UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 06-1197

HAJI BISMULLAH *a/k/a* HAJI BISMILLAH, and *a/k/a* HAJI ESMELLA,
HAJI MOHAMMAD WALI, Next Friend of HAJI BISMULLAH,
Petitioners

v.

ROBERT M. GATES, U.S. SECRETARY OF DEFENSE,
Respondent

No. 07-1508

ABDUL SABOUR,
Petitioner

v.

ROBERT M. GATES,
Respondent

No. 07-1509

ABDUL SEMET,
Petitioner

v.

ROBERT M. GATES,
Respondent

No. 07-1510

JALAL JALALDIN,
Petitioner

v.

ROBERT M. GATES,
Respondent

No. 07-1511

KHALID ALI,
Petitioner

v.

ROBERT M. GATES,
Respondent

No. 07-1512

SABIR OSMAN,
Petitioner

v.

ROBERT M. GATES,
Respondent

No. 07-1523

HAMMAD MEHMET,
Petitioner

v.

ROBERT M. GATES,
Respondent

MOTION TO REINSTATE THE COURT'S DECISIONS IN *BISMULLAH I* AND *BISMULLAH II*

For the reasons set forth in Petitioners' Memorandum in Support of Motion to Reinstate the Court's Decisions in *Bismullah I* and *Bismullah II*, Petitioners respectfully request the Court reinstate its decisions in *Bismullah v. Gates*, 501 F.3d 178 (D.C. Cir. 2007) ("*Bismullah I*"), and *Bismullah v. Gates*, 503 F.3d 137 (D.C. Cir. 2007) ("*Bismullah II*"), without delay.

July 3, 2008

Respectfully submitted,

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MEMORANDUM IN SUPPORT OF MOTION TO REINSTATE THE COURT'S DECISIONS IN *BISMULLAH I* AND *BISMULLAH II*

Introduction

On June 23, 2008, the Supreme Court issued a "GVR" order in *Gates v. Bismullah*, No. 07-1054, granting the government's petition for a writ of *certiorari*, vacating the judgment, and remanding the case to this Court for "further consideration in light of *Boumediene v. Bush*, 553 U.S. __ (2008)." *See Gates v. Bismullah*, No. 07-1054 (June 23, 2008). The question resolved by this Court in *Bismullah v. Gates*, 501 F.3d 178 (D.C. Cir. 2007) ("*Bismullah I*"), and *Bismullah v. Gates*, 503 F.3d 137 (D.C. Cir. 2007) ("*Bismullah II*"), and presented to the Supreme Court in *Gates v. Bismullah*, No. 07-1054, was a procedural question concerning the scope of the record on review in actions brought under the Detainee Treatment Act of 2005 ("DTA"). No such question was presented in *Boumediene,* and no holding of the Supreme Court addressed it.

The *Boumediene* decision expressly leaves the DTA intact as is. *See Boumediene v. Bush*, No. 06-1195, slip op. at 66. The decision does not hold that the scope of what must be produced in DTA actions is anything other than what this Court determined it to be in *Bismullah I* and *Bismullah II*. Certainly nothing in *Boumediene* compels a contraction of the scope of this Court's review, or of the Petitioners' rights, in DTA cases.

Boumediene makes clear that the DTA continues to provide a viable cause of action for detainees incarcerated at Guantanamo and that, since these men have been detained for many years without access to an impartial decision maker, cases challenging their detention should proceed quickly. This Court's

decision in *Parhat v. Gates,* No. 06-1397, issued after *Boumediene*, reinforces the point that *Boumediene* does not change the *Bismullah* analysis.

For the reasons set forth below, these DTA Petitioners respectfully request that the Court expeditiously reinstate its decisions in *Bismullah I* and *Bismullah II* and order the government to produce the "Government Information" for each DTA Petitioner immediately so that this Court's review of the merits of the DTA Petitioners' claims may at long last commence.

Procedural Background

Petitioners in these cases filed their DTA petitions in June 2006 (Bismullah) and December 2006 (the Uighur petitioners[1]). Despite two years of litigation, Petitioners, and potentially all other DTA petitioners who need production of the record to proceed to the merits, are nowhere close to being able to present their substantive arguments to the Court.[2] A year ago, in July 2007, this Court ruled that the government must produce the "Government Information"[3] be-

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[1] Other than Haji Bismullah, all Petitioners are ethnic Uighurs who were co-petitioners in Parhat until the Court ordered that each be assigned a separate docket number. *See Bismullah I*, 501 F.3d at 191.

