IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

In re Guantanamo Detainee Cases (*except* 04-CV-1142 (RJL), 04-CV-1166 (RJL)*, and* 04-CV-1519 (JR))	)	Civil Action Nos. 02-CV-0299 (CKK), 02-CV-1130 (CKK), 04-CV-1135 (ESH), 04-CV-1136 (JDB), 04-CV-1137 (RMC), 04-CV-1144 (RWR), 04-CV-1164 (RBW), 04-CV-1194 (HHK), 04-CV-1227 (RBW), 04-CV-1254 (HHK)

RESPONDENTS' RESPONSE TO PETITIONERS' MOTION FOR ACCESS TO UNREDACTED FACTUAL RETURNS AND TO COMPEL COMPLIANCE WITH ORDER ON PROTECTED INFORMATION PROCEDURES

Petitioners' November 18, 2004 motion presents two issues: (1) respondents' compliance with the Court's November 10, 2004 Order requiring disclosure to petitioners' counsel of information respondents desire to have deemed "protected information" under the Protective Order in this case; and (2) petitioners' counsel's entitlement to certain classified information redacted from Combatant Status Review Tribunal ("CSRT") proceeding records submitted to counsel as factual returns in these cases. The first issue is no issue at all: respondents fully complied with the November 10 Order. The second issue is also resolved in a straightforward fashion. Under applicable law pertaining to national security information, petitioners' counsel simply have no such entitlement to plenary access to classified information contained in the CSRT records. This is particularly evident in the circumstances of these cases, where any judicial review of the Military's determination that each petitioner is an enemy combatant who must be detained pursuant to the President's war powers must be exceedingly deferential.

ARGUMENT

I. RESPONDENTS HAVE COMPLIED WITH THE COURT'S NOVEMBER 10 ORDER AND HAVE IDENTIFIED ON NUMEROUS OCCASIONS THE INFORMATION THAT THEY SEEK TO DESIGNATE AS "PROTECTED"

Petitioners' accusation that "[r]espondents have not complied with the Court's November 10 Order requiring them to identify to Petitioners any portion of the Returns they seek to designate as 'Protected Information' pursuant to the Protective Order," see Motion at 5, is false. The Court's November 10 Order required counsel for respondents to "deliver the information they seek to be deemed 'protected' to the Court Security Officer at the designated secured facility on or before November 17, 2004." Respondents complied with the Court's Order. Indeed, respondents submitted the classified factual returns to the petitions for writ of habeas corpus, which contain the information the respondents seek to be deemed "protected," to the Court Security Officer on November 15, 2004, two days before the Court-imposed deadline. Respondents filed a Notice of Submission of Factual Returns to Petitions for Writ of Habeas Corpus Under Seal on November 15, 2004 via the Court's CM/ECF system to inform petitioners that they had submitted the factual returns to the Court and that the returns would be made available to petitioners' counsel consistent with the provisions of the Protective Order. Petitioners' counsel, thus, have had the opportunity to "review at the secured facility the information at issue and . . . notify the Court of their position with respect to the designation of the information on or before November 19, 2004" pursuant to the Court's November 10 Order.

In their motion to compel, petitioners' counsel state that they "have reviewed the Returns at the secure facility, and none [of petitioners' counsel] has found any indication whatsoever of what material, if any, Respondents claim to be protected information." Motion at 5-6. This

assertion cannot bear scrutiny, since it should be evident to petitioners that the information for which Respondents seek protected status consists of all unclassified information in the classified factual returns that was not included in the publicly filed portions of the factual returns. As explained below, and as has been explained to petitioners' counsel and would have been explained again had counsel informed respondents' counsel of their confusion, such information in the submitted classified factual returns consists of all documents designated, i.e., marked, "Law Enforcement Sensitive" or "LES," as well as the names and other personal identifying information that were redacted, i.e., blacked-out, in the publicly filed portion of the factual returns.[1] A review of the classified returns for "Law Enforcement Sensitive" or "LES" markings and a quick comparison of the redacted identifying information in the publicly filed version of the factual returns with the versions supplied under seal is all that is required.

