

[PENDING CLASSIFICATION REVIEW]

No. 07-1098

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

ADEL HASSAN HAMAD,

Prisoner, Guantánamo Bay Naval Station, Guantánamo Bay, Cuba,

Petitioner,

v.

ROBERT M. GATES,

Secretary of Defense of the United States of America,

Respondent.

PETITION FOR PANEL AND *EN BANC* RECONSIDERATION
OF THE NOVEMBER 9, 2007, ORDER
SUSPENDING BRIEFING SCHEDULE
AND FOR EXPEDITED CONSIDERATION

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The petitioner, Adel Hassan Hamad, pursuant to F.R.A.P. 35 and 40, hereby moves for reconsideration and reconsideration *en banc* of the order of November 9, 2007, that suspended the briefing schedule in this case which would have resulted in a hearing on the merits of Mr. Hamad's Petition under the Detainee Treatment Act of 2005 of the legality of his imprisonment at the United States Naval Base in Guantánamo Bay, Cuba. Ex. 1.

The question presented is of exceptional importance to the litigation involving the approximately three hundred fifty prisoners in Guantánamo. The history of the Guantánamo litigation is replete with fits and starts of argument over jurisdiction and procedure. Not one prisoner has had a hearing in a court on the merits of his claims. This Court's order of October 31, 2007, would have provided the first such hearing on the merits and allowed Mr. Hamad the hearing on the merits he has been urgently seeking. Ex. 2.

Several claims in Mr. Hamad's petition are ripe for resolution. Mr. Hamad requests that the panel and/or the full Court reinstate the briefing schedule which would require the government to respond by December 17, 2007, and complete briefing by December 31, 2007, and proceed to the merits. Mr. Hamad intends to file his brief on the merits on November 13, 2007, in an effort press forward to the merits of his claim.

A. BACKGROUND OF THE CASE

Adel Hamad is a Sudanese citizen who was seized from his bed in his apartment in Peshawar, Pakistan on July 18, 2002, where he was working as an administrator for a non-governmental charitable organization. Mr. Hamad was in Pakistan with all necessary papers – passport, visa, and work permit. He had resided in Pakistan with his wife and daughters for seventeen years providing assistance to refugees of the Afghan wars. He has been held in the prison in Guantánamo since March 2003. Ex. 4.

In November 2004, a CSRT was convened with Mr. Hamad in Guantánamo. Ex. 4. The allegations were guilt by association, essentially that Mr. Hamad worked for the non-governmental organization WAMY from 2000 to 2002, and from 1986 to 1999 had worked for the charity LDI. The allegations were that WAMY supports terrorist ideals and causes, that LDI has provided support to mujahaddin, and that while working at LDI, Mr. Hamad had come in contact with some members of al Qaeda. There was no allegation, or evidence, that Mr. Hamad was ever on a battlefield, engaged in hostilities, or provided any support to any person or organization that did. Mr. Hamad told the CSRT that he was an innocent aid worker and hospital administrator who abhorred the acts of terrorists. A United States Army Major sitting on the CSRT used the word “unconscionable”

in dissenting from the decision to declare Mr. Hamad an enemy combatant. Ex. 5.

In November 2005, an Administrative Review Board determined that Mr. Hamad could be transferred home to Sudan. Ex. 6.

Mr. Hamad filed a petition for a writ of habeas corpus in the spring of 2005 and counsel was assigned to represent him in October of that year. Since that time, counsel and his staff have traveled to Afghanistan, Pakistan, and Sudan and gathered hours of sworn statements attesting to Mr. Hamad's innocence from his employer, doctors who worked in the hospital where he was the administrator, his landlord, and Afghan government officials. Mr. Hamad presented that evidence to the district court in September 2006 in support of a motion for summary judgment and to OARDEC in October 2006. *Hamad v. Bush et al.*, 05 CV 1009, CR 55-63.

On April 20, 2007, Mr. Hamad filed his Petition for Immediate Release and Other Relief under the Detainee Treatment Act of 2005. Ex. 3. With that pleading, he presented this Court with the record of the CSRT that he had obtained in the district court and the extrinsic evidence of his innocence. Mr. Hamad sought expedited consideration of his claims. After several rounds of briefings and orders, on August 23 and 24, 2007 (Ex. 7), this Court granted Mr. Hamad's motion to expedite, denied his motion to bifurcate claims I and II, and set a

briefing schedule that called for completion of briefing on all issues by December 31, 2007. After several more rounds of litigation and efforts to delay by Respondent, on October 31, 2007, this Court granted the motion to bifurcate, in part, and reestablished the briefing schedule that had been set in August. It is that briefing schedule that has now been suspended by the order of November 9, 2007, and that Mr. Hamad seeks to reinstate.

