

Exhibit C

Part 2 of 2

1 THE COURT: Doesn't that go to timing of when this
2 would be done as opposed to the right not to seal these
3 matters so they could never be revealed. It goes to the
4 burden on the Government. But as to the right, I mean, what
5 basis is there to withhold all this in a generic fashion, to
6 seal all the returns without a specific showing. I'm sort of
7 quoting Parhat basically.

8 MR. AHERN: Well, the showing I think we have made,
9 and it is specifically with the unclassified returns
10 themselves. The burden is a little bit -- it's separate. And
11 the Court is right, that really what is at issue here is a
12 matter of timing. We are not asking to seal these in
13 perpetuity. We're simply asking that the Court recognize the
14 practical implications of this massive litigation and allow us
15 to take these prudent and incremental steps that will protect
16 national security.

17 Now, in terms of the unclassified returns
18 themselves, and the reason why we believe they should be
19 protected as a place holder measure until we can do the
20 interagency process to create publicly fileable information.
21 We lay out in the pleadings several issues that we have
22 encountered.

23 And I would correct counsel just in one respect, we
24 have filed some of these unclassified returned on the public
25 docket, and indeed it was in the process of filing those on

1 the public docket that we identified some of the issues that
2 we raised in our --

3 THE COURT: They are still protected?

4 MR. AHERN: I'm sorry, Your Honor.

5 THE COURT: I'm not sure I understood that. You
6 filed the unclassified returns to the public docket -- on the
7 public docket, you say?

8 MR. AHERN: Yes, Your Honor.

9 THE COURT: But under seal. They're protected,
10 they can't be shared.

11 MR. AHERN: Some unclassified returns were filed on
12 the public docket with Judge Leon, those remain on the public
13 docket.

14 THE COURT: Judge Leon's, that wasn't under my
15 purview.

16 MR. AHERN: Right. Right. But just generally, we
17 have filed some and that's sort of the basis as what we see as
18 the problems here. The one problem I've touched upon, and
19 it's the complexity of the task, even though presumably to
20 create an unclassified return -- unclassified exhibits, the
21 Court indicates that it goes to an agency, the agency redacts
22 whatever appears to be classified, it comes out and it's
23 deemed unclassified.

24 The nature of this information, though, is such
25 that it is intertwined with -- not just classified and

1 unclassified material, but also unclassified and sensitive
2 material. Unclassified material that may allow a party to
3 find classified material and unclassified material that
4 implicates other agencies' interests that are not apparent on
5 the face of the document and that other agency's interest is
6 clarified.

7 So, the notion of redacting simply based on
8 paragraph markings or any other basis is insufficient to
9 protect the information in these unclassified returns.
10 Especially if they were released to the public in a large mass
11 all at once. So, we have concerns and we have identified --
12 in fact, I think we have identified specifically for the
13 Court, but we are aware of particular instances where
14 information that ought to have been redacted was not, and
15 we're concerned about those mistakes.

16 THE COURT: I understand that, but does that meet
17 the requirements in Parhat and Bismullah where they are pretty
18 clearly stated that -- where you request to seal every
19 unclassified return clashes, I think, with their decisions
20 saying that you have to have a specific to the information
21 that you seek to protect or you have to show your basis
22 specifically.

23 In other words, the specificity requirement
24 articulated in Parhat and Bismullah, how can that be met by
25 saying, we have made a mistake and we're concerned that the

1 inadvertent release of unclassified factual returns could
2 expose individuals or the national security issues.

3 Is that specific enough to satisfy what I think the
4 circuit has laid out as what we're supposed to follow here,
5 even though those cases involved a different situation
6 perhaps.

7 MR. AHERN: It is, Your Honor. And it has to do
8 both with the nature of the interest implicated and the volume
9 that we're talking about. We have specified the problems that
10 we see in these unclassified returns, it is -- relatively
11 speaking, it is a narrow category of the paper that is flowing
12 in the course of this litigation. The unclassified returns
13 are a distinct subcomponent of information that's implicated
14 in this litigation.

15 We have identified with specificity the concerns
16 that we have, the national security implications of proceeding
17 to file these on the public record or to broadly disseminate
18 them. So, I think Parhat is satisfied in this case because we
19 have made that specific showing. But more to the point, I
20 think that Parhat did not necessarily contemplate the problem
21 at issue here, which is what we are concerned about in this
22 narrow category of information, is what we don't know yet.
23 And it's hard to specify what needs to be protected if the
24 concern is that things that have not been identified as needed
25 to be protected are going to be released.

