[ORAL ARGUMENT HELD ON MAY 15, 2007]

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

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

PETITIONERS' JOINT OPPOSITION TO RESPONDENT'S MOTION FOR LEAVE TO FILE *EX PARTE/IN CAMERA* TOP SECRET-SCI DECLARATIONS FOR JUDGES' REVIEW ONLY

Petitioners respectfully submit this opposition to Respondent's motion for leave to file Top Secret-SCI declarations.[1] The *Bismullah* and *Parhat* Petitioners have no objection to the particular procedures proposed by Respondent for the handling of Top Secret classified information. Petitioners rather object to Respondent's request to support its Petition for

[1] Petitioners do not oppose Respondent's simultaneously filed Motion to Expedite Review of Rehearing Petition and Any Subsequent Proceedings.

Rehearing and Hearing En Banc with secret evidence.

The Government promulgated the CSRT regulations that require it to collect and compile the Government Information in 2004, and the first motion in these proceedings for access to the Government Information was filed in August 2006. Thus, the issues presumably covered in the Top Secret declarations have been before the Court and the parties for over a year. While the matter was being briefed and argued, the Government decided not to submit declarations regarding the impact of compiling the Government Information. To the contrary, it maintained that the Government Information had already been compiled in a routine process entitled to a presumption of regularity.

The Government's attempt to file Top Secret declarations at this late date not only is inconsistent with prior representations, but unnecessarily threatens Petitioners with unfair prejudice and burdens the Court with a one-sided process. If the Government had timely filed the Top Secret declarations, Petitioners' counsel would have been able to request upgrades to their security clearances and thus be able to review and respond to the declarations. Alternatively, Petitioners might have been able to seek a lesser classified version of the declarations, or the Government, even at this late

date, on its own could have filed a lesser classified version of the Top Secret declarations. But none of those options is available absent significant delay—meaning continued imprisonment at Guantanamo—a penalty that Petitioners should not be forced to suffer for the Government's delinquency or litigation strategy. The Top Secret declarations therefore should not be allowed.

1. The DTA Was Intended To Provide Detainees A Process For Challenging Secret Evidence Used In CSRTs.

Three years ago, Petitioners were haled before a Combatant Status Review Tribunal ("CSRT") and, on the basis of secret evidence, deemed to be enemy combatants.[2] The DTA process is designed to afford Petitioners a meaningful opportunity to examine through an open, adversarial proceeding, whether Respondent complied with its own regulations, including the regulations that required the Recorder to review "Government Information," and cull and present both the "Government Evidence" and all exculpatory evidence to the CSRT. Though Petitioners still cannot see any classified

[2] Hammad Memet, a petitioner in *Parhat*, was initially determined by his CSRT to be a noncombatant. That determination was later reversed, apparently due to command pressure. Because the Government has refused to disclose any classified information, it is unknown whether the other petitioners initially were determined to be noncombatants and were subject to "do-overs" like Mr. Memet and several other detainees.

evidence—and all of the evidence against them is classified—their security-cleared counsel are supposed to be allowed access to the classified evidence. Yet six weeks after the Court entered the Protective Order, Respondent has not produced a single classified document. In fact, Respondent still refuses to allow Petitioners' counsel to see even the *CSRT record of hearing*—which Respondent filed with the Court months ago—despite having represented that it would provide copies to Petitioners' counsel as soon as a Protective Order was entered.

Respondent now asks the Court to consider new declarations that will be kept secret from Petitioners' counsel, and on the basis of that secret evidence, grant a rehearing and determine that Respondent may restrict the scope of review in DTA proceedings in order to keep secret all other evidence apart from the CSRT record of hearing. Respondent's motion for leave should be denied. The secrecy imposed upon Petitioners during their CSRTs should not be extended to Petitioners' security-cleared counsel in proceedings before this Court.

2. The Court Should Not Rely On Evidence Relating To These Specific Petitioners If Petitioners' Counsel Is Not Allowed To See That Evidence.

Petitioners' counsel have a compelling need to know the contents of

any declaration relating to these specific Petitioners. The Government seeks to be excused from affording the Court any review of the Government Information that it was required to collect under its own CSRT regulations. The Government's other declarations fail to identify any particular burden or risk of harm that might accrue if the Government were required to compile the Government Information relevant to the eight specific Petitioners in these actions—indeed, they make no mention of any petitioner in the present action.[3] The Government has acknowledged that it has no reason to believe that Petitioners' counsel in these proceedings would not abide by the Protective Order in these cases or otherwise disclose classified and sensitive information. *See* Opinion on Motions, at 19 (July 20, 2007) ("the Government does not suggest counsel for the present petitioners" violated the protective order entered in habeas cases). Thus, there is no basis to conclude that disclosure of the Government Information to counsel in these proceedings would pose any risk to national security. Similarly, the

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[3] The unclassified declarations address a vague burden and risk to national security if the Government were required to compile the Government Information in 130 DTA cases, but in those declarations, it is not clear whether those concerns arise from the cumulative impact of compiling Government Information in 130 cases, or whether those concerns are related to certain specific detainees among those 130 cases such as, for example, the so-called "high-value detainees."

