

IN THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA

SAIFULLAH PARACHA,

Petitioner,

v.

Case No. 04cv02022-PLF

ORAL ARGUMENT IS REQUESTED

Hon. GEORGE W. BUSH,

et al.,

Respondents.

**PETITIONER'S MOTION TO SUPPRESS
CLASSIFIED RETURN**

Petitioner moves for an order suppressing the classified portion of the record of his Combatant Status Review Tribunal until such time as it is released to petitioner himself and he is given a meaningful opportunity to rebut the allegations therein.

Respondents will oppose this motion.

Respectfully submitted,

February 14, 2005

_____/s/_____
GAILLARD T. HUNT
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**POINT AND AUTHORITIES IN SUPPORT OF
PETITIONER'S MOTION TO SUPPRESS
THE CLASSIFIED RETURN**

Petitioner acknowledges that there may be relevant privileges that would protect parts of the government case against him from disclosure under the Freedom of Information Act, or would be grounds to resist a subpoena if petitioner or someone else were trying to force disclosure of this information. These privileges are discussed in petitioner's January 18, 2005, motion to set aside or modify the protective order in this case. They include the privileges of military secrets (section I.A. of the points and authorities in support of that motion), state secrets (I.B.), informers privilege (I.C.), and others.

But none of these privileges can ever be used to justify secrecy of information when the information is being offered affirmatively, as evidence on which someone may be deprived of freedom. As Learned Hand put it:

It is, however one thing to allow the privileged person to suppress the evidence, and *toto coelo*, another thing to allow him to fill a gap in his own evidence by recourse to what he suppresses.

U.S. v. Coplon, 185 F.2d 629, 638 (2d Cir., 1950).

Seemle, *U.S. v. Andolschek*, 142 F.2d 503, 506 (2d Cir., 1944), cited with approval in *U.S. v. Reynolds*, 345 US. 1, 12 (1953). See also *U.S. v. Dobr*, 21 CMR 451 (Army Board of Review, 1956), vacating a conviction for AWOL because the accused was not allowed to discuss his assignment to classified intelligence work.

This doctrine is based firmly on elementary considerations of due process, and on the confrontation clause, so it is not subject to statutory abridgement. And no statute has ever attempted to abridge it. The Classified Information Procedures Act, 18 USC Appendix 3, allows trial courts to substitute stipulations, statements of fact, and summaries of evidence where these substitutes can fairly preserve the substance of classified documents, but that applies only to matter a criminal defendant may claim is relevant as a defense. Never has Congress suggested that anyone may be deprived of liberty on the basis of affirmative evidence which cannot be shown to him.

Over and above these legal and Constitutional obstacles, there looms the question of the reliability of the classified information used against petitioner. When prisoners are held in isolation their mental faculties deteriorate and they eventually lose the ability to remember what happened to them on the outside and what is the product of suggestive questioning. The interrogation techniques used at Guantanamo, in some cases

for over three years now, cultivate this process. The government may very well have statements that certain prisoners knew where to buy atomic weapons. If such information remains classified, it will never be subjected to the test of reality. We are dealing here with a self-sustaining fantasy factory, and its product should not be allowed to pollute the fact-finding processes of the Article III courts.

The classified portion of the CSRT record must therefore remain under seal, must not be considered by the Court, and must not be used against petitioner in any way.

Respectfully submitted,

February 14, 2005

 /s/
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CERTIFICATE OF CONFERRING

I hereby certify that I conferred with Andrew Warden, Esq., attorney for respondents, in an attempt to narrow the issues raised by the within motion. Respondents will oppose the motion.

_____/s/_____

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Cleared for public filing by the CSO.

A PROPOSED ORDER FOLLOWS:

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(PROPOSED) ORDER

On consideration of petitioner's motion to suppress the classified portion of his record before the Combatant Status Review Tribunal, and the opposition thereto, and the entire record, for good cause show,

IT IS HEREBY ORDERED:

That the classified portion of petitioner's record before the Combatant Status Review Tribunal is hereby suppressed.

FURTHER ORDERED:

That the sealed package containing the classified portion of petitioner's record before the Combatant Status Review Tribunal shall remain in custody of the Court Security Office and shall not be considered in the disposition of petitioner's case.

IT IS SO ORDERED.

Date

United States District Judge

Notify counsel:

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