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**[ORAL ARGUMENT TO BE HELD MAY 15, 2007]**

May 11, 2007

Mr. Mark J. Langer  
Clerk, United States Court of Appeals  
for the District of Columbia Circuit  
United States Courthouse  
333 Constitution Avenue, N.W., Room 5423  
Washington, D.C. 20001

Re: Parhat v. Gates, No. 06-1397  
Bismullah v. Gates, No. 06-1197

Dear Mr. Langer:

The United States submits this letter, pursuant to Federal Rule of Civil Procedure 28(j), to advise the Court that on May 10, 2007, the Department of Defense published the attached procedures addressing the submission of new evidence relating to a Guantanamo detainee's enemy combatant status (a copy of which is attached).

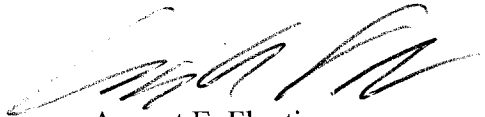
The policy sets out procedures by which the Department of Defense will consider new evidence pursuant to its obligation under the Detainee Treatment Act (DTA) to "provide for periodic review of any evidence that may become available relating to the enemy combatant status of a detainee." DTA § 1005(a)(3). New evidence has been reviewed during a detainee's Administrative Review Board (ARB) procedure or could be directly submitted to the Office for the Administrative Review of the Detention of Enemy Combatants (OARDEC). *See* Respondent's Br. at 13; Reply in Supp. of Proposed Protective Order in *Parhat* at 10 n.8 (filed Jan. 10, 2007) ("[t]ypically \* \* \* new material is submitted to the ARB [but] [i]f \* \* \* a detainee was previously found to be eligible for release or transfer \* \* \* the new material is considered instead by [OARDEC]"). The policy sets forth formal procedures by which the Department of Defense will consider new evidence through submission to OARDEC. Policy, § 3.

To qualify as new evidence, material must "be factual information that was not previously presented to the detainee's CSRT" and be "material to the factual question of whether the detainee is an [enemy combatant]." Policy, § 4.a. If the material submitted is "found to meet the 'new

evidence' standard," a new CSRT will be convened "to reconsider the basis of the detainee's [enemy combatant] status in light of the new information." Policy, § 5.b.

The formal policy further explains how new evidence is processed by the Defense Department pursuant to Congress's direction in DTA § 1005(a)(3), as discussed in our brief at page 55. The rule further supports the argument made by the Government (at p. 55) that review by this Court is based upon the record of the CSRT and that new evidence is properly considered by the Department of Defense.

Sincerely,



August E. Flentje  
Attorney, Appellate Staff  
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Enclosure

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Department of Defense  
Office for the Administrative Review of  
the Detention of Enemy Combatants (OARDEC)  
at U.S. Naval Base Guantanamo Bay, Cuba  
1010 Defense Pentagon, Washington, D.C. 20301-1010

OARDECINST 5421.1  
7 May 2007

OARDEC INSTRUCTION 5421.1

Subj: PROCEDURE FOR REVIEW OF "NEW EVIDENCE" RELATING TO ENEMY  
COMBATANT (EC) STATUS

Ref: (a) Detainee Treatment Act of 2005 (DTA)  
(b) Implementation of Combatant Status Review Tribunal Procedures for Enemy  
Combatants Detained at U.S. Naval Base Guantanamo Bay, Cuba dated July 14, 2006  
(c) Revised Implementation of Administrative Review Procedures for Enemy  
Combatants Detained at U.S. Naval Base Guantanamo Bay, Cuba dated July 14, 2006

1. Purpose: This regulation creates a unified procedure for the submission of new evidence relating to a Guantanamo detainee's EC status, including those who do not receive ARB hearings.

a. Section 1405(a)(3) of the reference (a) provides that Combatant Status Review Tribunal (CSRT) and Administrative Review Board (ARB) procedures, outlined in references (b) and (c), for individuals detained by the Department of Defense at Guantanamo "shall provide for periodic review of any new evidence that may become available relating to the enemy combatant status of a detainee."

b. Enclosure (13) of reference (c) provides that new information relating to the enemy combatant status of a Guantanamo detainee presented at an ARB shall be brought to the attention of the Deputy Secretary of Defense (DSD). Under that memorandum, the Department reviews new evidence and may either direct that a CSRT convene to reconsider the basis of the detainee's EC status in light of the new information, or determine that the new information does not warrant review by a CSRT.

c. Certain detainees (such as those previously approved for transfer/release or those subject to military commission charges) are not provided ARB hearings.

2. Cancellation: This is the first instruction in this series; no cancellation clause will be used.

OARDECINST 5421.1

7 May 2007

3. Initiation of a "New Evidence Review": A detainee or a person lawfully acting on the detainee's behalf can submit evidence that is new and relates to the detainee's EC status by mailing it to:

Director, OARDEC  
1010 Defense Pentagon  
Room 3A730  
Washington, DC 20301-1010.

a. If any such evidence is submitted by a detainee to his ARB, it will be forwarded to the above office, consistent with the DSD Memorandum on Revised Implementation of Administrative Review Procedures.

b. If an individual submitting information on a detainee's behalf has had access to classified material, it is the responsibility of that individual to follow all applicable information security regulations with respect to the handling of classified or otherwise protected information. These procedures do not absolve those individuals of that responsibility.

4. Definition of "New Evidence"

a. For purposes of these procedures, "new evidence" must meet the following two criteria:

(1) It must be factual information that was not previously presented to the detainee's CSRT, and

(2) It must be information that is material to the factual question of whether the detainee is an EC. Information will be deemed "material" if it creates a substantial likelihood that the "new evidence" would have altered the CSRT's prior determination that the detainee is an enemy combatant, as that term is defined by Deputy Secretary of Defense Order of July 7, 2004, and the Deputy Secretary of Defense Memorandum of July 14, 2006.

b. New "evidence" and "information" does not include legal argument or factual assertions not supported through documentation or witness testimony. For example, documents that merely claim the detainee is not an enemy combatant and/or that primarily focus on the legality of his detention or the propriety of his CSRT/ARB process will not be reviewed under these procedures. Information that contends the detainee is not an enemy combatant and that contains photographs, affidavits, videotaped witness statements or other supporting exhibits may be considered new evidence or information, as would documentation of investigative results.

7 May 2007

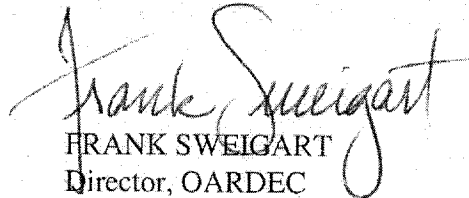
5. Conduct of a "New Evidence Review"

a. Every effort will be made to make a decision regarding whether or not to convene a new CSRT within 90 days of the "new evidence" being received at the above address.

b. If the evidence is found to meet the "new evidence" standard, the DSD will direct that a CSRT convene to reconsider the basis of the detainee's EC status in light of the new information. This CSRT will follow the procedures found in the "Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants Detained at U.S. Naval Base Guantanamo, Cuba."

c. If the evidence does not meet the "new evidence" standard, a new CSRT will not be convened.

d. The decision to convene a CSRT to reconsider the basis of the detainee's EC status in light of "new evidence" is a matter vested in the unreviewable discretion of the DSD.

  
FRANK SWEIGART  
Director, OARDEC