[ARGUMENTS HELD ON MAY 15, 2007]

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

HAJI BISMULLAH, et al., Petitioners, v. ROBERT M. GATES, SECRETARY OF DEFENSE, Respondent.	No. 06-1197
HUZAIFA PARHAT, et al., Petitioners, v. ROBERT M. GATES, SECRETARY OF DEFENSE, et al., Respondents.	No. 06-1397
ABDUSABOUR, Petitioner, v. ROBERT M. GATES, SECRETARY OF DEFENSE, et al., Respondents.	No. 07-1508
ABDUSEMET, Petitioner, v. ROBERT M. GATES, SECRETARY OF DEFENSE, et al., Respondents.	No. 07-1509

JALAL JALALDIN, Petitioner, v. ROBERT M. GATES, SECRETARY OF DEFENSE, et al., Respondents.	)	No. 07-1510
KHALID ALI, Petitioner, v. ROBERT M. GATES, SECRETARY OF DEFENSE, et al., Respondents.	)	No. 07-1511
SABIR OSMAN, Petitioner, v. ROBERT M. GATES, SECRETARY OF DEFENSE, et al., Respondents.	)	No. 07-1512
HAMMAD Petitioner, v. ROBERT M. GATES, SECRETARY OF DEFENSE, et al., Respondents.	)	No. 07-1523

EMERGENCY MOTION TO STAY THE MANDATE AND FOR A STAY OF ENFORCEMENT IN ALL RELATED CASES PENDING DISPOSITION OF THE GOVERNMENT'S PETITION FOR CERTIORARI OR, IN THE ALTERNATIVE, FOR A TEMPORARY STAY OF ENFORCEMENT WHILE THE SUPREME COURT CONSIDERS THE GOVERNMENT'S STAY REQUEST

On July 20, 2007, this Court held that the record on review in cases brought under the Detainee Treatment Act ("DTA") is not limited to the record that was actually presented to the Combatant Status Review Tribunal ("CSRT"), but also includes the broader class of material that the CSRT was "authorized to obtain and consider." *Bismullah v. Gates* ("*Bismullah I*"), 501 F.3d 178, 180 (D.C. Cir. July 20, 2007). On October 3, 2007, the panel denied the Government's petition for rehearing, *Bismullah v. Gates* ("*Bismullah II*"), 503 F.3d 137 (D.C. Cir. October 3, 2007), and on February 1, 2008, by a 5-5 vote, the Court denied the Government's petition for rehearing *en banc*. *Bismullah v. Gates (Bismullah III)*, __F.3d__, 2008 WL 269001 (D.C. Cir. Feb. 1, 2008). The Solicitor General has now authorized the filing of a petition for a writ of certiorari on an expedited basis. The Government plans to file the petition on February 14, 2008, and to seek expedited consideration of the petition.

For the reasons set forth below, pursuant to Rule 41 of the Federal Rules of Appellate Procedure, we ask this Court to stay the mandate, and to stay enforcement of its ruling, including its application to all other DTA cases, pending the disposition

of the Government's expedited petition for a writ of certiorari and, if the petition is granted, disposition of the case on the merits. If this Court denies that relief, we respectfully ask the Court, at a minimum, to temporarily stay enforcement of its ruling in this and in all DTA cases until the Government has had an opportunity to seek an emergency relief from the Supreme Court on an expedited basis.

1. A stay pending the disposition of the Government's expedited certiorari petition is warranted. As all of the members of the Court recognized in the opinions accompanying the 5-5 denial of rehearing en banc, this case involves an exceptionally important threshold legal question concerning the record on review, the resolution of which will apply to all actions brought under the DTA. Indeed, the question of the proper scope of the record on review in DTA cases is fundamental and must be resolved before any of the pending DTA cases, currently pertaining to over 180 detainees, may proceed. The Government believes that the Court's resolution of that issue is erroneous and warrants prompt Supreme Court review. And, as this Court has recognized, the question presented by this case is directly interrelated with the questions currently pending before the Supreme Court in *Boumediene v. Bush*, No. 06-1195, and *Al Odah v. United States*, No. 06-1196 (both argued Dec. 5, 2007). *See, e.g.*, *Boumediene* v. *Bush*, 127 S. Ct. 3078 (2007).

