[ORAL ARGUMENT HELD ON APRIL 4, 2008]

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

HUZAIFA PARHAT, Petitioner, v. ROBERT M. GATES, Respondent.	No. 06-1397

PETITIONER'S MOTION FOR CONDITIONAL ORDER OF CONTEMPT

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Pursuant to 18 U.S.C. § 401(3) and this Court's inherent powers, Petitioner Huzaifa Parhat ("Petitioner" or "Parhat") moves for a conditional order of contempt against Respondent Robert M. Gates, the Secretary of Defense ("Secretary Gates" or "Respondent"), for his refusal to comply with this Court's June 20, 2008 order "direct[ing] the government to release Parhat, to transfer him, or to expeditiously convene a new Combatant Status Review Tribunal to consider evidence submitted in a manner consistent with this opinion." *Parhat v. Gates*, 532 F.3d 834, 836 (D.C. Cir. 2008), *reh'g denied per curiam*, *Parhat v. Gates*, No. 06-1397 (D.C. Cir. Sept. 2, 2008), (the "Order"). This Court issued the Order on June 20, 2008, and denied Secretary Gates's motion for rehearing on September 2, 2008. *See Parhat v. Gates*, No. 06-1397 (D.C. Cir. Sept. 2, 2008) (order denying rehearing) (per curiam). The mandate issued September 12, 2008. *See Parhat v. Gates*, No. 06-1397 (D.C. Cir. Sept. 12, 2008) (mandate). No stay has been sought obtained. The Order is a final judgment.

It is beyond dispute that Respondent has failed to execute this Court's Order. Indeed, he is working strenuously to *avoid* compliance. Respondent should immediately purge himself of his contempt or face sanctions sufficient to compel the Executive branch to obey a lawful order of the Judicial branch.[1]

I. STATEMENT OF FACTS

The United States government has imprisoned Parhat at Guantanamo Bay for nearly seven years. On June 20, 2008, this Court entered judgment for Parhat on his claims under the Detainee Treatment Act of 2005 (the "DTA"), and in doing so vacated his classification as an enemy combatant. *Parhat*, 532 F.3d at 836. The

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[1] Because this motion concerns the Order of the *Parhat* panel, Petitioner respectfully suggests that this motion should be decided by that same panel.

Court "reject[ed] the government's contention that it can prevail by submitting documents that read as if they were indictments or civil complaints and that simply assert as facts the elements required to prove" an enemy combatant determination. *Id.* "To do otherwise would require the courts to rubber-stamp the government's charges. . . ." *Id.* The Court held that the government's evidence was so unreliable that, notwithstanding a presumption in favor of the government, the evidence was "insufficient to sustain its determination that Parhat is an enemy combatant." *Id.* at 850.

The Court's unanimous opinion gave Secretary Gates options, but ordered him to choose one of three remedies. Its order was clear and unambiguous: "[W]e direct the government to release Parhat, to transfer him, or to expeditiously convene a new Combatant Status Review Tribunal to consider evidence submitted in a manner consistent with this opinion." *Id.* at 836. At the same time, the Court noted that, pursuant to *Boumediene v. Bush*, 128 S. Ct. 2229 (2008), Parhat could immediately seek *habeas* review in the district court "without waiting to learn whether the government will convene another CSRT." *Id.* at 851.

With the Court's comments in mind, Parhat immediately sought release in *habeas*. *See* Petitioner's Motion for Judgment on *Habeas* Petition Ordering Release Into the Continental United States, *In re Guantanamo Bay Detainee Litigation*, Misc. 08-0442(TFH), Civil Action No. 05-1509(RMU) (D.D.C. filed July 23, 2008). On October 7, 2008, the district court granted Parhat's *habeas* petition and ordered him released into the United States on October 10, 2008. *In re Guantanamo Bay Detainee Litigation*, __ F. Supp. 2d __, 2008 WL 4539019 at *9-10 (D.D.C. Oct. 9, 2008); *In re Guantanamo Bay Detainee Litigation*, Misc. No. 08-0442(TFH), Civil Action Nos. 05-1509(RMU), 05-1602(RMU), 05-1704(RMU), 05-2370(RMU), 05-2398(RMU), and 08-1310(RMU) (D.D.C. Oct. 8,

2008) (order granting Petitioners' motion for judgment on pending *habeas* petitions).