Government has not contended that the volume of documents *in the cases of these specific Petitioners* is substantial or difficult to collect; indeed, Petitioners' specific backgrounds suggest that the Government is unlikely to have substantial volumes of information about them. In addition, we have attempted to minimize the Government's burden by suggesting where the Government might look for exculpatory information.[4]

Since the unclassified declarations are silent on the point, the classified declarations are the only possible source of evidence that might relate *to these Petitioners*, by showing the alleged burden and risk to national security that might result if the Government were required to compile the Government Information in these specific cases.[5] Petitioners

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[4] Entirely missing from this record is what one usually sees in good-faith burden disputes—a showing by the withholding party of what it has been able to locate and is prepared to disclose. More than a month ago, the *Parhat* petitioners pointed the Government to interrogation logs from 2003 (in which interrogators congratulated Petitioners on their innocence and imminent departure), and state department statements made to foreign governments (and thus likely unclassified) regarding petitioners' innocence (which are believed to exist in light of Respondent's claims to have attempted to resettle petitioners). *See* Petitioners' Emergency Motion for Entry of Scheduling Order and Request for Expedition ¶ 8 & Exs. 1-8, *Parhat v. Gates,* no. 06-1137 (D.C. Cir. Aug. 15, 2007). These items are discrete, pre-date the CSRTs and are easily located. Respondent has never responded regarding these items. More generally, it has made no effort to narrow disputes by advising Petitioners' counsel of what it has gathered and allowing counsel to view the same.

[5] Petitioners' counsel requested access to the unredacted version of FBI Director Robert S. Muller's declaration, which includes information classified as "secret," on the same day it was filed, September 7, 2007. At approximately 1:15 p.m. on

should not be wholly deprived of any idea of the substance of the only evidence that relates specifically to them, particularly when the Government's delinquency or strategy is the reason for Petitioners' handicap.[6]

3. The Government Should Be Precluded From Relying On Top Secret Declarations That Are Inconsistent With The Government's Prior Factual Representations.

The Government's motion for leave to file the Top Secret declarations should be denied to the extent that the Top Secret declarations are inconsistent with the Government's prior factual representations. In the briefing, the Government consistently represented that the Recorder had collected the Government Information, and that the process of compiling the Government Information and identifying relevant and exculpatory evidence was such a routine and administrative task that the Court should presume it

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September 12, 2007, the government informed counsel that it was available for their review in the secure facility in Arlington, Virginia. Counsel have not, therefore, been able to review the classified version of Director Muller's declaration prior to filing this Opposition.

[6] If the Top Secret declarations do not contain *any* information relating specifically to the Petitioners in these proceedings, then they are entirely irrelevant. Petitioners' right to meaningful review in their proceedings cannot be sacrificed because of vague concerns about the ostensible burden of collecting documents or perceived risk to national security if the Government were required to compile the Government Information in *other* cases.

had been correctly done.[7]

In retrospect, it is incredible that the Government has ever argued—and indeed maintains today—that the CSRT proceedings are entitled to a presumption of regularity. The story of what actually happened in the CSRTs seems to change with every new declaration. In its briefing, the Government did not suggest that the Government Information had not been collected. Nor did it do so in oral argument, although it did admit that the proverbial "box of documents" might not exist. *See* Transcript of Oral Argument at 39-40 (May 15, 2007). Only after oral argument, when the Government moved for leave to file the Declaration of Admiral McGarrah, did it advise that this material was not easily recoverable. *See* Mot. for Leave to File Decl. at 2 (June 1, 2007). Now, months after the Court's decision relying on this record, the Government reiterates that the Government Information was not collected and contends that the burden of

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[7] The Government represented that the "recorder's role of gathering reasonably available information . . . is routine and subject to the strongest presumption of regularity. That role does not encompass an investigation, but simply collecting files "generated in connection with the initial determination to hold the detainee, and any subsequent review of that determination." Respondent's Reply In Support of Motion to Stay Proceedings and to Enter Proposed Protective Order at 4, *Parhat v. Gates*, no. 06-1397 (D.C. Cir. Jan. 10, 2007) (internal quotations omitted). *See also* Respondent's Opp. To Motion to Compel at 5 n.5, *Bismullah v. Gates*, no. 06-1197 (D.C. Cir. Aug. 21, 2006) ("Recorder simply compiles relevant material that is reasonably available in government files").

now doing in eight cases what it earlier claimed to have done in 558 cases will work a profound harm on the Government. *See* Pet. for Reh'g, at 6-11. The facts at issue—whether the Government ever compiled the Government Information and the circumstances of collecting it—always have been within the exclusive possession of the Government, and certainly not difficult for the Government to ascertain. The Government was afforded a fair opportunity to argue, based on the facts its represented to the Court, that it should be entitled to withhold the Government Information from Petitioners' counsel. The Government should not be allowed a second chance to present its argument, this time based on a newly-minted set of facts that contradict the Government's previous representations, and that are completely shielded from Petitioners' counsel. Thus, to the extent that the Top Secret declarations are inconsistent with the Government's prior representations relating to the compilation of the Government Information, the Government's motion for leave should be denied.

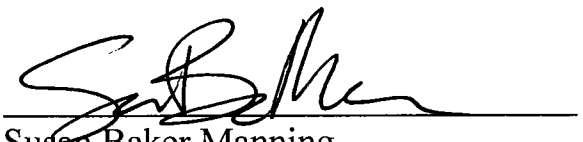
Conclusion

For the foregoing reasons, the Government's motion to file *ex parte/in camera* declarations for judges' review only should be denied.

September 12, 2007

Respectfully submitted,

BINGHAM McCUTCHEN LLP



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