[ORAL ARGUMENT HELD APRIL 4, 2008: DECIDED JUNE 20, 2008]

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

HUZAIFA PARHAT, *et al.*, Petitioners/Plaintiffs, v. ROBERT M. GATES, *et al.*, Respondents/Defendants.	Case No. 06-1397

PETITIONERS' RENEWED MOTION FOR

CONDITIONAL ORDER OF CONTEMPT

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Pursuant to 18 U.S.C. § 401(3) and this Court's inherent powers, Petitioner Huzaifa Parhat renews his motion for a conditional order of contempt against Respondent Robert M. Gates, the Secretary of Defense, for Secretary Gates' continued refusal to comply with a final order of this Court directing the Secretary "to release [Parhat], to transfer him, or to expeditiously convene a new Combatant Status Review Tribunal. . . ." *Parhat v. Gates*, 532 F.3d 834, 836 (D.C. Cir. 2008), *reh'g denied per curiam*, *Parhat v. Gates*, No. 06-1397 (D.C. Cir. Sept. 2, 2008) (the "June Order"). [1]

Last month, this Court ruled that a habeas judge may not order a prisoner released into the United States, even where the executive captured, transported and now is unlawfully detaining the prisoner in a military prison, and the prisoner is a civilian for whom U.S. release is the only practicable release option. *Kiyemba v. Obama*, 555 F.3d. 1022 (D.C. Cir. 2009). That ruling will be the subject of further requests for appellate review, but its correctness is not the issue presented by this motion. The narrow issue here is whether a litigant may ignore this Court's final orders.

While the June Order gave Respondent three options for compliance, he was not given the option of refusing to comply with *any* of them. The government

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[1] Parhat's original motion for a finding of conditional contempt was filed October 16, 2008, and denied pending the ruling in the related habeas case. *See Parhat v. Gates*, 532 F.3d 834 (D.C. Cir. Oct. 24, 2008). As noted *infra*, section II(C), the issue here (whether Respondent can continue to refuse to comply with this Court's final June Order, never appealed, to "release [Parhat]..., transfer [him]... or ... expeditiously convene a new Combatant Status Review Tribunal") is distinct from the issue in *Kiyemba* (whether an order in a habeas case, timely appealed, was error). Had *Kiyemba* affirmed the habeas judge, the ruling might as a practical matter have mooted the need for a remedy here. But *Kiyemba v. Obama,* 555 F. 3d 1022 (D.C. Cir. 2009), reversed, leaving open and unremedied the Secretary's contempt of the June Order, and necessitating this second motion for conditional contempt.

waived a new CSRT and conceded that it cannot effectuate a transfer. And although the government later would hotly dispute in *Kiyemba* whether, in law, it might properly be *compelled* to release Parhat into the United States (as it did during the *Parhat* DTA case), it has never contested that it is *able* to comply with the June Order. (In October it was on the point of doing so before the *Kiyemba* panel entered a stay in the habeas appeal.)

The question raised by this motion is whether the Secretary of Defense must comply with the order of an Article III court, or whether -- as he has done for almost nine months -- he may ignore an order at his pleasure. We show below that the Secretary is like any other litigant. He must comply with a judicial order, even where he disagrees with it, even where he litigates similar issues in other cases, even where, *arguendo*, the order was error, and even if, *arguendo*, a question later arises whether the court had jurisdiction to issue the order. No alternative course for vindication of this Court's *Parhat* judgment remains. The Secretary should be directed immediately to purge himself of his contempt or face sanctions sufficient to compel his compliance.