Respondents' Motion to Designate as "Protected Information" Unclassified Information in Factual Returns to Petitions for Writ of Habeas Corpus That Is Not Filed On the Public Record, which prompted the Court's November 10 Order, specifically and expressly identified this information:

> The factual returns contain classified national security information that is subject to the provisions of the Protective Order, and unclassified information, certain of which is not suitable for public release. As explained in the declarations submitted with the factual returns, respondents have filed on the public record only those portions of the factual returns that are unclassified and appropriate for

[1] As explained in Respondents' Motion to Designate as "Protected Information" Unclassified Information in Factual Returns to Petitions for Writ of Habeas Corpus That Is Not Filed On the Public Record (filed Nov. 8, 2004) at 2, this information is sought to be designated as "protected information" because of potential harms to law enforcement efforts, or, especially with respect to identifying information, to protect the privacy and safety of other detainees, detainees' family members, or U.S. Government personnel.

> public disclosure; unclassified information not suitable for public release was redacted. Such redacted information includes sensitive law enforcement information (e.g., FBI interview reports and other materials marked "Law Enforcement Sensitive"), and personal identifying information of certain individuals (e.g., names and addresses of detainees' family members, other detainees and United States government personnel). Respondents request that such information be designated and treated as "protected information" under the Protective Order, that is, that it not be publicly disclosed, not disclosed to detainees, etc. as provided in the Order.

See Respondents' Motion to Designate as "Protected Information" Unclassified Information in Factual Returns to Petitions for Writ of Habeas Corpus That Is Not Filed On the Public Record (filed Nov. 8, 2004) at 2-3. Counsel for respondents explained this request to David H. Remes, counsel for the *Abdah* petitioners, when conferring over this motion, as well as to other counsel for petitioners in various communications.[2]

Thus, as was explained to petitioners' counsel, to discern information that respondents seek to designate as "protected information," counsel for petitioners merely need to look through the classified factual returns in the secure facility for documents marked "Law Enforcement

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[2] The issue of protected information in the factual returns was also discussed as early as several weeks ago during negotiations over the Protective Order, when respondents proposed that the definition of "protected information" include the following:

> The terms "protected information and/or documents," "protected information" and "protected documents" refer to:
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> a. any document or information contained within the records of proceedings before the Combatant Status Review Tribunals that:
>
> i. is not classified national security information and/or documents as defined in paragraph 9; and
>
> ii. has not been filed in the public record in the government's factual returns to petitioners' petitions for writ of habeas corpus.

Proposed Protective Order (filed Oct. 19, 2004), ¶ 11.

Sensitive" or "LES," and, additionally, to look at the personal identifying information redacted in the publicly filed portion of the return but present in the classified return.[3] That information is the information that respondents seek to designate as "protected information."

Petitioners' demand that Respondents further "identify" – in some unspecified manner – every single piece of protected information in the factual returns is not justified. Such an exercise with respect to the 60+ returns involved would be a burdensome and unnecessary undertaking that would serve to only delay the proceedings in these cases. Petitioners' counsel can readily identify the information at issue, as noted above.

Counsel for respondents have complied with the Court's November 10 Order. Petitioners' motion to compel respondents to comply with the Order should be denied.

