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

No. 06-1197

HAJI BISMULLAH, et al.,
Petitioners,
v.
ROBERT M. GATES, Secretary of Defense,
Respondent.

No. 07-1509

ABDUSEMENT,
Petitioner,
v.
ROBERT M. GATES, Secretary of Defense,
Respondent.

[Captions Continued on Following Pages]

PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

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Caption continued:

No. 07-1510
JALAL JALALDIN,
Petitioner,
v.
ROBERT M. GATES, Secretary of Defense,
Respondent.

No. 07-1508

ABDULSABOUR,
Petitioner,
v.
ROBERT M. GATES, Secretary of Defense,
Respondent.

No. 07-1509

ABDUSEMENT,
Petitioner,
v.
ROBERT M. GATES, Secretary of Defense,
Respondent.

No. 07-1511

KHALID ALI,
Petitioner,
v.
ROBERT M. GATES, Secretary of Defense,
Respondent.

No. 07-1512

SABIR OSMAN,
Petitioner,
v.
ROBERT M. GATES, Secretary of Defense,
Respondent.

No. 07-1509

ABDUSEMENT,
Petitioner,
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INTRODUCTION AND SUMMARY

A divided panel of this Court reinstated an unprecedented decision that had been vacated by the Supreme Court and that, if left standing, would gravely endanger our national security, *Bismullah v. Gates*, 514 F.3d 1291, 1302 (D.C. Cir. 2008) (*Bismullah III*) (Randolph, J., dissenting); *see also id.* at 1301 (Henderson, J., dissenting). Because the panel's decision was issued without jurisdiction, is plainly incorrect on the merits, and threatens to cripple critical intelligence resources and compromise foreign relationships, the Secretary of Defense respectfully requests rehearing *en banc*.

At issue is the panel's ruling that, in actions under the Detainee Treatment Act (DTA), the record on review is *not* the record before the administrative tribunal, but rather "all 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." *Bismullah v. Gates*, 501 F.3d 178, 192 (D.C. Cir. 2007) (internal quotation marks omitted) (*Bismullah I*). This decision was incorrect when it was first issued, and it is even more wrong now in light of the Supreme Court's decision in *Boumediene v. Bush*, 128 S. Ct. 2229 (2008). Five judges of this Court previously sought to rehear this case *en banc*, and only four defended the ruling on the merits. For several reasons, the Court should grant *en banc* review.

First, the Court lacks jurisdiction because the provisions in the DTA bestowing

jurisdiction are inseverable from the statutory provision that the Supreme Court struck down in *Boumediene*. The question of severability turns on congressional intent, and there is no dispute that, in enacting the DTA and the Military Commissions Act (MCA), Congress intended to *limit* judicial review for detainees held at Guantanamo Bay and to channel review into a single forum. Congress's intent was not to provide suspected enemy combatants with *more* review than habeas, and certainly not to provide two simultaneous and overlapping tiers of review. Yet that would be the precise result if this Court allowed the DTA's judicial review provisions to stand even after *Boumediene*.

Second, even if the panel had jurisdiction, its decision cannot be reconciled with the text of the DTA, its legislative history, or the scope of review in other administrative or judicial contexts. If there were any doubt before *Boumediene*, there is no longer. As the Supreme Court observed, "[o]n its face, the [DTA] allows the Court of Appeals to consider *no evidence outside the CSRT record*." *Boumediene*, 128 S. Ct. at 2272 (emphasis added). And because *Boumediene* provides for habeas review, there is now no reason to expansively and atextually interpret the DTA to provide for more review than Congress intended. *Id.* at 2265.

Finally, *en banc* review is warranted based on the serious consequences of the panel's decision, which would effectively require the "disclos[ure] of clandestine intelligence activities," discouraging cooperation by foreign governments and other

critical intelligence sources. Hayden Unclass. Decl. ¶¶10, 11-17 (Sept. 2007). In addition, if the Government were forced to recreate the record required by the panel majority, or to convene new tribunals for every detainee who filed an action under the DTA, compliance would unduly strain intelligence resources, which have already been stretched to the breaking point by *Boumediene*'s mandate to litigate the habeas cases expeditiously.