Mr. Hamad has taken a multi-level approach to his efforts to obtain relief, first from the district court, and now from this Court. First, he argues that, based solely on review of the CSRT record, it is clear that his imprisonment is unlawful because the evidence presented does not meet any lawful definition of enemy combatant. Second, he argues that in reviewing the record of the CSRT, the Court should utilize the definition of enemy combatant required by the Supreme Court's decisions in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), *Hamdan v. Rumsfeld*, 126 S.Ct. 2749 (2006), and by the laws of war. Third, if he does not prevail on those claims, he argues that he is entitled to have the Court review the extrinsic evidence he has gathered in determining whether he is an enemy combatant and to review the fairness of the CSRT process.

The Court's orders of August 23 and 24, 2007, and its Order of October 31, 2007, reflected a sound understanding that Mr. Hamad's case is susceptible of

resolution under the DTA solely on the record presented in the CSRT, that it should be resolved quickly, and that the issues presented by Mr. Hamad in Claims II and III of his petition are ripe for resolution without litigation of the procedural and jurisdictional matters that have snarled other DTA cases.

Indeed, Mr. Hamad sought bifurcation of his claims I and II believing that the two claims are similar, one calling for review of the CSRT record under a broad view of the term enemy combatant, and the other for review of the record under the definition of the phrase required by the Supreme Court's decisions in *Hamdi* and *Hamdan* and by the laws of war.

While Mr. Hamad is gratified that a new CSRT has been ordered, he has no confidence that the military will act expeditiously or fairly and, therefore, continues to believe that judicial review is essential to his regaining his freedom as quickly as possibly.

B. JUDICIAL REVIEW IS ESSENTIAL GIVEN THE HISTORY OF THE LITIGATION AND OARDEC PROCESS

On October 13, 2006, Mr. Hamad sent the evidence of innocence he had gathered to OARDEC. He received email confirmation from OARDEC that it had received his material on November 3, 2006. It was only during the first round of litigation in *Bismullah v. Gates*, 501 F.3d 178 (D.C. Cir. 2007), and after Mr.

Hamad had provided this Court with his evidence of innocence, that, on May 7, 2007, OARDEC promulgated Instruction Number 5421.1 that defined the type of new evidence that would justify a new CSRT. Ex. 12. That definition closely parallels the types of evidence presented to OARDEC by Mr. Hamad.

OARDEC did not act on any request for a new CSRT until after this Court's order of August 23 in *al Gingo v. Gates*, No. 07-1090, granting expedited consideration of his DTA petition.¹ OARDEC did not act on Mr. Hamad's request for a new CSRT until the day this Court ordered consideration of the merits of his claim II.

The manner in which the government has acted in this case is consistent with the approach it has taken throughout the habeas corpus and DTA litigation, making decisions at the last minute when court action is imminent.²

¹Counsel for Mr. Hamad are also counsel for Mr. al Gingo and had also submitted evidence of his innocence to OARDEC in the fall of 2006.

²Throughout the history of litigation by the men imprisoned in Guantánamo, the Executive has exercised its power in a manner both calculated to affect the litigation and indicative of the importance of involvement by the judicial branch. One of the most glaring examples occurred when *Rasul v. Bush*, 542 U.S. 466 (2004), was pending before the Supreme Court. On March 9, 2004, just two weeks before oral argument was scheduled, the Executive released Rasul and Iqal from their imprisonment in Guantánamo. A related event occurred in March 2006 when, just days before the arguments in this Court in *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006), the government announced a change in policy and that it would no longer use the fruits of torture in military commission proceedings in

Mr. Hamad has no confidence that OARDEC will move expeditiously absent involvement of this Court in reviewing his case. Moreover, as set forth below, Mr. Hamad has no confidence in the fairness of any OARDEC proceeding.

C. THE FACT THAT A NEW CSRT HAS BEEN ORDERED DOES NOT RENDER THIS CASE MOOT

Mr. Hamad filed his DTA petition invoking this Court's jurisdiction based on his designation as an enemy combatant nearly seven months ago. The DTA provides this Court authority to "determine the validity of *any* final decision of a Combatant Status Review Tribunal that an alien is properly detained as an enemy combatant." Pub. L. No. 109-163, § 1405(c)(2)(A), 119 Stat. 3476 (Jan. 6, 2006) (emphasis added). The CSRT designation as an enemy combatant, which has resulted in Mr. Hamad's imprisonment is "any final decision" regardless of any future CSRT. *See United States v. Gonzalez*, 520 U.S. 1, 5 (1997) ("Read naturally, the word 'any' has an expansive meaning, that is, 'one of some indiscriminately of whatever kind.'"). Mr. Hamad's present detention is based on the 2004 CSRT decision. This Court's power to review final decisions should be construed broadly because the procedures for review of "new evidence" would

