[EN BANC REHEARING DENIED FEBRUARY 1, 2008]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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

JALAL JALALDIN, Petitioner, v. ROBERT M. GATES, Respondent.	No. 07-1510
KHALID ALI, Petitioner, v. ROBERT M. GATES, Respondent.	No. 07-1511
SABIR OSMAN, Petitioner, v. ROBERT M. GATES, Respondent.	No. 07-1512
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PETITIONERS' OPPOSITION TO THE GOVERNMENT'S EMERGENCY MOTION FOR STAY

I. INTRODUCTION

This Court has now devoted more than a year of judicial energy, three decisions and seven opinions, to providing the Executive direction on how to assemble the record on review in a case brought under the Detainee Treatment Act of 2005 ("DTA").[1] It has been an exercise in abstract hypotheticals. No actual record on review has been provided or tested. The government has never disclosed what specific information would, or would not, be included in the record in any particular case. No affiant has suggested that production of the record on review *in these specific cases* would impact national security.

The first DTA case, *Paracha v. Gates*, No. 06-1138 (D.C. Cir. filed Jan. 24, 2006), has now passed its second anniversary. *Bismullah v. Gates*, No. 06-1197 (D.C. Cir. filed June 9, 2006), will soon be twenty months old. The seven Uighur Petitioners[2] asked for DTA relief well over a year ago, on December 4, 2006. Behind these petitioners stand one hundred and seventy others.

The threshold business in these cases is to produce the record on review. The government has delayed and obstructed that business by every imaginable liti-

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[1] *See Bismullah v. Gates*, 501 F.3d 178 (D.C. Cir. 2007) ("*Bismullah I*") (defining the "Record on Review" and entering a Protective Order); *Bismullah v. Gates*, 503 F. 3d 137 (D.C. Cir. 2007) ("*Bismullah II*") (denying rehearing); *Bismullah v. Gates*, __ F.3d __, 2008 WL 269001 (D.C. Cir. Feb. 1, 2008) ("*Bismullah III*") (denying rehearing en banc).

[2] On December 4, 2006, the Uighur Petitioners filed a single joint petition in *Parhat v. Gates*, No. 06-1397. The Court assigned each of the seven a separate case number in December 2007. *See* Order, *Parhat v. Gates*, No. 06-1397 (D.C. Cir. Dec. 18, 2007) (assigning Docket Nos. 06-1397, 07-1508, 07-1509, 07-1510, 07-1511, 07-1512, and 07-1523).

gation stratagem: stay motions,[3] withholding the same documents it contended constituted the record,[4] grudging and belated disclosure of critical facts *after* briefing and oral argument,[5] motions for reconsideration, and for rehearing *en banc*. Now the government seeks yet another stay while it pursues yet another effort to appeal an interlocutory order. Its motion should be denied.

II. THE GOVERNMENT IMPROPERLY ASKS THIS PANEL TO INTERFERE WITH ORDERS ISSUED BY SEPARATE PANELS OF THE COURT.

Relying on Rule 41 of the Federal Rules of Appellate Procedure, the government asks the panel to "stay the mandate" and "to stay enforcement of its ruling, including its application to all other DTA cases." Mtn. at 1. Rule 41 is inapplicable. There is no mandate to issue because *Bismullah I* is an interlocutory order, not a judgment. *See, e.g.*, Fed. R. App. P. 41(a) ("the mandate consists of a certified copy of the judgment, a copy of the court's opinion, if any, and any direction about costs") (emphasis added); Black's Law Dictionary 962 (6th ed. 1990) (defining "mandate").

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[3] *See Parhat v. Gates*, No. 06-1397 (Opposition To Motions for Entry of Protective Order and for Order Setting Procedures and Cross Motion to Enter Proposed Protective Order and to Stay Proceedings, filed Dec. 29, 2006).

[4] Despite repeated requests, the government refused to produce the CSRT hearing record for *any* Petitioner for nearly eleven months, and it *still* has not disclosed the CSRT hearing record for some.

[5] *See, e.g.*, Motion for Leave to File Declaration Describing Process of Compiling CSRT Record (requesting leave to file—more than two weeks *after* oral argument—the Declaration of Admiral James A. McGarrah admitting, among other things, multiple failures to adhere to CSRT standards and procedures) (filed June 1, 2007); Petition for Rehearing and Suggestion for Rehearing En Banc (arguing for the first time that compiling the Government Information would be burdensome, despite having previously argued that it had already been compiled in a routine process entitled to a presumption of regularity. and submitting new declarations from intelligence officials (filed Sept. 7, 2007).

