UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LAKHDAR BOUMEDIENE, et al. Petitioners, v. GEORGE W. BUSH, President of the United States, et al., Respondents	)	Civil Action No. 04-cv-1166 (RJL)

GOVERNMENT'S OPPOSITION TO MOTION TO STRIKE
***IN CAMERA, EX PARTE* SUBMISSION**

INTRODUCTION

The motion to strike filed by petitioners should be denied. In the extraordinary circumstances presented by these cases – where wartime enemies have been captured abroad and are being detained based often on the same sort of classified intelligence that the military relies on in conducting wartime operations abroad – this Court or another district court may very well ultimately face the circumstance where the information justifying detention is too sensitive to share with not only the petitioner, but also with civilian counsel who represents the petitioner. In that circumstance where national security precludes the sharing of information with a litigant, it is well established that a court may consider *ex parte, in camera* submissions. The court of appeals has already held that in cases brought under the Detainee Treatment Act (DTA), it may consider *ex parte, in camera* submissions. *Bismullah v. Gates*, 501 F.3d 178 (D.C. Cir. 2007). The same rule should apply in the habeas cases. Further, the Supreme Court decision in *Boumediene v. Bush*, 128 S. Ct. 2229 (2008), recognized the importance of the government's interest in protecting classified information in these cases, and directed the habeas courts to

accommodate that interest.

The same rule follows from cases addressing the issue of *ex parte, in camera* submissions outside of the context of enemy combatant detention, including the cases cited by petitioners. And even in cases where the Due Process Clause applies, federal courts may review classified information *in camera* and *ex parte* consistent with due process.

Petitioners' motion should also be denied as premature. This Court has already resolved that it would hold the government's submission and allow the parties to be heard before reviewing that submission. At that time, this Court can consider what procedural protections are needed to ensure a fair process in conjunction with consideration of the *ex parte, in camera* submission. But there is no need to address those questions until this Court determines that it must consider the government's *ex parte, in camera* submission.

PROCEDURAL HISTORY

On August 22, 2008, the government submitted its amended factual return. Along with its return, the government filed *in camera, ex parte* supplemental materials. These supplemental materials were filed conditionally, however. The government made clear that the Court need consider them if – and only if – it determined that the weight of the evidence supported issuing a writ. As petitioners acknowledged, the government had explained that "the Court need not consider such supplemental *ex parte* materials unless it determines that the weight of the evidence otherwise supports issuance of the writ." Mot. at 1 (quoting return).

Petitioners filed an emergency motion to hold the *ex parte* materials under seal pending an opportunity for petitioners to be heard (Doc. No. 138, August 23, 2008). In response to that emergency motion, the Court entered a minute order providing that the *ex parte* materials would

remain sealed until petitioners had an opportunity to be heard on the record before the Court (August 26, 2008 Minute Order).

The Court thereafter granted the government's motion to file the amended return. In that Order, the Court stated, "[a]s previously noted on the record, the Court will not review or consider these *in camera, ex parte* submissions [of the government] without first notifying the parties and providing both parties with an opportunity to be heard on the issue of whether these materials should be considered." Order at 2 n.1 (Oct. 10, 2008) (Doc. No. 206). In spite of this Court's order that has already addressed how it would handle the government's submission, petitioners have now moved to strike the government's *in camera, ex parte* submissions. Doc. No. 209, October 10, 2008.[1]

ARGUMENT

I. Courts are Permitted to Consider *Ex Parte, In Camera* Submissions Because the Government Has a Compelling Interest in Protecting Sensitive Classified Information.

In the extraordinary circumstances presented by these cases – where wartime enemies have been captured abroad and are being detained based often on the same sort of classified intelligence that the military relies on in conducting wartime operations abroad – this Court or another district court may very well ultimately face the circumstance where the information justifying detention is too sensitive to share with not only the petitioner, but also with civilian counsel who represents the petitioner. In that circumstance, courts have made plain that they

[1]Habeas returns filed prior to the enactment of the DTA included some *ex parte, in camera* material, which was challenged by habeas petitioners in the *Al Odah* cases. That challenge is currently on appeal, with oral argument scheduled for November 7, 2008. *Al Odah v. United States*, Nos. 05-5117 through 05-5127 (D.C. Cir.).

may consider *ex parte, in camera* submissions when national security so requires. That was the holding of the D.C. Circuit when faced with this exact same issue raised under the Detainee Treatment Act. *Bismullah v. Gates*, 501 F.3d 178 (D.C. Cir. 2007). And, in the case relied upon most heavily by petitioners, the court of appeals explained that the litigant should be "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) (emphasis added).[2] Thus, contrary to the suggestion made by petitioners, the cases addressing disputes involving classified information make plain that this Court has the tools to consider the government's *ex parte, in camera* submission.

A. This Court May Consider *Ex Parte, In Camera* Submissions In Resolving This Case.

Habeas is an "adaptable remedy." *Boumediene*, 128 S. Ct. at 2267. It calls for the "initiative and flexibility" of the court in fashioning appropriate procedures. *Harris v. Nelson*, 394 U.S. 286, 295 (1969). Habeas is sufficiently flexible to enable this Court to resolve this case should it conclude it is necessary to review the *in camera, ex parte* submissions. Such a course is also fully consistent with case law, which recognize that *ex parte, in camera* consideration by the court may be required in cases involving classified information. Indeed, the D.C. Circuit has already held that such consideration would be appropriate in cases brought by Guantanamo detainees under the Detainee Treatment Act (DTA). *Bismullah v. Gates*, 501 F.3d 178 (D.C. Cir.

[2]When petitioners quote *Abourezk*, Mot. at 6, they tellingly leave off the end of the sentence emphasized above, *i.e.*, they omit the qualifier that makes it plain that petitioners' should have access to the "decisive evidence" only so long as such access does not "jeopardiz[e] legitimately raised national security interests." *Abourezk*, 785 F.2d at 1060.

2007).

