[ORAL ARGUMENT SCHEDULED ON MAY 15, 2007]

Nos. 06-1197, 06-1397

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

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HAJI BISMULLAH, et al.,
Petitioners,
v.
ROBERT M. GATES, SECRETARY OF DEFENSE,
Respondent.

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HUZAIFA PARHAT, et. al.,
Petitioners,
v.
ROBERT M. GATES, SECRETARY OF DEFENSE,
Respondent.

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# BRIEF FOR RESPONDENT ADDRESSING PENDING PRELIMINARY MOTIONS

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PETER D. KEISLER
*Assistant Attorney General*

GREGORY G. KATSAS
*Principal Deputy Associate Attorney General*

JONATHAN F. COHN
*Deputy Assistant Attorney General*

DOUGLAS N. LETTER
(202) 514-3602
ROBERT M. LOEB
(202) 514-4332
AUGUST E. FLENTJE
(202) 514-1278
*Attorneys, Appellate Staff*
*Civil Division, Room 7268*
*U.S. Department of Justice*
*950 Pennsylvania Ave., N.W.*
*Washington, D.C. 20530-0001*

## CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

### A. Parties and Amici

In No. 06-1197, petitioners are Haji Bismullah, and Haji Mohammad Wali, as next friend for Haji Bismullah.

In No. 06-1397, petitioners are Huzaifa Parhat, Abdusabour, Abdusemet, Hammad Mehet, Jalal Jalaldin, Khalid Ali, Sabir Osman, and Jamal Kiyemba, as next friend for both Abdusabour and Khalid Ali.

In both cases, respondent is Robert M. Gates, Secretary of Defense.

### B. Rulings Under Review

These cases are petitions for review from the decisions of the Department of Defense Combatant Status Review Tribunals. With respect to *Bismullah*, No. 06-1197, on January 29, 2005, the Department made a final determination that Petitioner Bismullah, ISN No. 968, is an enemy combatant. See App. 212.

*Parhat*, No. 06-1397, involves seven different enemy combatant petitioners. The final determination for petitioner Abdusabour, ISN No. 275, was made on January 23, 2005. The final determination for petitioner Khalid Ali, ISN No. 280, was made on January 25, 2005. The final determination for petitioner Sabir Osman, ISN No. 282, was made on January 29, 2005. The final determination for petitioner Jalal Jalaldin, ISN No. 285, was made on January 23, 2005. The final determination for petitioner Abdusemet, ISN No. 295, was made on January 29, 2005. The final determination for petitioner Huzaifa Parhat, ISN No. 320, was made on February 20,

2005. The final determination for petitioner Hammad, ISN No. 328, was made on January 27, 2005.

### C. Related Cases

1. Petitioners in *Parhat* are parties to a pending habeas corpus case in district court. See *Kiyemba v. Bush*, No. 05-1509 (D.D.C.). In an appeal to this Court in that case, this Court held as to petitioners here that their claims are covered by Section 7 of the Military Commissions Act, and ordered that the cases be dismissed for lack of subject matter jurisdiction pursuant to *Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007) and provisions of the Military Commissions Act (28 U.S.C. § 2241(e)(1)-(2)). See *Kiyemba v. Bush*, No. 05-5487 (D.C. Cir. March 22, 2007).

2. The present cases were previously stayed pending this Court's ruling in *Boumediene v. Bush*, Nos. 05-5062, 05-5063 (D.C. Cir.) and *Al Odah v. United States*, Nos. 05-5064, 05-5095 through 05-5116 (D.C. Cir.). In its ruling in those appeals, this Court, *inter alia*, held that aliens detained at the U.S. military base at Guantanamo Bay, Cuba, do not possess rights under the U.S. Constitution. *Boumediene v. Bush*, 476 F.3d at 992. The detainees in those cases petitioned for review by the Supreme Court, which the Supreme Court denied on April 2, 2007.

3. The ruling in the present cases is likely to provide guidance for all cases filed under Section 1005(e)(2) of the Detainee Treatment Act. Currently, there are five other pending petitions filed under that statute in this Court:

a. *Paracha v. Gates*, No. 06-1038.

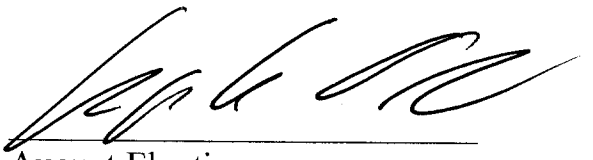
b. *Paracha v. Gates*, No. 06-1117.

c. *Abdulzaher v. Gates*, No. 07-1031.

d. *Madni v. Gates*, No. 07-1083.

e. *Mahnut v. Gates*, No. 07-1066.

4. Counsel is not aware at this time of any other related cases within the meaning of D.C. Cir. Rule 28(a)(1)(C).



August Flentje
Counsel for Respondent

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# GLOSSARY

ARB ..... Administrative Review Board

CSRT ..... Combatant Status Review Tribunal

DTA ..... Detainee Treatment Act

MCA ..... Military Commissions Act

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# BRIEF FOR RESPONDENT ADDRESSING PENDING PRELIMINARY MOTIONS

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Pursuant to this Court's March 14, 2007 orders, we address the preliminary procedural motions filed in the above-captioned cases.

## STATEMENT OF JURISDICTION

These petitions for review were filed in this Court pursuant to Section 1005(e)(2) of the Detainee Treatment Act of 2005 ("the DTA"), Pub. L. No. 109-148, tit. X, § 1005(e)(2), 119 Stat. 2680, 2739, which grants exclusive jurisdiction to this Court to review the "final decision" of a Combatant Status Review Tribunal

("CSRT") that "an alien is properly detained as an enemy combatant." The petition in *Bismullah* was filed on June 9, 2006 on behalf of one petitioner. The petition in *Parhat* was filed on December 4, 2006 on behalf of seven petitioners. The DTA does not contain a time limit for filing a petition; these petitions are accordingly timely under either 28 U.S.C. § 1658 (four-year limit after claim accrues) or § 2401 (six-year limit after claim accrues).

## STATEMENT OF THE ISSUES

These cases involve this Court's review of military determinations, based partially upon classified information, that petitioners are enemy combatants. The procedural motions now before the Court raise several issues.

**1.** To deal with the obvious national security implications arising in the context of review of decisions made by the U.S. military, based on classified information, regarding alien enemy combatant detainees held at a secure naval installation outside the United States, the Government has proposed a protective order that would: allow qualified private counsel access to classified information; create a confidential legal mail system so that counsel can consult with detainees on matters directly relating to their challenges to CSRT determinations; and allow a limited number of in-person visits between counsel and a represented detainee.[1] The

[1] The Government's proposed order is reprinted in the Appendix filed in this Court with petitioners' opening brief (see App. 72-135), and is discussed below.

Government has done so even though neither the Constitution nor the governing DTA requires access to classified information or enemy combatant detainees.

The first question presented is whether this Court should enter the Government's proposed protective order or instead, as petitioners request, should impose in these special proceedings the protective order used in the procedurally very different district court habeas litigation, which created substantial disagreements and security problems in its implementation.

**2.** This Court's review under the DTA of final CSRT determinations follows a familiar administrative-type review model. The second question presented is whether this review is to occur on the basis of the record before the CSRT or whether, instead, this Court should allow petitioners to engage in wide-ranging discovery, and should attempt to engage in its own factfinding.

**3.** The third question presented is closely related to the second one, and concerns whether this Court should agree with petitioners' proposal to appoint a special master to enable the type of fact exploration that petitioners urge.

**4.** The fourth question presented is whether the *Parhat* petition, which comprises seven enemy combatant challenges to seven different CSRT determinations, should be divided into individual DTA petitions.

## PERTINENT STATUTORY PROVISION

Section 1005(e)(2) of the DTA, as amended by Section 10 of the Military

Commissions Act of 2006 ("the MCA"), § 7, Pub. L. No. 109-366, 120 Stat. 2600, is reprinted in full in the Addendum to this brief.

## STATEMENT OF THE CASE

As described above, this brief addresses solely procedural motions in two actions filed under the DTA. Pursuant to this Court's orders of March 14, 2007, we are not here responding to petitioners' factual assertions (many of which the Government disputes), or addressing the merits of petitioners' DTA challenges.

## STATEMENT OF FACTS

### A. The Combatant Status Review Tribunals ("CSRTs")

**1.** On September 11, 2001, members of the al Qaeda terrorist network hijacked four commercial airliners, and crashed three of them into targets in the Nation's financial center and its seat of government. The attacks killed almost 3,000 people, injured thousands more, destroyed billions of dollars in property, and exacted a heavy toll on the Nation's infrastructure and economy.

The President took immediate action to prevent additional attacks, and Congress swiftly approved his use of "all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001." Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

The President ordered U.S. Armed Forces to subdue both the al Qaeda terrorist

network and the Taliban regime harboring it in Afghanistan. Active combat with al Qaeda, the Taliban, and associated forces remains ongoing. During these operations, the United States and its allies, consistent with the law and settled practice of armed conflict, seized many hostile persons and detained a small proportion of them as enemy combatants. Approximately 385 of these enemy combatants are being held at the U.S. Naval Base at Guantanamo Bay, Cuba. Each of the Guantanamo Bay detainees was captured abroad and is a foreign national.

**2.** In 2004, the Supreme Court held in *Rasul v. Bush*, 542 U.S. 466, 484 (2004), that Guantanamo detainees could seek in federal district court relief under the general habeas jurisdiction statute, 28 U.S.C. § 2241. Hundreds of habeas actions were filed in the district court by or on behalf of Guantanamo detainees. District Judge Green, in coordinating these many cases, ordered the Government to file factual returns – generally containing classified information – in many of the habeas cases, and ordered that the returns be provided to counsel for the detainees. *Rasul v. Bush*, No. 04-1254, Order at 8 (D.D.C. Sept. 20, 2004). In order to address civilian counsel access to classified materials and other matters relating to access to detainees at Guantanamo, the district court entered a protective order in November 2004 ("the Habeas Protective Order"). *In re Guantanamo Detainee Cases*, No. 02-299, et al., Amended Protective Order (D.D.C. Nov. 8, 2004).

Almost immediately, serious problems and disagreements arose over the

implementation of the Habeas Protective Order. For example, the parties disputed whether the order incorporated the standard "need-to-know" requirement that is a part of the Executive Order governing access to classified information. See *In re Guantanamo Detainee Cases*, No. 02-299, et al., Order (Jan. 31, 2006). That dispute led to an appeal to this Court (see *Al Odah v. United States*, Nos. 05-5117 through 05-5127), which has not been resolved.

In addition, conduct by private attorneys involving mail and visits to the military base at Guantanamo resulted in "situations threatening the safety and security of [Guantanamo military] personnel and detainees as a result of inadequacies in the Protective Order." App. 137.[2] These problems are described in part in the declaration of U.S. Navy Commander Patrick McCarthy (App. 136-40). As Commander McCarthy notes, his declaration recounts "only a sampling of the problems we have experienced at Guantanamo Bay under the Protective Order." App. 140.

Commander McCarthy describes how security procedures were broken by private attorneys through, among other acts, taking photographs or making sound recordings while on the base. App. 137-40. Further, the sheer number of civilian attorney visits, which were not limited by the Habeas Protective Order, "consumed

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[2] "App. ___" citations refer to pages in the Appendix filed by petitioners in this Court with their opening brief.

enormous resources and disrupted day-to-day operation of the base." 152 Cong. Rec. S10269 (Sen. Kyl). Congress recognized that the system of habeas litigation was extraordinarily burdensome and was causing serious problems in the war effort against al Qaeda and the Taliban.

**3.** In response, Congress enacted the DTA and the MCA. These statutes provide for exclusive review in this Court of CSRT decisions, and repeal habeas jurisdiction and the district court habeas system that Congress found so problematic. Under the DTA, this Court's task is to directly review the military determination that a petitioner is an enemy combatant. DTA § 1005(e)(2).

Enemy combatant determinations are made by Department of Defense CSRTs, which are modeled on the tribunals created under Article 5 of the Third Geneva Convention, implemented by Army Regulation 190-8. That process under the Geneva Convention provides for a tribunal of three military officers to determine a person's status.

**4.** Each Guantanamo detainee (including the petitioners here) received a formal adjudicatory hearing before a CSRT. The CSRT procedures relevant to the petitioners here[3] were established under orders by the Deputy Secretary of Defense and the Secretary of the Navy (see App. 1, 5), acting under authority designated by

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[3] Revised CSRT procedures were issued in July 2006: http://www.defenselink.mil/news/Aug2006/d20060809CSRTProcedures.pdf.

the Secretary of Defense. These procedures have been recognized by Congress. DTA § 1005(e)(2) (authorizing and detailing court "Review of Decisions of Combatant Status Review Tribunals").

