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 BESMELLA, 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

OPPOSITION TO RESPONDENT'S PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES:

RULES

REGULATIONS

OTHER AUTHORITIES

INTRODUCTION

For more than two years, Petitioners have been seeking production of the full body of information that should have been considered when the Government determined that they were enemy combatants. Four different times, this Court has ruled that Petitioners are entitled to that information. The Government now asks these Petitioners to bear the burden of more delay so that the Court may consider for the fifth time a decision that is firmly grounded in the language of the Detainee Treatment Act and the Department of Defense's procedures for the conduct of Combatant Status Review Tribunals ("CSRTs"). Since the full Court last denied the Government's petition for rehearing on this issue, the Supreme Court has made clear that courts should hear detainee claims expeditiously, more evidence has emerged that the Government failed to follow its own procedures for conducting CSRTs, and while the legal wrangling continues, Petitioners have been detained for another year.

Nothing in the Supreme Court's decision in *Boumediene* (nor in the Government's multiple submissions in DTA cases after that decision was issued) suggests that the cause of action created by the DTA has been extinguished. To the contrary, both the *Boumediene* opinion and the Government's prior submissions make clear that the cause of action survives. Despite years of litigation, the Government has never produced the full records that should have been created in connection with the determinations that these Petitioners were enemy combatants, and this Court has not reached the merits of the DTA claims made by Bismullah and three of the Uighur Petitioners. To consider this interlocutory issue *en banc* would add nothing to the analysis in the Court's three written opinions but would delay consideration of Petitioners' claims on the merits and therefore conflict with the urgent need reflected in the *Boumediene* opinion for detainee challenges to be heard without delay.

BACKGROUND

In December 2005, Congress enacted the Detainee Treatment Act, which created a limited cause of action through which Guantánamo detainees could challenge their designation as enemy combatants. DTA § 1005(e)(2)(C)(i). Just months after the DTA became law, Petitioner Bismullah filed a claim under the statute. Consistent with its express terms, he claimed, *inter alia,* that the Department of Defense failed to comply with its own procedures in conducting his CSRT,[1] in part because the Recorder failed to present exculpatory information that was reasonably available and in the Government's possession. Bismullah DTA Pet. ¶¶ 10, 106, 116-17. In August 2006, he sought production of the Government Information, as defined by the CSRT Procedures, and the Government opposed his request. The Uighur Petitioners similarly filed claims under the DTA and sought production of the Government Information. The scope of production issue was jointly briefed multiple times and argued before the panel.

I. The Prior Decisions

The panel ruled for Petitioners, and the Government's requests for rehearing by the panel and *en banc* were denied. After deciding *Boumediene*, the Supreme Court granted the Government's interlocutory petition for *certiorari*, vacated the panel decisions and remanded. In August, the panel reinstated its earlier decisions. This petition followed.

On four occasions, this Court has concluded that the Government Information must be produced. Each time, the Court has relied on the plain language of the statute and the CSRT Procedures to find that the Government Information is necessary for the Court to engage in

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[1] The relevant "standards and procedures" are contained in Deputy Secretary of Defense Paul Wolfowitz's "Order Establishing Combatant Status Review Tribunal" (July 7, 2004) ("CSRT Order"), and Navy Secretary Gordon England's Memorandum "Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants detained at Guantanamo Naval Base, Cuba" (July 29, 2004) ("CSRT Procedures").

meaningful review of a DTA claim. *See Bismullah v. Gates,* 501 F.3d 178, 185 (D.C. Cir. 2007) (*"Bismullah I"*); *Bismullah v. Gates*, 503 F.3d 137, 139-40 (D.C. Cir. 2007) (*"Bismullah II"*); *Bismullah v. Gates*, 514 F.3d 1291, 1295-96 (D.C. Cir. 2008) (*en banc*) (*"Bismullah III"*); *Bismullah v. Gates*, No. 06-1197 (D.C. Cir. Aug. 22, 2008) (*"Bismullah IV"*). Within that fundamental framework, the Court has made every accommodation to the Government's stated concerns: it provided the full scope of protection requested for classified information (including permitting the Government to produce *ex parte* any highly sensitive material), *Bismullah I*, 501 F.3d at 187-88; it clarified that the Government need only collect "reasonably available" information; and it offered that in lieu of collecting the Government Information, the Government could hold new CSRTs. *Bismullah II*, 503 F.3d at 141.

