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

| | |
|---|---|
| LAKHDAR BOUMEDIENE, et al.<br><br>*Petitioners*,<br><br>v.<br><br>GEORGE WALKER BUSH, et al.<br><br>*Respondents*. | Civil Action No. 04-cv-1166 (RJL)<br><br>**ORAL ARGUMENT REQUESTED** |

**PETITIONERS' REPLY BRIEF IN SUPPORT OF THEIR MOTION TO STRIKE THE GOVERNMENT'S "*IN CAMERA, EX PARTE* SUPPLEMENTAL NARRATIVE AND SUPPORTING MATERIALS"**

## INTRODUCTION

The Government contends that it may hold Petitioners in indefinite detention on the basis of black-box evidence it has not described and is unwilling to disclose to Petitioners' security-cleared counsel. The Government's argument ignores the facts of this case and misstates the well-established law on this subject.

The Government's vision (Opp'n 3) of "wartime enemies ... captured abroad and ... being detained ... on the same sort of classified intelligence that the military relies on in conducting wartime operations," which "may very well [be] too sensitive to share with ... civilian counsel," is a hypothetical construct with no support in the facts of this case.

First, Petitioners are not "wartime enemies." Other than Mr. Bensayah, the Government does not allege that Petitioners were "part of" Al Qaeda or the Taliban or that they engaged in any act "supporting" those entities, such as "commit[ing] a belligerent act or … directly support[ing] hostilities in aid of enemy armed forces." Memorandum Order (Oct. 27, 2008) (Dkt. 237).

Petitioners were arrested (not "captured") in Bosnia, thousands of miles from any "wartime operations" conducted by the United States against Al Qaeda and the Taliban. The pretext on which they were arrested by Bosnian authorities and reluctantly turned over to the United States — that they were part of a supposed plot against the U.S. embassy in Sarajevo — has been voluntarily withdrawn. The Government's sole material allegation against five of the six Petitioners now involves only a supposed inchoate "plan" to travel to Afghanistan in the

future, an allegation that (even if proven) would not amount to an act of "support" for any entity with which the United States is at war.

Further, the Government offers no plausible reason why evidence, concerning the imprisonment almost seven years ago of individuals not even alleged to be engaged in hostile or warlike acts, should bear any resemblance to "intelligence that the military relies on in conducting wartime operations" or could possibly be so sensitive that it cannot be disclosed to security-cleared counsel who have an obvious "need to know."

The Government has not asserted that anything (let alone everything) in its black box is sensitive, except in the most general way: it simply declared that it has lodged additional materials for *ex parte* review. *See* Amended Factual Return at 2-3. And its Opposition also is carefully phrased *not* to assert that the black box contains actually sensitive materials. The Government states no fewer than three times that Guantanamo prisoners are detained "often" on the "same sort of" information as the military uses for wartime operations, but nowhere states that the information in the black box *in this case* consists of such information. *E.g.*, Opp'n 1, 3, 20.

Conversely, Petitioners' counsel's "need to know" the black-box materials (if they are to be used at all) could not be more clear. Petitioners' lives and liberty are at stake: they are being held, indefinitely but potentially for the rest of their lives, under conditions that are dramatically shortening those lives. And the supposed justification for this treatment (as to one or more of them) is in the black box: on the Government's submission, the *ex parte* materials are to be examined only when, and precisely because, this Court has determined that the materials available to counsel are insufficient to justify detention.

This Reply makes two central points. First, there is no legal basis for refusing to disclose black box materials to Petitioners' counsel before they are used in Court. *Boumediene* confirmed that Guantanamo prisoners have the right to confront the legal and factual justification for their detention; the Government may not undermine that right through the application of "closed and accusatorial" procedures akin to those held constitutionally inadequate in *Boumediene*. *Boumediene v. Bush*, 128 S. Ct. 2229, 2269-70 (2008). The law of this Circuit requires disclosure of "need to know" information to the opposing party's counsel to the maximum feasible extent, and there is no basis to conclude that such disclosure would not be feasible here, particularly given that counsel is security-cleared. *See infra* Part I. Second, the Government has failed to follow the well-established requirements for proceeding *ex parte*: an articulated claim that the materials in issue *are in fact* too sensitive to be disclosed under the circumstances, a demonstration of compelling national security concerns, and disclosure of as much material as can be disclosed. The black box should be stricken from the record until and unless the Government makes such a showing and Petitioners have an opportunity to address it. *See infra* Part II.