CSRT procedures were created "to determine, in a fact-based proceeding, whether the individuals detained * * * at the U.S. Naval Base Guantanamo Bay, Cuba, are properly classified as enemy combatants and to permit each detainee the opportunity to contest such designation." App. 5. They define an enemy combatant as an "individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners." App. 1; see App. 8. Enemy combatants "include[] any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces." App. 1, 8.

**a.** These procedures created CSRTs composed of "three neutral commissioned officers" who were not involved in the "apprehension, detention, interrogation, or previous determination of status of the detainee." App. 1-2; see App. 8. One of the tribunal members must be a Judge Advocate. App. 2. Each tribunal "determine[s] whether a preponderance of the evidence supports the conclusion that each detainee meets the criteria to be designated as an enemy combatant," and shall "make a written assessment as to each detainee's status." App. 8; see App. 3. "[T]here shall be a rebuttable presumption in favor of the Government's evidence." *Ibid.*; see App. 13.

A CSRT is "free to consider any information it deems relevant," and "may consider hearsay evidence, taking into account the reliability of such evidence in the circumstances." App. 13.

**b.** Another military officer served as the Recorder, who provides the CSRT with the information generated with regard to a detainee. App. 2. The Recorder thus obtained and examined "the Government Information" (App. 17), defined as "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" (App. 10).

The Recorder presented 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 custody of U.S. or allied forces." App. 17. If 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." *Ibid.*

The Recorder also made a record of the proceedings, which consists of all the documentary evidence presented to the Tribunal, the transcript of all witness

testimony, a written report of the Tribunal's decision, and an audio recording of the proceedings (except proceedings involving deliberation and voting by the members). App. 2, 9; see App. 18.

**c.** The detainee may participate in the CSRT proceedings in several ways.

First, a personal representative was assigned to each detainee and performs several functions on behalf of the detainee. This personal representative is a military officer who "assist[s] the detainee in connection with the [CSRT] review process." App. 1. The representative "explain[s] the nature of the CSRT process to the detainee." App. 19; see App.20-21 (guidelines for explaining CSRT process). The personal representative reviews any reasonably available, relevant information in the possession of the Department of Defense, and may share unclassified information with the detainee. App. 1. And the personal representative assists the detainee in collecting relevant and reasonably available information, and in presenting information to the tribunal. App. 19. The personal representative may also "comment upon classified information * * * that bears upon the presentation made on the detainee's behalf." App. 20.

Second, the detainee was provided an interpreter, and may attend all CSRT proceedings, except the deliberations and voting by the CSRT, or for testimony and other matters "that would compromise national security if held in the presence of the detainee." App. 2; see App. 11.

Third, the detainee has the right to testify or otherwise address the Tribunal in oral or written form, but cannot be compelled to testify, and may "introduce relevant documentary evidence." App. 3. The CSRT may be "postpone[d] * * * to provide the detainee or his Personal Representative a reasonable time to acquire evidence deemed relevant and necessary to the Tribunal's decision." App. 12.

Fourth, the detainee may call reasonably available, relevant witnesses. App. 2; see App. 11. The CSRT shall "determine the reasonable availability of witnesses." App. 2-3. If a witness is not available, "written statements * * * may be submitted" instead. App. 3; see App. 11. The CSRT President must "document the basis for [the] decision" that a witness is not reasonably available or relevant, including "efforts undertaken to procure the presence of the witness and alternatives considered or used in place of that witness's in-person testimony." App. 13.

**d.** A "Legal Advisor" to the CSRT "review[s] each Tribunal decision for legal sufficiency." App. 9. This legal review must "specifically address Tribunal decisions regarding reasonable availability of witnesses and other evidence." App. 16. Further, the Legal Advisor is available to advise on legal, evidentiary, procedural, or other matters. App. 9.

After reviewing the CSRT decision, the Legal Advisor forwards the record and Tribunal recommendation to the Director, CSRT, who reviews the Tribunal's decision and "may approve the decision and take appropriate action, or return the record to the

Tribunal for further proceedings." App. 16. Once the Director approves a decision, "the case is considered final." App. 16.

Out of 558 CSRTs conducted as of March 2005, 38 resulted in determinations that detainees no longer met the criteria to be enemy combatants. See CSRT Summary, http://www.defense link.mil/news/Mar2005/d20050329csrt.pdf.

**e.** After a CSRT makes its determination, detainees have an opportunity to present new evidence to the Defense Department relating to their status. In the DTA, Congress required that new evidence reviews be conducted periodically when new information relating to the status of a detainee becomes available. See DTA § 1005(a)(1) & (3) (directing Secretary to promulgate procedures that, among other things, "provide for periodic review of any new evidence that may become available relating to the enemy combatant status of a detainee").

The Department's Administrative Review Board ("ARB") procedures provide for the annual consideration whether continued detention of an enemy combatant is appropriate. See ARB Mem., Enc. 13 (July 14, 2006) (latest version of ARB procedures) (http://www.defenselink.mil/news/Aug2006/d20060809ARB ProceduresMemo.pdf). In the ARB proceedings, the detainee is allowed to "present information relevant to his continued detention, transfer, or release." *Ibid.* The ARB process does not reevaluate a detainee's enemy combatant status, but instead determines whether an enemy combatant "should be released, transferred, or continue

to be detained" based on several factors, including whether the detainee "represents a continuing threat." ARB Mem., § 1.a.

"[N]ew information" presented during an ARB that "relat[es] to the enemy combatant status" of a detainee also "shall be brought to the attention of the Deputy Secretary of Defense * * * as soon as practicable." ARB Mem., Enc. 13. The Deputy Secretary of Defense "shall review the new evidence" and decide whether to "direct that a [CSRT] * * * convene to reconsider the basis of the detainee's enemy combatant status in light of the new information." *Ibid.* New information also may be considered outside of the ARB process. See generally DTA § 1005(a)(3).[4]

### B. Petitioners' Circumstances and These Cases

Petitioner Bismullah was captured in Afghanistan in 2003, and has been detained as an enemy combatant since that time.[5] In a hearing held on November 30, 2004, a CSRT determined that he is an enemy combatant. In June 2006, Haji

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[4] Once a detainee has been identified for release pursuant to an ARB, he might not be immediately transferred out of Guantanamo, because it could be difficult to locate a country that will accept him. A CSRT based on new material could be convened while the detainee is awaiting release, because the purpose of a CSRT – to determine if an individual was properly classified as an enemy combatant – is different from the purpose of an ARB.

[5] In their opening brief, petitioners make various assertions concerning their activities and their captures, as well as conditions at Guantanamo. The Government strongly disputes many of these claims and will present its response in the actual CSRT review proceedings before this Court. Pursuant to this Court's briefing order, such a factual discussion does not belong in this brief addressing the pending procedural motions.

Mohammad Wali filed a petition for review in this Court under the DTA. Wali states that he is Bismullah's brother, and is acting as his "next friend." Pet. at 6-7. Counsel has been allowed to visit Bismullah in person twice at Guantanamo (in June and August 2006), but has not submitted anything to this Court signed by Bismullah to suggest that Bismullah supports this lawsuit or wants counsel to represent him.

*Parhat* includes seven petitioners, who are ethnic Uighurs, alleging that they were captured in Pakistan in approximately December 2001. Pet. ¶ 54. Each was determined to be an enemy combatant in separate CSRT proceedings. See *id.* ¶ 137. These petitioners were each involved in a habeas case in district court that this Court recently ordered to be dismissed. See *Kiyemba v. Bush*, No. 05-5487 (D.C. Cir. March 22, 2007).

Petitioners seek to recreate in this Court the defunct habeas litigation regime that Congress emphatically rejected. Specifically, petitioners would have this Court reimpose the Habeas Protective Order and provide for discovery and a factfinding mechanism through appointment of a special master. Indeed, petitioners have specifically nominated Magistrate Judge Kay for this position, the same magistrate judge who was active in the habeas litigation regime. We instead propose a protective order designed for the new DTA proceedings exclusively in this Court, and assert that this Court's review is to be undertaken on the basis of the records developed by the CSRTs.

## SUMMARY OF ARGUMENT

In considering the numerous motions pending before the Court, it is essential to keep in mind what this litigation is actually about. At bottom, there is only one question presented: Should petitioners, who are detainees captured on a battlefield during a time of war, be given unprecedented access to our Nation's courts and to classified information, even after Congress emphatically rejected such an approach?

Ignoring the obvious answer to this question, petitioners seek three decisions from this Court in an attempt to recreate the habeas regime that Congress recently abolished. First, petitioners move for the entry of the district court protective order, which has no legal basis and has been proven to be flawed, unworkable, and violative of basic principles of separation of powers. Second, petitioners request extensive discovery and detailed fact-finding that is inconsistent with this Court's historical review of agency decisions and Congress's intent in enacting the DTA. Third, petitioners seek the appointment of a special master (indeed, the same special master who handled the district court proceedings) to assist with this free-wheeling factual exploration. As explained below, this court should reject every one of these interrelated requests.

**I.** First, this Court should reject petitioners' request for the district court Habeas Protective Order. The Court should adopt the Government's procedural order that: (1) provides properly cleared counsel access to most classified information in

a CSRT record; (2) creates a confidential legal mail system for counsel to consult with detainees regarding their DTA cases; (3) allows a sufficient number of in-person counsel visits to detainee clients at Guantanamo; and (4) in suits filed by "next friends" or pro se petitioners, permits counsel a lengthy visit to Guantanamo in person to seek authorization to represent the detainee.

There are strong reasons for this Court to refuse to reimpose the Habeas Protective Order in these new proceedings. First, the Habeas Protective Order is not appropriate for review under the DTA, a different review statute that calls for a different protective order. Second, the Habeas Protective Order had policing and enforcement difficulties in its confidential legal mail system, and allowed limitless in-person lawyer visits to Guantanamo. These provisions caused serious security and resource problems at Guantanamo – problems that Members of Congress specifically identified in replacing the habeas litigation regime. Third, Congress unambiguously rejected the Habeas Protective Order regime when it repealed habeas jurisdiction and replaced it with CSRT review by this Court. Finally, the order proposed by the Government provides for meaningful participation by counsel and places proper emphasis on protecting national security

The Government's reasonable proposal obviates a separation of powers clash because it enables this Court to properly perform its CSRT review function by allowing appropriate private counsel participation, while protecting essential security

interests in wartime. Petitioners' objections to the proposed order are meritless. First, a confidential legal mail system with a careful definition of legal mail and an enforcement mechanism is needed because of past abuses that threatened security at Guantanamo and to limit use of the confidential mail system to correspondence directly related to this Court's DTA review. Second, the number of in-person counsel visits to the Guantanamo military facility is limited to three, a plainly sufficient system for litigating the straightforward administrative review based upon the agency record, provided for by Congress. And the proposal to allow a single separate visit to seek authorization to represent a detainee ensures detainees an opportunity to consult with counsel in "next friend" suits. At the same time, the limits we propose respect detainee decisions not to authorize representation, and reduce the burden created at Guantanamo by the habeas regime.

**II.** Second, petitioners' request for discovery should be denied. Review in this case is of a final agency decision, and it is well established that such review is normally based on the record developed by the relevant agency. This scope of review is confirmed by: Congress's decision to lodge review in this Court and not a district court; the legislative history of the DTA and MCA; the applicable Federal Rules of Appellate Procedure; and the point that a factfinding role by this Court would lead to more extensive review than has ever historically been provided under the habeas statute in this context.

The fact that the DTA authorizes procedural challenges does not necessitate or justify factfinding by this Court. Most procedural challenges, including every challenge cited by petitioners, should be reviewable on the basis of the agency record, as the CSRT procedures provide that the foundation for key procedural decisions, such as evidentiary rulings, must be reflected in the CSRT record. Even in rare instances in which a procedural challenge cannot adequately be reviewed based upon that record, this Court's precedents call for a remand to the agency, not factfinding in the first instance by a court. Such principles should apply with even more force here, where the military is entitled to the highest level of deference in establishing and applying procedures used in connection with the detention of the enemy during wartime.

Petitioners are also flatly wrong in suggesting that discovery must be allowed because of their desire to show that CSRT Recorders failed to properly compile the records; rather, a strong showing of bad faith must be presented before this Court will look behind an agency's compilation of the record. Such a showing has not been made here.

