[ORAL ARGUMENT NOT SCHEDULED]

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

HUZAIFA PARHAT, et al. Petitioners, v. ROBERT M. GATES, Secretary of Defense, Respondent.	)	No. 06-1397

MOTION TO ASSIGN SEPARATE DOCKET NUMBERS AND TREAT FILING AS SEVEN SEPARATE PETITIONS FOR REVIEW

This petition for review was filed against the Secretary of Defense, now Robert M. Gates, pursuant to the Detainee Treatment Act of 2005, Pub. L. No. 109-148, tit. X, §§ 1001-1006, 119 Stat. 2680, 2739 (DTA). The petition purports to be filed on behalf of seven detainees at Guantanamo Bay, Cuba who have been determined to be enemy combatants: Huzaifa Parhat, Abdusabour, Abdusemet, Hammad, Jalal Jalaldin, Khalid Ali, and Sabir Osman. *See* Pet. at 1. With respect to those seven detainees, the petition challenges the conclusions of seven different Combatant Status Review Tribunals (CSRTs), each tribunal having been separately conducted for one of the seven petitioners and each tribunal having concluded that the petitioner before it was an enemy combatant. *Id.* (listing as "Rulings Under Review" the "decisions of [CSRTs] * * * that each Petitioner is an 'enemy combatant'"). Because the function of this Court is to review those seven different decisions, each petitioner

should be treated as having filed a separate petition for review, each petition should be assigned a separate docket number, and each petition should proceed separately.[1] We have contacted counsel for petitioners to aks whether petitioners will object to this motion, and counsel indicated that the decision on whether to object would be made once counsel reads the motion.

The CSRTs were established by written orders of the Deputy Secretary of Defense and the Secretary of the Navy "to determine, in a fact-based proceeding, whether the individuals detained * * * [at] Guantanamo * * * are properly classified as enemy combatants and to permit each detainee the opportunity to contest such designation." Deputy Sec. England Memo. at 1 (Pet. Ex. 2). A separate CSRT proceeding is conducted for each Guantanamo detainee. *See Id.*, CSRT Process, § B ("to determine whether each detainee * * * meets the criteria to be designated as an enemy combatant," DoD "shall convene [CSRTs] * * * to make a written assessment as to each detainee's status as an enemy combatant") .

[1] On December 18, 2006, petitioners filed a motion for entry of the district court protective order that governs habeas cases filed by Guantanamo Bay detainees. The government will file an opposition to that motion in due course because the district court protective order has led to security problems and is not appropriate for use in this Court, and will seek entry of the protective order proposed by the Government in another case filed in this Court under the DTA, *Bismullah v. Gates*, 06-1197.

The Detainee Treatment Act of 2005 establishes a judicial review mechanism for final decisions rendered by the CSRTs. The statute confers on this Court "exclusive jurisdiction to determine the validity of *any final decision of a [CSRT]* that an alien is properly detained as an enemy combatant." DTA § 1105(e)(2)(A) (emphasis added). Federal Rule of Appellate Procedure 15 provides that "[r]eview of an agency order is commenced by filing * * * a petition for review * * * to review the agency order." Fed. R. App. P. 15(a)(1). The rule goes on to explain that if "their interests make joinder practicable, two or more persons may join in a petition to the same court *to review the same order*." *Ibid.* (emphasis added).

Because it does not challenge a single CSRT final decision, the petition in this case does not comply with this rule. Rather, the petition challenges seven different CSRT final determinations with respect to seven different enemy combatants. In these circumstances, a single petition for review is not appropriate, nor is joinder under Rule 15(a)(1), because the challenge is not to "the same order." Instead, the filing should be treated as seven separate petitions for review of the seven CSRT determinations at issue – each must be assigned a separate docket number and should be handled separately.

The requirement under Rule 15 that this petition be severed into seven distinct proceedings is underscored by the nature of this Court's review of the CSRT record. Review by this Court under the DTA is on the record compiled by the CSRT in each