Bismullah I is also the law of this Circuit. Unless the Supreme Court grants *certiorari* (a doubtful proposition) and reverses (even more doubtful) this Court is obligated to follow it. *See, e.g.*, *United States v. Alaw*, 327 F.3d 1217, 1220 (D.C. Cir. 2003) ("the law of the circuit doctrine . . . prevents a new appellate panel from declining to follow the legal rulings of the panel in a prior appeal"); *Investment Co. Inst. v. FDIC*, 728 F.2d 518, 526 (D.C. Cir. 1984) (same). In at least six cases, panels of this Court have issued orders requiring the government to file a revised certified index of record within fourteen days of the Court's disposition of the *en banc* petition. Mtn. at 5. Under the Protective Order, the government is required to provide the Record on Review to security-cleared counsel at the same time. *Bismullah I*, 501 F.3d at 202 (Protective Order § 7(H) ("The Record on Review must be provided to Petitioner's Counsel at the time the certified index of the record is filed in this court or as otherwise ordered by the court."). Those panels have made it abundantly clear that they are not amenable to further delay.

> Respondent is directed to file a revised certified index to the record within 14 days of the court's disposition of the petition for rehearing and rehearing en banc filed September 7, 2007, in Bismullah v. Gates, No. 06-1197. **Any motion for extension of time to file the revised certified index will be highly disfavored.**

Paracha v. Gates, No. 06-1038 (Order of Sept. 12, 2007) (Henderson, Tatel, and Kavanaugh, J.J.) (emphasis added). Similar orders were entered in Nos. 07-1066, 07-1340, 07-1341, 07-1101, and 07-1098. This panel is not sitting in the above cases, but even if it were, the government's effort to circumvent those orders, without any notice to counsel in at least some of those cases, should not be tolerated.

III. THE GOVERNMENT HAS NOT JUSTIFIED A STAY.

In considering whether a stay is appropriate (including a stay of a mandate) pending disposition of an appeal to a federal court of appeals or disposition of a pe-

tition for writ of certiorari, courts apply the standard employed by the Supreme Court under 28 U.S.C. § 2101(f) and Supreme Court Rule 23. That standard requires the stay applicant to demonstrate: "(1) a reasonable probability that four Justices would vote to grant certiorari; (2) a significant possibility that the Court would reverse the judgment below; and (3) a likelihood of irreparable harm, assuming the correctness of the applicant's position, if the judgment is not stayed." *Packwood v. Senate Select Comm. on Ethics*, 510 U.S. 1319, 1319-20 (1994) (Rehnquist, C.J., in chambers, denying application to stay district court order enforcing subpoenas pending appeal) (citation omitted); *see Edwards v. Hope Med. Group for Women*, 512 U.S. 1301, 1302 (1994) (Scalia, J., in chambers, denying application to stay district court order pending appeal). The applicant must "rebut the presumption that the decisions below—both on the merits and on the proper interim disposition of the case—are correct." *Planned Parenthood of Southeastern PA v. Casey*, 510 U.S. 1309, 1310 (1994) (Souter, J., in chambers, denying application to stay mandate pending filing of petition certiorari for certiorari) (quoting *Rostker v. Goldberg*, 448 U.S. 1306, 1308 (1980)).[6] A court (or Justice) deciding a stay application must also "balanc[e] the stay equities." *California v. American*

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[6] Rule 41(d)(2)(A) of the Federal Rules of Appellate Procedure provides that a party seeking to stay the mandate pending the filing of a petition for certiorari must demonstrate that "the certiorari petition would present a substantial question and that there is good cause for a stay." Fed. R. App. P. 41(d)(2)(A). Circuit courts applying this rule have employed the same standard applied by the Justices of the Supreme Court. *See, e.g., Nanda v. Bd. of Trs. of the Univ. of Illinois*, 312 F.3d 852, 853-54 (7th Cir. 2002) (Ripple, J., in chambers) (denying motion to stay mandate pending certiorari). This Court has declined to reach the issue of the existence of a "substantial question" where the movant fails to show irreparable harm during the pendency of the petition. *See Judicial Watch, Inc. v. Nat'l Energy Policy Dev. Group*, Nos. 02-5355 & 02-5356, 2003 WL 22319584, at *1 (D.C. Cir. Sept. 30, 2003); *United States v. Microsoft Corp.*, 2001 WL 931170, at *1 (D.C. Cir. Aug. 17, 2001) (same).