[2] Some, but not all, of the Uighur petitioners have filed motions for summary judgment disposition. On January 4, 2008, Parhat filed a motion for judgment as a matter of law, which this Court was granted on May 20, 2008. On May 6, 2008, Khalid Ali (ISN 280, No. 07-1511), Sabir Osman (ISN 282, No. 07-1512), Jalal Jalaldin (ISN 285, 07-1510), and Abdul Semet (ISN 295, 07-1509), each filed motions in this Court seeking the same relief on the same grounds. The Court has scheduled oral argument in these cases for September 8, 2008 before a single panel.

[3] "Government Information" is defined by the Department of Defense CSRT regulations as "reasonably available information in the possession of the U.S.

cause "to review compliance with the [CSRT] procedures, the court must be able to view the Government Information with the aid of counsel for both parties." *Bismullah I*, 501 F.3d at 185. The government sought rehearing by the panel and rehearing *en banc*. On October 3, 2007, the panel declined to reconsider its earlier decision, affirming its conclusion that "the record on review must include all the Government Information, as defined by the DoD Regulations" and directing the government "either to reassemble the Government Information . . . or . . . convene a new CSRT, taking care this time to retain all the Government Information. *Bismullah II*, 503 F.3d at 142. On February 1, 2008, this Court, sitting *en banc*, denied the government's' motion for rehearing, concluding for the third time that the record on review must include all the Government Information:

> Because the DoD Regulations assign to the Recorder a central role in the CSRT process, to ignore the actions of the Recorder – and especially to ignore the evidence the Recorder did not put before the Tribunal – would render utterly meaningless judicial review intended to ensure that status determinations are made "consistent with" DoD Regulations.

Bismullah v. Gates, 514 F.3d 1291, 1296 (D.C. Cir. 2008) (*"Bismullah III"*) (Ginsburg, C.J., concurring).

In each of these decisions, the Court grounded its conclusion in the text of

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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. *See Bismullah I*, 501 F.3d at 180.

the DTA, which requires this Court to assess "whether the status determination of the Combatant Status Review Tribunal . . . was consistent with the [CSRT] standards and procedures," DTA § 1005(e)(2)(C)(i), and the language of the Department of Defense's CSRT regulations, which requires the Recorder to collect and maintain the Government Information and to provide all exculpatory information in the Government Information to the CSRT panel. *See Bismullah I*, 501 F.3d at 185; *Bismullah II*, 503 F.3d at 140-41; *Bismullah III*, 514 F.3d at 1295-96 (Ginsburg, C.J., concurring).

Respondents then filed a petition for a writ of *certiorari* seeking interlocutory review of this Court's determination of what constitutes the record on review in a DTA action. On June 23, 2008, the Supreme Court issued its "GVR" order. *Gates v. Bismullah*, No. 07-1054 (June 23, 2008). Petitioners here then filed (without the consent of Respondents here) a motion in the Supreme Court for an expedited certified judgment. The Supreme Court granted that motion and notified this Court on June 27, 2008.

In connection with its petition for *certiorari*, the government filed motions in this Court and the Supreme Court seeking to stay its obligations under *Bismullah I* and *Bismullah II* to produce the Government Information in these cases and all related cases. On February 13, 2008, this Court granted a stay, effective only until the Supreme Court ruled on the government's stay motion. The Supreme Court denied the government's stay motion on June 23, 2008. *Gates v. Bismullah*, No. 07-1054 (07A677) (June 23, 2008) (Order). Accord-

ingly, no stay is in effect in these cases.

The government has moved to hold in abeyance or dismiss without prejudice all DTA cases pending resolution of the *habeas* petitions filed by detainees incarcerated at Guantanamo, which had all been stayed pending the Supreme Court's decision in *Boumediene*. The government has also sought a stay of Bismullah's DTA action on the ground that it has announced its intention to hold a new CSRT for him because there is a substantial likelihood that his first status determination was erroneous. *See* Notice of New CSRT Hearing and Motion to Remand, or, In the Alternative, to Hold in Abeyance, *Bismullah v. Gates*, No. 06-1197 (D.C. Cir. May 8, 2008). To the best of our knowledge, no date has been set for his new CSRT hearing.

The *Boumediene* Decision

In its June 12, 2008 decision in *Boumediene*, the Supreme Court held that detainees imprisoned at Guantanamo have the right to seek *habeas* relief in federal court, and that the provisions of the DTA and the Military Commission Act ("MCA") that stripped the federal courts of jurisdiction to hear such claims were unconstitutional.[4] *Boumediene v. Bush*, 553 U.S. __ (2008). *Boumediene* does not hold that the scope of review in DTA actions as determined by this

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[4] Bismullah does not have a pending *habeas* action, but all of the Uighur petitioners have filed *habeas* petitions in the cases styled *Kiyemba v. Bush*, D.D.C. No. 05-cv-01509. In light of the *Boumediene* decision, the Uighur Petitioners have moved to lift the stay orders entered in their pending *habeas* case. *See* Emergency Motion to Lift Stay and Set a Scheduling Conference, *Kiyemba v. Bush*, No. 05-1509 (D.D.C. June 12, 2008).

