Nos. 06-1197 and 06-1397

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

HAJI BISMULLAH, *et al.*,
Petitioners,
v.
ROBERT M. GATES,
Respondent.

HUZAIFA PARHAT, *et al.*,
Petitioners,
v.
ROBERT M. GATES, *et al.*,
Respondents.

ORIGINAL ACTIONS UNDER THE DETAINEE TREATMENT ACT OF 2005

PETITIONERS' JOINT OPPOSITION TO RESPONDENT'S PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

Sabin Willett
Rheba Rutkowski
Neil McGaraghan
Jason S. Pinney
BINGHAM McCUTCHEN LLP
150 Federal Street
Boston, MA 02110
Telephone: (617) 951-8000
Facsimile: (617) 951-8736

Susan Baker Manning
BINGHAM McCUTCHEN LLP
2020 K Street, N.W.
Washington, D.C. 20006
Telephone: (202) 373-6000
Facsimile: (202) 373-6001

Counsel for Petitioners Huzaifa Parhat, et al.

John B. Missing
DEBEVOISE & PLIMPTON LLP
555 13th Street, N.W.
Washington, D.C. 20004
Telephone: (202) 383-8000
Facsimile: (202) 383-8118

Jeffrey I. Lang
Jennifer R. Cowan
DEBEVOISE & PLIMPTON LLP
919 Third Avenue
New York, NY 10022
Telephone: (212) 909-6000
Facsimile: (212) 909-6836

Counsel for Petitioners Haji Bismullah and Haji Mohammad Wali

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I. INTRODUCTION AND SUMMARY

Last April, the Government advised the Court that the Recorders in Petitioners' CSRTs had "obtained and examined the Government Information," using the term "Government Information" as it is defined in the CSRT Procedures. Corrected Brief for Respondent Addressing Preliminary Motions at 9 (Apr. 10, 2007). The Court was told that the Recorders' gathering and review of the Government Information was so routine as to merit the "strongest presumption of regularity." *Id.* at 67.

On July 20, the panel held that the "record on review" included the Government Information—using the very words with which the government identified the information it had "obtained and examined." In its Petition for Rehearing, the government now complains of the "enormous burden" associated with compiling the Government Information, and the "risk to national security." Petn. at 6-7. Thus, the government's position is that the panel so grievously erred as to warrant en banc review when it adopted the government's own words.

Rehearing en banc "is not favored," Fed. R. App. P. 35(a), and a rehearing petition "must state with particularity each point of law or fact that the petitioner believes the court has overlooked or misapprehended." Fed. R. App. P. 40(a)(2). The rehearing petition does not contend that the panel "overlooked" or "misapprehended" any of the relevant facts or law; it urges that the law be disregarded in favor of policy concerns.[1] This misreads the role of the Court in

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[1] Deputy Attorney General James B. Comey, speaking to the National Security Agency about the role of lawyers in the intelligence community, warned of the danger of reflexively bowing to assertions of national security concerns. "[W]e are a nation of laws, not men. . . We know that the rule of law sets this nation apart and is its foundation. . . We know that there may be agonizing collisions between our duty to protect and our duty to that constitution and the rule of law . . . and that, in the long run, intelligence under law is the only sustainable intelligence in this country." James B. Comey, Intelligence Under the Law, Speech to the National Security Agency, May 20, 2005 reprinted at 10 Green Bag 2d 439, 442-44 (2007) (attached).

carrying out its judicial function. If a problem exists at all, it is for Congress, not the Court, to address.

II. THE PANEL'S DEFINITION OF THE "RECORD ON REVIEW" WAS CORRECT.

A. The Court's Statutory Role.

The Congress enacted and the Executive signed into law the Detainee Treatment Act of 2005 ("DTA") to provide a process for Guantanamo detainees to petition for independent and meaningful review of the Combatant Status Review Tribunal ("CSRT") determination that they are enemy combatants. DTA § 1005(e)(2)(A). Under the DTA, this Court has jurisdiction to resolve issues of fact and law in these original actions. Specifically, the Court must decide:

1. Is the Petitioner's enemy combatant classification supported by a preponderance of the evidence?
2. Did the Petitioner's CSRT follow its own rules?
3. Are the CSRT rules lawful?

