

[ARGUMENTS HELD ON MAY 15, 2007]

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

HAJI BISMULLAH, et al.,)	
Petitioners,)	
v.)	No. 06-1197
)	
ROBERT M. GATES, Secretary of Defense)	
Respondent.)	
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HUZAIFA PARHAT, et al.)	
Petitioners,)	
v.)	No. 06-1397
)	
ROBERT M. GATES, Secretary of Defense,)	
Respondent.)	
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**MOTION FOR LEAVE TO FILE DECLARATION
DESCRIBING PROCESS OF COMPILING CSRT RECORD**

The respondent hereby seeks leave to file the attached declaration of Rear Admiral (Retired) James M. McGarrah describing the process of compiling the record of a Combatant Status Review Tribunal (CSRT). During oral argument, the panel asked numerous questions (Tr. at 21-42) about the collection and retention of "Government Information," as defined by CSRT Procedures, enc. 1, § E(3). The government believes that this declaration is responsive to such questions and will assist the Court in understanding the process of developing the CSRT record. *See Environmental Defense Fund, Inc. v. Costle*, 657 F.2d 275, 285 (D.C. Cir. 1981) (in administrative review, Court "may 'obtain * * * through affidavits * * * such

additional explanations of the reasons for the agency decision as may prove necessary” so long as the materials are “merely explanatory of the original record”).

The McGarrah Declaration describes which files were reviewed, Decl. ¶¶ 7-9, how other federal agencies were queried, *id.* ¶ 10, and what information was retained, *id.* ¶¶ 11, 16. It also identifies several problems that would arise if the Court were to require the production of all “Government Information.” For instance, the “release of [certain] documents could reasonably be expected to cause harm to national security by revealing sensitive information such as sources or methods.” Decl. ¶ 10.b-c. In addition, 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” (*id.* ¶ 16), such a record was not physically compiled, *Id.* ¶ 11; *id.* ¶ 10.b-c. The Recorder did not maintain copies of every document he ever “obtain[ed] and examine[d]” (CSRT Procedures, enc. 2, § C(1)), including those that are only “marginally relevant” or “not relevant” and those that contain certain law-enforcement or especially sensitive material. Decl. ¶¶ 10.b-c, 11.a. However, in examining the Government Information, “*all* material that might suggest the detainee should not be designated as an enemy combatant was identified and included in the materials presented to the CSRT and included in the CSRT Record,” *Id.* ¶ 13.a; *id.* ¶ 10.d; *see* CSRT Procedures, enc. 2, § B(1).

Finally, it is worth noting that requiring the production or recreation of all

material qualifying as “Government Information” would far exceed even the constitutionally derived *Brady* obligations of a criminal prosecutor. *See Brady v. Maryland*, 373 U.S. 83, 87 (1963). In that context, the prosecution is *not* required to provide access to *all* government files relating to an accused. Rather, the prosecution must produce only the “evidence favorable to an accused * * * where the evidence is material.” *Banks v. Dretke*, 540 U.S. 668, 691 (2004); *see also Kyles v. Whitley*, 514 U.S. 419, 439 (1995) (prosecutor must “make judgment calls about what would count as favorable evidence” and criminal justice system relies on this “prosecutorial obligation for the sake of truth”); *see generally United States v. Brooks*, 966 F.2d 1500, 1502-05 (D.C. Cir. 1992).

Because Government Information is defined broadly to include any relevant, “reasonably available” information in government files, ordering its production would essentially be equivalent to requiring full-blown discovery in every DTA case. *Brady* does not require that. *See, e.g., United States v. Bagley*, 473 U.S. 667, 675 (1985) (“the prosecutor is not required to deliver his entire file to defense counsel” because “[a]n interpretation of *Brady* to create a broad, constitutionally required right of discovery ‘would entirely alter the character and balance of our present systems of criminal justice’”). And there is no reason to believe that Congress intended to impose a more onerous burden on the government in DTA proceedings.

