[ORAL ARGUMENT HELD MAY 15, 2007]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

HAJI BISMULLAH and HAJI MOHAMMAD WALI, as Next Friend of Haji Bismullah, Petitioners, v. ROBERT M. GATES, Respondent.	Case No. 06-1197
HUZAIFA PARHAT, *et al.*, Petitioners, v. ROBERT M. GATES, *et al.*, Respondents.	Case No. 06-1397

PETITIONERS' JOINT RESPONSE TO RESPONDENT'S MOTION FOR LEAVE TO FILE DECLARATION DESCRIBING PROCESS OF COMPILING CSRT RECORD

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

RULES

I. CONTROL THE RECORD, CONTROL THE LAWYERS, CONTROL THE OUTCOME

The government has tried to control the pending motions by controlling the Court's access to the facts necessary to resolve them. Having faced the Court's pointed questioning during oral argument, however, the government now offers the declaration of Rear Admiral James M. McGarrah ("McGarrah Declaration"). Petitioners support the disclosure of relevant facts related to the CSRT process—indeed, we believe full disclosure is critical to the integrity of the judicial process. In the interest of a prompt and fair hearing on the merits, Petitioners do not oppose Respondent's motion for leave[1] to file the McGarrah Declaration,[2] and respectfully request the Court to promptly resolve the motions; however, we urge the Court to order Admiral McGarrah to appear for deposition on the subject matter of his Declaration in connection with the merits of the claims in the Petitions.

The McGarrah Declaration's revelations are startling, and yet the document is replete with omissions, gaps, and lacunae. The government took sixteen days to draft the declaration, and it bears all the hallmarks of careful management by lawyers. Where detail might be troubling, generalities are provided; where the full picture might be damaging, only half is set out. Nevertheless, we now know:

- the Recorder did *not* obtain and review the Government Information in most, if not all, of the CSRTs, and instead these critical tasks were

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[1] Respondent's Motion for Leave to File Declaration Describing Process of Compiling CSRT Record is not limited to whether good cause exists for filing the declaration. Rather, it squarely addresses the merits of the motions that were argued and submitted on May 15, 2007. Petitioners therefore respond as to those issues as well.

[2] Petitioners do not object to the *filing* of the McGarrah declaration, but each reserve the right to object to its *admissibility* as evidence.

performed by a Pentagon "Team" that pre-packaged the limited information sent to the Tribunal;

- the Personal Representative did *not* review the Government Information; and
- the Recorder did *not* present all exculpatory evidence contained in the Government Information to the Tribunal.

Three critical points arise from the McGarrah Declaration. First, it shows that the government has made numerous arguments and assertions that are flatly inconsistent with the actual facts. Indeed, in urging this Court to adopt "a strong presumption of regularity," the government asked this Court to presume facts that were not true.

Second, the McGarrah Declaration demonstrates conclusively that Petitioners' motions to compel should be granted. The government has exclusive control over the relevant evidence, and for too long has disclosed only the evidence that suits it. The McGarrah Declaration dramatically emphasizes the need for an order requiring the government to do what it has so vigorously resisted: allow Petitioners' counsel access to all relevant facts. The revelations in the McGarrah Declaration powerfully show that the Court cannot meaningfully review these cases on less than all relevant facts.

Third, the McGarrah Declaration indicates that the CSRTs did not follow their own procedures, and is thus highly relevant to the merits. In order to decide this case, the Court will need to have a full understanding of how Petitioners' CSRTs were conducted.

In order for counsel to effectively prepare and present Petitioners' cases to the Court, we must have access to our clients, as well as to the complete facts. The government will allow us neither until the Court enters a protective order. *See infra* § IV. Petitioners respectfully urge the Court immediately to enter the district

court form of protective order, to require the government to produce the requested documents, and to enter a scheduling order for the prompt briefing and resolution of the merits.