1. In *Bismullah*, the parties in a DTA case fully litigated before the D.C. Circuit the issue of whether *ex parte, in camera* submissions could be made to the court of appeals in support of the decision that a Guantanamo detainee was an enemy combatant. The D.C. Circuit ruled that counsel need not be provided access to "highly sensitive information, or information pertaining to a highly sensitive source." *Bismullah v. Gates*, 501 F.3d at 178. The Court recognized that, if necessary, it can review classified information *ex parte* and *in camera*. *Id.* As a result of that litigation, the protective order entered in DTA cases provides that while there is a "presum[ption]" that counsel will have a need to know certain relevant classified information in the DTA record, the "presumption is overcome to the extent the Government seeks to withhold from Petitioner's Counsel highly sensitive information or information concerning a highly sensitive source that the Government presents to the court *ex parte* and *in camera*." DTA Protective Order, § 5.B (entered in *Bismullah v. Gates*, No. 06-1197 (Oct. 23, 2008)). In those circumstances the government is required to "provide notice to Petitioner's Counsel on the same day it files such information with the court *ex parte*." *Ibid.*[3]

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[3]The protective order entered in this habeas case – which was entered before the DTA protective order was negotiated and litigated – does not explicitly address *ex parte, in camera* submissions to the Court. The new habeas protective order entered by Judge Hogan expressly allows the submission of *in camera, ex parte* information:

> Nothing herein requires the government to disclose classified information. Additionally, nothing herein prohibits the government from submitting classified information to the Court *in camera* or *ex parte* in these proceedings or entitles petitioners or petitioners' counsel access to such submissions or information. Except for good cause shown in the filing, the government shall provide petitioners' counsel or petitioners with notice served on petitioners' counsel on the date of the filing.

In support of its holding, the D.C. Circuit cited *Stillman v. CIA*, 319 F.3d 546 (D.C. Cir. 2003). *Bismullah*, 501 F.3d at 188. There, the court of appeals reversed a district court order that counsel for a plaintiff had a right to review relevant classified information, holding that the district court must attempt to "determine without the aid of plaintiff's counsel" the issue because of the "compelling interest in protecting both the secrecy of information important to our national security and the appearance of confidentiality so essential to the effective operation of our foreign intelligence service." *Stillman*, 319 F.3d at 548. The *Bismullah* panel similarly recognized that "'[i]t is within the role of the executive to acquire and exercise the expertise of protecting national security,'" and that it is "'not within the role of the courts to second-guess executive judgments made in furtherance of that branch's proper role.'" *Bismullah*, 501 F.3d at 187-88 (quoting *Center for Nat'l Sec. Studies v. U.S. Dep't of Justice*, 331 F.3d 918, 932 (D.C. Cir. 2003)).

This aspect of *Bismullah* should be controlling here and permit the government's *ex parte, in camera* submission. Even though *Bismullah* involved judicial review under the DTA, the question of whether the government may submit material *ex parte* and *in camera* is the same issue presented by petitioners' motion to strike.[4] And *Bismullah* specifically allowed such

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Protective Order, *In re Guantanamo Bay Detainee Litigation*, Misc. No. 08-442, ¶ 48.b (D.D.C. Sept. 11, 2008).

[4] While the government sought Supreme Court review of another aspect of the *Bismullah* ruling regarding the scope of the record in a DTA case, neither party sought further review of the D.C. Circuit's holding regarding the extent of counsel access to classified material. The Supreme Court vacated the D.C. Circuit ruling and remanded to this Court for it to reconsider its ruling in light of *Boumediene*. The court of appeals recently reinstated its ruling, *Bismullah*, Order (D.C. Cir. Aug. 22, 2008), and the government has sought *en banc* review of that reinstatement order. However, the relevant aspect of the *Bismullah* ruling here is correct and has never been challenged, and continues to be the law of the Circuit.

submissions even when the *ex parte, in camera* material was part of the CSRT record and therefore would be relevant and material to the case. *See Bismullah*, 501 F.3d at 188 ("only information that was presented to the CSRT *and* that "the Government has determined petitioners' counsel has a 'need to know'" will be provided to petitioners' counsel) (emphasis added). Thus, petitioners misdescribe *Bismullah* in suggesting that it did not involve the submission of material that "had been submitted to a CSRT." Mot. at 10.

Indeed, the *Bismullah* decision explicitly allowed the *ex parte, in camera* consideration of particularly sensitive classified information even if it is directly relevant to the questions to be decided by the court. *See* 501 F.3d at 187. In addition to allowing for the *ex parte, in camera* submission of material that was not relevant – *i.e.*, classified information that pertained to someone "other than the detainee" – the *Bismullah* court also expressly allowed for the *ex parte, in camera* submission of information that was "highly sensitive" or "pertain[ed] to a highly sensitive source." *Id*. (explaining that petitioner's counsel would have "access to *as much as is practical* of the classified information regarding his client" but that "highly sensitive information" need not be "disclose[d] * * * to counsel") (emphasis added). The *Bismullah* Court based the need for *ex parte* review not on relevance, but solely on the government's judgment with respect to the sensitivity of the information and the harm of disclosing it to civilian counsel. *See Bismullah v. Gates*, 503 F.3d 137, 143 (D.C. Cir. 2007) ("*ex parte* review * * * should be avoided to the extent *consistent with safeguarding classified information*") (emphasis added) (*Bismullah II*); *Bismullah I*, 501 F.3d at 187-88 ("[t]he court does not require * * * disclos[ure of] such information to counsel because, consistent with our rule of deference, '[i]t is within the role of the executive to acquire and exercise the expertise of protecting national security. It is not

within the role of the courts to second-guess executive judgments made in furtherance of that branch's proper role'").

In fact, the *Bismullah* Court specifically anticipated that large amounts of relevant material might be reviewable only by the Court *in camera* and *ex parte*. The Government Information that the Court held to constitute the appellate record was, by definition, material relevant to the detainee's enemy combatant status. *See Bismullah II*, 503 F.3d at 140 ("requir[ing] the Government to collect (and preserve for judicial review) only the *relevant information* in its possession that is reasonably available") (emphasis added); *Bismullah I*, 501 F.3d at 180 (Government Information is information "bearing on the issue of whether the detainee meets the criteria to be designated as an enemy combatant"). Yet the court of appeals also anticipated that some of that information would be submitted *ex parte* and *in camera*; indeed, the Court recognized that it was possible that "*most* of the Government Information will come within an exception to the requirement that the petitioners' counsel be given access" and in that circumstance court review would be "in large part *ex parte*." *Bismullah II*, 503 F.3d at 143 n.7 (emphasis added). This is exactly the sort of material that the government has provided to this Court in the *ex parte, in camera* submission for its consideration if that proves necessary. Accordingly, the *Bismullah* Court plainly envisioned that *ex parte, in camera* submissions would be appropriate even if those submissions are relevant to the court's ultimate evaluation of whether the detainee was an enemy combatant. The *Bismullah* Court therefore directly supports the government's submission of *ex parte, in camera* material in this case.