STATEMENT

This case concerns the scope of review under the DTA, which Congress enacted to eliminate habeas jurisdiction and to provide, in its place, a narrower form of review of decisions of Combatant Status Review Tribunals (CSRTs). *See Boumediene*, 128 S. Ct. at 2265-66. Despite Congress's attempt to limit judicial scrutiny, a panel of this Court held that the record on review includes the entirety of all "Government Information," and not just the materials presented to the Tribunal. *See Bismullah v. Gates*, 503 F.3d 137, 141 (D.C. Cir. 2007) (*Bismullah II*). Under the regulations, "Government Information" includes all "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 Enc. 1, § E(3). The regulations define the "Record of Proceedings," by contrast, as consisting of the evidence that was before the CSRT, the CSRT's decision, and a statement of the time and place of the hearing and the names of those present. *See*

Bismullah I, 501 F.3d at 182.

The Government sought *en banc* review of this decision because it could not be squared with the DTA's text or history. The Government attached declarations (which are also attached to this petition) by heads of the intelligence community, including the Directors of the CIA, the FBI, and National Intelligence. They explained that the panel's ruling risked seriously damaging national security and sidetracking critical national security resources. *See, e.g.*, Hayden Unclass. Decl. ¶¶10, 12-13, 15-16. On a 5-5 vote, this Court denied the Government's petition, but only four judges defended the ruling on the merits. *See Bismullah III*, 514 F.3d 1291. The Supreme Court then granted certiorari, vacated the decision, and remanded the case for reconsideration in light of *Boumediene*.

On remand, a divided panel of this Court reinstated its earlier ruling. It did so in a summary order, without addressing *Boumediene* or the Government's argument against reinstatement. Because the decision is even less defensible now that it was before *Boumediene*, the Government once again seeks *en banc* review.

ARGUMENT

I. THIS COURT LACKS JURISDICTION

As an initial matter, the Court lacks jurisdiction over this action. The basis for jurisdiction had been the DTA, but the provisions creating jurisdiction are inseverable from the one struck down in *Boumediene*. When a court strikes down one statutory

provision, the question becomes "what Congress would have intended in light of the Court's constitutional holding." *United States v. Booker*, 543 U.S. 220, 246 (2005) (quotation marks omitted). The issue, then, is whether Congress would have wanted to preserve the provisions creating DTA jurisdiction without the provisions eliminating habeas jurisdiction.

Unquestionably, the answer is no. As the Supreme Court held in *Boumediene*, Congress's intent in enacting the DTA was to limit, not to expand, the review available. 128 S. Ct. at 2266, 2274. Congress confirmed this intent after *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), when it enacted the MCA to clarify that the repeal of habeas jurisdiction and the consolidation of review into a single forum applied to all detainee cases. Congress intended to streamline review and put it in a single court.

To be sure, *Boumediene* commented that "both the DTA and the CSRT process remain intact." 128 S. Ct. at 2275. But, in context, it is clear that all the Supreme Court meant was that it was not striking down those laws as unconstitutional. The Court's point, as the previous sentence in its opinion shows, was simply that "[t]he only law [the Court] identified as unconstitutional was" the jurisdiction-stripping provision of the MCA. *Id.* The question of severability was not before the Court; the parties did not brief the question; and the Court did not decide it. "'Questions * * * neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents.'" *Cooper Indust., Inc. v. Aviall*

Servs., Inc., 543 U.S. 157, 170 (2004) (quoting *Webster v. Fall*, 266 U.S. 507, 511 (1925)).

Moreover, the evidence is overwhelming that Congress viewed the grant of jurisdiction to this Court as inseverable from the jurisdiction-stripping provisions of the MCA. The congressional objective was to have detainee cases decided by only "one court," H. Rep. No. 109-664, pt. 2, at 155 (2006), in order to avoid "swamping the system" with parallel challenges, 151 Cong. Rec. S12732 (Nov. 14, 2005) (Sen. Graham). *See also, e.g.*, 152 Cong. Rec. H7938 (daily ed. Sept. 29, 2006) (Rep. Hunter) ("The practical effect of this amendment will be to * * * consolidate all detainee treatment cases in the D.C. Circuit"); 152 Cong. Rec. S10374 (Sept. 28, 2006) (Sen. Domenici) (giving detainees the right to habeas corpus "will clog our already overburdened courts"); *id.* S10403 (Sen. Cornyn) (Section 7 of the MCA "will substitute the blizzard of litigation * * * with a narrow DC Circuit-only review of the Combatant Status Review Tribunal * * * hearings"). It is thus inconceivable that Congress would have intended to "double up" the review available to wartime detainees by giving them both habeas review and DTA review in this Court.

