures at work. Because the CSRT record by itself is an insufficient basis, as a matter of law, for claims

challenging Respondent's failure to abide by many of these procedures the Court necessarily will have to look beyond the CSRT hearing record to adjudicate such claims. Limited discovery is therefore appropriate to permit the development of such claims.

Bismullah and the *Parhat* Petitioners all assert claims that their CSRT proceedings were not conducted consistent with the CSRT standards and procedures. Counts 7 through 10 of Bismullah's Petition challenge inter alia compliance with such functions as the collection and presentation of evidence to the Tribunal, advice and assistance to Bismullah in connection with his CSRT, and evaluation of the legal sufficiency of the CSRT proceedings. For example, Bismullah alleges that the Recorder in his CSRT proceeding breached her duty to obtain and/or present to the Tribunal significant exculpatory evidence in the government's ready possession, including statements submitted to U.S. diplomatic and military officials in support of Bismullah's innocence. App.10 § (E)(3); App.14 § (H)(4). Bismullah has a right to reasonable discovery to ascertain whether this information was in fact within Respondent's possession at the time of Bismullah's CSRT, and if so whether it was obtained and improperly excluded from the evidence presented to the Tribunal. Likewise, Bismullah has a right to determine if reasonable efforts were made to secure the testimony of his brother, Haji Mohammed Wali. App.11 §F(6); App.13 §G(9). Although the Tribunal President concluded that Bismullah's brother would provide relevant testimony, he was deemed not reasonably available despite the fact that, as senior spokesman and aide for a provincial governor, he often participated in press conferences, including with Western media, and he can be located through a simple internet search.

Counts 2 and 3 of the *Parhat* Petition challenge inter alia compliance by Respondent and his subordinates with such functions as the collection and presentation of exculpatory evidence to the Tribunal and application of the CSRT standards and procedures to similarly situated

individuals. Specifically, Count 2 asserts that the Recorder failed to apprise Petitioners' CSRT Tribunals of statements made by military interrogators advising Petitioners of their innocence and imminent release at least as early as 2003.[12] Such exculpatory statements were almost certainly documented in Petitioners' interrogation files, and failure to introduce them as evidence would be a direct violation of CSRT procedures. App.17 §B(1). Count 3 of the *Parhat* Petition asserts that Respondent arbitrarily applied the CSRT standards so that men situated in the exact same position as the Petitioners were determined to be non-combatants while Petitioners were classified as enemy combatants. *Parhat* Petn. ¶¶ 163-69. This Count cannot be addressed without examination of the complete CSRT record for each of the eighteen identically-situated Uighur men.

The fact that these claims cannot be adjudicated on the CSRT hearing record alone means that—even if the Court were to determine ultimately that claims premised on the sufficiency of the evidence should be focused primarily on the CSRT hearing record—the Court would still have to permit Petitioners an opportunity to submit evidence outside that record in connection with these claims. And because all of the information bearing on these allegations is in the

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[12] Respondent has never denied that such statements were made to Petitioners, and indeed the public record supports the *Parhat* Petitioners' representations. *See, e.g.*, Shirley A. Kan, CONGRESSIONAL RESEARCH SERVICE, U.S.-CHINA COUNTERTERRORISM COOPERATION: ISSUES FOR U.S. POLICY (June 27, 2006), *available at* http://italy.usembassy.gov/pdf/other/RL33001.pdf ("Starting in late 2003, the Defense Department reportedly has determined without public announcement that 15 Uighurs at Guantanamo could be released.").

Furthermore, as described in the *Parhat* Petition, State Department officials have repeatedly acknowledged—even before the CSRT Standards and Procedures were promulgated—that the Uighurs at Guantanamo were eligible for release. *See* Tim Golden, *For Guantanamo Review Boards, Limits Abound*, N.Y. TIMES, Dec. 31, 2006, at A20 ("'We were shocked that they even sent [the Uighurs] before the C.S.R.T.'s,' said one former national security official who worked on the matter. 'They had already been identified for release.' Because the Uighurs told very similar stories, Pentagon officials were confounded when at least five of them were determined not to be enemy combatants and the rest properly held, officials said.").

exclusive possession of Respondent, limited discovery is integral to Petitioners' ability to exercise their full statutory right to review under the DTA.

3. Petitioners' Limited Discovery Requests

In order for Petitioners to litigate claims specifically provided for by the DTA, Petitioners request that the Court order Respondent to produce the following documents, all of which are directly relevant to their DTA claims and readily available to Respondent.