**III.** Third, petitioners request for appointment of a special master should be declined. These cases are standard administrative law matters that should not necessitate the assistance of a special master. Indeed, such an appointment would constitute an improper step down the path to recreating the habeas litigation regime

rejected by Congress.

**IV.** Finally, the *Parhat* petition, which comprises seven separate challenges to seven separate CSRT determinations, should be divided into individually distinct DTA proceedings.

## ARGUMENT

### I. The Nature of this Dispute Requires Carefully Circumscribed Review by this Court and Careful Procedures for Counsel Access.

The scope of this Court's review and every procedural issue before the Court must be viewed under the appropriate analytical lens. That lens consists of several elements, including: (1) the historically narrow role for the courts in evaluating wartime-detention decisions (see, *e.g.*, *Yamashita v. Styer*, 327 U.S. 1, 12 (1946)); (2) the recent plurality decision in *Hamdi v. Rumsfeld*, 542 U.S. 507, 538 (2004), confirming this limited roll even with respect to the detention of U.S. citizens; (3) Congress's enactment of the DTA and the MCA, eliminating habeas review for Guantanamo detainees; (4) the fact that Guantanamo detainees do not possess any constitutional rights; and (5) long-standing separation of powers principles, which preclude the courts from aggressively stepping in to impose onerous procedural requirements on the Executive Branch during a time of war.

**A.** The power to make war includes at its core the power to detain enemy fighters. As the Supreme Court has explained, "[t]he war power * * * is not limited

to victories in the field, but carries with it the inherent power to guard against the immediate renewal of the conflict." *Yamashita*, 327 U.S. at 12; *Hamdi*, 542 U.S. at 519 ("detention to prevent a combatant's return to the battlefield is a fundamental incident of waging war"). The process granted to members of military forces captured on a foreign battlefield typically is that reflected in Article 5 of the Geneva Convention and Army Regulation 190-8, which provide, as do the CSRTs, for a military tribunal to determine the status of a detainee, and afford detainees neither a right to counsel nor access to classified information (nor, for that matter, review by a federal court). See Army Reg. 190-8, § 1-6.e(3) & (5); *Hamdi*, 542 U.S. at 538 (plurality op.) (reasoning that constitutional due process standards "could be met by an appropriately authorized and properly constituted military tribunal" under Army Reg 190-8).

These military procedures do not include a judicial review mechanism. And there is no significant history of federal court involvement in military determinations to hold enemy combatants abroad during ongoing hostilities. See *Johnson v. Eisentrager*, 339 U.S. 763, 774 (1950) ("[e]xecutive power over enemy aliens, undelayed and unhampered by litigation, has been deemed, throughout our history, essential to war-time security"); *Hamdi*, 542 U.S. at 524 (dissent could "point to no case or other authority for the proposition that those captured on a foreign battlefield * * * cannot be detained outside the criminal process"); 152 Cong. Rec. S10404 (Sen.

Sessions) (recalling that "[w]e held very large numbers of enemy soldiers in this country during World War II" but "[t]hey did not sue our Government seeking release").

Most precedents dealing with court review of military detainees involve circumstances where the military has imposed criminal sanctions (see, *e.g.*, *Yamashita*, 327 U.S. at 5); in those circumstances, habeas review is extraordinarily narrow. Normally, habeas courts provide only the most limited factual review of Executive Branch detention determinations. *INS* v. *St. Cyr*, 533 U.S. 289, 305-06 (2001). ("writ of habeas corpus has always been available to review the legality of Executive detention," but, "other than the question whether there was some evidence to support the order, the courts generally did not review the factual determinations made by the Executive"). In the context of wartime military criminal sanctions, judicial involvement is even more deferential. At most, "courts may inquire whether the detention complained of is within the authority of those detaining the petitioner," and such determinations are "not subject to judicial review merely because they have made a wrong decision on disputed facts." *Yamashita*, 327 U.S. at 8, 23.

**B.** It is with this background in mind that the Supreme Court in *Hamdi* addressed the process due a U.S. citizen to challenge a military determination that he is an enemy combatant. Nothing in that opinion suggests process remotely comparable to that sought by petitioners in this Court, nor does it support their

criticisms of the CSRT procedures. Indeed, the Supreme Court plurality spoke favorably about the Army procedures upon which the CSRT proceedings are based and share most important elements.

The Court plurality began by stating that the Due Process Clause would be satisfied by a straightforward and rudimentary procedure fashioned for wartime detention: "notice of the factual basis for his [enemy combatant] classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker." 542 U.S. at 533. Within that general framework, the proceedings "may be tailored to alleviate their uncommon potential to burden the Executive." *Ibid.* To that end, "[h]earsay * * *may * * * be accepted," and there may be "a presumption in favor of the Government's evidence." *Id.* at 533-34. This evidence may consist of "documentation regarding battlefield detainees already * * * kept in the ordinary course of military affairs." *Id.* at 534. This documentation can be presented by having a "knowledgeable affiant * * * summarize these records to an independent tribunal." *Id* at 535.

Courts, in reviewing "an administrative record developed after an adversarial proceeding" with "process at least of the sort" detailed above, have properly utilized the "'some evidence' * * * standard of review." *Id.* at 537. To this end, while not specifically resolving the viability of the Army Regulation 190-8 process under the Due Process Clause, the Court explained that it was "possibl[e] that the [due process]

standards we have articulated could be met by an appropriately authorized and properly constituted military tribunal." *Id.* at 538. Indeed, the Court explained, specifically citing Army Regulation 190-8, that "military regulations *already provide for such process* in related instances." *Ibid.* (emphasis added). And, even when there was *no* formal administrative process, the Court expressly rejected "extensive discovery of various military affairs" in a federal court. *Id.* at 528. Instead, it stated that the "factfinding process [must be] both prudential and incremental." *Id.* at 539. Rather than discovery, the Court stated that a habeas petitioner should be allowed simply "to present his own factual case to rebut the Government's return." *Id.* at 538.

**C.** The Defense Department established the CSRT procedures using this baseline set forth by the Supreme Court. And it is the limited administrative review model of a formal military determination – as opposed to the habeas court's review directed by the Supreme Court when no formal military process had been conducted – that Congress authorized in enacting the DTA and the MCA. Indeed, the construction of the CSRTs mirrors in many respects (and are more protective than in certain respects) the procedures described by the Supreme Court as "already" existing in Army Reg. 190-8 and calling for administrative-type court review (542 U.S. at 538).[6] The review scheme enacted by Congress seems plainly designed to invoke the

[6] Army Reg. 190-8, like the CSRT process, provides for a tribunal composed of three military officers (Army Reg. 190-8 § 1-6(c)); provides that proceedings involving classified information are not open to the detainee (*id.* § 1-6(e)(3), (5));

Supreme Court plurality's identification of review of such determinations upon the administrative record developed by the military. *Hamdi*, 542 U.S. at 537-38.

**D.** While the military and statutory procedures were based on the Court's plurality decision in *Hamdi* and Army Regulation 190-8, unlike the situation in *Hamdi*, the Constitution does not apply in the circumstances at bar. *Boumediene v. Bush*, 476 F.3d 981, 991 (D.C. Cir. 2007). Thus, not only is there plainly no right to counsel under the Sixth Amendment in these circumstances, the Due Process Clause also cannot here provide such a right or require other procedures. See *Boumediene*, 476 F.3d at 991 ("the [Supreme] Court concluded that with respect to aliens, 'our rejection of extraterritorial application of the Fifth Amendment was emphatic'"); see also *id.* at 1011 (Rogers, J., dissenting) (Guantanamo "detainees cannot rest on due process under the Fifth Amendment" because "the Constitution does not afford rights to aliens in this context"). Instead, whatever right petitioners "enjoy in regard to these cases are therefore statutory rights only." *People's Mojahedin Organization of Iran v. U.S. Dept. of State*, 182 F.3d 17, 22 (D.C. Cir. 1999).

And in evaluating the scope of these "statutory rights," national security and separation of power concerns play a dominant role. *Ibid.* In *People's Mojahedin*, this

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allows a detainee to call "reasonably available" witnesses or submit written statements if the witness is not available (*id.* § 1-6(e)(6)); does not provide for counsel (see *id.* § 1-6); allows, but does not compel, the detainee to testify (*id.* § 1-6(e)(7)-(8)); imposes a preponderance of the evidence standard (*id.* § 1-6(e)(9)); and provides for a recorder to prepare the tribunal record (*id.* § 1-6(f)-(g)).

Court addressed judicial review of administrative determinations in an area, like this one, fraught with national security implications and where the Constitution did not apply. (That case involved judicial review of a decision by the Secretary of State designating an entity as a Foreign Terrorist Organization pursuant to 8 U.S.C. § 1189.) This Court was careful to engage in a circumscribed form of administrative review – review based only upon the record prepared by the State Department, and review that declined to address issues of "national security" and "foreign policy decisions," which were "beyond the judicial function for a court to review." *Id.* at 23. This Court also explained that it would not judge the "the quality of the information in the reports [on which the Secretary based her terrorist designation] * * * something we have no way of judging." *Id.* at 25. Instead, this Court explained that "our only function is to decide if the Secretary, on the face of things, had enough information before her to come to the conclusion that the organizations were foreign and engaged in terrorism." *Ibid.*

This sort of limited review role is also envisioned by the DTA. Review in the case at bar, where the *Hamdi* plurality identified (542 U.S. at 543-44) and Congress specifically endorsed (DTA § 1005(e)(2)(C)(i)) a presumption in favor of the Government's evidence, should be of a similarly limited scope. See 152 Cong. Rec. S10403 (Sen. Cornyn) ("Weighing of the evidence is a function for the military when the question is whether someone is an enemy combatant. Courts simply lack the

competence – the knowledge of the battlefield and the nature of our foreign enemies – to judge whether particular facts show that someone is an enemy combatant"). Given the presumption, this Court should evaluate whether the CSRT had "enough information before" it to conclude that the detainee is an enemy combatant, without judging the quality of that evidence. *People's Mojahedin*, 182 F.3d at 25.

**E.** The final element that informs the Court's inquiry here is provided by background separation of powers principles. This case involves matters at the very core of the Executive Branch's authority – the conduct of war and detention of enemy belligerents to prevent their return to the battlefield. The procedures established by the Department of Defense for determining enemy combatant status as well as the procedures utilized by this Court in reviewing those determination touch upon an array of core Executive Branch functions: the detention of the enemy in wartime; the operation of a secure naval facility overseas; civilian access to enemy detainees; and the handling of classified national security information generated in connection with these detentions.

In each of these areas, the President's authority is at its apex and separation of powers principles call for the highest level of deference to the Executive Branch. See *Hamdi*, 542 U.S. at 531 (plurality op.) ("core strategic matters of warmaking" such as the detention of enemy combatants "belong in the hands of those who are best positioned and most politically accountable for making them"); *Department of Navy*

v. *Egan*, 484 U.S. 518, 527 (1988) ("authority to classify and control access to information bearing on national security * * * flows primarily from [Article II's] constitutional investment of power in the President and exists quite apart from any explicit congressional grant"); *Holy Land Foundation v. Ashcroft*, 333 F.3d 156, 164 (D.C. Cir. 2003). Furthermore, the President's authority is underscored by Congress's express acknowledgment of the CSRT procedures for the designation of enemy combatants and recognition that the procedures are to be "specified by the Secretary of Defense" (DTA § 1005(e)(2)(C)(I)). See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) ("[w]hen the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum").

Moreover, difficult separation-of-powers questions would arise if a court attempted to *compel* disclosure of national security information or *order*, in the face of the Government's opposition, civilian access to detained enemy combatants at a secure military facility. See *Stillman v. C.I.A.*, 319 F.3d 546, 548 (D.C. Cir. 2003). Separation of powers principles also preclude this Court from stepping too far down the path of administering the process of detaining the enemy. *Hamdi*, 542 U.S. at 531 (plurality op.). Cf. *People's Mojahedin*, 182 F.3d at 22. These questions are obviated, however, because the Government has here proposed procedures explained below that will allow counsel to meaningfully participate in this action and allow this Court

to carry out the review function established by Congress in the DTA.

It is with these principles in mind that this Court should assess the scope of its review and evaluate the Government's proposed protective order.