1 In order to ensure that all of those interests are
2 accounted for, in order to ensure that there is no information
3 that slips through that would allow an adversary to collect up
4 and form a complete picture as recognized in Hulkin (phonetic)
5 and in Simms, as a legitimate concern for the intelligence
6 agencies. The only way that we can do that is to protect all
7 of this information until it has a chance to go through the
8 multiagency process, and to allow each agency to review it for
9 its own interests and to make sure that we aren't --

10 THE COURT: Most of the unclassified returns have
11 been filed, the greater majority of them, right?

12 MR. AHERN: That's correct.

13 THE COURT: There are only very few outstanding?

14 MR. AHERN: That's right.

15 THE COURT: So, you should be able to complete a
16 declassification review rather expeditiously?

17 MR. AHERN: No, Your Honor, that's not true. It's
18 not true because of all of the things that I started out with
19 here. The same individuals who are -- would be responsible
20 for conducting this multiagency review in order to process
21 these documents for broader release are right now engaged in
22 the process of discovery, and incidentally, in the process of
23 creating declassified versions of material so that the
24 detainee can have the most information to challenge his
25 detention. And that's --

1 THE COURT: Obviously, the resources that you had
2 to use to produce the unclassified returns are now the
3 resources you have available for the declassified returns?

4 MR. AHERN: But those same resources are processing
5 declassified information on a priority basis. At the
6 detainee's request they are processing discovery -- they are
7 clearing documents for even classified production. They're
8 going through all of those tasks that are involved in
9 litigating 150 cases right now.

10 The agencies are tapped to the absolute limit of
11 their resources, I think it's fair to say. And to take them
12 off of that task to start producing unclassified returns I
13 think would have the impact, not just of delaying the
14 litigation, but I think it would have an adverse impact on the
15 detainee's ability to challenge their detention. Because the
16 bottom line is that what we're trying to get to here and the
17 process that we're mapping out for the Court gives the
18 detainee the most information that he can have, and gives him
19 priority over the public, over more broad dissemination.

20 And I think that's appropriate because this Court
21 and the Government have the mandate to proceed expeditiously
22 in these cases. Mindful also of the need for the Government
23 to protect the unique nature of this information.

24 THE COURT: Is it your understanding that once you
25 do complete a declassification review of a particular factual

1 return -- unclassified factual return, that it would be made
2 public or that there's a possibility that such a declassified
3 return could be filed as protected for some other reason and
4 not made public?

5 MR. AHERN: Our end state, Your Honor, is to file
6 the fully declassified publicly releasable versions of the
7 returns on the public record.

8 THE COURT: There is a case before Judge Bates,
9 Hamlily, H-A-M-L-I-L-Y, where I believe the Government sought
10 to declassify portions of a declassified return as protected.

11 MR. AHERN: The declassified -- again, it goes back
12 to the multiple versions of declassified documents. The
13 returns that were at issue in Hamlily, and there may have
14 been -- because Hamlily was the only one that got this far,
15 but the return at issue there, it was created as a detainee
16 only version. One of these versions that is -- in the
17 calculus of what could be declassified, the agency looked at
18 it as it is being disseminated to a limited audience, and that
19 affected the amount of information that could be released.

20 In order to protect that and to limit it to its
21 dissemination, it was designated as protected, and we
22 specified that it was for the detainee's eyes only. Now,
23 again, separately, and this is also in front of Judge Bates,
24 incidentally, we are in the process right now of creating
25 these declassified documents for slightly broader

1 dissemination so that witnesses and experts can see them.

2 THE COURT: On the generic -- on the big view that
3 we're looking at, not the individual case, I want to be sure
4 that we're not in a Catch 22 where the Government says we will
5 declassify these as expeditiously as possible and make them
6 public, and when that occurs then you make them protected --

7 MR. AHERN: That is not our intent, Your Honor.

8 THE COURT: -- with certain issues that you have.

9 MR. AHERN: That's not our intent. Like I said,
10 the end state is to get to a declassified publicly releasable
11 version. Now, will that declassified publicly releasable
12 version, will that differ from the detainee version? Yes.
13 Will it differ from the expert witness version? Perhaps. But
14 it will be a product that has gone through the multiagency
15 process, that has been fully reviewed, that has mitigated
16 these concerns about mistakes and about the mosaic theory
17 ability to collect diverse bits of information and will be
18 releasable to the public.

19 THE COURT: Is there any suggestion that you can
20 make to the Court, the duration of the requested designation
21 as protected for these unclassified returns, keeping them from
22 the public? I don't know if we're talking about 30 days, 100
23 days or 5,000 days. I just have no concept of where we are
24 with what you've explicated as a burden upon the Government to
25 declassify these returns in light of other litigation.