The importance of this issue, and the imperative need for Supreme Court

review, is further evidenced by the fact that the Order denying *en banc* review consists of five separate opinions, with five members of this Court, including one member of this panel, voting to rehear the case *en banc*. As Judge Randolph explained in his opinion dissenting from the denial of *en banc*, which was joined by three other judges, "the court's ruling in these cases endangers national security." *Bismullah III*, 2008 WL 269001, at *8 (Randolph, J., dissenting from denial of rehearing *en banc*). In addition, as evidenced by the various opinions both concurring in and dissenting from the denial of *en banc*, most of the judges appear to be well aware of the need for Supreme Court resolution of this issue. See *Bismullah III*, 2008 WL 269001, at *5 (Ginsburg, J., concurring in denial of rehearing *en banc*); *id.* at *6 (Garland, J., concurring in denial of rehearing *en banc*); *id.* at *7 n.6 (Henderson, J., dissenting from denial of rehearing *en banc*); *id.* at *10 (Randolph, J., dissenting from denial of rehearing *en banc*). Accordingly, the Government is preparing an expedited petition for certiorari, and respectfully requests that this Court's ruling not be enforced in any pending DTA case until the Supreme Court has had an opportunity to consider and dispose of the Government's expedited petition.

A stay pending disposition of the Government's expedited certiorari petition is particularly appropriate because the issues presented in this case are intertwined with the issues the Supreme Court is now considering in *Boumediene* and *Al Odah*.

It would make little sense to require the Government to undertake the extraordinary measures required to comply with the panel's decision in this case before the Supreme Court's decision in *Boumediene* and *Al Odah*. If, for example, the Supreme Court determined that detainees have Suspension Clause rights and that habeas would have been available to them at common law, then the Court may consider the adequacy of the DTA procedures and may provide additional guidance regarding what additional procedures, if any, are necessary. If, on the other hand, the Supreme Court determined that detainees do not have Suspension Clause rights, then the adequacy of the DTA procedures would not be in issue. In the absence of guidance from the Supreme Court on these critical questions, the Government should not be required to either assemble and provide all of the Government Information or to reconstitute all of the CSRTs for new determinations, *see* pp. 7, *infra*. Indeed, if a stay were not granted, the Government might be required to expend extraordinary resources to comply with the panel's decision in this case, only to have its efforts mooted by the Supreme Court's decision in *Boumediene* and *Al Odah*.

If the Court's ruling is not stayed, immediate and drastic consequences would result. Absent a stay, the Government faces numerous record-production orders that it simply cannot meet. For example, now that the *en banc* petition has been denied, respondent faces other imminent deadlines to produce the certified index of the record

and/or record. *See, e.g.*, *Paracha v. Gates*, No. 06-1038 (Order of Sept. 12, 2007) (stay for production of the certified index expires fourteen days after disposition of *Bismullah* rehearing petition); *Mahnut v. Gates*, No. 07-1066 (Order of Sept. 26, 2007) (same); *Nasser v. Gates*, No. 07-1340 (Order of Sept. 26, 2007) (same); *Thabid v. Gates*, No. 07-1341 (Order of Sept. 26, 2007) (same); *Chaman v. Gates*, No. 1101 (Order of Nov. 28, 2007) (same); *Hamad v. Gates*, No. 07-1098 (Order of Oct. 31, 2007) (same). Respondent also sought a stay of its obligation to file a certified index of record in 64 pending DTA cases, pending the resolution of the *Bismullah* rehearing petition (although the Court has yet to rule on that motion). In addition, respondent is currently obligated to provide a certified index of record in a "high value detainee" case on Monday, February 4, 2008. *See Husayn v. Gates*, No. 07-1520. Moreover, petitioner in the present cases has already filed a demand letter for the immediate production of the record as defined by *Bismullah*.

