IN RE: GUANTANAMO BAY DETAINEE LITIGATION
Doc. 1004 Att. 1

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE: **GUANTANAMO BAY** **DETAINEE LITIGATION**	Misc. No. 08-442 (TFH) Civil Action Nos.: 02-CV-0828, 04-CV-1136, 04-CV-1164, 04-CV-1194, 04-CV-1254, 04-CV-1937, 04-CV-2022, 04-CV-2035, 04-CV-2046, 04-CV-2215, 05-CV-0023, 05-CV-0247, 05-CV-0270, 05-CV-0280, 05-CV-0329, 05-CV-0359, 05-CV-0392, 05-CV-0492, 05-CV-0520, 05-CV-0526, 05-CV-0569, 05-CV-0634, 05-CV-0748, 05-CV-0763, 05-CV-0764, 05-CV-0833, 05-CV-0877, 05-CV-0881, 05-CV-0883, 05-CV-0889, 05-CV-0892, 05-CV-0993, 05-CV-0994, 05-CV-0995, 05-CV-0998, 05-CV-0999, 05-CV-1048, 05-CV-1124, 05-CV-1189, 05-CV-1220, 05-CV-1236, 05-CV-1244, 05-CV-1347, 05-CV-1353, 05-CV-1429, 05-CV-1457, 05-CV-1458, 05-CV-1487, 05-CV-1490, 05-CV-1497, 05-CV-1504, 05-CV-1505, 05-CV-1506, 05-CV-1509, 05-CV-1555, 05-CV-1590, 05-CV-1592, 05-CV-1601, 05-CV-1602, 05-CV-1607, 05-CV-1623, 05-CV-1638, 05-CV-1639, 05-CV-1645, 05-CV-1646, 05-CV-1649, 05-CV-1678, 05-CV-1704, 05-CV-1725, 05-CV-1971, 05-CV-1983, 05-CV-2010, 05-CV-2083, 05-CV-2088, 05-CV-2104, 05-CV-2112, 05-CV-2185, 05-CV-2186, 05-CV-2199, 05-CV-2200, 05-CV-2249, 05-CV-2349, 05-CV-2367, 05-CV-2371, 05-CV-2378, 05-CV-2379, 05-CV-2380, 05-CV-2381, 05-CV-2384, 05-CV-2385, 05-CV-2386, 05-CV-2387, 05-CV-2398, 05-CV-2444, 05-CV-2477, 05-CV-2479, 06-CV-0618, 06-CV-1668, 06-CV-1674, 06-CV-1684, 06-CV-1688, 06-CV-1690, 06-CV-1691, 06-CV-1758, 06-CV-1759,

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08-CV-1233, 08-CV-1235,
08-CV-1236, 08-CV-1237, 08-CV-1238,
08-CV-1310, 08-CV-1360, 08-CV-1440

DECLARATION OF THE HONORABLE GORDON ENGLAND, DEPUTY SECRETARY OF DEFENSE, DEPARTMENT OF DEFENSE, WASHINGTON, DC

Pursuant to 28 U.S.C. § 1746, I, Gordon England, hereby declare that to the best of my knowledge, information, and belief, the following is true, accurate, and correct:

1. I am the Deputy Secretary of Defense. I served as Acting Deputy from May 16, 2005 to January 4, 2006, when I was recess appointed by the President as Deputy Secretary of Defense. I was confirmed by the Senate on April 6, 2006 as the 29th Deputy Secretary of Defense. Prior to this appointment, I served as the Secretary of the Navy, beginning in September 2003.

2. On November 6, 2008, United States District Court Judge Thomas Hogan issued a Case Management Order (CMO) to govern proceedings in the above-captioned cases. This included an order for the government to disclose certain "exculpatory evidence" and "discovery" materials and to create unclassified substitutes of certain classified information found in those documents. The CMO specifically requires the government to:

a. Disclose "all reasonably available evidence in its possession that tends to materially undermine the information presented to support the government's justification for detaining the petitioner" for the already-filed factual returns (approximately 100) by November 20, 2008 and for the remaining factual returns within 14 days of those factual returns being filed.

b. Disclose "(1) any documents or objects in its possession that are referenced in the factual return; (2) all statements, in whatever form, made or adopted by the petitioner that relate to the information contained in the factual return; and (3) information about the circumstances in which such statements of the petitioner were made or adopted" within 14 days of a detainee's request for the information for the already-filed factual returns (approximately 100). For all other cases, the disclosure must be made within the later of 14 days of the factual return being filed or the date the detainee requests the material.

c. Create "adequate substitutes" for any classified information described in a or b above.