## II. This Court Should Enter the Government's Proposed Protective Order.

### A. Neither the Constitution Nor the DTA Calls for a Protective Order Other than the One Proposed by the Government.

In proposing a protective order to govern CSRT litigation in this Court, the Government is allowing private civilian attorney access to a secure overseas military base during wartime to meet with detained enemy combatants, and access to classified national security information. Despite this extraordinary step, petitioners are seeking even greater, more burdensome access. But neither the Constitution nor the DTA supports an order more invasive than the one proposed by the Government. Instead, the Government's proposal goes well beyond whatever constitutional or statutory floor might apply here. At the same time, this access will allow this Court to carry out its CSRT determination review function provided for in the DTA.

As we have explained, the alien detainees at Guantanamo cannot assert rights under the U.S. Constitution. *Boumediene*, 476 F.3d at 991. Thus, just as the detainees have no constitutional right to counsel, there is no right on the part of counsel to access to detained aliens on a secure military base in a foreign country. See *Cuban Am. Bar Ass'n v. Christopher*, 43 F.3d 1412, 1429-30 (11th Cir. 1995).

And given that there is no history or tradition of an attorney/client privilege for enemy combatants, the common law attorney/client privilege that applies in other contexts obviously does not control here. See *United States v. Golberger & Dubin, P.C.*, 935 F.2d 501, 504 (2d Cir. 1991) (attorney/client privilege "is based in policy, rather than in the Constitution, and therefore cannot stand in the face of countervailing law or strong public policy and should be strictly confined within the narrowest possible limits underlying its purpose").

Thus, any detainee procedural rights must be sourced exclusively in the DTA. But the DTA does not require counsel access of the sort sought by petitioners. That statute authorizes this Court to review CSRT enemy combatant determinations, and the CSRT records contain classified material. There is no indication, however, that *sub silentio* Congress took the unprecedented step of requiring the Executive to provide a right of private attorney access to classified material. Instead, the established norm when this Court reviews an administrative record containing classified material is for the Court to "review classified material *ex parte*, *in camera* as part of its judicial review function." *Jifry v. FAA*, 370 F.3d 1174, 1182 (D.C. Cir. 2004); accord *People's Mojahedin Org. v. Dep't of State*, 327 F.3d 1238, 1242 (D.C. Cir. 2003); *Holy Land Foundation*, 333 F.3d at 164.

Given that *ex parte*, *in camera* review of classified information by the Court is the norm where due process interests are at stake, in these circumstances, there is

simply no legally cognizable counterweight to the Government's compelling interest in protecting national security information. See *Haig v. Agee*, 453 U.S. 280, 307 (1981); *Egan*, 484 U.S. at 527. Thus, as this Court has explained when the review of classified information is at issue, "'[w]e anticipate that in camera review of affidavits, followed if necessary by further judicial inquiry, *will be the norm.*'" *Stillman*, 319 F.3d at 548 (emphasis added).

In light of this background, it would have been astonishing had Congress overridden the Executive's control over access to classified information in the manner demanded by petitioners here. There is no evidence in the statutory text or legislative history of the DTA and MCA that Congress did so, and no such intrusion into the Executive's powers should be created by the courts. See *Armstrong v. Bush*, 924 F.2d 282, 289 (D.C. Cir. 1991) (Court applies "clear statement" rule before finding that Congress intends to interfere with the constitutional powers of the Executive).

The DTA also in no way incorporates the sort of extensive access to enemy combatant detainees at the military base in Guantanamo sought by counsel here. Thus, any access required by an order of this Court must take into account the serious national security interests at stake and should be directed at implementing only this Court's role in resolving the DTA actions before it. Petitioners are accordingly mistaken in urging that they must be allowed to "freely communicat[e]" with the enemy combatants in any matters "germane to their imprisonment, or how to end it

(judicially, diplomatically, politically, or legislatively)." Br. at 35. Indeed, the notion that this Court, because of enactment of the DTA, should authorize counsel access to further "political[]" or "legislativ[e]" ends with detained enemy combatants is obviously badly mistaken. Such a rationale would confer on counsel, under the auspices of this Court's procedural order, a right to recommend to enemy combatants "political[]" acts – hunger strikes, protests, disobedience – that are plainly inconsistent with base security, are dangerous, and have nothing to do with this Court's review role under the DTA.

Moreover, civilian access to the detainees – like this Court's scope of review under the DTA – must be viewed through the lens of the history we set out in Part I.

In sum, there is no right under the Constitution or the DTA to access detainees or classified material in the CSRT record. Thus, there is no legal basis for challenging the Government's proposed protective order.

### B. The Government's Protective Order, Rather than the Habeas Protective Order, Is Appropriate for this Court's Review under the DTA.

In any event, even if there were a basis for the Court to review the Government's proposed protective order, the Court should still reject petitioners' request to replace it with the district court Habeas Protective Order. First, in seeking the reimposition of the Habeas Protective Order, petitioners are attempting to recreate in this Court the habeas litigation regime that existed in district court, but the DTA

is a different review statute that calls for a different protective order. Second, the Habeas Protective Order has led to intractable problems and threats to security at Guantanamo. Third, Congress unambiguously rejected the Habeas Protective Order regime when it repealed habeas jurisdiction and replaced it with CSRT review by this Court. Finally, the order proposed by the Government provides for meaningful participation by counsel and places proper emphasis on protecting national security.

**1. The Habeas Protective Order is Not Needed in DTA Litigation.**

The district court habeas regime should not be recreated in this Court because it is not appropriate to this Court's limited review under the DTA. First, as we will explain in Part III, the review here is administrative in nature and is on the record of the CSRT. Accordingly, factual development at Guantanamo will not be necessary in pursuing this action – the broad access to Guantanamo by private counsel under the Habeas Protective Order is therefore not necessary.

Second, Congress barred many types of claims in enacting the MCA – Congress precluded claims outside of the scope of the DTA, including any claims relating to "detention, transfer, treatment, trial, or conditions of confinement." MCA § 7(a). Accordingly, there is no need for a protective order that might encompass access to detainees in connection with claims of this sort or potential claims falling within those categories. Instead, the protective order entered by this Court should limit access to that related to the scope of this Court's review under the DTA.

### 2. The Habeas Protective Order was Rife with Problems and Threatened to Undermine Base Security at Guantanamo.

The Habeas Protective Order has caused several types of problems that are solved by the protective order we have proposed to this Court.

First, the Habeas Protective Order enabled detainees' counsel to cause unrest on the base by informing detainees about terrorist attacks and other incidents. The Habeas Protective Order caused these problems because it included only a vague definition of "legal mail" and lacked robust policing and enforcement mechanisms. Materials sent to enemy combatants by civilian lawyers were inspected only for physical contraband (App. 54), and legal mail was vaguely defined to include any communications "related to counsel's representation of the detainee." App. 51. It was not made clear whether the definition was limited to counsel's representation in the habeas case.

Given private counsels' broad view of their representation of the detainee, as anything "germane to their imprisonment" including "diplomatic[], political[], [and] legislative[]" action (Br. at 35), habeas counsel regularly sent materials to detainees pursuant to the habeas legal mail system that did not relate to the legality of their detention and that, as explained in the Declaration of Commander Patrick M. McCarthy, presented serious security issues at Guantanamo. See App. 137-40. The habeas legal mail system was misused to inform detainees about terrorist attacks

(App. 138, 140), military operations in Iraq (App. 137-38), activities of terrorist leaders (App. 138), efforts in the war on terror (*ibid.*), the Hezbollah attack on Israel, (App. 140), detainee biographies (App. 139), and abuse at Abu Ghraib prison (App. 137-38). These sorts of materials "contained inflammatory information regarding current political events" and "could incite detainees to violence." App. 138. Attorneys also disguised as privileged materials intended as communications to or from the media. App. 139-40.

Unrest at Guantanamo is a serious and persistent problem that has resulted in riots, violence, hunger strikes, and suicides. Detainees have demonstrated their hostility in numerous ways, such as by hunger strikes and attacks on guards with broken toilet parts, utensils, radios, and mixtures of feces, urine, vomit and semen collected in meal cups.[7] This unrest creates serious risks of harm to detainees and requires rigorous security procedures to protect detainees and guards. *Compare* Br.

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[7] See John Solomon, Gitmo Guards Often Attacked by Detainees, at http://www.washingtonpost.com/wp-dyn/content/article/2006/07/31/AR2006073100576.html; Kathleen T. Rhem, Skirmish With Guards, Two Suicide Attempts Test Guantanamo Procedures, at http://www.defenselink.mil/news/May2006/20060519_5177.html (describing incident in which two detainees overdosed on medications that they had illicitly hoarded during medical treatment and a separate incident on that same day in which detainees ambushed and attacked guards using weapons fashioned from fans and other materials); Carol J. Williams, Commander: Suicide Plots Continuing, Miami Herald, June 28, 2006, at 7A, at http://www.miami.com/mld/miamiherald/news/nation/14920247.htm (recent searches of detainees' cells at Guantanamo have uncovered hoarding of medicines, including in detainees' waistbands and even in a detainee's prosthetic limb).

at 31 (pointing out that, for a period, some petitioners were held in "'Camp 6,' where they are confined, alone * * * [in] metal cells" with limited public recreation time, rather than "in communal bunkhouses" allowing more "companionship") *with* Kathleen Rehm, New Guantanamo Facility Safer for Guards, More Comfortable for Detainees, *available at* http://www.defenselink.mil/news/NewsArticle.aspx?ID=2665 (cells previously "were made of mesh fencing, which made it possible for detainees to pelt guards with feces, urine and other bodily fluids" in over 400 documented assaults during 2006) *and* Tim Golden, Hunger Strike Breaks Out at Guantánamo, *available at* http://www.nytimes.com/2007/04/08/us/08cnd-hunger.html (April 8, 2007) ("after a riot last May and the suicides of three prisoners in June, [Camp 6] * * * was retrofitted to * * * reduce the risk that [detainees] might hurt themselves").[8]

Second, the Habeas Protective Order contained no limits on in-person counsel visits to Guantanamo. Every counsel visit to Guantanamo causes a substantial burden

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[8] We contest petitioners' characterization of Camp 6 (Br. at 31-32) and note that it is a modern facility modeled on U.S. prisons. See Rehm, New Guantanamo Facility Safer (Camp 6 is an "air-conditioned facility, modeled on the most modern and efficient prisons in the United States, is more comfortable for detainees" and "allows them to have more room and privacy than earlier facilities used at Guantanamo"). More importantly, wartime detention conditions are appropriately monitored by the Red Cross, not in person by civilian lawyers. See http://www.icrc.org/Web/eng/siteeng0.nsf/iwpList4/C5667B446C9A4DF7C1256F5C00403967 ("The International Committee of the Red Cross * * * has been regularly visiting the US detention facility at Guantanamo Bay since early 2002 for the purpose of monitoring that persons held there are treated in accordance with applicable international laws and standards").

for the military. Arranging for attorneys to meet with their detainee clients at Guantanamo is a significant and time-consuming undertaking, requiring extensive logistical coordination. Counsel must be lodged on the base, and petitioners must be moved from the detention areas to meeting facilities capable of supporting privileged communications. Movement of the detainees to and from the meeting facilities requires a number of logistical and security measures, including orders from military supervisors to move the detainee, arrangements for vehicular transport in some cases, and arrangements for multiple guards and support personnel for the movement of the detainee, his personal belongings, and for the delivery of meals and other services. These arrangements must be orchestrated with other operational functions and duties at Guantanamo, including, but not limited to, daily meals, multiple daily prayer calls, and exercise opportunities. Moreover, detainees have at times refused to meet with counsel who purport to represent them, through alleged next friends or otherwise, leading to baseless allegations by counsel that the military is preventing the detainee from meeting with counsel. See, *e.g.*, *Al-Adahi v. Bush*, Motion to Compel Access to Petitioner, docket entry 79 (filed Mar. 29, 2006); Vitale Decl., docket entry 80 (filed Apr. 6, 2006) ("We approached Mr. Bawazir in the recreation yard * * *. [w]hen he met with us, by means of the interpreter, I explained that his counsel was here, that they had come a long way to meet him and very much wanted to do so. Mr. Bawazir was adamant in his refusal. He stated that he did not want to meet with the

lawyers, and that it was his personal decision.").

These visits have been pursued because habeas counsel have ascribed to themselves a representational role far exceeding what is necessary to represent a detainee in DTA review proceedings. To that end, civilian lawyers have, as petitioners explain, viewed themselves as representing the detainees "diplomatically, politically, [and] legislatively" (Br. at 35), and have thus attempted to monitor – most often through exaggerated and inaccurate reports of detainees themselves – conditions of confinement (Br. at 31-32). However, the MCA precludes any action in federal court regarding conditions of confinement (MCA § 7(a) (no jurisdiction to consider "any aspect of detention, treatment * * * or conditions of confinement")).