II. The *Boumediene* Decision

The Supreme Court's decision in *Boumediene* does nothing to advance the Government's request for *en banc* review. As even the Government acknowledges, the Supreme Court said explicitly that the DTA process remains "intact." *Boumediene v. Bush*, 128 S.Ct. 2229, 2275 (2008).[2] That statement was not a passing remark. The Court addressed at length the question of whether habeas petitioners first had to exhaust their rights under the DTA, and the assumption underlying that discussion was that a cause of action under the DTA remains available. *See id.*

ARGUMENT

I. Rehearing *En Banc* Is Disfavored.

Rehearing *en banc* "is not favored and ordinarily will not be ordered." Fed. R. App. P. 35(a). It should be granted "only in the rarest of circumstances." *Bartlett on Behalf of Neuman v.*

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[2] Until now, the Government seemed to agree. Despite dozens of submissions in DTA cases since the *Boumediene* decision, this is the first time the Government has even suggested that it results in elimination of the DTA cause of action.

Bowen, 824 F.2d 1240, 1244 (D.C. Cir. 1987); *see also* Fed. R. App. P. 40(a)(2). *A fortiorari*, the standard for evaluating successive *en banc* petitions on the same decision should be forbiddingly high.[3] This Court has already denied a request for rehearing *en banc* on this issue, and the Government provides no justification for the Court to revisit the question.

Nothing that has occurred since this Court rejected the Government's first petition for rehearing *en banc* creates a basis for granting the second petition. *Boumediene* explicitly states that a cause of action under the DTA remains "intact." 128 S. Ct. at 2275. The document review that the Government claims to be burdensome is essentially underway in connection with the habeas proceedings. The most significant change since the Government's last *en banc* petition is that Petitioners have remained detained for more than a year while the Government appealed this preliminary issue. The Court should heed the Supreme Court's explicit admonition in *Boumediene* that "the costs of delay can no longer be borne by those who are held in custody," *id.*, and deny the Government's petition.

II. The Jurisdiction-Stripping Provision Of The DTA Is Severable.

The Government's severability argument, raised for the very first time in this petition, is both incorrect and utterly inconsistent with the Government's submissions in DTA cases since *Boumediene* was decided. Not once has the Government so much as suggested the jurisdictional concern that it raises here. To the contrary, citing *Boumediene*, the Government explicitly conceded that "Petitioner [Bismullah] is correct that he maintains a statutory right to pursue a DTA action in this Court." Reply in Supp. of Resp't's Mot. to Hold in Abeyance at 1, *Bismullah*

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[3] The Government also seeks rehearing by the panel. Petitions for rehearing must "state with particularity each point of law or fact that the petitioner believes the court has overlooked or misapprehended." Fed. R. App. P. 40(a)(2). Because no aspect of the law has changed since the panel reinstated *Bismullah I* and *Bismullah II*, rehearing by the panel is not warranted.

v. Gates, No. 06-1197 (D.C. Cir. July 14, 2008). In opposing reinstatement of *Bismullah I* and *II*, the Government presented only prudential and statutory interpretation arguments that it had raised on multiple occasions prior to *Boumediene*. *See* Opp. to Mot. to Reinstate, *Bismullah v. Gates*, Nos. 06-1197 *et al.* (D.C. Cir. July 21, 2008). Its last-ditch effort to raise a severability argument should not be countenanced.

Even on its merits, the argument must fail. It is axiomatic that "a court should refrain from invalidating more of [a] statute than is necessary." *Regan v. Time*, 468 U.S. 641, 652 (1984) (plurality opinion). Accordingly, where a statute "contains unobjectionable provisions separable from those found to be unconstitutional, it is the duty of [the] court to . . . maintain the act in so far as it is valid." *Id.* (internal quotations omitted). The presumption in favor of severability is well established: "Unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law." *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684 (1987) (internal quotations omitted); *see also Regan*, 468 U.S. at 497; *Booker v. Fanfan*, 543 U.S. 220, 258 (2005).