Stores Co., 492 U.S. 1301, 1307 (1989) (O'Connor, J., in chambers); *see Barnes v. E-Systems, Inc. Group Hosp. Med. & Surgical Ins. Plan*, 501 U.S. 1301, 1304-05 (1991) (Scalia, J., in chambers).

But section § 2101(f) applies only to cases in which the lower court has issued a "final judgment or decree" that "is subject to review by the Supreme Court on writ of certiorari." *Ohio Citizens for Responsible Energy, Inc. v. Nuclear Regulatory Comm'n*, 479 U.S. 1312 (1986) (Scalia, J., in chambers) ("[I]t is only the execution or enforcement of *final* orders that is stayable under § 2101(f)."). Where section 2101(f) does not apply, an original writ of injunction, pursuant to the All-Writs Act, 28 U.S.C. § 1651(a), is required. *Id.* Such injunctive relief is to be granted "sparingly and only in the most critical and exigent circumstances, and only where the legal rights at issue are indisputably clear." *Id.* (internal quotation marks and citations omitted). Furthermore, "the applicant must demonstrate that the injunctive relief is necessary or appropriate in aid of the Court's jurisdiction." *Id.* (citing 28 U.S.C. § 1651(a); internal quotation marks and alterations omitted).

Each relevant factor weighs against a stay in this case. Nor is there any justification for granting a stay under the authority of the All Writs Act, with its even more stringent standards.[7]

[7] Fed. R. App. 8 and D.C. Cir. R. 8(a)(1) apply to motions to stay or enjoin judgments and orders of the *district court*, and so do not govern here. Even if these rules did apply, however, the government has not satisfied their requirements (similar to those of Fed. R. App. P. 41(d)(2)(A), 28 U.S.C. § 2101(f) and Supreme Court Rule 23), or the more onerous requirements of 28 U.S.C. § 1651(a), for the reasons discussed below.

A. The Government Has Not Met Its Burden To Demonstrate Both A Reasonable Probability That Certiorari Review Of Its Petition Would Be Granted And A Significant Possibility That The Supreme Court Would Reverse The Challenged Order.

No purpose is served by reprising the exhaustive analysis contained in this Court's two decisions in these cases, nor in the statements appended to the denial of *en banc* review. The panel reached a sound conclusion based on the statute, declined to reconsider, and the *en banc* Court refused the rehearing request. Under the plain terms of the DTA, there is no basis to argue that the Supreme Court would grant certiorari review of the panel's interlocutory order or that there is a significant possibility of reversal if it did.

1. The challenged order is compelled by the DTA.

The DTA provides a process for Guantanamo detainees to petition for independent and meaningful review of the CSRT determination that they are enemy combatants, DTA § 1005(e)(2)(A), and grants this Court jurisdiction to resolve issues of fact and law in these original actions, DTA § 1005(e)(2)(C). As the Court recognized, its oversight function would be impossible without the production of the Government Information, defined in the government's own procedures as the evidence required to be collected by the government. *Bismullah I*, 501 F.3d at 181 (citing CSRT Procedures, Encl. 1 § E(3), Encl. 2 § C(1)). Without reviewing the Government Information, the Court could not fulfill its statutorily mandated role because it would be unable to "review [the Recorder's] compliance with [Respondent's] procedures," determine whether "the Recorder withheld exculpatory evidence from the Tribunal in violation of the specified procedures," or "consider whether a preponderance of the evidence supports the Tribunal's status determination." *Bismullah I*, 501 F.3d at 185-86.

2. Neither this Court nor the Supreme Court can overturn the express mandate of Congress.

The government's burden argument is legally insufficient and, indeed, irrelevant, as the Court cannot relieve a party from requirements imposed by Congress even if it believes the requirements are "unnecessarily inefficient and burdensome." *EchoStar Satellite L.L.C. v. FCC*, 457 F.3d 31, 41 (D.C. Cir. 2006); *see also South Coast Air Quality Mgmt. Dist. v. EPA*, 472 F.3d 882, 894 (D.C. Cir. 2006) (rejecting agency's attempt to adopt "far less burdensome" requirements because agency "cannot replace Congress's judgment with its own"); *American Maritime Assoc. v. Blumenthal*, 590 F.2d 1156, 1168 (D.C. Cir. 1978). Grounded in the separation of powers doctrine, this principle applies equally in the Supreme Court. *See Vance v. Bradley*, 440 U.S. 93, 97 (1979) ("The Constitution presumes that . . . even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted.").