I. STATEMENT OF FACTS

The Secretary has imprisoned Parhat at Guantanamo Bay for nearly seven years. On June 20, 2008, this Court entered judgment for Parhat on his claims under the Detainee Treatment Act of 2005 (the "DTA"), and in doing so vacated his classification as an enemy combatant. *See Parhat*, 532 F.3d at 836. The Court "reject[ed] the government's contention that it can prevail by submitting documents that read as if they were indictments or civil complaints and that simply assert as facts the elements required to prove" an enemy combatant determination. *Id.* "To do otherwise would require the courts to rubber-stamp the government's charges. . . ." *Id.* The Court held that the government's evidence was so unreliable

that, notwithstanding a presumption in favor of the government, the evidence was "insufficient to sustain its determination that Parhat is an enemy combatant." *Parhat*, 532 F.3d at 850.

A. The Secretary Has Violated the June Order.

The facts are undisputed. There is no question that the Secretary has violated the June Order.

1. The Secretary Waived a New Combatant Status Review Tribunal.

On August 4, 2008, Secretary Gates conceded that he would not convene a new CSRT for Parhat. "After reviewing [the Order], the government has determined that it would serve no useful purpose to engage in further litigation over his status. As the Court is aware, the government had concluded that Parhat should be cleared for release, and it has now determined that it will treat Parhat as if he were no longer an enemy combatant and house him accordingly while it uses its best efforts to place him in a foreign country." Respondent's Petition for Rehearing at 1-2, *Parhat v. Gates*, No. 06-1397 (D.C. Cir. Aug. 4, 2008) (footnote omitted).

2. Respondent's Efforts to "Transfer" Parhat Have Failed.

The Secretary has not transferred Parhat. The government has long conceded that Parhat, like the other Uighur prisoners at Guantanamo, cannot be returned to his native China. *See, e.g.,* Transcript of Hearing at 10-11, *In re Guantanamo Bay Detainee Litigation*, 581 F. Supp. 2d 33 (D.D.C. 2008) (Misc. No. 08-0442 (TFH), Civil Action Nos. 05-1509 (RMU), 05-1602 (RMU), 05-1704(RMU), 05-2370 (RMU), 05-2398 (RMU), and 08-1310 (RMU)). *See also Parhat*, 532 F.3d at 838. But the government's long-standing efforts to send Parhat to a third country have been unsuccessful. Judge Urbina recently summarized these failed efforts in Parhat's *habeas* case:

> [T]he government cleared 10 of the [17 Uighur] petitioners for release by the end of 2003.[2] The government cleared an additional 5 for release in 2005, 1 for transfer in 2006, and 1 for transfer in May of this year. Throughout this period, the government has been engaged in "extensive diplomatic efforts" to resettle the petitioners. These efforts over the years have remained largely unchanged, and the government has not indicated that its strategy or efforts have been or will be altered now that petitioners are no longer treated as enemy combatants. Furthermore, the government cannot provide a date by which it anticipates releasing or transferring the petitioners. Accordingly, their detention has become effectively indefinite.

In re Guantanamo Bay Detainee Litigation, 581 F. Supp. 2d 33, 38 (D.D.C. 2008) (internal citations and footnote omitted) (also noting that "the government has unsuccessfully approached and re-approached almost 100 countries in its efforts to locate an appropriate resettlement location" for the Uighurs). As the district court noted, the failure to find a safe transferee country is a situation largely of the government's making. *See id.* at 42 (branding the Uighurs "enemy combatants" -- which happened after Parhat and others were cleared for release -- "subvert[ed] diplomatic efforts to secure alternative channels for release").

3. The Secretary Has Not Released Parhat.

Almost nine months after the June Order issued, Parhat remains imprisoned at Guantanamo.[3]

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[2] Parhat was among those cleared for release in 2003. *See* Joint Status Report at Ex. 1, *In re Guantanamo Bay Detainee Litigation*, 581 F. Supp. 2d 33 (D.D.C. 2008), Misc. No. 08-0442 (TFH), Civil Action Nos. 05-1509 (RMU), 05-1602 (RMU), 05-1704 (RMU), 05-2370 (RMU), 05-2398 (RMU), and 08-1310 (RMU) (D.D.C. Aug. 18, 2008).