II. PETITIONERS' COUNSEL ARE NOT ENTITLED TO ACCESS TO ESPECIALLY SENSITIVE CLASSIFIED INFORMATION REDACTED FROM THE CLASSIFIED FACTUAL RETURNS

Once more petitioners' counsel engage in the groundless and tiresome characterization of anything occurring is this litigation they do not like as an attempt by the government "to thwart

[3] In addition, there may be a few unclassified documents in the classified returns, i.e., documents without a "CONFIDENTIAL," "SECRET," etc. marking, that also do not have a "Law Enforcement Sensitive" or "LES" marking, but are nonetheless sensitive and have not been included in the publicly filed portions of the factual returns. These documents are also ones respondents seek to have designated as "protected information." Respondents attempted to make sure that any such documents were marked "Law Enforcement Sensitive" or "LES," but it is possible that in the multiple boxes of classified returns submitted in this case, a few such documents were missed and not so marked. Again, identifying the documents respondents seek to designate as "protected" is simple, however: they include any document in the classified return that is not marked classified and is not in the publicly filed return.

the mandate of Rasul v. Bush, 124 S. Ct. 2686 (2004),"[4] this time complaining that certain classified information was redacted from the classified CSRT proceeding records served on counsel as factual returns in these cases.[5] See Motion, § I. Without citing any supporting authority, counsel claim immediate entitlement to all such redacted information. Petitioners' claim of entitlement is doubly foreclosed, however. For one, the applicable law regarding national security information vests judgments concerning access to classified information in the discretion of the Executive Branch. For another, petitioners' contention that counsel must see every scrap of classified information in the CSRT records founders on the very limited scope of review that the Court must apply in testing the Military's determination that each petitioner is an enemy combatant subject to detention.

In these cases, the Director of Central Intelligence, in his capacity as head of the United States intelligence community, has delegated to originating agencies the responsibility to review the classified factual returns in the cases and redact information that would tend to reveal intelligence sources and methods, in accordance with the duty to protect such sources and methods pursuant to Executive Order 12958, as amended by Executive Order 13292, 68 Fed.

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[4] As respondents have explained elsewhere, Rasul did no more than decide that 28 U.S.C. § 2241 confers jurisdiction on district courts to hear habeas corpus petitions filed by aliens detained at Guantanamo Bay. See Respondents Response to Petitions for Writ of Habeas Corpus and Motion to Dismiss or for Judgment as a Matter of Law and Memorandum in Support, filed Oct. 4, 2004, at 28-30 ("Response") (citing Rasul, 124 S. Ct. at 2498-99). It made no decisions regarding how the habeas cases would proceed.

[5] Petitioners' accusations that the government in the past has not complied with the Court's scheduling orders are likewise groundless and are based merely upon petitioners' counsel's imaginings as to how they wanted these cases to proceed and not upon the actual scheduling proposals put forth by the government or court orders entered in the cases.

Reg. 15315 (Mar. 28, 2003), and 50 U.S.C. § 403-3(c)(7). See Sims v. CIA, 471 U.S. 159, 168-69 (1985) (§ 403-3 accords DCI sweeping authority to protect sources and methods from disclosure). In a number of the classified factual returns, such redactions were made; declarations identifying the redactions and articulating the reason(s) for such redactions accompany each factual return in which redactions were made.[6] As indicated in the declarations, in general, the redactions involve intelligence sources, methods or activities, as well as certain information collected from those resources, that pertain to individuals other than the detainee or are source-identifying, and in any event, do not support a determination that the detainee is ***not*** an enemy combatant.

Petitioners' counsel argue, without citing any authority, that they are "entitled to review this information in full and unredacted form" because it might "lead to evidence that would exculpate" a detainee or undermine or otherwise discredit the government's reasons for designating a detainee an enemy combatant. See Motion at 4-5. From the nature of these assertions, it appears petitioners reflexively and conclusorily assume that the proceedings in these cases must necessarily involve unlimited and unrestrained factual development. Such an approach, however, is never the norm in either civil or criminal cases involving classified information, and it most certainly is not appropriate in the unique circumstances of this litigation.

[6] In addition, certain FBI documents in the classified factual returns contain redactions, which are explained in the FBI memoranda included in the publicly filed portions of the returns referencing "Request for Redaction of National Security Information." These redactions were made before the documents were considered by the CSRTs, and the redactions are present in both sets of classified factual returns – the *in camera* submissions to the Court as well as the submissions made available to counsel for petitioners. Because this FBI-redacted information was never part of the CSRT record, or reviewed by the CSRTs, the information is not implicated by petitioner counsel's request for access to unredacted factual returns.