1 MR. AHERN: In some respects it depends, Your
2 Honor. If we were to drop everything right now to review the
3 unclassified returns, get them into a form where they could be
4 publicly fileable, I think we would be talking about something
5 on the magnitude of months, and it would be a rolling basis
6 like with the factual returns. But everything else would stop
7 in order to do that.

8 And my uncertainty about when we get to the end
9 state has to do with the natural course of the litigation in
10 front of the merits judges. To the extent that we are
11 involved in the discovery -- to the extent that we're still
12 clearing documents, these massive amounts of documents, still
13 trying to declassify information for various purposes, the
14 public release of that information I think would be on hold
15 until we get the litigation to the stage where we can turn
16 these resources to producing publicly releasable versions.

17 I suspect that -- it seems to me, and this is just
18 my outside view, but it seems to me that the litigation is
19 proceeding in front of the merits judges. There is certainly
20 a lot of discovery going on, so I anticipate that being done
21 within the next few months, at least by the end of the summer.
22 And then I think, at least if we can remain faithful to the
23 schedule that the Court seems to anticipate, I think at that
24 time we can start producing the publicly releasable versions.

25 THE COURT: Is there a concern, though, still that

1 despite the burdens on the Government, and I'm not treating
2 them lightly, that you're asking me to bless the Government's
3 unilaterally determining whether this information is protected
4 without specific facts as to each factual return --
5 unclassified factual return, which was prescribed in Bismullah
6 and Parhat by saying -- I guess Parhat said by resting its
7 motion to nary claims applicable to all of more than 100 cases
8 in which the motion is filed, the Government has effectively
9 duplicated its request unilaterally to determine whether
10 information is protected.

11 They denied that saying that the generic assertion
12 of need to protect information wasn't sufficient.

13 MR. AHERN: Leaving aside the different context of
14 Parhat, except for the fact that Parhat was not concerned with
15 the public dissemination of that information, but what we are
16 faced with here is something a little bit different. These
17 returns are much more fulsome than the records at issues at
18 Parhat, and we are talking about disseminating them into a
19 much broader universe than even the Parhat court anticipated.

20 I think that to remain faithful to Parhat, we have
21 designated and we have specified exactly what our concerns
22 are. We have limited the specification to this limited
23 universe of filings within the overall litigation. And I
24 think to force the Government to specify what it needs to
25 protect when the entire issue is that the pace of this and the

1 scale of it makes us -- you know, we're not sure exactly what
2 we need to protect, it kind of puts us to a Hobson's choice
3 essentially.

4 We cannot designate with a specificity that the
5 Court seems -- that the Court implies that Parhat requires,
6 line by line information to protect if we don't know in fact
7 that it needs to be protected. And that is the entire harm
8 that we're asking this Court to assist in preventing.

9 THE COURT: All right. Thank you, sir.

10 MR. AHERN: Thank you, Your Honor.

11 THE COURT: The petitioners want to address the
12 Court next then, and I'll hear from the press after that.

13 MR. REMES: Thank you, Your Honor. David Remes for
14 the petitioners.

15 THE COURT: Mr. Remes, thank you.

16 MR. REMES: Here we are, Your Honor, nine months
17 after Boumediene still trying to extract from the Government
18 information that it concedes it should provide. This is
19 information it should have provided a long time ago. Every
20 time we come into a hearing on this kind of issue, Your Honor,
21 the Government says: The task is huge, but we're going to
22 move heaven and earth to get it done because we know it should
23 be done expeditiously. And every time the Government asks for
24 something in order to speed things up, it slows things down.

25 This is exactly what happened when the Court issued

1 its order on July 8th requiring production of the first set of
2 amended returns in September. The Government blew that
3 deadline off claiming burden, unanticipated burden, and
4 requested a relief from its own deadline. The Court,
5 appreciating the burden issue that the Government had raised,
6 granted the request for extension.

7 Now, while the Government was laboring in moving
8 heaven and earth to produce the classified returns, it was
9 putting these classified returns through multiple layers of
10 agency review. Not just review through the authorizing
11 agencies, but through a separate level of review by the CIA in
12 order to ensure that there would be no inadvertent disclosure
13 of individual facts by the authorizing agencies that might
14 produce the mosaic that the Government says it's concerned
15 with.

16 So, the Government did not, despite that process,
17 produce a classified return and an unclassified version of the
18 return concurrently, which it logically should have done. No.
19 The Government said it's too huge a burden but we'll move
20 heaven and earth to get the unclassified versions out. The
21 Government then slowly began producing unclassified versions,
22 except it designated these unclassified versions, protected in
23 their entirety, which as Your Honor notes was contrary to
24 Parhat, contrary to Bismullah.