The district court *habeas* proceedings did not, of course, relieve Respondent of his obligation to comply with this Court's Order. But through those recently concluded proceedings Respondent has made it clear that he will not comply.[2] Petitioner is thus forced to seek the Court's assistance in enforcing its Order.

A. Respondent Has Failed to Comply With the Order.

The Court's Order gave Secretary Gates three options. He has waived a new CSRT, cannot effectuate a transfer (due largely to the government's self-defeating litigation posture), and refuses to do the only thing left to him: release Parhat.

1. Respondent has Waived a New Combatant Status Review Tribunal.

On August 4, 2008, Secretary Gates conceded that he would not convene a new CSRT for Parhat. "After reviewing [the Order], the government has determined that it would serve no useful purpose to engage in further litigation over his status. As the Court is aware, the government had concluded that Parhat should be cleared for release, and it has now determined that it will treat Parhat as if he were no longer an enemy combatant and house him accordingly while it uses its best efforts to place him in a foreign country." Respondent's Petition for Rehearing at 1-2, *Parhat v. Gates*, No. 06-1397 (D.C. Cir. Aug. 4, 2008) (footnote omitted).[3]

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[2] Although the Government's effort to stay the *habeas* court's release order provides important context, this motion is not about *habeas* relief, or whether the district court properly can order Parhat released into the United States. It is about correcting Respondent's defiance of this Court's Order.

[3] Parhat is one of seventeen Uighurs imprisoned at Guantanamo. In the wake of this Court's *Parhat* Order, Secretary Gates conceded that the other sixteen Uighur prisoners are not "enemy combatants" either. *See* Respondent's Motion to Enter Judgment, *Abdusemet v. Gates*, No. 07-1509, *Jalaldin v. Gates,* No. 07-1510,

(Footnote Continued on Next Page.)

2. Respondent's Efforts to "Transfer" Parhat Have Failed.

The government has long conceded that Parhat and the other Uighur prisoners at Guantanamo cannot be returned to their native China. *See, e.g.*, Hearing Transcript at 10-11, *In re Guantanamo Bay Detainee Litigation*, Misc. No. 08-0442(TFH), Civil Action Nos. 05-1509(RMU), 05-1602(RMU), 05-1704(RMU), 05-2370(RMU), 05-2398(RMU), and 08-1310(RMU) (D.D.C. Oct. 7, 2008) ("Urbina Hr. Tr.") (attached hereto as Exhibit A). *See also Parhat*, 532 F.3d at 838. But the government's long-standing efforts to send Parhat to a third country have been unsuccessful. Judge Urbina recently summarized these failed efforts in Parhat's *habeas* case:

> [T]he government cleared 10 of the petitioners for release by the end of 2003.[4] The government cleared an additional 5 for release in 2005, 1 for transfer in 2006, and 1 for transfer in May of this year. Throughout this period, the government has been engaged in "extensive diplomatic efforts" to resettle the petitioners. These efforts over the years have remained largely unchanged, and the government has not indicated that its strategy or efforts have been or will be altered now that petitioners are no longer treated as enemy combatants. Furthermore, the government cannot provide a date by which it anticipates releasing or transferring the petitioners.

(Footnote Continued from Previous Page.)

Ali v. Gates, No. 07-1511, and *Osman v. Gates*, No. 07-1512 (D.C. Cir. Aug. 18, 2008) (government motion requesting entry of the *Parhat* judgment in four Uighur DTA cases); Notice of Status, *In re Guantanamo Bay Detainee Litigation*, Misc. No. 08-0442(TFH), Civil Action Nos. 05-1509(RMU), 05-1602(RMU), 05-1704(RMU), 05-2370(RMU), 05-2398(RMU), and 08-1310(RMU) (D.D.C. Sept. 30, 2008) (conceding non-combatant status as to the remaining Uighurs).

[4] Parhat was among those cleared for release in 2003. *See* Joint Status Report at Ex. 1, *In re Guantanamo Bay Detainee Litigation*, Misc. No. 08-0442(TFH), Civil Action Nos. 05-1509(RMU), 05-1602(RMU), 05-1704(RMU), 05-2370(RMU), 05-2398(RMU), and 08-1310(RMU) (D.D.C. Aug. 18, 2008).

> Accordingly, their detention has become effectively indefinite.