Indeed, counsel's assumption reveals that at the same time they wrongly castigate the government for attempting to avoid Rasul, petitioners' counsel altogether ignore the Supreme Court's decision in Hamdi v. Rumsfeld, 124 S. Ct. 2633 (2004). In Hamdi, five Justices of the Court held that detention of enemy combatants is a fundamental and accepted incident to war. See id. at 2640 (plurality opinion), 2679 (Thomas, J., dissenting). The President, of course, is Commander in Chief of the Armed Forces, U.S. Const. art. II, § 2, cl. 1, and the "Constitution recognizes that core strategic matters of warmaking belong in the hands of those who are best positioned and most politically accountable for making them." See Hamdi, 124 S. Ct. at 2647 (plurality opinion) (citing Department of Navy v. Egan, 484 U.S. 518 (1988); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 587 (1952)). Likewise, that the power to detain enemy combatants is vested in the Executive is confirmed by Congress's Authorization for Use of Military Force passed in the wake of the September 11, 2001 attacks. Hamdi, 124 S. Ct. at 2639-43 (plurality opinion).

Given this demonstrable commitment of a quintessentially military function to the Executive Branch, the nature and scope of appropriate judicial inquiry in this litigation is necessarily limited. In particular, there should be no evidentiary hearing in this Court, whose role is solely to confirm that the detention of petitioners is not "in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2241(c)(3). This function does not require – indeed, the constitutional balance does not permit – this Court to engage in the type of original fact-finding on a blank slate that is characteristic of ordinary civil or criminal cases. For instance, it is not the Court's role to develop or weigh in the first instance the mix of facts that tend to show or not to show that an individual is an enemy combatant, or to authorize a wide-

ranging or free-wheeling exploration and presentation of all relevant information. Rather, that inquiry and factual determination already have been made by those to whom the Constitution entrusts those responsibilities. As set forth in our prior briefs, see Response at 46; Reply Memorandum in Support of Motion to Dismiss or for Judgment as a Matter of Law (filed November 16, 2004) at 19-20, this Court's function is, at most, to confirm that a factual basis (i.e., "some evidence") exists supporting the Military's determination that a detainee is, indeed, an enemy combatant, taking into account the constitutionally sensitive nature of the determination. See Superintendent v. Hill, 472 U.S. 445, 455 (1985). Indeed, it is only "in the absence of such process" previously provided by the Military that the Court "must itself ensure that the minimum requirements of due process are achieved," i.e., undertake its own factual inquiry. Hamdi, 124 S. Ct. at 2651 (emphasis added). A fortiori, petitioners' counsel are not entitled, as of right, to pursue every scrap of information that might ultimately lead to additional evidence bearing on the detainee's activities.

Here, there are unquestionably legitimate reasons supporting the types of redactions of classified information made in a number of the classified factual returns provided to petitioners' counsel. As noted above, the redactions involve intelligence sources, methods, or activities, as well as certain information collected from those resources that could, if inadvertently disclosed compromise those sources. See Snepp v. United States, 444 U.S. 507, 512 (1980) ("The continued availability of these foreign sources depends upon the CIA's ability to guarantee the security of information that might compromise them and even endanger the personal safety of foreign agents."); see also Sims, 471 U.S. at 169, 180. Such information must not be subject to unnecessary or inadvertent disclosure, especially outside the government. Intelligence sources