## ARGUMENT

### I. THERE IS NO LEGAL BASIS FOR CONCEALING BLACK-BOX MATERIALS FROM SECURITY-CLEARED COUNSEL.

#### A. *Boumediene* Confirmed that Petitioners Have the Right to Confront, Through Counsel, the Factual And Legal Basis for Their Detention.

The Government's central argument is that *Bismullah I* authorized the submission of *ex parte* materials in proceedings concerning Guantanamo detainees. But *Boumediene* held that the DTA/CSRT review procedure at issue in *Bismullah* was not a constitutionally adequate substitute for habeas corpus review, precisely because it failed to afford Petitioners an opportunity to

confront the allegations and evidence against them. *See Boumediene v. Bush*, 128 S. Ct. 2229, 2269-70 (2008) (declaring that the CSRTs were "closed and accusatorial" and did not give Petitioners notice of "the most critical allegations that the Government relied upon to order [their] detentions" or adequate "means to find or present evidence to challenge the Government's case").

The Government's invocation of lesser DTA/CSRT standards in this habeas proceeding should be rejected.[1] The Government presumes it has the license to submit "the most critical allegations" of its case — not just raw evidence but also allegations via a "supplemental narrative" — in a private audience before the Court. That is directly contrary to the Supreme Court's command that Petitioners be able "to rebut the factual basis for the Government's assertion that [they are] enemy combatant[s]." *Boumediene*, 128 S. Ct. at 2269. When challenged, the Government responds only with material from the very DTA/CSRT proceedings that were rejected by the Court in *Boumediene*: the *Bismullah* decisions and a protective order entered in *Bismullah*. (Opp'n 5.)[2] The Government's facile claim that *Bismullah* is "the law of

---

[1] While the Government aptly describes the habeas remedy as "adaptable" (Opp'n 4) and "flexible" (Opp'n 10), what the Government proposes is not flexibility but the wholesale substitution of one set of procedures and standards for another.

[2] The Government's attempt to use Judge Hogan's protective order in this context (Opp'n 5 n. 3) is even more spurious. The protective order language did not purport to authorize wholesale *ex parte* filings by the Government, but simply noted that it did not *prohibit* them, leaving the issue for case-specific resolution as needed. Nothing in Judge Hogan's order suggests a willingness to deviate from this Circuit's strict rule that *ex parte* filings are improper except in very limited scenarios not shown to be present here. *See infra* Parts I.B-I.D.

the Circuit" (Opp'n 6 n.4) elides the fact that *Bismullah* addresses the limited review available in DTA proceedings, but has nothing to say about these habeas proceedings.[3]

Contrary to the Government's claim, the Supreme Court's statement that Congress may "perhaps" have sought to "avoid the *widespread dissemination* of classified information," 128 S. Ct. at 2276 (emphasis added), cannot reasonably be read to countenance the *ex parte* procedure that the Government has followed in this case. A limited disclosure to *security-cleared counsel* under a long-standing protective order is not a "widespread dissemination." The Supreme Court's statement was addressing the concern that classified information might be disclosed to *prisoners themselves*. See Brief for Respondents at 55, *Boumediene* (Oct. 2007) (cited at 128 S. Ct. at 2276) (expressing concern that armed forces could not "capture al Qaeda terrorists on a foreign battlefield, and then *detain them* abroad as enemy combatants, without *giving them* access to classified information about our sources and methods of intelligence against al Qaeda" (emphases added)). The issue here is not disclosure of classified evidence to Petitioners, but the prospect of withholding material and potentially decisive information from security-cleared