Even attempting to meet these deadlines under the panel's conception of the record on review would require the Government to commit, for the next year or more, a large portion of its intelligence and law enforcement resources, as well as massive military resources during an armed conflict, to create the records that the panel has ordered to be produced. In addition, requiring the production of "Government Information" to the Court and potentially to counsel "could seriously disrupt the

Nation's intelligence gathering programs by, for example, discouraging cooperation by foreign governments and other critical intelligence sources." Respondents' Rehearing Pet. at 2. Production of this material, therefore, "could cause 'exceptionally grave damage to national security.'" Id. at 7 (quoting Hayden Unclass. Dec.). The Government's rehearing *en banc* petition explains in detail why this option cannot be carried out without compromising national security. *See id.* at 6-11.[1] As Judge Randolph recognized in his opinion dissenting from the denial of rehearing *en banc* – which was joined by three other judges – the panel's definition of the record on review "risks serious security breaches for no good reason." *Bismullah III*, 2008 WL 269001, at *8. In her separate opinion dissenting from the denial of rehearing *en banc*, Judge Henderson specifically noted that in the unclassified declarations accompanying the *Bismullah* petition for rehearing, "the five officials – charged with safeguarding our country while we are now at war – have detailed the grave national security concerns the *Bismullah I* holding presents." *Id.* at *7.

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[1] The *Bismullah* petition for rehearing was accompanied by declarations from Michael V. Hayden, Director, Central Intelligence Agency (classified and public versions); Gordon England, Deputy Secretary of Defense; Keith Alexander, Director, National Security Agency (classified and public versions); Robert Mueller, Director, Federal Bureau of Investigation (classified and public versions); and J. Michael McConnell, Director of National Intelligence. Those declarations set out in detail the potential harms that would result from complying with the Court's order to produce the record as defined in *Bismullah*.

In denying rehearing, the panel recognized that the Government did not possess the historical records of materials reviewed by the CSRT recorder and that the Government would have to undertake extraordinary efforts to attempt to gather all of the records that would include those materials now. *Bismullah II*, 503 F.3d at 141. The panel nonetheless held that production of those materials was essential to its review: "if the Government cannot, within its resource constraints, produce the Government Information collected by the Recorder with respect to a particular detainee, then this court will be unable to confirm that the CSRT's determination was reached in compliance with the DoD Regulations and applicable law." *Ibid.* The panel noted, however, that the Government has an "alternative": "It can abandon its present course of trying to reconstruct the Government Information by surveying all relevant information in its possession without regard to whether that information is reasonably available, and instead convene a new CSRT." *Ibid.*

This ruling gives the Government a highly undesirable choice: to commit massive military, intelligence, and law enforcement resources to a burdensome search and gathering process aimed at creating a broad record that would necessarily encompass the material the recorder examined in each DTA case or, in the midst of an armed conflict, commit massive resources to redoing some 275 CSRTs (*i.e.*, for the over 180 DTA petitioners and all of the other Guantanamo detainees, if they also

seek DTA review). See *Bismullah III*, 2008 WL 269001, at *3 (Ginsburg, J., concurring in denial of rehearing en banc) (to comply with the Court's order, "the Government could either 'reassemble the Government Information it did collect or . . . convene a new CSRT.'" (quoting *Bismullah II*, 503 F.3d at 141-142)).

The second, drastic option of conducting close to 275 new CSRTs, and the enormous burden that process would entail, should also not be required before permitting the Government to first seek Supreme Court review to challenge this Court's ruling. In particular, there is no reason to require the Government to engage in that massive undertaking before the Supreme Court's decision in *Boumediene* and *Al Odah*, which likely will shed significant light on the scope of the remedies available to detainees. Indeed, if any remands were necessary, it would make far more sense to wait until the Government has the benefit of the Supreme Court's decision in in *Boumediene* and *Al Odah* to ensure that any additional CSRTs are conducted in accordance with this Court's decision. No one would benefit from requiring the Government to embark on one set of remands to conduct new CSRTs in the wake of the *Bismullah* decision only to have to go back and conduct *additional* CSRTs to comply with any additional guidance provided by the Supreme Court's decision in *Boumediene* and *Al Odah.* Of course, the Supreme Court -- which presumably knows where it is headed in *Boumediene* and *Al Odah* -- is in the best

position to determine the appropriate course in this case, and entering the requested stay would simply maintain the status quo pending disposition of the Government's expedited certiorari petition in *Bismullah*.