Court in *Bismullah I* and *Bismullah II* must be altered at all, and any suggestion that *Boumediene* requires a contraction of the scope of review or of the rights of petitioners under the DTA is clearly refuted by what *Boumediene* did say about *Bismullah.*

The *Boumediene* decision implicitly endorsed the Court's analysis in *Bismullah* by relying on it, in part, in concluding that a remand of *Boumediene* was not necessary. *Boumediene*, No. 06-1195, slip op. at 43 ("We do have the benefit of the Court of Appeals' construction of key provisions of the DTA . . . . [T]he three-judge panel in *Bismullah* has issued an interim order giving guidance as to what evidence can be made part of the record on review.").

The Supreme Court also assumed for purposes of its decision in *Boumediene* that *Bismullah I* correctly held that the Court must review the Government Information in DTA actions. *Boumediene,* No. 06-1195, slip op. at 60 ("For present purposes, however, we can assume that the Court of Appeals was correct that the DTA allows introduction and consideration of relevant exculpatory evidence that was 'reasonably available' to the Government at the time of the CSRT but not made part of the record.") (citing *Bismullah I*, 501 F.3d at 181).

The *Boumediene* decision does not alter the Court's holding in *Bismullah* that production of the Government Information is necessary for the Court to conduct the review mandated by Congress in the DTA and provides no basis for altering that conclusion to the detriment of the DTA Petitioners.

Argument

A. The Supreme Court's "GVR" Order Does Not Compel This Court To Alter Its Analysis Or Conclusion in *Bismullah*.

The Supreme Court's June 23, 2008 "GVR" order in *Gates v. Bismullah* does not require this Court to reverse its earlier rulings in *Bismullah I* and *Bismullah II*. "An order to grant the writ of certiorari, vacate the decision and remand does not constitute a final determination on the merits; it does not even carry precedential weight." *Gonzalez v. Justices of the Municipal Court*, 420 F.3d 5, 7 (1st Cir. 2005). It "is neither an outright reversal nor an invitation to reverse; it is merely a device that allows a lower court that had rendered its decision without the benefit of an intervening clarification to have an opportunity to reconsider that decision and, if warranted, to revise or correct it." *Id.*; *see Tyler v. Cain*, 533 U.S. 656, 666 n.6 (2001); *Henry v. City of Rock Hill*, 376 U.S. 776, 777 (1964); *see also Stutson v. United States,* 516 U.S. 163, 178 (1996) (Scalia, J., dissenting) (suggesting that GVR ought to be termed "no-fault V & R" because it represents a "vacation of a judgment and remand *without* any determination of error in the judgment below") (emphasis in the original).

B. The *Boumediene* Decision Does Not Require This Court To Alter Its Analysis Or Conclusion In *Bismullah*.

The *Boumediene* decision does not alter the CSRT Procedures or the scope of review required by the DTA. As this Court noted in *Bismullah III*, the DTA requires review of the CSRT process to ensure that it complied with the CSRT Procedures. *Bismullah III*, 514 F.3d at 1295 (Ginsburg, C.J., concurring).

Many crucial steps in that process occur prior to the CSRT hearing; most critically, the Recorder's review of the Government Information and presentation of all exculpatory information. Because the detainee in a CSRT was given only a summary of the allegations against him, and was never afforded the opportunity to review the Government Information, the *only* way for this Court to determine whether the government complied with the CSRT Procedures is to review the Government Information.

In all of its briefing on this issue, the government has asserted numerous practical objections to the production of the Government Information, but has never satisfactorily explained how this Court could comply with the mandate issued by Congress in the DTA without access to the Government Information.[5] As this Court observed in granting Huzaifa Parhat's motion for judgment as a matter of law, to limit the Court's review to the CSRT record would mean, in many instances, simply "plac[ing] a judicial imprimatur on an act of essentially unreviewable executive discretion." *Parhat v. Gates*, No. 06-1397, slip op. at 3 (D.C. Cir. June 20, 2008); *see also Bismullah III*, 514 F.3d at 1296 (Ginsburg, C.J., concurring). To accept the government's definition of the record on review would make DTA review a mere rubber stamp of the CSRT decision and

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[5] Although a wider range of claims are available in a *habeas* action, the DTA permits, and Petitioners have brought, claims that the CSRT was inconsistent with federal statutes and the Constitution to the extent they are applicable. As the *Boumediene* decision reopens the question of which federal statutes and provisions of the Constitution protect Guantanamo detainees, the Government Information may become important for those claims as well.

empty the DTA of any meaning.