---

[3] The Government also claims (Opp'n 9) that the petitioners in the *Al Odah* case "have agreed with the Government" on *Bismullah*, while ignoring the sharp differences between the Government's actions in *Bismullah* and *Al Odah* vis-à-vis this case. In *Bismullah*, the "Government represent[ed]" that "highly sensitive information" requiring redaction would be "rare[]," in accordance with the court's "presum[ption that] counsel for a detainee has a 'need to know' all Government Information concerning his client." *Bismullah v. Gates*, 501 F.3d 178, 187 (D.C. Cir. 2007). Similarly in *Al Odah*, the issue is merely whether the Government could "redact" text in the original factual returns. Supplemental Brief of Appellees at 5, *Al Odah v. United States*, No. 05-5117 (D.C. Cir. Sept. 9, 2008) (citing *Bismullah* as a framework for determining "when Respondents may *redact* information in their returns"). Here, the Government has done much more than redact isolated information from its return; it has lodged its putatively best case for detention — not just a separate set of evidence but also a separate line of argument — in the black-box submission, completely disregarding any notion, let alone a presumption, that Petitioners' counsel have a need to know the contents of that black box. *Bismullah*'s statements regarding limited, rare redactions do not support the *ex parte* allegations and evidence the Government has submitted here.

counsel. The Supreme Court nowhere approved such a procedure. *Boumediene*'s general expectation that this Court will "use its discretion to accommodate this interest to the greatest extent possible," 128 S. Ct. at 2276, cannot fairly be read as authorization to undermine the core purpose of a habeas proceeding, which is "to rebut the factual basis for the Government's assertion that [they are] enemy combatant[s]," *id.* at 2269.

The fact that the Supreme Court invalidated as unconstitutional Congress's attempt to substitute DTA/CSRT proceedings for habeas hearings makes plain that the adversarial process enshrined in habeas corpus — and the critical liberty interests it protects — cannot be lightly set aside. The Executive may not claim for itself the right to do what Congress was not permitted to do by statute. The "closed and accusatorial" proceedings that may have been acceptable under the DTA have no place here, and thus the black-box submission should be rejected under *Boumediene*.

**B. There Is No Reason to Believe that Any Evidence in the Black Box Is Too Sensitive to Disclose to Cleared Counsel.**

Contrary to the impression suggested throughout the Opposition (Opp'n 1, 3, 5, 7, 10, 13, 20), the Government may not generally insinuate that bushels of materials may be "sensitive" and then submit them *ex parte*. *Ex parte* consideration of materials submitted on the merits of a case is appropriate, if at all, only under "extraordinary" circumstances involving materials that are so "highly sensitive" that they cannot be disclosed even to cleared counsel, but nevertheless cannot be excluded from a case because of the risk of an unjust result. Although the Government repeatedly describes Guantanamo cases as "extraordinary" in general (Opp'n 1, 3, 18, 20), it carefully provides no reason to conclude that the evidence in the black box *in this case* is so

"extraordinary" as to justify lifelong imprisonment without an opportunity for rebuttal by security-cleared counsel.

*Bismullah I* opened only the narrowest of windows. In that DTA case, the Government proposed to turn over the requested "Government Information," subject only to "limited exceptions" for information it described as "highly sensitive." *Bismullah v. Gates*, 501 F.3d 178, 187 (D.C. Cir. 2007). The Government represented that such redacted information would be "rare[]." *Id.* The D.C. Circuit also repeatedly called the material "highly sensitive," *id*., and described the exception in limiting terms: "We think it clear that this court cannot discharge its responsibility under the DTA ... unless a petitioner's counsel has access to *as much as is practical* of the classified information regarding his client." *Id.* (emphasis added). Neither the Government nor the D.C. Circuit described the type of submission apparently made in this case, which apparently goes beyond the mere "redact[ion]" of information, but rather consists of an *ex parte* filing of undisclosed length comprising not only new evidence, but potentially new factual allegations not made known to Petitioners' counsel, none of which has been shown to be "highly sensitive."

*Abourezk* reinforces the inappropriateness of the Government's filing. As the Government notes, the D.C. Circuit there instructed the district court "to make certain that plaintiffs are accorded access to the decisive evidence *to the fullest extent possible*, without jeopardizing legitimately raised national security interests." *Abourezk v. Reagan*, 785 F.2d 1043, 1060 (D.C. Cir. 1986), *aff'd by an equally divided Court*, 484 U.S. 1 (1987). The D.C. Circuit noted the importance of "safeguard[ing] party access to the evidence tendered in support of a requested court judgment" in order to "preserve both the appearance and the reality of fairness."