CONCLUSION

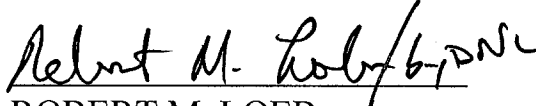
For the foregoing reasons, the Government moves for leave to file the McGarrah Declaration.

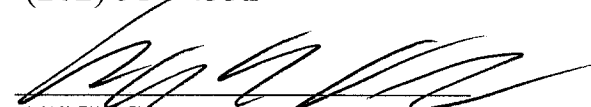
Respectfully submitted,

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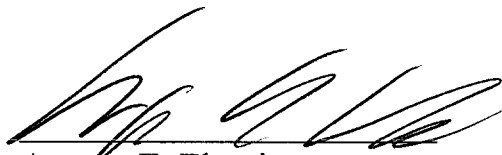
CERTIFICATE OF SERVICE

I hereby certify that on June 1, 2007, I caused copies of the foregoing
“MOTION FOR LEAVE TO FILE DECLARATION DESCRIBING PROCESS OF
COMPILING CSRT RECORD” to be served upon counsel of record by causing
copies to be sent by Fed Ex overnight delivery and by e-mail transmission to:

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August E. Flentje

capacity as Director of OARDEC and CSRT Convening Authority.

2. In July 2004, the Department of Defense established the CSRT process. This process was established to provide a formalized, standardized process to review the combatant status of all “foreign nationals held as enemy combatants in the control of the Department of Defense at the Guantanamo Bay Naval Base, Cuba.” CSRT Order, 7 Jul 2004. OARDEC was established in July 2004, and charged with implementing this process, as well as the annual Administrative Review Boards conducted for detainees at Guantanamo. As Director of OARDEC, I was appointed the CSRT Convening Authority by the Secretary of the Navy in July 2004. During my tenure as Director, we conducted 558 Combatant Status Review Tribunals (CSRTs). During that time frame, over 200 personnel (including active duty and reserve military, civilians and contractors) were assigned to OARDEC, and were involved in carrying out OARDEC’s missions. The primary OARDEC mission during this period was preparing for and conducting these Tribunals, and involved the vast majority of these assigned personnel. Some of these personnel were assigned to work at Guantanamo Bay while others were assigned in the Washington, D.C. area.

3. The CSRT procedures provide that the CSRT “Tribunal is authorized to * * * request the production of 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, 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, Enc. 1, § E(3). The CSRT Recorder is charged with, among other things, “obtain[ing] and examin[ing] the Government

Information.” CSRT Procedures, Enc. 2, § C(1). Additionally, “the Recorder has a duty to present to the CSRT 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 the U.S. or allied forces (the “Government Evidence”).” CSRT Procedures, Enc. 2, § B(1).

4. Prior to September 1, 2004, the CSRT Recorder personally collected the Government Information. At that time, due to the other extensive responsibilities of the Recorder¹ and in order to provide greater efficiency in the collection of this information, additional individuals were assigned to assist the Recorder in gathering detainee information. Responsibilities of Recorder, CSRT Procedures, Enc. 2, § C(2). Accordingly, after September 1, 2004, the task of gathering and analyzing the Government Information was performed by a specially-formed research, collection and coordination team (hereinafter referred to as “Team”). This Team, which was dedicated to the functions of obtaining, examining and analyzing detainee information, brought greater manpower resources to this important function. In addition, due to the location of the Team in the Washington, D.C. area in close proximity to other Government agencies, the interagency approval procedure used for clearance of the Government Evidence was much more efficient. *See supra* text accompanying Paragraph 10. The dedicated Team focused on the tasks of identifying relevant information on each detainee, including information that might suggest that the detainee should not be designated as an enemy combatant.