Id. § 1005(e)(2)(C). Chief Judge Ginsburg's opinion for a unanimous panel held that to perform its statutory role—and, in particular, to answer the first and second questions—the Court must have access to all of the relevant evidence. Slip. Op. at 13-14. The panel's ruling was correct.

B. The Court Cannot Fulfill Its Statutory Duty Without Access To the Government Information.

A CSRT involves five military officers: the three voting members of the Tribunal, a Recorder, and a Personal Representative. CSRT Procedures, Encl. 1 § C (1)-(3).[2] The Recorder acts as investigator, prosecutor and clerk of the Tribunal.

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[2] The relevant "standards and procedures" are contained in Deputy Secretary of Defense Paul Wolfowitz's "Order Establishing Combatant Status Review Tribunal" (July 7, 2004) ("CSRT Order"), and Navy Secretary Gordon England's Memorandum "Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants detained at Guantanamo Naval Base,

(Footnote Continued on Next Page.)

The non-lawyer Personal Representative is to "assist" the detainee, but is not to act as the detainee's "advocate." *Id.*, Encl. 3 at §§ A(1) & D ¶ 8. .

The CSRT Procedures define the "Government Information" as:

> reasonably available information in the possession of the U.S. Government bearing on the issue of whether the detainee meets the criteria to be designated as an enemy combatant, including 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 (cumulatively called hereinafter the "Government Information").

CSRT Procedures, Encl. 1 § E(3).[3] The procedures specify that "the Recorder *shall* obtain and examine the Government Information." *Id.*, Encl. 2 § C(1) (emphasis added).[4] From it, she culls the relevant evidence—including all exculpatory evidence—and submits it to the panel.

> The Recorder shall present to the Tribunal such evidence in the Government Information as may be sufficient to support the detainee's classification as an enemy combatant, including the circumstances of how the detainee was taken into the custody of U.S. or allied forces (the evidence so presented shall constitute the 'Government Evidence'). In the event the Government

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Cuba" (July 29, 2004) ("CSRT Procedures"). *See* Appendix at 1-4 & 5-34 (Mar. 26, 2007).

[3] "Government Information" explicitly encompasses information "in the possession of the U.S. Government," not just in DoD's possession. Any agency withholding Government Information "*shall* provide either an acceptable substitute for the information requested or a certification to the Tribunal that none of the withheld information would support a determination that the detainee is not an enemy combatant." CSRT Procedures, Encl. 1, § E(3)(a) (emphasis added).

[4] The Personal Representative is also required to review the Government Information. *See, e.g.*, CSRT Procedures, Encl. 1 § 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); *id.*, Encl. 3 § C(2) ("After the Personal Representative has reviewed the Government Information . . ."). That is one reason why the CSRT Procedures require the Recorder to "obtain," and not merely review, the Government Information.

> Information contains evidence to suggest that the detainee should not be designated as an enemy combatant, the Recorder *shall* also separately provide such evidence to the Tribunal.

Id., Encl. 1 § H(4) (emphasis added). This was a crucial step. The panels conducted no independent inquiry: all depended on the Recorder diligently procuring all the Government Information, fairly culling it, and including all the exculpatory information.[5] There was no adversarial process, no discovery, no right of confrontation or right to test the reliability of evidence. If the Recorder did not fully discharge these duties, grave injustice could—and here did—follow. And Congress gave Petitioners the right to challenge that injustice under the DTA.

The panel's "record on review" definition flows directly from the CSRT regulations and the Court's duty under the statute. Because the Court can make the required statutory determinations only if it has access to the "Government Information," the panel adopted DoD's own definition of relevant information.

> [T]he record on review consists of all the information a Tribunal is authorized to obtain and consider, pursuant to the procedures specified by the Secretary of Defense, hereinafter referred to as Government Information and defined by the Secretary of the Navy as "such reasonably available information in the possession of the U.S. Government bearing on the issue of whether the detainee meets the criteria to be designated as an enemy combatant," which includes any information presented to the Tribunal by the detainee or his Personal Representative.

Slip Op. at 3 (quoting CSRT Procedures, Encl. 1 § E(3)).