In re Guantanamo Bay Detainee Litigation, 2008 WL 4539019 at *5 (internal citations and footnote omitted) (also noting that "the government has unsuccessfully approached and re-approached almost 100 countries in its efforts to locate an appropriate resettlement location" for the Uighurs). As the district court noted, the failure to find a safe transferee country is a situation largely of the government's making. *See id.* at *9 (branding the Uighurs "enemy combatants"—which happened after Parhat and others were cleared for release—"subvert[ed] diplomatic efforts to secure alternative channels for release").

Most recently, in its effort to obtain a stay of the *habeas* court's release order, the government elevated its rhetoric, asserting for the first time that Parhat and the other Uighurs are dangerous, and "have sought to wage terror on a sovereign nation." Respondent's Emergency Motion for Stay at 3, *Kiyemba v. Bush*, Nos. 08-5424 through 08-5429 (D.C. Cir. filed Oct. 7, 2008). The allegations are unsourced and untrue.[5] Nonetheless it is public, and in Respondent's zeal to avoid the release ordered by this Court and the district court,

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[5] This Court has already reviewed the government's record, and concluded that as to Parhat—who is materially indistinguishable from the sixteen other Uighurs—"[i]t is undisputed that he is not a member of al Qaida or the Taliban, and that he has never participated in any hostile action against the United States or its allies." *Parhat*, 532 F.3d at 835-836. When Judge Urbina pointedly asked the government to identify "the security risk to the United States should these people be permitted to live here," Respondent's counsel could not identify any risk at all. Urbina Hr. Tr. at 15-17. In the face of this record, the district court correctly found that "[t]he Government has not charged these Appellees with a crime and has presented no reliable evidence that they would pose a threat to U.S. interests." Urbina Hr. Tr. at 38. The Government's newly minted dangerousness argument cannot be squared with the fact that Respondent evidently believes the Uighurs would *not* be too dangerous to the multitude of countries the Government has reportedly lobbied to resettle them (including, according to press reports, Canada, Germany and other western European allies).

the government has sabotaged any reasonable likelihood of finding a willing transferee country.[6]

3. Respondent Has Not Released Parhat.

The government's failed and self-defeating diplomacy leave Secretary Gates with the sole option of releasing Parhat. Contrary to this Court's Order, however, Parhat remains imprisoned at Guantanamo.

Though he refuses to release them, Respondent asserts that Parhat and the other Uighurs have been moved from virtual solitary confinement to "the least restrictive conditions practicable at Guantanamo, with virtually unrestricted access to one another and only limited conditions on their liberty." Respondent's Emergency Motion for Stay at 2, *Kiyemba v. Bush*, Nos. 08-5424 through 08-5429 (D.C. Cir. filed Oct. 7, 2008).[7]

But this Court's order requires "release," not merely a different prison. And while the parties might debate whether "release" means release into the United States or to a third country, there is no dispute that Parhat is still in prison. The imposition on Parhat's liberty is not "limited"; it is extreme. Parhat, along with the other Uighurs, is now jailed in a part of Guantanamo called Camp Iguana. Camp

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[6] *The New York Times* reports that the State Department, which is charged with persuading other countries to resettle the Uighurs, "regarded the language [in the Department of Justice's brief] as inflammatory and impossible to prove." William Glaberson, *Release of 17 Guantanamo Detainees Sputters as Officials Debate the Risk*, N.Y. TIMES, Oct. 16, 2008 at A20. "'Based on what they were saying in the brief, it made it impossible to conduct negotiations'" with possible resettlement countries. *Id.* (also reporting the cancellation of planned resettlement negotiations as a direct result of the Department of Justice's stay briefing).

[7] Indeed, Respondent takes the absurdist view that "*the United States Government is not actually preventing them from leaving Guantanamo Bay* in the sense that if there were . . . a country willing to accept them, they would be free to go. It's the fact that there is no willing country and their home country is one that U.S. policy prevents us from returning them to . . . forcibly because of humanitarian concerns." Urbina Hr. Tr. at 10-11 (emphasis added).

Iguana is a high security prison controlled by Joint Task Force Guantanamo ("JTF-GTMO"), the command that operates all areas of the Guantanamo prison. *See* October 15, 2008 Declaration of J. Wells Dixon ("Dixon Decl.") at ¶ 6 (attached hereto as Exhibit B). The men are not permitted to leave the Camp, even under supervision. *Id.* ¶ 4. It is surrounded on all sides by fences and razor wire. *Id.* ¶ 6. Armed soldiers guard the prison, patrol its perimeter, and monitor the men by camera 24-hours a day. *Id.* ¶ 6.