particular enemy combatant case - -the Act authorizes this court to determine "the validity of [the] final decision of" the CSRT. DTA § 1105(e)(2)(A). Even outside of the extraordinary context of wartime detention of the enemy, statutes providing for review of final agency decisions authorize a "reviewing function [that] is * * * ordinarily limited to consideration of the decision of the agency or court below and of the evidence on which it was based." *United States v. Carlo Bianchi & Co.*, 373 U.S. 709, 714-15 (1963). Here, by mixing several petitioner claims together, the petition often fails to address the record before the CSRT in a particular petitioner's case, instead addressing the record in other cases. *See, e.g.*, Pet.¶¶ 133, 135, 139, 142 (addressing CSRT of Hassan Anvar); Pet.¶ 48 (addressing CSRT of Akhtar Qassim); Pet. ¶ 138 (culling allegations relating to various petitioners); Pet. ¶ 119 n.12 (addressing CSRT procedural issues relating to detainees who are not petitioners); Pet .¶ 54; Pet. ¶122. In fact, each petitioner is an individual and the CSRT determination with respect to him is unique, as the petitioners concede. *See* Pet. ¶ 138 ("some of the [factual] details vary[] for each of the eighteen" detained Uighurs). Accordingly, it is not necessary or appropriate for this Court to review material from outside of a petitioner's CSRT record in determining the "validity of [the] final decision of" the CSRT. DTA § 1105(e)(2)(A). While this petition must be severed irrespective of the scope of this Court's review under the DTA, the record review function of this Court underscores the fact that it is inappropriate to bundle together these seven

distinct challenges to seven different CSRT determinations.

Further, each petitioner has standing only to challenge the CSRT final decision that pertains to him. Accordingly, the petitioners must be dismissed except to the extent they are challenging the CSRT proceeding in their particular case. Standing requires that "plaintiff must have suffered an injury in fact"; that there "must be a causal connection between the injury and the conduct complained of-the injury has to be fairly traceable to the challenged action of the defendant"; and that it is "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Here, petitioners do not have standing to challenge CSRT determinations with respect to individuals other than themselves because those other CSRT determinations are not the cause of their injury, and a ruling with respect to such other CSRT determinations will not redress their injury. *Id.* Accordingly, the petitioners have standing to challenge only the CSRT determination issued in their particular case, and this Court should treat the filing as seven separate petitions for review.

While these claims cannot be considered on the merits in the same petition for review proceeding, we understand that appropriate coordination of all the DTA petitions likely to be filed in the Court on behalf of the almost 400 current Guantanamo Bay detainees is necessary and is called for. For example, this Court may wish to consider consolidation of this and other DTA cases for purposes of the

entry of a protective order – an issue which the government will address more fully in its opposition to petitioners' motion for entry of a protective order. And while some fashion of consolidation would not be opposed for procedural purposes, separate briefing of the claims of each petitioner will be required to address each different CSRT proceeding and final decision.

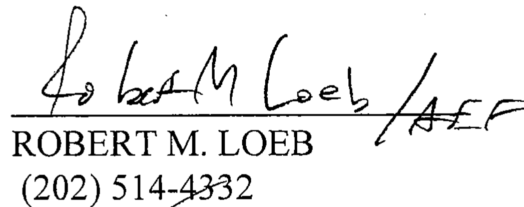
CONCLUSION

For the foregoing reasons, this Court should treat the filing by petitioners as seven separate petitions for review.

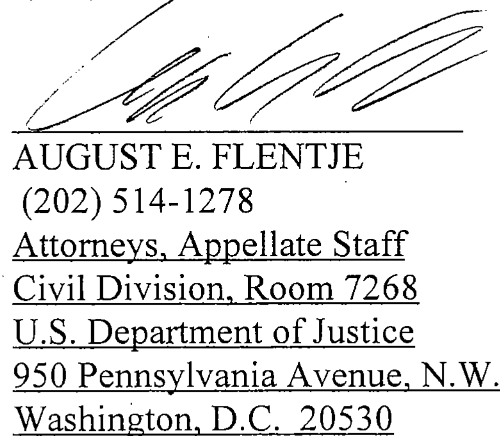
Respectfully submitted,

PETER D. KEISLER
Assistant Attorney General

DOUGLAS N. LETTER
Terrorism Litigation Counsel



ROBERT M. LOEB
(202) 514-4332



AUGUST E. FLENTJE
(202) 514-1278
Attorneys, Appellate Staff
Civil Division, Room 7268
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530

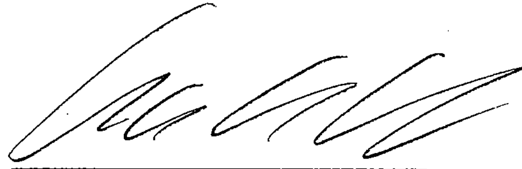
DECEMBER 2006

CERTIFICATE OF SERVICE

I hereby certify that on December 20, 2006, I caused copies of the foregoing "MOTION TO ASSIGN SEPARATE DOCKET NUMBERS AND TREAT FILING AS SEVEN SEPARATE PETITIONS FOR REVIEW" to be served upon counsel of record by causing copies to be sent to:

Sabin Willett (by Federal Express)
Bingham McCutchen LLP
150 Federal Street
Boston, MA 02110-1726

Susan Baker Manning (by hand delivery)
2020 K Street, N.W.
Washington DC 20006-1806



August E. Flentje