In addition, civilian lawyers have interjected themselves repeatedly into medical treatment decisions made by detainees and military doctors (see *Paracha v. Bush*, 2006 WL 3355177 (D.D.C. 2007) (denying motion for emergency medical evacuation); *Al-Ghizzawi v. Bush*, 2006 WL 2844781 (D.D.C. 2006) (denying emergency motion for emergency medical treatment), *appeal pending*, No. 06-5394 (D.C. Cir.)), but the DTA provides no authority for involvement of this sort, and the MCA precludes it (MCA § 7(a)).

Civilian lawyers have also sought to impose their involvement in or delay sensitive negotiations regarding the release or transfer of detainees (*Zalita v. Bush*, No. 05-1220, Minute Order (D.D.C. Feb. 15, 2007) (after government provided court-

required notice of an intended repatriation of a detainee, court effectively stayed transfer for 60 days at habeas counsel's request); *Al-Joudi v. Bush*, 2005 WL 774847 (D.D.C. 2005) (order requiring the Government to provide counsel for petitioners and the court with 30-days' advance notice of any intended removal of petitioners from Guantanamo)), but the MCA expressly precludes court involvement in such matters (MCA § 7(a) (no jurisdiction to consider "any aspect of the * * * transfer * * * or conditions of confinement" of an enemy combatant)).

Third, suits have been pursued by counsel on behalf of detainees without obtaining authorization from the detainee. For example, in *Al Hamandy v. Bush*, a habeas counsel sought to serve as next friend for over 60 detainees who had been "inform[ed] that they can file their own habeas corpus petition," but had not sought review. See *Al Hamandy v. Bush*, No. 05-2385, docket entry 1 (Olshansky Decl. ¶¶ 10, 14) (D.D.C.). In *Mohammon v. Bush*, detainees sought to serve as "next friends" for large numbers of fellow detainees, with no basis for asserting next friend status other than the fact that they had purportedly met each other as fellow Guantanamo detainees. One detainee "next friend" in that case filed an affidavit seeking to serve as next friend to 52 fellow detainees; another for 35 detainees; another for 34 detainees. *Mohammon v. Bush*, No. 05-2386, docket entry 1-2 exs. 2, 4, 5 (D.D.C.). The Habeas Protective Order failed to properly address this problem of counsel access for the purpose of soliciting clients, or in circumstances where a suit was being

pursued without the detainee's authorization.

### 3. Congress Repealed Habeas Jurisdiction with the Problems Created by the Habeas Protective Order in Mind.

Petitioners' attempt to resuscitate the Habeas Protective Order should also be rejected because Congress repealed the district court's "jurisdiction to hear or consider * * * an application for a writ of habeas corpus" filed by a detainee at Guantanamo. DTA § 1005(e)(1); see MCA § 7(a) (28 U.S.C. § 2241(e) (2006)). One core reason Congress passed the DTA and MCA were the problems created by the habeas procedures – including the Habeas Protective Order – as well as the assertion of a wide range of novel legal claims and arguments. Members of Congress were concerned about the serious burdens created by the habeas litigation and concomitant civilian lawyer access to Guantanamo.[9] Members were also concerned about specific conduct of private counsel under the Habeas Protective Order regime.[10]

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[9] See 152 Cong. Rec. S10269 (Sen. Kyl) ("[w]e already know that habeas litigation at Guantanamo has consumed enormous resources and disrupted day-to-day operation of the base" and that the "habeas litigation has imperiled crucial military operations during a time of war"); *id.* at 14271 (Sen. Clinton) ("I am deeply troubled by the circumstances that have opened our Federal courts to enemy combatants" because "the present level of accessibility to our courts by individuals who would do us harm is unprecedented in our Nation's history").

[10] See 152 Cong. Rec. S10269 (Sen. Kyl) (war effort "imperiled" because habeas counsel has "[i]n some instances, * * * jeopardized the security of the base by giving detainees information likely to cause unrest"); 151 Cong. Rec. S14264 (Dec. 21, 2005) (Sen. Graham) (criticizing counsel who had "boast[ed] about the fact that this litigation has undermined intelligence gathering in the war on terror").

When enacting the DTA, Congress was aware of the fact that it was replacing these habeas procedures being carried out in district court with streamlined record review by this Court.[11] This reasoning is familiar in circumstances where habeas review or other methods of district court review are replaced by a more streamlined appellate court review. See *Foti v. INS*, 375 U.S. 217, 224-26 (1963) ("The fundamental purpose behind § 106(a) [providing for direct review of immigration matters in the courts of appeals] was to abbreviate the process of judicial review of deportation orders" because of "abuse of the existing judicial review process"). This Court should not disregard what Congress did and replicate the habeas procedures – including the Habeas Protective Order - in the very different procedural context of review of CSRT determinations.

### 4. The Government's Proposed Protective Order is Reasonable and Properly Tailored to DTA Review.

The Government's proposed order properly protects national security and provides for meaningful participation in these actions to review CSRT determinations. The proposed protective order would govern four primary subjects

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[11] See 151 Cong. Rec. S12802 (Nov. 15, 2005) (Sen. Levin) (DTA would impose a "habeas prohibition" in future cases and instead "authorize courts to determine whether tribunals and commissions applied the correct standards, and whether the application of those standards and procedures is consistent with the Constitution and laws of the United States"); 151 Cong. Rec. S14263 (Sen. Kyl) (DTA intended to replace "one type of action-all of the actions now in the courts-and create in their place a very limited judicial review of certain military administrative decisions").

related to DTA cases: (1) counsel access to classified information in the CSRT record; (2) counsel access to his detainee client through a confidential legal mail system; (3) in-person access by counsel to his detainee client at Guantanamo; and (4) initiation of suits by purported "next friends."[12]

As noted earlier, in assessing the Government's proposal, it is important to keep in mind the starting point of the legal rights possessed by the detainees. Thus, while detainee counsel have no *right* to classified material in the CSRT record, the Government believes that permitting counsel, with required clearances, access to the classified CSRT record will facilitate this Court's review under the DTA. Similarly, while detainees have no *right* to counsel and no *right* to have that counsel visit them at the military base in Guantanamo, the Government recognizes that this Court's review will be assisted by having informed counsel represent the interests of the detainees in connection with their DTA actions. Moreover, because review under the DTA is "narrow DC Circuit-only review of the [CSRT] hearings," (*Boumediene*, 476 F.3d at 986 n.2), based upon the record of the CSRT (*id.* at 1006 (Rogers, J., dissenting)), counsel should not have a need to engage in numerous in-person consultations with detainees.

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[12] Although not relevant to the case at bar, we note that, because of the level of classification involved, the protective order proposed by the Government here is not appropriate for use in cases involving 14 high value detainees who recently were transferred to Guantanamo, if those detainees seek review under the DTA.

**a. Access to Classified Information in the CSRT Record.** The Government's proposed order provides counsel with nearly all of the classified material in the CSRT record: the "Government *will provide* petitioners' counsel * * * with access * * * to material in the CSRT record for the petitioner that the Government has determined petitioners' counsel has a 'need to know.'" App. 85 (proposed order § 5.C) (emphasis added).[13] Most of the provisions of Part One of the proposed order (App.72-99) address protections necessary to allow private counsel access to this classified material and protected information in the CSRT record, and should not be controversial.

Petitioners nevertheless object (Br. at 36) to the proposed order's "need-to-know" section. This provision simply reflects the "need-to-know" requirement in the Executive Order governing access to classified information. Exec. Order 12,958, as amended by Exec. Order 13,292, § 4.1(a), 68 Fed. Reg. 15,315 (2003). As the Commander-in-Chief, the President has "authority to classify and control access to information bearing on national security." *Egan*, 484 U.S. at 527. Under the rules established by the President, information may be disclosed only to a person with a clearance *and* "a need-to-know the information." Exec. Order 12,958, as amended

[13] We anticipate that only a small amount of information – information that pertains to individuals other than the particular detainee or information pertaining to highly sensitive sources – will be redacted from the CSRT records based on the "need-to-know" requirement. This material will, however, be made available to the judges of this Court.

by Exec. Order 13,292, § 4.1(a).

This "need-to-know" requirement means that the person must "require[ ] access to [that] specific classified information in order to perform or assist in a lawful and authorized governmental function." Executive Order 12,958, § 6.1(z). The requirement is meant to consider the risk of disclosure to additional persons, even when those persons possess a security clearance. See *Northrop Corp. v. McDonnell Douglas Corp.*, 751 F.2d 395, 401-02 (D.C. Cir. 1984).

Petitioners' objections to a "need-to-know" requirement are meritless. A blanket exemption from the "need-to-know" requirement that otherwise applies to all individuals, including Government attorneys, would undoubtedly violate separation of powers principles. See *Egan*, 484 U.S. at 527 (*President* has "authority to classify and control access to information bearing on national security"))

**b. The Confidential Legal Mail System.** The proposed order creates a confidential legal mail system to allow counsel to communicate in confidence with the enemy combatant detainees they represent. See App. 104-13 (§ 13). The Government is taking an extraordinary step in allowing confidential communications between enemy detainees and civilians during a time of war – an allowance that creates inherent risks to national security and base security that are difficult to ameliorate and impossible to extinguish. As we have explained, information sent to a detainee can threaten security and cause unrest at the Guantanamo facility,

App.137-40.

The Government's proposal nevertheless allows confidential communications between counsel and represented detainees while minimizing the security threats. It affirmatively authorizes confidential written communications relating to a DTA case from counsel to his client detainee. See App. 104 (§ 13) (counsel "shall have access to the privileged mail system"). But the order limits confidential communications to those that comprise legal mail as defined in the order. App. 109 (§ 13.A.vi.).

Legal mail includes only documents and correspondence that are "directly related to the litigation of this Detainee Treatment Act action," and address only "those events leading up to this detainee's capture" or the "conduct of the CSRT proceeding relating to this detainee." App. 79 (§ 2.J.i, ii). These limits allow confidential communications relating to the central merits issue of the DTA proceeding. Proposed Protective Order ¶ 2.J.ii.; see DTA §2 1005(e)(2)(C)(i) (court may review whether "conclusion of the Tribunal [was] supported by a preponderance of the evidence"). Communications may also address the central procedural issue in a DTA proceeding by allowing counsel and detainee clients to discuss in legal mail "the conduct of the CSRT proceeding." Proposed Protective Order ¶ 2.J.ii.; see DTA § 1005(e)(2)(C) (authorizing review of compliance by the CSRT with CSRT "standards and procedures").

To enforce these limits and confidentially resolve disputes that may arise, the

proposed order creates a Department of Defense privilege team and a Department of Justice special litigation team. App. 80-82 (§ 4). The privilege team serves to protect national security while "assuring attorney-client privilege is not violated." App. 81 (§ 4.A). To this end, the privilege team may review legal mail sent to the detainee for "content" (*i.e.*, do the materials constitute legal mail under the protective order definition) and may engage in "security and contraband screening" (*i.e.*, do the materials contain contraband or will they threaten base security). App. 107-08 (§ 13.A.v); see App. 110 (§ 13.A.ix, x) (treatment of information that "could be expected to result in immediate and substantial harm to the national security" or "relate to imminent acts of violence"); App. 124 (§ 19.B) (defining "contraband")). In turn, a special Justice Department litigation team is provided for to litigate any disputes that may arise with respect to the decisions made by the DoD privilege team, while still preserving confidentiality. See App. 107, 108-09 (§ 13.A.iv.c & v.c). This enforcement mechanism is needed given the problems under the Habeas Protective Order, which did not have adequate policing and enforcement mechanisms, with violations or problems not being discovered until damage was already done.

Importantly, this legal mail system does not preclude *any* communications between counsel and the detainee; rather, it sets up a special avenue for confidential communications directly related to their DTA suit that will be reviewed by a privilege team rather than the normal Guantanamo security screeners. Counsel remains free to

send a detainee any written material, subject to normal Guantanamo security screening. See App. 109 (§ 13.A.vii)

**c. In-Person Visits with Detainees.** The proposed order authorizes counsel to visit Guantanamo on four occasions during the pendency of the DTA action in this Court. First, before appointed counsel or counsel for an appropriate next friend is directly retained by a detainee, counsel "will be provided one visit to Guantanamo to meet with the detainee (for up to a total of eight hours) in order to ask the detainee to * * * grant[] authorization to represent the detainee." App. 101 (§ 10.B) (suits filed by next friends); see App. 99 (§ 9.A) (suits filed by detainees pro se). Second, once counsel obtains authorization to represent a detainee, that counsel is allowed "three additional" visits "to assist in the preparation of this action under the [DTA], including all stages of review in this Court." App. 100 (§ 9.C); App. 102 (§ 10.C). If authorization is not obtained, the proposed order will not allow additional in-person visits by unauthorized counsel, will not provide a confidential legal mail system for unauthorized counsel, and will not provide unauthorized counsel with access to classified material in the CSRT record. App. 102 (§ 10.B).

