

[NO ARGUMENT SCHEDULED AT THIS TIME]

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

HAJI BISMULLAH, et al.,

Petitioners

ROBERT M. GATES,
Secretary of Defense

Respondent

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) No. 06-1197
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**NOTICE OF NEW CSRT HEARING AND
MOTION TO REMAND, OR, IN THE ALTERNATIVE,
TO HOLD IN ABEYANCE**

On May 1, 2008, on the basis of new evidence, the Deputy Secretary of Defense directed that a new Combatant Status Review Tribunal (“CSRT”) be convened to consider petitioner Haji Bismullah’s enemy combatant status. *See* Declaration of Frank Sweigart, ¶ 4 (Exhibit A). Given the determination to hold a new hearing, the CSRT decision that forms the basis of the instant petition for review is now non-final for purposes of judicial review. Upon completion of the new CSRT, petitioner, if found to be an enemy combatant, may seek review in this Court of the new CSRT ruling based upon the new record compiled for that proceeding.

Accordingly, this Court should enter an order remanding Bismullah’s case to the agency. In the alternative, the Court should hold Bismullah’s case in abeyance pending completion of the new CSRT proceeding.

As we note below, the determination to hold a new hearing for petitioner in this case does not render moot or otherwise disturb this Court's earlier rulings in this case (*Bismullah v. Gates*, 501 F.3d 178, 503 F.3d 137 (2007)). Those rulings were rendered not just in regard to petitioner here, but also were filed with respect to seven other party-detainees (Huzaiifa Parhat (No. 06-1397), Abdusabour (No. 07-1508), Abdusement (No. 07-1510), Jalal Jalaldin (No. 07-1510), Khalid Ali (No. 07-1511), Sabir Osman (No. 07-1512), Hammad, No. 07-1523)), whose CSRTs remain final.

1. The Detainee Treatment Act of 2005 ("DTA"), Pub. L. No. 109-148, 119 Stat. 2680, directs the Secretary of Defense to promulgate procedures that, among other things, "provide for periodic review of any new evidence that may become available relating to the enemy combatant status of a detainee." DTA, § 1005(a)(1) & (3). On May 7, 2007, the Office of Administrative Review for the Detention of Enemy Combatants ("OARDEC") issued Instruction 5421.1 (Exhibit B hereto). The Instruction "creates a unified procedure for the submission of new evidence relating to a Guantanamo detainee's [enemy combatant] status * * *." See Instruction ¶ 1. The Instruction provides that a detainee may "submit evidence that is new and relates to the detainee's [enemy combatant] status" directly to the Director of OARDEC, or to his ARB, which will then forward such evidence to OARDEC. *Id.* ¶ 3. "[T]he Department reviews new evidence and may either direct that a CSRT convene to

reconsider the basis of the detainee's [enemy combatant] status in light of the new information, or determine that the new information does not warrant review by a CSRT." *Id.* ¶ 1.b.

"New evidence" is defined as "factual information that was not previously presented to the detainee's CSRT," and "that is material to the factual question of whether the detainee is an [enemy combatant]." *Id.* ¶ 4.a. Information is "'material' if it creates a substantial likelihood that the 'new evidence' would have altered the CSRT's prior determination that the detainee is an enemy combatant." *Id.* ¶ 4.a.(2). "If the evidence is found to meet the 'new evidence' standard, the [Deputy Secretary of Defense] will direct that a CSRT convene to reconsider the basis of the detainee's [enemy combatant] status in light of the new information." *Id.* ¶ 5.b. If the evidence does not satisfy that standard, a new CSRT will not be convened. *Id.* ¶ 5.c.

2. Based on new evidence, and pursuant to the new evidence procedures outlined above, the Deputy Secretary of Defense directed that a new CSRT be held for Haji Bismullah. *See* Sweigart Decl., ¶ 4.

Given the determination by the agency to hold a new hearing, the CSRT decision that forms the basis of Bismullah's petition for review is now non-final for purposes of judicial review. Under the DTA, this Court reviews "the validity of any final decision of a Combatant Status Review Tribunal that an alien is properly

detained as an enemy combatant.” DTA, §1005(e)(2)(A) (emphasis added). Upon completion of the new CSRT, petitioner, if found to be an enemy combatant, may seek review under the DTA in this Court of the new final CSRT ruling based upon the new record compiled for that proceeding.

Accordingly, this Court should enter an order remanding Bismullah’s case to the agency. In the alternative, the Court should hold Bismullah’s case in abeyance pending completion of new CSRT proceeding.

