

[ORAL ARGUMENT NOT SCHEDULED]

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

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| ADEL HASSAN HAMAD, |) | |
| Petitioner, |) | |
| v. |) | No. 07-1098 |
| ROBERT M. GATES, Secretary of Defense, |) | |
| Respondent. |) | |

**NOTICE OF NEW CSRT AND MOTION TO MODIFY
COURT'S OCTOBER 31 ORDER**

On October 31, 2007, this Court issued an order bifurcating petitioner's petition for review under the Detainee Treatment Act ("DTA"), which challenges the final decision of his Combatant Status Review Tribunal ("CSRT"). The Court ordered that Claims II and III of the petition proceed to briefing according to the schedule previously established by the Court. See Order of Oct. 31, 2007. Pursuant to that schedule, petitioner's opening brief is due on November 14, respondent's answering brief is due on December 17, and any reply is due on December 31, 2007. See Order of August 24, 2007. The Court further ordered that the remaining issues be held in abeyance pending the disposition of the petition for rehearing en banc in Bismullah v. Gates, No. 06-1197, at which time the Clerk is to enter a separate briefing schedule to govern those issues. See Order of Oct. 31, 2007.

We hereby inform the Court that, based on new evidence, the Deputy Secretary of Defense has now directed that a new CSRT be convened to reconsider petitioner's enemy combatant status. As a result of that directive and as explained below, respondent respectfully requests that the Court modify its Order of October 31, 2007, to clarify that the briefing ordered is limited to pure questions of law and excludes arguments concerning sufficiency of the evidence.

1. On October 31, 2007, the Deputy Secretary of Defense directed that a new CSRT be convened to reconsider petitioner's enemy combatant status, based on new evidence. See OARDEC Instruction 5421.1 (May 7, 2007) (defining "new evidence" as "factual information that was not previously presented to the detainee's CSRT" and "that is material to the factual question of whether the detainee is an [enemy combatant]"). The new CSRT is designed to "reconsider the basis of the detainee's [enemy combatant] status [.]" Id. ¶¶ 1(b), 5(d). Should the new CSRT find that petitioner should not be deemed an enemy combatant, this matter will become moot. Should the new CSRT result in a finding that petitioner is an enemy combatant, he will be free to challenge that decision, including any claims regarding the sufficiency of the evidence or other fact-based claims, based upon the record of the new CSRT proceeding.¹

¹ In addition, there is a possibility that petitioner could be transferred from Guantanamo, at which point this Court's jurisdiction under the DTA would cease.

2. Ordinarily, respondent would seek to remand petitioner's case in light of the agency's decision to convene a new CSRT, and we believe that a remand in this case would be reasonable and appropriate. See, e.g., Respondent's Motion to Remand, or, In the Alternative, To Hold in Abeyance Pending Further Proceedings of the Combatant Status Review Tribunal, filed in Al Ginco v. Gates, No. 07-1090 (D.C. Cir. Sept. 13, 2007). In light of the Court's order of October 31, 2007, however, respondent is prepared to proceed with briefing on the legal issues presented by Claims II and III of the petition. However, because a new record will be compiled in conjunction with petitioner's new CSRT, which will supersede the prior CSRT record, respondent respectfully requests this Court to clarify that record-based or factual issues, including sufficiency-of-evidence arguments, are not to be addressed in the parties' briefs.

The issue of the precise scope of the "record on review" is pending before this Court in respondent's petition for rehearing en banc in Bismullah. Because the agency has decided to convene a new CSRT, the record compiled for the new CSRT will be the "record on review" if and when this Court reviews the new CSRT's final

See DTA, § 1005(e)(2)(B) (limiting claims under DTA to those brought by aliens who are still detained at Guantanamo); DTA, § 1005(e)(2)(D) (jurisdiction under (e)(2) ceases when alien is released from DOD custody). Petitioner has been approved for transfer from Guantanamo, subject to the process of making appropriate diplomatic arrangements for his departure. That process is ongoing, and respondent will notify the Court if and when such a transfer is accomplished.

decision. Accordingly, it would be a waste of the Court's and the parties' resources to brief, argue, and decide factual or evidentiary issues based on the record pertaining to the prior CSRT.

Indeed, in its order bifurcating the issues, this Court rejected petitioner's suggestion to proceed with factual or record-based issues. Petitioner had sought to proceed with claims regarding the sufficiency of the evidence (e.g., Claim I), based on the existing CSRT record. See Response to Omnibus Motion to Stay Orders to File Certified Index of Record at 3, 14-15 (filed on October 4, 2007); Sur Response to Reply in Support of Motion to Stay Order to File Certified Index of Record at 2 (filed on October 31, 2007). Respondent opposed petitioner's request to proceed on record-based issues, but "le[ft] to the Court's discretion whether to grant petitioner's" request to proceed on "purely legal issues." See Reply in Support of Motion to Stay Order to File Certified Index of Record at 2 (filed on October 15, 2007) (emphasis added). Respondent explained that "Claim II (and possibly claim III) of the petition would appear to present such issues, while the remaining claims do not." Id. The Court subsequently ordered briefing on Claims II and III, implicitly rejecting petitioner's proposal to brief the sufficiency of the evidence. Thus, because the Court's order was apparently intended to limit briefing solely to the purely legal issues presented in the petition, the resolution of which might not be affected by the convening of a new CSRT for petitioner, we do not seek to remand petitioner's case.

3. Because petitioner has suggested that “Claim II requires the Court to review the sufficiency of the CSRT record as well as articulating legal standards,” Sur Response at 2, respondent respectfully requests clarification from the Court that the briefing on Claims II and III is limited to purely legal issues, and does not encompass sufficiency-of-the-evidence or other record-based arguments. As explained above, excluding from the briefing any factual or sufficiency-of-evidence arguments is appropriate given both the pendency of the record issue in the petition for rehearing en banc in Bismullah and the fact that the Department of Defense will be convening a new CSRT (and therefore compiling a new record). There is nothing to be gained by having the parties brief the merits of a record that will be superseded by the new CSRT.

We propose that the Court modify its October 31 order to limit the briefing to the following two legal issues, as presented by Claims II and III of the petition:

(1) Whether it is unlawful for the United States military to hold petitioner as an enemy combatant based on the facts found by the CSRT regarding his activities and/or actions and his place of capture, and

(2) Whether the enemy combatant definition is unlawful because it is vague.

CONCLUSION

For the foregoing reasons, we respectfully request that the Court modify its Order of October 31, 2007 to limit the briefing on Claims II and III to purely legal issues, as suggested by respondent's proposed statement of the issues.

Respectfully submitted,

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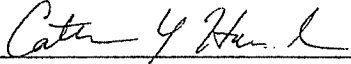
November 8, 2007

CERTIFICATE OF SERVICE

I hereby certify that on November 8, 2007, I filed and served the foregoing Notice Of New CSRT And Motion To Modify Court's October 31 Order by causing an original and four copies to be delivered to the Court via hand delivery, and by causing one paper copy to be delivered to lead counsel of record via e-mail and U.S.

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