2. Petitioners argue that this Court should disregard *Bismullah* because it arose in a process found to be "constituitionally inadequate" by *Boumediene* and that was "closed and

accusatorial." Mot. at 9. Notably, in making this argument, petitioners are departing from many of their colleagues who are leading the representation of Guantanamo detainees in the court of appeals case raising the same habeas issue. In *Al Odah*, a habeas case now pending on appeal in the D.C. Circuit on the issue of whether a factual return may include *ex parte, in camera* information, the over thirty habeas petitioners have agreed with the Government that "*Bismullah* . . . provides the correct framework for determining when Respondents may redact information in their returns." *Al Odah v. United States*, Nos. 05-5117 through 05-5127, Supp. Br. in Resp. to Court's Order (D.C. Cir. filed Sept. 9, 2008) (attached as exhibit 1). Thus, petitioners stand alone in asking this Court to disregard the on-point decision of the court of appeals in *Bismullah* that squarely addresses *in camera, ex parte* submissions in cases arising out of the detention of enemy combatants at Guantanamo.

More importantly, petitioners' attempt to distinguish or undermine *Bismullah* based on *Boumediene* is meritless. Instead, *Boumediene* strongly supports the notion that detention of the enemy may at times need to be justified by information that, due to its national security sensitivity, may be provided only to the Court. As the Supreme Court recognized in *Boumediene*, one reason for Congress's repeal of habeas jurisdiction and replacement of it with DTA review "was to avoid the widespread dissemination of classified information." *Boumediene*, 128 S. Ct. at 2276. Far from *questioning* Congress's action on this basis, the Supreme Court specifically *endorsed* this congressional concern as "legitimate," and it directed district courts in the exercise of their habeas authority to accommodate it. *Ibid.* Thus, the Court very much recognized that its unprecedented holding bringing habeas courts into the business of evaluating wartime detention would call for careful protection of the intelligence that led to and

is relied upon to justify that detention.

The *Boumediene* Court therefore specifically acknowledged that any constitutional habeas procedures – which by their nature are flexible – must accommodate the government's compelling interest in protecting sensitive classified information during wartime. The Court expressly "recognize[d] * * * that the Government has a legitimate interest in protecting sources and methods of intelligence gathering," and it therefore directed the "District Court [to] use its discretion to accommodate this interest to the *greatest extent possible*." *Boumediene*, 128 S. Ct. at 2267 (emphasis added).[5] Indeed, in so directing the habeas courts to accommodate the government, the Court specifically cited the government's concern that habeas procedures, if not carefully implemented, could result in a situation where the "armed forces cannot legally 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." *Boumediene v. Bush*, No. 06-1195, Brief of Respondents at 55 (S. Ct. filed Oct. 2007) (attached as exhibit 2); *see Boumediene*, 128 S. Ct. at 2276 (citing this portion of the government's brief for the proposition that "Government has raised . . . concerns" regarding the "dissemination of classified information" which are "legitimate").

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[5] In support of this direction, the Court cited *United States v. Reynolds*, 345 U.S. 1, 10 (1953). In *Reynolds*, the Court "recogniz[ed] an evidentiary privilege * * * where 'there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged.'" *Boumediene*, 128 S. Ct. at 2267 (describing the holding of *Reynolds*). The submission of some material to the habeas court *in camera* and *ex parte* is far more "accommodat[ing]" to habeas petitioners than the exercise of an evidentiary privilege over material that would damage national security if released, because the exercise of a privilege could require termination of the proceedings without a resolution of the merits. *See Reynold*s, 345 U.S. at 11 ("even the *most compelling necessity* cannot overcome the claim of privilege if the court is ultimately satisfied that military secrets are at stake") (emphasis added); *see also Totten v. United States*, 92 U.S. 105 (1875).

In this respect, *Boumediene* is consistent with prior law, which has recognized that intelligence sources will "close up like a clam" absent ironclad assurances of confidentiality, *see CIA v. Sims*, 471 U.S. 159, 172 (1985), and with the CIA's own experience in these cases, where the Director of the CIA explained that "abandoning the rigorous deliberation of the CIA's review process for the habeas litigation reasonably could be expected to cause exceptionally grave damage to the national security by the disclosure of very sensitive information." Respondent's Motion for Partial and Temporary Relief from the Court's July 11, 2008 Scheduling Order, *In re Guantanamo Bay Detainee Litigation*, Misc. No. 08-442 (Aug. 29, 2008), Exh. D, ¶ 20 (Declaration of Michael V. Hayden).

Review of classified information *ex parte* and *in camera* is thus fully consistent with *Boumediene*. The *Boumediene* Court recognized a constitutionally derived habeas requirement that *the habeas Court* have "some authority to assess the sufficiency of the evidence," 128 S. Ct. at 2270; that requirement is satisfied here, as the *ex parte* submission is, of course, to the Court.

The *Boumediene* Court also concluded that a habeas petitioner must have the ability to submit "relevant exculpatory evidence that was not introduced during the earlier proceeding." *Ibid*. But this requirement is not implicated, because petitioners are not in any way precluded from submitting exculpatory material to the Court. (Additionally, the government is under its own obligation to provide exculpatory material to the Court. *See* Case Management Order at 2 (Aug. 27, 2008).) In fact, petitioners in these cases have submitted a traverse comprising some 1,625 pages in an effort to show that they are not enemy combatants. To the extent petitioners argue that any *in camera, ex parte* consideration would unduly hamper their ability to present exculpatory material with respect to the *in camera* material, this Court first should review the

submissions to determine if it can perform its reviewing function "without the aid of plaintiff's counsel." *Stillman*, 319 F.3d at 548; *see Bismullah II*, 503 F.3d at 143 (accepting that in some cases "*most* of the Government Information will come within an exception to the requirement that the petitioners' counsel be given access" and in that circumstance court review would be "in large part *ex parte*"). Only if the court feels it needs further information on the submission should this Court consider other "prudent and incremental" steps that "pay proper heed . . . to the matters of national security that might arise in an individual case." *Hamdi v. Rumsfeld*, 542 U.S. 507, 539 (2004). One such approach might be obtaining further information from the government on reliability; a further step might be development of substitutions or summaries of the *in camera, ex parte* submissions, if feasible, that could be provided to petitioners' counsel. *See infra*, pp. 22-25 (addressing considerations that this Court should employ in evaluating the *ex parte, in camera* submission); *Hamdi*, 542 U.S. at 534 (explaining that due process would be satisfied by a "factfinding imposition" that was "minimal" such as having an "affiant . . . summarize" military records). *Cf. Abourezk*, 785 F.2d at 1061 (government should disclose "as much of the material as it could divulge without compromising the privilege").