[3] Parhat is now jailed in a part of Guantanamo called Camp Iguana. Even the Government has conceded that transfer to Camp Iguana does not, in any way, amount to release:

(Footnote Continued on Next Page.)

II. ARGUMENT

"[C]ourts have inherent power to enforce compliance with their lawful orders through civil contempt." *Shillitani v. United States*, 384 U.S. 364, 370 (1966). "Civil contempt . . . is a remedial sanction used to obtain compliance with a court order or to compensate for damage sustained as a result of noncompliance." *Nat'l Labor Relations Bd. v. Blevins Popcorn Co.*, 659 F.2d 1173, 1184 (D.C. Cir. 1981). An adjudication of civil contempt is warranted based on "clear and convincing evidence" that the contemnor has violated a "clear and unambiguous" order. *Armstrong v. Executive Office of the President, Office of Admin.*, 1 F.3d 1274, 1289 (D.C. Cir. 1993). *See also Cobell v. Babbitt*, 37 F. Supp. 2d 6, 9-10 (D.D.C. 1999) (violation of "clear and reasonably specific" order). "[A] finding of bad faith on the part of the contemnor is not required [and] . . . the law is clear in this circuit that 'the [contemnor's] failure to comply with the court decree need not be intentional.'" *Food Lion v. United Food & Commercial Workers Int'l Union*, 103 F.3d 1007, 1016 (D.C. Cir. 1997). Respondent's intent is "irrelevant." *Blevins*, 659 F.23 at 1184.

A civil contempt proceeding is a three stage process "consisting of (1) issuance of an order; (2) following disobedience of that order, issuance of a

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(Footnote Continued from Previous Page.)

> Of course, we do not mean to imply that being temporarily confined at Camp [Iguana] pending release is somehow tantamount to outright freedom. However, no housing arrangement that could be granted to petitioners while they remain at Guantanamo, a secure U.S. military base, would entail outright freedom. Despite what petitioner's counsel may have perceived during his visit, *Guantanamo outside Camp Delta is not an open society but a military base that, for sound reasons and like any other military base, maintains a controlled environment.*

See Respondent's Memorandum in Opposition to Petitioners' Motion to Vacate Stay Order and Issue Writ Directing Immediate Release of Petitioners at 8, *Qassim v. Bush*, 547 U.S. 1092 (2006) (second emphasis added).

conditional order finding respondent in contempt and threatening to impose a specified penalty unless respondent purges himself of contempt by complying with prescribed purgation conditions; and (3) exaction of the threatened penalty of the purgation conditions are not fulfilled." *Oil, Chem. & Atomic Workers Intern. Union, AFL-CIO v. Nat'l Labor Relations Bd.*, 547 F.2d 575, 581 (D.C. Cir. 1976). We find ourselves at the second stage.

A. Respondent is Under a Present Duty to Comply With the Order.

The June Order is clear, specific, and unconditional: Secretary Gates was ordered "expeditiously" to convene "a new CSRT to consider evidence submitted in a manner consistent with this opinion," to "transfer" Parhat, or to "release" him. *Parhat*, 532 F.3d at 851. The Court did not suggest or advise; it directed. Because the Court denied Secretary Gates's motion for rehearing, and the mandate issued, and no appeal was filed, the June Order became final. *See Parhat v. Gates*, No. 06-1397 (D.C. Cir. Sept. 2, 2008) (order denying rehearing) (per curiam); *id.* (D.C. Cir. Sept. 12, 2008) (mandate).