25 The Government's argument boils down to the

1 proposition that we can't follow Parhat or Bismullah because
2 what we're dealing with here is a mosaic problem, and
3 therefore, it's impossible for us to pinpoint the particular
4 information in a particular unclassified return.

5 So what they're essentially doing is leap-frogging
6 over Parhat and Bismullah and this Court's orders --

7 THE COURT: Is there any distinction in Parhat
8 or -- that involved disclosure of classified information?
9 Wasn't Parhat directed to that -- I mean, here -- I'm sorry,
10 the Government here is trying to prevent disclosure of
11 inadvertently disclosing classified information in what they
12 call unclassified returns where they miss something?

13 MR. REMES: Well -- I'm sorry, Your Honor.

14 THE COURT: In Parhat they would provide -- to try
15 to stop the disclosure of unclassified information. I don't
16 know if that's a distinction or a difference, but I thought
17 they had some distinction. And the other distinction, I
18 thought that Parhat may have been -- the Government didn't
19 give any end to the gain. In other words, they were going to
20 seal these and there was no suggestion when they could ever be
21 seen.

22 Here they're making some suggestion, as I take it
23 from the statements of counsel, that they are going to file
24 declassified returns which will be made public. When that is,
25 I don't know. But I think they're making that approach. That

1 coupled -- let me just ask you that with this question coupled
2 with it.

3 Additionally, I don't think petitioners, meaning
4 your clients, contest that there have been errors made in the
5 unclassified returns. They have released some things
6 inadvertently that they shouldn't have. Things being put in
7 the public document that they shouldn't have.

8 MR. REMES: Our position is, A, that hasn't been
9 established. And, B, if anything, there has been massive
10 over-redaction in the returns, not under-redactions.

11 THE COURT: Are you referring to an article that
12 appeared in the Washington Post on a cooperator, for instance,
13 naming --

14 MR. REMES: Excuse me, what --

15 THE COURT: I'm referring to an article in the
16 Washington Post that referred to a cooperator, naming the
17 cooperator, releasing that to the public, including to foreign
18 individuals in other countries that could affect that person's
19 family, which I think may have occurred because of inadvertent
20 disclosure of documents on the record that should not have
21 been disclosed.

22 I mean, when we have that activity, does that cause
23 a concern for the Court to stop and say, wait, are we pushing
24 this too far too fast? Are there some concerns we should
25 have, and at least temporarily sealing things until we're sure

1 they're ready to be released.

2 MR. REMES: Your Honor, you're right, it is a
3 timing question. But in terms of moving too far too fast,
4 it's been nine months since Boumediene came down, and now the
5 Government is talking about a process that may take a few
6 months longer, in spite of the fact that habeas is supposed to
7 be an expeditious and meaningful remedy.

8 They should have produced unclassified returns
9 concurrently with their classified returns. They should have
10 done proper redactions when they released their unclassified
11 returns. Now they're presenting the Court with a fait
12 accomplis where the Court can't require them to justify their
13 designation of information as protected because they might
14 have missed something which would then come out and form part
15 of a mosaic that our enemies could use against us. So, the
16 real issue is what should be done next.

17 It's our contention, Your Honor, that the
18 Government should be required to submit to the Court within 7
19 days, 14 days, all of the classified returns in either
20 redacted or declassified form. I'll point out that when the
21 Government filed this motion with respect to protected
22 information on December 29th of 2008, four months ago -- I
23 think it's four months ago. The Government said that it was a
24 huge job, but it was going to move heaven and earth to provide
25 declassified returns.

1 My understanding, without having done a thorough
2 census of petitioner's counsel, is that the Government has
3 produced very few returns that have been put through
4 declassification review. I'm talking about entire returns.
5 It has produced some information that has been put through
6 declassification review. But even there, Your Honor, there
7 are a lot of instances in which the Government continues to
8 designate that information as protected, or what is the
9 functional equivalent here for official use only, FOUO.

10 So, our submission would be, Your Honor, that the
11 Court has to hold the Government's feet to the fire. The
12 Government, I will say this harshly, has been playing fast and
13 loose here. The reason that it is under such resource strain
14 is that it's devoting all of its resources to fighting us
15 tooth and nail on absolutely everything. And if it approached
16 the litigation in a more constructive way, rather than seeking
17 to obstruct it, it could put its resources to use, too.

18 THE COURT: Let me --

19 MR. REMES: To provide us with the information to
20 which we're entitled.

21 THE COURT: How are petitioners harmed in their
22 applications and their proceeding to get their habeas heard on
23 the merits by having these unclassified factual returns
24 protected for the time being? I mean, you can see them. I
25 take it the petitioners can see them. And those who have,

1 under the protective order that are allowed to see them,
2 witnesses or experts, have access to those, I take it.