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[5] The Tribunal is deemed to have had access to, and to have considered, the wide collection of information beyond that actually presented to the panel: CSRT Order § g(7) ("The Tribunal, through its Recorder, shall have access to and consider any reasonably available 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 reasonably available records, determinations, or reports generated in connection therewith.").

C. The Panel's Decision That The Record on Review Includes The Government Information Is Compelled by the DTA and This Court's Precedents.

1. The Plain Language of the DTA Requires that the Record on Review Include the Government Information.

In considering whether each Petitioner's CSRT followed its own rules, the Court must determine whether the Recorder presented all exculpatory evidence in the Government Information to the Tribunal panel. *It is impossible to answer that question without the Government Information.* The Court can never know if the Recorder performed this critical duty unless it can examine the Government Information, identify the exculpatory information (with the assistance of counsel for the parties), and compare that with what the Recorder actually presented to the Tribunal. *See* Slip Op. at 13.

The government argues that the panel "conflated" the question of whether the Recorder presented all exculpatory information in the possession of the U.S. government to the Tribunal with the concept of record review. Petn. at 5. But the panel's ruling was compelled by the plain words of the DTA—words the government fails to address. The government's argument entirely ignores Petitioner's undisputed statutory right to bring a claim asserting that the Recorder failed to gather the Government Information, and failed to present all exculpatory information within it. The government's only response has been—and still is—to urge the Court to presume that the CSRT followed its own rules. This presumption would dictate the result and reduce judicial review to a mere formality. The argument is contrary to the statute, and the panel properly rejected it. Slip Op. at 13-14.[6]

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[6] The government's *Brady* argument (which it also made to the panel) is inapt. *Brady* and its progeny set the standard for reversal of a criminal conviction where the prosecution withheld exculpatory or impeachment evidence. *Brady v. Maryland*, 373 U.S. 83 (1963). But the rules

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The Court's review can be meaningful only if it has access to the same information that was, and is, in government hands. As Chief Judge Ginsburg observed, "I don't see how there can be any meaningful review. Maybe you can tell me. How [can we conduct] any meaningful review of the determination if we don't know what we don't know, but you know?" Tr. at 29:23-30:1. *See also McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479, 497 (1991) (ordering the record supplemented because "it is unlikely that a court of appeals would be in a position to provide meaningful review of ... the unfairness of the [agency's] practices").

2. There is Neither Factual Nor Legal Basis for a Presumption of Regularity.

In urging the Court to presume what the statute says it must actually *decide*, the government tries to side-step Chief Judge Ginsburg's question. Even if the urged presumption could be squared with the statute—which it cannot—no presumption could survive the extraordinary disclosures that followed oral argument. From its response to the first motion seeking access to the Government Information in August 2006 through the oral argument on May 15, 2007, the government maintained that the Recorder compiled the Government Information, and produced all exculpatory evidence to the panel. *See, e.g.,* Respondent's Reply In Support of Motion to Stay Proceedings and to Enter Proposed Protective Order

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under *Brady* arise under the full panoply of safeguards attendant to a criminal trial. Petitioners had none of the usual 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. Moreover, as the government itself has argued, this is not a criminal case. *See* Resp. Br. at 68 n.17 ("This is just one of many areas where it is inappropriate to compare CSRT proceedings with background principles that stem from domestic criminal law."). Rather, this is statutorily created civil litigation, and the Court cannot do the job Congress gave it without the Government Information.

at 4, *Parhat v. Gates*, No. 06-1137 (D.C. Cir. Jan. 10, 2007). On June 1, 2007, the government submitted the declaration of Rear Admiral (Ret.) James M. McGarrah, who ran the Office for the Administrative Review of the Detention of Enemy Combatants ("OARDEC"), the department within DoD that conducted the CSRTs. The McGarrah Declaration revealed for the first time that:

- in most, and possibly in all, CSRT proceedings, the Recorder did *not* obtain and review the Government Information;
- instead, the government retained a "team" of military personnel and civilian contractors, and after two weeks of training and security clearance at the Secret level, assigned them the responsibility of searching two limited DoD databases for relevant information, and packaging the evidence that the Recorders presented to the panel;
- the "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;'"
- the "team" of temps was instructed to exclude certain types and categories of exculpatory evidence from the materials compiled for the Recorder to present to the panels; and
- the Personal Representative did not review the Government Information.