*Id.* The D.C. Circuit described its "firmly held main rule that a court may not dispose of the merits of a case on the basis of *ex parte*, *in camera* submissions." *Id*. at 1061. It described the exceptions as "few and tightly contained." *Id*.; *see also infra* Part I.C. In particular, it said that "[o]nly in the most extraordinary circumstances does our precedent countenance court reliance upon *ex parte* evidence to decide the merits of a dispute," *id*., and it said it had only found such circumstances in a case involving both "acute national security concerns" and "a large risk that an unjust result would [otherwise] eventuate." *Id*.

The Government has failed to show either of these "extraordinary circumstances" here. It has not even claimed "acute national security concerns" except in the most conclusory manner, and it seems highly implausible that this "extraordinary circumstance" could be present here. Petitioners were detained almost seven years ago, thousands of miles from any area of wartime operations, for a reason the Government has since abandoned. There is now no suggestion that they were engaging or had engaged in any hostilities against the United States. The sole material allegation against five Petitioners alleges an inchoate plan to travel to Afghanistan to engage in battle there — an alleged intention that, even if the Government is able to meet its burden with respect to each of the men, was never carried out. It is hard to imagine good grounds for believing that disclosure to *security-cleared counsel* of materials regarding such a 2001 "plan" could now pose any sort of threat to U.S. security let alone "a large risk that an unjust result would [otherwise] eventuate." *Abourezk*, 785 F.2d at 1061; *see also Ellsberg v. Mitchell*, 709 F.2d 51, 61 (D.C. Cir. 1983) (addressing the state secrets privilege, doubting "that serious harm to national security would be likely to result from disclosure of the material at issue" because "over five years had elapsed" since the last gathering of intelligence, yielding a reduced need for secrecy).

What *is* extraordinary here is what is at stake for Petitioners. They have been held in crushing isolation for six years, and are threatened with being so held for the rest of their lives. The Supreme Court has said they are entitled to confront the legal and factual grounds for their detention in a federal court, and there could hardly be a more compelling case for affording counsel "access to the decisive evidence to the fullest extent possible," particularly where, as here, "national security interests" have never clearly been asserted, let alone "legitimately raised." *Abourezk*, 785 F.2d at 1060. The Government's cases involving publication contracts, pilot's licenses, and other comparatively trivial stakes do not suggest otherwise. *See, e.g., Jifry v. FAA*, 370 F.3d 1174, 1184 (D.C. Cir. 2004) (whether FAA had properly revoked individuals' licenses to fly); *Stillman v. CIA*, 319 F.3d 546 (D.C. Cir. 2003) (whether former intelligence official was contractually bound not to publish information known to him); *People's Mojahedin Org. v. Dep't of State*, 327 F.3d 1238 (D.C. Cir. 2003) (administrative designation of terrorist organization, freezing assets and yielding possible criminal consequences); *Holy Land Found. for Relief & Dev. v. Ashcroft*, 333 F.3d 156 (D.C. Cir. 2003) (same); *Molerio v. FBI*, 749 F.2d 815, 818-19 (D.C. Cir. 1984) (whether FBI could properly deny plaintiff a job).

### C. *Abourezk* Is Controlling Precedent, As None of the Exceptions to the "Main Rule" Established in *Abourezk* Are Present Here.

Even if the Government could demonstrate that "extraordinary circumstances" or "a large risk [of] an unjust result" existed in this case (which it has not attempted to do), *none* of the actual stated exceptions to the "main rule" of *Abourezk* exist here. 785 F.2d at 1061. "Exceptions to the main rule" forbidding *ex parte* submissions on the merits "are both few and tightly contained." *Id.* The only exceptions identified by *Abourezk* are: (1) "when a party seeks *to prevent use* of the materials in the litigation," (2) where there is a "proper invocation" of "the

state secrets privilege," and (3) "exceptions to the main rule specified by statute," such as the Freedom of Information Act. *Id.* As for the first exception, Petitioners have already established — and the Government does not contest — that the Government seeks *to use* the black-box materials offensively rather than to *prevent* their use. And since neither the state secrets privilege nor any statute permitting *ex parte* submissions is at issue here, *Abourezk* is controlling precedent and forbids the consideration of the black-box submission.

