

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

LAKHDAR BOUMEDIENE, et al.

*Petitioners,*

v.

GEORGE WALKER BUSH, et al.

*Respondents.*

Civil Action No. 04-cv-1166 (RJL)

**ORAL ARGUMENT REQUESTED**

**PETITIONERS' MOTION TO PRECLUDE THE GOVERNMENT  
FROM SUBMITTING UNCLASSIFIED OR SECRET REBUTTAL EVIDENCE *EX PARTE***

Petitioners hereby move to preclude the Government from submitting any unclassified or secret evidence *ex parte*.

There is no basis for the Government to submit to the Court any unclassified or secret-level evidence without serving it on Petitioners' counsel at the same time. The Government has not suggested any reason why it should be permitted to present an advance preview of unclassified or secret evidence (and argument based thereon) to the Court without also presenting it to Petitioners' counsel, in order to permit preparation of whatever response is appropriate.

The Government has repeatedly demonstrated its willingness in this case to present meritless allegations and unreliable evidence to the Court — such as the statement of Enaam Arnaout (AFR Ex. 29) and allegations relating to the Embassy plot — only to withdraw them once Petitioners' counsel reveals their baselessness. To permit the Government to present evidence or

allegations that are either unclassified or classified only at the secret level (for which counsel possess clearance) to the Court only would be erroneous and undermine the purpose of this habeas case. *See Boumediene*, 128 S. Ct. at 2273 (holding that an “adversarial character” is “necessary” to habeas proceedings); *Carroll v. President & Comm’rs of Princess Anne*, 393 U.S. 175, 183 (1968) (“The value of a judicial proceeding ... is substantially diluted where the process is *ex parte*, because the court does not have available the fundamental instrument for judicial judgment: an adversary proceeding in which both parties may participate.”); *Doe v. Gonzales*, 386 F. Supp. 2d 66, 71 (D. Conn. 2005) (“For good reason, our system of justice relies on the adversarial process to bring to the attention of the finder of fact the strengths and deficiencies in parties’ litigation postures.”).<sup>1</sup>

---

<sup>1</sup> For the reasons stated in the briefing in support of Petitioners’ Motion to Strike the Government’s “*In Camera, Ex Parte* Supplemental Narrative and Supporting Materials,” submission of rebuttal classified above the secret level should be deferred until such time (if any) as the Government can meet this Circuit’s stringent requirements for presentation of *ex parte* material to obtain a determination on the merits.

For the foregoing reasons, Petitioners' Motion to Preclude the Government from Submitting Unclassified or Secret Rebuttal Evidence *Ex Parte* should be granted.

Respectfully submitted,

Seth P. Waxman (*admitted*)  
Paul Wolfson (*admitted*)  
Robert McKeehan (*admitted*)  
Wilmer Cutler Pickering Hale and Dorr LLP  
1875 Pennsylvania Avenue, NW  
Washington, DC 20006  
(202) 663-6800

Douglas F. Curtis (*admitted*)  
Paul M. Winke (*admitted pro hac vice*)  
Wilmer Cutler Pickering Hale and Dorr LLP  
399 Park Avenue  
New York, NY 10022  
(212) 230-8800

Dated: October 31, 2008

/s/ Allyson J. Portney

Stephen H. Oleskey (*admitted pro hac vice*)  
Robert C. Kirsch (*admitted pro hac vice*)  
Mark C. Fleming (*admitted pro hac vice*)  
Gregory P. Teran (*admitted pro hac vice*)  
Allyson J. Portney (*admitted pro hac vice*)  
Wilmer Cutler Pickering Hale and Dorr LLP  
60 State Street  
Boston, MA 02109  
(617) 526-6000

**CERTIFICATE OF SERVICE**

I, Allyson J. Portney, hereby certify that on October 31, 2008, I electronically filed and served the foregoing PETITIONERS' MOTION TO PRECLUDE THE GOVERNMENT FROM SUBMITTING UNCLASSIFIED OR SECRET REBUTTAL EVIDENCE *EX PARTE*.

/s/ Allyson Portney  
Allyson Portney