McGarah Decl. ¶¶ 4-6, 10, 11 & 13. *See also generally* Decl. of Lt. Col. Stephen Abraham (filed June 22, 2007) (averring dominance of command influence; refusal of agencies to certify non-existence of exculpatory evidence). The Court cannot presume regularity where Admiral McGarrah avers there was none.

3. The Court Must Have Access To The Government Information To Meaningfully Review Whether The CSRT Determination Is Supported By A Preponderance Of The Evidence.

The statute charges the Court to determine whether each Petitioner's enemy combatant classification is supported by a preponderance of the evidence, as required by the CSRT Procedures. DTA § 1005(e)(2)(C)(i). That determination also requires the Court to consider the Government Information. Nothing in the statute or the CSRT Procedures limits the relevant evidence to what was presented to the CSRT panel. *See also* supra n.5 (the Tribunal is deemed to "have access to and consider" evidence beyond that presented to them during the hearing).

Even in the context of administrative agency review—the doubtful analogy the government prefers[7]—the record on review is comprised of all information "before the agency at the time the decision was made." *Environmental Def. Fund, Inc. v. Costle*, 657 F.2d 275, 284 (D.C. Cir. 1981). *See also Fund for Animals v. Williams*, 391 F. Supp. 2d 191, 196 (D.D.C. 2005) (record includes "all documents that the agency 'directly or indirectly considered'"). For example, in *Kent County v. EPA*, 963 F.2d 391 (D.C. Cir. 1992), the Court held that the record on review included documents that were within EPA files at the time of the agency action—even though the documents were negligently omitted from the record provided to, and relied upon, by the agency decisionmakers. *Id.* at 396; *see also Haynes v. United States*, 891 F.2d 235, 238 (9th Cir. 1989) (rejecting contention that "administrative record" includes only "those materials actually used by the decision maker" and holding that record includes all material in agency case file).

The panel thus correctly reasoned that it could decide whether the

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[7] *See* Oral Argument Tr. at 26:1-27:2.

preponderance of the evidence supported the enemy combatant classification only by looking at all of the evidence.

> [T]he court cannot, as the DTA charges us, consider whether a preponderance of the evidence supports the Tribunal's status determination without seeing all the evidence, any more than one can tell whether a fraction is more or less than one half by looking only at the numerator and not at the denominator.

Slip Op. at 14.

III. THE ALLEGED BURDEN OF COMPLIANCE WITH THE PANEL'S RULING DOES NOT WARRANT EN BANC REVIEW.

A. The Court Cannot Excuse the Government from the Burden of Statutory Review.

The government asks the Court to reconsider its decision because of the burden associated with review under the DTA. But the Court lacks the power to excuse the government from the burden of judicial review. The DTA was enacted by Congress and signed into law by the Executive. The political branches adopted the DTA a year after the DoD had completed its round of CSRT hearings in 2004.

Under the constitutional separation of powers, the Court cannot relieve a party, even the government, from the burdensome requirements of legislation—even "unnecessarily inefficient and burdensome" requirements—when the party's interpretation "finds no support in, and is actually inconsistent with, the statute." *EchoStar Satellite L.L.C. v. FCC*, 457 F.3d 31, 41 (D.C. Cir. 2006). *See also South Coast Air Quality Mgmt. Dist. v. EPA*, 472 F.3d 882, 894 (D.C. Cir. 2006) (rejecting agency's attempt to adopt "far less burdensome" requirements because agency "cannot replace Congress's judgment with its own"); *American Maritime Assoc. v. Blumenthal*, 590 F.2d 1156, 1168 (D.C. Cir. 1978) (refusing to depart from statute exempting Virgin Islands from U.S. coastwise laws despite economic and policy concerns to contrary); *Vance v. Bradley*, 440 U.S. 93, 97 (1979) ("The Constitution presumes that . . . even improvident decisions will eventually be

rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted.").

B. Even Taken at Face Value, the Allegations of Burden Do Not Support En Banc Review.

The government complains of the burden of compiling the Government Information given the volume of potentially relevant information. Petn. 10-11. But its failure to collect and retain the Government Information in 2004—which jeopardized the quality of Petitioners' CSRT hearings—should not now be an excuse to jeopardize judicial review in their DTA proceedings.