3 MR. REMES: Your Honor, I would state that the
4 principal problem is that for any third party to see the
5 protected information they have to sign the Memorandum of
6 Understanding, which puts them in the position of having to
7 comply with the protective order under penalty of court
8 sanction.

9 Now, I submit, that going to a shop keeper in
10 Ta'izz, Yemen, and telling him: Please look at this
11 information, give us your reactions, tell us whether you think
12 it's right, tell us whether you think it's leaving something
13 out. And, oh, by the way, before I can show it to you I have
14 to give you the Memorandum of Understanding which requires you
15 to comply with a protective order, and by the way, you can be
16 held in contempt of court if you happen to violate this.

17 It really hamstrings our ability to develop
18 witnesses, and also hamstrings our ability to gather
19 witnesses -- I mean, to gather experts, because however
20 well-intentioned a potential expert or witness may be, I can't
21 say that everybody would be eager to submit themselves to a
22 protective order on pain of contempt sanctions.

23 The other aspect of it, and we point out the public
24 interest issue that's involved here, is our own right to
25 petition other branches of government as a means of resolving

1 the litigation in this case. That entails our making the
2 information public, and finally, Your Honor, we can show the
3 protected unclassified information to our clients. The
4 Government makes a lot of that point.

5 We can't mail it to our clients. We can't take it
6 out of the room with us -- I mean, we can't leave it with the
7 client when we go out of the room because of the possibility
8 that the client will show it to another prisoner. And the
9 prisoners are not allowed to be shown this information in
10 order to address the accusations that are made.

11 So, even though the information is unclassified,
12 the protected status of it prevents the petitioners from
13 meaningfully confronting his accuser. So, at the end of the
14 day, Your Honor, we do believe it's a question of timing.
15 When the Government says, you know, in a few months we may get
16 this done and we don't want to slow things down so they can
17 have merits hearings. Well, we can't have merit hearings if
18 we don't have the means to prepare effective traverses, and we
19 can't prepare those without witnesses and experts.

20 THE COURT: All right. Did you have any comment at
21 all -- the Government suggested that there may be different
22 types of declassified returns, that some you can show to the
23 whole public, some can be only for the experts. I mean, they
24 seem to be indicating there is distinctions among them.

25 MR. REMES: Well, it reminds me of the exchange

1 between Alice and Humpty Dumpty, which is, a word means what I
2 say it means. Whenever the Government chooses to put
3 something out, it's because there's no problem. When the
4 Government seeks to withhold something, it's because it thinks
5 there is -- it says there is a problem.

6 At the end of the day it has put out on the public
7 docket unclassified information that's not protected. And
8 maybe its point is that they are only a few grains there and
9 you can't weave that into a mosaic, or it's petitioner
10 specific. But to me that is sort of baffle-gab, I don't know
11 how to answer it, I don't know how to penetrate it.

12 THE COURT: Presumptively, if getting these
13 declassified then would allow you, as you're saying, to
14 attempt to contact and review these statements -- declassified
15 statements with others who may be witnesses on behalf of one
16 of your clients, I mean --

17 MR. REMES: Or experts.

18 THE COURT: Or experts or other detainees.

19 MR. REMES: Or potential accusers, and to exercise
20 our rights of petitioning.

21 THE COURT: All right. Thank you, Mr. Remes. I
22 appreciate it. Let me hear from the press as to their
23 rationale that these should be made public now that -- as a
24 permissive intervener for a limited purpose only. What does
25 it do to make these unclassified documents that may have

1 inadvertently or, as we just heard, make a mosaic -- make a
2 map that people can make sense of, released totally to the
3 public at this time without further review unclassifying them?

4 MR. SCHULZ: Judge, let me just be clear about the
5 relief that we're requesting and the nature of the argument
6 that's being advanced by the press here. Because it is
7 different from the concerns of the petitioners, but it's also
8 not fairly characterized by the Government's response, and it
9 doesn't fairly meet the issues that we're raising. The press
10 is not here saying that the public must get these returns if
11 they are going to jeopardize national security.

12 What the public is saying is that the Government
13 has an obligation to demonstrate to the Court that the
14 information they want to withhold is properly withheld. They
15 haven't met that. And the reason that this is important, the
16 reason that the press is here standing up on its hind legs
17 saying, Judge, we need some help, is not just because the
18 public has a right to know why these individuals are being
19 held. That's an interest that is aligned with the petitioners
20 here.