Here, there can be no question that the constitutionally valid portion of the DTA is "capable of 'functioning independently.'" *Booker*, 543 U.S. at 258 (quoting *Alaska Airlines*, 480 U.S. at 684). Judicial review under the DTA constitutes an independent cause of action that in no way depends on the availability or unavailability of habeas review. The Government does not appear to argue otherwise and indeed acknowledges, as it must, the Supreme Court's express finding that the DTA remains "intact" following the restoration of habeas jurisdiction. *Boumediene*, 128 S. Ct. at 2275. That the Supreme Court implicitly understood an "intact" DTA to include survival of the DTA cause of action is evident in the preceding paragraph of the

Boumediene decision in which it held that detainees must not be required "to complete DTA review before proceeding with their habeas corpus actions." *Id.* Had the Court not presumed that DTA review was still available, a ruling premised on the speed with which that review would likely proceed would be difficult to understand.

It also is far from "evident" that Congress would have declined to preserve DTA jurisdiction had it known that habeas jurisdiction would be restored. *See Alaska Airlines*, 480 U.S. at 684. As an initial matter, Congress made no provision for the inseverability of the jurisdiction-stripping provision either in the DTA itself or when it amended that provision after the Supreme Court's decision in *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) limited the applicability of the DTA. Had Congress specifically intended, as the Government suggests, to make DTA review contingent upon the unavailability of habeas, a provision to that effect would have been appropriate and easy to incorporate.[4]

Congress also is well aware that DTA proceedings have continued to advance since *Boumediene* was decided, yet it has taken no action to modify or repeal the DTA, despite a request from Attorney General Mukasey to do so.[5] Recently, the Supreme Court determined that failure by Congress to effect a change in the law may be interpreted as congressional acceptance of the status quo, even where Congress had only four months to act in response to a Supreme

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[4] Particularly when viewed against the backdrop of this silence, the Government's emphasis on proposed statutory language specifically authorizing concurrent DTA and habeas actions is misplaced. *See* Pet. at 6.

[5] Michael B. Mukasey, Att'y Gen., *Remarks at the American Enterprise Institute for Public Policy Research* (July 21, 2008) (transcript available at http://www.usdoj.gov/ag/speeches/2008/ag-speech-0807213.html) ("One unintended consequence of the Supreme Court's decision in *Boumediene* is that detainees now have two separate, and redundant, procedures to challenge their detention, one under the Detainee Treatment Act and the other under the Constitution. Congress should eliminate statutory judicial review under the Detainee Treatment Act.").

Court decision. *See Medellin v. Texas*, Nos. 06-984, 08-5573, and 08-5574, 552 U.S. __, 2008 U.S. LEXIS 5362, at *1-2 (Aug. 5, 2008). Congress' inaction since *Boumediene* was decided can only be understood as confirmation that ongoing DTA review remains "consistent with [its] basic objectives in enacting the statute." *Booker*, 543 U.S. at 259.

Finally, as a practical matter, Congressional intent to streamline review of detainee claims still can be amply served in a world with concurrent habeas jurisdiction. *See Boumediene*, 128 S. Ct. at 2276. In some cases, DTA review may prove sufficient. That has long been Bismullah's faithful belief, as evidenced by his decision to date to proceed exclusively under the DTA.[6] In other cases there may be synergies between the two types of proceedings, such that this Court's determination under the DTA may supplant the need for a factual inquiry by the District Court. In *Parhat,* this Court noted that "*Boumediene* made it quite clear that, at least for a detainee like Parhat who has been imprisoned for a lengthy period and has already had a CSRT, a habeas corpus proceeding in the district court is also available . . . in that proceeding, he will be able to make use of the determinations we have made today regarding the decision of his CSRT." *Parhat v. Gates*, 532 F.3d 834 (D.C. Cir. 2008); *see also In re Guantanamo Bay Detainee Litig.*, Nos. 05-1509, 05-1602, 05-1704, 05-2370,05-2398, 08-1310, 2008 U.S. Dist. LEXIS 79238 at *8 (D.D.C. Oct. 8, 2008) ("Prompted by the *Parhat* decision, the government decided that it would no longer consider the 17 Uighur detainees enemy combatants."). Even where individual petitioners proceed concurrently under both causes of action, efficiencies could well result due to overlaps in the evidentiary record in each. *See infra* at 13. For all of these reasons, the Government's severability argument must be rejected.