II. THE McGARRAH DECLARATION REFUTES THE GOVERNMENT'S PREVIOUS REPRESENTATIONS CONCERNING THE CSRT PROCEEDINGS.

The government consistently represented that Guantanamo prisoners were held as enemy combatants only after "multiple levels of review," and that an extensive file about each detainee had been generated in connection with those prior determinations.[3] The government explained that at the outset of each CSRT proceeding, the Recorder was supposed to examine the files "generated in connection with the initial determination to hold the detainee, and any subsequent review of that determination." Respondent's Reply In Support of Motion to Stay Proceedings and to Enter Proposed Protective Order at 4-5, *Parhat v. Gates*, no. 06-1137 (D.C. Cir. Jan. 10, 2007); *see also* App.10 § E(3) & App.17 § C(1) (Recorder is to review "information generated in connection with the initial determination to hold the detainee as an enemy combatant and in any subsequent reviews of that determination, as well as any records, determinations, or reports generated in connection with such proceedings"). Now we learn that in the fall of 2004, a massive research effort—involving up to 200 people—was *launched* in Washington. The inference is plain, and after five years, startling: in 2004, more

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[3] *See, e.g., Rasul v. Bush*, Nos 334, 343, Brief for the Respondents (U.S. Mar., 2004) at 4 ("individuals taken into U.S. control ... undergo a multistep screening process ... commanders in the field, using all available information, make a determination as to whether the individual is an enemy combatant"); *id.* at 5 (prisoners are then "sent to a centralized holding in the area of operations where a military screening team reviews all available information ... [a]ny recommendations for transfer to Guantanamo are further reviewed by a Department of Defense review panel ... Upon their arrival in Guantanamo, detainees are subject to an additional assessment by military commanders regarding the need for their detention. That assessment is based on information obtained from the field, detainee interviews, and intelligence and law enforcement sources.").

than two years into the imprisonment of most prisoners, the government was starting from scratch to build a case for detention.

During oral argument on May 15, 2007, the government told the Court that the Recorder compiled and selected the materials presented to the CSRT Tribunals: "[I]t is what the Recorder selects." *See* Transcript of Oral Argument at 29, *Bismullah v. Gates*, Nos. 06-1197 and 06-1397 (May 15, 2007) ("Tr."); *see also* Brief for Respondent Addressing Pending Preliminary Motions at 9, *Bismullah v. Gates*, Nos. 06-1197 and 06-1397 (Apr. 9, 2007) ("The Recorder thus obtained and examined the Government Information[.]"). The Court heard nothing of "Case Writers" in Washington preparing the unclassified summaries of evidence and researching the Government Information, McGarrah Decl. ¶ 5(a); nothing of Washington "civilians and contractors" who pre-packaged the files sent to Guantanamo, *compare id.* ¶¶ 2-6 *with* Tr. at 38 (representing that various federal agencies provided information "to the Recorder"); nothing about some person other than the Recorder managing the "coordination" with government agencies, McGarrah Decl. ¶ 5(c); nothing about the "instances where the Team was not permitted to use certain documents as government Evidence or to make copies of them," *id.* ¶ 10(b); nothing about a process in which "Government Information" was disregarded based on an unknown, and possibly uninformed, person's determination that it was "not relevant or only marginally relevant," *id.* at ¶ 11(a).[4]

Most significantly, on May 15 no one told the Court that exculpatory evidence was withheld, either by the mysterious "Case Writers," or by the

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[4] We do not suggest that Mr. Letter or anyone else at the Department of Justice knowingly or intentionally made misrepresentations to this Court. We do not know how it came to be that the government said one thing to the Court, and Admiral McGarrah another. We note however, that the Department of Justice has a duty to investigate the relevant facts thoroughly, as well as to act at all times with candor and good faith before this Court.

Recorder himself. McGarrah Decl. ¶ 13. Quite the opposite: "*if* the recorder has done what he or she was required to do," the government said, "the recorder has presented to the panel any exculpatory information." Tr. at 33 (emphasis added).

A. The Recorder neither obtained nor examined the Government Information.

Under the CSRT Procedures, the Recorder was obliged to "obtain and examine the Government Information to obtain and examine the Government Information." App. 17 § C(1). Indeed, the Tribunal, through its Recorder, is deemed to have access and to have considered the Government Information. App.2 § g(7) ("The Tribunal, through its Recorder, *shall have access to and consider* any reasonably available information.) (emphasis added).

Respondent represented that the Recorder personally performed the routine task of collecting files containing the Government Information:

> Petitioners' assertion that their DTA claims will require discovery . . . is also based on a faulty understanding of the CSRT recorder's role. The recorder's role of gathering "reasonably available information" in the government's 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." That role does not encompass an investigation, but simply collecting files "generated in connection with the initial determination to hold the detainee, and any subsequent review of that determination.