3. Neither certiorari nor a stay of the panel's interlocutory order is appropriate.

The challenged order, undeniably procedural and interlocutory, is the type of decision that the Supreme Court declines to review prior to final judgment. *See Mazurek v. Armstrong*, 520 U.S. 968, 975 (1997) ("we are ordinarily reluctant to exercise our *certiorari* jurisdiction ... prior to the entry of a final judgment"); *Societe Nationale Industrielle Aerospatiale v. United States Dist. Ct.*, 482 U.S. 522, 527 (1987) ("immediate appellate review of an interlocutory discovery order ... not ordinarily available"); *Denver v. New York Trust Co.*, 229 U.S. 123, 133 (1913).

Not only is *Bismullah I* interlocutory, but the parties can do no more than speculate about the effect of the decision, because there are no *actual* records to review, and no actual document identified in Petitioners' cases that an affiant alleges would have any impact on national security.[8] This Court's direction to the Executive on how to assemble the record on review in a DTA action is the kind of interlocutory order that falls well outside the normal scope of *certiorari* grants, *see Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916); *Virginia Military Inst. v. United States,* 508 U.S. 946 (1993) (Scalia, J., concurring in denial of certiorari).

The Supreme Court's forthcoming decision in *Boumediene v. Bush* should not limit the scope of the record on review in a DTA action. The question before the Supreme Court is the constitutionality of the DTA provisions stripping district courts of the jurisdiction to hear habeas claims by Guantanamo detainees. Petitioners will have a statutory right to DTA review regardless of that decision.

B. The Government Has Not Demonstrated That It Will Be Irreparably Harmed Absent A Stay.

The government has not shown that it will be irreparably injured absent a stay. It complains of the time and effort required to comply, and makes a generalized appeal to national security. These assertions are unsupported by any argument based on the specific facts of these particular cases.

Time and effort are not irreparable injury, and do not warrant a stay. *See Renegotiation Bd. v. Bannercraft Clothing Co.*, 415 U.S. 1, 24 (1974); *Commonwealth Oil Refining Co. v. Lummus Co.*, 82 S. Ct. 348 (1961) (Harlan, J., in cham-

[8] The materials provided to security-cleared counsel did not discuss Petitioners in these cases at all. We trust that Top Secret-SCI versions provided to the Court did not either, in part because the panel deemed them irrelevant and refused to consider them. *Bismullah II*, 503 F.3d at 138 n.1.

bers). Indeed, it is extremely likely that most of the Government Information is readily available, including apprehension reports, interrogations logs and the interrogators' "knowledgeability briefs" regarding Petitioners.[9] Petitioners themselves gave the government specific guidance as to where to look for additional evidence. *See, e.g.*, Pets' Jt. Opp. to Pet'n for Reh'g 12, n.10. Furthermore, the government was able to devote sufficient resources to collecting information and holding 558 CSRTs within just a few months, beginning in August 2004, when the circumstances were identical.[10] Had the government complied with its own regulations then, the effort to produce the required record now would be routine.[11] That aside, the government's past efforts show that it can, without disruption, complete the task of gathering the Government Information.

Nor do the government's generalized assertions concerning national security meet the test. The challenged order already provides extraordinary protection to the government. It may submit *ex parte* for *in camera* review Government Information which, if disclosed, would arguably pose a risk to national security. *See Bismullah I* at 187; Protective Order ¶ 4.B. Courts have "long held the view that *in camera* review is a highly appropriate and useful means of dealing with claims of

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[9] *See, e.g.,* Memo. in Supp. Pet. Mot. for Preservation Order, *El Banna v. Bush*, No. 04-CV-1144 (D.D.C. Dec. 5, 2005) (RWR) (detailing the types of documents regarding Guantanamo prisoners believed to be in the government's possession).

[10] *See, e.g.,* Sara Wood, Tribunals Held for High-Value Detainees at Guantanamo, March 12, 2007, *available at* http://www.defenselink.mil/news/newsarticle.aspx?id=3346.

[11] If burden exists at all, it is due to the government's own failure to comply with its own record procedures. *See* Gordon England, Secretary of Navy, *Memorandum re Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants Detained at Guantanamo Bay Naval Base, Cuba* (July 29, 2004) at Encl. 1 § E(3) (defining Government Information and authorizing the Tribuanl to request its production) and Encl. 2 § C(1) ("the Recorder shall obtain and examine the Government Information").

governmental privilege." *Kerr v. United States Dist. Court*, 426 U.S. 394, 405-06 (1977); *United States v. Nixon*, 418 U.S. 683, 706 (1974).