3. This declaration, and the declarations attached or referenced, is filed to explain why the burdens imposed upon DoD ("DoD") by the Court's order are unworkable. Further, the declaration describes for the Court the damage to national security that reasonably could be expected to result from compliance with the Court's order.

Creation of Factual Returns

4. In order for the Court to understand the overwhelming burdens imposed on DoD by the Court's order, it is necessary to provide a brief summary of the process employed by DoD to create the factual returns that have been filed with this Court over the past several months.

5. In creating the factual returns that are being filed in the habeas corpus cases, DoD and DOJ attorneys typically review a variety of materials (to include classified information), including the Combatant Status Review Tribunal (CSRT) and Administrative Review Board (ARB) proceedings for the detainee, as well as information collected by the Joint Intelligence Group (JIG) at Joint Task Force Guantanamo.

6. The CSRT and ARB proceedings consist of information collected by the Office for the Administrative Review of the Detention of Enemy Combatants (OARDEC) through a comprehensive and robust search for relevant information bearing on the detention of Guantanamo Bay detainees. Since 2004, OARDEC estimates it has spent 800,000 man hours preparing for and conducting the CSRTs and ARBs.

a. The process for gathering relevant material for use in the CSRTs is reflected in detail in the Declaration of RADM (ret.) James M. McGarrah, signed on May 31, 2007 and submitted in Bismullah v. Gates before the D.C. Circuit. That declaration is attached here.

b. A similar search and review process is followed for gathering relevant material for use in the ARBs. Unlike the CSRT process which is typically conducted only once for an individual detainee, most detainees receive annual reviews through the ARB process[1]. The ARB process is designed to annually assess enemy combatants at Guantanamo and "encompass[es] an administrative proceeding for consideration of all relevant and reasonably available information to determine whether the enemy combatant represents a continuing threat to the U.S. or its allies in the ongoing armed conflict against al Qaida and its affiliates and supporters (e.g. Taliban)...." (*See* http://www.defenselink.mil/news/Aug2006/d20060809ARBProceduresMemo.pdf).

7. Additionally, analysts assigned to the JIG at JTF-GTMO gathered materials relevant to each detainee and provided those materials to the DoD and DOJ attorneys for use in drafting the

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1 Detainees at Guantanamo do not receive an ARB if they have already been approved for release or transfer (whether through the ARB process or the review process that existed prior to the creation of the ARB) or if they have been charged through the Military Commissions process.

factual return. The JIG's mission is to collect, analyze, and disseminate strategic intelligence in support of counterterrorism, force protection, and the Global War on Terror. This includes information gleaned from Guantanamo detainees on, among other things, how al Qaeda, the Taliban, and other terrorist organizations are organized and funded, their leadership structures, how such organizations recruit and train members, and how they plan, command, and control their operations. This JIG also provides support in developing and filing factual returns.[2]

a. In gathering the materials to support the returns, the analysts utilized a variety of repositories of intelligence information which they typically use in their daily work supporting intelligence operations, conducting detainee assessments, and providing analysis in support of the CSRT and ARB processes. Further, the JIG conducted specific searches for new information bearing on the detention of detainees in appropriate circumstances.

b. In sum, the JIG expended approximately 11,500 man hours to provide these materials for all current habeas petitioners to the DoD and DOJ attorneys.

8. DoD does not maintain centralized repositories of all information about detainees or gleaned from detainees. Instead, the information is disseminated, duplicated or maintained in databases or file systems of various DoD organizations, depending on the type of information and/or mission of the organization. However, given their respective missions and their long-term involvement in searching for, collecting and evaluating information on the Guantanamo detainee population, DoD determined that the information compiled by OARDEC and the JIG comprise the most complete, readily available information regarding these detainees. Accordingly, and especially given the compressed timeframe imposed by the Court to begin production of factual returns, DoD elected to limit its search for information relevant to enemy combatant status to these two organizations, as described above. DoD previously attempted to search a much broader range of organizations for information relevant to enemy combatant status in its efforts to comply with the D.C. Circuit's decision in Bismullah v. Gates in the summer of 2007. That effort is described in detail in my declaration signed on September 7, 2007 and attached here. For all the reasons explained in that declaration, it was decided that a broader search for information was neither reasonable nor practicable for the habeas cases. Among other reasons, it would have been impossible for DoD to complete broader searches and conduct the appropriate review of that information within the deadlines established by the Court's factual return schedule. The searches for information undertaken during preparation of the factual returns were designed to meet the dual goal of preparing returns on a schedule consistent with the deadlines established by the Court and gathering relevant information from accessible and comprehensive pre-existing collections of information pertaining to Guantanamo Bay detainees. DoD, therefore, focused its search efforts on the JIG (the component of Joint Task Force-Guantanamo charged to gather intelligence) and OARDEC (DoD component charged with performing regular status reviews of detainees). DoD's efforts to assemble information for

[2] Detainees at Guantanamo also continue to provide useful information about the physical areas of operation in which the Global War on Terror is conducted, the locations of training compounds and safe houses, travel patterns and routes used for smuggling people and equipment, and the identities of newly captured fighters.

inclusion in the factual returns is described more fully in the declaration of Daniel J. Dell'Orto (Aug. 29, 2008), previously filed with this Court.