Camp Iguana is not large. Three huts take up much of the physical space at Camp Iguana, leaving a small area as the only space for physical recreation. *Id.* ¶ 7. On three sides, the fences are covered in green mesh preventing any meaningful view outside the prison walls. *Id.* ¶ 6. On the fourth side, the green mesh has been partially removed, revealing an endless ocean Parhat can see but not touch. *Id.* The guards do not refer to the Uighurs detained in Camp Iguana by name, but rather by an Internment Serial Number ("ISN") assigned to each. *Id.* ¶ 8. Parhat and the other men are not permitted to know the names of their guards, as military personnel cover their own name tags with tape. *Id.*

In Camp Iguana, Parhat and the Uighurs are utterly isolated from the outside world. They see their anonymous jailers, and have an occasional visit from a lawyer[8] or Red Cross representative, but have no meaningful access to news or information about their families. *Id.* ¶¶ 4, 5. There is no telephone or other direct access to the outside world. *Id.*

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[8] On the evening of October 7, 2008, J. Wells Dixon of the Center for Constitutional Rights was allowed to meet with Parhat and the other men at Camp Iguana. Mr. Dixon was able to inform the men of Judge Urbina's *habeas* release order, issued earlier that day. Mr. Dixon was not permitted to walk into the part of Camp Iguana where the men are actually held, and he was forced to talk to the men from the other side of a fence. Dixon Decl. ¶ 6.

Four months after the Court ordered Respondent to "release Parhat, to transfer him, or to expeditiously conduct a new CSRT," Parhat grinds out his days in Respondent's Camp Iguana.

B. Respondent Has Made it Clear that He Intends Not to Comply.

As noted above, in the wake of this Court's Order, Parhat sought release through a writ of *habeas corpus* in the District Court for the District of Columbia. On October 7, 2008, the district court, recognizing that there was no legal or factual basis for the continued imprisonment of the men and that the Government's multi-year diplomatic efforts to find a suitable country to repatriate the men have failed, ordered that the Uighurs, including Parhat, be released into the only country where its Article III power extends—the United States. *In re Guantanamo Bay Detainee Litigation*, 2008 WL 4539019 at *9-10.

Rather than comply with the district court's order, and *despite this Court's outstanding Order requiring Respondent to release Parhat*, the government immediately moved for, and the next day obtained, an administrative stay of the district court's order. This effort is directly contrary to Secretary Gates's present obligations to comply with the Order by releasing Parhat, and makes clear that Secretary Gates has simply opted not to comply.

Meanwhile, Parhat will soon mark the completion of his seventh year of imprisonment. Although the *Parhat* decision gave Respondent several options to right the wrong done to Parhat, it did require a remedy. Compliance with this Court's clear and lawful orders is not optional. Having sought and obtained the now-stayed *habeas* relief, and having waited months for Respondent to obey this Court's order, Parhat is left with no option. Our system of laws does not tolerate the Executive's defiance of the Judiciary, any more than the continued imprisonment of an innocent man.

II. ARGUMENT

There is "no question that courts have inherent power to enforce compliance with their lawful orders through civil contempt." *Shillitani v. United States*, 384 U.S. 364, 370 (1966). "Civil contempt . . . is a remedial sanction used to obtain compliance with a court order or to compensate for damage sustained as a result of noncompliance." *Nat'l Labor Relations Bd. v. Blevins Popcorn Co.*, 659 F.2d 1173, 1184 (D.C. Cir. 1981). An adjudication of civil contempt is warranted based on "clear and convincing evidence" that the contemnor has violated a "clear and unambiguous" order. *Armstrong v. Executive Office of the President, Office of Admin.*, 1 F.3d 1274, 1289 (D.C. Cir. 1993). *See also Cobell v. Babbitt*, 37 F. Supp. 2d 6, 9-10 (D.D.C. 1999) (violation of "clear and reasonably specific" order). "[A] finding of bad faith on the part of the contemnor is not required [and] . . . the law is clear in this circuit that 'the [contemnor's] failure to comply with the court decree need not be intentional.'" *Food Lion v. United Food & Commercial Workers Int'l Union*, 103 F.3d 1007, 1016 (D.C. Cir. 1997). Indeed, Respondent's intent is "irrelevant." *Blevins*, 659 F.23 at 1184.

