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July 9, 2007

Catherine Hancock, Esq.
Attorney, Appellate Staff
Civil Division, Room 7236
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530

Re: **Paracha v. Gates, No. 06-1038 (D.C. Cir.)**

Dear Catherine:

I am writing pursuant to FRAP 30(b)(1) to designate portions of the record for purposes of the Joint Appendix. I also write to call your attention to certain items that should be included in the CSRT "record" as certified by Respondent.

First, however, I wish to explain our understanding of what constitutes the record before the Court in this case. In our view, this proceeding is not a "review . . . of an agency order" within the meaning of FRAP Title 16. It is an original proceeding "to determine the validity of [a] final decision of a [CSRT] that an alien is properly detained as an enemy combatant." DTA § 1005(e)(2)(A). In our view, DTA review is *de novo* and plenary, and not limited to the CSRT "record." Because only a small fraction of the evidence needed to determine the validity of the CSRT's decision has been produced, the Joint Appendix for purposes of FRAP 30(a)(1) will necessarily be incomplete.

The DTA requires the Court to determine whether the CSRT's decision is "supported by a preponderance of the evidence." DTA § 1005(e)(2)(C)(i). This language does not limit the universe of evidence that the Court is to consider to the CSRT "record." The DTA also requires the Court to determine whether the detainee has been afforded a fair opportunity to rebut "the presumption in favor of the government's evidence." *Id.* A detainee who was denied access to all adverse evidence before the CSRT has not had a fair opportunity to rebut that presumption.

We believe that review under DTA § 1005(e)(2) requires, at a minimum, that (1) the Court review *all* evidence in the government's possession that may be relevant to a decision "that an alien is properly detained as an enemy combatant;" (2) the detainee be afforded access to *all* such evidence in order to rebut, if possible, the "presumption in favor the Government's evidence;" and (3) the detainee be afforded an opportunity, with the assistance of counsel, to present evidence in his favor. In our view, any more limited construction of DTA review – and any review more limited than habeas review – would render the statute unconstitutional.

For these reasons, we construe the "certified index to the record" filed by the government on June 25, 2007, as a designation under FRAP 30(b)(1), not a submission under FRAP 16. For

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his part, Petitioner intends to include in the Joint Appendix under FRAP 30(b)(1) at least the following unclassified materials included in the certified record submitted by the government: Record Item Nos. 1, 2, 5, 6, 8, 9, 11, 13-16, 26.

In specifying this information, Petitioner reserves the right to supplement the record before the Court, by discovery or otherwise, as the Court may permit in its forthcoming decision in *Bismullah* and *Parhat* or as otherwise permitted by the Court or the Supreme Court. Also, as you know, Petitioner has moved to strike all classified documents included in the CSRT "record" if the government will not allow Petitioner and his counsel to review them in unredacted form.

Please provide a complete copy of the CSRT "record" for our review as soon as possible. As I discussed with you earlier today, certain documents, such as the Recorder's exhibit list (Record Item No. 10) and the tapes of the classified and unclassified portions of the CSRT proceedings, are missing from the factual return provided to us in Petitioner's habeas case. Please provide those items, and let us know how we may review the tapes of Petitioner's CSRT proceeding, which you have indicated are not playable on conventional tape recorders. Finally, you have omitted from the government's certified record the transcript of Petitioner's CSRT proceeding, which was included with the government's factual return in his habeas case. Please confirm that the government's certified record shall include this transcript. We plan to include the transcript in the Joint Appendix.

Please promptly let us know of any request we have made that you do not intend to honor.

Very truly yours,



Jason M. Knott