Case Management Order

9. Although DoD's factual return process has been underway for several months, resulting in the filing of over 100 returns, the Court's CMO appears to require DoD to alter its practices significantly. To the extent the Court's CMO requires DoD to begin conducting searches for information beyond those undertaken in developing the factual return, the Court's CMO would impose immense and unworkable burdens. Moreover, even assembling the information required to be produced by the Court's CMO for approximately 200 detainees from within the universe of readily available information would require thousands of hours of additional work on the part of the personnel supporting the habeas litigation for DoD, to include the JIG. While the JIG did, and continues to, devote a portion of its personnel to the habeas effort, that assignment of personnel to this litigation support function detracts significantly from the JIG's primary mission of supporting intelligence gathering and analysis at Guantanamo Bay and supporting military, intelligence, and law enforcement operations worldwide.

Production of documents or objects referenced in the return

10. Compliance with the order to disclose "(1) any documents or objects in its possession that are referenced in the factual return" would likely require untold hours to search various intelligence and law enforcement repositories of information maintained by DoD and likely other U.S. Government organizations outside DoD. These searches would tie-up access to these databases and take away personnel from performing the mission of all of these organizations and agencies. The objects and documents mentioned in many of the source documents utilized and referenced in the factual return are not maintained under a criminal law model. DoD does not conduct military operations as a police force with chain of custody documents tracking every item that may end up referenced in a document at a later time. Many of these objects were obtained by DoD (sometimes in concert with non-DoD or foreign organizations and agencies) in remote locations, on the battlefield or, at the very least, during operations conducted as part of the War on Terror. Once an object is identified and described in an intelligence report or document, the value of the actual object itself is often minimal for intelligence purposes and therefore would not typically be maintained. A determination as to whether these objects are in DoD's possession in and of itself would be time-consuming; and there will be some that are in DoD's possession but are not readily accessible.

Burden of producing statements and additional exculpatory materials

11. In order to comply with the requirement in the Court's order that the government produce "all statements, in whatever form, made or adopted by the detainee that relate to the information contained in the factual return," at a minimum DoD would have to search through the sources of information that had been used by the JIG and OARDEC to create the information (CSRTs, ARBs and JIG materials) that was originally reviewed in creating the factual returns.

a. The JIG estimates it would take approximately 18-24 hours per detainee to retrieve all statements in its possession that meet this definition. As the DoD entity primarily responsible for gathering information and intelligence from Guantanamo detainees, the JIG maintains tens of thousands of documents related to the detainees. Narrowing this vast collection of information to only those documents that reference detainee statements will necessarily be time consuming. In the alternative, if the JIG were provided guidance on certain topics within the factual return to use in conducting more targeted searches, it would take approximately 5 hours per detainee to retrieve this material.

b. OARDEC, however, would have to gather every document within its internal database on each detainee, which would take approximately 3 hours per case. Although the volume of information will vary among detainees, it is important to note that OARDEC has been collecting information about detainees since 2004 in order to conduct CSRTs and ARBs. Therefore, the collection of information that OARDEC has accumulated over the past four years will be substantial. Once gathered, all of this information would then need to be reviewed by DoD and DOJ attorneys to identify which statements "relate to the information contained in the factual return."

12. In creating the factual returns, the attorneys from DoD and DOJ included all exculpatory information relevant to the allegations stated in the return which they reviewed during the preparation of the return. For the reasons stated above, DoD determined that the information compiled by OARDEC and the JIG contained the most complete, readily available source of exculpatory information on the detainee.

13. The burden of having to gather and provide exculpatory information and statements would increase significantly if DoD were required to conduct searches for information at Department components/agencies beyond OARDEC and the JIG and therefore where this type of information has not already been gathered, as well as confirm with OARDEC and the JIG that no additional such information existed. As my September 7, 2007 declaration filed with the D.C. Circuit in the Bismullah v. Gates Motion for Rehearing made clear, retrieving this information from the myriad Commands, organizations and Agencies within DoD creates numerous problems, would take a number of months and an enormous commitment of DoD resources and would likely result in only a marginal increase in distinct materials, given OARDEC's and the JIG's long-term involvement in gathering information on Guantanamo detainees.