Respondent's Reply In Support of Motion to Stay Proceedings and to Enter Proposed Protective Order at 4, *Parhat v. Gates*, no. 06-1137 (D.C. Cir. Jan. 10, 2007). *See also* Respondent's Opp. To Motion to Compel at 5 n.5, *Bismullah v. Gates*, no. 06-1197 (D.D. C. Aug. 21, 2006) ("Recorder simply compiles relevant material that is reasonably available in government files (see CSRT Procedures, Encl. 1 § E(3) (defining 'Government Information').").

The McGarrah Declaration reveals that the Government Information was never collected, and the Recorder thus never obtained and examined the Government Information. Instead, a "Case Writer" had "primary responsibility"

for "researching " and "collecting" information from limited government sources. McGarrah Decl. ¶ 5. This Case Writer apparently compiled information that he or she thought sufficiently important to present to the Tribunal—but Admiral McGarrah explains that the Case Writer's "file of information gathered as a result of these inquiries . . . did not necessarily include all material that might be considered to meet the definition of 'Government Information.'" *Id.* ¶ 11. The Recorder generally reviewed only the information provided by the "Team," rather than the Government Information. *Id.* ¶ 6.

B. The Recorder did not present all exculpatory evidence to the Tribunal

The CSRT Procedures require the Recorder to present all exculpatory evidence to the Tribunal. App.17, § B(1) ("In the event the Government Information contains evidence to suggest that the detainee should not be designated as an enemy combatant, the Recorder *shall* also provide such evidence to the Tribunal.") (emphasis added); App.14 §H(4) (same).

At oral argument, the government conceded that "*if* the recorder has done what he or she was required to do, the recorder has presented to the panel any exculpatory information." Tr. 33 (emphasis added); *see also id.* at 24 ("If you note at Appendix page 17 [CSRT Procedures], the recorder has an obligation to gather exculpatory material and provide that to the tribunal. So unless there is evidence that the recorder has not done his or her job, the exculpatory evidence should be in the record.").

The government also urged the Court to reject Petitioners' challenges to the CSRT proceedings—including claims that the Recorder failed to present exculpatory evidence to the Tribunal—based on the "strongest sort of presumption of regularity." According to Respondent "[t]he recorder's role of gathering 'reasonably available information' in the government's 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." Respondent's Motion to Stay Proceedings at 4 , *Parhat v. Gates*, no. 06-1397 (Jan. 10, 2007). Respondent argued that Petitioners could overcome this presumption only through a "'strong showing of bad faith or improper behavior." S*ee, e.g.,* Respondent's Motion to Govern Further Proceedings and Opp. To Petitioners' Mtn. to Govern at 9-10, *Parhat v. Gates*, no. 06-1397 (Mar. 9, 2007). This "strongest sort of presumption of regularity" would have led the Court to presume a set of facts that, according the McGarrah Declaration, were untrue.

Admiral McGarrah testified that at least for CSRTs conducted after September 1, 2004,[5] exculpatory evidence was not always provided to Tribunals. McGarrah Decl. ¶ 13. First, Admiral McGarrah testified that "duplicative" exculpatory information "might" have been omitted from the "Government Evidence" presented to the Tribunal. *Id.* ¶ 13(a). Second, he testified that exculpatory information "may be excluded from the Government Evidence—if," in the estimation of either the "Team" *or* the Recorder, "it did not relate to a specific allegation being made against the detainee." *Id.* ¶ 13(b). But the CSRT procedures do not provide for any such exceptions. If information was (1) in the possession of the U.S. government, (2) was "reasonably available," and (3) "suggest[ed] that the detainee should not be designated as an enemy combatant," the Recorder was required to present it. App.17, § B(1); App.14 §H(4). The apparently routine—and previously unknown—withholding of exculpatory evidence from the Tribunals was a flat violation of the CSRT procedures.

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[5] *See generally* App.152 (timeline of hearing dates for 102 CSRTs studied (of 558 conducted)).

C. The Personal Representative did not review the Government Information.

The Personal Representative was required to review the Government Information—indeed, the CSRT hearing could not be scheduled until he or she had done so. App. 12 § G(4) ("The Director, CSRT, will schedule a Tribunal hearing for a detainee within 30 days after the detainee's Personal Representative *has reviewed* the Government Information[.]") (emphasis added). Respondent represented that the Personal Representative in fact reviewed the Government Information, and thus acted as a check on the Recorder. *See also* Brief for Respondent Addressing Pending Preliminary Motions at 67, *Bismullah v. Gates*, Nos. 06-1197 and 06-1397 (Apr. 9, 2007) ("[T]he detainee's personal representative may also review all of the government information, and may independently present evidence 'to the CSRT on the detainee's behalf.' . . . Thus the notion that the Recorder alone was responsible for placing exculpatory material in the record is not true.").