A civil contempt proceeding is a three stage process "consisting of (1) issuance of an order; (2) following disobedience of that order, issuance of a conditional order finding respondent in contempt and threatening to impose a specified penalty unless respondent purges himself of contempt by complying with prescribed purgation conditions; and (3) exaction of the threatened penalty of the purgation conditions are not fulfilled." *Oil, Chem. & Atomic Workers Intern. Union, AFL-CIO v. Nat'l Labor Relations Bd.*, 547 F.2d 575, 581 (D.C. Cir. 1976).

A. Respondent is Under a Present Duty to Comply With the Order.

The Order is clear, specific, and unconditional: Secretary Gates is to act "expeditiously" to convene "a new CSRT to consider evidence submitted in a

manner consistent with this opinion," to "transfer" Parhat, or to "release" him. *Parhat*, 532 F.3d at 851. The Court did not suggest or advise; it directed.

On September 2, 2008, the Court denied Secretary Gates's motion for rehearing. *See Parhat v. Gates*, No. 06-1397 (D.C. Cir. Sept. 2, 2008) (order denying rehearing) (per curiam). The mandate issued September 12, 2008. *See Parhat v. Gates*, No. 06-1397 (D.C. Cir. Sept. 12, 2008) (mandate). No stay has been sought or obtained.[9] The *Parhat* judgment is therefore final and immediately binding on Secretary Gates.

All that remains is Secretary Gates's undisputable duty to comply immediately with the Order. *See Maness v. Meyers*, *419* U.S. 449, 458-459 (1975) ("[A]ll orders and judgments of courts must be complied with promptly. If a person to whom a court directs an order believes that order is incorrect the remedy is to appeal, but, absent a stay, he must comply promptly with the order pending appeal[.]"); *United States v. United Mine Workers of Am.*, 330 U.S. 258, 293 (1947) (collecting "impressive authority for the proposition that an order issued by a court with jurisdiction over the subject matter and person must be obeyed by the parties until it is reversed by orderly and proper proceedings"); *Land v. Dollar*, 190 F.2d 366, 379 (D.C. Cir. 1951) ("An order issued by a court having jurisdiction of the persons and subject matter must be obeyed, even though the defendants may sincerely believe that the order is ineffective and will finally be vacated, even

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[9] On the contrary, *the government* has sought entry of the same judgment in four other Uighur cases. *See* Judgment, *Osman v. Gates, et al.*, Nos. 07-1509- through 07-1512 (D.C. Cir. Sept. 12, 2008) (granting government motion and ordering: "We direct the Government to release or to transfer the petitioners, or expeditiously to hold a new Combatant Status Review Tribunal. This disposition is without prejudice to petitioners' right to seek release immediately through a writ of habeas corpus in the district court, pursuant to the Supreme Court's decision in *Boumediene v. Bush*, 128 S. Ct. 2229 (2008).").

though the Act upon which the order is based is void, even though the order is actually set aside on appeal, even though the basic action becomes moot."). Not only is Respondent's compliance long overdue, but it has become abundantly clear that he has no intention of complying with the Order.

B. Respondent Should be Held in Civil Contempt.

Secretary Gates's compliance here can be achieved simply: he should immediately release Parhat into the United States. All that is preventing Secretary Gates's compliance is Secretary Gates himself. Far from taking "all reasonable steps within [his] power to comply with the courts [*sic*] order," as is his unquestionable duty, *Cobell*, 37 F. Supp. 2d at 9-10 (internal quotation marks and citations omitted), Secretary Gates has instead simply opted to ignore this Court's Order. A finding of non-compliance is now warranted. *See* 18 U.S.C. § 401(3) ("Disobedience or resistance to [the Court's] lawful writ, process, order, rule, decree, or command" is punishable by contempt); *American Rivers v. U.S. Army Corps of Engineers*, 274 F. Supp. 2d 62 (D.D.C. 2003) (failure to promptly comply with injunction warranted finding of contempt and threat of $500,000 per day coercive sanction against Secretary of the Army). *See also id.* at 68 ("Moving to stay an order does not represent a good faith effort to comply with that order; rather, it represents an effort to *postpone* compliance with that order in the hope that it will be overturned on appeal.") (emphasis in original).