1. Workload.

The government offers no compelling evidence that the collection of Government Information alone is burdensome.[8] The government's experience shows it can compile data quickly. During 2004, the government conducted 558 CSRTs within six months and each required, among other things, the collection of the Government Information. Last week, Frank Sweigart, the current Director of OARDEC, submitted a declaration in support of the government's motion for a stay in another DTA proceeding. Director Sweigart said the government intends to convene a new CSRT hearing, and "proceed expeditiously with this CSRT in the gathering, collecting and review of *all* relevant Government Information. I expect to convene a new CSRT Tribunal within 60 days or less from this date." Respondent's Mot. To Remand, or in the Alternative, to Hold in Abeyance Pending Further Proceedings of the Combatant Status Review Tribunal, *Al Ginco v. Gates*, No. 07-1090 (D.C. Cir. Sept. 13, 2007) (emphasis added).

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[8] *See* Declarations of Robert S. Mueller, III and Hon. Gordon England (only declarations that assert workload burden). Director Mueller suggests that a search of the "ACS" Mainframe Computer system is difficult, but he acknowledges that a search of the IDW database would be manageable. *Id.* at ¶¶ 7, 9 10 & 12.

At least part of the professed burden is self-imposed by the government's decision to limit collection to Government Information that existed prior to the CSRT, something the government contends requires careful review and determination whether each particular document was available to the Recorder. Petn. at 10 n.3. The government could avoid this burden by collecting all Government Information, as Director Sweigart apparently intends to do in preparation for Mr. Al Ginco's new CSRT hearing. The risk to the government is only that Petitioners' counsel might see post-CSRT exculpatory evidence—which the government in any event could move to exclude from the DTA record on review.

There was no record before the panel, and none before the Court now, that collection of the record necessary for the Court to perform its statutory mandate in any of these cases would pose an *undue* burden the government.[9] Instead, the government contends that collecting and reviewing Government Information concerning a petitioner in another case has been burdensome. As the petitioner in that case has noted, the government's own declarations belie its claim of burden in that case. *See* Supp. Opp. To Govt's Mot. To Stay Order Requiring Filings of Certified Index at 7-8, *Paracha v. Gates*, No. 06-1038 (D.C. Cir. Sept. 10, 2007). In any event, the scope of the Court's review is set by statute. The government

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[9] The government requested, and Petitioners opposed, leave to file declarations from Generals Hayden and Alexander that are classified as "Top Secret-Sensitive Compartmentalized Information." As Petitioners explained in their Opposition, the filing of declarations that even Petitioners' security-cleared counsel are not allowed to see threatens Petitioners with unfair prejudice and burdens the Court with a one-sided process. We also noted that unless the secret declarations specifically addressed the burden in Petitioners' cases, they are not relevant. In its reply, the government confirmed that the Top Secret-SCI declarations "do not address the particulars of petitioners' cases." Reply to Petitioners' Opposition to Motion for Leave to File *Ex Parte/In Camera* Top Secret-SCI Declarations for Judges Review Only, *Bismullah v. Gates*, No. 06-1197, and *Parhat v. Gates*, No. 06-1397 (D.C. Cir. Sept. 21, 2007).

may not avoid its statutory obligation to defend indefinite imprisonment of individuals by complaining that the burden of review is too onerous.

The government and its affiants act as though the Court has ordered a search of the Library of Congress, book by book, as if there were no card catalogue. They ignore, for example, readily available paper files at Guantanamo, including apprehension reports, interrogation logs, and the interrogators' "knowledgeability briefs" regarding each prisoner. *See* Memo. In Supp. Pet. Mot. For Preservation Order, *El Banna v. Bush*, No. 04-CV-1144 (D.D.C. Dec. 5, 2005) (RWR) (identifying a "knowledgeability brief" and a "detainee dossier" prepared by interrogation team, summarizing known government information regarding prisoner). The government also ignores Petitioners' specific guidance—given long ago—as to where to look for crucial elements of the Government Information.[10] The government does not deny the existence of these materials, nor contend that inclusion in the record would be a burden. It simply advocates a rule that would ensure that the Court never learns of it.

