[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

REPLY IN SUPPORT OF MOTION TO STAY PROCEEDINGS AND TO ENTER PROPOSED PROTECTIVE ORDER

Petitioners' opposition to the government's motion to stay proceedings and for entry of its proposed protective order is steeped in heated rhetoric, but provides little basis for denying the relief requested in the government's motion.[1] The government seeks to have this case held in abeyance simply to comport with this Court's ruling in the earlier-filed *Bismullah v. Gates*, No. 06-1197, which raises identical procedural issues and which this Court determined should be held in abeyance until this Court resolves *Al Odah v. United States*, No. 05-5064, and *Boumediene v. Bush*, No. 05-5062. And the government seeks entry of a protective order that is tailored to DTA review; resolves conflicts and abuses that persisted under the district court protective order; and allows for robust participation of counsel. Petitioners provide no substantial reason to decline to enter the government's proposed protective order.

1. The government's motion for a stay was filed to parallel this Court's order holding the *Bismullah* matter in abeyance pending its resolution of *Al Odah* and *Boumediene*. As we explained, this case raises three preliminary procedural issues[2] that are identical to issues previously raised in *Bismullah* and held by this Court in

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[1] On January 9, the day before this reply was due, petitioners filed an additional "memorandum" in further support of their motions. That pleading is not authorized by this Court's rules, and the government will file a motion to strike it in due course.

[2] The issues are: (1) whether to enter the government's proposed protective order or some other form of protective order; (2) whether the Detainee Treatment Act (DTA) authorizes discovery; and (3) whether to appoint a special master.

abeyance. Recognizing that this Court's disposition of *Al Odah* and *Boumediene* may provide guidance regarding these issues, this Court stayed the *Bismullah* case pending the outcome of those appeals. It would make little sense for this Court to hold resolution of those same issues in abeyance in *Bismullah,* but move forward to resolve the issues in this matter.

Petitioners state, erroneously, that this Court held *Bismullah* in abeyance "based on the stipulation of the parties." Opp. at 2. In fact, neither party stipulated nor proposed that resolution of the initial procedural questions (that are common to this case) be stayed. While the government moved to hold merits briefing in abeyance pending this Court's resolution of *Al Odah* and *Boumediene*, it expressly noted that "[d]uring the interim period" while merits briefing was held in abeyance, the government would seek "entry of a protective order" and once such an order was entered "grant[] access to the appropriate portions of the CSRT record" to petitioner's counsel. Mot. to Hold Briefing in Abeyance in *Bismullah* at 3. Likewise, Bismullah urged that the Court go ahead and address the initial procedural matters. Pet's Resp. in *Bismullah* at 2. Thus, the parties did not ask this Court to hold the procedural matters in *Bismullah* in abeyance. Nonetheless, the Court did so on its own initiative, and petitioners have provided no reason to treat this case differently.

Petitioners also argue that Counts 1 through 4 of their petition have no relationship to *Al Odah* and *Boumediene*. Opp. at 2. That is simply wrong. This

Court, if it converts the *Al Odah* and *Boumediene* appeals into DTA cases (as the government has urged), may address the nature of DTA review, as well as necessary requirements for a CSRT to find a detainee to be an enemy combatant, which will have clear bearing on these counts, as well.[3]

2. Petitioners provide little concrete objection to the government's proposed protective order.[4] Indeed, petitioners do not address the primary reason that a different protective order is needed: this case arises under the DTA, a new statute that provides for limited review by this Court and eliminates challenges to conditions of confinement and other matters that might entail factual development. This case therefore calls for a protective order tailored to the scope of this Court's review.

a. Petitioners' primary ground for objecting to the proposed order, and preferring the district court model, is that they contemplate that the DTA proceedings in this Court will entail significant fact finding and demand wide ranging discovery.

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[3] For example, in Count 1, petitioners claim, *inter alia*, that to be held as "enemy combatants" they themselves must have engaged in active hostilities against the United States. Similar arguments were asserted in *Boumediene*. *See Boumediene* Reply Br. 22-23. In Counts 2 and 4, petitioners assert that the CSRT record was incomplete and that the tribunal and recorder failed to adequately search for exculpatory evidence. Similar arguments regarding the adequacy and reliability of the CSRT record were asserted in *Boumediene*. *See Boumediene* Opening Br. 45-51.

[4] Petitioners falsely assert that the government's motion is "an excuse to withhold even the most basic information about Petitioners' detention." Opp. at 8. The government suggested in its motion that this Court enter the proposed protective order on an interim basis to allow immediate counsel access to the CSRT record. *See* Mot. at 6 n.3.