> As an additional check, the Personal Representative also reviews all of the government information, and may independently present evidence "to the CSRT on the detainee's behalf."

Respondent's Opp. To Motion to Compel at 19, *Bismullah v. Gates*, no. 06-1197 (D.C. Cir. Aug. 21, 2006)

In fact, the Government Information was never collected, and therefore never reviewed by the Personal Representative (nor by the Recorder, the "Case Writer" or the other members of the "Team"). McGarrah Decl. ¶ 11 (the file that was "gathered" did not include all Government Information). The Personal Representative did not even have access to the information in the government databases or files; the Personal Representative had merely the "*ability* to request additional information." *Id.* ¶ 6 (emphasis added).

III. THE McGARRAH DECLARATION SUPPORTS PETITIONERS' MOTION FOR ACCESS TO GOVERNMENT INFORMATION.

Petitioners demonstrated a compelling need to review the Government Information, even when Petitioners and the Court believed, incorrectly, that the Recorder had examined all of the Government Information. Even in that case, Petitioners have the right to review the information that was available to the Recorder, and to determine, among other things, whether he or she presented all exculpatory evidence to the Tribunal.

The McGarrah Declaration shows that Petitioners' need to review the Government Information is even greater than originally suspected. Given Admiral McGarrah's admission that exculpatory evidence was regularly withheld from the CSRT Tribunal, there can be no real dispute that Petitioners are entitled to review the Government Information to prove that the CSRT determination in each of their cases is not supported by a preponderance of the evidence, as well as to prove the prejudice resulting from the failure to comply with the CSRT Procedures.

A. Respondent's new substantive arguments are meritless.

After months of briefing, oral argument, and submission of the case, the government makes two entirely new substantive arguments in its motion for leave. Specifically, the government argues that some of the Government Information cannot be released to security-cleared counsel for unspecified reasons of national security, and it implies that being required to produce the Government Information would be burdensome. Mtn. for Leave at 2. Even if the Court wishes to consider these procedurally improper arguments, both fail.

Respondent seeks to create a purported security issue that, in fact, rests on a misreading of the CSRT Procedures. The Procedures state, "Classified information for [sic] which the originating agency declines to authorize for use in the CSRT process is not reasonably available." App.10 § D(2). *Cf.* McGarrah Decl. ¶ 10. Because they are not "reasonably available" under the CSRT

Procedures, classified documents withheld from the CSRT are, by definition, not "Government Information." App.10 § E(3). For each document withheld from the CSRT, the agency should have provided "either an acceptable substitute . . . or a certification . . . that none of the withheld information would support a determination that the detainee is not an enemy combatant." App.10 § 3(E)(a). The Government Information therefore should reflect a complete record of all documents and materials that qualify as Government Information, including substitutes or certifications in lieu of classified information withheld by the originating agency.

The government's suggestion that an order requiring the production of the Government Information would be burdensome is meritless. It argues that "because the CSRT procedures never required DoD 'to compile a record of material comprising all the records in government files that would qualify as Government Information,' such a record was not physically compiled." Mtn. for Leave at 2 (quoting McGarrah Declaration at ¶ 16). That argument should be rejected on a number of grounds.

First, the government should be estopped from seeking to avoid collecting the Government Information based on its prior representations. In order to avoid being compelled to provide access to the Government Information, the government repeatedly suggested that the collection of the Government Information was required under the CSRT Procedures, and that the CSRT Recorder fulfilled that requirement. The government cannot now argue the contrary.

Second, the CSRT Procedures clearly require the compilation of all of the Government Information. App.02 § g(7) ("The Tribunal, through its Recorder, *shall have access to and consider* any reasonably available information.") (emphasis added); App.17 § C(1) ("[T]he Recorder *shall obtain* and examine the Government Information.") (emphasis added); App.19 § C(2) (requiring the

Personal Representative to "review[] the Government Information"). Thus, an order compelling the government to produce the Government Information would impose no greater burden than the one the government imposed on itself when the Pentagon promulgated the CSRT Procedures.