14. While it is difficult to estimate the time required to complete these tasks of gathering and providing exculpatory information and statements for all of the currently pending habeas cases, it is not a process susceptible to completion in a two-week span, even with respect to a portion of the first 100 cases in which factual returns have been filed, particularly in light of the review required to address any national security concerns presented by the presence of classified information. The time required to search and identify responsive documents would require thousands of man hours, to say nothing of the additional time required to conduct appropriate "need to know" reviews of the information to ensure proper dissemination of classified national

security information, and is unlikely to result in more than a marginal increase in distinct materials being found, given OARDEC's and the JIG's long-term involvement in gathering information on Guantanamo detainees. For example, the Criminal Investigative Task Force (CITF), the organization established in 2002 by DoD to investigate detainees for purposes of criminal prosecution via military commission, does not have the ability to isolate statements of the detainees in its database; instead CITF would need to provide all information in its possession, collected over a period of six years, pertaining to the detainees. That large volume of information would then have to be reviewed for responsiveness and release by attorneys and other personnel - a task that will certainly take significantly longer than two weeks for 200 detainee cases. The benefit to conducting such a time consuming process is likely to be minimal, however, because OARDEC has access to this CITF material as it conducts its CSRT and ARB review processes, and the JIG also has access to this same CITF material as it is performing its mission. Therefore, it is likely that requiring review of materials beyond OARDEC and the JIG will result in a significant amount of time being spent reviewing cumulative, and generally irrelevant, information in the possession of these other DoD components. These problems will be magnified exponentially if DoD is required to search for information in additional DoD Commands and Agencies.

Circumstances of Statements

15. This Court's order also requires production of information about the circumstances in which such statements of the detainee-petitioner were made or adopted. In the event that such information does not already exist in the text of the statements themselves, it is difficult to forecast what would be required but it would surely be overwhelming given the number of statements provided to multiple organizations found worldwide and over an extended period of time across multiple agencies of the government. Furthermore, it is unlikely the personnel who handled or interrogated these detainees remain in these organizations or locations, and most may no longer even still be serving in our armed forces. The burden of gathering and providing such materials would be comparable to, or significantly more burdensome than, that described above for gathering and finding statements.

Processing of all information prior to production

16. Once any documents relevant to the Case Management Order are found, they then need to be processed by the document review team (consisting of personnel qualified and trained in handling and identifying classified material) created to support the habeas effort for DoD. This team would conduct a review to approve the document for production at the current classification level, conduct a declassification review of the document and, if necessary, create adequate substitutes for information that cannot be provided to the detainee.

17. Review of a document at the current classification level includes a review of the document by a team leader to assess which Department Command(s) and/or Component(s) is the originator of the information and thus needs to approve its use as the original classification authority; the representative of the respective Command and Component then reviews the document to ensure that it is appropriately classified and determines whether any information is subject to being

withheld even from properly cleared counsel and/or the Court. The Command/Component representative also determines whether the equities of another DoD organization or another agency are involved. This is often a time-consuming process as many documents contain information from multiple sources, a fact that may not be readily apparent on the face of or during initial review of the document.

18. The second review would be a declassification review of the document and the information contained within it. This review requires that a member of the team qualified and trained in handling and identifying classified material conduct an initial draft declassification using the guidance provided by the Command or Component that is the originator of the document. These drafts are then reviewed and finalized by select individuals who have been specifically delegated declassification authority by the Command or Component. This is often a time consuming process as many documents contain information from multiple sources. Processing them for declassification therefore would require multiple reviews by multiple organizations.

19. Providing an adequate "substitute" for classified information that cannot be provided to the detainee would require additional processing and review by the team, as well as approval by the Command or Component. It is impossible to predict how much information would be required to constitute an "adequate substitute," but it is certain that some portion of nearly every document could not be declassified and would, under this order, require a substitute. In light of the broad scope of the Court's order requiring production of "all statements, in whatever form," all "documents or objects," and all information about the circumstances in which statements were made, it is anticipated that the document review team will be required to review tens of thousands of pages and require upwards of 50,000 man hours to do so.

20. In addition to the order to search for and produce the information discussed above, we have been ordered to produce unclassified versions of each factual return filed to date within 14 days. The creation of an unclassified version of the factual return requires review and redaction of classified information within the exhibits and narrative. The attorney and support staff resources utilized to create these unclassified versions of the return are the same resources that produce 50 classified factual returns per month. The need to produce unclassified versions of the returns within 14 days of the order jeopardizes our ability to produce 50 classified factual returns in the month of November.