All that remained was Secretary Gates's undisputable duty to comply. "[A]ll orders and judgments of courts must be complied with promptly. If a person to whom a court directs an order believes that order is incorrect the remedy is to appeal, but, absent a stay, he *must* comply promptly with the order pending appeal[.]" *Maness v. Meyers*, 419 U.S. 449, 458-459 (1975) (emphasis added). *See also United States v. United Mine Workers of Am.*, 330 U.S. 258, 293 (1947) (collecting "impressive authority for the proposition that an order issued by a court with jurisdiction over the subject matter and person must be obeyed by the parties until it is reversed by orderly and proper proceedings"); *Land v. Dollar*, 190 F.2d 366, 379 (D.C. Cir. 1951) ("An order issued by a court having jurisdiction of the persons and subject matter must be obeyed, even though the defendants may

sincerely believe that the order is ineffective and will finally be vacated, even though the Act upon which the order is based is void, even though the order is actually set aside on appeal, even though the basic action becomes moot.").

B. The Subsequent *Bismullah* Decision Does Not Excuse Compliance.

Months after the June Order became final, and while the Secretary's unexcused noncompliance continued, this Court ruled in *Bismullah v. Gates*, 551 F.3d 1068 (D.C. Cir. 2009), that it no longer had subject matter jurisdiction to adjudicate pending DTA petitions under the DTA. But as this Court has already recognized, that ruling did not disturb the June Order: "As to whether the judgment in *Parhat* remains res judicata despite our holding today, see Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, 18A FEDERAL PRACTICE & PROCEDURE: JURISDICTION 2D § 4428, at 7 ('The res judicata effects of a judgment entered by a court that lacked subject-matter jurisdiction have not been captured in any rule or clear statement of controlling policies.... Recent decisions [tend] more and more toward supporting res judicata. Today, it is safe to conclude that most federal-court judgments are res judicata notwithstanding a lack of subject-matter jurisdiction.')." *id.* at 1071 n*.

Indeed, nothing in *Bismullah* raises any question as to the continuing force of the June Order. The theory of *Bismullah* was that Congress impliedly revoked DTA jurisdiction after the Supreme Court, in *Boumediene v. Bush,* 128 S. Ct. 2229 (2008), struck the DTA's habeas strip. Nothing in *Bismullah* identifies the day and hour of Congress's implied revocation; any such determination would be pure speculation. At the time the June Order in *Parhat* was entered, "*the DTA and the*

CSRT process remain[ed] intact." *Boumediene,* 128 S. Ct. at 2275 (emphasis added).[4]

The premise that a subsequent judicial invalidation of a congressional act renders that act, prior thereto, "inoperative, conferring no rights and imposing no duties" has long been rejected. *Chicot County Dist. v. Bank*, 308 U.S. 371, 374 (1940). "The actual existence of a statute, prior to ... [a judicial ruling of invalidity], is an operative fact and may have consequences which cannot justly be ignored." *Id. See also United States v. Baucom,* 80 F.3d 539, 541 (D.C. Cir. 1996) (rejecting, under *Chicot*, the "broad-sweeping proposition" that if "an Act of Congress is unconstitutional, it is void *ab initio*, and any action taken pursuant to it is thus invalid.").

At the time the *Boumediene* judgment was entered, *Parhat* had been fully litigated, briefed, argued and the decision was *within days of being printed.* There is no indication that Congress would have intended for the detainee, the Court, and the Executive branch to have incurred the vast expense of the *Parhat* 2006 DTA petition, the 2007 summary judgment motion, and the 2008 briefing and argument, and for this Court to have suffered through almost the entirety of the adjudicatory process, only to have jurisdiction stripped -- by implication -- one day before the *Parhat* decision was printed. It would be bizarre—and a tremendous waste of resources—if exclusive judicial remedies, diligently pursued to the brink of decision, could avoid the *res judicata* bar through an implied revocation.

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[4]As this Court recognized, the "question of severability was not presented, granted, or briefed and [the Supreme Court] had no occasion to decide it." *Bismullah,* 551 F.3d at 1071. "In sum, the Supreme Court in *Boumediene* did not address the issue of severability and thereby left it to this court to *resolve it in the first instance* in light of that decision." *Id.* (emphasis added).