**1. The Government has not invoked the state secrets privilege.**

The sole instance in which this Circuit has allowed a court to rely on *ex parte* evidence to decide the merits of a case is *Molerio v. FBI*, 749 F.2d 815 (D.C. Cir. 1984), in which the government claimed the "state secrets privilege." While the D.C. Circuit there "allowed … recourse to the confidential information," it "based that allowance upon proper invocation of the privilege." *Abourezk*, 785 F.2d at 1061. Such invocation requires "a formal claim of privilege, lodged by the head of the department which has control over the matter, after actual personal consideration by that officer." *Ellsberg v. Mitchell*, 709 F.2d 51, 56-57 (D.C. Cir. 1983). *Ellsberg* also describes a number of other requirements, none of which the Government has even attempted to meet here:

> The various harms, against which protection is sought by invocation of the privilege, include impairment of the nation's defense capabilities, disclosure of intelligence-gathering methods or capabilities, and disruption of diplomatic relations with foreign governments. . . . [T]he privilege may not be used to shield any material not strictly necessary to prevent injury to national security; and, whenever possible, sensitive information must be disentangled from nonsensitive information to allow for the release of the latter.

709 F.2d at 57. Further, *Ellsberg* required "(1) that the formal claim of privilege be made *on the public record* and (2) that the government either (a) *publicly* explain in detail the kinds of injury to national security it seeks to avoid and the reason those harms would result from revelation of

the requested information or (b) indicate why such an explanation would itself endanger national security." *Id.* at 63-64 (emphases added).

It is not surprising that the Government wishes to avoid "a formal invocation" of the state secrets privilege (Opp'n 23) — a formal invocation in accordance with *Ellsberg* would require the Government to follow the detailed procedures it would rather ignore. *See also infra* Part II. But the D.C. Circuit's longstanding precedents in *Ellsberg*, *Molerio*, and *Abourezk* are inescapable: formal invocation of the state secrets privilege is required to trigger the national security exception to *Abourezk*'s "main rule." The absence of such an invocation here conclusively distinguishes *Molerio* and reaffirms the applicability of the general rule in *Abourezk*. This Court, therefore, may not rely on *ex parte* evidence in resolving this case on the merits.

**2. There is no statutory authority permitting an *ex parte* submission.**

The only authorities the Government cites to support the consideration of *ex parte* submissions on the merits all fall into the third and final exception articulated by *Abourezk* — use of *ex parte* material pursuant to statutory authority. *See Jifry v. FAA*, 370 F.3d at 1184 (reviewing administrative decision in context of specific FAA regulations at issue); *People's Mojahedin Org. v. Dep't of State*, 327 F.3d at 1242 (reviewing administrative designation of a group as a terrorist organization, pursuant to 8 U.S.C. § 1189(a)(3)(B), which explicitly permits the Secretary of State to "consider classified information in making a designation under this subsection" and stipulates that such information "shall not be subject to disclosure for such time as it remains classified, except that such information may be disclosed to a court ex parte and in camera for purposes of judicial review under … this section"); *Holy Land Found. v. Ashcroft*, 333 F.3d at 164 (reviewing administrative designation of a group as a terrorist organization

pursuant to 50 U.S.C. § 1702(c), which provides that "[i]n any judicial review of a determination made under this section, if the determination was based on classified information … such information may be submitted to the reviewing court ex parte and in camera"). There is no statutory authority that could permit the consideration of *ex parte* materials on the merits here, and thus any case involving such statutory authority is inapposite. Moreover, none of those cases cited by the Government involved *security-cleared counsel* who already possess secret-level clearance and could easily obtain (and have previously held) clearance at higher levels. *Abourezk* thus remains the controlling authority.

**D. The Government's Remaining Efforts to Avoid the "Main Rule" of *Abourezk* Are Baseless.**

The Government asserts four other arguments for circumventing the rule in *Abourezk*, none of which has merit.