In some circumstances, however, substitutions or summaries may not be possible. In those circumstances, this Court is ultimately charged with performing a careful review of the reliability of the evidence the government submits *ex parte* given the fact that counsel cannot, consistent with national security, access it. *See United States v. Abuhamra*, 389 F.3d 309, 331-32 (2d Cir. 2004) (in cases where court considers *ex parte* submission relating to bail denial, there must be "careful judicial scrutiny of the sealed submission" because "*ex parte* submissions are not tested for reliability in the usual adversarial crucible"). Otherwise, the review provided

by the Supreme Court in *Boumediene* would work to require the release of enemy combatants who were identified based on highly sensitive classified information – a result that the Court did not direct; one that "disregard[s] the dangers the detention in these cases was intended to prevent," 129 S. Ct. at 2276; and one that is directly contrary to the President's authority to capture and detain enemy combatants, which "by 'universal agreement and practice,' are 'important incident[s] of war,'" *Hamdi*, 542 U.S. at 518 (quoting *Ex parte Quirin*, 317 U.S. 1, 28 (1942)).

3. Contrary to petitioners' claims, the allowance of *in camera*, *ex parte* submissions does not violate the Due Process Clause and is fully consistent with prior case law on *ex parte* submissions outside of the context of Guantanamo enemy combatant detention.

a. To begin with, the Supreme Court squarely has held that aliens captured and held outside sovereign United States territory have no Fifth Amendment Due Process rights. *See Johnson v. Eisentrager*, 339 U.S. 763, 783 (1950). Although *Boumediene* effectively overruled the parallel suspension clause holding of *Eisentrager*, it expressly declined to render any due process holding. *See* 128 S. Ct. at 2258. Accordingly, the Fifth Amendment holding of *Eisentrager* remains binding on this Court. *See, e.g.*, *Agostini v. Felton*, 521 U.S. 203 (1997) ("if a precedent of this Court has direct application in a case, yet appears to rest on reason rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions"). Moreover, *Boumediene* further suggests that the Fifth Amendment affords no greater rights than the Suspension Clause in this context. *See Boumediene*, 128 S. Ct. at 2268 ("necessary scope of habeas review * * * accords with our test for procedural adequacy in the due process context").

In any event, the *Boumediene* Court recognized that constitutional provisions could not be applied in these circumstances where "enforcement of the provision would be impracticable and anomalous." 128 S. Ct. at 2255. It would be the epitome of anomalous – not to mention dangerous – if, in conjunction with the Suspension Clause, the Due Process Clause applied in such a way so as to preclude the detention of the enemy in wartime if that detention was based on classified information that could not be provided to private counsel without damaging national security.

Moreover, under *Hamdi*, even where the Due Process Clause applies, wartime exigencies profoundly shape the extent of process available for wartime detention of the enemy. The *Hamdi* plurality acknowledged, in circumstances where the Due Process Clause applied in full to the detention of a United States citizen held in this country, the dangerous possibility that "discovery into military operations" would "intrude on the sensitive secrets of national defense," and it specifically explained that, "[t]o the extent that these burdens are triggered by heightened procedures, they are properly taken into account in our due process analysis." 542 U.S. at 532; *see Haig v. Agee*, 453 U.S. 280, 307 (1981) ("It is 'obvious and unarguable' that no governmental interest is more compelling than the security of the Nation.") (quoting *Aptheker v. Secretary of State*, 378 U.S. 500, 509 (1964)). In doing so, the *Hamdi* plurality directed "that courts faced with these sensitive matters . . . play proper heed . . . to the matters of national security that might arise in an individual case." 542 U.S. at 539. This is just such a circumstance where national security requires that this Court review matters *ex parte* and *in camera*, as the D.C. Circuit found to be appropriate in *Bismullah*. *See Morrissey v. Brewer*, 408 U.S. 471, 481 (1972) ("due process is flexible and calls for such procedural protections as the

particular situation demands").

Moreover, even in cases where the Due Process Clause fully applies outside of the context of wartime exigency, the D.C. Circuit has consistently allowed *ex parte, in camera* submissions in cases touching on national security. Evoking the "compelling interest" in protecting the dissemination of classified information, the D.C. Circuit has held that the Due Process Clause does not prohibit courts from considering classified evidence *ex parte* and *in camera* in civil proceedings. *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)); *Holy Land Foundation v. Ashcroft*, 333 F.3d 156, 164 (D.C. Cir. 2003). Indeed, on many occasions both the D.C. Circuit and other courts of appeals have declined requests that classified information be provided to private parties or their counsel during litigation against the government. *See, e.g.*, *Patterson v. FBI*, 893 F.2d 595, 600 (3d Cir. 1990); *Molerio v. FBI*, 749 F.2d 815, 821-22 (D.C. Cir. 1984); *Ellsberg v. Mitchell*, 709 F.2d 51, 61 (D.C. Cir. 1983); *Pollard v. FBI*, 705 F.2d 1151, 1153 (9th Cir. 1983); *Salisbury v. United States*, 690 F.2d 966, 973 n.3 (D.C. Cir. 1982); *Weberman v. NSA*, 668 F.2d 676, 678 (2d Cir. 1982); *Hayden v. NSA*, 608 F.2d 1381, 1385-86 (D.C. Cir. 1979); *Halkin v. Helms*, 598 F.2d 1, 7 (D.C. Cir. 1978).

For example, in *Jifry*, the Federal Aviation Administration cancelled the airman certificates for two Saudi commercial pilots based largely on classified information disclosed neither to the pilots nor to their counsel. 370 F.3d at 1176-77. This Court "[v]iew[ed] as a whole the record evidence before the TSA, including *ex parte in camera* review of the classified intelligence reports" and held "that there was substantial evidence to support the [agency's]

determination that the pilots were security risks." *Id.* at 1181. Applying settled precedent, this Court specifically held that this scheme is consistent with due process. *Id.* at 1184. The court explained that even though the pilots would lose the basis of their livelihood – their "certificates to fly . . . aircraft," this personal interest "pales in significance to the government's security interests." *Id.* at 1183 (citing *Agee* for proposition that "no governmental interest is more compelling than the security of the Nation"). The court also reasoned that the "risk of erroneous deprivation" was mitigated by the pilot's ability to make their own evidentiary showing and the "*ex parte, in camera* judicial review of the [classified] record." *Id.*

Similarly, in *People's Mojahedin*, the D.C. Circuit upheld an administrative determination that the petitioner was a foreign terrorist organization, based on classified information considered by the agency, but disclosed to neither the organization nor its counsel. The D.C. Circuit held – in language echoed by *Bismullah* – that due process does not require disclosure of classified materials, "informed by the historically recognized proposition that under the separation of powers created by the United States Constitution, the Executive Branch has control and responsibility over access to classified information and has [a] 'compelling interest in withholding national security information from unauthorized persons in the course of executive business.'" *People's Mojahedin*, 327 F.3d at 1242 (quoting *Department of the Navy v. Egan*, 484 U.S. 518, 527 (1988)). Likewise, the court of appeals has explained that, even though a petitioner was entitled to constitutional due process rights, the government "need not disclose the classified information to be presented *in camera* and *ex parte* to the court," because the Executive's designation is "within the privilege and prerogative of the executive, and we do not intend to compel a breach in the security which that branch is charged to protect." *Nat'l Council*

of Resistance, 251 F.3d at 208-09. The court held that *ex parte, in camera* review was procedurally adequate even though that evidence formed the bases of a terrorist designation that carried with it very "serious[] . . . consequences": the "blocking of any funds . . . on deposit with any financial institution in the United States," the "exclusion from the United States of representatives of the organization," and "criminal penalties on any persons 'knowingly provid[ing] material support or resources' to such organization." *People's Mojahedin*, 327 F.3d at 1239.