C. The Subsequent Decision in *Kiyemba* Does Not Excuse Compliance.

More than five months after the June Order became final, and while the Secretary's unexcused violation thereof continued, *Kiyemba* held that a habeas judge erred when he ordered U.S. release, even where release was the only practicable option to relieve unlawful imprisonment. *See Kiyemba v. Obama*, 555 F.3d. 1022 (D.C. Cir. 2009). Even if one assumes that the two-judge *Kiyemba* majority purported to hold the unanimous *Parhat* decision in error, and even if we assume, *arguendo*, that the *Parhat* panel in fact erred, the litigants before the Court in *Parhat* were not excused from compliance with the June Order except upon issuance of an order by a court of competent jurisdiction vacating or reversing that order. No such order issued, nor could issue now. Senior Circuit Judge Randolph's scholarly opinion for the Court in *LaShawn v. Barry*, 87 F.3d 1389 (D.C. Cir. 1996) (en banc) sets out the principle that governs here: the law-of-the-circuit doctrine. The doctrine derives from legislation and from the structure of the federal courts of appeals. *Id.* at 1395. This Court sits in panels of "not more than three judges" pursuant to the authority granted in 28 U.S.C. § 46(c). Thus *Parhat*, as a "decision of a division" is "the decision of the court." 87 F. 3d. at 1395 (citing, *inter alia*, *Critical Mass Energy Project v. Nuclear Regulatory Comm'n,* 975 F.2d 871, 876 (D.C. Cir. 1992) (en banc), *cert. denied,* 507 U.S. 984 (1993)). As Judge Randolph explained:

> Were matters otherwise, the finality of our appellate decisions would yield to constant conflicts within the circuit. *Textile Mills Sec. Corp.,* 314 U.S. at 335, 62 S.Ct. at 278. One three-judge panel, therefore, does not have the authority to overrule another three-judge panel of the court. *E.g., United States v. Caldwell,* 543 F.2d 1333, 1370 n.19 (D.C.Cir.1974), *cert. denied*, 423 U.S. 1087, 96 S. Ct. 877, 47 L.Ed.2d 97 (1976). That power may be exercised only by the full court, either through an

> *en banc* decision, *id.,* or pursuant to the more informal practice adopted in *Irons v. Diamond,* 670 F.2d 265, 268 n.11 (D.C. Cir. 1981).

LaShawn, 87 F.3d at 1395. In short, it would offend *LeShawn* and the law-of-the-circuit doctrine to argue that the judicial order in *Parhat* was overcome by the *Kiyemba* litigation.

Nor is Respondent's compliance excused by this Court's prior denial of Parhat's initial motion for contempt. That motion was denied on ground that "the underlying question of [Parhat's] release is now before the court in Kiyemba v. Bush, No. 08-5424 (D.C. Cir.), calendared for oral argument on November 24, 2008." *Parhat v. Gates*, 532 F.3d 834 (D.C. Cir. Oct. 24, 2008) (order denying Petitioner's Motion for Conditional Contempt). At that point in time, the denial made sense: If *Kiyemba* had ruled in favor of *habeas* relief, Parhat would have been released, and enforcement of the June Order might have become moot. *Kiyemba* ruled differently, and held that a *habeas* court cannot explicitly order the release of *habeas* petitioners (including Parhat) from Guantanamo into the United States. *See Kiyemba v. Obama*, 555 F.3d. 1022 (D.C. Cir. 2009). By contrast, the June Order does not expressly order Parhat brought into the United States. Rather it requires Respondent to either "release [Parhat]..., transfer [him]... or ... expeditiously convene a new Combatant Status Review Tribunal." It is undisputed that none of these three options have yet to occur. Despite *Kiyemba* having been argued and decided, the issue that remains unresolved and unremedied is whether Respondent can continue to refuse to comply with the June Order without consequence.