C. This Court's Decision In *Parhat* Confirms That *Boumediene* Does Not Change The *Bismullah* Analysis Or Conclusion.

On June 20, 2008, after the *Boumediene* decision was issued, this Court granted Huzaifa Parhat's motion for judgment as a matter of law and ordered the government to release or transfer him or expeditiously hold a new CSRT.[6] *Parhat*, No. 06-1397, slip. op. at 38. The government has not produced the Government Information to any DTA petitioner and so the Court's analysis in *Parhat v. Gates* necessarily focused only on what was presented in Parhat's CSRT. Noting that Parhat's CSRT panel had not heard exculpatory evidence (which was available to counsel and the Court only because it had been presented in another CSRT), the Court held that the CSRT Procedures require presentation of all exculpatory evidence and that the government "must give the Tribunal an opportunity to consider contrary evidence." *Parhat*, No. 06-1397, slip op. at 21-22. Except in the rare instance in which that information is included in another detainee's CSRT record (and counsel to the detainee becomes aware of it on her own), the only way for the Court to be able to assess that information is if the government is obligated to produce the Government Information.

The DTA also explicitly requires the Court to review whether the detainee's status determination was supported by a preponderance of the evidence.

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[6] The opinion in *Parhat* was sealed and on June 30, 2008, a redacted version of the opinion was publicly released.

DTA § 1005(e)(2)(C)(i). In *Parhat*, the Court concluded that to make such a determination, it must review the raw evidence and assess whether it is reliable and probative – to do otherwise would make the DTA's rebuttable presumption in favor of the government's evidence irrebuttable. *Parhat*, No. 06-1397, slip op. at 25 (quoting *Concrete Pipe & Prods., Inc. v. Construction Laborers Pension Trust*, 508 U.S. 602, 622 (1993)). Except in narrow circumstances such as those present in Parhat's case, the determination that the Court is required to make under the DTA will require review of the Government Information. *Bismullah I*, 501 F.3d at 185-86.

Reinforcing these points, the Court in *Parhat* also described the CSRT process subject to its review under the DTA as including the collection of Government Information and the culling of all exculpatory information for presentation to the CSRT panel. *Parhat*, No. 06-1397, slip op. at 12, 22 n.9. *Parhat* was decided after *Boumediene* and that decision informed the relief granted to Parhat. *See Parhat* slip op. at 38 (granting relief without prejudice to Parhat's right to seek release immediately through a writ of *habeas corpus*). Nothing in *Parhat* suggests that *Boumediene* changes the scope of the Court's review under the DTA or the material necessary in order for that review to have meaning.

D. The Court Should Reinstate Its Prior Rulings In *Bismullah I* And *Bismullah II* Expeditiously.

The Supreme Court recognized in *Boumediene* that "the costs of delay can no longer be borne by those who are held in custody. The detainees in these

cases are entitled to a prompt *habeas corpus* hearing." *Boumediene*, No. 06-1195, slip. op. at 66; *see also id.* at 43 (recognizing that these are "exceptional circumstances," in part, because of "the fact that these detainees have been denied meaningful access to a judicial forum for a period of years"). *Habeas* undeniably provides a more robust review than that afforded by the DTA. *Parhat*, No. 06-1397, slip op. at 32. This does not mean, however, that these or other DTA petitioners are prepared to abandon their DTA actions in favor of *habeas*.

In the DTA, Congress gave detainees incarcerated at Guantanamo a right of review, and the Court is obliged to give meaning to that right. Having a record in a case is a gating event. The gate in DTA cases has been closed by the Supreme Court's GVR order vacating the Court's *Bismullah* decisions. As a result, scores of DTA cases filed since Congress enacted the DTA in 2005 are in limbo. Without records, most Petitioners cannot proceed and the Court cannot do the job that Congress ordered it to do. It is an institutional imperative then, that the Court immediately reinstate its order in *Bismullah I* and *Bismullah II*.

Administrative matters, and matters of judicial economy, such as whether a given DTA case should be stayed pending review of a *habeas* case, or whether a *habeas* case should be stayed while a petitioner seeks DTA relief, or whether both should proceed together present no basis for changing the scope of the Court's DTA review or the scope of the record on review.

Given the length of Petitioners' incarceration to date, uncertainty about the path and timing of the *habeas* litigation, the government's long history of

delaying litigation involving Guantanamo detainees by every available means, and the need for the Court to carry out its duties under an act of Congress, Petitioners respectfully request that the Court act with all deliberate speed to return to the status quo so that cases are not frozen.

Conclusion

For the foregoing reasons, Petitioners respectfully request the Court reinstate its decisions in *Bismullah I* and *Bismullah II* without delay.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing **MOTION TO REINSTATE THE COURT'S DECISIONS IN *BISMULLAH I* AND *BISMULLAH II*** was served on July 3, 2008, via first class U.S. mail, postage prepaid, on the following:

Robert Loeb, Esq.
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