5. Members assigned to the Team each received approximately two weeks of training prior to assuming their data collection responsibilities, as well as additional instruction, as appropriate,

¹ Among other duties, the Recorder must attend and present evidence at CSRT hearings and prepare the records of those proceedings. *See* CSRT Procedures, Enc. 2, § C

during their tenures. The training included instruction on the CSRT process with specific emphasis on the Recorder's functions and responsibilities, operator training on the pertinent government databases, as well as cultural awareness and intelligence training to assist Team members in better understanding the potential significance of individual data elements. The Team was organized in three separate functions.

a. The first function, Case Writer, had primary responsibility for researching, reviewing and ultimately collecting information from government sources. The Case Writers would then use this information to draft an unclassified summary of the factual basis for the detainee's designation as an enemy combatant.

b. The second function, Quality Assurance (QA), reviewed the draft products from the Case Writers to ensure they were logical, consistent and grammatically correct.

c. The third function, Coordination, worked with the various government agencies whose information was to be used as Government Evidence, in order to receive clearance to use their information in the Tribunal, as well as to verify the accuracy of the Unclassified Summary.

6. Although the Team functioned as a data collection "staff" for the Recorders, each Recorder was held personally responsible for reviewing and verifying the information provided by the Team, for finalizing each package of unclassified and classified Government Evidence (to include the Unclassified Summary), and for presenting this evidence to the tribunal. 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; could decline to use as Government Evidence any material provided by the Team; and/or could submit requests for further information to obtain additional evidence from government entities. New information obtained by the Recorder in this manner would be treated as Government Information and, if appropriate, would be included in the Government Evidence presented to the CSRT panel. Throughout the CSRT process, the Recorder was responsible for making the final determination of what material would be presented to the CSRT as the Government Evidence. CSRT Procedures, Enc. 2, § B(1). In addition, both the Personal Representative and the Tribunal members had, and exercised, the ability to request additional information; the Recorder had the responsibility to respond to such requests.

7. The Team pursued leads found in government files relating to a detainee to identify other material that would qualify as Government Information. First, the Team conducted computer searches via a Defense Department database called the Joint Detainee Information Management System (JDIMS).

a. JDIMS is an information management tool developed and used primarily to support interrogations. Information stored on this database includes interrogation reports, intelligence messages, intelligence reports, analyst products, and periodic detainee assessments by DoD and other U.S. Government organizations, such as the U.S. Army Criminal Investigation Task Force (CITF). Only information classified at the SECRET level and below is placed into the JDIMS system. The information also must be in the possession and control of the Joint Intelligence Group (JIG), an element of Joint Task Force Guantanamo (JTF-GTMO). The JDIMS system is a repository of centralized information, but does not and could not hold all information that is in the possession of the United States Government regarding a particular detainee.

b. JIG personnel regularly use and rely on this database as a primary resource when conducting research about detainees and their interrelationships, when preparing for interrogations and when responding to official requests for information about detainees, as well as for other mission-critical functions. Accordingly, the JIG regularly populates the database with new detainee information developed or uncovered through research and interrogations, and that is assessed as pertinent to the detainee.

c. Because the JDIMS system represented one of the most complete repositories of information on each detainee, it was used as the starting point for gathering the material that would qualify as the Government Information. Additionally, this database permits the interrelationships between individuals and/or organizations to be searched and cross-referenced electronically. Ultimately, most of the data qualifying as Government Information were found through JDIMS. The Team also followed references that arose in these files – if a file revealed possible locations for more information, the Team pursued those leads.

8. The second database regularly searched by the Team was the database system called I2MS, used primarily by investigators from the Criminal Investigation Task Force (the investigatory arm for the Office of Military Commissions). This system holds information pertaining to individual detainees collected by CITF from both the law enforcement and intelligence communities, and would include files on the detainees developed by the authorities who captured the detainees and transferred them to Guantanamo, files relating to any subsequent reviews of the determination to continue to hold the detainee, and interrogation files. The Team also followed references that arose in these files – if a file revealed possible locations for more information, the Team pursued those leads.

9. Third, the Team reviewed paper files in the possession of JTF-GTMO, as well as other

Department of Defense databases and files that might contain information on the detainee.

