[ARGUMENTS 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

MOTION FOR LEAVE TO FILE DECLARATION DESCRIBING PROCESS OF COMPILING CSRT RECORD

The respondent hereby seeks leave to file the attached declaration of Rear Admiral (Retired) James M. McGarrah describing the process of compiling the record of a Combatant Status Review Tribunal (CSRT). During oral argument, the panel asked numerous questions (Tr. at 21-42) about the collection and retention of "Government Information," as defined by CSRT Procedures, enc. 1, § E(3). The government believes that this declaration is responsive to such questions and will assist the Court in understanding the process of developing the CSRT record. *See Environmental Defense Fund, Inc. v. Costle*, 657 F.2d 275, 285 (D.C. Cir. 1981) (in administrative review, Court "may 'obtain * * * through affidavits * * * such

additional explanations of the reasons for the agency decision as may prove necessary'" so long as the materials are "merely explanatory of the original record").

The McGarrah Declaration describes which files were reviewed, Decl. ¶¶ 7-9, how other federal agencies were queried, *id.* ¶ 10, and what information was retained, *id.* ¶¶ 11, 16. It also identifies several problems that would arise if the Court were to require the production of all "Government Information." For instance, the "release of [certain] documents could reasonably be expected to cause harm to national security by revealing sensitive information such as sources or methods." Decl. ¶ 10.b-c. In addition, because the CSRT procedures never required DoD "to compile a record of material comprising all the records in government files that would qualify as Government Information" (*id.* ¶ 16), such a record was not physically compiled, *Id.* ¶ 11; *id.* ¶ 10.b-c. The Recorder did not maintain copies of every document he ever "obtain[ed] and examine[d]" (CSRT Procedures, enc. 2, § C(1)), including those that are only "marginally relevant" or "not relevant" and those that contain certain law-enforcement or especially sensitive material. Decl. ¶¶ 10.b-c, 11.a. However, in examining the Government Information, "*all* material that might suggest the detainee should not be designated as an enemy combatant was identified and included in the materials presented to the CSRT and included in the CSRT Record," *Id.* ¶ 13.a; *id.* ¶ 10.d; *see* CSRT Procedures, enc. 2, § B(1).

Finally, it is worth noting that requiring the production or recreation of all

material qualifying as "Government Information" would far exceed even the constitutionally derived *Brady* obligations of a criminal prosecutor. *See Brady v. Maryland*, 373 U.S. 83, 87 (1963). In that context, the prosecution is *not* required to provide access to *all* government files relating to an accused. Rather, the prosecution must produce only the "evidence favorable to an accused * * * where the evidence is material." *Banks v. Dretke*, 540 U.S. 668, 691 (2004); *see also Kyles v. Whitley*, 514 U.S. 419, 439 (1995) (prosecutor must "make judgment calls about what would count as favorable evidence" and criminal justice system relies on this "prosecutorial obligation for the sake of truth"); *see generally United States v. Brooks*, 966 F.2d 1500, 1502-05 (D.C. Cir. 1992).

Because Government Information is defined broadly to include any relevant, "reasonably available" information in government files, ordering its production would essentially be equivalent to requiring full-blown discovery in every DTA case. *Brady* does not require that. *See, e.g., United States v. Bagley*, 473 U.S. 667, 675 (1985) ("the prosecutor is not required to deliver his entire file to defense counsel" because "[a]n interpretation of *Brady* to create a broad, constitutionally required right of discovery 'would entirely alter the character and balance of our present systems of criminal justice'"). And there is no reason to believe that Congress intended to impose a more onerous burden on the government in DTA proceedings.

CONCLUSION

For the foregoing reasons, the Government moves for leave to file the McGarrah Declaration.

Respectfully submitted,

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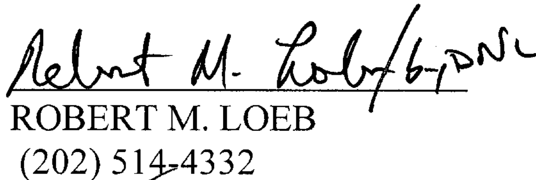

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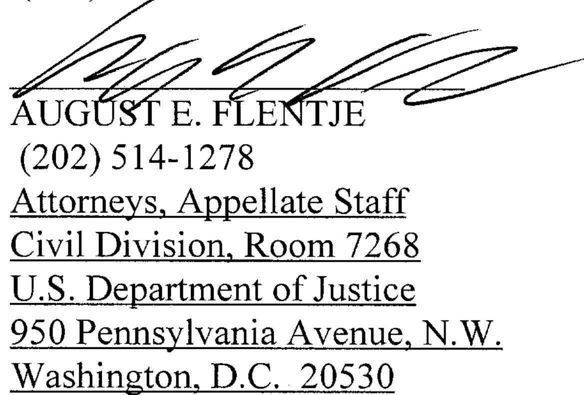

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MAY 2007

CERTIFICATE OF SERVICE

I hereby certify that on June 1, 2007, I caused copies of the foregoing "MOTION FOR LEAVE TO FILE DECLARATION DESCRIBING PROCESS OF COMPILING CSRT RECORD" to be served upon counsel of record by causing copies to be sent by Fed Ex overnight delivery and by e-mail transmission to:

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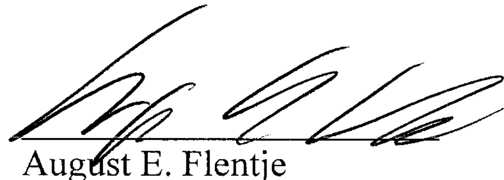

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