***Bismullah* Document Request**

- The complete Record of Proceedings for Bismullah's CSRT, including both classified and unclassified information;
- The Government Information provided to the Tribunal and/or the Recorder in connection with Bismullah;
- Any statements or letters in support of Bismullah submitted by Afghan public officials, government entities, and individuals to U.S. military or diplomatic officials, and correspondence regarding such statements;
- Any other documents relating to any phase of Bismullah's CSRT, including records, notes, memoranda and correspondence of the Tribunal members, Recorder, Personal Representative, or other person who participated in Bismullah's CSRT, including requests for information, requests to locate a witness for testimony, records reflecting the collection of evidence and selection of evidence presented to the Tribunal, and records reflecting preparation of the CSRT hearing record;
- Other reasonably available documents or information in the possession of the U.S. government bearing upon the issue of whether Bismullah meets the criteria to be designated an enemy combatant, including documents relating to his apprehension.

***Parhat* Document Request**

- The complete classified and unclassified record of all CSRTs relating to Petitioners;[13]
- The complete classified and unclassified record of all CSRTs conducted for the thirteen other Uighur men arrested alongside Petitioners in Pakistan;

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[13] Respondent has conceded that the CSRT hearing record is relevant. To date, however, Respondent has refused to make even the unclassified portion of the *Parhat* Petitioners' CSRT hearing records available to counsel.

- Records that discuss Petitioners' enemy combatant or non-combatant status or whether Petitioners are eligible for release from Guantánamo. Such records, on information and belief, were created at Kandahar and in Guantánamo, and are available in Petitioners' respective interrogation files, and in the State Department records created during its professed three-year effort to persuade foreign governments to grant asylum to each of the Uighurs;

- Records concerning the nature and activities of the so-called East Turkistan Islamic Movement ("ETIM"), including State Department admissions that, at all times prior to the *Parhat* Petitioners' capture, it was not a "terrorist organization," and any information concerning the government's decision to change ETIM's designation in or about August or September of 2002;

- Records regarding any alleged affiliation between Petitioners and ETIM, including any hearsay allegations received from the Chinese government;

- Records concerning the conduct of the Recorder, including records reflecting the Recorder's evidence gathering and communication with the tribunal; and

- Records concerning any visit by officials from the People's Republic of China to Guantánamo to interrogate any of the Uighurs arrested together in Pakistan, including Petitioners.

B. The Court Should Enter The Protective Order

There is no dispute that these cases involve sensitive information. All parties agree that a protective order is necessary. Petitioners urge the Court to adopt the same protective order that has governed attorney-client meetings and communication, and the handling of classified information in scores of district court Guantanamo cases. While Petitioners would never argue that the standard protective order is perfect, the enormous benefits of familiarity and uniformity counsel strongly in favor of its adoption in these cases. Respondent, in contrast, has drafted a new proposed protective order designed to hamper the attorney-client relationship and to hamper Petitioners' pursuit of their Congressionally-authorized claims.

On a motion for a protective order, the Court is required to properly balance the interests of the parties, preserving access to relevant information and protecting against risk of harm. *See, e.g., Diamond Ventures, LLC v. Barreto*, 452 F.3d 892, 898-99 (D.C. Cir. 2006); *United States v.*

Microsoft Corp., 165 F.3d 952, 959-60 (D.C. Cir. 1999). The protective order entered in the district court has governed detainees' interaction with counsel for two years. Because it adequately balances the government's national security concerns against Petitioners' need to access counsel and participate in their DTA actions, it should be entered here.

Respondent's proposed order does not balance the parties' interests. Instead it unacceptably interferes with the ability of Petitioners and counsel to prosecute these cases and places intolerable restraints on the attorney-client relationship by defining what topics Petitioners and counsel may discuss, allowing government review of privileged communications, limiting Petitioners to just three meetings with counsel, and allowing Respondent to unilaterally decide what relevant information counsel can review. The length and conditions of Petitioners' imprisonment already have gravely damaged the attorney-client relationship. A protective order that bars counsel from seeing relevant documents, permits the government to review attorney-client communications, and sets a cap of three meetings, would destroy whatever trust remains.

The government's proposal is an affront to the adversarial system. The Court should enter instead the Protective Order under which counsel, the government, and hundreds of others have operated since 2004.