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[6] To be clear, Petitioner Bismullah reserves his right to proceed in habeas should it be determined that that is the appropriate course in his case.

III. The Prior Rulings Were Correct And Should Not Be Revisited.

Although the Supreme Court remanded this case only for determination of whether *Boumediene* necessitated a different result, *see Gates v. Bismullah*, 553 U.S. __, 128 S. Ct. 2960 (2008), the Government seeks to re-litigate issues untouched by *Boumediene* that were resolved over a year ago. As was true the last time the Government petitioned for reconsideration and rehearing *en banc,* the crux of its argument is that this Court should override the will of Congress to relieve the Government of the burden that it claims production of the Government Information will entail. In support, the Government resubmits the same declarations used in its prior application, ignoring the clarifications offered by the panel in *Bismullah II*, and a declaration submitted in the habeas litigation describing its efforts to review the relevant information in connection with those cases. This Court's prior decisions were and remain soundly grounded in the language of the DTA and the CSRT Procedures. The Court should decline the Government's invitation to rewrite the DTA from the bench and let stand the panel's decision to reinstate *Bismullah I* and *Bismullah II.*

1. The Court's Rulings Were Compelled By The Language Of The DTA.

A court cannot substitute its own judgment for that of Congress. Rather, when a "statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms." *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) (internal citation and quotation marks omitted). Here, the Court is incapable of discharging its mandate under the plain terms of the DTA without access to the Government Information. The DTA is clear: a detainee may bring a claim contesting, *inter alia,* that his determination as an enemy combatant was not "consistent with the standards and procedures specified by the Secretary of Defense for

the Combatant Status Review Tribunals (including the requirement that the conclusion of the Tribunal be supported by a preponderance of the evidence and allowing a rebuttable presumption in favor of the Government's evidence.)" Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1005(e)(2)(C)(i),119 Stat. 2739 (2005). The language of the referenced procedures is also clear. The CSRT, acting through its Recorder, must review all of the "Government Information," which is defined as "reasonably available information in the possession of the U.S. Government bearing on the issue of whether the detainee meets the criteria to be designated as an enemy combatant." CSRT Procedures, Encl. 1 § E(3). Pursuant to the CSRT Procedures, at the hearing, the Recorder must present evidence supporting the designation as an enemy combatant as well as *all* material in the Government Information "to suggest that the detainee should not be designated as an enemy combatant." *Id.*, Encl. 1 § H(4), Encl. 2 § B(1). The hearing panel then must assess whether the preponderance of the evidence supports the designation of the detainee as an enemy combatant. *Id.*, Encl. 1 § G(11).

The Government is simply incorrect when it argues that the DTA does not authorize review of steps taken by the CSRT prior to the panel hearing. *See* Pet. at 8. The steps taken prior to the hearing are part of the CSRT process and can affect the conduct and outcome of the hearing. *See Bismullah I*, 501 F.3d at 185 ("[M]any of the procedures specified by the Secretary relate to steps the Recorder and others must take before the Tribunal holds a hearing."). As this Court has recognized multiple times, the Government Information is necessary for the Court to "review [the Recorder's] compliance with [the Government's] procedures," to determine whether "the Recorder withheld exculpatory evidence from the Tribunal in violation of the specified procedures," and to "consider whether a preponderance of the evidence supports the Tribunal's status determination." *Id.* at 181, 185-86. Without the Government Information, the

Court cannot consider the balance of the evidence: "the court cannot, as the DTA charges us, consider whether a preponderance of the evidence supports the Tribunal's status determination without seeing all the evidence, any more than one can tell whether a fraction is more or less than one half by looking only at the numerator and not at the denominator." *Id.* at 186; *see also Bismullah II*, 503 F.3d at 139-40; *Bismullah III*, 514 F.3d at 1295-96. The *Boumediene* decision reinforces the emphasis that this Court placed on meaningful review: "[t]he DTA should be interpreted to accord some latitude to the Court of Appeals to fashion procedures necessary to make its review function a meaningful one." *Boumediene*, 128 S. Ct. at 2266.