D. Respondent Should be Held in Civil Contempt.

There is no practical impediment to compliance. Whether he wants to or not, Secretary Gates *can* effect a release in the United States.[5] Far from taking "all reasonable steps within [his] power to comply with the courts [*sic*] order," as became his duty last September, *Cobell*, 37 F. Supp. 2d at 9-10 (internal quotation marks and citations omitted), Secretary Gates has refused to comply. Because there is no dispute about this, and no compliance is forthcoming, a finding of contempt is now warranted. *See* 18 U.S.C. § 401(3) ("Disobedience or resistance to [the Court's] lawful writ, process, order, rule, decree, or command" is punishable by contempt); *American Rivers v. U.S. Army Corps of Engineers*, 274 F. Supp. 2d 62 (D.D.C. 2003) (failure to promptly comply with injunction warranted finding of contempt and threat of $500,000 per day coercive sanction against Secretary of the Army). *See also id.* at 68 ("Moving to stay an order does not represent a good faith effort to comply with that order; rather, it represents an effort to *postpone* compliance with that order in the hope that it will be overturned on appeal.") (emphasis in original).

The judicial power would be hollow if an Executive officer might disobey court orders without consequence. That would render the Court a "mere board[] of arbitration, whose judgments and decrees would be only advisory." *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 450 (1911). "If a party can make himself a judge of the validity of orders which have been issued, and by his own act of disobedience set them aside, then are the courts impotent, and what the Constitution now fittingly calls the 'judicial power of the United States' would be a

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[5] Respondent has never argued otherwise; he has merely contended that a Court may not specifically order him to release a Guantanamo detainee in the United States.

mere mockery." *Gompers*, 221 U.S. at 250. The contempt power is necessary here to prevent such irretrievable dilution of the judicial power. *See generally Spallone v. United States*, 493 U.S. 265, 276 (1990) ("courts have inherent power to enforce compliance with their lawful orders through civil contempt"); *Ex parte Robinson*, 86 U.S. (19 Wall.) 505, 510 (1874) (from "[t]he moment the courts of the United States were called into existence and invested with jurisdiction over any subject, they became possessed" of the "power to punish for contempts[,]" a power "essential to . . . the enforcement of the judgments, orders, and writs of the courts, and consequently to the due administration of justice").

The contempt power is uniquely important in cases involving the coordinate branches. "It is essential to ensuring that the Judiciary has a means to vindicate its own authority without complete dependence on other Branches." *Young v. U.S. ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 796 (1987). *See also Shepherd v. American Broadcasting Cos., Inc.*, 62 F.3d 1469, 1472 (D.C. Cir. 1995) (the inherent power of contempt is "[a]s old as the judiciary itself, [and is necessary to] . . . enable[] courts to protect their institutional integrity and to guard against abuses of the judicial process. . . ."). This is especially true as to the executive branch. A finding of contempt ensures that the judicial power remains exclusively within the judiciary, and that the Executive respects its own constitutional obligation to "faithfully execute" the laws as interpreted by the federal judiciary. *See* U.S. Const. Art. II, §1, cl. 7; *Franklin v. Gwinnett County Pub. Schools*, 503 U.S. 60, 74 (1992) (the judicial contempt power "provide[s] an important safeguard against [such] abuses of legislative and executive power, as well as to ensure an independent judiciary"); *Nat'l Treasury Employees Union v. Nixon*, 492 F.2d 587, 604-05 (D.C. Cir. 1974) ("[T]he judicial branch of the Federal government has the constitutional duty of requiring the executive branch to remain within the limits stated by the legislative branch."). Thus, even senior member of the Executive

branch is under a duty to comply with a validly-issued federal court order. *See United States v. Nixon,* 418 U.S. 683 (1974) (affirming denial of President Nixon's motion to quash third-party subpoena duces tecum); *see also, e.g., Jones v. Clinton*, 36 F. Supp. 2d 1118 (E.D. Ark. 1999) (holding President Clinton in contempt for failure to comply with civil discovery order); *Hayburn's Case*, 2 U.S. 409 (1792) (executive cannot treat Court of Claims decisions as though precatory).