A stay of the Court's ruling pending disposition of an expedited petition for certiorari is particularly appropriate, given that the Court's conception of record review is both unprecedented in any administrative or judicial context of which the Government is aware,[2] and was unanticipated here. *Bismullah II*, 503 F.3d at 141 ("We note in the Government's defense that CSRTs made hundreds of status determinations, including those under review in the present cases, before the DTA was enacted in December 2005 and therefore without knowing what the Congress would later specify concerning the scope and nature of judicial review"). The Court's ruling should not be enforced here or in any other DTA cases, given the substantial harm that could result, before providing the Supreme Court with an opportunity to

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[2] As we have explained, it is the limited administrative review model of a formal military determination that Congress followed in enacting the DTA and the MCA. But even in the habeas context, no more extensive review has historically been provided (*see, e.g., Yamashita v. Styer*, 327 U.S. 1, 8, 23 (1946)), and Congress certainly did not seek to broaden that scope of review in repealing habeas and replacing it with the "narrow DC Circuit-only review of the [CSRT] hearings." *Boumediene v. Bush*, 476 F.3d 981, 986 n.2, *cert. granted*, 127 S. Ct. 3067 (2007). Further, as Judge Randolph explained in his opinion dissenting from the denial of rehearing *en banc*, 28 U.S.C. § 2112(b) and Federal Rule of Appellate Procedure 16(a) "make crystal clear that . . . the record does not include information never presented to the [CSRT]." *Bismullah III*, 2008 WL 269001, at *8.

determine whether to review that ruling on an expedited basis.

2. If this Court declines to stay the mandate and its ruling pending disposition of the Government's expedited petition for writ of certiorari (which the Government plans to file on an expedited basis), we ask, in the alternative, that the Court grant a limited stay of enforcement of its ruling, in all DTA cases, pending the Supreme Court's disposition of an emergency stay motion that the Government would be required to file in such circumstances to maintain the status quo while the Supreme Court considers this extraordinarily important matter.

CONCLUSION

For the foregoing reasons, respondent respectfully requests that the Court stay the mandate and enforcement of its ruling in this and all DTA cases, pending the disposition of the Government's expedited petition for writ of certiorari and, if the petition is granted, disposition of the case on the merits. If this Court denies that relief, we ask that the Court, at a minimum, stay enforcement of the ruling until the Supreme Court rules upon an emergency stay motion.

Respectfully submitted,

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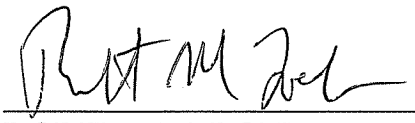

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CERTIFICATE OF SERVICE

I hereby certify that on February 4, 2008, I filed and served the foregoing "EMERGENCY MOTION TO STAY THE MANDATE AND FOR A STAY OF ENFORCEMENT IN ALL RELATED CASES PENDING DISPOSITION OF THE GOVERNMENT'S PETITION FOR CERTIORARI OR, IN THE ALTERNATIVE, FOR A TEMPORARY STAY OF ENFORCEMENT WHILE THE SUPREME COURT CONSIDERS THE GOVERNMENT'S STAY REQUEST," by causing an original and four copies to be sent by FedEx overnight delivery (as well as electronic mail to each counsel):

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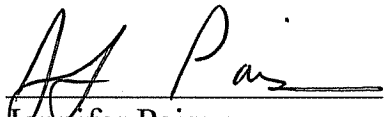

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