That erroneous position has been addressed comprehensively in the government's opposition to the petitioners' discovery motion. First, fundamental principles of administrative law provide that in a case like this one, where review is of the decision of an agency, review is on the record of the agency decisionmaker. Second, this is not a garden variety administrative law case but an extraordinary grant of court review of an enemy combatant determination during an ongoing armed conflict; to read the DTA as authorizing discovery would be to interpret it to provide for more extensive review than previously provided under habeas corpus. Third, the Due Process Clause does not require discovery in these circumstances. And fourth, Congress rejected the district court approach when it enacted the DTA and the MCA.

Petitioners assertion that their DTA claims will require discovery and *de novo* factual findings by this Court is also based on a faulty understanding of the CSRT recorder's role.[5] The recorder's role of gathering "reasonably available information" in government files that "bear[s] on the issue" of whether the detainee is an enemy combatant is routine and subject to the strongest presumption of regularity. Deputy Sec. England Memo., CSRT Process § E(3). That role does not encompass an investigation, but simply collecting files "generated in connection with the initial

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[5] *See* Opp. at 14 (Count II "asserts that * * * the Recorder failed to provide to the panels evidence of innocence"); Opp. at 15 (Count IV alleges that the "Recorder * * * failed * * * to take into account the reliability of hearsay evidence" or "provide * * * Government Information suggesting that the detainee should not be designated as an enemy combatant").

determination to hold the detainee" and "any subsequent review of that determination." *Ibid.* This role is circumscribed to the role envisioned by the Supreme Court plurality of compiling "documentation regarding battlefield detainees [that] is kept in the ordinary course of military affairs." *Hamdi v. Rumsfeld*, 542 U.S. 507, 534 (2004). The *Hamdi* plurality explained, the role is "a minimal one." *Ibid.* The recorder's role, modeled on that language, does not reflect the more expansive role suggested by petitioners.

If petitioners' rule were the norm, every administrative law case would require unbounded, wide-ranging discovery and this Court's function would be transformed into a *de novo* review where the Court created its own record in order to compare it to the administrative record. That, of course, is not the law. The process proposed by petitioners would also constitute an extraordinary burden – a burden that is incompatible with the process historically provided to enemies in war and contrary to congressional intent in enacting the DTA. The argument should be rejected.

b. Petitioners next argue that the district court protective order should be entered because there is no evidence that petitioners' counsel misused the legal mail system. Opp. at 9. Whether or not petitioners' counsel misused the mail system is not the issue. The question is whether the system established by the district court left vague definitions that permitted abuse, and there can be no doubt of that. Commander Patrick M. McCarthy's declaration details that communications between

enemy combatant detainees and civilians have resulted in serious threats to security at Guantanamo. As we explained in *Bismullah* (Mot. for Entry of Protective Order at 6-8) and in our motion in this case (at 8), communications have included information relating to current events and the activities of terrorist leaders that has posed a persistent theat to base security. These communications were able to get through because of vagueness in the definition of legal mail in the district court order (*see* Pets' Mot. for Entry of Protective Order, Ex. A, § II.E) and the inability under that regime for a privilege team to review such communications being introduced into the camp. The proposed order addresses these shortcomings by providing a carefully constructed definition of legal mail that pertains to communications related to this DTA case and by authorizing privilege team review of those communications while ensuring that the communications are kept confidential. Notably, petitioners have provided no substantive opposition to these proposed provisions on legal mail.

c. Petitioners also argue that the protective order should authorize unlimited civilian attorney visits to solicit enemy combatant detainees as clients when those individuals have not sought a lawyer and have not filed their own federal court challenge under the DTA. Petitioners speculate that because the combatants are enemy forces who do not trust visitors, they will not "cheerfully dictate a complete statement to [an] American lawyer" unless there are "multiple base visits." Opp. at 10. But even assuming that this speculation is true, nothing in the DTA requires this

Court to allow civilian lawyers to visit enemy combatants in person in an attempt to persuade them that it is in their best interest to file DTA petitions.

Detainees have been clearly notified in their native language of their ability to file a suit and to seek the appointment of an attorney. Because no law requires the government to facilitate attorney solicitations, it need not allow *any* counsel visits to enemy combatant detainees who have not sought to file a suit or seek representation. Further, to pursue fully a case without the authorization of the party in interest, an onerous showing must be made to act as the party's "next friend": the person pursuing the suit must establish both that the real party in interest cannot appear on his own behalf due to "inaccessibility, mental incompetence, or other disability" and that the petitioner has a "significant relationship with the real party in interest." *Whitmore v. Arkansas*, 495 U.S. 149, 163 (1990). Given the notice provided to all detainees, it would be in the end quite difficult to make this showing. In spite of this fact, the proposed protective order leaves room for one visit to be made by counsel without requiring the Court to address next friend standing in circumstances where next friend standing is not challenged. The government's proposal therefore goes beyond the baseline to benefit, rather than hamper, the detainees by allowing a solicitation visit without always requiring that standing first be resolved by the court.

d. Petitioners argue (at 11-13) that this Court should ignore years of jurisprudence addressing the handling of cases that involve classified material (*e.g.*,