2. The CSRT Is Not An Administrative Agency.

The Government persists in analogizing the CSRT hearing to an administrative agency action. *See* Pet. at 8-9. As this Court has recognized, however, the comparison is "inapt," *Bismullah III*, 514 F.3d at 1297, because the CSRT is "*sui generis* and outside the contemplation of the APA," *id.* at 1294. The reason for the Court's conclusion is obvious—the CSRTs lack the "transparent features of the ordinary administrative process" that ensure the reliability of agency hearing records. *Bismullah I*, 501 F.3d at 185-86. As the Court recognized, if the CSRTs fell within the ambit of any of the structures to which the Government attempts to analogize them, Petitioners would be entitled to a host of due process protections of which they are deprived under the CSRT Procedures. *See Bismullah III*, 514 F.3d at 1295 & n.4.

Even if a DTA action were considered analogous to review of an administrative agency decision, the "agency record" for purposes of the DTA would certainly include the Government Information. The Recorder is an indispensable and profoundly influential part—indeed, the cornerstone—of the CSRT: "The Tribunal, through *its* Recorder, shall have access to and consider any reasonably available information." *See* CSRT Order § g(7) (emphasis added); *see also* CSRT Procedures, Encl. 1 § E(3) (authorizing Tribunal to request Government

Information). The relevant record would therefore be the universe of material before the Recorder and available to the Tribunal, which is the Government Information. *See, e.g., Bar MK Ranches v. Yuetter*, 994 F.2d 735, 739 (10th Cir. 1993) (determining that the "agency record" consists of *all* of the evidence that "was directly or indirectly considered" by the agency, even if "the agency appeal record is...different than the record considered [by the decisionmaker.]").[7]

Moreover, even if Respondent was entitled to a "presum[ption] that the Government furnishe[d] exculpatory evidence" to the CSRT panel, Pet. at 9, it has essentially conceded that it failed to follow its own CSRT Procedures and thereby has forfeited that purported presumption through its own actions. After oral argument before the panel, the Government submitted a declaration from Rear Admiral James M. McGarrah which both contradicted the statements of counsel at oral argument and acknowledged that as a general practice, the Department of Defense did *not* follow its own procedures in conducting the CSRTs, including by routinely and purposefully failing to present exculpatory information at the CSRT hearing. *See* McGarrah Decl. ¶ 13, *Bismullah v. Gates*, Nos. 06-1197, 06-1397 (D.C. Cir. May 31, 2007); *see also* Lt. Col. Stephen Abraham Decl. ¶ 51, *Hamad v. Gates*, No. 07-1098 (D.C. Cir. Nov. 9, 2007) (describing the lack of "a rational system for pursuing leads that might have resulted in the discovery of exculpatory evidence").

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[7] Nor can the Government avoid the requirements of the DTA because it failed to compile and retain the Government Information at the time of the CSRTs, as required by both the CSRT Procedures, *see* CSRT Procedures, Encl. 1 §§ F(8), G(4) (requiring compilation of the Government Information so that the Personal Representative can review it), and by its independent legal obligation to maintain evidence given the litigation about the detainees' imprisonment pending at the time of the CSRTs. *See, e.g., Boumediene*, 128 S. Ct. at 2278 (Souter, J., concurring) ("*Rasul* put everyone on notice that habeas process was available to Guantánamo prisoners"). Had the Government compiled and retained the Government Information as required, producing the record now would be ministerial.