2. National Security.

The second proffered burden is that national security will be compromised. General Alexander reprises the monstrous crimes of September 11, 2001, and al

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[10] Petitioner Bismullah provided a copy of the set of senior Afghan officials' declarations that was handed to a U.S. general prior to Bismullah's CSRT, which explained that Bismullah had spent his entire adult life in opposition to the Taliban. The *Parhat* petitioners identified pre-CSRT statements by U.S. interrogators that the Petitioners were not enemy combatants (which would be documented by interrogation logs), *see Parhat* Petition at 42-43, public statements by senior State Department officials indicating the existence of pre-CSRT exculpatory statements to foreign governments (indicating the existence of correspondence with foreign governments about them), *id.* at 24-26, and even more current statements by senior officials strongly indicating the existence of pre-CSRT exculpatory material. Tim Golden, *Chinese Leave Guantánamo for Albanian Limbo*, N.Y. TIMES, June 10, 2007, at A1 ("The United States has made extensive and high-level efforts *over a period of four years* to try to resettle the Uighurs in countries around the world.") (comments of State Department Legal Advisor John B. Bellinger III) (emphasis added).

Qaida's involvement in them. Alexander Unclass. Decl. ¶¶ 4-8. He posits that release of information to security-cleared officers of this Court will threaten national security, *id.* ¶ 12,[11] even though Petitioners are now represented by counsel with higher security clearances than were held by the unnamed civilian contractors who—after two weeks of training—began packaging evidence for the CSRTs. *See* McGarrah Decl. ¶ 5.

The Court's Protective Order adopted safeguards to protect against this very risk. Under the Protective Order, the government may submit for in camera review Government Information that poses a risk to national security, and rebut the presumption that Petitioners' Counsel have a need to know the information. Protective Order at § 4(B), *Bismullah v. Gates*, no. 06-1197, and *Parhat v. Gates*, no. 06-1397 (D.C. Cir. July 30, 2007). *See also* Slip. op. at 16 (noting the panel's reliance on government representations that such highly sensitive material "will rarely be found and redacted"). There is no basis for en banc review, certainly not before the Court's safeguards have even to be tested.

IV. CONCLUSION

For innocents in the sixth year of grinding isolation, far too much time has been lost already. Petitioners urge the Court to deny the government's Petition For Rehearing and Suggestion For Rehearing En Banc.

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[11] The declarations of CIA Director Hayden and Director of National Intelligence McConnell are to the same effect.

September 26, 2007

Respectfully submitted,

BINGHAM McCUTCHEN LLP

Susan Baker Manning
2020 K Street, N.W.
Washington, D.C. 20006
Telephone: (202) 373-6000
Facsimile: (202) 373-6001

Sabin Willett
Rheba Rutkowski
Neil McGaraghan
Jason S. Pinney
150 Federal Street
Boston, MA 02110
Telephone: (617) 951-8000
Facsimile: (617) 951-8736

Counsel for Petitioners Huzaifa Parhat, et al.

DEBEVOISE & PLIMPTON LLP

John B. Missing
555 13th Street, N.W.
Washington, D.C. 20004
Telephone: (202) 383-8000
Facsimile: (202) 383-8118

Jeffrey I. Lang
Jennifer R. Cowan
919 Third Avenue
New York, NY 10022
Telephone: (212) 909-6000
Facsimile: (212) 909-6836

Counsel for Petitioners Haji Bismullah and Haji Mohammad Wali

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INTELLIGENCE UNDER THE LAW

James B. Comey

MY TOPIC TODAY is "Intelligence Under the Law." I want to divide my remarks into two parts: First, I'd like to start with a plug for lawyers, in a way you may not expect. Let's call the first part: "Intelligence Under the Law – The Value of a Legal Education." In the second part, I'd like to talk about the hardest thing lawyers, acting as lawyers, do in the intelligence community – say "no."

Now, on to the unappreciated value of a legal education. I have read a lot of intelligence products over the last four years, both finished pieces and so-called "raw" intelligence. As a beginner, like a beginner in anything, I assumed that those who did this for a living – those who analyzed and wrote about intelligence – were so trained, so steeped, so talented, that I couldn't possibly run with them.