Petitioners protest that the protective order will impose an "arbitrary cap" on in-person visits to Guantanamo that is "antithetical to the attorney-client privilege." Br. at 29. But, as discussed above, there is *no* right to counsel in these circumstances. And the number of visits has been set in order to balance the interests of detainees

and counsel against the security needs at the Guantanamo military base.

Furthermore, three additional counsel visits should be fully sufficient to litigate and resolve a challenge under the DTA, especially because DTA review, as we explain below, is of the standard administrative variety, based upon the record developed by the CSRT. Importantly, the protective order entered by this Court would govern only the DTA action before it; it will not and cannot govern, as petitioners assert, contact with detainees for "diplomatic[], political[], or legislativ[e]" purposes (Br. at 35), nor does it serve as a proxy for counsel to monitor conditions at Guantanamo. See MCA § 7(a). Finally, if it turns out that legal or constitutional requirements compel additional visits, or other unanticipated circumstances arise, this Court can address the issue at that time.

Petitioners have also argued that one introductory visit to Guantanamo (which can consist of multiple meetings with the detainee totaling up to eight hours) is insufficient to convince a detainee that "we are his lawyers" in a suit filed by a "next friend." Br. at 30. But again, balancing the various relevant interests, one visit of substantial duration should provide an adequate opportunity to test if the detainee is interested in pursuing a claim in the United States court system. Such a visit will be allowed, in most circumstances, without first necessitating a difficult standing inquiry by this Court under *Whitmore v. Arkansas*, 495 U.S. 149 (1989). At the same time, the provision recognizes other strong interests that must be given weight in these

circumstances.

First, the provision addresses and attempts to resolve the unwieldy and unworkable situation that had developed in the district court habeas litigation, discussed above.

Second, direct detainee authorization is the strongly preferred course here because the *Whitmore* test is not likely to be met in most cases filed by individuals seeking status as "next friends." Next-friend standing is allowed only when the real party in interest is "unable to litigate his own cause due to mental incapacity, lack of access to court, or other similar disability." *Whitmore*, 495 U.S. at 163. Here, every detainee was provided notice, in his native language, of his ability to challenge his detention in a habeas action. See, *e.g.*, App. 1. The Government plans to provide notice regarding the availability of a DTA action. Accordingly, nothing prevents a detainee from initiating court review.

Third, while the DTA created a ready avenue whereby enemy combatants can challenge their enemy combatant designations, there is no indication that Congress sought to create opportunities for civilian attorneys, however well-intentioned, to gain access to the military facility at Guantanamo to solicit detainee clients. Thus, Congress did not create a regime whereby civilian lawyers are provided "multiple personal meetings to establish trust" and thereby encourage the filing of legal claims. Br. at 37

Fourth, some of the detainees acknowledge or revel in their status as enemies of the United States. See, *e.g.*, http://www.defenselink.mil/news/transcript_ISN10024.pdf, at p. 15 ("I will not regret when I say I'm enemy combatant") (CSRT testimony of Khalid Sheikh Muhammed). Others distrust the court system of a nation they have dedicated their lives to fighting. See Br. at 37.24 (observing that detainees frequently lack "trust necessary" to seek counsel representation). Accordingly, the proposed order provides that, when a detainee declines to authorize representation, that determination is given effect. App. 102 (§ 10.C). These limitations are consistent with the established principle that a competent client, even if in custody, has a right to choose his own representative when appearing in court. See *First Defense Legal Aid v. City of Chicago*, 319 F.3d 967, 969 (7th Cir. 2003) ("persons in custody must select counsel for themselves; volunteers and friends may not form an attorney-client relation on behalf of persons in custody"). For all of these reasons, the protective order proposed by the Government should be entered.

## III. Review under the DTA Is on the CSRT Record, and Counsel Is Not Entitled to the Production of Materials Outside of that Record.

Petitioners are seeking discovery in this DTA proceeding. Br. at 14-24. That request should be denied. The DTA does not permit free-wheeling discovery, but instead constitutes a narrow check by this Court on the Executive Branch's core warmaking function of detaining enemy combatants during the duration of hostilities.

As we explained in Part I, the Supreme Court plurality in *Hamdi* recognized that, in circumstances where there has been a formal military process akin to the CSRT process here, a court conducting habeas review simply evaluates the "administrative record developed" to determine if "some evidence" supports the administrative decision. *Hamdi*, 542 U.S. at 537. No more extensive review has been provided historically through habeas (see, *e.g.*, *Yamashita*, 327 U.S. at 8, 23), and Congress certainly did not seek to broaden this scope of review in repealing habeas and replacing it with the "narrow DC Circuit-only review of the [CSRT] hearings." *Boumediene*, 476 F.3d at 986 n.2; see *People's Mojahedin*, 182 F.3d at 22 (conducting narrow record-based review in similar context).

Even in circumstances unlike these where there was *no* formal military process, the *Hamdi* plurality squarely rejected free-wheeling discovery (542 U.S. at 528); instead, it stated that constitutional requirements would be met by simply allowing petitioner to "present his own factual case to rebut the Government's." *Id.* at 538. Any factfinding, much less discovery, would set this Court down the path of resolving "core strategic matters of warmaking" in the first instance (*Hamdi*, 542 U.S. at 531 (plurality op.)), but doing so would raise serious separation of powers concerns.

Thus, in providing for this Court's review, Congress plainly invoked the narrow record-based review identified in *Hamdi* and discussed in Part I. Congress

also effected a familiar administrative law scheme whereby this Court reviews the administrative determination of the CSRT based on the record developed by the CSRT.

### A. As An Administrative Review Matter, this Court's Narrow Review of the Executive Branch's Enemy Combatant Designation is Conducted on the Record of the CSRT.

The DTA specifies that "review" is of "the validity of any final decision of a Combatant Status Review Tribunal." *Id.* § 1105(e)(2)(A). This language evokes this Court's familiar function of reviewing a final administrative decision based upon the record before the agency.

In the administrative law context, statutes providing for review of final agency decisions authorize a "reviewing function [that] is * * * ordinarily limited to consideration of the decision of the agency or court below and of the evidence on which it was based." *United States v. Carlo Bianchi & Co.*, 373 U.S. 709, 714-15 (1963); see *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 743 (1985) (recognizing the "fundamental principle[] of judicial review of agency action" that "'[t]he focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court'"); *Jifry*, 370 F.3d at 1181.[14]

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[14] The statute's standard of merits review – whether the decision is supported by a "preponderance of the evidence" (DTA § 1005(e)(2)(C)(i)) – is also a mainstay of review based on an administrative record. See *Charlton v. FTC*, 543 F.2d 903, 907

The recent enactment of the MCA underscores the fact that Congress intended this Court to assess the CSRT record rather than attempt to create a new factual record based on discovery. The MCA's legislative history emphasizes that Congress envisioned limited record review of the military CSRT determinations. See 152 Cong. Rec. S10268 (daily ed. Sept. 27, 2006) (Sen. Kyl) (the "DTA does not allow re-examination of the facts underlying a * * * detention, and it limits the review to the administrative record"); 152 Cong. Rec. S10403 (daily ed. Sept. 28, 2006) (Sen. Cornyn) (DTA "substitute[s] the blizzard of litigation instigated by *Rasul v. Bush* with a narrow DC Circuit – only review of the Combatant Status Review Tribunal—CSRT—hearings," which is "by design" because "[c]ourts of appeals do not hold evidentiary hearings or otherwise take in evidence outside of the administrative record").[15]

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(D.C. Cir. 1976) (where "agency itself is to initially ascertain the facts" under a "preponderance of the evidence" standard, "on judicial review of agency action, [those] administrative findings of fact must be sustained when supported by substantial evidence on the record considered as a whole"); see also *Carlo Bianchi*, 373 U.S. at 715 ("the standards of review adopted * * * 'not supported by substantial evidence'-have frequently been used by Congress and have consistently been associated with a review limited to the administrative record"); *Jifry*, 370 F.3d at 1181.

[15] *Accord* 152 Cong. Rec. S10271 (Sen. Kyl)("only thing the DTA asks the courts to do is check that the record of the CSRT hearings reflect that the military has used its own rules"); *id.* at S10367 (Sen. Graham) (DTA "take[s] habeas off the table" because of "worrie[s] about having Federal judges turn[] every enemy combatant decision into a trial" that "would hamper the war effort and bring aid and comfort to the enemy").

Review on the record is particularly appropriate where Congress has lodged review of an agency determination in the courts of appeals, which are not suited for factfinding. See *Bianchi*, 373 U.S. at 715; *Midwest Independent Transmission System Operator, Inc. v. FERC*, 388 F.3d 903, 910 (D.C. Cir. 2004) (court of appeals review appropriate when "'[t]he factfinding capacity of the district court is *** unnecessary to judicial review of agency decisionmaking,' because the administrative proceedings have already generated the record necessary for appellate review"). As the Supreme Court has explained, "statutes that provide for only a single level of judicial review in the courts of appeals 'are traditionally viewed as warranted only in circumstances where district court factfinding would unnecessarily duplicate an adequate administrative record.'" See *McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479, 497 (1991).

The development of a new record in this Court goes against the most fundamental principles of agency review and the underlying rationale for those principles. As this Court has explained, far short of discovery, even "enabl[ing] challenging parties to submit affidavits addressing the merits and propriety of the agency decision" is "contrary to decisions of the Supreme Court and of this court," as "[t]here is no occasion for a judicial probe beyond the confines of a record which affords enough explanation to indicate whether the agency considered all relevant factors." *Environmental Defense Fund*, 657 F.2d at 286. Indeed, "a judicial venture

outside the record * * * can never * * * examine the propriety of the decision itself." *Ibid.*; see *Tripoli Rocketry Ass'n, Inc. v. Bureau of Alcohol, Tobacco, Firearms, and Explosives*, 437 F.3d 75, 83 (D.C. Cir. 2006) ("It is well understood in administrative law that the 'focal point for judicial review should be the administrative record already in existence, not some new record completed initially in the reviewing court.'"). These principles "predate[] the APA." *Texas Rural Legal Aid, Inc. v. Legal Services Corp.*, 940 F.2d 685, 698 (D.C. Cir. 1991).

These limits have been "consistently honored" and "stem[] from the well ingrained characteristics of the administrative process"; namely, that the "administrative function is statutorily committed to the agency" and a "reviewing court is not to supplant the agency on the administrative aspects of the litigation." *Doraiswamy v. Secretary of Labor*, 555 F.2d 832, 840 (D.C. Cir. 1976). The import of these principles are at their maximum in this context, where this Court is reviewing "core strategic matters of warmaking." *Hamdi*, 542 U.S. at 531 (plurality op.).

The appropriateness of review on the record is underscored by the applicable Federal Rules of Appellate Procedure. Rule 16 provides that the "record on review * * * of an agency order consists of (1) the order involved; (2) any findings or report on which it is based; and (3) the pleadings, evidence, and other parts of the proceedings before the agency." Fed. R. App. P. 16. The agency is required to file or certify the contents of the record, which it has done in both of these cases.

See Fed. R. App. P. 17(b)(1)(B) (requiring "a certified list adequately describing all documents, transcripts of testimony, exhibits, and other material constituting the record, or describing those parts designated by the part").

Petitioners have submitted or referenced substantial amounts of new or newly identified evidence (*Parhat* Pet. ¶¶ 125-162; Br. at 21) and argued that new evidence is one of a "host of circumstances" that might justify discovery or factfinding in administrative law cases (Br. at 17). In enacting the DTA, however, Congress expressly considered the issue of new evidence that is not in the a CSRT record. Rather than provide for review of that evidence in this Court, Congress directed the Defense Department to consider it through the administrative process. See DTA § 1005(a)(1) & (3) (DoD procedures "shall provide for periodic review of any new evidence that may become available relating to the enemy combatant status of a detainee"). Thus, Congress envisioned an administrative mechanism for considering new evidence, not factfinding by this Court or free-wheeling discovery, both of which are alien to administrative review.