The "judicial power" would mean nothing if an Executive officer was allowed to disobey a court order without consequence. That would render the Court a "mere board[] of arbitration, whose judgments and decrees would be only advisory." *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 450 (1911). "If a party can make himself a judge of the validity of orders which have been issued, and by his own act of disobedience set them aside, then are the courts impotent, and what the Constitution now fittingly calls the 'judicial power of the United

States' would be a mere mockery." *Id.* A robust exercise of the contempt power under these circumstances thus is necessary to prevent such irretrievable dilution of the judicial power. *See generally*, *Spallone v. United States*, 493 U.S. 265, 276 (1990) ("courts have inherent power to enforce compliance with their lawful orders through civil contempt"); *Ex parte Robinson*, 86 U.S. (19 Wall.) 505, 510 (1874) (from "[t]he moment the courts of the United States were called into existence and invested with jurisdiction over any subject, they became possessed" of the "power to punish for contempts[,]" a power "essential to . . . the enforcement of the judgments, orders, and writs of the courts, and consequently to the due administration of justice").

In addition to protecting the vitality of the judicial power, the contempt power is also "essential to ensuring that the Judiciary has a means to vindicate its own authority without complete dependence on other Branches." *Young v. U.S. ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 796 (1987). *See also Shepherd v. American Broadcasting Cos., Inc.*, 62 F.3d 1469, 1472 (D.C. Cir. 1995) (the inherent power of contempt is "[a]s old as the judiciary itself, [and is necessary to] . . . enable[] courts to protect their institutional integrity and to guard against abuses of the judicial process . . . ."). A finding of contempt ensures that the judicial power remains exclusively within the judiciary, and that the Executive respects its own constitutional obligation to "faithfully execute" the laws as interpreted by the federal judiciary. *See* U.S. Const. Art. II, §1, cl. 7; *Franklin v. Gwinnett County Pub. Schools*, 503 U.S. 60, 74 (1992) (the judicial contempt power "provide[s] an important safeguard against [such] abuses of legislative and executive power, as well as to ensure an independent judiciary"); *Nat'l Treasury Employees Union v. Nixon*, 492 F.2d 587, 604-05 (D.C. Cir. 1974) ("[T]he judicial branch of the Federal government has the constitutional duty of requiring the executive branch to remain within the limits stated by the legislative branch.").

Indeed, while no party is at liberty to ignore a valid court order, this is especially true with respect to a member of the Executive branch. The United States Supreme Court has made clear that even the most senior member of the Executive branch is under a duty to comply with a validly-issued federal court order. *See United States v. Nixon,* 418 U.S. 683 (1974) (affirming denial of President Nixon's motion to quash third-party subpoena duces tecum); *see also, e.g., Jones v. Clinton*, 36 F. Supp. 2d 1118 (E.D. Ark. 1999) (holding President Clinton in contempt for failure to comply with civil discovery order). For centuries, it has been established that the Executive, like any other party subject to the jurisdiction of the court, is not free to ignore a lawful order in a case over which the court has clear jurisdiction.[10] *See, e.g., Hayburns Case*, 2 U.S. 409 (1792) (executive cannot treat Court of Claims decisions as if they were precatory).

Thus, federal courts have not hesitated to find executive officials in contempt for failure to comply with federal court orders. *See, e.g., McBride v. Coleman*, 955 F.2d 571 (8th Cir. 1992) (affirming judgment of civil contempt against officials of an agency of the U.S.D.A. for violation of a nationwide injunction requiring the Agency to give homeowners in default 30 days notice of loan deferral program before demanding voluntary conveyance); *Nelson v. Steiner*, 279 F.2d 944, 948 (7th Cir. 1960) (affirming judgment of civil contempt against Department of Justice official for preventing the release of tax-payer's money in direct violation of an injunctive order: "The executive branch of government has no right to treat with impunity the valid orders of the judicial branch."); *American*

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[10] The Court's jurisdiction is undisputed. *See* Corrected Brief for Respondent at 1, *Parhat v. Gates*, No. 06-1397 (D.C. Cir. filed Feb. 7, 2008) (acknowledging jurisdiction); *see also* Detainee Treatment Act of 2005, § 1005(e)(2), Pub. L. No. 109-148 §§ 1001-1006, 119 Stat. 2680, 2739-45 (2005).