First, the Government suggests that invocation of the state secrets privilege is unnecessary because it seeks *to use* the black-box submission rather than to *prevent* its use. Opp'n 24. That position is contrary to the holding in *Molerio*, in which the district court had relied upon the Government's *ex parte*, *in camera* submission in reaching its determination. See *Molerio*, 749 F.2d at 822. Accordingly, where the Government seeks to use *ex parte* material, it may do so only by invoking the state secrets privilege or otherwise complying with *Abourezk*. See *Abourezk*, 785 F.2d at 1061 (discussing *Molerio*).

Second, the Government cites a number of cases in which it claims courts have "declined requests that classified information be provided to private parties or their counsel during litigation against the government." Opp'n 15. Except for Molerio (discussed *supra*), none of the cases is on point, as none of them involve the government's use of *ex parte* material to obtain a

determination on the merits. See *Patterson v. FBI*, 893 F.2d 595 (3d Cir. 1990) (affirming FBI's denial of FOIA request); *Pollard v. FBI*, 705 F.2d 1151 (9th Cir. 1983) (same); *Ellsberg v. Mitchell*, 709 F.2d 51 (D.C. Cir. 1983) (reviewing government's refusal to respond to interrogatories); *Salisbury v. United States*, 690 F.2d 966 (D.C. Cir. 1982) (affirming government's denial of FOIA request); *Weberman v. NSA*, 668 F.2d 676 (2d Cir. 1982) (same); *Hayden v. NSA*, 608 F.2d 1381 (D.C. Cir. 1979) (same); *Halkin v. Helms*, 598 F.2d 1 (D.C. Cir. 1978) (reviewing government's refusal to respond to discovery requests). Moreover, none of these cases involved *security-cleared counsel*.

Third, the Government misconstrues several cases involving bail determinations (Opp'n 19 n.6), none of which stand for the propositions the Government asserts. Leaving aside the fact that bail cases do not involve indefinite military detention without charge, but rather detention pending or following a full criminal trial, *none* of the cited cases allowed the Government to make *ex parte* submissions even in that circumstance. See *United States v. Abuhamra*, 389 F.3d 309, 328 (rejecting the Government's *ex parte* submission and ruling that such "submissions should generally not be received or considered by district courts" as there is a "a strong presumption against ex parte submissions"); *United States v. Accetturo*, 783 F.2d 382, 392 (3d Cir. 1986) (rejecting the Government's ex parte submission in pre-trial detention hearing in which defendant has "the right to know what information is being submitted to the decisionmaker and the opportunity to challenge the reliability of the government's sources as well as provide contrary information. An in camera presentation, even when a summary is provided to the defendant, seriously compromises those protections."); *United States v. Acevedo-Ramos*, 755 F.2d 203, 208-09 (1st Cir. 1985) (not involving any Government submission of

evidence *ex parte* but, in *dicta*, suggesting that the defense could have requested review of tapes and transcripts that the Government offered through hearsay).

Finally, the Government's attempt to have this Court ignore this Circuit's decisions rejecting *ex parte* submissions by insisting that Petitioners may not rely on the Due Process Clause (Opp'n 13) is also without merit. The Supreme Court has rejected the Government's argument that *Johnson v. Eisentrager*, 339 U.S. 763 (1950), forecloses the application of constitutional rights at Guantanamo. *See Boumediene*, 128 S. Ct. at 2258 ("Nothing in *Eisentrager* says that *de jure* sovereignty is or has ever been the only relevant consideration in determining the geographic reach of the Constitution."). Rather, "whether a constitutional provision has extraterritorial effect depends upon the 'particular circumstances, the practical necessities, and the possible alternatives which Congress had before it' and, in particular, whether judicial enforcement of the provision would be 'impracticable and anomalous.'" *Id.* at 2255 (quoting *Reid v. Covert*, 354 U.S. 1, 74-75 (1956) (Harlan, J., concurring in the result)). There is nothing impracticable or anomalous about requiring the Government to comply with Due Process in this case; indeed, *Boumediene*'s analysis of the applicability of the Suspension Clause at Guantanamo applies equally to the Due Process Clause. *See, e.g., Boumediene*, 128 S. Ct. at 2268 (analysis of "the necessary scope of habeas review" accords with "our test for procedural adequacy in the due process context"); *id.* at 2269 (noting that "there are places in the