James B. Comey was Deputy Attorney General of the United States from 2003 to 2005 and is now General Counsel of Lockheed Martin Corporation. *This essay was originally delivered as a speech at the National Security Agency in Fort Meade, Maryland, on Law Day, May 20, 2005.*

Much that I read and heard was indeed extremely well done. But much of what I read was sloppy, loose, and imprecise – all things I can do. And much of what I read was inconsistent, lacking in rigor, and unimpressive – all things I can be. I must confess that the sense of intimidation went away quite quickly and I realized that much of my education and experience and yours, lawyers, was well-suited to intelligence.

Intelligence – and by that I mean intelligence analysis, not collection – wasn't physics, it wasn't advanced calculus, it wasn't Greek (although it sometimes seemed that way). Intelligence analysis was, at bottom, grouping facts, sorting those facts, and then reasoning from those facts. Intelligence was understanding motives, looking for biases, comparing new facts with known facts, new conclusions with old conclusions. Intelligence was confronting other conclusions, understanding unspoken assumptions, looking for alternative explanations, knowing how certain you were about something. Word choices were critical; words could convey meaning and nuance, or conceal meaning and nuance.

What I discovered is that I had been learning the skills of intelligence analysis since college, where I was a chemistry and religion major. The religion major taught me important analytic skills in two senses. Biblical exegesis – the study of texts – is about comparing wording, comparing accounts, taking known texts and comparing to other sources; it involves a maniacal focus on the meaning of words, the history of words, the biases of historical observers, the biases of contemporary scholars. I also studied Applied Ethics, things like medical ethics, the ethics of warfare, business ethics. That also taught me that words carry great freight; words telegraph outcomes and often foreclose discussion. To use an obvious example, choosing whether to call the product of human conception a "fetus" or "unborn child," even when adopting a posture of apparent neutrality in a discussion about abortion, is a hugely important choice, a choice that largely ends neutral discussion.

But I learned most of my intelligence skills in law school and as a practicing trial lawyer. What is the first thing you do in law school? You read a case and decipher two things: relevant facts, and the

holding of the case. You find the conclusion and examine that which supports it. You then spend three years expanding on that skill, examining what other cases and other facts mean to the holding and relevance of earlier cases. You are drilled on your reasoning, challenged by other interpretations, other facts, other language. You learn that clear writing matters, that facts matter, and that the conclusions drawn matter a great deal. (Those of you who spent law school in a pub learned other things.)

As a practicing lawyer, I took those skills – the ability to find key facts and to scrutinize the conclusions drawn from them – and applied them to real life, applied them to witnesses telling a story, people with all the biases and imperfections of all humans. I learned that everybody lies, everybody forgets, and that all people perceive and recall events differently. I learned that human memory is the most imperfect of tools, sliding and slipping in ways that are hard to fathom. I learned that two very different reports could be honestly written by two people reporting the same interview. I learned that a bias or predisposition imposed a screen that affected the facts reported and conclusions drawn.

And most importantly, I learned all those things in the crucible of the adversary process. Everything I did would be tested by a worthy adversary – distorted, picked apart, mischaracterized, criticized, ridiculed. And that the attack on my reasoning would take place before a fact finder – judge or jury – that would offer its own scrutiny, skepticism. And as a prosecutor, I learned to organize my facts to meet a very high burden, beyond a reasonable doubt. The crucible of the adversary process, with defense lawyer and fact finder, forced me instinctively to organize and examine facts, claims, assertions in the courtroom of my mind: How will that play? What could be said about that claim? What facts are consistent? What facts hurt and will buttress the defense claims? What can be claimed about the bias of the observer or the limitations of the observation? How sure am I of my conclusion: probable cause? By a preponderance? Clear and convincing? Beyond a reasonable doubt?

The point of all this is not that I am great. My experience, to one degree or another, is widely shared. My point is also not that the

training I described does not also bring challenges for the world of intelligence, like a too-cautious attitude borne of a high burden of proof. My point instead, is that on this Law Day, I wanted to take a moment to praise legal training, because it is an extraordinarily valuable tool in the world of intelligence.

