[ORAL ARGUMENT NOT YET SCHEDULED]

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

HAJI BISMULLAH, et al., Petitioners, v. ROBERT M. GATES, Secretary of Defense Respondent.	)	No. 06-1197
ABDUSEMENT, Petitioner, v. ROBERT M. GATES, Secretary of Defense, Respondent.	)	No. 07-1509
JALAL JALALDIN, Petitioner, v. ROBERT M. GATES, Secretary of Defense, Respondent.	)	No. 07-1510
ABDULSABOUR, Petitioner, v. ROBERT M. GATES, Secretary of Defense, Respondent.	)	No. 07-1508

KHALID ALI, Petitioner, v. ROBERT M. GATES, Secretary of Defense, Respondent.	)	No. 07-1511
SABIR OSMAN, Petitioner, v. ROBERT M. GATES, Secretary of Defense, Respondent.	)	No. 07-1512
ABDUSEMENT, Petitioner, v. ROBERT M. GATES, Secretary of Defense, Respondent.	)	No. 07-1509
HAMMAD MEHMET, Petitioner, v. ROBERT M. GATES, Secretary of Defense, Respondent.	)	No. 07-1523

OPPOSITION TO MOTION TO COMPEL THE FILING OF A REVISED CERTIFIED INDEX AND THE PRODUCTION OF THE CLASSIFIED "GOVERNMENT INFORMATION"

For the reasons set forth below, respondent hereby opposes petitioners' motion to compel the filing of revised certified indexes and the production of the classified "government information," as specified in this Court's decision in *Bismullah v. Gates*, 501 F.3d 178 (D.C. Cir. 2007), *vacated and remanded on other grounds*, 2008 WL 436938 (June 23, 2008), *reinstated*, Order (D.C. Cir. Aug. 22, 2008) .

1. Respondent moved to hold all of the DTA cases in abeyance pending the outcome of petitioner's habeas litigation. In the captioned cases, the abeyance motions remain pending as to petitioners Bismullah (No. 06-1197), Abdul Sabour (No. 07-1508), and Mehmet (No. 07-1523). Those motions, if granted, would stay any duty to file a revised certified indexes or to produce any further record material in these cases.[1] Thus, this Court should not rule upon this motion until it acts first upon the abeyance motions in those cases.

Abeyance motions were denied without prejudice in the four remaining captioned cases, involving petitioners Abdul Semet (No. 07-1509), Jalaldin (No. 07-1510), Ali (07-1512), and Osman (No. 07-1523). The denial was due to the fact the

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[1] Petitioners claim the certified indexes are overdue. The Government, however, timely filed indexes of the records that were before the CSRT. When *Bismullah* held that the record was more expansive than the material that was before the tribunal, the Government sought timely stays of any obligation to produce that broader record or an index thereof, and, more recently filed abeyance motions, which would stay the obligation, as well.

case were set for the argument to address a motion for judgment based upon the existing CSRT record. Since that order, the government has consented to the entry of judgment in petitioners' favor (based on this Court's ruling in *Parhat v. Gates*, 532 F.3d 834 (D.C. Cir. 2008)), and this Court recently entered judgment in favor of the petitioners in those cases. Order (filed Sept. 12, 2008). Accordingly, as petitioners agree, their motion is now moot with respect to these four petitioners. *See* Motion at 2 n.1.

Accordingly, petitioners' motion should be denied as moot with respect to Abdul Semet (No. 07-1509), Jalaldin (No. 07-1510), Ali (07-1512), and Osman (No. 07-1523). It should be denied for the remaining three petitioners, Bismullah (No. 06-1197), Abdul Sabour (No. 07-1508), and Mehmet (No. 07-1523), for the following reasons.

2. As the Government's abeyance motions explain, holding the DTA cases, such as these, in abeyance is appropriate given the pendency and rapid movement of the habeas litigation. The two types of cases are duplicative. And the Supreme Court in *Boumediene* directed that habeas move forward "prompt[ly]," while at the same time holding the DTA proceedings to be a constitutionally inadequate substitute for habeas corpus. *Boumediene*, 128 S. Ct. at 2275. Thus, Judge Hogan has entered an order requiring expedited briefing on case procedures and the production of at least

50 factual returns every month with respect to cases he is coordinating. Scheduling Order, In re Guantanamo Bay Litig., Misc. No. 08-442 (D.D.C. July 11, 2008).[2] Moreover, the Government has additional obligations in the cases pending before Judges Leon and Sullivan. Indeed, Judge Leon recently issued an order scheduling the first merits hearing in a case before him for October 6, 2008. *See* Scheduling Order, *Boumediene v. Bush*, Civ. Case No. 04-1166 (D.D.C. Aug. 27, 2008).