21 But it's because the public has a right to know
22 that these proceedings are fair. That American justice is
23 being carried out fairly. That's why the public is allowed to
24 come to these proceedings and to look at court records. It is
25 also an opportunity for the public to exercise Democratic

1 control over their elected officials. They can't do that if
2 they don't know what's going on.

3 The fundamental problem we have, as we lay out in
4 the papers, once you recognize that there is a public right of
5 access to these proceedings, there are standards the
6 Government must meet if it's going to withhold them. The
7 Government just stood here and said: We've met our burden,
8 we've specified our reasons. Well, with all respect, they
9 absolutely have not. We're back before Bismullah.

10 In Bismullah the Government was arguing to the
11 Court of Appeals that they should be allowed to withhold
12 information from the public record because it might create a
13 threat to national security. The Government said no. In
14 Bismullah they were quite clear and unambiguous.

15 THE COURT: Slow down.

16 MR. SCHULZ: They said the Government must come
17 forward, quote, must give a court a basis for withholding
18 specific information from public review. So they come back in
19 Parhat, they say, all right, here is our basis. We have two
20 things that we want to withhold. We want to withhold names of
21 people and we want to withhold law enforcement sensitive.

22 And the Court of Appeals said, you didn't
23 understand us, you're making the very same argument. You're
24 saying the executive branch is going to decide this without
25 the Court having a role, because you're saying we'll decide if

1 it's law enforcement sensitive. They said, you must be
2 specific. Well, we're back here now, and they're saying, we
3 can't be specific because we don't know what we need to
4 withhold because we can't be sure what the risks are --

5 THE COURT: Slow down.

6 MR. SCHULZ: Sorry. So that they are -- it borders
7 on contempt of court. They've been told twice now that they
8 have a duty to make specific designations of information that
9 they're going to withhold from the public or the stuff -- if
10 they're to meet their burden. We're not here saying the
11 public has to get information that's going to hurt national
12 security, but we are here saying that if this country is going
13 to live by a rule of laws, the Government should be held to
14 its obligations.

15 And while I believe the Government is acting in
16 good faith here, you know, in terms of saying that they have
17 these problems, what would you expect the Government to say if
18 it was trying to keep embarrassing information secret? What
19 would you expect the Government to say if these documents were
20 going to reveal illegal actions by Government employees?
21 They'd be saying the kind of things that we say here. How are
22 the citizens of this country to judge what's going on if they
23 haven't made the types of showings that are required to be
24 made, and if the courts aren't the ones making the decision
25 that the information can be kept secret. That's all we're

1 saying, let's follow the rules.

2 THE COURT: If --

3 MR. SCHULZ: We're not predetermining an outcome
4 here, but we're saying there are rules that must be followed.

5 THE COURT: If the public's interest in accessing
6 these unclassified returns, as you said, to learn what's going
7 on, is it diminished or is it -- lessens any harm of immediate
8 disclosure if there is a deadline by which the Government will
9 file declassified factual returns that will be made public?

10 MR. SCHULZ: I think that that's an important part
11 of protecting the public's right here again, Judge. Our
12 position is that there has to be a judicial determination that
13 the Government has followed the rules in keeping information
14 from the public. If there are grounds for doing so, fair
15 enough, but a judge makes that decision.

16 It's not sufficient and it's not narrowly tailored
17 for the Government, particularly after two rulings from the
18 Court of Appeals, at nine months and a Case Management Order
19 that contemplates this being done in 14 days, to say we'll get
20 to it. That's not narrow. There should be a deadline and
21 they should be held to it.

22 THE COURT: I accept your premise that the
23 Government has specifically in each factual return set forth
24 the rationale as to why it should not be made public until
25 such time as they do a declassified return. Would that then

1 go to each individual judge as to each return?

2 MR. SCHULZ: I'm not totally familiar with the
3 ground rules under which these cases were consolidated for
4 case management, but our position would be that a judge must
5 make that determination. Whether it's -- I mean, presumably
6 it would be the judge who is most familiar with that
7 proceeding. But the Government has to come forward with a
8 specific designation, that's not to say mosaic theory, we
9 can't tell you what we need to withhold, so we're going to
10 withhold everything. We need to withhold this information and
11 here's why. You know, judges can make those decisions.

12 THE COURT: Has the Government been somewhat -- the
13 old phrase used to be hoisted on its own petard. By that I
14 mean, has the Government been attempting to satisfy the
15 demands of the Court and petitioners to move swiftly by
16 filing, quote, unclassified returns, sort of a new category
17 document, instead of fully declassifying the return before
18 they filed it?