Jifry v. FAA, 370 F.3d 1174 (D.C. Cir. 2004); *Stillman v. CIA*, 319 F.3d 546 (D.C. Cir. 2003); *Department of Navy* v. *Egan*, 484 U.S. 518 (1988)) because none of those cases involve detention. This argument is widely off-base – the government is endeavoring here through the entry of the protective order to *allow* counsel to access classified material in the record, not deny access. Further, if anything, cases under the DTA call for an even more heightened concern for national security needs because they involve the detention of the enemy during wartime. Such detention is inextricably intertwined with sensitive national security information with respect to the basis for detention. *Hamdi*, 542 U.S. at 531 (plurality op.). In the context of history and under the Geneva Conventions, such detention *never* required that the enemy be given access to classified information - the notion itself strains credulity. *See* Army Reg. 190-8, § 1-6.e(3) & (5). Here, on the other hand, unlike cases such as *Jifry* where this Court upheld the denial of all access to classified information, the government is taking the extraordinary step of providing appropriate counsel with security clearances and access to classified information. Nothing more is required.

As a subsidiary point, petitioners' counsel argues that it is inappropriate to include a "need-to-know" requirement in the protective order. Opp. at 9. But this requirement is contained within the Executive Order governing the handling of classified material. Exec. Order 12,958, as amended by Exec. Order 13,292, § 4.1(a), 68 Fed. Reg. 15,315 (Mar. 25, 2003). The requirement applies to *anyone* who seeks

access to classified material, including government employees. Petitioners have provided no reason to ignore it in this context.[6]

3. Petitioners quote a newspaper article suggesting that, prior to the CSRTs, the Government determined that they were innocent. *See* Opp. (cover). There was no such prior determination. Petitioners were detained as enemy combatants prior to the CSRTs, and then, after a CSRT hearing in which petitioners were afforded an opportunity to be heard, and after examining the records in petitioners' particular cases, the government found that each of the petitioners is properly designated as an enemy combatant.

In addition to the CSRT process, there is also an examination by DOD of whether an enemy combatant detainee could be safely released or transferred from Guantanamo. It is not the intention of the United States to hold the enemy combatant detainees indefinitely, and, accordingly, DOD has undertaken to review whether those otherwise properly detained may nonetheless be transferred or released from Guantanamo. This is a wholly discretionary determination, unrelated to the detainee's enemy combatant status, and is a process DOD has engaged in since 2002.

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[6] Contrary to petitioners' suggestion, only a small portion of the material in classified CSRT records would be considered not to satisfy the need-to-know requirement with respect to counsel on that particular case. *See* Appellant's Br. in *Al-Odah II*, Nos. 05-5117 through 05-5127 at 11 (explaining that government had "redacted especially sensitive source-identifying information" and "information in the record that pertains to individuals other than the detainee at issue").

Today, consistent with the terms of the Detainee Treatment Act, this function is carried out by the DOD Administrative Review Board (ARB).[7] An ARB finding of eligibility for transfer from Guantanamo means that the United States will pursue options for release or transfer to other countries. It does not mean, however that the detainee is "innocent" or that the continued detention of the detainee as an enemy combatant, in the meantime, is in any way improper.[8] Petitioners' erroneously conflate these two independent processes.

CONCLUSION

For the foregoing reasons and for the reasons explained in our motion, this Court should hold this case in abeyance and grant the government's motion for entry of the proposed protective order.

Respectfully submitted,

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[7] The ARB considers, among other things, "whether the enemy combatant represents a continuing threat to the U.S. or its allies." ARB Memo, § 1 (available at http://www.defenselink.mil/news/Aug2006/d20060809ARBProceduresMemo.pdf).

[8] In our opening motion (pp. 24-25), we explained that new information regarding a detainee's enemy combatant status is considered by DOD and that there is a mechanism for the conduct of a new CSRT if the new evidence so warrants. Typically, as we noted, new material is submitted to the ARB. If, however, a detainee was previously found to be eligible for release or transfer (either prior to the CSRTs, or since by an ARB), the new material is considered instead by the DOD Office of Administrative Review of the Detention of Enemy Combatants. Thus, all of petitioners here, whether cleared for release/transfer or not, have an appropriate administrative route for consideration of any new relevant evidence bearing on their particular enemy combatant status.

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CERTIFICATE OF SERVICE

I hereby certify that on January 10, 2007, I caused copies of the foregoing "REPLY IN SUPPORT OF MOTION TO STAY PROCEEDINGS AND TO ENTER PROPOSED PROTECTIVE ORDER" to be served upon counsel of record by causing copies to be sent to:

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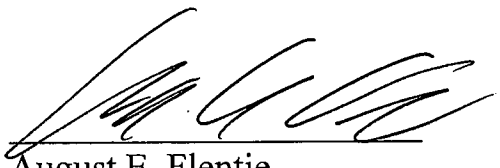

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