1. Development of the Existing Protective Order

After months of negotiation, briefing, and argument, United States District Court Judge Green entered the predecessor to the Standard Protective Order in all Guantánamo detainee cases. *See generally Adem v. Bush*, 425 F. Supp. 2d 7, 10-12 (D.D.C. 2006) (describing the lengthy process by which the Standard Protective Order was created). On November 8, 2004, Judge Green entered an Amended Protective Order and Procedures for Counsel Access to Detainees at the United States Naval Base in Guantánamo Bay, Cuba. *See In re Guantanamo Detainee Cases*, 344 F. Supp. 2d 174 (D.D.C. Nov. 8, 2004). Judge Green twice clarified the

November 8, 2004, order. *See* Order Supplementing and Amending Filing Procedures Contained in November 8, 2004 Amended Protective Order in *In re Guantanamo Detainee Cases*, No. 02-0299, (D.D.C. Dec. 13, 2004); Order Addressing Designation Procedures for "Protected Information" in *In re Guantanamo Detainee Cases*, No. 02-0299, (D.D.C. Nov. 10, 2004). We refer to these three orders collectively as the "Standard Protective Order."[14] App.35-71.

The Standard Protective Order worked. Guantánamo prisoners filed over 200 *habeas corpus* actions in the district court, and it was entered in nearly all of them. The district court has developed expertise in handling disputes that arose under the order. *See* Order, *Kiyemba v. Bush*, No. 05-1509 (Nov. 2, 2005) (referring all motions under the Standard Protective Order to Magistrate Judge Alan Kay in all then-pending Guantánamo *habeas corpus* cases). Its contours have been explained and defined in numerous cases over the past two years.

The government says the existing regime should now be scrapped. Evidently the "unique national security needs presented by civilian visits to a secure military base and civilian communication with an alien detained by the military as an enemy combatant during a time of war" are now more compelling than they were two and a half years ago. *See* Opposition to Motions for Entry of Protective Order and for Order Setting Procedures and Cross Motion to Enter Protective Order and to Stay Proceedings ("Cross Motion") at 7, *Parhat v. Gates*, No. 06-1397 (D.C. Cir. Dec. 29, 2006). Petitioners merely seek entry of the very same protective order the government *defended* in the district court *more than a year after it had been in place*:

> The regime established by the Protective Order addresses the unique context of these cases, involving litigation on behalf of

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[14] The Standard Protective Order was entered in the *Parhat* Petitioners district court *habeas corpus* case. Bismullah does not have a district court *habeas corpus* case and the Standard Protective Order has not been entered as to him.

> individuals detained at a military facility in wartime....[T]he regime provides procedures for litigation filings and other matters in order to protect legitimate government security interests.
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> * * *
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> The Access Procedures ... recognize the fact that the detention setting is that of a secure military base and acknowledge the role of the military with respect to the detentions by reserving to military authorities prerogatives related to security and management of the detention facility.
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> * * *
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> The regime established by the Protective Order has been in place for over a year .... [It] was developed after extensive negotiations between counsel for the government and for petitioners in the habeas cases pending at the time, and after both briefing and a hearing before Judge Green.

Respondents' Opposition to Petitioner's Motion for an Order Amending Access Procedures Pertaining to Non-Enemy Combatants at 2-4, *Kiyemba v. Bush*, No. 05-1509 (D.D.C. Nov. 14, 2005).

The government's invocation of special national security concerns is particularly curious here. All but one of the *Parhat* Petitioners has been *approved for release* because the military determined that there is no need to detain them further.[15] App.276 ¶27. Bismullah, with U.S. support, fought against the Taliban and served in the Afghan government that is now a staunch U.S. ally. App.252-53 ¶¶1-4. Furthermore, Respondent does not suggest that counsel for these Petitioners has ever failed to live up to the letter and spirit of the existing Protective Order.[16]

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[15] One of the many ironies of the *Parhat* Petitioners' situation is that although they have been approved for release, they are now held in conditions of isolation so psychologically brutal as to be all but unknown in the U.S. penitentiary system.

[16] Indeed, they have been operating under the existing Protective Order for more than two years in other cases and have faithfully complied with all aspects of the Protective Order. Respondent does not contend otherwise.

We highlight the five most offensive aspects of Respondents' proposed protective order: provisions that (1) would terminate Petitioners' access to counsel after three meetings; (2) circumscribe the attorney-client privilege and attorney-client communications based on the government's view of how Petitioners should prepare their case; (3) permit the government to withhold relevant information—even information in the CSRT record—unless it determines that the Petitioners' counsel have a "need to know"; (4) effectively eliminate a Petitioner's right to proceed under "next friend" authority; and (5) give the government sole discretion to terminate Petitioners' access to counsel.

2. Petitioners' Access to Counsel Must Not Be Limited to Three Visits

a. As a Practical Matter, Petitioners Cannot Proceed Without Regular, Meaningful Access to Counsel.