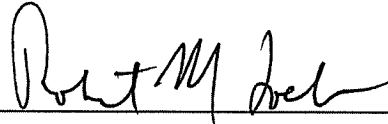
3. The determination to hold a new hearing for Bismullah does not render moot or otherwise disturb this Court’s earlier rulings in this case (*Bismullah v. Gates*, 501 F.3d 178, 503 F.3d 137 (2007)). Those rulings were rendered not just in regard to Bismullah, but also were filed with respect to seven other party-detainees, whose CSRTs remain final. The government has sought Supreme Court review from this Court’s rulings (as to all detainees subject to this Court’s decision). That petition for certiorari remains live and is still pending before the Supreme Court. By filing today in *Gates v. Bismullah*, No. 07-1054, the government has separately advised the Supreme Court of this development.

Respectfully submitted,

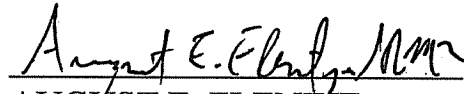
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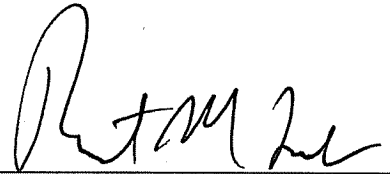


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CERTIFICATE OF SERVICE

I hereby certify that on May 8, 2008, I caused copies of the foregoing “NOTICE OF NEW CSRT HEARING AND MOTION TO REMAND, OR, IN THE ALTERNATIVE, TO HOLD IN ABEYANCE” to be served upon counsel of record by causing copies to be sent by FedEx overnight delivery and by e-mail transmission to:

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Jennifer R. Cowan
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Robert M. Loeb

EXHIBIT A

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

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|------------------------|---|-------------|
| Haji Bismullah, et al, |) | |
| |) | |
| Petitioner |) | No. 06-1197 |
| |) | |
| |) | |
| v. |) | |
| |) | |
| Robert M. Gates, |) | |
| Secretary of Defense, |) | |
| |) | |
| Respondent |) | |
| |) | |

DECLARATION OF FRANK SWEIGART

FRANK SWEIGART hereby declares, pursuant to 28 U.S.C. § 1746, as follows:

1. I am the Director of the Office for the Administrative Review of the Detention of Enemy Combatants ("OARDEC"). I have served in that position since March 17, 2006. Prior to being assigned as Director, I served as the Deputy Director of OARDEC from June 7, 2004 to March 16, 2006. The statements in this declaration are based upon my personal knowledge and information obtained by me in the course of my official duties.
2. One of the missions of OARDEC is to conduct Combatant Status Review Tribunals (CSRTs) for individuals detained by the Department of Defense at U.S. Naval Base Guantanamo Bay, Cuba. Petitioner's CSRT was convened on November 08, 2004, and the tribunal concluded the petitioner was an enemy combatant on November 30, 2004.
3. Section 1405(a)(3) of the Detainee Treatment Act (DTA) of 2005 states that CSRT procedures for individuals detained by DoD "shall provide for periodic review of any new evidence that may become available relating to the enemy combatant status of a detainee." This requirement was implemented via OARDEC Instruction 5421.1, *Procedure for Review of "New*

Evidence” Relating to Enemy Combatant (EC) Status. (Exhibit 1, available at <http://www.defenselink.mil/news/May2007/New%20Evidence%20Instruction.pdf>).

4. On May 1, 2008, the Deputy Secretary of Defense directed that a new CSRT be convened for Petitioner, based on certain information that he determined met the requirements of “new evidence” as defined in the OARDEC instruction. Accordingly, I have instituted the process to prepare for Petitioner’s new CSRT. This CSRT will follow the procedures found in the “Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants Detained at U.S. Naval Base Guantanamo, Cuba,” dated July 14, 2006.
5. OARDEC will proceed expeditiously with the processing of the new CSRT.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true, accurate, and correct.