Indeed, to ensure that the Court's jurisdiction in the DTA was truly exclusive, Congress repeatedly rejected proposed amendments to the MCA that would have permitted detainees *both* to file habeas corpus petitions *and* to bring petitions under the DTA. *See* 152 Cong Rec. S10369 (Sep. 28, 2006); H. Rep. No. 109-664 at 156-

58. There can thus be no question that Congress sought to limit review and that it viewed the strip of habeas jurisdiction as an integral and inseverable component of the judicial review procedures established in the DTA. Leaving the DTA's judicial review provisions intact after *Boumediene* would lead to a result that is precisely the opposite of what Congress intended: instead of less judicial review, there would be duplicative and overlapping review in two separate forums. The jurisdiction-creating and jurisdiction-stripping provisions must stand or fall together.

II. THE PANEL'S RULING IS IN ERROR AND CONFLICTS WITH *BOUMEDIENE.*

In any event, even if the Court had jurisdiction, it should still grant rehearing *en banc*. *Bismullah* was incorrect when first issued, and *Boumediene* confirms that the ruling cannot stand.

A. As discussed in our prior *en banc* petition, Pet. at 5-13, the decision incorrectly conflates two distinct issues: (1) what constitutes the administrative record in a DTA case and (2) what is the appropriate process and remedy (if any) in the event the agency failed to comply with its rules in compiling the administrative record. Even if the DTA permits this Court to consider a detainee's claim that the agency did not follow its own procedures, it does not follow that the ability to bring such a challenge automatically expands the record beyond what was before the Tribunal. As Judge Randolph explained, the federal statute defining the record "make[s] crystal

clear that – contrary to the panel's opinions – the record does not include information never presented to the * * * Tribunal." *Bismullah III*, 514 F.3d at 1302-03 (Randolph, J., dissenting) (citing 28 U.S.C. 2112(b)); *see also id.* at 1299 (Henderson, J., dissenting) ("[T]he Supreme Court has made clear that we have no license to 'create' a record consisting of more than the agency itself had before it.").

The panel's conception of the record on review is both unprecedented in any administrative or judicial context and disregards the DTA's explicit definition of the record on review. "The focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 743 (1985) ((internal quotation marks omitted)). That fundamental principle is embodied in CSRT procedures, which specifically define the record as the evidence that was before the CSRT, the CSRT's decision, and a statement of the time and place of the hearing and the names of those present. CSRT Procedures I(4). And the text of the DTA reinforces that the record is limited to the evidence actually presented to a CSRT. Congress authorized only a narrow form of review, which does not include review of the Recorder's actions in gathering materials or in deciding what to present, or not to present, to the Tribunal. *See* DTA § 1005(e)(2)(A) (review is of "whether the status determination of the * * * *Tribunal* * * * was consistent with the standards and procedures" (emphasis added)); *see also Bismullah III*, 514 F.3d at 1302, 1304

(Randolph, J., dissenting) (recognizing that Congress "limit[ed] [the Court's] jurisdiction to review of the Tribunal's status determination" (emphasis omitted)).

Indeed, the panel's conception of the record is even more expansive than what a criminal defendant would obtain pursuant to the constitutionally based requirements of *Brady v. Maryland*, 373 U.S. 83 (1963); *see also* 18 U.S.C. 3500 (Jencks Act); Fed. R. Crim. P. 16(a). As Judge Henderson observed, in "the criminal context–where the protections accorded the arrestee are greater and our review is, accordingly, more searching–[the] Court is plainly able to review * * * without knowing all the evidence the prosecution has gathered." *Id.* at 1299-1300 (Henderson, J., dissenting). The Constitution generally presumes that the Government furnishes exculpatory evidence as part of the criminal justice process, and there is accordingly no standing obligation that the prosecution turn over "the Commonwealth's files." *Pennsylvania v. Ritchie*, 480 U.S. 39, 59 (1987) ("Unless defense counsel becomes aware that other exculpatory evidence was withheld and brings it to the court's attention, the prosecutor's decision on disclosure is final."). Thus, by requiring the Government to open up its files to suspected enemy combatants, the panel not only transcended the textual limits of the DTA and the traditional scope of administrative review, but also the outer bounds of what is constitutionally required in criminal cases involving United States citizens.