19 They found itself in this situation now where they
20 are being hung out to dry, in essence, saying now you're going
21 to make unclassified returns public. Even though they tried
22 to accommodate the Court by moving quickly, because it would
23 take too long to do declassified returns. The Court said we
24 got to do something, so we created this unclassified return
25 category. So now they're being punished for doing that?

1 MR. SCHULZ: I don't think it's a question of
2 punishing or not punishing. I think it's a question of being
3 sure that the public's rights are vindicated here. And if the
4 Government has a legitimate -- again, we're not saying this
5 stuff has to come out tomorrow because -- but there has to be
6 a procedure in place and it's not sufficient for the
7 Government to say, we've met our burden by letting the Court
8 know our general concerns, that's not enough.

9 THE COURT: All right. I appreciate that. Thank
10 you for the assistance in this case. Does the Government want
11 to reply to that briefly, Mr. Ahern?

12 MR. AHERN: Just a couple of points, Your Honor.
13 It is, I reiterate, just a question of timing. To tag on to
14 the last argument from the interveners -- and I don't want to
15 embrace the Court's view that we've been hoisted on our own
16 petard, but certainly there have been a chain of events here
17 that lead us to this place.

18 Parhat, which has been discussed quite a bit this
19 afternoon, it also indicated to us that the returns that we
20 had to file in these cases had to be fulsome, they had to be
21 sourced. As a result, the returns include intelligence
22 reporting and source materials and things like that, a massive
23 amount of it, which is in some respects causing the problem
24 here with the unclassified returns.

25 The Court's animating premise, I think, in crafting

1 the CMO originally was to provide some information to the
2 petitioners themselves. And that is a critical difference
3 between what we're dealing with here and what the Parhat court
4 was dealing with. But, more specifically, the Government did
5 satisfy that requirement in rapid order. We did provide
6 information to the petitioners that they could use -- that
7 they could view to satisfy the Court's concern in crafting the
8 CMO.

9 I don't think this issue of releasing vast amounts
10 of information to the public really was contemplated at the
11 time. I mean, that's something that has come up subsequent.
12 And, you know, really, again, the last point on the
13 intervener's concerns, it is a matter of priorities. And in
14 order to allow the detainees involved here to challenge their
15 detention they need to come before the unclassified returns.

16 All we're asking is for the Court to allow us to
17 continue litigating these cases, to do the things that we need
18 to do to affect what Boundediene said, and later to turn to a
19 publicly releasable version.

20 THE COURT: The problem with that -- it sounds
21 reasonable. But the problem with that, as you look at it,
22 you're asking then to continue to litigate these basically in
23 secrecy when there is certainly a right of the public to know
24 what's going on. Without clearly defining what you want to
25 withhold from the public as matters of national security or

1 not until some later time that's undefined.

2 MR. AHERN: At this point maybe it's helpful to
3 turn to the second prong of the Press Enterprises case, you
4 know, just whether the First Amendment right attaches in the
5 first place. Is there some positive benefit to the public and
6 the press in terms of the judicial process. Necessarily,
7 regardless of what comes out of the declassification process,
8 regardless of what is released to the public in an
9 unclassified return, the evidence that will be presented and
10 that will be adjudicated in these cases is largely going to be
11 classified. It's not going to be publicly released.

12 We will file on the public record as much
13 information as can be released, but that is not by no means
14 saying that it's going to be everything. I think the Court
15 appreciates that, and that is sort of the unique aspect of
16 these cases. So, I don't think that there is any purpose
17 served by forcing the release of this information publicly in
18 terms of acting as a check on the judicial process at this
19 stage. That wouldn't, frankly, be well-served later on when
20 we can file the declassified information as well as the
21 declassified pleadings and all of the other information that
22 goes into this litigation.

23 And I would like to address just the time gap here.
24 Petitioner's counsel makes much of the fact that this motion
25 was filed months ago and there haven't been any unclassified

1 returns presented on the public record since that time. And
2 the reason for that is simply all of the reasons that I laid
3 out to the Court initially. We have since -- since the CMO
4 was finalized, these cases have taken off, as the Court is
5 well-aware, they are in active litigation across all of the
6 merits judges.

7 And the individuals who would have turned to doing
8 the unclassified returns, doing essentially a declassification
9 scrub just to get the unclassified returns to a point where
10 they can be publicly fileable are right now doing declassified
11 documents individually across all of these cases on a priority
12 basis, to be fair to all of the petitioners, in order to get
13 into their hands the most information that they can have.

14 And all we're asking the Court is to give us the
15 time to do that. To see this litigation through expeditiously
16 and then later on turn to releasing the information to the
17 public.