Halfway around the world from their homes, the *Parhat* Petitioners are now living the sixth year of an indefinite imprisonment characterized by cruelty unprecedented in our history. Bismullah is in his fourth year of imprisonment. Almost none reads or speaks English. They have no legal training or knowledge of the U.S. legal system. They are forbidden access to newspapers, magazines, television, radio, or news of any kind. Limiting access to counsel under these circumstances would frustrate Petitioners' ability to pursue their DTA petitions. *Cf. Al Odah*, 346 F. Supp. 2d at 5-8 ("[I]t is simply impossible to expect Petitioners to grapple with the complexities of a foreign legal system and present their claims to this Court without legal representation. Petitioners face an obvious language barrier, have no access to a law library, and almost certainly lack a working knowledge of the American legal system.").

It is only through client visits that counsel can learn relevant facts. For example, it was only through client meetings that counsel for the *Parhat* Petitioners learned that at least three of their clients had been assured of their innocence by military personnel as early as 2003, and that

this evidence of innocence was not presented to their CSRT panels (at least not in their presence).[17] This information, if correct, shows a direct violation of the CSRT Procedures. It would never have been learned from the record to which Respondent would limit us. Because of the difficulty establishing—and maintaining—client trust, it will certainly require more than three visits with some clients to gather the relevant information.

Respondent says the government's proposal "allows for robust participation of counsel." Reply in Support of Motion to Stay Proceedings and to Enter Proposed Protective Order at 1, *Parhat v. Bush*, No. 05-1397 (Jan. 10, 2007). But the government has studiously avoided explaining a rational connection between a three-visit limit and "robust" attorney-client collaboration. The stakes here could not be higher: will innocent men be freed or incarcerated indefinitely? Imposing a limit on the number of counsel visits cannot be justified.[18]

b. An Arbitrary Cap On Attorney-Client Meetings Is Antithetical to the Attorney-Client Privilege.

The attorney-client privilege is "the oldest of the privileges for confidential communications known to the common law." *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). Its purpose is to "encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." *Swidler & Berlin v. United States*, 524 U.S. 399, 403 (1998); *see also Lanza v. State of N.Y.*, 370 U.S. 139, 143-44 (1962) ("[E]ven in a jail, or perhaps especially there, the

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[17] Respondent has not denied this assertion.

[18] The Standard Protective Order already recognizes the government's exclusive discretion as regards the operational needs of the base. *See* App.59 §X(A).

relationships which the law has endowed with particularized confidentiality must continue to receive unceasing protection.").

The Supreme Court stated in *Hamdi* that a Guantánamo detainee "unquestionably has the right to access to counsel in connection with [his *habeas corpus*] proceedings." 542 U.S. at 539 (2004). He unquestionably has the same right in pursuing the DTA cause of action Congress created for him. The notion that the government may decide how many times a Petitioner may meet with his lawyer is fundamentally at odds with the essence of the attorney-client relationship.[19] There is no justification and no precedent for giving the government such power.

c. Only Regular Personal Visits Can Preserve the Attorney-Client Relationship

At Guantánamo, trust is dying. Begin with this: how does a Petitioner even know we are his lawyers? The only evidence available to him is that (i) we say we are lawyers, (ii) we purport to be part of a justice system that in five years cannot organize even a simple merits hearing, (iii) we look, dress, and sound like his interrogators, and (iv) none of our efforts in court has amounted to anything real to him. Whether it is coincidence or not, each *Parhat* prisoner—even though all but one are approved for release—has seen the conditions of imprisonment profoundly degraded since his lawyers became involved. As a result of Respondent's refusal to permit additional visits, after meeting twice with Bismullah, counsel have not seen him for more than seven months or been able to explain their absence. At the threshold, then, trust—a fundamental prerequisite to effective representation—is exceedingly difficult to establish.

This challenge would be formidable enough if our clients were healthy and whole. But for four months, the *Parhat* Petitioners' minds have systematically been brutalized through an

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[19] The government does not propose that its counsel would operate under any similar disability.

unaccountable new regimen of isolation. Petitioners are held in Guantánamo's newly constructed super-max prison, "Camp 6," where they are confined, alone, to 6' x 10' metal cells for twenty-two hours a day. App. 269 ¶¶12.[20] They have no companions, no social activity, no mental stimulation, and no natural light or air. App.270 ¶15. From these cells, Petitioners cannot communicate with other prisoners. App.271 ¶17. They are offered two hours during each twenty four (which regularly is at night, sometimes after midnight) in a 3 x 4 meter chimney in Camp 6. App.272 ¶19; App.273-74 ¶22. This is called, without a trace of irony, "rec time." The prisoner is alone in the recreation chimney. App.273-74 ¶22. However, for this time (and only this time) he may actually talk to another human being, albeit through a mesh fence. App.273-74 ¶22.