Finally, the panel's decision is all the more extraordinary considering the

context in which Congress enacted the DTA. Prior to its enactment, the Supreme Court had recognized that military hearings modeled on Army Regulation 190-8, *see* Army Reg. 190-8, 1-6.e(3) & (5) (setting out the process for reviewing prisoner-of-war status in a conventional conflict), could satisfy due process even for a citizen enemy combatant. *See Hamdi v. Rumsfeld*, 542 U.S. 507, 533, 538 (2004) (plurality opinion). And in so holding, the *Hamdi* plurality expressly rejected "extensive discovery of various military affairs" and anything "approach[ing] the process that accompanies a criminal trial," *id.* at 528; *see also id.* at 538; *Yamashita v. Styer*, 327 U.S. 1, 17 (1946). Considering this context, Congress did not intend DTA review to be as broad as the panel construed it.

B. Were there any doubt that the panel decision could not be squared with Congress's intent, that is no longer the case. *Boumediene* makes plain that *Bismullah* is fundamentally flawed.

First, as the Supreme Court observed, the DTA "[o]n its face," allows "consider[ation] of *no evidence outside of the CSRT record.*" *Boumediene*, 128 S. Ct. 2272 (emphasis added). Indeed, in the view of the Supreme Court, the principal shortcoming of the DTA was that it restricted this Court's ability to consider material outside of the CSRT record. *See id.* at 2271-74. The Supreme Court also concluded that the DTA does not permit this Court to find the facts necessary to determine whether a detention is lawful. *See id.* at 2265-66. Although the Supreme Court

ultimately did not reach the issue presented in *Bismullah*, its reading of the DTA is diametrically at odds with the panel's construction of the statute.

Second, *Boumediene* explained that Congress intended the DTA to provide a process for judicial review that is *less* rigorous than habeas. *See id.* 2272-74. *Boumediene* also observed that the rights afforded in habeas were *less* than those afforded in a criminal trial. *Id.* at 2269 ("[h]abeas corpus proceedings need not resemble a criminal trial"). *A fortiori*, DTA review must also be less rigorous than what is provided in criminal proceedings, but as noted, the panel has created a disclosure obligation under the DTA broader than in a domestic criminal case.

Third, *Boumediene* confirms that DTA review is limited to reviewing the actions of the Tribunal, and not other Department of Defense officials. The Supreme Court explained that the DTA "confines the Court of Appeals' role to reviewing whether the *CSRT* followed the 'standards and procedures' issued by the Department of Defense," *Id.* at 2272 (emphasis added), and does not permit review of the "Deputy Secretary's determination whether to convene a new CSRT." *Id.* at 2274. Such a determination is "not a 'status determination of the * * * Tribunal.'" *Id.*

Fourth, and perhaps most fundamentally, *Boumediene* undercuts a central premise of *Bismullah*, namely that the DTA can and should be read expansively in order to remedy perceived flaws in the CSRT proceeding. *Bismullah III*, 514 F.3d at 1296 (Ginsburg, C.J., concurring) (emphasis added) (expressing concern that the

CSRTs were "closed and accusatory" in nature); *Bismullah II*, 503 F.3d at 140. Although the Supreme Court agreed with *Bismullah* that the CSRT process was flawed in some respects–including the fact that the record before the Tribunal "may not be accurate or complete," *id.* at 2273–the Supreme Court did *not* agree that the DTA could be read to cure those supposed flaws. Instead, it ruled that those inherent flaws in the DTA rendered it an inadequate substitute for habeas.

In the end, the *Bismullah* panel grounded its holding in a core assumption that *Boumediene* rejected–that Guantanamo Bay detainees "ha[ve] no constitutional right to [a] writ of habeas corpus." *Bismullah III*, 514 F.3d at 1297 (Ginsburg, C.J., concurring). To compensate for that perceived lack of meaningful judicial review, *Bismullah* read the DTA *broadly* to require production of all "Government Information." *See id.* at 1298-97. That argument cannot be squared with the *Boumediene* ruling, which interpreted the DTA to *narrow* the procedural protections as compared to what would be available in habeas. 128 S. Ct. at 2266, 2274.

III. REINSTATING *BISMULLAH* THREATENS GRAVE HARM TO NATIONAL SECURITY AND WILL MASSIVELY DISRUPT THE PENDING HABEAS PROCEEDINGS.

Rehearing *en banc* is also warranted because *Bismullah* threatens severe damage to our national security. As Judge Henderson explained, "the five officials–charged with safeguarding our country while we are now at war–have detailed the grave national security concerns the *Bismullah I* holding presents" in five

public and two Top-Secret-SCI declarations.[1] Producing this larger record would "disclose clandestine intelligence activities, including counterterrorism operations of the CIA"; violate "assurances of confidentiality" made to foreign intelligence services or sensitive human sources, resulting in a "high probability that" those sources "will decrease their cooperation"; and thereby "severely restrict the U.S. Government's ability to collect intelligence and wage the war on terrorism." Hayden Decl. ¶¶ 10, 12-13, 16, 17. *See also* Pet. 6-7; Mueller Decl. ¶¶ 19-25; Alexander Decl. ¶¶ 11-12; McConnell Decl. ¶¶ 11-16.