10. The Team also had the ability to submit requests for information to other organizations within the Department of Defense and to other federal agencies that might have information bearing on the issue of whether the detainee meets the criteria to be designated as an enemy combatant, that was not already in the JDIMS database. These requests included information above the classification level of SECRET.

a. In both the initial data search and in requests for additional information from other agencies, the Team's requests would be for any information bearing on the issue of whether the detainee meets the criteria to be designated as an enemy combatant, and also specifically asked those agencies to provide any information that might suggest the detainee should *not* be designated as an enemy combatant.

b. In some instances, the Team did not directly obtain copies of Government Information from certain intelligence agencies. Instead, upon request, certain agencies allowed properly cleared members of the Team to review the organization's information responsive to their request in order to satisfy the Team's request that the agencies produce reasonably available information under the CSRT procedure. The Team could use information the agency authorized for inclusion in the CSRT record to support an enemy combatant status. However, during their review, there were instances where the Team was not permitted to use certain documents as Government Evidence or to make copies of them, because release of these documents could reasonably be expected to cause harm to national security by revealing sensitive information such as sources or methods. These searches were broadly based on names and other available identifying information, and involved voluminous responsive documents, many of which were found not relevant to the determination of whether a

detainee continued to meet the criteria for designation as an enemy combatant

c. In other instances, the Team would submit a request for information to law enforcement agencies; however, these agencies would not always provide the Team with information contained in certain files, due to the fact there was an ongoing investigation. In these cases, the law enforcement agencies would do a search of the information requested and provide the Team with documentation stating that none of the information withheld would support a determination that the detainee is not an enemy combatant.

d. The Team never encountered a situation where an agency objected to the use of information that suggested a detainee *should not* be designated an enemy combatant.

11. A file of information was gathered as a result of these inquiries, but it did not necessarily include all material that might be considered to meet the definition of "Government Information" in the CSRT procedures. CSRT Procedures, Enc. 1, § E(3).

a. First, material that might qualify as Government Information from government databases would be reviewed, but might not be collected in a distinct file if it was viewed as being not relevant or only marginally relevant.

b. Second, as explained in Paragraph 10, some material in the possession of intelligence agencies that would likely qualify as Government Information would be reviewed, but could not be collected or used as Government Evidence, because of the sensitivity of the material.

12. In some instances, all of the compiled Government Information referred to in Paragraph 11 above was included in the Government Evidence. In fact, however, the Recorder was required to present to the tribunal only "such evidence in the Government Information as may be *sufficient* to

support the detainee's classification as an enemy combatant..." CSRT Procedures, Enc. 1, §H(4) (emphasis added). Therefore in many instances not all of the Government Information was included as Government Evidence. Three primary considerations were employed in selecting the Government Evidence from among this information.

a. First, with respect to information derived from intelligence agencies, those agencies needed to approve the use of their information as part of the Government Evidence before it could be presented to the CSRT, particularly if that information was going to be used in the unclassified portion of the CSRT. If the agency or organization declined to approve the use of information tending to show that the detainee was an enemy combatant, it was deemed "not reasonably available." Often, the primary reason that this information could not be used as Government Evidence is because release of these documents could reasonably be expected to cause harm to national security by revealing sensitive information such as sources or methods. Also, there was a concern about dissemination of this information beyond what was necessary. That said, the Team never encountered a situation where an agency objected to the use of information that suggested a detainee should not be designated an enemy combatant.

b. Second, information was often duplicative of other information. Material was frequently not presented to the CSRT as part of the Government Evidence because it would merely duplicate other information already included in the Government Evidence and therefore would be unnecessarily redundant.

c. Third, the Recorder might elect not to use certain information as Government Evidence if the Recorder determined that other data being used as Government Evidence appeared sufficient to support the detainee's classification as an enemy combatant. For example, if a detainee was alleged

to be an enemy combatant based on six actions he was allegedly involved in and these six actions were supported by documents already in the Government Evidence, the Recorder could decide not to include documents about additional actions that the detainee took that would also suggest that the detainee is an enemy combatant. As a result, no Government Information excluded from the Government Evidence was taken into consideration by the CSRT in reaching a determination as to enemy combatant status.