Federal courts have not hesitated to find executive officials in contempt for failure to comply with federal court orders. *See, e.g., McBride v. Coleman*, 955 F.2d 571 (8th Cir. 1992) (affirming judgment of civil contempt against officials of an agency of the U.S.D.A. for violation of a nationwide injunction requiring the Agency to give homeowners in default 30 days notice of loan deferral program before demanding voluntary conveyance); *Nelson v. Steiner*, 279 F.2d 944, 948 (7th Cir. 1960) (affirming judgment of civil contempt against Department of Justice official for preventing the release of tax-payer's money in direct violation of an injunctive order: "The executive branch of government has no right to treat with impunity the valid orders of the judicial branch."); *American Rivers*, 274 F. Supp. 2d 62 (holding U.S. Army Corps of Engineers in contempt for failing to comply with injunction requiring a reduction of water flow from a dam to protect species protected by Endangered Species Act); *Cobell,* 37 F. Supp. 2d 6 (holding Secretaries of the Departments of Interior and Treasury in contempt for failure to comply with civil discovery orders).

This Circuit has long recognized the necessity of coercive sanctions to "enforce compliance with an order of the Court and to remedy any harm inflicted on one party by the other party's failure to comply." *Oil, Chem. & Atomic Workers Union*, 547 F.2d at 581; *see also Blevins Popcorn*, 659 F.2d at 1184 (same); *American Rivers*, 274 F. Supp. 2d at 65 (civil contempt necessary for

"vindication of judicial authority"). The rule applies with no less force when the recalcitrant party is an Executive officer. If the rule of law is to be upheld, coercive sanctions are "necessary to ensure that 'the executive branch of government [does not] treat with impunity the valid orders of the judicial branch.'" *American Rivers*, 274 F. Supp. 2d at 69 (citation omitted) (brackets in original). Sovereign immunity is not a defense to the imposition of coercive fines. *Id.*

E. The Court Should Issue A Conditional Contempt Order.

Petitioner is aware of the gravity of a request to sanction the Secretary of Defense, but there is no alternative. This Court issued a lawful order. The Secretary has actively defied it for nine months, and continues to defy it. Under the law of this Circuit, the Court should issue "a conditional order finding [Respondent] in contempt and threatening to impose a specified penalty unless [Respondent] purges [himself] of the contempt. . . ." *Blevins Popcorn*, 659 F.2d at 1184.

An order must include a threat of sanctions sufficient to enforce Respondent's prompt compliance with the Order. Parhat suggests that a conditional contempt order (a) grant Respondent five calendar days to comply with the June Order, and if he has not complied within that time, (b) further order that he appear before the Court to consider what further measures are necessary to secure compliance. *See, e.g., American Rivers*, 274 F. Supp. 2d at 70 (threatening to impose fine of $500,000 for each day that the Secretary of the Army failed to comply with injunction concerning river management).

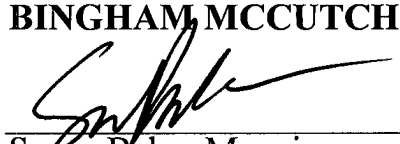
III. CONCLUSION

Petitioner requests that the Court issue a conditional order to Secretary Gates finding him in contempt of this Court's June 20, 2008 Order, directing that he comply with the June Order in five calendar days and certify in writing his compliance therewith, and failing such compliance and certification, that the Court schedule an immediate hearing to consider the entry of such sanctions as shall be necessary to secure compliance with the June Order.

March 20, 2009

Respectfully submitted,

BINGHAM MCCUTCHEN LLP



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CERTIFICATE OF SERVICE

I hereby certify that on March 20, 2009, copies of the foregoing Petitioner's Renewed Motion for Conditional Order of Contempt were served via electronic mail and overnight mail:

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Erika Tillery