Previously, Petitioners were held in communal bunkhouses, and although held apart from the world, at least stayed sane through companionship. App.276 ¶27. Since early December, 2006, they have been in Camp 6's crushing isolation. The conditions in which Petitioners are now imprisoned violate every law and treaty governing the treatment of prisoners of war, and are far harsher than the conditions in which even the most hardened criminals are kept. App.269-75 ¶¶14-26. Some Petitioners show signs of deep psychological injury.[21] App.277-79 ¶¶30-42.

This same regimen of solitary confinement was used by North Korea against U.S. airmen in the 1950s, and also by the Soviet KGB. Marine Colonel Frank C. Schwable, a U.S. airman shot down in 1952, was not physically tortured, but after fourteen months of isolation confessed

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[20] Because counsel for Bismullah has not been able to communicate with him, they do not know if he was also transferred to Camp 6.

[21] During a meeting with counsel in January, Petitioner Abdusamet reported hearing voices in the solitude of his cell. App.275. He had been in Camp 6 for just one month.

to a fanciful germ warfare plot, later describing the "utter, hopeless despair" that proceeded from his isolation. *See generally* Raymond Lech, BROKEN SOLDIERS (U. Ill. Press 2000); *Text of Inquiry Finding on Marine Col. Schwable and Commentary by Defense Officials*, N.Y. TIMES, Apr. 28, 1954, at 16 (reprinting UNITED STATES MARINE CORPS, COL. FRANK H. SCHWABLE CASE, MARINE CORPS COURT OF INQUIRY, FINDINGS NUMBER 57 (Apr. 27, 1954)).

After the abuse of Colonel Schwable came to light in 1953 (and was roundly denounced by the United States), the Department of Defense commissioned studies of the physiological effects of isolation. *See* Lawrence E. Hinkle, Jr. & Harold G. Wolff, COMMUNIST INTERROGATION AND THE INDOCTRINATION OF "ENEMIES OF THE STATES" (1956), *cited in* Stuart Grassian, *Psychiatric Effects Of Solitary Confinement*, 22 WASH. U. J. L. & POL'Y. 325 (2006) ("Grassian"). Like Camp 6, the KGB facilities contained cells approximately six by ten feet in size, where the prisoner was isolated for at least 22 hours a day. Grassian at 380-81. The Department of Defense's studies noted the effect of isolation:

> The period of anxiety, hyperactivity, and apparent adjustment to the isolation routine usually continues from one to three weeks. As it continues, the prisoner becomes increasingly dejected and dependent. He gradually gives up all spontaneous activity within his cell and ceases to care about personal appearance and actions. Finally, he sits and stares with a vacant expression, perhaps endlessly twisting a button his coat. He allows himself to become dirty and disheveled. . . . Ultimately he seems to lose many of the restraints of ordinary behavior. He may soil himself. He weeps; he mutters. . . . It usually takes four to six weeks to produce this phenomenon in a newly imprisoned man.

Grassian at 381. The report continued, "[the prisoner's] sleep is disturbed by nightmares. . . . In this state the prisoner may have illusory experiences." *Id.*

A psychiatrist who has personally observed more than two hundreds persons held in solitary confinement, Dr. Grassian concludes, "for many of the inmates so housed, incarceration

in solitary caused . . . the appearance of an acute mental illness in individuals who had previously been free of any such illness." Grassian at 333.

In the nineteenth century, various prison systems experimented with isolation. The Supreme Court noted the results:

> A considerable number of prisoners fell, after even a short confinement, into a semi-fatuous condition, from which it was next to impossible to rouse them, and others became violently insane; others, still, committed suicide; while those who stood the ordeal better were not generally reformed, and in most cases did not recover sufficient mental activity to be of any subsequent service to the community.

In re Medley, 134 U.S. 160, 167-68 (1890).

The deliberate destruction of our clients' minds by the Department of Defense further burdens the attorney-client relationship. Trust may now be impossible; without repeated personal visits it certainly will be gone. If the Court limits access to our clients, it will have ensured that they will never effectively present their case.

d. Client Access is Needed to Explain the Ever-Changing Rules and Respondent's Efforts to Avoid A Hearing

For five years the Respondent has avoided a public hearing on the merits of any claim by a Guantánamo detainee. The government has sought stay after stay. On the eve of rare merits hearings, it has sought to moot them by transferring prisoners out of the jurisdiction. *See, e.g.*, Emergency Motion to Dismiss as Moot, *Qassim v. Bush*, No. 05-5477 (D.C. Cir. May 5, 2006). The Executive has backed two pieces of legislation to hamstring review. Whatever the effect of such legislation, each has spawned more briefing and procedural delay.