Too few lawyers realize this. Too few non-lawyers appreciate what a legal education is all about. Instead, they see blood-sucking divorce lawyers, greedy class-action lawyers, weasel ACLU lawyers, and timid DOJ lawyers. But beneath those blood sucking, greedy, weasel, frightened exteriors, beat the hearts of some of the finest intelligence analysts in the world.

Now that I have told you why lawyers are some of the finest analysts in the world, let me get closer to the core value of good lawyering and the rule of law. I'd like to call this part: "Intelligence Under the Law – The Value of No."

It can be very, very hard to be a conscientious attorney working in the intelligence community, particularly for those whose work touches on counter-terrorism and war-fighting. It is not because we don't work with great people. We do. We work with people who have dedicated their lives to protecting this great country and all it stands for.

It can be hard, instead, because the stakes couldn't be higher. Hard because we are likely to hear the words: "If we don't do *this*, people will die." You can all supply your own *this*: "If we don't collect this type of information," or "If we don't use this technique," or "If we don't extend this authority." It is extraordinarily difficult to be the attorney standing in front of the freight train that is the need for "this." Because we don't want people to die. In fact, we have chosen to devote our lives to institutions whose sworn duty it is to prevent that, whose sworn duty it is to protect our country, our fellow Americans.

But it's not that simple, although during crises, at times of great threat, it can surely seem that simple, certainly to the policy maker

and operator, and even to the lawyer. We lawyers know – or should know – better than anyone, that it is not that simple.

At the outset, we know that we are a nation of laws, not men. We have chosen a profession that internalizes that truth. We know that the rule of law sets this nation apart and is its foundation. We also know that we took an oath to support the constitution of the United States. We know that there may be agonizing collisions between our duty to protect and our duty to that constitution and the rule of law.

When we encounter those moments of collision, I hope we are aided by a uniquely lawyerly ability: the ability to transport ourselves to another time and place; and the ability to present facts to an imaginary future fact-finder, in an environment very different from the one in which we face current crisis and decision. We know that the setting will not be a late-night command center, thick with the tension of threat and danger. We know that our actions, and those of the agencies we support, will be held up in a quiet, dignified, well-lit room, where they can be viewed with the perfect, and brutally unfair, vision of hindsight. We know they will be reviewed in hearing rooms or courtrooms where it is impossible to capture even a piece of the urgency and exigency felt during a crisis.

We also know – at the risk of sounding parochial – that once we give our legal blessing, the individual policymakers, the operators – good people though they may be – won't be there. In fact, if the stuff has really hit the fan, we know what will be said: "We never told the lawyer what to say." And: "We simply asked him/her what was permissible."

But we also know that we won't be alone in that imaginary calm, well-lit room – blazingly lit by hindsight. With us will be the reputation of our great institutions, the institutions we love because they do so much good over so many years. We know that damage to the reputation of that institution will cause harm for years to come, as our institution recovers from scandal or allegations of abuse of authority. We know the damage that comes from the pendulum swings of American public life, the pendulum swings that pushed us

so far backwards in the late 1970s, again in the late 1980s, and surely will again.

The lawyer is the custodian of so much. The custodian of our own personal reputations, surely. But more importantly, the custodian of our institutional reputations. And most importantly of all, the custodian of our constitution and the rule of law.

It is the job of a good lawyer to say "yes." It is as much the job of a good lawyer to say "no." "No" is much, much harder. "No" must be spoken into a storm of crisis, with loud voices all around, with lives hanging in the balance. "No" is often the undoing of a career. And often, "no" must be spoken in competition with the voices of other lawyers who do not have the courage to echo it.

For all those reasons, it takes far more than a sharp legal mind to say "no" when it matters most. It takes moral character. It takes an ability to see the future. It takes an appreciation of the damage that will flow from an unjustified "yes." It takes an understanding that, in the long-run, intelligence under law is the only sustainable intelligence in this country.

Thank you for your commitment to the rule of law, to "yes" when it can be, to "no" when it must be.

Thank you for your commitment to Intelligence Under the Law.

CERTIFICATE OF SERVICE

I hereby certify that on September 26, 2007, copies of the foregoing Petitioners' Joint Opposition to Respondent's Petition for Rehearing and Suggestion for Rehearing En Banc were served via electronic mail and hand delivery upon:

Robert Loeb, Esq.
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Room 7268
Washington, DC 20530

Christine Young