can be expected to furnish information only when the confidentiality of their identity can be assured. See Sims, 471 U.S. at 175 (noting concern that intelligence sources will "close up like a clam" unless the government maintains complete confidentiality). And in other instances, unnecessary disclosure of source identity could lead to countermeasures by adversaries or adversely impact the ability to recruit other potential sources. See Sims, 471 U.S. at 176; see also King v. United States Dept. of Justice, 830 F.2d 210, 223 (D.C. Cir. 1987). Unnecessary disclosure of intelligence methods could jeopardize the use of such methods, whether for the collection of intelligence information, the conduct of clandestine activities, or the analysis and evaluation of intelligence information. See Judicial Watch, Inc. v. U.S. Dept. of Commerce, 337 F. Supp. 2d 146, 162 (D.D.C. 2004) ("Intelligence sources, both the individual human sources and their intelligence gathering methods, must be insulated from unnecessary revelation as such may lead to, at the least, embarrassment, and at the most, retribution. Blanketing this type of information, source and method, in a cloak of near absolute secrecy is critical to the United States' ability to deal with confidential agents in furtherance of national security."). And unnecessary disclosure of information provided through such sources and methods could undermine the government's ability to use such information effectively. See Sims, 471 U.S. at 172-73.

Thus, as a general matter, the compromise of intelligence sources or methods, and the accompanying loss in critical intelligence that they can provide, or the compromise of information gathered through such sources and methods, that might be occasioned by unnecessary disclosure could have serious effects upon national security. And the responsibility for assessing the potential for such harms and the need for protecting such information rests upon

the Executive. See Fitzgibbon v. CIA, 911 F.2d 755, 766 (D.C. Cir. 1990) ("The assessment of harm to intelligence sources, methods and operations is entrusted to the Director of Central Intelligence, not to the courts."); Center for National Security Studies, et al. v. U.S. Dep't of Justice, 331 F.3d 918, 928 (D.C. Cir. 2003) (courts should not second-guess Executive's judgment in the area of national security).

Under Executive Order 12958, as amended by Executive Order 13292, 68 Fed. Reg. 15315 (Mar. 28, 2003), generally a person may be granted access to classified information only if three independent conditions are satisfied:

> (1) a favorable determination for eligibility for access [i.e., a security clearance] has been made by an agency head or the agency heads designee; (2) the person has signed an approved nondisclosure agreement; and (3) the person has a need-to-know the information.

Id. § 4.1(a) (emphasis added). In order to be granted access to classified information, a person must meet all three criteria. The fact that a person has a security clearance, even of the highest level, is not sufficient to be granted access to classified information; that person must also meet the third requirement and have a "need to know." Here, the Executive's authority to protect classified sources, methods, and other information has been exercised and judgments made that certain information in the classified factual returns should not be disclosed to petitioners' counsel, as indicated in the declarations accompanying returns where such redactions were made. Thus, it has been determined that the third requirement noted above – that a person have a "need to know" in addition to being determined eligible (or "cleared") for access – has not been satisfied, and it is that determination that is essentially at issue here.

"Need to know," as defined by Executive Order 12958, as amended, means that the person seeking access has been determined by an "authorized holder" of the classified information at issue to "require[ ] access to [that] classified information in order to perform or assist in a lawful and authorized governmental function." Id. § 6.1(z). Moreover, under the Executive Order, the "need to know" determination is committed solely to the discretion of the "authorized holder[s]" of the classified information at issue. Such is the teaching of Dep't of the Navy v. Egan, 484 U.S. 518 (1988). In Egan the Supreme Court held that the Merit Systems Protection Board had no authority to review a denial of a security clearance for a federal employee because "the grant of [a] security clearance to a particular employee . . . is committed by law to the appropriate agency of the Executive Branch." Id. at 527. In reaching this conclusion, the Court reasoned that the authority to protect information bearing on national security – including the authority "to classify and control access to [such] information" – is constitutionally vested in the President as head of the Executive Branch and as Commander in Chief and that this authority should not be intruded upon by the courts, particularly in the absence of a statute specifically establishing a right to judicial review of an access or eligibility determination. Id. at 527-30. In the Court's words, "[f]or reasons . . . too obvious to call for enlarged discussion, . . . the protection of classified information must be committed to the broad discretion of the agency responsible, and this must include broad discretion to determine who may have access to it." Id. at 529 (internal quotation omitted).