In *Holy Land*, the court of appeals "[a]gain * * * emphasized the primacy of the Executive in controlling and exercising responsibility over access to classified information and the Executive's compelling interest in withholding national security information from unauthorized persons in the course of executive business" in upholding procedures whereby counsel could not gain access to classified information presented *in camera* and *ex parte* to the court. *Holy Land*, 333 F.3d at 164. Petitioners do not cite these cases, but they each stand for the proposition that the Court can conduct its review, if necessary, the government's *ex parte, in camera* submission, and that conducting that *ex parte* review is fully consistent with the Due Process Clause, even in cases that involve serious deprivations. To be sure, the Court may need to take special precautions to ensure that its review is fair and that petitioners' counsel has access to "the decisive evidence to the fullest extent possible, without jeopardizing legitimately raised national security interests." *Abourezk*, 785 F.2d at 1060. But that does not mean this Court should decline to rely on *ex parte* submissions; instead, it means just the opposite: when national security concerns are legitimate, the Court must conduct its review *ex parte* and *in camera*.

b. The other cases cited by petitioners also support the government's right to make an *ex parte* showing, contrary to petitioners' claim. As we have explained, the case at the center of petitioners' motion, *Abourezk*, specifically recognizes that "legitimate . . . national security interests" might preclude petitioner from having access to even the "decisive evidence" in the litigation. 785 F.2d at 1060. Thus, while the court of appeals recognized that it is the "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," that rule has a "[e]xceptions." *Id*. at 1061. This case falls into just such an exception – the "extraordinary circumstance[]" where the case involves "acute national security concerns" and an "unjust result would eventuate if the case proceeded without the privileged material." *Id*. Here, the information at issue of course raises acute national security concerns. Moreover, the information is evidence that petitioners are enemy combatants. If it is not considered and as a result petitioners are released in spite of being enemy combatants, the result would be both "unjust" and might ultimately result in the deaths of more American soldiers or civilians, either on the field of battle or from terrorist attacks. *See Boumediene*, 128 S. Ct. at 2276 ("it does not follow [from our holding] that a habeas corpus court may disregard the dangers the detention in these cases was intended to prevent").

Similarly, the court of appeals in *Molerio v. FBI*, 749 F.2d 815 (D.C. Cir. 1984) considered material *ex parte* that was subject to the state secrets privilege in concluding that a plaintiff's First Amendment claim was meritless. *Id*. at 825; *see Strang v. U.S. Arms Control and Disarmament Agency*, 920 F.2d 30, 31 (D.C. Cir. 1990) ("if the government's supporting evidence 'contain[ed] extremely sensitive information, ... the district court [could] take up [its] offer to present a detailed, classified declaration for in camera review'" so long as "'plaintiffs are

accorded access to the decisive evidence to the fullest extent possible, without jeopardizing legitimately raised national security concerns'"); *Ellsberg v. Mitchell*, 709 F.2d 51, 69 (D.C. Cir. 1983) ("without serious risk of error, the . . . questions [of whether government conduct was legally appropriate] could be resolved by the trial judge through the use of appropriate *in camera* procedures.").[6] In sum, there is ample precedent for accepting *ex parte, in camera* submissions here, if there is no other alternative method for the government to make its case that detention is legal.

Petitioners have relied on cases addressing the Classified Information Procedures Act (CIPA), a statute that applies to domestic criminal proceedings. Mot. at 16. These are not, of course, criminal proceedings, so CIPA does not apply. Moreover, CIPA is *not* "applicable by analogy" (Mot. 16) because *Boumediene* rejected the notion that these "[h]abeas corpus proceedings need . . . resemble a criminal trial." 128 S. Ct. at 2269; *see Hamdi*, 542 U.S. at 528 (plurality) (these cases do not call for a "process [that] would approach the process that

[6]*See also Abuhamra*, 389 F.3d at 321 (even when information is not classified, "on rare occasions, extraordinary circumstances might warrant receipt of *ex parte* evidence in opposition to bail release"); *United States v. Accetturo*, 783 F.2d 382, 391 (3d Cir. 1986) (*ex parte* evidence may be provided to court to corroborate evidence offered in open court on bail "on rare occasions" where there is a "compelling need and no alternative means of meeting that need"); *United States v. Acevedo-Ramos*, 755 F.2d 203, 208 (1st Cir. 1985) (Breyer, J.) ("even in an unusual case, where the government provides strong special reasons for keeping its evidentiary sources confidential (*e.g.*, protecting witness safety), the magistrate or judge, upon defendant's request, can still test the veracity of the government's testimony and the quality of the underlying evidence, by, for example, listening to tapes or reading documents *in camera*"). Each of these cases involves bail, *i.e.*, detention, and *Bismullah* of course involved the detention of enemy combatants at Guantanamo; thus, it is inaccurate for petitioners to claim that there is "no case in which the Government has been allowed to submit *ex parte, in camera* materials as part of its affirmative case to justify . . . continuing detention." Mot. at 10.

accompanies a criminal trial").[7] CIPA does not provide the appropriate analogy because the balance CIPA strikes for criminal proceedings is not appropriate for these wartime habeas cases. In criminal proceedings governed by CIPA, if the classified information may not publicly be used at trial and the court cannot approve an adequate classified summary or substitution, the court must dismiss counts; exclude evidence entirely; or enter a finding against the United States. CIPA § 6. That balance at bottom is inconsistent with *Boumediene*'s direction that the district court accommodate the government's need to protect classified information in these proceedings and the court of appeals holding in *Bismullah* that the balance can be met through *in camera, ex parte* submissions of highly sensitive classified information that is relevant to the cause for detention. Ultimately, where the purpose of the writ is to give the *habeas court* an independent role in "assess[ing] the sufficiency of the evidence," 128 S. Ct. at 2270, the balance must be struck to allow an *ex parte, in camera* presentation to the *court* when detention is based upon highly sensitive classified information showing that petitioner is an enemy combatant.