These issues cannot be addressed on a cold sheet of law firm letterhead delivered by a guard to a client in his isolation cell.[22] As with any client relationship, there is a process of question and answer, discussion and follow-up. Because the rules are continually changing through judicial and legislative action, counsel must have the flexibility to meet with the Petitioners to explain the changes.

3. Petitioners are Entitled to Meaningfully Correspond with Counsel through Legal Mail

Under the existing Standard Protective Order, "Legal Mail" protected from government review is defined as "[l]etters written between counsel and a detainee that are related to the counsel's representation of the detainee, as well as privileged documents and publicly-filed legal documents relating to that representation." App.51 §IV. The government is not permitted to review privileged communications between counsel and client. App.54-55 §IV.

The Standard Protective Order already imposes constraints. The hallmark of the existing scheme is counsel's obligation to abide by the specific limitations contained in the order, specifically the prohibition on disclosure of classified information and details of current events "that are not directly related to counsel's representation of [the] detainee." App.43 ¶29; App.55 §IV(A)(7). Counsel for these Petitioners have faithfully met this obligation.[23] There is no legitimate argument that any other procedure is necessary beyond the procedure that has governed the parties here for more than a year.

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[22] As described below, these issues would not even constitute privileged attorney-client communications under the Government's proposed new protective order.

[23] Counsel for Petitioners have been operating under the existing protective order for more than two years in other cases and have faithfully complied with all aspects of the existing order. Respondent does not contend otherwise.

Respondent would limit "Legal Mail" to "documents and drafts of documents that are intended for filing in this action and correspondence directly related to those documents that – (i) are directly related to the litigation of this Detainee Treatment Act action; (ii) address only (a) those events leading up to this detainee's capture or (b) the conduct of the CSRT proceeding relating to this detainee." App.78-80 §2(J). However, even privileged mail would be screened by the government. App. 80-81 §4(A); App.104-11 §13(A). Anything the "DoD Privilege Team" deems not to fall within the narrow definition of "Legal Mail" is subject to redaction. App.106-07 §13(A)(iv).

This proposed system unjustifiably prohibits counsel from communicating to Petitioners on a truly privileged basis essential information and advice relevant to their claims. For example, the restriction would prevent counsel from providing a Petitioner with a copy of the DTA, the Military Commissions Act of 2006, a Congressional debate regarding Guantánamo, information concerning possible asylum in another country, or a court opinion from another case, without first allowing Respondent to review and redact it. App.80 §2(K); App.106-07 §13(A)(iv). The proposed order would constrain counsel from freely communicating to Petitioners matters that counsel in good faith determine are germane to their imprisonment, or how to end it (judicially, diplomatically, politically, or legislatively). Written communications concerning statements by government officials about Petitioners' innocence, if not made in the CSRT proceeding, would be stripped of the privilege. The provision would prohibit correspondence concerning compliance with the proposed protective order itself. This is only the beginning of the list of ordinarily privileged communications that would be subject to Government review and censorship. An order imposing this regimen would be a confession that there is no legal representation at Guantánamo.

4. Petitioners Counsel Must be Afforded Access to Protected Information

Under the existing Standard Protective Order, Petitioners' counsel "are presumed to have a 'need to know' information both in their own cases and in related cases." App.43 ¶29. The existing Order permits counsel for Respondent to "challenge the 'need to know' presumption on a case-by-case basis for good cause shown." App.43 ¶29.

Respondent now proposes providing classified material "only if the government determines that there is a 'need-to-know.'" Cross Motion at 10. Thus, if the government in its discretion determines that Petitioners do not "need to know" whatever is in the classified record, Petitioners' counsel will have no way to respond to it. Are Petitioners designated as enemy combatants on the basis of hearsay? We may never know. Are they held on suspicion of affiliation with an organization the U.S. State Department said was not a terrorist organization in December, 2001? If we don't know what the organization is, we can't say. The proposal permits Respondent to deny Petitioners and the Court crucial evidence. This would make a mockery of the adversary process.