While the specific holding of Egan was that a security clearance (i.e., trustworthiness) determination made pursuant to an executive order is not reviewable, the decision clearly stands for the broader proposition that the merits of *all* determinations regarding who shall have access

to classified information are committed to the sole exercise of judgment by the Executive Branch and thus are not judicially reviewable. See In re United States, 1 F.3d 1251 (Table), 1993 WL 262656 (Fed. Cir. Apr. 19, 1993) (see Fed. Cir. Rule 47.6(a) permitting citation of unpublished opinions). As the Federal Circuit in In re United States stated,

> [A] decision to deny a particular individual a security clearance is functionally identical to . . . [a] decision to deny . . . [someone] access to . . . [classified information]. In both instances, the decision is based essentially on the same factors. For example, the deciding official must weigh the importance of the information, the harm from disclosure, the acceptable level of risk to national security, and the potential for leaks or disclosures, including purely inadvertent ones. The only distinguishing factor between an individual's security clearance determination and [a] determination . . . [not to allow additional individuals access to classified information] is that . . . [in the latter, the decision-maker] is not evaluating an individual's credibility or trustworthiness. This distinction, however, is not material, and hence does not remove our decision from the principle for which *Egan* stands. Indeed, that is why *Egan* discussed "access to information" as well as "an individual's" trustworthiness.
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> . . . By speaking more broadly of "protection of classified information, and that this would "include" individual clearance decisions, the Court made clear that what was committed exclusively to the Executive was more than just whether an individual could be denied a security clearance.

1 F.3d 1251 (Table), 1993 WL 262656, at * 6 (Fed. Cir. Apr. 19, 1993). A "need to know" determination clearly entails some of the same risk assessment that a security clearance decision does; thus, the principles enunciated in Egan apply with just as much force to "need to know" determinations. Accordingly, the determination made here that petitioners' counsel do not "need to know" certain classified information that reveals intelligence sources and methods is properly within the purview of the Executive to decide and is not subject to second-guessing by the courts.

That petitioners' counsel in these cases have obtained security clearances pursuant to the Protective Order is not dispositive of the issue of their access to any and all classified

information in Respondents' possession.[7] The discussion quoted above in In re United States, which also involved civil litigation between the government and private parties, makes that clear. In its decision in that case, the Federal Circuit upheld a refusal by the government to increase the number of members of its opponent's litigation team who would have access to classified information produced in discovery even though the proposed additional team members already had security clearances. See also In re United States, 1 F.3d 1251 (Table), 1993 WL 262658 at *5-*6 (Fed. Cir. Apr. 30, 1993) (in same litigation, fact that attorneys for litigant against government possessed security clearances was held "irrelevant" to issue of whether government must disclose withheld classified information to those attorneys) (see Fed. Cir. Rule 47.6(a) permitting citation of unpublished opinions).

In short, it is beyond the power of the courts to second-guess the merits of an Executive Branch decision to deny someone access to classified information, regardless of whether they have qualified for security clearances. Cf. Sims, 471 U.S. at 180 ("[I]t is the responsibility of [the Executive], not that of the judiciary, to weigh the variety of complex and subtle factors in determining whether [to disclose sensitive information]."); Fitzgibbon, 911 F.2d at 766 (impermissible for trial court to "perform its own calculus as to whether or not harm to the national security . . . would result from disclosure" of national security information).