13. The CSRT procedures specify that “[i]n 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.” CSRT Procedures, Enc. 2, § B.1; *see* CSRT Procedures, Enc. 1, § H.4 (same).

a. The Team and Recorder ensured that, as they reviewed Government Information, *all* material that might suggest the detainee should not be designated as an enemy combatant was identified and included in the materials presented to the CSRT and included in the CSRT Record. Thus, the Team and Recorder did not exclude any such material even if it had been originally obtained from other intelligence agencies. They also did not exclude any such material based on any sort of sufficiency assessment. However, if certain information which suggested that the detainee should not be designated as an enemy combatant was duplicative, the Recorder might decide not to include that duplicative information in the Government Evidence.

b. There was one other circumstance where this type of material may be excluded from the Government Evidence—if it did not relate to a specific allegation being made against the detainee. For example, if the government had data that indicated the detainee had engaged in a certain specific combatant activity and also had evidence that he had not engaged in that specific activity, the Team

and Recorder could elect to present no data about that specific activity at all. In short, if the Recorder decided not to demonstrate to the CSRT that a specific incident relating to the detainee occurred, the Recorder could decide not to submit evidence to the CSRT suggesting that this specific incident did not occur.

14. In addition to the Government Evidence, the following factual material was presented to the CSRT and made part of the CSRT record:

- (a) material submitted by the detainee or his Personal Representative;
- (b) testimony of the detainee or witnesses deemed relevant and reasonably available.
- (c) material obtained by the CSRT panel through its own requests for information.

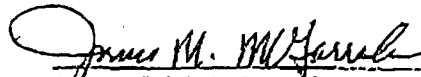
15. After the CSRT deliberated and reached its conclusion, the CSRT determination was reviewed by the CSRT Legal Advisor and the CSRT Director. CSRT Procedures, Enc. 1, § I(7) & (8). If the CSRT concluded, based upon the evidence before it, that the detainee should no longer be classified as an enemy combatant, the CSRT Director would notify the intelligence agencies and provide them an opportunity to submit additional information relating to the detainee or to reconsider any of their prior decisions that had prevented the Recorder from using their material as Government Evidence at the CSRT. Additionally, if the CSRT Legal Advisor or CSRT Director returned the record to the CSRT for further proceedings, the Recorder would have the ability to supplement the material presented to the CSRT as Government Evidence.

16. Both the CSRT Order and CSRT Regulations specifically defined the record as including (among other things) “all the documentary evidence presented to the tribunal” (Government Evidence). CSRT Order, 7 July 2004, para g(3), and CSRT Procedures, Encl 1., para I(5). There was no requirement for OARDEC to compile a record of material comprising all of the records in

government files that would qualify as Government Information. The Recorder was required only to prepare a "Record of Proceedings" which must include 1) a statement of the time and place of the hearing, persons present, and their qualifications; 2) the Tribunal Report Cover Sheet; 3) the classified and unclassified reports detailing the findings of fact upon which the Tribunal decision was based; 4) copies of all documentary evidence presented to the tribunal and summaries of all witness testimony; and 5) a dissenting member's summary report, if any. CSRT Procedures, Enc. 2, §C(8). However, OARDEC made an effort to retain the Government Information as referred to in Paragraph 11, compiled for each CSRT. It is my understanding that despite their efforts, some of these electronic files became corrupted following a technical change-over from one computer system to another in 2005. This has made it difficult to fully recreate the electronic files of Government Information compiled for each tribunal. I also understand that OARDEC is currently working to retrieve stored data from system archives to see if it is possible to recreate the files. As of this date, OARDEC is uncertain whether this is possible.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true, accurate, and correct.

Dated: 31 May 2007



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