No. 06-1196

In the Supreme Court of the United States

KHALED A. F. AL ODAH, ET AL., PETITIONERS,

v.

UNITED STATES OF AMERICA, ET AL., RESPONDENTS.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SUPPLEMENTAL REPLY BRIEF FOR PETITIONERS EL-BANNA ET AL.

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Petitioners submit this supplemental brief to inform the Court of the D.C. Circuit's recent denial of the government's motion for rehearing *en banc* in *Bismullah v. Gates*, No. 06-1397, __ F.3d __, 2007 WL 269001 (D.C. Cir. Feb. 1, 2008). The *en banc* plurality confirmed the ruling of the D.C. Circuit panel that the "record on review" in a DTA case consists of "all Government Information . . . regardless of whether it was all put before the Tribunal." Slip Op. at 6.

This ruling does nothing to alleviate the fundamental structural inadequacies of the DTA review process as a substitute for habeas, and will only result in more delay.

1. A DTA court is not allowed to consider or accept new evidence. Its review is restricted to the existing record. Regardless of how that record is defined – whether as all the evidence reasonably available to the government or just the evidence presented to the Tribunal – the existing record is necessarily incomplete.

The government has now acknowledged that "most of the CSRT decisions are based in significant part on classified information"[1] – that is, on accusations the detainees were never allowed to know and so could not rebut. The existing record, no matter how it is defined, therefore lacks significant rebuttal evidence that the detainees never had the chance to present and would not now have the chance to present before a DTA court.[2]

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[1] Government Brief at 4.

[2] *See* Brief for Petitioners El-Banna et al. at 33-35. In fact, even counsel for DTA petitioners may not be able to see or rebut

Moreover, even when detainees were informed of the accusations against them, because they were isolated at Guantanamo and denied assistance of counsel, they had no way to discover and introduce evidence rebutting those accusations. Thus, Murat Kurnaz had no way of knowing or proving that his friend was not, as alleged, a suicide bomber, but in fact was alive and well and living peacefully and without criminal suspicion in their hometown in Germany.[3] And Mr. Abdur Sayed Rahman had no way of introducing evidence to show that he was not Abdur Rahman Zahid, a former Taliban deputy foreign minister, but instead "only a chicken farmer in Pakistan."[4] The record before the DTA court would contain only the false accusations, not the exculpatory evidence that the detainees never had the opportunity to present.

In addition, regardless of whether the "record on review" consists of all the Government Information or only the evidence presented to the CSRT panel, it is still replete with evidence obtained through coercion and torture, with no way for the reviewing court to determine which pieces of evidence are so tainted.[5]

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a significant amount of the classified information on which the CSRT decision was based, as the *Bismullah* panel decision allows the government to withhold "highly sensitive information" from the detainee *and his counsel*. *Bismullah v. Gates (Bismullah I)*, 501 F.3d 178, 179 (D.C. Cir. 2007).

[3] Brief for Petitioners El-Banna et al. at 36.

[4] *Id.* at 37.

[5] *Id.* at 38-41.

As the *en banc* plurality also confirmed, a DTA court is limited to determining whether the CSRTs followed the "standards and procedures specified by the Secretary of Defense" – that is, the same standards and procedures that deprived detainees of counsel and of the right to know the accusations against them, to confront their accusers, and to present exculpatory evidence establishing their innocence. The statute authorizes a DTA court to consider whether those standards and procedures are consistent with the Constitution "to the extent" that the Constitution applies. App. 135-36. But that provision has been rendered meaningless, because the D.C. Circuit has already decided that the Constitution does not apply. *See* App. 15.

These fundamental inadequacies all remain regardless of whether the D.C. Circuit can see all the Government Information or just some of it.

2. The denial of rehearing in *Bismullah* will result only in further delay, not a prompt hearing of any type. The government has already announced its intention to petition for certiorari from the D.C. Circuit's *Bismullah* ruling,[6] yet again postponing the day when a detainee will have the chance to challenge his detention even under the inadequate and unfair DTA review process.

Moreover, the *en banc* plurality made note of the government's admission that it has long ago

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[6] *See* Emergency Motion to Stay the Mandate and For a Stay of Enforcement In All Related Cases Pending Disposition of the Petition for Certiorari, *Bismullah v. Gates*, No. 06-1197 (D.C. Cir. Feb. 4, 2007)

discarded any evidence collected and not presented to the CSRTs. The plurality's proposed remedy for this spoliation is for the government to "reassemble" the Government Information or "convene a new CSRT." Slip Op. at 6.[7] There is little doubt that the government will proclaim itself unable to "reassemble" the lost evidence, leaving no option but to hold a new CSRT for each of the approximately 280 remaining detainees, including petitioners. Indeed, in announcing its intention to petition for certiorari in *Bismullah*, the government has said that, if it does not succeed in overturning the panel's decision, there is a "distinct possibility" that it will reconvene the CSRTs for all detainees rather than comply with *Bismullah. See* Motion for Leave to File and Motion for Fourteen Day Extension of Time Within Which to File Respondents' Brief at 1, 6-7, *Parhat v. Gates*, No. 06-1397 (D.C. Cir. Feb. 4, 2007).

This means more delay before any substantive DTA review can get underway.[8] Such a prolonged

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[7] *See also Bismullah v. Gates*, 503 F.3d 137, 141 (D.C. Cir. 2007) (panel denial of petition for rehearing) (noting that the government no longer possesses all information reviewed by the Recorder and suggesting that it can therefore "convene a new CSRT"); Respondent's Opposition to Motion for Inquiry Concerning Destruction of Evidence at 2-3, *Zalita v. Gates*, No. 07-1384 (D.C. Cir. Jan. 29, 2008) (arguing that the DTA panel cannot even inquire whether evidence has been destroyed).

[8] Even if the government were not seeking certiorari, resolving the dispute over the DTA "record" has already taken more than a year, and is only the first step in the DTA process. In the two years since the first DTA case was filed, no CSRT records have been produced and no CSRT decisions have been reviewed. The length of the dispute over this threshold issue shows just how patently ineffective the DTA review process is.

process plainly is not an adequate substitute for the "swift and imperative remedy" of habeas.

For these reasons and those provided in Petitioners' prior briefs, this Court should reverse the D.C. Circuit's holding in *Boumediene* and remand for the district courts to hold the habeas hearings mandated by this Court so long ago. There can be no acceptable legal excuse for the continued denial of a fair hearing in which these detainees can finally confront the accusations against them and challenge their indefinite detention in U.S. custody.

Respectfully submitted,

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