This Court has repeatedly remarked upon the considerable evidence showing that the Government failed to follow its CSRT Procedures. *See, e.g., Bismullah I*, 501 F.3d at 193 (Rogers, J., concurring) ("[T]he Executive [has] acknowledged that it has not utilized the procedure for compiling the CSRT record that the Department of Defense specified in its publicly-announced procedures"); *Bismullah III*, 514 F.3d at 1295 n.5 (Ginsburg, C.J., concurring) ("The record before the court suggests the Recorder has not always fulfilled his obligations under the DoD Regulations."); *Parhat v. Gates*, 532 F.3d 834, 845 (D.C. Cir. 2008) (finding that the Recorder failed to present exculpatory evidence to the tribunal, even though the same evidence had been presented to a prior tribunal).[8] The only way the Court can assess whether Petitioners' CSRT determinations were consistent with the CSRT Procedures and supported by a preponderance of the evidence is by examining the Government Information.

3. The CSRT Is Not Analogous To A Criminal Trial.

The Government's attempt to compare the CSRT to a criminal trial also fails. *See* Pet. at 9. The standard articulated in *Brady v. Maryland*, 373 U.S. 83 (1963) is irrelevant. The language of the DTA and the CSRT Procedures, not an analogy to criminal law, define what must be produced in a DTA action. *Bismullah III*, 514 F.3d at 1297 (Ginsburg, C.J., concurring). Furthermore, as the Supreme Court recognized in *Boumediene,* criminal cases "give little helpful

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[8] Recent disclosures only reinforce the conclusion that the Government has not adequately disclosed exculpatory material about detainees. In one military commission, the prosecutor resigned over concerns that "[p]otentially exculpatory evidence has not been provided" to detainee counsel and "discovery in even the simplest of cases is incomplete or unreliable." *See* Lt. Col. Darrel J. Vandeveld Decl. ¶¶ 7-10, *U.S. v. Jawad*, (Mil. Comm. Sept. 22, 2008), *available at* s3.amazonaws.com/propublica/assets/docs/vandeveld_declaration_080922.pdf. Lt. Col. Vandeveld's concerns forced the Government to drop all charges against five other detainees. *See* William Glaberson, *U.S. Drops Charges For 5 Guantánamo Detainees*, N.Y. TIMES (Oct. 21, 2008); *see also* Peter Finn, *Key Allegations Against Terror Suspect Withdrawn*, WASH. POST (Oct. 15, 2008) (Government dropped serious terrorism allegations against Guantánamo detainee after being ordered to turn over exculpatory evidence).

instruction (save perhaps by contrast) for [detainee] cases, where no trial has been held." *Boumediene*, 128 S. Ct. at 2264.[9]

IV. The *Boumediene* Decision Does Not Alter The Analysis Of The Government's Security And Burden Arguments.

The *Boumediene* opinion also speaks to the issues of burden and security that the Government has raised as reasons for reconsideration and *en banc* review. First, the Supreme Court found that there was no showing "that the Executive faces such onerous burdens that it cannot respond to habeas corpus actions." *Id.* at 2275. Subsequent events have shown that to be true. The Government (albeit with an extension of the timetable it initially set) has been producing proposed amended factual returns at a rate of approximately fifty per month in the habeas litigation. The pace of that review significantly undermines the Government's claims of burden here. Presumably the material reviewed by the Government to create proposed amended factual returns is the same material that must be reviewed to produce the Government Information. Because the Government recycled the declarations from its first *en banc* petition, it has not offered any explanation why this review process cannot operate for use in both the habeas and DTA actions.[10]

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[9] Nor is Respondent's analogy to Army Regulation 190-8 apposite. *See* Pet. at 10. As this Court noted, "Army Regulation 190-8 is irrelevant because this court is bound not by it but by the DTA, which charges the court to ensure that the CSRT's determination is consistent with the DoD Regulations and that the conclusion of the Tribunal is supported by a preponderance of the evidence." *Bismullah II*, 503 F.3d at 140.

[10] The Government's cries of burden ring particularly hollow with regard to Petitioner Bismullah. The Government has, on its own initiative, decided to conduct a new CSRT on the grounds that, after years of imprisonment, new evidence creates a substantial likelihood that Bismullah is not an enemy combatant. The new CSRT process requires the compilation of the very materials the Government now objects to collecting. Moreover, the Government has represented to this Court that it has already spent months re-compiling the Government Information in Bismullah's case, yet it objects to producing even a scrap of this material. *See* Reply in Supp. of Mot. to Compel at 6-11, *Bismullah v. Gates*, Nos. 06-1197 *et al.* (D.C. Cir. Sept. 25, 2008).