Third, the Government Information is critical to the Court's evaluation of the merits. The government provides no facts to support the suggestion that collecting and producing the Government Information would be burdensome. Admiral McGarrah reports that the government was able to assemble a significant "Team" in the fall of 2004 to process an unstated, but apparently large, number of the 558 CSRTs. The government surely can marshal sufficient resources to collect the Government Information with respect to these eight Petitioners.

B. *Brady* is irrelevant.

The government argues that making the Government Information available to the Court and Petitioners is equivalent to requiring a prosecutor to "deliver his entire file" to a criminal defendant. Mtn. for Leave at 2-3. *Brady*, however, does not inform the analysis here.

First, *Brady v. Maryland* and its progeny set the standard for reversal of a criminal conviction where the prosecution withheld exculpatory or impeachment evidence. 373 U.S. 83 (1963). But such a conviction arises under the full panoply of constitutional protections attendant to a criminal trial. In stark contrast, the Petitioners had virtually no procedural protections in their CSRTs: no counsel, jury, or impartial judge; no ability to confront their accusers or see the evidence against them; no presumption of innocence; no reasonable doubt standard. The criminal procedure analogy is wildly off-base.

Second, as the government itself has argued, this is not a criminal case. Rather, this is statutorily created civil litigation. The DTA requires the Court to determine whether Petitioners' CSRTs followed the applicable procedures, and

whether those procedures were lawful. DTA § 1005(e)(2)(C). The Government Information goes to the very heart of this case—whether Petitioners should or should not have been classified as enemy combatants. The Court cannot do the job Congress gave it without the Government Information.[6]

C. The corruption of certain electronic files should not impair the government's ability to produce the Government Information.

Admiral McGarrah notes that files of documents collected in connection with CSRTs were saved in electronic files, and "some" of those electronic files were corrupted in 2005. McGarrah Decl. ¶ 16. The fact that some electronic files may have been corrupted will not prevent the government from producing the Government Information relevant to Petitioners or any other detainee.

Admiral McGarrah testifies that the data collection "teams" collected a limited file of documents relevant to each detainee. *Id.* ¶ 11. Those files—an apparently small subset of the Government Information that exists and should have been collected—were copied and saved in electronic files. The corruption of these electronic files has no impact on the government's ability to promptly compile all of the Government Information.

Indeed, Admiral McGarrah identifies a number of government sources likely to contain Government Information relevant to Petitioners, including two different searchable databases, *id.* ¶¶ 7 & 8, the paper files and interrogation records at Guantanamo, *id.* at ¶ 9, and files of DoD and other government agencies,

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[6] For this same reason, the government would be required to produce the Government Information if this were a criminal case. Federal prosecutors are required to produce, *inter alia*, all documents or things that (i) are "material to preparing the defense" or (ii) the government "intends to use . . . in its case-in-chief." Fed. R. Crim. P. 16 (a)(1). *See also* Fed. R. Crim. P. 15 (contemplating the taking of depositions under certain circumstances). One of the key disputed issues here is whether the Recorder complied with the requirement to present all exculpatory evidence to the Tribunal. The only way the Court can determine that is to examine what was presented and what was withheld. Thus the "Government Information" would surely be deemed "material to the defense" were this a criminal case.

id. at ¶ 10. The "Government Information" about Petitioners *must* exist and be available because it is, by definition, "reasonably available information *in the possession of the U.S. Government*" relevant to the enemy combatant determination. App.10 at § E(3) (emphasis added).[7]

IV. THE COURT SHOULD ENTER THE DISTRICT COURT FORM OF PROTECTIVE ORDER.

The McGarrah Declaration does not expressly address the protective order issue—and yet powerfully demonstrates the need for immediate entry of the district court's form of protective order. Petitioners continue to urge the Court to enter a schedule to resolve the merits of these challenges as soon as possible. The government, however, continues to exploit the absence of a protective order to interfere with Petitioners' preparation of their cases on the merits.