The government's assertion that it cannot decide whether to hold new CSRTs in lieu of producing the Government Information until the Supreme Court issues its decision in *Boumediene* is another desperate effort to avoid its obligations under the DTA. The government need not await any decision to hold new CSRTs; its own regulations purport to authorize new CSRT hearings at the government's discretion. *See* Procedure for Review of New Evidence Relating to Enemy Combatant (EC) Status at 3 ¶ 5d (May 7, 2007).

If the government's position is credited, when would the Court actually consider the merits of any DTA petition? How much time would the government need after the decision to decide whether to hold new CSRTs? Presumably only then would the government collect the Government Information. How long would that take? And how many months would pass before the CSRT hearing process and review and approval of the panel's decision was complete?[12] The government seeks not a brief stay but endless delay while Petitioners remain imprisoned.

C. A Stay Will Cause Grievous Harm To The Petitioners.

As the Chief Judge has rightly pointed out, judicial review is not a mere charade. *See, e.g., Bismullah III*, 2008 WL 269001 at *4. The Court then must consider this: suppose the government is wrong, and that among the petitioners is one whose case has merit. When his case finally is decided, will he be insane?

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[12] The government's ability to conduct new CSRTs seems to vary with its litigation position. The government sought a stay of the DTA action filed by Abdulrahim Abdul Razak al Ginco on the basis that a new CSRT for al Ginco would be convened within sixty days. *See Al Ginco v. Gates,* No. 07-1090, Declaration of Frank Sweigert, filed Sept. 13, 2007 at ¶ 5. However, the Court denied a stay, and months later, according to a status report filed by the government with the Court on January 31, 2008, the CSRT hearing has still not been scheduled.

The question is not rhetorical. The Uighur Petitioners have now begun a seventh year of incarceration, and Bismullah a fifth, under conditions so grinding as to be almost unheard of in the federal prison system.[13] We have described the regimen of Camp 6, which is one of stunning psychological cruelty, and which causes the same psychological injuries—paranoia, depression, and an inability to distinguish fact from fancy—that American servicemen suffered when their North Korean captors imposed similar isolation upon them in 1952.[14]

Counsel are particularly fearful that your Petitioner Abdusemet, ISN 295, No. 07-1509, may become insane. More than a year ago, he was transferred to Camp 6. Although he was briefly moved to another camp some time in 2007, we believe Abdusemet was in Camp 6 now for most of 2007, and remains there today. Abdusemet—like all but one of the other Uighur Petitioners—has long been officially cleared for release by the military's Annual Review Board. He presents a compelling case that he was never an enemy combatant.[15] In January 2007, counsel met Abdusemet and learned of his recent transfer to Camp 6. Abdusemet showed signs even then of serious psychological injury. His foot shook uncontrollably, his affect was flat, he confessed to hearing voices in his head.[16] In October

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[13] Only the regimen at the Administrative Maximum, or "ADMAX," facility in Florence, Colorado, where dangerous convicted mass murderers are held, approaches them.

[14] *See* Petitioners' Emergency Motion for Leave to Supplement the Record on Pending Motions with January 20, 2007 Declaration of Sabin Willett, *Parhat v. Gates*, No. 06-1397 (D.C. Cir. filed Jan. 22, 2007); Willett Decl., *Parhat v. Gates*, No. 06-1397 (D.C. Cir. filed Jan. 22, 2007). Bismullah is not currently held in Camp 6.

[15] The Protective Order prevents us from reprising the particulars in a public filing, but the Court may see them in Abdusemet's Motion for Leave to file Motion for Summary Disposition, *Parhat v. Gates*, No. 06-1397 (D.C. Cir. filed Dec. 6, 2007), and related motion lodged therewith.

[16] Willett Decl., *Parhat v. Gates*, No. 06-1397 (D.C. Cir. filed Jan. 22, 2007).

2007, we learned that Abdusemet had been transferred back to Camp 6. Other Uighur petitioners, who we believe also present powerful cases, are experiencing similar psychological injuries. As officers of the Court, we can represent our belief that the same has happened, or is happening, to detainees who are petitioners in scores of other DTA cases. Quite apart from the appalling human cost, the attorney-client relationship is being systematically undermined by delay. Without that relationship, how can counsel carry out their duty to assist the Court in reaching the correct decision?