B. This Court Need Not Resolve The Appropriate Procedures To Consider The *Ex Parte* Material Until It Determines That Material Must be Considered.

1. As we have explained, it is likely a court will eventually have to consider how to handle *ex parte, in camera* submissions given these extraordinary circumstances, where wartime enemies have been captured abroad and are being detained based often on the same sort of classified intelligence that the military relies on in conducting wartime operations. However, this circumstance has not yet arisen and need not be considered until it actually arises – until this

[7]Given CIPA's allowance of substitutions and summaries in domestic criminal prosecutions, CIPA §§ 4, 6, *a fortiori* such procedural devices would be allowable in these proceedings.

Court determines it must consider the *ex parte, in camera* submission. Indeed, this Court has already determined that the proper course is to hold the *ex parte, in camera* submission but not to review it; and to allow the parties to be heard on the issue only if this Court determines that it must be considered. Order at 2 n.1 ("[a]s previously noted on the record, the Court will not review or consider these *in camera, ex parte* submissions [of the government] without first notifying the parties and providing both parties with an opportunity to be heard on the issue of whether these materials should be considered").

It is therefore premature to consider the handling of the supplemental factual return material or petitioners' motion to strike. *Cf. United States v. Libby*, 429 F. Supp. 2d 18, 22 (D.D.C. 2006) (motion to establish CIPA procedures limiting *ex parte* submissions "is premature" because "this Court cannot preemptively constrain either party or limit their ability to make filings they deem appropriate and necessary"). Only if this Court determines it would be necessary or appropriate to consider the substance of the *ex parte* and *in camera* submission should this Court consider and work out with the parties the appropriate procedures for handling the filing. *Cf. id*. at 24 ("the Court declines to adopt the defendant's position that he must first have the opportunity to litigate whether the government has established exceptional circumstances before the government can submit to the Court *ex parte* filings").

Petitioners' only rationale for striking the submission in advance is their unfounded assertion that it "creates a danger that this Court's consideration . . . of the materials that are properly before it will have been tainted." Mot. at 1-2. This assertion is meritless. Not only has this Court already rejected the notion that it might be tainted by the mere lodging of the submission, it is self-evident that this Court can address the legality of detention based upon the

return and traverse submitted to it without any risk of being "tainted" by a submission it has not yet reviewed. Indeed, if this Court determines that it need not review the supplemental submission, it can do exactly what petitioners' propose: "declar[e] that it shall not be considered." Mot. at 18; *id*. at 19 (court should "emphasiz[e] that the *ex parte* submissions 'have not been read by the court, and will not be'"). In any event, it strains credulity to suggest that the Court may not review *ex parte* materials, much less possess them, without being somehow "tainted" by that evidence. Indeed, in bench trials courts frequently review evidence that it determines is not admissible without any risk of "taint."

2. Petitioners' motion is not only premature, it is also not yet necessary for this Court to decide what procedures to employ in considering the *ex parte, in camera* submission. When it does consider those procedures, the government is willing to work with the Court to help it fashion procedures that will allow the participation of petitioner's counsel to the "fullest extent possible, without jeopardizing legitimately raised national security concerns." *Abourezk*, 785 F.2d at 1060.[8]

As an initial matter, this is emphatically not a case of gamesmanship as suggested by petitioners – the government made the submission to preserve its ability to invoke this evidence if necessary without risking forfeiture. The government expressly advised the Court that it should not rely on this material unless absolutely necessary. And had the government not submitted this material, it would surely be facing claims of waiver by petitioners should it later seek to submit it. Moreover, the government made its submission at a time before it knew

[8]Other issues relating to TOP SECRET//SCI information that have not yet been presented in relation to the government's rebuttal evidence will likely soon require the Court to consider these issues.

whether this Court would allow a factual showing to be made in rebuttal and prior to this Court addressing key procedural issues such as the standard of review. In sum, the government was in no way attempting to "taint" this Court's review of the factual return but was taking every precaution to preserve its ability to present this evidence if necessary.

The government's *ex parte* submission includes an explanation for the reason why that information may not be released to petitioners' counsel. If the Court reviews that and believes an additional showing is necessary, the government can provide it. Thus, this is not a case where the government has, in the words of petitioners, "unilaterally awarded itself the right to make" an *ex parte* presentation. Mot. at 3. Importantly, it is well established that the government may support this compelling need for secrecy with *in camera* submissions. *Molerio*, 749 F.2d at 822 (noting, approvingly, that court "did not rest upon the conclusory statements contained in the public affidavit" but "also examined the sworn *in camera* affidavit"); *Ellsberg*, 709 F.2d at 58 (recognizing that "government often is unable publicly to demonstrate the likelihood of harm without revealing the very information sought to be shielded").

Second, the government has not formally invoked the state secrets privilege, a privilege that has been invoked in one prior case involving *ex parte, in camera* submissions. *See Abourzek*, 785 F.2d at 1061 (observing that in *Molerio*, the court considered *ex parte* submissions after "proper invocation of the [state secrets] privilege"). We submit, however, that such a formal invocation is not necessary here for two reasons. First, in *Bismullah* the D.C. Circuit expressly approved the use of *in camera* classified submissions in similar litigation without requiring a formal invocation of the privilege. The D.C. Circuit also relied on classified material without necessitating an invocation of the privilege in *Jifry*, *Peoples Mojahedin*, and

Holy Land. Moreover, because the government is not seeking to exclude the material from consideration in the litigation, but is asking for *ex parte, in camera* consideration, the state secrets privilege, as it is traditionally understood, is not apt. *See Reynold*s, 345 U.S. at 11. Indeed, because the state secrets privilege normally requires dismissal of an action without opportunity of review on the merits, *supra* n.5, its invocation would hugely disadvantage the petitioners.

Third, if the Court determines that consideration of the *ex parte, in camera* materials as a general matter is appropriate, this Court should first review the material to determine whether it can perform its reviewing function "without the aid of plaintiff's counsel." *Stillman*, 319 F.3d at 548; *see Bismullah II*, 503 F.3d at 143. Only if the Court feels it needs further information on the submission should this Court consider other "prudent and incremental" steps that "pay proper heed . . . to the matters of national security that might arise in an individual case," *Hamdi*, 542 U.S. at 539, such as substitutions or summaries. *See Hamdi*, 542 U.S. at 534 (approving use of a "summar[y]" of military records). *Cf. Abuhamra*, 389 F.3d at 321. Depending on the nature of the classified information, however, it may not ultimately be possible to devise an appropriate substitution that may be provided to petitioners' counsel.