On May 8, 2007, at the Court's direction, the government filed each Petitioners' CSRT Record of Proceedings, *see* App.18 § C(8), including both unclassified and classified information. It provided only the unclassified documents to counsel. Almost a month later, the government persists in refusing to provide Petitioners' security-cleared counsel with access to the classified documents on file with this Court. The government has indicated that it will not do so until a protective order is entered. Likewise, the government refuses to allow Bismullah any contact with his counsel absent entry of a protective order.[8] The entry of a protective order, even on an interim basis pending the Court's final

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[7] Likewise, nothing in the McGarrah declaration indicates that the relevant documents requested by Petitioners in addition to the "Government Information," such as the CSRT records for identically situated non-combatant Uighurs, are not available to the government.

[8] To date, the *Parhat* Petitioners' district court case has not been dismissed and the protective order in that action presently governs their contact with counsel, something that could change at any moment.

resolution, will enable Petitioners' counsel to start the process of preparing their cases.

Moreover, the government's proposed protective order would vest significant authority in the government to police suspected violations, and also unilateral discretion to withhold documents from Petitioner's counsel. *See, e.g.,* App.85 §C (government may unilaterally withhold relevant information from counsel), App.98-99 §8(B) (unilateral denial of access to counsel), App.76-77 (creating new category of unilaterally "protected" information) and App.122 § 18(A) (also limiting use of unclassified information *not* designated as "protected"). The McGarrah Declaration reveals all too clearly that the government is an intensely interested litigant. Neither Petitioners, their counsel, nor the fundamental fairness of the judicial process should be beholden to a self-interested partisan. Rather, the district court protective order, under which each party is equal and disputes are referred to the Court (or, at the Court's discretion, a special master) for resolution, should be entered without delay.

V. THE COURT SHOULD ALLOW LEAVE TO DEPOSE ADMIRAL MCGARRAH IN CONNECTION WITH THE MERITS OF PETITIONERS' CHALLENGES.

Petitioners made limited, targeted and specific requests for relevant documents and information. It is the government—which has *all* of the evidence in its exclusive possession—that has repeatedly chosen to submit witness declarations. As noted above, Petitioners do not oppose the filing of the McGarrah Declaration, but the Admiral should be deposed regarding the issues it raises. The McGarrah Declaration goes to the heart of the issues in this case, and therefore it is particularly important that the Court and Petitioners have a fuller understanding of facts thus far known only by the government. Only by questioning Admiral McGarrah regarding his declaration can Petitioners obtain the information necessary to the Court an accurate picture of the actual CSRT process, and thus

brief the core questions set out in the statute: whether Petitioners' CSRTs complied with the CSRT procedures, and whether they were otherwise lawful.

The McGarrah Declaration raises far more questions that it answers. For example, the entire declaration is presented in general terms; it strains credulity to believe that every CSRT record was compiled the same way, every time. Indeed, Admiral McGarrah merely purports to be testifying "to the best of [his] knowledge, information, and belief." McGarrah Decl. at 1. *Cf.* Fed. R. Evid. 602 (personal knowledge requirement); Fed. R. Evid. 802 (hearsay prohibited). At minimum, Petitioners and the Court are entitled to know the basis for Admiral McGarrah's beliefs about how the process worked, and to learn what he does and does not actually know. In other words, Petitioners and the Court are entitled to know the actual facts.

Admiral McGarrah describes two situations in which exculpatory evidence was not presented to the Tribunal. McGarrah Decl. ¶ 13. Who decided what exculpatory evidence was cumulative or immaterial, and on what basis? On what basis would a "Case Writer" omit exculpatory evidence—which, by definition, is "evidence to suggest that the detainee should not be designated as an enemy combatant" App.17 § B(1)—because it did not relate to "a specific allegation being made against the detainee"? Were the specific factual allegations tailored to avoid the presentation of exculpatory evidence to the panel? The McGarrah Declaration doesn't say.

For the vast majority of the CSRTs, the "Team" in Washington was tasked with researching for collecting information to present to the Tribunals. McGarrah Decl. ¶¶ 4-5. The "Team," and what it did or did not do, is of obvious critical importance, yet Admiral McGarrah omits the most basic information about it. He does not say how many people were part of the "Team"; what their qualifications were; whether they held high level security clearance; whether they were civilian

or military; whether, if military, they were officers or enlisted; or whether they were lawyers.[9] Although Admiral McGarrah states that "Team" members received two weeks of training, he provides no specific information about what they were taught regarding the "CSRT process" or the "Recorder's functions and responsibilities," what the "pertinent government databases" were, or the content of their "cultural awareness and intelligence training."