It should not be a subject of significant controversy that review is on the record of the CSRT. Indeed, we note that three Justices, dissenting in the denial of certiorari in *Boumediene*, explained that "review under the DTA * * * provides for no augmentation of the record on appeal." *Boumediene v. Bush*, No. 06-1195, Slip Op. at 5 (Breyer, J., dissenting from denial of certiorari). Likewise, Judge Rogers of this

Court, dissenting in *Boumediene*, explained that, under the DTA, "[t]his court may review only the record developed by the CSRT to assess whether the CSRT has complied with its own standards." 476 F.3d at 1006 (Rogers, J., dissenting). In sum, there is little doubt that review in this Court is of the CSRT record.

### B. Supplementing the Record in Administrative Law Cases is the Rare Exception, Not the Rule.

Petitioners argue (Br. at 16-18) that, even in cases where this Court is conducting administrative review of an agency decision, discovery is authorized "to enable a party to demonstrate that the agency record merits enlargement." Br. at 16. But petitioners' expansive position would end agency review as we know it and effectively require full-blown discovery in any agency review case. Indeed, before even seeing the record or identifying *any* problems therein, petitioners seek this Court's authorization to rummage through the Government files on behalf of the enemy detainees. Petitioners seek access to CSRT records for individuals who are not their clients (Br. at 23), diplomatic correspondence and other communications with foreign governments (*id.* at 23-24), State Department records relating to inter-governmental negotiations over the release of detainees (*id.* at 24), and any records relating to a terrorist organization called the East Turkistan Islamic Movement (*ibid.*). In his motion to compel, Bismullah stated broadly that petitioner should be able to review "all information in the possession of the government that is relevant."

*Bismullah* Mot. to Compel at 15.

These requests should be rejected. Instead, as explained in Part I, factfinding by a court should never arise in a case like this one involving the Executive's core warmaking functions. Moreover, even in the administrative law context, factual development in agency cases is the "rare" exception. *Community for Creative Non-Violence v. Lujan*, 908 F.2d 992, 998 (D.C. Cir. 1990).

The cases cited by petitioners (Br. at 16-18) do not support their theory that this Court "must permit discovery" so long as "a conceivable basis exists" to "believe that the Court will ultimately admit additional evidence" (Br. at 15 & 16 n.10). Instead, the cited cases recognize the legal reality that "[t]he focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." *Camp v. Pitts*, 411 U.S. 138, 142 (1973).[16] Indeed, under the "conceivable basis" test that petitioners propose, there would have to be discovery in virtually any administrative law case.

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[16] See, *e.g.*, *Citizens to Preserve Overton Park*, 401 U.S. at 420 ("review is to be based on the full administrative record that was before the Secretary at the time he made his decision" and there must be a "strong showing of bad faith or improper behavior before" further inquiry can be made into the motivation of the decisionmaker); *James Madison Ltd. by Hecht v. Ludwig*, 82 F.3d 1085, 1095 (D.C. Cir. 1996) ("Ordinarily, courts confine their review to the "'administrative record'"); *Esch v. Yeutter*, 876 F.2d 976, 991 (D.C. Cir. 1989) (reciting the "familiar rule that judicial review of agency action is normally to be confined to the administrative record"); *Natural Resources Defense Council, Inc. v. Train*, 519 F.2d 287, 291 (D.C. Cir. 1975) (recognizing that "review [is] 'to be based on the full administrative record that was before the Secretary at the time he made his decision'").

"[I]n the rare case[s]" where factfinding has been allowed in agency cases (*Community for Creative Non-Violence*, 908 F.2d at 998), it is generally done on the basis of statutes that expressly authorize factfinding under certain circumstances. *Citizens to Preserve Overton Park*, 401 U.S. at 415 (APA) (citing statutory text for the proposition that "[d]e novo review * * * is authorized by § 706(2) (F) in only two circumstances"); see *FCC v. ITT World Communications, Inc.*, 466 U.S. 463, 469 (1984) (recognizing that Hobbes act authorizes "in some circumstances refer[ral of] the case to a special master [under] 28 U.S.C. § 2347(b)(3)").

Thus, when Congress intends to allow factfinding when a court is conducting review of an agency decision, it knows how to provide for it explicitly. See *Cabinet Mountains Wilderness v. Peterson*, 685 F.2d 678, 685 (D.C. Cir. 1982) ("applicability of de novo review to administrative actions is limited and is generally not presumed in the absence of statutory language or legislative intent to the contrary"); see, *e.g.*, 28 U.S.C. § 2347(c) (Hobbs Act provision addressing "leave to adduce additional evidence"); 5 U.S.C. § 706(2)(F); *Reid ex rel. Reid v. District of Columbia*, 401 F.3d 516, 521 (D.C. Cir. 2005) (IDEA expressly authorizes district court to "'hear additional evidence at the request of a party'" and "'bas[e] its decision on the preponderance of the evidence'") (quoting 20 U.S.C. § 1415(i)(2)(B)). The DTA contains no analogous provision authorizing judicial factual development.

The cases cited by petitioners (Br. at 17-18) do not support expanding the

record or allowing discovery as the general rule in these circumstances. In *Train*, factfinding was conducted not to go beyond the administrative record, but to ensure that the administrative record was complete after a "substantial showing" had been made that the "Administrator had not filed the entire administrative record with the court." 519 F.2d at 292; see also *Esch*, 876 F. 2d at 993 (allowing supplementation of the record based on a claim "not different in character from the one" advanced in *Train* in that the agency "never gathered in a coherent record"). Similarly, in *Public Power Council v. Johnson*, 674 F.2d 791 (9th Cir. 1982), the Ninth Circuit allowed factfinding only after explaining that "there is a further exception to the general rule that agency actions are to be judged on the agency record alone," namely, "when it appears the agency has relied on documents or materials not included in the record." *Id.* at 793.

Here, there has been no "substantial showing" that the record is incomplete. *Train*, 519 F.2d at 291. In *Train*, there was a substantial showing where the plaintiff "specified several documents" that the agency decisionmaker considered, but failed to include in the record, and the agency eventually conceded the missing documents were part of the record. 529 F.2d at 291-92. No similar showing has been made here; instead, petitioners merely make an unsupported and vague assertion that the CSRT "Record * * * may not include all of the evidence considered by the Tribunal." Br. at 18. Such an assertion falls far short of the substantial showing necessary to further

probe whether the agency considered material that was not included in the certified record.

### C. The Availability Of Procedural Challenges under the DTA Does Not Necessitate Or Warrant Discovery.

Petitioners urge (Br. at 19-23) that discovery is necessary because the DTA allows them to challenge "whether the status determination of the Combatant Status Review Tribunal with regard to such alien was consistent with the standards and procedures specified by the Secretary of Defense for [CSRTs]." DTA § 1005(e)(2)(C)(i). Petitioners are mistaken. This "narrow DC Circuit-only review of the [CSRT] hearings," (*Boumediene*, 2007 WL 506581, at *3 n.2 (quoting 152 Cong. Rec. S10403 (daily ed. Sept. 28, 2006) (Sen. Cornyn))), including compliance with CSRT procedures, should be able to be conducted based upon the CSRT record, given the substantial leeway afforded the agency in implementing its own procedures. See *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 544-545 (1978) (agencies "'should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties'"). In addition, the extraordinary context of wartime detention militates in favor of substantial deference to the conduct of procedures employed in detaining the enemy. See *Hamdi*, 542 U.S. at 531 (plurality op.) ("core strategic matters of warmaking belong in the hands of those who are best

positioned and most politically accountable for making them"). Moreover, the CSRT record should answer the most common procedural challenges likely to be made (and the only ones cited by petitioners in their brief, at 20).

First, petitioners urge that discovery is needed to evaluate evidentiary rulings made by the CSRT: "efforts to secure witness testimony" and "assistance * * * to the detainee in obtaining * * * evidence." Br. at 20. But the CSRT procedures require that evidentiary rulings of this sort be explained on the record. See App. 13 (CSRT President must "document the basis for [the] decision" that a "witness or evidence" is not reasonably available and "include * * * efforts undertaken to procure the presence of the witness and alternatives considered or used in place of that witness's in-person testimony"); *id.* at 16 (CSRT legal advisor "shall specifically address Tribunal decisions regarding reasonable availability of witnesses and other evidence"). Petitioner Bismullah's CSRT record contains just such an explanation. See App. 219; see also App. 222 (addressing issue in hearing transcript); App. 230 (documentation relating to witness request). Accordingly, evidentiary challenges should be fully reviewable based upon the CSRT record.

Second, petitioners claim that discovery is needed to address pre-hearing consultations by the personal representative and notice regarding the right to seek federal court review. Br. at 20. But these aspects of the CSRT procedures are carefully set out in written guidance or express written notifications. See App. 1

(specifying that notice of opportunity to file habeas suit will be provided to detainees); App. 22 (text of notice provided to each detainee in his native language); App. 20-21 (guidelines, including a script, for personal representative "to assist the detainee in preparing for the CSRT"). These written directions or notices can be assessed by this Court, and petitioners do not suggest any reason to believe that they were not followed. See also App. 222 (explaining that CSRT "President read the Hearing Instructions the Detainee and confirmed that the Detainee understood the Tribunal procedures").

Other types of procedural or legal issues that arise during a hearing are also documented in the record. App. 15 (if the CSRT consults with the legal adviser during the hearing on "any issues relating to evidence, procedure, or other matters," the "President * * * shall summarize on the record the discussion with the Legal Advisor"); see App. 220. Moreover, after reviewing the record, the personal representative "may submit * * * observations or information that he/she believes was presented to the Tribunal and is not included or accurately reflected on the record." App. 20. It is therefore likely that most procedural challenges can be assessed based upon the CSRT record.

If this Court nonetheless determines in an unusual case that the record is not sufficiently well developed to allow this Court to assess whether the CSRT determination "was consistent with" CSRT procedures, the proper course is not to

direct discovery or to appoint a special master and implement novel and burdensome factfinding procedures. Rather, administrative law principles provide clear guideposts for how to proceed. If the record is not adequate to understand the basis for a procedural determination, the Court may seek a further explanation from the agency of the basis for its action. See *Environmental Defense Fund, Inc. v. Costle*, 657 F.2d 275, 285 (D.C. Cir. 1981) ("When the record is inadequate, a court may 'obtain from the agency, either through affidavits or testimony, such additional explanations of the reasons for the agency decision as may prove necessary'")

Further, if the record is not sufficient to allow this Court's review and the agency's explanation is "not sustainable on the record itself, the proper judicial approach has been * * * to remand the matter back to the agency for further consideration." *Ibid.*; see *Florida Power & Light*, 470 U.S. at 744 ("if the reviewing court simply cannot evaluate the challenged agency action on the basis of the record before it, the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation"). And while a remand might normally also entail "vacat[ing] the [agency] action" (*Environmental Defense Fund*, 657 F.2d at 285), national security concerns in these circumstances would militate strongly against vacating the enemy combatant designation while the agency is developing the record to allow this Court to review procedural challenges. See *National Council of Resistance of Iran v. Department of State*, 251 F.3d 192, 209 (D.C. Cir. 2001)

(remanding terrorist designation determination to Secretary but declining to "order the vacation of the existing designations" because of "the realities of the foreign policy and national security concerns" at issue).

Contrary to the suggestion made by petitioners (Br. at 19-20), there is nothing novel about this method of proceeding in cases involving procedural challenges to agency actions. This Court has specifically stated that the "proper course" is to "remand the matter to the agency for further proceedings" where a party had established that "flaws in the procedures by which the agency produced [the] record" led to an "inadequa[te] * * * administrative record." *Occidental Petroleum Corp. v. SEC*, 873 F.2d 325, 346-47 (D.C. Cir. 1989). This is because "'Congress intended that the discretion of the agencies and not that of the courts be exercised in determining when extra procedural devices should be employed.'" *Id.* at 338 Otherwise, the court would "propel[] [itself] into the domain which Congress has set aside exclusively for the administrative agency.'" *Vermont Yankee*, 435 U.S. at 545

Thus, even under the APA, which expressly leaves room for "de novo review" (*Occidental Petroleum*, 873 F.2d at 339), remand is the "proper course." *Id.* at 347. Here, where the DTA does not authorize de novo review (or the appointment of a special master) and explicitly gives the Secretary of Defense deference to develop the procedures employed (DTA § 1005(e)(2)(C)(i) (reviewing whether determination "consistent with the standards and procedures *specified by the Secretary of Defense*")

(emphasis added)), Congress was clearly directing this Court to adopt a reviewing function, not a fact development function. See *McNary*, 498 U.S. at 497.