Second, *Boumediene* rejected the Government's argument that professed security concerns override the mandate for meaningful judicial review. The Supreme Court explicitly concluded that "[s]ecurity subsists, too, in fidelity to freedom's first principles. Chief among these are freedom from arbitrary and unlawful restraint and the personal liberty that is secured by adherence to the separation of powers." *Id.* at 2277. Thus, rather than restricting the scope of judicial review on the basis of security concerns, the Supreme Court directed the District Court to "use its discretion to accommodate [the Government's interest in protecting sources and methods of intelligence] to the greatest extent possible." *Id.* at 2276. In *Bismullah I* and *II*, the panel struck a similar balance, affirming the primacy of the Court's review function under the DTA while making all appropriate provisions to address the Government's stated security concerns.[11] Nothing has occurred to alter the analysis, and the Government's concerns cannot be allowed to eviscerate a cause of action granted by Congress.

V. Requiring DTA Petitioners To Pursue Habeas Claims Would Prejudice These Petitioners.

The Government assumes that Court's decision in *Bismullah I* and *Bismullah II* effectively converted DTA review into the equivalent of habeas or, if not, habeas review would always be preferable to DTA review. *See* Pet. at 12, 14-15. The Government is mistaken on both counts. The Government confuses the scope of the record on review with the scope of review. *See id.* at 3. Only the former is at issue here. Ordering production of the record necessary to conduct the analysis required by the DTA has nothing to do with the scope of challenges that a detainee may raise under the DTA. As the Supreme Court concluded in

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[11] The Government's statement that it would be required "to open its files to suspected enemy combatants," Pet. at 9, is flatly wrong, as only security-cleared counsel would have access to classified information and the Government could submit particularly sensitive information *ex parte* to the Court. *Bismullah I*, 501 F.3d at 187.

Boumediene, the claims under the DTA are significantly more narrow than those that can be raised through habeas, in part because no information collected *after* the CSRT can be considered. *Boumediene*, 128 S. Ct. at 2272. This is true even if the Government Information is collected and produced; the Government Information consists of reasonably available material in the Government's possession at the time of the CSRT. *See* CSRT Procedures, Encl. 1 § E(3).

Despite the limited cause of action, the DTA may still be preferable for some detainees due to timing. The habeas cases consolidated before Judge Hogan are being considered in order of docket number. *In re Guantanamo Bay Detainee Litigation*, 564 F. Supp. 2d 14, 16 (D.D.C. 2008) (Scheduling Order). A detainee like Haji Bismullah, who does not have a pending habeas action, would be among the last Guantánamo detainees to obtain a merits hearing. And presently, no merits hearings are scheduled for cases before Judge Hogan.[12] In contrast, Bismullah's DTA action should be among the first to be considered on the merits, and his case is strong enough that he may be able to obtain relief through his first-heard DTA action more quickly than through his last-heard habeas action. The Government's proposal that this Court require all DTA petitioners to seek relief in habeas would prejudice detainees like Haji Bismullah, who has been pursuing his DTA claims in good faith for more than two years.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that the Court deny Respondents' Petition For Rehearing And Suggestion For Rehearing En Banc.

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[12] The Uighurs, including petitioners here, are the only Guantánamo prisoners who have had a judgment on the merits in their habeas case. *In re Guantanamo Bay Detainee Litigation*, 2008 U.S. Dist. LEXIS 79238. Despite the District Court's release order, which has been stayed pending appeal, and this Court's release order in *Parhat* and four other DTA cases, they remain imprisoned at Guantánamo.

October 23, 2008

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing OPPOSITION TO RESPONDENT'S PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC was served on October 23, 2008, via e-mail and first class U.S. mail, postage prepaid, on the following:

Robert Loeb, Esq.
August E. Flentje
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Room 7268
Washington, DC 20530

Gregory A. Senn