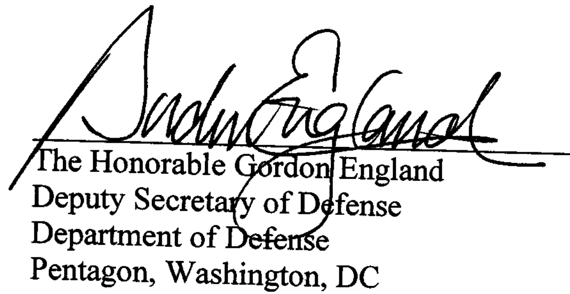
Potential damage to national security

21. The breadth of information and dissemination to counsel for all of the detainees that is contemplated by the order would create a very real danger of disclosure of sensitive intelligence information, to include sources and methods of collection. As stated above, DoD has resources in place to conduct a classification review of all information that is gathered and needs to be produced in the habeas litigation. However, it is an undeniable fact that an exponential increase in the speed with which these reviews have to be conducted, which is what this order requires, will increase the risk of accidental improper release of classified information. Additionally, requiring the release of such large amounts of information in and of itself could risk harm to national security. Widespread dissemination of this kind of information even to cleared counsel

increases the risk of inadvertent or intentional disclosure.

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

Dated this 18th day of November 2008.



The Honorable Gordon England
Deputy Secretary of Defense
Department of Defense
Pentagon, Washington, DC

EXHIBIT A

[ARGUMENT 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.

HUZAIFA PARHAT, et al.
Petitioners,
v. — No. 06-1397

ROBERT M. GATES,
Secretary of Defense,
Respondent.

DECLARATION OF REAR ADMIRAL (Retired) JAMES M. McGARRAH

Pursuant to 28 U.S.C. § 1746, I, James M. McGarrah, hereby declare that to the best of my knowledge, information, and belief, the following is true, accurate, and correct:

1. I was the Director of the Office for the Administrative Review of the Detention of Enemy Combatants (OARDEC) from July 2004 until March 2006. I currently serve as a Special Assistant to the Deputy Assistant Secretary of Defense for Detainee Affairs. This declaration is intended to provide a general description of the overall Combatant Status Review Tribunal (CSRT) process during this period in which I served as the Director of OARDEC, and concurrently as the CSRT Convening Authority. CSRT Order, 7 July 2004, para f. This declaration is based on my personal knowledge as well as information obtained in my official

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 Recorder[1] 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

James M. McGarrah
Rear Admiral, Civil Engineer Corps, U.S. Navy (Retired)
Special Assistant
Office of the Deputy Assistant Secretary of Defense, Detainee Affairs

EXHIBIT B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE:	)	
	)	MISC. NO. 08-0442
GUANTANAMO BAY DETAINEE LITIGATION	)	
	)	

DECLARATION OF DANIEL J. DELL'ORTO

I, Daniel J. Dell'Orto declare as follows:

1. I am the Acting General Counsel for the Department of Defense ("DoD"). The statements contained in this declaration are based on my personal knowledge or on information I have gained in my official capacity.

2. This declaration is provided in order to document the efforts DoD has undertaken to defend, on the merits, more than 250 habeas corpus proceedings filed by or on behalf of individuals detained by DoD at Guantanamo Bay, Cuba. DoD has taken unprecedented steps to marshal resources and develop appropriate procedures for gathering and reviewing information on these detainees, developing pertinent information into a factual return and receiving appropriate permissions to use that information in the habeas proceedings.

3. As of today, DoD has approximately 30 attorneys working exclusively on habeas corpus litigation, including more than 20 attorneys who were diverted from other offices within DoD that provide legal advice to a variety of DoD organizations and components, some of which are located outside of the Washington, D.C. area. Each of these diverted attorneys is now working full-time on habeas corpus matters. Their offices have redistributed these attorneys' work to

other attorneys within the office, at a time when each office is supporting a DoD organization or component engaged in DoD's war mission. The first of these attorneys arrived in mid-July 2008, and additional attorneys have arrived during July and August. Furthermore, the Office of the General Counsel is in the process of hiring 40 attorneys who will replace these diverted attorneys, as well as additional administrative support staff.[1]

4. The DoD attorneys described above work directly with attorneys from the Department of Justice. There is at least one attorney from each organization assigned to each detainee's factual return. This attorney team works together on reviewing the information and developing a factual return for the detainee.