Petitioners cite *McNary* in support of their claim that in-court factual development is required for procedural challenges made under the DTA. Br. at 19-20. But as we have just demonstrated, this Court has frequently assessed such challenges based upon the administrative record and looked to the agency to develop a record when necessary. Moreover, the issue in *McNary* was not whether to supplement an administrative record in an agency review proceeding; rather, the issue was whether Congress, in enacting a special immigration review scheme, meant to preclude review of certain procedural challenges that could not be raised in those proceedings. 498 U.S. at 494-99. Here, on the other hand, there is no dispute that Congress intended that review of procedural challenges be limited to a "single level of judicial review in the courts of appeals"; Congress therefore is presumed to have concluded that CSRT proceedings produced "an adequate administrative record," and "factfinding [in this Court] would [be] duplicat[ive]." *McNary*, 498 U.S. at 497. In sum, *McNary* militates against this Court concluding that Congress intended that it engage in factfinding.

In sum, even in the rare difficult case, the appropriate course for this Court is to employ traditional administrative law review principles that afford to the agency its Congressionally-authorized role in developing the record and making the ultimate

determination that is the subject of this Court's review under the DTA. This should be all the more the case in the context of judicial review of the military detention of enemy combatants during wartime.

### D. Discovery Is Not Needed To Assess Whether The Recorder Properly Performed His Function of Producing the Administrative Record.

Petitioners also argue that discovery is called for to assess whether the CSRT Recorder properly performed his function of collecting evidence and presenting exculpatory information to the CSRT. Br. at 20 (citing as potential procedural challenges the Recorder "collection of evidence" and "selection of evidence"); *id.* at 21, 22. Such a request is an effort to disguise as a procedural challenge what is in effect free-ranging discovery of any relevant material pertaining to the petitioners that is in the possession of the Government.

But this Court has rejected the notion that it should deconstruct the process of compiling the administrative record, except in the most egregious cases. In *James Madison*, this Court explained that it would only look at the administrative record – the "materials compiled by the agency that were before the agency at the time the decision was made" – and it would not review "whatever materials [agency] examiners may have seen during their on-site investigation" but that did not make it into the record. 82 F.3d at 1095. Ultimately, a contrary view would turn the Court into the first line factfinder searching for "all information in the possession of the

government that is relevant" (*Bismullah* Mot. to Compel at 15), but in administrative review courts "do not duplicate agency fact-finding efforts." *James Madison*, 82 F.3d at 1096.

Indeed, the Recorder's task is routine and subject to a strong presumption of regularity. The Recorder's job, essentially, is to compile material that is both relevant and reasonably available and to present that material to the CSRT. App. 9. That role is subject to two important checks – the detainee's personal representative may also review all of the government information, and may independently present evidence "to the CSRT on the detainee's behalf." App. 19-20. And, of course, the detainees themselves could have testified and submitted evidence that was reasonably available. App. 11. Moreover, Congress created an *administrative* process for consideration of new evidence that turns up (DTA § 1005(a)(3)), not factfinding by this Court. Thus, the notion that the Recorder alone is responsible for placing exculpatory material in the record is not true. Further, the routine role of the Recorder is entitled to the strongest sort of presumption of regularity in reviewing the decision of the CSRT. See *Martino v. U.S. Dept. of Agriculture*, 801 F.2d 1410, 1413 (D.C. Cir. 1986). Indeed, the original purpose of the presumption of regularity is to allow reliance upon the record on which a decision is based. See *Dorsey v. Gill*, 148 F.2d 857, 874 (D.C. Cir. 1945).

In sum, the functions of the Recorder cannot be utilized as an avenue for

freewheeling discovery into all relevant evidence. Instead, the review in this Court is to be based upon the record before the CSRT, and that record will be provided to this Court for its review and, upon entry of an appropriate protective order, to counsel.

Petitioners have provided nothing to suggest the Recorder in their cases acted in bad faith or deliberately or negligently excluded information. The *Parhat* petitioners assert that the CSRT record might not include information supposedly relating to administrative release determinations made with respect to the petitioners. Br. at 22. But, having not seen the CSRT record, this assertion is completely speculative.[17]

## IV. Petitioners' Request for Appointment of a Special Master Should Be Rejected.

Petitioners' request for the appointment of a special master (Br. at 39-40) should also be rejected. Appointment of a special master would be a substantial step towards injecting this Court into the administration of Guantanamo – a role for this Court that Congress plainly did not envision and which would impinge upon core

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[17] Petitioners also allege that multiple CSRT hearings have been held with respect to certain detainees who are not petitioners in this case. Br. at 18-19. But as the CSRT procedures make plain, the CSRT process is not final until review has been conducted by the CSRT Director. App. 16. That official may, for a variety of reasons, "return the record to the Tribunal for further proceedings." App. 16. Nothing about that review is inconsistent with CSRT procedures. This is just one of many areas where it is inappropriate to compare CSRT proceedings with background principles that stem from domestic criminal law.

Executive Branch functions in wartime. Moreover, because this Court's review is limited to the CSRT record and Congress has eliminated jurisdiction over related fact-bound claims, this proceeding should not entail the sort of constant refereeing that went on in the district court. Further, the more specific definition of legal mail and clear provisions as to the number of counsel visits should also significantly reduce the potential for disputes with respect to in-person detainee visits and materials being sent to a detainee. If it turns out that legitimate disputes arise regularly under the proposed protective order, this Court can consider at that time whether some other procedures to resolve such disputes are necessary. But there is no reason to create a special master system from the outset that anticipates the wide-ranging litigation that was part of a system Congress rejected.

Moreover, the rules governing appointment of a special master do not support appointment of a special master in these circumstances. The appellate rules authorize the appointment of a special master "to recommend factual findings and disposition in matters ancillary to proceedings in the court." Fed. R. App. P. 48(a). The normal function of a special master in the appellate court is to address ancillary issues that require factual development such as a contempt sanction or attorney discipline or when reviewing a claim for which factual development is Congressionally authorized. See, *e.g.*, *In re Bagdade*, 334 F.3d 568, 575 (7th Cir. 2003) (attorney discipline); *Reich v. Sea Sprite Boat Co., Inc.*, 50 F.3d 413, 414 (7th Cir. 1995) (contempt); *Gulf*

*Power Co. v. United States*, 187 F.3d 1324 (11th Cir. 1999) (factual development in Hobbes Act case where Congress has authorized factual development in 28 U.S.C. § 2347(b)(3)). None of these circumstances is present here.

Petitioners argue that a special master is necessary to referee "discovery disputes." Br. at 39. This assertion rests on petitioners' faulty premise – that review by this Court is of some record developed through discovery rather than, as we have explained, on the record before the CSRT.

If this Court determines that appointment of a special master is called for, it is also not appropriate for petitioners to attempt to select their preferred judge to perform that role. See Br. at 40. Instead, the special master should be selected at random from qualified individuals who have not previously been involved in these issues. Indeed, "substantial experience overseeing the * * * [Habeas] Protective Order" (Br. at 40) should all but disqualify a potential special master. Such an individual is not likely to come to these cases with a fresh perspective, as Congress plainly intended in enacting the DTA and MCA. Additionally, by picking a magistrate by name in circumstances where he has addressed in detail issues very similar if not identical to the ones that may arise in this Court, petitioners' request bears the hallmarks of judge-shopping. The better approach would be to select a special master at random from individuals who have not been involved in previous litigation on these issues.

## V. *Parhat* Needs to Be Divided into Seven Distinct DTA Proceedings.

The petition for review filed in *Parhat* purports to be filed on behalf of seven different detainees at Guantanamo who have each been determined to be enemy combatants. See Pet. at 1. With respect to those seven detainees, the petition challenges the conclusions of seven different CSRTs, each tribunal having been separately conducted for each of the seven petitioners and each tribunal having concluded that the individual petitioner before it was an enemy combatant. *Ibid.* Because the function of this Court is to review those seven different decisions, each petitioner should be treated as having filed a separate petition for review, each petition should be assigned a separate docket number, and each petition should proceed on the merits separately before this Court, based on the specific CSRT record for each petitioner.

## CONCLUSION

For the foregoing reasons, this Court should grant the Government's motions to enter the Government's proposed DTA protective order, and divide the *Parhat* case into seven separate proceedings. In addition, it should deny petitioners' motions to enter the Habeas Protective Order, to order discovery, and to appoint a special master.

Respectfully submitted,

PETER D. KEISLER
*Assistant Attorney General*

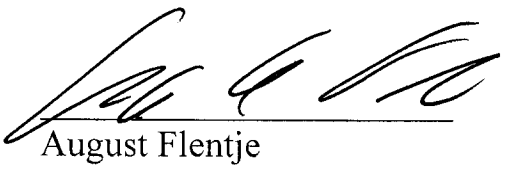
GREGORY G. KATSAS
*Principal Deputy Associate Attorney General*

JONATHAN F. COHN
*Deputy Assistant Attorney General*

DOUGLAS N. LETTER
(202) 514-3602
ROBERT M. LOEB
(202) 514-4332
AUGUST E. FLENTJE
(202) 514-1278
*Attorneys, Appellate Staff*
*Civil Division, Room 7268*
*U.S. Department of Justice*
*950 Pennsylvania Ave., N.W.*
*Washington, D.C. 20530-0001*

**CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)(C) OF THE FEDERAL RULES OF APPELLATE PROCEDURE**

I hereby certify, pursuant to Fed. R. App. P. 32(a)(7)(C) and D.C. Circuit Rule 32(a), that the foregoing brief is proportionally spaced, has a typeface of 14 point, and contains 17,312 words (which does not exceed the applicable 21,000 word limit set by this Court's order).



August Flentje

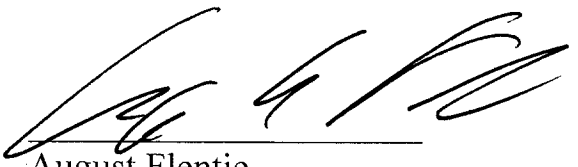
## CERTIFICATE OF SERVICE

I hereby certify that on April 9, 2007, I served the foregoing "Brief for Respondent" on the following counsel with their consent by causing two copies to delivered to be sent via Federal Express and e-mail transmission:

Sabin Willett
Bingham McCutchen LLP
150 Federal Street
Boston, MA 02110-1726

Susan Baker Manning
2020 K Street, N.W.
Washington DC 20006-1806

Jennifer R. Cowan
Debevoise & Plimpton
919 Third Avenue
New York, New York 10022



August Flentje

## STATUTORY ADDENDUM

Section 1005(e)(2) of the Detainee Treatment Act of 2005, as amended by section 10 of the Military Commissions Act of 2006:

REVIEW OF DECISIONS OF COMBATANT STATUS REVIEW TRIBUNALS OF PROPRIETY OF DETENTION-

(A) IN GENERAL- Subject to subparagraphs (B), (C), and (D), the United States Court of Appeals for the District of Columbia Circuit shall have exclusive jurisdiction to determine the validity of any final decision of a Combatant Status Review Tribunal that an alien is properly detained as an enemy combatant.

(B) LIMITATION ON CLAIMS- The jurisdiction of the United States Court of Appeals for the District of Columbia Circuit under this paragraph shall be limited to claims brought by or on behalf of an alien--

(i) who is, at the time a request for review by such court is filed, detained by the United States; and

(ii) for whom a Combatant Status Review Tribunal has been conducted, pursuant to applicable procedures specified by the Secretary of Defense.

(C) SCOPE OF REVIEW- The jurisdiction of the United States Court of Appeals for the District of Columbia Circuit on any claims with respect to an alien under this paragraph shall be limited to the consideration of--

(i) whether the status determination of the Combatant Status Review Tribunal with regard to such alien was consistent with the standards and procedures specified by the Secretary of Defense for Combatant Status Review Tribunals (including the requirement that the conclusion of the Tribunal be supported by a preponderance of the evidence and allowing a rebuttable presumption in favor of the Government's evidence); and

(ii) to the extent the Constitution and laws of the United States are

applicable, whether the use of such standards and procedures to make the determination is consistent with the Constitution and laws of the United States.

(D) TERMINATION ON RELEASE FROM CUSTODY- The jurisdiction of the United States Court of Appeals for the District of Columbia Circuit with respect to the claims of an alien under this paragraph shall cease upon the release of such alien from the custody of the Department of Defense.