Rivers, 274 F. Supp. 2d 62 (holding U.S. Army Corps of Engineers in contempt for failing to comply with injunction requiring a reduction of water flow from a dam to protect species protected by Endangered Species Act); *Cobell,* 37 F. Supp. 2d 6 (holding Secretaries of the Departments of Interior and Treasury in contempt for failure to comply with civil discovery orders).

Secretary Gates has made it crystal clear by his actions that he has no intention to comply with the Order. *See supra* §I(B). To preserve the integrity of this Court, to stem the overreaching of the Executive's perceived authority, and, most importantly, to remedy the egregious wrongs suffered by Parhat, a finding of civil contempt is not just warranted but necessary.

C. The Court Should Issue A Conditional Contempt Order.

Parhat is acutely aware of the gravity of a request to sanction the Secretary of Defense. Unfortunately, there appears to be no alternative. This Court issued a lawful order. Respondent has failed to comply with the Order, and indeed is actively defying it. Under the law of this Circuit, the Court must issue "a conditional order finding [Respondent] in contempt and threatening to impose a specified penalty unless [Respondent] purges [himself] of the contempt. . . ." *Blevins Popcorn*, 659 F.2d at 1184.

This Circuit has long recognized the necessity of coercive sanctions to "enforce compliance with an order of the Court and to remedy any harm inflicted on one party by the other party's failure to comply." *Oil, Chem. & Atomic Workers Union*, 547 F.2d at 581; *see also Blevins Popcorn*, 659 F.2d at 1184 (same); *American Rivers*, 274 F. Supp. 2d at 65 (civil contempt necessary for "vindication of judicial authority"). The rule applies with no less force when the recalcitrant party is an Executive officer. Indeed, if the rule of law is to be upheld, coercive sanctions are "necessary to ensure that 'the executive branch of government [does not] treat with impunity the valid orders of the judicial branch.'"

American Rivers, 274 F. Supp. 2d at 69 (citation omitted) (brackets in original). Sovereign immunity is not a defense to the imposition of coercive fines. *Id.*

No case could better illustrate the need to vindicate the judicial authority against Executive recalcitrance. Although questions of Respondent's good faith or intent are not strictly relevant, *see Oil, Chem. & Atomic Workers Int'l Union*, 547 F.2d at 581, there is little doubt that Respondent's defiance is deliberate. The government has waived further CSRTs. By its own rhetoric the government has sabotaged any reasonable hope of transfer to a safe third country, and cannot force any other sovereign to accept Parhat. Given three options, the Executive has voluntarily foreclosed two. It cannot now refuse to implement the only option it left itself—release into the United States. A conditional contempt order is not merely warranted, it is necessary to preserve the proper balance of power between the Judicial and Executive branches.

Such an order must include a threat of sanctions that are onerous enough to enforce Respondent's prompt compliance with the Order. Parhat respectfully suggests that a conditional contempt order grant Respondent five calendar days to comply with the Order, and if he has not complied within that time to appear before the Court for a hearing to consider appropriate sanctions for each day of noncompliance thereafter. *See, e.g., American Rivers*, 274 F. Supp. 2d at 70 (threatening to impose fine of $500,000 for each day that the Secretary of the Army failed to comply with injunction concerning river management).

III. CONCLUSION

The Court's Order was clear, specific and lawfully issued. Secretary Gates is bound by it. Respondent has determined not to re-CSRT Parhat, cannot transfer him, and refuses to release him. As a result, Parhat is exactly where he has been for nearly seven years: imprisoned indefinitely at Guantanamo. *See Boumediene*,

128 S. Ct. at 2275 ("[T]he costs of delay can no longer be borne by those who are held in custody.").

It is regrettable that it has come to this, but Respondent's ongoing defiance of this Court's Order is intolerable. Petitioner therefore respectfully moves this Court to issue a conditional order to Secretary Gates finding him in contempt of this Court's June 20, 2008 Order, granting Respondent five calendar days to comply with the Order, and imposing appropriate sanctions for each day of noncompliance thereafter.

October 16, 2008

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 16, 2008, copies of the foregoing Petitioner's Motion for Conditional Order of Contempt were served via electronic mail and overnight mail:

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