5. The DoD attorneys described above have been actively involved in gathering and reviewing information for potential use in the factual returns, including intelligence and law enforcement material which originated with DoD or other government agencies. (To assist these attorneys with this effort, DoD has diverted intelligence or other personnel from their other intelligence-related work (including personnel from the Joint Intelligence Group at Guantanamo), in order to have them work full-time on the habeas litigation.). When a document is proposed for inclusion in a factual return, it must then be reviewed to determine who originated the information contained within it. The originator may be a DoD organization or it may be another U.S. government agency, or an individual document may contain a combination of the two. Once the originator or originators are identified, permission must be sought from those organizations before DoD can use the information in a habeas corpus proceeding, similar to the process followed when information is being requested for use in criminal proceedings or for release under the Freedom of Information Act. During this review, the organization considers issues

[1] DoD has also been standing up the infrastructure for these attorneys, including appropriating sufficient office space in the Washington, D.C. area for what will ultimately be more than 50 DoD attorneys and support staff.

such as the classification level of the information, the receiving party's security clearance and need to know the information, and the potential harm to sensitive methods or sources of intelligence that may be implicated by the information's use in the habeas proceeding. The originator of the information is the organization that is capable of making decisions about harm from dissemination and the release of the information in the habeas context.

6. To process information that originates with a DoD organization (and may be reflected in the narrative document that cites that information), DoD has created a multi-person team of personnel which is responsible for coordinating the process of seeking permission from the relevant DoD organization(s). For the documents identified to date, this team was required to coordinate with the following DoD organizations: United States European Command, United States Central Command, United States Pacific Command, United States Southern Command (which has cognizance over the detention facility at Guantanamo), United States Special Operations Command, the Criminal Investigation Task Force, the Defense Intelligence Agency, the National Security Agency, the National Geospatial-Intelligence Agency and the Department of the Army. Upon being contacted, personnel from each of these organizations reviewed the relevant documents, for the purpose of conducting the analysis described above. For some of the documents, this review resulted in a conclusion that another DoD organization or U.S. government agency had equities in the information being reviewed, thus requiring the document to be further coordinated.

7. Within the last 30 days, the team has coordinated the review of almost 1,900 documents that originated with DoD organizations (all of which are multi-page documents), in addition to expending a significant amount of time preparing supporting materials and coordinating them for

use in the litigation. Approximately 1,700 of those 1,900 documents were cleared by their DoD originators for use in the habeas corpus proceedings. (The remaining 200 documents could not be cleared by DoD as they contained some information that originated with other U.S. government agencies and thus are undergoing further coordination.) Before being used in the factual return, however, those 1,700 documents are also subject to review by the Central Intelligence Agency, as discussed in its declaration being submitted to this court, for any equities that organization may have in the material.

I declare under the penalty of perjury and the laws of the United States that the foregoing statement is true and accurate to the best of my knowledge.

August 29, 2008 Daniel J. Dell'Orto

EXHIBIT C

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

HAJI BISMULLAH, et al., Petitioners v. ROBERT M. GATES, Secretary of Defense, Respondent.	)	No. 06-1197
HUZAIFA PARHAT, et al., Petitioners, v. ROBERT M. GATES, Secretary of Defense, Respondent.	)	No. 06-1397

DECLARATION OF THE HONORABLE GORDON R. ENGLAND, DEPUTY SECRETARY OF DEFENSE, DEPARTMENT OF DEFENSE, WASHINGTON, DC

Pursuant to 28 U.S.C. § 1746, I, Gordon R. England, hereby declare that to the best of my knowledge, information, and belief, the following is true, accurate, and correct:

1. I am the Deputy Secretary of Defense. I served as Acting Deputy from May 16, 2005 to January 4, 2006, when I was recess appointed by the President as Deputy Secretary. I was confirmed by the Senate on April 6, 2006 as the 29th Deputy Secretary of Defense. Prior to that, I served as the Secretary of the Navy, beginning in September 2003.

2. As the Deputy Secretary of Defense, I serve as the Designated Civilian Official responsible for overseeing the detainee review processes at Joint Task Force-Guantanamo (JTF-GTMO). This includes the Combatant Status Review Tribunals (CSRTs) and the Administrative Review Board (ARBs) proceedings.

3. On July 20, 2007, the Court issued its opinion in the above styled cases. Subsequently, a panel of this Court ordered the Government to produce the record, as defined in Bismullah on September 13, 2007, in Paracha v. Gates, No. 06-1038, and other panels have likewise ordered the production of a Bismullah record in other cases on other dates. I understand the Court to have determined that the "record on review" under the

Detainee Treatment Act is not limited to the record actually presented to and considered by the CSRT in making its enemy combatant determination, but rather includes all information the CSRT is "authorized to obtain and consider" under the Secretary of Defense's CSRT procedures (i.e., the "Government Information," which is defined 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.")

4. As reflected in the Declaration of RADM (ret.) James M. McGarrah, previously submitted in this case, in the 2004-2005 time frame, when the Office for the Administrative Review of the Detention of Enemy Combatants (OARDEC) conducted the CSRTs for 558 Guantanamo detainees, the Recorders (the term Recorder is meant to include the teams that assisted the Recorders), in searching for and gathering material for the CSRTs, relied primarily upon searches of relevant DoD databases, specifically the Joint Detainee Information Management System and the I2G Investigative Information Database (formerly called I2MS). Recorders also went beyond these databases and pursued gathering information from other sources. The "Government Information" with respect to a detainee, however, was not amassed into a single, reproducible file. Nor are there reliable records of the precise materials that were in fact examined by a Recorder in every case. Thus, it is not possible to recreate easily or with any precision the information that was reviewed by the Recorders in performing their duties.