To duck this obvious shortcoming, Respondent suggests that this Court should review classified material *ex parte, in camera*. But even *in camera* review by a conscientious court cannot replace the judgment of counsel who are preparing the Petitioners' cases with the benefit of years of background, research, analysis of the facts and issues presented here, and an advocate's view of the case. The provision would require the *Court* to act as Petitioners' advocate, to decide what is and what is not relevant to Petitioners' claims. Alternatively, it requires the Court to rely on the Government's assessment of what is relevant to Petitioners' claims. Neither alternative is acceptable.

Furthermore, the Court need not be burdened with *in camera* review, as Respondent has produced no evidence of any danger created by permitting counsel with security clearances

(which these counsel have) to access classified information, when these counsel have had access to classified information in other cases for more than two years with no problems.

5. DTA Petitioners Must Be Permitted to Proceed Through Next-Friends

Respondent's proposed order effectively eliminates the right of a next friend to prosecute a DTA action. It would allow an action to be commenced by a next friend, but prohibit its prosecution. App.101-02 §10. Counsel would be denied access to classified information, legal mail, and to the detainee unless counsel obtains from the detainee an authorization of representation. App.101-02 §10. As a practical matter, this will simply eliminate next friend cases. The prisoners have been systematically destroyed psychologically. Some may never sign any formal authorization, and it is implausible to think any would do so without multiple personal meetings to establish trust.[24]

Respondent's proposed order also offends the plain language of the DTA, which expressly authorizes an action under the DTA "by *or on behalf of* an alien" and must be given its plain meaning. DTA § 1005(e)(2)(B) (emphasis added); *see also Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992) ("We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there."). The standing of a next friend to pursue a claim on behalf of a real party in interest, who is inaccessible or physically or mentally incapacitated, or who otherwise suffers from an impediment to exercise free will or judgment, holds an important and well-established

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[24] The district court recognized in its protective order—which Respondent has consented to have entered in many cases—that counsel's first visit occurs under conditions unlikely to be conducive to the establishment of trust necessary for a detainee to comfortably execute an authorization. *In re Guantanamo Detainee* Cases, 344 F. Supp. 2d at 185 ("The Court recognizes that counsel may not be in a position to present ... evidence [of authority to represent a detainee] after the initial meeting with a detainee.").

substantive right at common law. *See Whitmore v. Arkansas*, 495 U.S. 149, 161-63 (1990); *Adem*, 425 F. Supp. 2d at 11 & n.6. A next friend is entitled to "stand[] in the shoes of the real party in interest throughout the entire litigation when the real party in interest is unable to represent himself." *Adem*, 425 F. Supp. 2d at 11.

6. Petitioners Cannot Unilaterally be Denied Counsel Access

Respondent's proposed protective order would vest in Respondent the authority "unilaterally" to terminate counsel's right to visit Petitioners, to use the legal mail, to see classified information, and any other right or benefit available under the terms of the protective order. App.98-99 §8(B). Respondent offers no explanation as to why this power should be available without judicial order. Each attorney who receives a security clearance is asked to sign a memorandum of understanding which prohibits divulging, publishing, or revealing by word, conduct, or other means, any classified documents without authorization to do so. We are subject to contempt of court and criminal prosecution for improperly disclosing classified information. A violation of the existing order by counsel would be a deeply serious infraction, which this Court would undoubtedly punish swiftly and effectively.

7. Entry of the Standard Protective Order Would Promote Uniformity and Judicial Efficiency

Entry of the Standard Protective Order here will ensure uniformity, and provide familiar and efficient procedures in this case. The Standard Protective Order has been in place for over two years while the Guantánamo detainee habeas cases have been pending. Hundreds of attorney visits, not to mention innumerable letters and pages of presumptively-classified attorney notes, have all been handled under its provisions. All parties are familiar with the system. The implementation of the Standard Protective Order provides a uniform set of rules that are familiar and efficient.

C. The Court Should Appoint a Special Master

The best and most efficient way to manage this case is for the Court to appoint a special master pursuant to Rule 48 of the Federal Rules of Appellate Procedure. The rule provides the proper framework for resolving discovery disputes and, if necessary, resolving factual disputes. *See* FED. R. APP. P. 48 advisory committee notes ("[W]hen factual issues arise in the first instance in the court of appeals . . . it would be useful to have authority to refer such determinations to a master for recommendation."). Rule 48 authorizes the Court to appoint a special master to hold hearings, order discovery and make factual findings on matters ancillary to proceedings before the Court. *See, e.g., Int'l Union of Operating Engineers, Local 465 v. NLRB*, No. 99-1189, 2003 U.S. App. LEXIS 18444 (D.C. Cir. May 19, 2003).