*Hamdi* plurality opinion where it is difficult to tell where its extrapolation of § 2241 ends and its analysis of the petitioner's Due Process rights begins").[4]

The Government has not shown any impracticability or anomaly that would result if the Court were to require it to make a specific showing of need in this case — as it would in cases with far less at stake — before it could subvert the adversarial system by submitting *ex parte* information. The Government hints at "information that could not be provided to private counsel without damaging national security" (Opp'n 14), but once again stops noticeably short of asserting that the black box *in this case* actually contains such information. It is difficult to understand how national security could be harmed by disclosure under seal to security-cleared counsel.

The Government has demonstrated its willingness in this case to present meritless allegations and 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 or Court-ordered discovery reveals their baselessness. To permit the Government to present evidence or allegations to the Court, without either adversarial testing or any showing of need, would be unprecedented and unjustified. *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

---

[4] The Government's assertion that *Eisentrager* "directly controls" this case (Opp'n 13) is simply wrong. The Supreme Court has repeatedly distinguished the situation of the war criminals at Landsberg Prison from the situation of persons held indefinitely without charge at Guantanamo. *See, e.g.*, *Boumediene*, 128 S. Ct. at 2261 ("The situation in *Eisentrager* was far different[.]"); *Rasul v. Bush*, 542 U.S. 466, 476 (2004) ("Petitioners in these cases differ from the *Eisentrager* detainees in important respects[.]"); *id.* at 487 (Kennedy, J., concurring in the judgment) ("The facts here are distinguishable from those in *Eisentrager* in two critical ways[.]").

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.").[5]

## II. EVEN WHEN *EX PARTE* SUBMISSIONS HAVE BEEN ENTERTAINED, THE GOVERNMENT MUST SATISFY PROCEDURAL PREREQUISITES THAT IT HAS COMPLETELY IGNORED IN THIS CASE.

For any proposed *ex parte* submission, the Government must provide its reasons for the submission *and* "make certain that plaintiffs are accorded access to the decisive evidence to the fullest extent possible." *Abourezk*, 785 F.2d at 1060-61. The Government has never asserted with sufficient detail, much less demonstrated, that the black-box materials are in fact sensitive or classified. No rationale or justification has been provided, nor has the Government made any effort to provide excerpts, summaries, or substitutes to the black-box materials, although it concedes that it is required to do so. Opp'n 12, 17. Rather than honoring the process for consideration of *ex parte* materials, the Government has tried to circumvent it entirely by jumping to the end. This tactic must be rejected, and the black-box submission must be stricken from the record until the Government makes the necessary showing.

While the Government has artfully implied that its black-box submission contains sensitive material, it has never explicitly declared so. Until it has satisfied that requirement, the

---

[5] *Ex parte* submission of rebuttal evidence that is either unclassified or merely secret would be even less justifiable. 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 presenting it to Petitioners' counsel at the same time.

Government fails to meet even the initial threshold for any consideration of *ex parte* material. Even where an exception to the *Abourezk* rule applies, the Government must begin by providing (1) a "proper invocation of the privilege" and (2) a "demonstration of compelling national security concerns." *Abourezk*, 785 F.2d at 1061.[6] Similarly, in *Ellsberg* — upon which the Government relies (Opp'n 19, 23) — the D.C. Circuit required that the Government assert and justify its need for secrecy. *See Ellsberg v. Mitchell*, 709 F.2d 51, 63-64 (D.C. Cir. 1983) (requiring "formal claim of privilege … on the public record" and a detailed public explanation of the national security issues involved); *see also United States v. Camacho*, 2002 WL 31770810, at *2-3 (S.D.N.Y. Dec. 11, 2002) (rejecting *ex parte* submission; criticizing prosecution for "mak[ing] no effort to explain why the perceived risk … cannot be guarded against in a manner which allows defense counsel to comment upon the evidence"); *Naji v. Nelson*, 113 F.R.D. 548, 553 (N.D. Ill. 1986) ("The government's duty to justify on the public record any attempt to shield relevant information as classified is particularly critical where, as here, it is offered as the sole basis for … judgment against the excluded party").