5. Accordingly, in order to attempt to comply with the Bismullah ruling and assemble the "Government Information" for any particular detainee, DoD is having to undertake new searches and assembly of materials from which "Government Information" can be taken. The Director of OARDEC has directed six DoD intelligence agencies, the Office of Military Commissions, and five Combatant Commands to identify, assemble and provide information from which the "Government Information" for certain individuals detained at U.S. Naval Base Guantanamo Bay, Cuba can be derived. OARDEC has conducted the same search of its own files for original documents falling within this definition. The particular components tasked for such searches were selected after an assessment was made that their organization may hold potentially responsive documents on the detainees at issue. Searches were initially undertaken with respect to six detainees currently held as enemy combatants at U.S. Naval Station, Guantanamo Bay, Cuba who have filed petitions under the Detainee Treatment Act so that the Department could assess the likely impact of a tasking to gather all available "Government Information" with respect to the Detainee Treatment Act review cases on the mission of each command, agency and office during a time of war.

6. In addition, a number of outside agencies, including the CIA, FBI, State Department, and Department of Homeland Security, as well as the National Security Agency (NSA) within DoD, were separately tasked in the context of this litigation with searching for and assembling information from which "Government Information" can be derived. DoD shares the concerns expressed in some of those outside agencies' declarations regarding the disclosure of highly sensitive information.

7. The current search undertaken to comply with the requirements of the Bismullah decision, has created an immense burden on the Department of Defense. Documented accounts from the DoD components and commands demonstrate undue burden to war-time missions and objectives, compromise of resources necessary for the war effort, and diversion of significant manpower from the war time mission.

8. For example, one of the components tasked to search for potentially responsive material is the Criminal Investigation Task Force (CITF). CITF's primary mission is to investigate non-U.S. citizen detainees captured during the Global War on Terrorism and suspected of illegal activities in conjunction with their affiliation to al Qaida and other enemies of the United States. The objective is to either refer the cases to the DoD Office of Military Commissions for criminal prosecution or to identify detainees who should be released and/or transferred from DoD control. Information obtained as the result of these investigations is also provided to the U.S. intelligence community.

9. To comply with the search-related tasking on the initial set of six cases, CITF created special working groups that included subject matter experts, law enforcement agents and intelligence analysts. The working group developed search terms, protocols and parameters. To date, CITF agents and analysts have spent nearly 2000 total manhours to comply with this tasking. At bottom, CITF reports that it was rendered ineffective for normal operations with respect to about thirty percent of CITF staff, personnel, and resources during the search process. The effect was highly disruptive. Long term repetition of these efforts, that is, extrapolating such efforts to all Detainee Treatment Act review cases (currently involving approximately 130 detainees), would render CITF ineffective as an investigative task force.

10. Other DoD components tasked to conduct searches (aside from NSA, which is addressing this matter in its own declaration in this litigation) also have reported not an insignificant resource toll in the matter. Currently, it is estimated that gathering of such materials has expended several hundred manhours, although efforts are still underway to determine whether additional search-related work from the components is necessary. Long term repetition of such efforts with respect to these components points to a significant burden on these components' abilities to carry out duties associated with their primary mission. For example, the Joint Task Force-Guantanamo reported that future impact of a wide-scale document gathering effort could impact its primary mission of conducting detention and interrogation operations in support of the Global War on Terrorism by, among other things, diverting personnel otherwise involved in interrogations and analysis from those duties to the gathering of information to support litigation requirements.

11. The above-related examples do not include the work performed by OARDEC, which is discussed in detail below.

12. OARDEC is an organization within the DoD that is responsible for several processes involving detainees at Guantanamo Bay, Cuba. Specifically, OARDEC conducts CSRTs and annual ARBs for detainees at Guantanamo Bay, Cuba. The ARB is an annual review

to determine the need to continue the detention of an enemy combatant. The ARB recommends whether an individual should be released, transferred or continue to be detained. This process has resulted in approximately 200 detainees being approved for transfer or release from U.S. custody.

13. OARDEC is responsible for working with each of the DoD components tasked to ensure that a complete and comprehensive search for "Government Information" was accomplished. It is then the responsibility of OARDEC to review the information collected by the components to determine what information is "Government Information" that should be produced in compliance with the Bismullah decision.