When these cases are finally decided, will your Petitioners even be alive? This question is not rhetorical either. Guantanamo has passed its sixth anniversary. Men grow sick, or old. In December, a detainee died. The account of how he came to Guantanamo mirrors Bismullah's uncannily. Like Bismullah, he was an opponent of the Taliban who was accused of being a Taliban commander by personal enemies in Afghanistan. High-level Afghani officials repeatedly informed American officials that he had been taken in error, but that information was not considered by his CSRT panel. At his CSRT hearing, the detainee himself requested that those officials in the Karzai government be called as witnesses. Despite their public positions and accessibility, the panel deemed them not reasonably available, and so he died alone, far from home or family, in Guantanamo's isolation.[17]

Suicide is an even bigger risk. The depth of Petitioners' psychological despair is far beyond our ability to express in a court filing. Many prisoners believe, after years of delay, that judicial review is an illusion, and thus that peaceful suicide (which injures no one but themselves) is the only escape. In June 2006, three

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[17] *See* Carlotta Gall & Andy Worthington, *Time Runs Out For An Afghan Held By The U.S.*, N.Y. TIMES, February 5, 2008, at A1.

prisoners succeeded in committing suicide.[18] Scores more have attempted it and are attempting it now through the last election left to them: declining to eat. Will this Court some day dismiss a case that, although merit-worthy, is moot because the petitioner died in despair of judicial review? It is a very real possibility.

D. A Stay Would Harm The Interests of Third Parties.

The government asks a stay because it hopes to delay consideration of every other DTA case. Some of those petitioners have been in this Court for more than a year. Some have been requesting—but never getting—judicial review for almost four years. It has been over two years since Congress gave these men a statutory right to judicial review in this Court. Stays granted by courts to enable piecemeal appeals by the government allowed a remedy explicitly authorized by Congress to slip away. In practice, the same thing is happening again. It is long past the hour for judicial review to mean something again.

E. A Stay Will Disserve The Public Interest.

1. A stay disserves the government's *legitimate* interests.

More than three years ago, the trial courts of this district, urged on by the government, lost sight of a fundamental proposition of jurisprudence. The stay motion invites this Court to the same error, to the great cost not only of the Court itself, but of the coordinate branches of government. The administration of justice is served only when courts of original jurisdiction develop full records and *decide cases* based on those records, and is disserved by piecemeal appeals. This idea finds expression in, but is not limited to the final judgment rule, 28 U.S.C. § 1291.

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[18] Josh White, *Three Detainees Commit Suicide at Guantanamo*, WASH. POST, June 11, 2006, at A01.

In the leading decision of *Cobbledick v. United States*, 309 U.S. 323 (1940), Justice Frankfurter explained:

> Since the right to a judgment from more than one court is a matter of grace and not a necessary ingredient of justice, Congress from the very beginning has, by forbidding piecemeal disposition on appeal of what for practical purposes is a single controversy, set itself against enfeebling judicial administration . . . . To be effective, judicial administration must not be leaden-footed. Its momentum would be arrested by permitting separate reviews of the component elements in a unified cause.

309 U.S. at 325. Encouraging finality is "crucial to the efficient administration of justice," and reflects a congressional policy that is "inimical to piecemeal appellate review of trial court decisions which do not terminate the litigation." *Flanagan v. United States*, 465 U.S. 259, 264 (1984) (quoting *United States v. Hollywood Motor Car Co.*, 458 U.S. 263, 265 (1982)). *See also Canter v. Am. Ins. Co.*, 28 U.S. 307, 318 (1830) (Story, J.) (prohibiting fragmentary review is "of great importance to the due administration of justice," as successive appeals would lead to great delays and "oppressive expenses" for the parties); *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 123-24 (1945).

We are told that the executive is waging a new kind of war, against a new kind of enemy. The question of who is an "enemy combatant" in such a conflict is of profound importance, for it marks the crucial boundary between military and civil power. Final judgments based on complete records assist not only the judicial branch—which can better discern the law on a full record—but the coordinate branches of government as well.

The Executive. Decisions on the merits would provide much-needed instruction to the Executive on where the boundary lies. It would teach us who the Executive actually has been capturing and holding. Not only would this check Ex-

ecutive abuse where it exists, but it would assist the Executive by providing much-needed credibility if it has *not* overreached.