In another glaring example, Admiral McGarrah attempts to reassure the Court about the performance (or, more accurately, the apparent non-performance) of the Recorder's duties by the "Team" in Washington.

> [E]each Recorder was held personally responsible for reviewing and verifying the information provided by the Team, [and] for finalizing each package of unclassified and classified Government Evidence. . . . In reviewing and verifying the information received from the Team, the Recorder had access to the same information systems used by the Team, and could add information to be presented to the CSRT panel as Government Evidence or as material that might suggest that the detainee should not be designated as an enemy combatant[.]"

McGarrah Decl. ¶ 6. The government apparently intends to argue that this was close enough to comply with the CSRT Procedures. But in what sense was the Recorder "held personally responsible for reviewing and verifying the information provided by the Team"? By whom? In what sense did the Recorder have "access to the same information systems used by the Team," particularly given the stated advantages of the "Team" being located in Washington, D.C.? If the Recorder had "access to the same *information systems* used by the Team," does that mean the Recorder had the same access to the JDIMS and 12MS databases mentioned in the Declaration, but not to the other Government Information? If the Recorder had

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[9] The Recorder is "a commissioned officer . . . preferably a judge advocate." App.09 § C(2).

"access" to some, but not all, Government Information, did the Recorder ever use this access? Given that the "Team" was established "due to the other extensive responsibilities of the Recorder," did any Recorder, and in particular the Recorders in Petitioners' cases, ever actually "add information [beyond the Team's pre-packaged Government Evidence] to be presented to the CSRT panel"?

These are just a few examples of the kinds of questions the McGarrah Declaration raises but scrupulously avoids answering. It is inconceivable that the Court should—or even can—rely on the one-sided generalities of the McGarrah Declaration. This Court, like any other American court of law, gets to the bottom of things by looking at the facts.[10] The rules of evidence apply in this case just as they do in any other. Fed. R. Evid. 101. In this case, as in any other case, a witnesses' testimony should be fleshed-out and tested through cross-examination. *See, e.g., Pennsylvania v. Ritchie*, 480 U.S. 39, 66-67 (1987) ("no one, certainly no one experienced in the trial of lawsuits, would deny the value of cross-examination in exposing falsehood and bringing out the truth"). The government has offered Admiral McGarrah as a witness, and Petitioners should be allowed to cross-examine him.

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[10] The government repeatedly raises the specter of depositions and "full-blown discovery," apparently in the belief that this Court, as an appellate court, will be scared off. Depositions and discovery are, however, unremarkable litigation events. The Court is fully empowered to require the parties to provide documents and information regarding non-privileged matters relevant to the claims and defenses of the parties. *See, e.g.*, 28 U.S.C. § 1651(a) ("The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."). Nothing in the DTA or the Federal Rules of Appellate Procedure limits the Court's authority to require the parties to produce relevant documents or information.

VI. CONCLUSION

For all of these reasons, Petitioners request that, to the extent the Court is inclined to grant Respondent's motion for leave, it order the following relief at the same time:

a. The Court should immediately enter the district court protective order;

b. The Court should order the government to immediately make available to Petitioners' security-cleared counsel all classified documents previously filed with this Court;

c. The Court should grant the Petitioners' pending motions for the production of relevant documents, and require the government to produce all such documents promptly;

d. The Court should appoint a special master to address any questions regarding the protective order, or the production of documents and information;

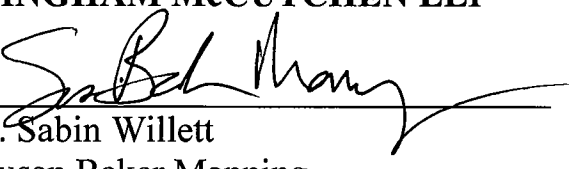
e. The Court should enter an appropriate briefing schedule for a prompt resolution of the merits; and

f. The Court should order Admiral McGarrah to appear for a deposition regarding the subject matter of the McGarrah Declaration no later than fifteen days from the date of the Court's order.

June 7, 2007

Respectfully submitted,

BINGHAM McCUTCHEN LLP



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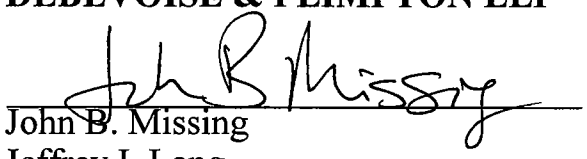

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