14. OARDEC is working or coordinating with each DoD agency and command, and outside agencies, on the gathering of documents. Many of the agencies and commands have different data systems and information in them is retrieved differently and sent to OARDEC in different formats. Some agencies have required OARDEC to review documents at their facility; others have provided documents to OARDEC. OARDEC is also conducting a review of the CSRT tribunal files for the cases to gather any appropriate original documents for the record on review.

15. Once documents are made available to OARDEC, either by DoD components or by outside agencies, OARDEC must then review the documents to eliminate documents not relevant to the detainee and not relevant to the detainee's enemy combatant status. Where materials are supplied to OARDEC in electronic form, OARDEC is responsible for developing appropriate search terms, protocols, and parameters for searching through the materials via electronic means and conducting such review. In addition, some agencies provide documents in a format that is not electronically searchable, so OARDEC is responsible for re-formatting those documents before they can conduct their search. Not all agencies provide documents in electronic form; in such cases OARDEC is responsible for manually reviewing the documents. Once OARDEC's review is completed and a set of material for potential production to the Court and detainee counsel is gathered from a component or agency, OARDEC then forwards these documents to the originating agency for a "need to know" analysis to determine the propriety of disclosure of the documents to the court or detainee's counsel.

16. The burden to OARDEC has been substantial and continues to constitute a significant burden to the mission and objectives of OARDEC at both its Washington, DC Headquarter offices and its offices at Guantanamo Bay, Cuba. The combined efforts by OARDEC for all agencies, offices and commands so far have involved more than 270 manhours just with respect to the gathering of information for the Paracha matter. To conduct the work accomplished so far, which is not complete even with respect to the Paracha matter, much less the other cases, OARDEC has had to re-prioritize its work or delay other pressing responsibilities, including preparing for or conducting CSRTs for recently arrived Guantanamo detainees, ARBs, and new CSRTs based on newly obtained evidence (see OARDEC Instruction 5421.1 (issued May 7, 2007)). OARDEC has experienced a decrease of production of the ARBs and CSRTs over the last four weeks. This is due to the fact that OARDEC has had to take 18 of the 20 personnel assigned to

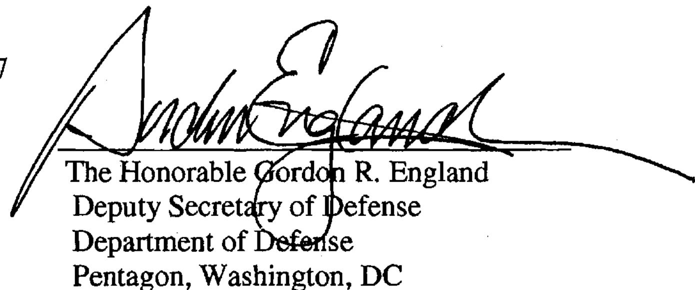
the production of ARB and CSRT case files and reassign them to the current gathering and review effort. A long-term and significant increase in these gathering efforts, which would be the result of effectuating such efforts for all Detainee Treatment Act review cases (currently involving approximately 130 detainees), would lead to an exponential increase in the burden on OARDEC's ability to carry out its other duties and a requirement for significantly increased staffing to carry out the assembly of Government Information called for under Bismullah.

17. Aside from the burdens discussed above, additional burdens are involved in DoD's attempt to comply with the Court's order regarding production of Government Information to the Court and counsel. Prior to the regime created through the Court's order in Bismullah, with respect to Guantanamo detainees with habeas cases or DTA review petitions and where so ordered by a court, only the "Government Evidence," that is, the record considered by the CSRT in making the enemy combatant determination (with certain exceptions), was provided to the Court and properly cleared and otherwise qualified petitioner's counsel. The required disclosure of the "Government Information" per the Bismullah decision, however, will typically require a much broader potential production of materials to the Court and petitioner's counsel. As indicated above, this broader set of typically classified materials must be reviewed by appropriate DoD components and outside agencies to determine "need to know," that is, the suitability of disclosure of such information to the Court and counsel. Although a precise assessment of such burdens with respect to DoD components (other than NSA) cannot be made at this time, given that such work on the cases in process is not complete, the process promises to be burdensome and time-consuming.

18. Although DoD is committed to devoting all necessary resources to complying with any court order, it is important to note that our components are still engaged in active combat around the world in the Global War on Terrorism. Compliance with the Bismullah court order that requires the gathering of information as has been described here will require DoD to pull resources away from the warfighting and intelligence gathering missions that are essential to fighting the Global War on Terrorism. We cannot overstate the importance of ensuring that our components can focus on their primary missions.

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

Dated this the 7th day of September 2007



The Honorable Gordon R. England
Deputy Secretary of Defense
Department of Defense
Pentagon, Washington, DC