Congress. Decisions on the merits would also permit Congress to assess whether the authority that it conferred in the Authorization for Use of Military Force ("AUMF"), Pub. L. 107-40, 115 Stat. 224 (Sept. 18, 2001), and the DTA has been and is being executed properly. Has the President been using military force (*i.e.*, the detention power) against the enemy specified by Congress? If not, does Congress need to identify a new enemy? Factual determinations will help Congress assess compliance with its constitutional prerogative, set out with specificity in Article I of the Constitution, to declare war—that is, to name the enemy—and to make rules regarding captures.

The Court. This panel has done its work, and panels of this Court now have before them the important business of deciding cases on merits. They will best be served, and serve each other, by getting underway with reasoned decisions on the merits of discrete cases.

2. The pattern of piecemeal review has injured legitimate government interests in the Guantanamo litigation.

For six years, the litigation concerning Guantanamo detainees and others designated as enemy combatants has provided a laboratory. The results illustrate—not simply for *habeas,* but for any scheme of judicial review—the disastrous systemic consequences of infidelity to the final judgment rule. District court judges evidently thought that fragmentary review would assist in reaching accurate decisions on discrete issues.[19] Experience has shown that precisely the opposite is

[19] Early in 2005, after finding that claimants before her had stated good claims, District Judge Joyce Hens Green unaccountably declined to hear them on the merits. Order Granting in Part and Denying in Part Resp'ts Mot. for Certification of January 31, 2005 Order and for Stay, *In re Guantanamo Detainee Cases,* No. 02-cv-0299 (D.D.C. Feb. 3, 2005). This Court's review was constrained by the ab-

true: nothing was decided, and facts crucial to litigants and coordinate branches of government remain unknown. Had trial courts demanded full records in *habeas* cases from mid-2004, when the Supreme Court directed that they "consider in the first instance the merits of the petitions," *Rasul v. Bush*, 542 U.S. 466, 485 (2004), the following would have occurred: (i) courts would have been fully apprised of the broad range of persons against whom the President's war powers had been asserted, (ii) shameful errors could swiftly have been resolved, and (iii) Congress would have known something about what actually happened in the CSRTs *before*, rather than after, it founded a statutory regime on them. In addition, the Executive might have gained credibility from judicial affirmation, based on factual records, of its activities in legitimate cases. The Guantanamo litigation illustrates as well as any litigation in recent memory that fragmentary review impedes efficiency.[20]

For two years now, the DTA cases have presented a golden opportunity for the Court to provide to the co-ordinate branches guidance on important questions. That guidance is needed now more than ever.

a. Against whom is the Executive using military force?

A decision in the Uighur cases would provide needed elucidation of the "enemy combatant" concept. Identically situated to persons determined by the military to be *non*combatants, these men are dissidents from communist oppression by the People's Republic of China. The State Department, which regularly grants asylum to such dissidents, would be surprised to learn that they are our enemy—as

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sence of that record, and in the event the Supreme Court reverses in *Boumediene*, those cases will have to start again.

[20] It blocks altogether the central imperative of the federal courts that cases and controversies *actually be decided.* Since *Marbury v. Madison,* 1 U.S. (Cranch) 137 (1803), the Supreme Court has reminded us that the judicial branch has not only the power, but the duty to decide cases and controversies. *See, e.g., United States v. Nixon,* 418 U.S. 683, 703-05 (1974) (duty of judicial branch to enter orders where it finds conduct of Executive unlawful).

might the Congress. But if it really is the case that the philosophical enemy of communism is our enemy, and subject to indefinite detention, because the President says so, then this Court should endorse the proposition in plain words, and based on a record. Since July 2005, the Uighur Petitioners have sought that decision (here and in habeas) in every imaginable way. The judiciary has failed to provide it.

Bismullah's case is another missed opportunity in this regard. Had the exculpatory evidence been presented to the CSRT panel and had it considered his witnesses, he would certainly have been determined to be a civilian noncombatant (like the Uighurs, a supporter of the United States). *Bismullah* provides the perfect opportunity for guidance, which would assist the President and Congress. Thus far the Court has provided none.