18 THE COURT: All right. Thank you, sir.

19 MR. AHERN: Thank you. Do you want to respond
20 briefly, Mr. Remes?

21 MR. REMES: Your Honor, I wanted to suggest that it
22 be left to the merits judges to --

23 THE COURT: Come to the podium, please.

24 MR. REMES: Your Honor, I wanted to suggest that it
25 be left to the merits judges to set the deadlines for

1 declassification of the returns. If the Government says that
2 it needs to do that rather than specify the redactions, then
3 these deadlines should be awfully short. If the Government is
4 to do the specified redactions, then that deadline should be
5 very short. But in all events, it would seem appropriate for
6 the individual merits judges to make those determinations in
7 the particular circumstances of the particular case.

8 THE COURT: All right. Thank you. I appreciate
9 that suggestion. Obviously, I have looked at that as an issue
10 before the Court, having done the protective order, but
11 returning the cases basically to the individual judges for
12 merits litigation. The concern is, obviously, having -- I
13 guess now we have 12 active judges, having three vacancies,
14 and a couple of senior judges working on them, managing their
15 own litigation and overall -- looking at the overall issues
16 that the Court needs to review to make sure that they are
17 moving appropriately ahead.

18 The Court is concerned because of Parhat and
19 Bismullah that the circuit having, as far as we can see -- I
20 can see, a rejected -- basically a blanket designation by the
21 Government of returns being protected, in essence. At the
22 same time, vis-a-vis petitioners, there are some effect upon
23 them as appears from Mr. Remes' arguments that it could limit
24 them in their ability to present their case, although not, it
25 seems to me, a tremendous disadvantage. Because under the

1 protective order they're allowed to use these materials for
2 people who acknowledge the protective order. And if they
3 won't acknowledge the response by the protective order, I'm
4 not sure that they should receive this kind of information.

5 But, in any event, the overall riding issue for the
6 Court is the circuit rules under Parhat and Bismullah and the
7 press's application for the public to have these returns -- or
8 at least declassified returns in a reasonable timeframe, after
9 the Government has satisfied that this information should
10 remain protected. The Government presents its statements that
11 they have to proceed with the litigation before each judge
12 individually in a hundred plus cases moving forward right now,
13 and declassified materials. And the Court -- and the
14 requirements and their time frames, and that they have no
15 abilities to proceed to declassify the overall unclassified
16 returns to have them made public at this time, but would do so
17 eventually. And claiming that they have, by the application
18 shown specifically, which is required under Parhat and
19 Bismullah.

20 It concerns the Court whether that's been shown by
21 the Government sufficiently. At the same time, I don't want
22 to interfere with the ongoing litigation in any way. And that
23 we're trying to move -- all judges in this court are setting
24 aside their civil dockets and they're trying to move forward
25 as required by the Supreme Court. And the Government

1 understands that, and are hopefully gearing up for that and
2 have been in the past.

3 Petitioners certainly have worked very hard and
4 their counsel very hard on this matter. It presents somewhat
5 of a Hobson's choice for the Court as to what is necessary for
6 the preparation of petitioner's cases and what is appropriate
7 for the Government to claim that they can list as protected
8 without showing more, under case law, in the circuit so far,
9 and balancing the issue of national security and inadvertent
10 disclosures. I think some have already occurred,
11 unfortunately.

12 The Court is going to take it under advisement, not
13 for long, but for a period of time to review this in an
14 attempt to resolve these issues so that we can move forward.
15 Whether or not it goes back to the individual judges and
16 causes them an additional burden, or whether the Government is
17 going to have to litigate each return individually with each
18 judge as part of their ongoing discussions and then provide
19 information to each judge at each return that would show
20 specifically why this unclassified return cannot be made
21 public, or that they will provide a declassified return in a
22 reasonable period of time remains to be seen.

23 At this time I'm going to leave the order in effect
24 as the Government has interpreted right now my protective
25 order and my Case Management Order that will protect these

1 matters that are designated by the Government until I rule.
2 And after that -- when I rule, the parties can take
3 appropriate actions. I will enter an order granting the press
4 status in this case as preventive -- not preventive -- as
5 permissive intervener so that they become a party to the case
6 for this limited purpose.

7 All right. All right. Thank you, Counsel, for the
8 arguments.

9 END OF PROCEEDINGS AT 3:30 P.M.

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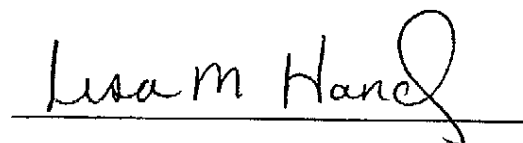
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I, Lisa M. Hand, RPR, certify that the
foregoing is a correct transcript from the record of
proceedings in the above-titled matter.



Lisa M. Hand, RPR