In addition to Rule 48, "[c]ourts have . . . inherent power to provide themselves with appropriate instruments required for the performance of their duties." *In re Peterson*, 253 U.S. 300, 312 (1920); *see also FCC v. ITT World Commc's, Inc*, 466 U.S. 463, 469 (1984) (prior to adoption of Rule 48, recognizing Circuit Court's power to appoint special master); *Oil, Chemical & Atomic Workers Int'l Union v. NLRB,* 547 F.2d 575, 579 (D.C. Cir. 1977) (appointment of special master pursuant to Federal Rule of Civil Procedure 53).

A special master has resources not readily available to the Court, such as the ability to more readily hold hearings on short notice, request supplemental briefing, and participate in conferences with the parties. By appointing a special master, the Court can benefit from the recommendations of an independent judicial officer, while retaining the power to resolve all issues, including the power to reject the special master's recommendations when warranted.

A special master would be ideally situated to address disputes under the Standard Protective Order. The district court coordinated all the creation of the now-standard protective order before a single judge, who closely supervised a four-month process of intense negotiations

and litigation. Following entry of its Standard Protective Order, frequent judicial supervision and intervention has been required, often on an expedited basis. The demand for judicial attention, the number and complexity of issues, and the need for consistency led the district court to refer administration of the Standard Protective Order to Magistrate Judge Kay.

Magistrate Judge Kay is uniquely qualified for appointment as a special master because of his substantial experience overseeing the district court Standard Protective Order. Magistrate Judge Kay has been called upon to resolve significant questions relating to the Standard Protective Order, and has often done so on short notice. At present, the Standard Protective Order reflects the comprehensive procedures for all aspects of counsel access to detainees and classified information. All parties involved in those processes—including detainee counsel, Department of Justice counsel, Judge Advocate General counsel, Guantánamo military personnel, court security officers, and the staff at the secure facility—look to Magistrate Judge Kay as an expert in these matters.

CONCLUSION

For the reasons set forth herein, Petitioners respectfully request that the Court issue orders in their respective cases:

1. adopting the following orders: (a) Amended Protective Order and Procedures for Counsel Access to Detainees at the United States Naval Base in Guantanamo Bay, Cuba, *In re Guantanamo Detainee Cases*, 344 F. Supp. 2d 174 (D.D.C. Nov. 8, 2004); (b) Order Supplementing and Amending Filing Procedures Contained in November 8, 2004 Amended Protective Order, *In re Guantanamo Detainee Cases*, No. 02-0299, *et al.*, (D.D.C. Dec. 13, 2004); and (c) Order Addressing Designation Procedures for "Protected Information," *In re Guantanamo Detainee Cases*, No. 02-0299, *et al.*, (D.D.C. Nov. 10, 2004);

2. granting limited, essential discovery, including immediate production of the classified and unclassified CSRT record, and other documents requested above;

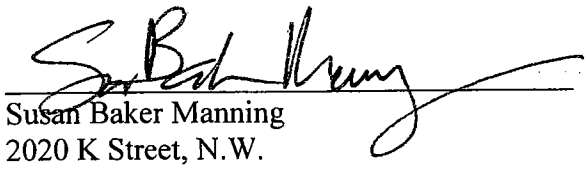
3. appointing a special master to resolve issues concerning the protective order entered in these cases, discovery, and, if necessary, factual disputes; and

4. establishing case management deadlines such that the merits of Petitioners' cases can be decided prior to the Court's July recess.

March 26, 2007

Respectfully submitted,

BINGHAM McCUTCHEN LLP



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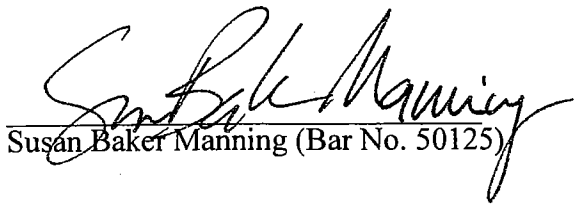
CERTIFICATE OF COMPLIANCE

I, Susan Baker Manning, hereby certify that, based upon the word and line count of the word processing system used to prepare this brief, the brief contains 12,480 words.

Susan Baker Manning (Bar No. 50425)

CERTIFICATE OF SERVICE

I certify that, on this 26th day of March, 2007, I served the foregoing Brief of Petitioners on the Respondent's counsel of record by causing copies to be sent by hand to Robert M. Loeb, Attorney, Appellate Staff, Civil Division, Room 7268, Department of Justice, 950 Pennsylvania Avenue, N.W., Washington, D.C. 20530-0001.



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