Guantánamo. Another example occurred in this Court when, just days before argument in *Qassim v. Bush*, 466 F.3d 1073 (D.C. Cir. 2006), the government informed the Court that five of the men had been released to Albania. *See Qassim v. Bush*, 466 F.3d 1073 (Emergency Motion To Dismiss As Moot (May 5, 2006)).

place in the Department of Defense's sole and unrestricted power the ability to delay DTA proceedings by repeatedly reconvening a Tribunal.³

D. JUDICIAL REVIEW OF THE CSRT PROCESS IS ESSENTIAL

The Supreme Court's test for common law exhaustion militates strongly in favor of entertaining the DTA petition without further delay. *McCarthy v. Madigan*, 503 U.S. 140, 146-49 (1992) (the Court should consider undue prejudice from an unreasonable or indefinite timeframe; doubt as to the efficacy of the available relief; and concern regarding the adequacy of the reviewing body).

On October 3, 2007, Mr. Hamad submitted to this Court an affidavit from Lt. Col. Stephen Abraham and a declaration from Federal Defender Investigator Teesdale that raise serious questions about the fairness of the CSRT process. Both declarations describe substantial command interference. Ex. 8, 9.⁴ The Teesdale declaration describes significant failings in the gathering of exculpatory evidence.

³The provisions under which the Deputy Secretary of Defense convened the new CSRT were not even in existence when the Detainee Treatment Act of 2005 and Military Commissions Act of 2006 were enacted, and purport to provide "unreviewable discretion" whether to hold a new CSRT. *See* OARDEC Instruction 5421.1 (May 7, 2007). Ex. 12.

⁴The classified unredacted affidavit is on file with the Court. It does not contain any additional substantive information.

Submitted herewith is a new declaration from Lt. Col. Abraham that casts even more doubt on the fairness of the process in Guantánamo. Ex. 10. In the new declaration, Lt. Col. Abraham explains, *inter alia*, how evidence-gathering personnel at OARDEC who had no information about an individual detainee would often “presume[] that having an alleged association with an organization was a sufficient basis for attributing all research related to that organization to the individual.” Ex. 10, ¶ 49. Lt. Col. Abraham further explains that OARDEC “did not have a rational system for pursuing leads that might have resulted in the discovery of exculpatory evidence. . . .” Ex. 10, ¶ 51. Finally, as relevant to this proceeding, Lt. Col. Abraham states that “a major source of highly relevant evidence was never explored – independent evidence from the detainee’s life before his arrest.” Ex. 10, ¶ 52. In the face of the questions raised about the CSRT process, expeditious review by this Court of the merits of Mr. Hamad’s case is critical.

**E. MR. HAMAD HAS BEEN APPROVED TO LEAVE
GUANTÁNAMO SINCE NOVEMBER 2005.**

In his motion of November 8, 2007, Respondent states that there “is a possibility” that Mr. Hamad may “be transferred from Guantánamo.” That statement should not deter this Court from hearing the merits of Mr. Hamad’s

claim because there is a significant distinction between release and transfer.

Mr. Hamad was approved for transfer two years ago. Ex. 6. The process of transfer requires negotiation between the United States and Sudan. Ex. 13. Counsel has been advised that negotiations for Mr. Hamad's repatriation are stalled, that the Sudanese government wants Mr. Hamad to be repatriated, will treat him fairly, and is frustrated that Mr. Hamad has not been returned home. An affidavit describing the state of negotiations is attached as Exhibit 11. The unfortunate state of relations between the United States and Sudan may well be hindering negotiation over Mr. Hamad's repatriation.

If this Court rules that the CSRT evidence was insufficient to hold Mr. Hamad as an enemy combatant, he would be eligible for release from Guantánamo without the necessity for diplomatic negotiations. Release of a person who is not an enemy combatant is distinct from transfer of a person the government continues to label as an enemy combatant but one who can be safely transferred to his home country. This distinction renders action by this Court on the merits of Mr. Hamad's claim critical to the circumstances of his departure from Guantánamo and, it appears, the likelihood of any departure in the near future.

CONCLUSION

Mr. Hamad is innocent; he has been a prisoner for more than five years.

This Court has the authority to review the legality of his detention under the DTA. It is time for the Judiciary to act, examine the record of the CSRT in this case, and require the government to defend its detention decision in a public courtroom.

Respectfully submitted this 13th day of November, 2007.

/s/ Steven T. Wax

Steven T. Wax

Federal Public Defender

/s/ Stephen R. Sady

Stephen R. Sady

Chief Deputy Public Defender

CERTIFICATE OF SERVICE

I hereby certify that on November 13, 2007, I served the foregoing Petition for Panel and *En Banc* Reconsideration Of the November 9, 2007, Order Suspending Briefing Schedule And for Expedited Consideration by e-mail with a paper copy to follow by Federal Express to:

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