While petitioners appear to assume that any result in which they are prevented from accessing every scrap of classified information in Respondents' possession would be highly

[7] Of course, the Protective Order does not compel the government to disclose classified information or entitle petitioners' counsel access to classified information. See Amended Protective Order (filed Nov. 8, 2004), ¶ 48.

unusual, there is, in fact, nothing remarkable about it. The government in civil cases is simply not required to disclose classified information to an opposing litigant or their counsel in analogous instances. Indeed, the D.C. Circuit has determined that it is consistent with due process that counsel are not entitled to review classified information upon which the government has relied in reaching an administrative determination regarding their clients, where the court is given the opportunity to review the information ex parte and in camera, as is the case here. See Jifry v. FAA, 370 F.3d 1174, 1184 (D.C. Cir. 2004); People's Mojahedin Org. v. Dep't of State, 327 F.3d 1238, 1242 (D.C. Cir. 2003) (citing Nat'l Council of Resistance of Iran v. Dep't of State, 251 F.3d 192, 207-09 (D.C. Cir. 2001)). Even in a federal criminal case, which this is not, the mere assertion of relevance does not lead to the automatic disclosure of classified information involved in a case. Rather, the law contemplates a number of intermediary steps, including ex parte, in camera review as to the materiality of the information, and other alternatives, and, in any event, disclosure of classified information cannot be compelled. See, e.g., United States v. Yunis, 867 F. 2d 617, 623-624 (D.C. Cir. 1989) (citing Classified Information Procedures Act, 18 U.S.C. App. 3). In this same vein, this Circuit has determined that a court should not "plunge ahead" to decide a constitutional right of access to classified information in the abstract, where alternatives exist so that the question can be avoided, however more difficult those alternative inquiries may be. See Stillman v. CIA, 319 F.3d 546, 548 (D.C. Cir. 2003).

The ramifications of these principles for petitioners' motion for access – which asks the Court to decide immediately and in the abstract that petitioners' counsel are entitled to all classified information redacted from the CSRT records – are straightforward: the motion must be denied. And while, for the reasons explained supra, the government's decision that petitioners'

counsel should not have access to the classified information redacted from certain CSRT records is not reviewable, the Court need not and should not reach any conclusion at this point as to the effect, if any, of that withholding on any of these cases. Rather, in light of the extraordinary nature of these cases, an incremental approach to this issue should be utilized. Cf. Hamdi, 124 S. Ct. at 2652 ("We anticipate that a District Court would proceed with the caution that we have indicated is necessary in this setting").

Among the many incremental steps available to the Court that would potentially avoid the need to determine whether there is a constitutional or other right of access to classified information in this case is, of course, consideration of respondents' pending dispositive motion. Respondents have argued, for example, that petitioners do not possess the constitutional rights upon which their petitions are purportedly founded, and that, in any event, their constitutional, statutory, and treaty claims fail as a matter of law for a multitude of legal reasons. If the Court were to accept some or all of these arguments, petitioners' claims could not proceed, obviating the necessity of deciding whether petitioners' counsel are entitled to access to the redacted information.

Beyond that, it might be appropriate for the Court (through the Coordinating Judge or Judges from whom these cases were transferred) to examine, with the aid of briefing by the parties, the factual returns in the individual cases to confirm that a factual basis (i.e., "some evidence") exists supporting the Military's determination that the detainee is, indeed, an enemy combatant, taking into account the constitutionally sensitive nature of the determination. If the requisite evidentiary threshold is judged to be met without regard to any redacted "sources and methods" information, there will be no need to inquire further into the question whether

petitioners have any right of access to further information. In any close case, the Court could review any redacted information in camera and ex parte, with the assistance of representatives of the government, as desired, to consider on a case-by-case basis whether the redacted information is material to the case, in light of the applicable standard of review, and, if so, whether the information rises to such a level of materiality to require any further action by the government, in the form of briefing or additional declarations justifying the withholding, or by the Court. Such an approach would appropriately account for the unique and constitutionally sensitive nature of the issues in these cases, as well as the sheer number of petitioners and factual returns involved.

In any event, petitioners' counsel's request that the Court order at the outset, and in the abstract, that counsel are entitled to all classified information redacted from the CSRT records must be rejected.

CONCLUSION

For the reasons stated above, petitioners' Motion for Access to Unredacted Factual Returns and to Compel Respondents to Comply with Order on Protected Information Procedures should be denied.

Dated: November 22, 2004

Respectfully submitted,

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