Here the Government has couched its defense of the black-box submission in purely hypothetical terms, stating that in "these cases" — *i.e.*, the entire set of Guantanamo-related cases — "this Court or another district court *may very well ultimately face* the circumstance where the information justifying detention is too sensitive to share." Opp'n 1 (emphasis added). The Government never actually states that its black-box submission *is* "too sensitive to share" or

---

[6] Even in the cases relied upon by the Government, which are not on point, the Government was required to state a privilege and the reasons for it. *See, e.g., United States v. Acevedo-Ramos*, 755 F.2d 203, 209 (1st Cir. 1985) (even when *defense* requests *in camera* review of certain evidence, "the defendant is [to be] apprised of the gist of the evidence" before any *in camera* review).

that it is sensitive (or even classified) at all. The Government's other descriptions are also indirect and tautological. *See, e.g.*, Opp'n 3 (information "may very well [be] too sensitive to share with … civilian counsel"); Opp'n 8 ("This is exactly *the sort* of material that the government has provided to this Court in the *ex parte*, *in camera* submission.") (emphasis added); Opp'n 1, 3, 20 (stating that "wartime enemies" are "often" detained on "same sort of" information as the military uses for wartime operations).

The absence of a clear assertion, let alone explanation, that any or all of the black box materials are "highly sensitive," or that their simple exclusion from these proceedings would risk an unjust result, is not just a matter of formality. If there is any basis for allowing *ex parte* presentation of any materials at all, the Government (and this Court) are nevertheless obligated to assure the participation of Petitioners' counsel to the "fullest extent possible." The Government concedes this (Opp'n 12, 22) and the cases abundantly support this requirement. *See*, *e.g.*, *United States v. Abuhamra*, 389 F.3d 309, 321, 330 (2d Cir. 2004) (*ex parte* submissions permitted "only upon substitute disclosure of the substance of the information to the defense," and "*prerequisite to the receipt* of *ex parte* evidence" in favor of detention, there must be "disclosure to the defendant of the gist or substance of the reasons advanced in the government's sealed submission so that the defendant may fairly meet this challenge") (emphasis added); *United States v. Moussaoui*, 382 F.3d 453, 480 (4th Cir. 2004) (Government must provide materials that substitute for withheld sensitive evidence and "the compiling of substitutions [should] be an interactive process among the parties and the district court"); *cf. United States v. Aviv*, 1995 WL 758756, at *2 (S.D.N.Y. Dec. 22, 1995) (rejecting Government *ex parte* submission because "with no attempt to show that the goal of confidentiality cannot be cured by redaction, [it] goes beyond advocacy; it approaches effrontery"); *Allende v. Shultz*, 605

F. Supp. 1220, 1226 (D. Mass. 1985) (rejecting *ex parte* submission and noting that the Government had not offered a summary of the information in question "nor a detailed explanation for their inability to do so").

The D.C. Circuit and other courts have thus made it abundantly clear that assuring Petitioners' participation "to the fullest extent possible" means (i) giving cleared counsel as much of the material as possible, not as little as the Government can get away with, and (ii) providing counsel with summaries and substitute materials that will enable counsel to represent their clients and confront the legal and factual basis asserted to justify their detention. The Government has not even initiated a process to meet these prerequisites. For the Court to examine any of the black-box materials before the completion of such a process would, with all respect, be unthinkable.

## CONCLUSION

For the foregoing reasons, Petitioners' Motion to Strike the Government's Supplemental Narrative and Supporting Materials should be granted.

Respectfully submitted,

/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

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

**CERTIFICATE OF SERVICE**

I, Allyson J. Portney, hereby certify that on October 31, 2008, I electronically filed and served the foregoing PETITIONERS' REPLY BRIEF IN SUPPORT OF THEIR MOTION TO STRIKE THE GOVERNMENT'S "IN CAMERA, EX PARTE SUPPLEMENTAL NARRATIVE AND SUPPORTING MATERIALS."

/s/ Allyson Portney
Allyson Portney