Fourth, the government understands that as the Court considers material submitted *in camera* and *ex parte*, it may need to make its own evaluation of the reliability of that evidence, especially if an appropriate substitution is not possible. *See Abuhamra*, 389 F.3d at 331 ("because *ex parte* submissions are not tested for reliability in the usual adversarial crucible, a judicial officer who receives such evidence 'has the singular responsibility for ensuring that he has been provided with all the facts and circumstances necessary to make an informed

assessment of reliability'"). In this regard, the government can respond to the Court's questions in an *ex parte, in camera* setting or consider requests to provide further evidence to the Court with respect to reliability.

In sum, the Court should not strike the government's *in camera* submission, but may need to explore additional procedures if and only if it determines that reviewing the submission is necessary to determining the legality of petitioners' detention.

CONCLUSION

For the foregoing reasons, the Court should deny the motion to strike filed by petitioners.

Dated: October 24, 2008

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[ORAL ARGUMENT NOT YET SCHEDULED]

No. 05-5117
Consolidated with 05-5118,
05-5119, 05-5120, 05-5121,
05-5122, 05-5123, 05-5124,
05-5125, 05-5126, 05-5127

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

_____

KHALED A. F. AL ODAH, NEXT FRIEND OF FAWZI, KHALID ADBULLAH FAHAD AL ODAH, *ET AL.*,
Appellees/Petitioners,

v.

UNITED STATES OF AMERICA, *ET AL.*,
Appellants/Respondents.

_____

APPELLEES' SUPPLEMENTAL BRIEF IN RESPONSE TO COURT'S ORDER OF AUGUST 14, 2008

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INTRODUCTION

Respondents are appealing from an order of Judge Joyce Hens Green entered on January 31, 2005 requiring them to produce to Appellees' counsel unredacted returns. Judge Green, who reviewed the redacted information in the returns *in camera*, concluded that the "classified information . . . not disclosed to counsel for the petitioners is relevant to the merits of this litigation and that counsel for the petitioners are entitled to have access to that information." *See* Opening Brief for the Guantánamo Detainees Appellees' Br. ("Appellees' Br.") at 6 (quoting Order, PJA 248).

This Court's order of August 14, 2008, directs the parties to file "supplemental briefs on the merits of these appeals, to address the effect of *Boumediene* and any other relevant changes in the law and the factual setting of these cases since the original briefs were filed." Respondents filed their reply brief on December 8, 2005.

ARGUMENT

1. The Essential Facts Have Not Changed.

Over 250 men remain imprisoned at Guantánamo, including most of the Petitioners; some of the men have been imprisoned there since early 2002. The prisoners are still awaiting their day in court. Because the Supreme Court has held that Petitioners have a constitutional right to pursue their habeas claims, *see Boumedi-*

ene v. Bush, 128 S. Ct. 2229 (2008), the District Court has begun to schedule habeas hearings.

In defending Petitioners' imprisonment in these hearings, Respondents will be relying on the factual returns that gave rise to these appeals—the CSRT records previously provided to Petitioners' counsel—except to the extent that Respondents move to amend those returns and the District Court grants the motion. Even if the District Court grants a motion to amend, the amended returns filed to date continue to contain redactions.

2. The Court Continues To Lack Jurisdiction Over The Appeals.

The Court continues to lack jurisdiction over these appeals because the appeals are untimely. Appellees' Br. at 7, 8-10.

3. Judge Green's Order Is Nonappealable.

In their opening brief, Appellees argued that Judge Green's order is not appealable as a collateral order under *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949), because the order does not raise a serious issue deserving interlocutory review. Appellees' Br. at 7, 10-12. Since Petitioners filed their brief, this Court has reemphasized the "narrow confines of the collateral order doctrine." *Banks v. Office of Senate Sergeant-At-Arms and Doorkeeper of U.S. Senate*, 471 F.3d 1341, 1344 (D.C. Cir. 2006). Thus, the Court stated in *Banks*:

> We have construed the final judgment rule strictly, repeatedly noting that a district court's decision is ordinarily not final until it ends

> the litigation on the merits and leaves nothing for the court to do but execute the judgment.
>
> * * *
>
> [E]ven when interlocutory review is expressly granted by statute or rule, we construe such provisions narrowly, applying them only when a district court's challenged ruling might be of serious, perhaps irreparable, consequence to a litigant and therefore merit immediate review. In balancing the benefits of efficiency against the avoidance of error, the Supreme Court has favored the latter only where the effect of error may be serious and remain uncorrected by appeal from a final judgment entered long in the future.

Id. at 1345 (citations and internal quotation marks omitted); *see also La Reunion Aerienne v. Socialist People's Libyan Arab Jamahiriya*, 533 F.3d 837, 842-43 (D.C. Cir. 2008).

Banks is analogous and instructive. There, the defendants, two Senate officials, invoked the collateral order doctrine to appeal discovery sanctions. They argued that Legislative Branch immunity barred the entry of the sanctions. This Court dismissed the appeal on the ground that it lacked jurisdiction under the collateral order doctrine to review a discovery sanction until the district court enters a final judgment. Here, Petitioners are likewise withholding from Respondents information to which the District Court held them entitled; and here, Respondents analogously argue that Executive Branch immunity bars compelled disclosure, *see* Appellants' Br. at 56-62. So here, as in *Banks*, the Court should dismiss the appeal for lack of jurisdiction under the collateral order rule. *See also Doe v. Exxon Mobil Corp.*, 473 F.3d 345, 351 (D.C. Cir. 2007) ("[T]his Court has expressly held that a

party is not entitled to an appeal every time a district court denies a motion to dismiss based upon the separation of powers."); *see generally* Appellees' Br. at 26-29.[1]

4. *Boumediene* And *Bismullah* Confirm That Petitioners Have A Need to Know All Classified Information In Their Returns

Boumediene supports Petitioners' claim that Respondents must produce unredacted returns to Petitioners. In their opening brief, Petitioners argued that access to unredacted classified returns was critical to counsel's preparation of their cases, *see* Appellees' Br. at 14-16, particularly in light of the Supreme Court's recognition in *Rasul v. Bush*, 542 U.S. 466, 483-84 & n.15 (2004), that the petitioners had stated a claim for habeas relief and could seek federal habeas review. The Supreme Court has now held in *Boumediene* that Petitioners have a constitutional right to pursue their habeas claims, 128 S. Ct. at 2262, and Petitioners are facing hearings in the near future. In these circumstances, Petitioners' access to the unredacted classified information in Respondents' returns is even more urgent than it was four years ago.

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[1] *Cf. Fields v. Office of Eddie Bernice Johnson*, 459 F.3d 1, 23 (D.C. Cir. 2006) (en banc) (Brown, J., concurring in the judgment) (denial of motion to dismiss based on a claim of absolute immunity from a civil damages action was appealable collateral order rule because "the essence of absolute immunity is its possessor's entitlement not to have to answer for his conduct in a civil damages action").