The preparation of factual returns in the habeas cases is an enormous undertaking. As the Government recently explained to the district court, the Department of Defense has approximately 30 attorneys working exclusively on the habeas litigation (with more to be deployed), and has diverted intelligence personnel to work full-time in support of the habeas litigation. *See* Respondent's Motion for Partial and Temporary Relief from the Court's July 11, 2008 Scheduling Order, *In Re Guantanamo Bay Litigation*, No. 08-442 (filed Aug. 29, 2008), at 4. The Department of Justice has assigned or detailed more than 50 attorneys to producing factual returns and litigating the more than 250 habeas cases, and the CIA presently has more than 50 attorneys, paralegals, subject matter experts, and classification officials involved

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[2] The Government recently requested partial relief from the district court's factual return production requirement for August 2008. *See* Respondent's Motion for Partial and Temporary Relief from the Court's July 11, 2008 Scheduling Order, *In Re Guantanamo Bay Litigation*, No. 08-442 (filed Aug. 29, 2008).

in the process of reviewing classified factual returns – a necessary step to their submission in the habeas litigation. *Id.* at 6-7.

The Government's resources are finite, and they will not permit it to litigate 190 DTA cases and more than 200 fast-track habeas cases at the same time at the rate ordered by the district courts. It also makes no sense to expend resources on these proceedings which are duplicative and constitutionally inadequate. Under these circumstances, respondent cannot properly divert to this and other DTA cases resources that are urgently needed to meet expedited court deadlines in the habeas litigation.

3. As the Government's abeyance motion further explains, permitting the DTA cases to go forward now would result in an even greater waste of government resources given this Court's decision to reinstate *Bismullah*.

Under *Bismullah*, the record on review consists not just of the material reviewed by the CSRT, but also the historic "Government Information" actually reviewed by the recorder, even if not provided to the tribunal. The Government, for good reason, however, does not have a reliable mechanism for identifying the content of that historical record. *See Bismullah v. Gates*, 503 F.3d 137, 141 (D.C. Cir. 2007) (*Bismullah II*) (quoting the Government filing, "[a]t the time, Recorders had no reason to believe that DoD would be required to produce (or explain post hoc) what

was not provided to the Tribunal"); *ibid.* ("We note in the Government's defense that CSRTs made hundreds of status determinations, including those under review in the present cases * * * without knowing * * * the scope and nature of judicial review"). The panel nevertheless held that production of those historic record materials was essential to its review. *Ibid.* The panel noted, however, that if the Government cannot "reconstruct the Government Information" collected by the Recorder, then 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.*

Thus, petitioners are requesting the production a historic "record" that is effectively impossible to reconstruct. Petitioners cite the Government's substantial efforts in 2007 to comply with *Bismullah*, by conducting brand new, broad searches of material at numerous agencies. Those efforts were, however, undertaken prior to *Bismullah II*, when it became clear that the record required by this Court was the actual historic record of what the recorder collected. *Bismullah II*, 503 F.3d at 141 (holding that the Government must "produce the Government Information collected by the Recorder with respect to a particular detainee;" and explaining that absent the production of the historic record, "this court will be unable to confirm that the

CSRT's determination was reached in compliance with the DoD Regulations and applicable law"). As noted above, there is no reliable mechanism for recompiling that record in these cases or the other DTA cases where the CSRTs were conducted prior to *Bismullah*.

Given that fact, the only practical means of complying with *Bismullah*, as this Court has acknowledged, *Bismullah II*, 503 F.3d at 141, is to convene a new CSRT hearing in these case and in the other 190-some DTA cases. Convening new hearings for petitioners and the other detainees, however, would require a massive expenditure of government resources–resources that are simply not available at the present because they are properly being devoted to complying with *Boumediene*'s mandate for the habeas proceedings to proceed on an expedited basis.

The proper course of action would be for this Court to hold this and the other DTA cases in abeyance pending the resolution of the habeas proceedings. At a minimum, the Court should not order the Government to produce the certified index to the record until the Court rules upon the Government's abeyance motion.