Executed May 8, 2008

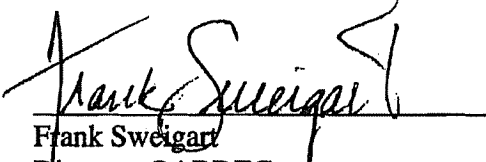

Frank Sweigart
Director, OARDEC

EXHIBIT B



Department of Defense
Office for the Administrative Review of
the Detention of Enemy Combatants (OARDEC)
at U.S. Naval Base Guantanamo Bay, Cuba
1010 Defense Pentagon, Washington, D.C. 20301-1010

OARDECINST 5421.1

7 May 2007

OARDEC INSTRUCTION 5421.1

Subj: PROCEDURE FOR REVIEW OF "NEW EVIDENCE" RELATING TO ENEMY
COMBATANT (EC) STATUS

Ref: (a) Detainee Treatment Act of 2005 (DTA)
(b) Implementation of Combatant Status Review Tribunal Procedures for Enemy
Combatants Detained at U.S. Naval Base Guantanamo Bay, Cuba dated July 14, 2006
(c) Revised Implementation of Administrative Review Procedures for Enemy
Combatants Detained at U.S. Naval Base Guantanamo Bay, Cuba dated July 14, 2006

1. Purpose: This regulation creates a unified procedure for the submission of new evidence relating to a Guantanamo detainee's EC status, including those who do not receive ARB hearings.

a. Section 1405(a)(3) of the reference (a) provides that Combatant Status Review Tribunal (CSRT) and Administrative Review Board (ARB) procedures, outlined in references (b) and (c), for individuals detained by the Department of Defense at Guantanamo "shall provide for periodic review of any new evidence that may become available relating to the enemy combatant status of a detainee."

b. Enclosure (13) of reference (c) provides that new information relating to the enemy combatant status of a Guantanamo detainee presented at an ARB shall be brought to the attention of the Deputy Secretary of Defense (DSD). Under that memorandum, the Department reviews new evidence and may either direct that a CSRT convene to reconsider the basis of the detainee's EC status in light of the new information, or determine that the new information does not warrant review by a CSRT.

c. Certain detainees (such as those previously approved for transfer/release or those subject to military commission charges) are not provided ARB hearings.

2. Cancellation: This is the first instruction in this series; no cancellation clause will be used.

OARDECINST 5421.1

7 May 2007

3. Initiation of a "New Evidence Review": A detainee or a person lawfully acting on the detainee's behalf can submit evidence that is new and relates to the detainee's EC status by mailing it to:

Director, OARDEC
1010 Defense Pentagon
Room 3A730
Washington, DC 20301-1010.

a. If any such evidence is submitted by a detainee to his ARB, it will be forwarded to the above office, consistent with the DSD Memorandum on Revised Implementation of Administrative Review Procedures.

b. If an individual submitting information on a detainee's behalf has had access to classified material, it is the responsibility of that individual to follow all applicable information security regulations with respect to the handling of classified or otherwise protected information. These procedures do not absolve those individuals of that responsibility.

4. Definition of "New Evidence"

a. For purposes of these procedures, "new evidence" must meet the following two criteria:

(1) It must be factual information that was not previously presented to the detainee's CSRT, and

(2) It must be information that is material to the factual question of whether the detainee is an EC. Information will be deemed "material" if it creates a substantial likelihood that the "new evidence" would have altered the CSRT's prior determination that the detainee is an enemy combatant, as that term is defined by Deputy Secretary of Defense Order of July 7, 2004, and the Deputy Secretary of Defense Memorandum of July 14, 2006.

b. New "evidence" and "information" does not include legal argument or factual assertions not supported through documentation or witness testimony. For example, documents that merely claim the detainee is not an enemy combatant and/or that primarily focus on the legality of his detention or the propriety of his CSRT/ARB process will not be reviewed under these procedures. Information that contends the detainee is not an enemy combatant and that contains photographs, affidavits, videotaped witness statements or other supporting exhibits may be considered new evidence or information, as would documentation of investigative results.

7 May 2007

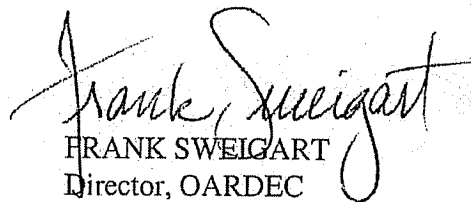
5. Conduct of a "New Evidence Review"

a. Every effort will be made to make a decision regarding whether or not to convene a new CSRT within 90 days of the "new evidence" being received at the above address.

b. If the evidence is found to meet the "new evidence" standard, the DSD will direct that a CSRT convene to reconsider the basis of the detainee's EC status in light of the new information. This CSRT will follow the procedures found in the "Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants Detained at U.S. Naval Base Guantanamo, Cuba."

c. If the evidence does not meet the "new evidence" standard, a new CSRT will not be convened.

d. The decision to convene a CSRT to reconsider the basis of the detainee's EC status in light of "new evidence" is a matter vested in the unreviewable discretion of the DSD.


FRANK SWEIGART
Director, OARDEC