So too is *Paracha* a missed opportunity. The account given about Paracha is serious. The government alleges that, in carrying out his import-export business in Pakistan, Paracha had close contact with senior Al Qaeda officials.[21] But no one alleges military activity by him in the classic sense. No one says he was part of an army or militia, or that he engaged in other martial activity. We understand that he was captured not on a battlefield, but in an airport, in an ambush commercial, not military (he had been promised a meeting with K-Mart).[22] Can such a person be an "enemy combatant," as opposed, say, to an alleged criminal conspirator? The Fourth Circuit wrestled with that question in a similar context, and on the evidence of a long and scholarly majority opinion, a thoughtful dissent, and a grant of *en banc* review, the question is not an easy one. *See Al-Marri v. Wright*, 487 F.3d 160, 184-189 (4th Cir.), *rehearing en banc granted* (Aug. 22, 2007). A decision in

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[21] Undersigned counsel do not represent Paracha, and know only what can be gleaned from public filings. Paracha stoutly denies wrongdoing.

[22] *See* DTA Petition in *Paracha v. Gates*, No. 06-1038 (filed Jan. 24, 2006).

Paracha's case based on a full record would be of enormous importance to all branches of government. Paracha has been asking for that decision since 2004. No court is close to providing it.

b. How is an unconventional enemy to be identified?

By now, it is becoming clear (as it would have years ago had there been full review of records) that very few of the Guantanamo prisoners were captured on a battlefield, and that CSRT panels never had the benefit of percipient accounts by *anyone*—least of all U.S. forces.[23] Like most Guantanamo prisoners, the Uighur Petitioners were not taken by U.S. forces at all, but rather by bounty hunters in Pakistan. Bismullah was detained at an American military base in Afghanistan in 2003. *Bismullah* and the Uighur cases present powerful evidence that the process was command-driven, result-oriented, and unjust. In this environment, which departs from all previous history of wartime military captures, what standards govern the identification of the enemy? Is it just, as Judge Doumar lamented, "the government's 'say-so'?" *See Hamdi v. Rumsfeld*, 542 U.S. 507, 512 (2004) (quoting district court). The law is not as the Executive would have it, but even if it were, coordinate branches of government would greatly profit from a reasoned decision on a full record.[24]

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[23] *See* Mark Denbeaux, *et al.*, *The Guantanamo Detainees: The Government's Story* at 2 (2006), *available at* http://law.shu.edu/news/guantanamo_report_final_2_08_06.pdf (noting that only five percent of the Guantanamo prisoners are even alleged to have been taken on a battlefield); Mark Denbeaux, *et al.*, *No-Hearing Hearings: CSRT, the Modern Habeas Corpus?* at 19, 21 (2006), *available at* http://law.shu.edu/news/final_no_hearing_hearings_report.pdf (noting that the government never presented a single witness, military or civilian, at any of the 558 CSRTs).

[24] Moving forward to the merits is far *more* efficient, as the experience of the *Hamdi* case showed. After remand from the Supreme Court, rather than entertain motions on pleadings as the district judges in this Circuit did, District Judge Doumar ordered a hearing on the merits in October 2004. On the eve of that hearing,

IV. CONCLUSION

If six years of Guantanamo litigation have demonstrated anything, it is that clashing viewpoints based on pleadings and hypotheses will never be resolved through more preliminary rulings on pleadings and hypotheses. Only decisions on the merits, based on full records, will elucidate the law. Petitioners therefore request that:

1. the motion be denied; and
2. the government be ordered forthwith to provide the record on review to the Petitioners, in conformity with the protective order entered by this Court.
3. In the alternative, that in the event any further delay is permitted, it should be conditioned on *at least* the following:
    a. the Motions for Leave to File Motion for Judgment as a Matter of Law filed by Khalid Ali (Nov. 14, 2007), Sabir Osman (Nov. 14, 2007), Abdusemet (Dec. 6, 2007) and Jalal Jalaldin (Dec. 13, 2007) be granted, and each Motion for Judgment as a Matter of Law be set for expedited briefing and hearing; and
    b. the government's commitment immediately to transfer all Petitioners out of Camps 5 and 6 and to Camp 4, where they may be housed communally, permitted each other's companionship, to go in and out of doors, and to be treated under a regimen more appropriate to persons who have been cleared for release.

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the government released Hamdi, thus efficiently terminating what otherwise would have been years of litigation. Joseph Margulies, GUANTANAMO AND THE ABUSE OF PRESIDENTIAL POWER 156 (2006). In this Court, Uighur prisoners who had been imprisoned for a year after favorable CSRT findings were released one business day before the oral argument. *Qassim v. Bush*, 466 F.3d 1073, 1074 (D.C. Cir. 2006). These are not coincidences.

February 6, 2008

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