4. Requiring the Government to compile the certified index to the record in accordance with *Bismullah* is all the more inappropriate because the Government is currently considering whether to seek further review of this Court's decision, by a divided motions panel, to reinstate *Bismullah*, despite the Supreme Court's decision

to grant, vacate, and remand *Bismullah* in light of *Boumediene*. There is good cause for further review of the motions panel's decision, given that *Boumediene*'s exceedingly narrow interpretation of the DTA is at odds with the expansive interpretation of the DTA adopted by *Bismullah*. *See, e.g.*, *Boumediene*, 128 S. Ct. at 2272 (faulting the DTA's procedures in part because the DTA restricts this Court's ability to consider material outside of the CSRT record). Indeed, even before the Supreme Court vacated the original *Bismullah* ruling, and even when habeas review was wholly unavailable in this Court, only a minority of the *en banc* court supported the panel ruling in response to the Government's first rehearing petition. *Bismullah III*, 514 F.3d at 1298-99, 1306. Especially given the pendency of the habeas litigation, this Court should not impose upon the Government the massive task of complying with *Bismullah* in this and the other DTA cases, until the process of seeking further review of *Bismullah* is complete.

5. In opposing this motion, the Government is *not* seeking to prevent petitioners from challenging their detention in court. On the contrary, *Boumediene* entitles them to contest their detention in the habeas proceeding brought in United States District Court. The habeas proceedings are moving at an accelerated pace.

Petitioners' request for a revised certified index and the "government information" in these DTA actions, by contrast, are not likely to gain them a speedy

hearing on the merits of their claims. As noted above, that request, if granted, would likely necessitate convening new CSRT hearings. Thus, forcing the Government to "comply" with *Bismullah* at this juncture is not a mechanism for speedy judicial adjudication of the lawfulness of petitioners' detention.

6. Petitioners' motion is also not warranted based on the particular circumstances presented by the captioned petitioners.

a. As to one of the petitioners here, Bismullah (No. 06-1197), respondent has already decided to hold a new CSRT based on new evidence. Because there is no final CSRT ruling, the government has moved to remand this DTA case on that basis. *See* Notice of New CSRT Hearing and Motion to Remand (filed May 8, 2008); *see also* Dismissal Order, *Abdulmalik v. Gates*, No. 08-1130 (D.C. Cir. Aug. 25, 2008) ("Because no Combatant Status Tribunal ('CSRT') hearing has been conducted and the CSRT has not issued a final decision, this court lacks jurisdiction over petitioner's Detainee Treatment Act petition"). That dismissal motion remains pending.

The Government should not be required to produce the "government information" supporting Bismullah's prior CSRT. That record will be superceded by the new tribunal record. Moreover, as discussed above, under *Bismullah II*, the Government has the option of providing a new CSRT, instead of producing the prior historic record. That alternative is already underway for *this petitioner – i.e.*

Bismullah is already being provided with a new CSRT. Thus, under *Bismullah II*, there no requirement of producing the"government information" collected by the recorder for his prior CSRT.

b. As explained above, petitioners admit (motion at 2 n.1) that their demands for the revised index and record are moot with respect to four petitioners (Abdul Semet (No. 07-1509), Jalaldin (No. 07-1510), Ali (07-1512), and Osman (No. 07-1523)), now that this Court has entered judgment in light of *Parhat*.

c. As to the remaining two captioned petitioners, Abdul Sabour (No. 07-1508), and Mehmet (No. 1523), the Government is examining their cases and considering whether it would be appropriate to house them as if they were no longer an enemy combatants, as with the aforementioned petitioners. In their habeas cases (which have been consolidated with the habeas cases brought by other Uighurs before Judge Urbina), the Government advised the district court that it is evaluating their status in light of the *Parhat* decision, and stated that it would provide the court a status report by September 30, 2008, that would advise whether further litigation regarding their status will be necessary. *In re Guantanamo Bay Detainee Litigation*, Misc. No. 08-CV-442, Joint Status Report at 14-15, (D.D.C. Aug. 18, 2008). Judge Urbina has since ordered the government to notify the court whether each of the petitioners is to be considered to be an enemy combatant on or before September 30,

2008. *Kiyemba v. Bush*, No. 05-1509, Minute Order (D.D.C. Aug. 21, 2008). Thus, their cases could also soon become moot. In this context, it makes no sense to issue the order demanded by petitioners which would then likely require the Government to hold new CSRTs (pursuant to *Bismullah II*).

CONCLUSION

The Court should deny petitioners' motion. In the alternative, this Court should defer action on this motion until it rules on the pending motions to hold these cases in abeyance.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 15, 2008, I served the foregoing "OPPOSITION TO MOTION TO COMPEL THE FILING OF A REVISED CERTIFIED INDEX AND THE PRODUCTION OF THE CLASSIFIED 'GOVERNMENT INFORMATION'" by causing an original and four copies to be served on the Court via hand delivery and one copy to be sent to the following counsel via e-mail and first-class U.S. mail:

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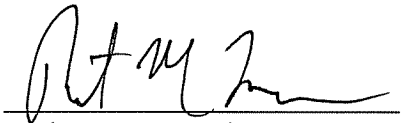

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