In *Boumediene*, the Court stated that the "most relevant" of the constitutional shortcomings of the Combatant Status Review Tribunals ("CSRTs") from a habeas standpoint were "the constraints upon the detainee's ability to rebut the factual basis for the Government's assertion that he is an enemy combatant." *Id.* at 2269; *see also id.* at 2274 (identifying a detainee's inability to "contest the CSRT's findings of fact" as among the signal deficiencies of judicial review under the Detainee Treatment Act of 2005 ("DTA")). *Boumediene* confirms that allowing Respondents to withhold information included in a factual return from the Petitioners' counsel would be impermissibly constraining a detainee's ability to challenge the factual basis for his detention. *See generally* Appellees' Br. at 20-25.[2]

This Court's decision in *Bismullah v. Gates*, 501 F.3d 178 (D.C. Cir. 2007),[3] provides the correct framework for determining when Respondents may redact information in their returns. Not only is the framework sensible; the Court established it to implement judicial review under the DTA, which the Supreme Court held in *Boumediene* is inadequate to protect the detainees' constitutional right to pursue habeas claims.

First, it is to be presumed that "counsel for a detainee has a 'need to know'" all information concerning his client included in his return. *See id.* at 187. Second,

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[2] Appellants need provide the classified information only to counsel with the necessary level of clearance to receive it.

[3] *Vacated and remanded*, 128 S. Ct. 2960 (2008), *reinstated on remand*, Nos. 06-1197, 06-1397 (D.C. Cir. Aug. 22, 2008).

Respondents may overcome that presumption "to the extent the Government seeks to withhold from counsel highly sensitive information, or information pertaining to a highly sensitive source or to anyone other than the detainee but presents such evidence to the court ex parte and in camera." *Id.* Third, "except for good cause shown, the Government shall provide notice to counsel for the petitioners on the same day it files such information ex parte," *id.*—in these cases, when Respondents file the amended or original return for a detainee. Fourth, "insofar as [the Government] seeks to file with the court nonclassified information the Government believes should be 'protected,' the Government must give the court a basis for withholding it from public view." *Id.* at 188.

In the instant cases, Respondents submitted the unredacted returns to the district court *ex parte* for review. The district court did exactly what it was supposed to do: It reviewed the redacted information *in camera* and considered whether the redactions were warranted. Petitioners do not contend that there will never be instances when information may properly be withheld, but this Court should not second-guess district courts when it is acting within its discretion. Respondents have not asked this Court to conduct its own *in camera* review of the unredacted returns, and have provided no basis for a conclusion that the district court abused its discretion by ordering the production of the redacted information.

CONCLUSION

For the foregoing reasons, as well as those set forth in Petitioners' opening brief, the Court should dismiss these appeals for want of jurisdiction, either because they are untimely or because they are not collateral orders. Alternatively, the Court should affirm the District Court.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 1365 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and Circuit Rule 32(a)(4).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and Circuit Rule 32(a)(1) and the type style requirements of Fed. R. App. P. (32)(a)(6) because this brief has been prepared in a proportionally spaced typeface using times new roman type style and 14-point font size.

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Nos. 06-1195 and 06-1196

In the Supreme Court of the United States

LAKHDAR BOUMEDIENE, ET AL., PETITIONERS

v.

GEORGE W. BUSH,
PRESIDENT OF THE UNITED STATES, ET AL.

KHALED A.F. AL ODAH, NEXT FRIEND OF
FAWZI KHALID ABDULLAH FAHAD AL ODAH, ET AL.,
PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS

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ance" assigned to the detainee "for the purpose of assisting the detainee" in the CSRT process. 06-1196 Pet. App. 141. The personal representative may attend the entire CSRT proceeding, even where classified information is at issue. *Id.* at 143. The personal representative fulfills some of the most important functions of counsel: he is required to "explain the nature of the CSRT process to the detainee, explain his opportunity to present evidence and assist the detainee in collecting relevant and reasonably available information and in preparing and presenting information to the Tribunal." *Id.* at 168. Finally, the personal representative may "comment upon classified information" that bears upon the detainee's status. *Id.* at 170.

b. Petitioners also object (Al Odah Br. 33-34; El-Banna Br. 33-38) that they were not given access to classified information that, in most cases, formed part of the basis for the government's determination that they were enemy combatants. In effect, petitioners contend that the armed forces cannot legally 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. Petitioners cite no authority for that startling proposition, which is inconsistent with the conduct of every armed conflict in this country's history; inconsistent with Army Regulation 190-8, which specifically permits a tribunal to hold proceedings closed to the detainee; and inconsistent with *Hamdi*, which recognized that, even where the liberty of a citizen is at issue, the danger that "discovery into military operations" might "intrude on the sensitive secrets of national defense" is a consideration "properly taken

into account in our due process analysis." 542 U.S. at 532 (plurality opinion).

c. Further, petitioners claim (Br. 27-29; Al Odah Br. 33) that the CSRT procedures precluded them from submitting rebuttal evidence. That contention ignores the provisions of those procedures that allow the detainee to testify, to seek the testimony of reasonably available witnesses, and to seek and obtain other reasonably available evidence. 06-1196 Pet. App. 144. Detainees are also free to present claims in their DTA proceedings that any particular exclusion of evidence was inconsistent with the CSRT's standards and procedures or with applicable law. See DTA § 1005(e)(2)(C), 119 Stat. 2742.

More importantly, petitioners' claim (Al Odah Br. 35) that DTA counsel is precluded from "supplement[ing] the record" fails to account for the fact that counsel in cases brought on behalf of detainees have actively participated in submitting material for review by the Department of Defense in considering whether to reopen CSRT proceedings.[30] In one recent case, a new CSRT was ordered in response to counsel's submission of new evidence bearing on a detainee's status. See Respondent's Motion to Remand, *Al Ginco* v. *Gates*, No. 07-1090 (D.C. Cir. filed Sept. 13, 2007).

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[30] Under instructions issued by the Department of Defense Office for the Administrative Review of the Detention of Enemy Combatants (OARDEC), upon the receipt of new evidence that "was not previously presented to the detainee's CSRT" and that is "material to the factual question of whether the detainee" is an enemy combatant, the Deputy Secretary of Defense "will direct that a CSRT convene to reconsider the basis of the detainee's [enemy combatant] status in light of the new information." See *OARDEC Instruction 5421.1, Procedure for Review of "New Evidence" Relating to Enemy Combatant (EC) Status* paras. 4(a)(1) and (2), 5(b) (May 7, 2007) <http://www.defenselink.mil/news/May2007/New%20Evidence%20Instruction.pdf>.