Complying with *Bismullah* would also divert vital intelligence resources currently devoted to the ongoing armed conflict. Hayden Unclass. Decl. ¶ 18; England Decl. ¶ 18. This concern is magnified by the Supreme Court's mandate in *Boumediene* that the habeas hearings proceed expeditiously. *See* 128 S. Ct. at 2275. Since then, the district court has ordered expedited procedural briefing and the filing of factual returns at a sufficient rate so that *all* factual returns for petitioners detained at Guantanamo would be filed within several months.[2]

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[1] 514 F.3d at 1301 (Henderson, J., dissenting); *see id.* at 1305 (Randolph, J., dissenting) ("we can also be sure that its assembly and filing in this court, and potential sharing with private counsel, gives rise to a severe risk of a security breach").

[2] *See, e.g.*, Scheduling Order, *In re Guantanamo Bay Detainee Litig.*, Misc No. 08-442 (TFH) (July 11, 2008); Briefing and Scheduling Order, *Boumediene v. Bush*, No. 04-1166 (RJL) (July 30, 2008); Order, *Sharifullah v. Bush*, No. 08-1222 (EGS) (July 31, 2008).

This expedited schedule is severely taxing the government's limited intelligence resources. The vital need for careful intelligence review of the classified material provided to counsel and the court is set forth in an unclassified declaration and in a more detailed Top Secret-SCI declaration recently filed by CIA Director, Michael J. Hayden in *In re Guantanamo Bay Detainee Litigation*, Misc. No. 08-0442.[3] Recognizing the burdens on the government and the national security risks of foregoing a careful review of the classified material by intelligence experts, Judges Hogan and Leon both granted the Government modest extensions.[4] But the break-neck pace of the more than 200 hundred habeas proceedings has stretched intelligence resources to their limits.

Bismullah magnifies these problems. As *Bismullah* recognized, to comply with its mandate, Respondent would need either to reconstruct the historic "Government Information," or hold new CSRT hearings for each detainee. *See Bismullah I*, 503 F.3d at 141.[5] Either of these options is a massive undertaking, which could not be

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[3] The unclassified version is attached hereto. The Court Security Officers have been instructed to make the Top Secret/SCI declaration available to the Judges of this Court on an ex parte basis.

[4] *See* Mem. Op. at 4, *In re Guantanamo Bay Litig.*, Misc. No. 08-442 (Sept. 19, 2008) (granting the government's extension motion because "[t]hese cases are not run of the mine" but rather "involve significant amounts of sensitive, classified information"); Order, *Rumi v. Bush*, Civ. No. 06-619 (Sept. 23, 2008).

[5] Although this Court could mitigate these burdens by holding the DTA cases in abeyance, the Court has not yet granted the Government's motions, which were

pursued without diverting intelligence assets away from vital national security missions. The Court should not impose this burden on the Government in the name of DTA review, considering that the Supreme Court has held that DTA review is constitutionally inadequate.

When the Government previously sought rehearing *en banc* of the panel's decision, there was a pragmatic concern with granting the petition: it would have "delayed * * * the Supreme Court's disposition of *Boumediene*." *Bismullah III*, 514 F.3d at 1298-99 (Garland, J., concurring). But that is no longer the case. Indeed, now it is only a denial of the petition that would give rise to grave practical problems that this Court can readily avoid.

CONCLUSION

The petition for rehearing and suggestion for rehearing *en banc* should be granted.

Respectfully submitted,

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opposed by the petitioners. Also, the Court could alleviate the problems by making clear that the Government is not obligated to hold new CSRT hearings for each detainee. *See Boumediene*, 128 S. Ct. at 2273 (the decision to initiate a new CSRT "is wholly a discretionary one"). Presumably, petitioners would oppose that too.

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CERTIFICATE OF SERVICE

I hereby certify that on October 6, 2008, I filed and served the foregoing Petition for Panel Rehearing and Suggestion for Rehearing En Banc by causing an original and nineteen copies to be delivered to the Court via hand delivery, and by causing two paper copies to be delivered to lead counsel of record via electronic mail, as well as first-class mail

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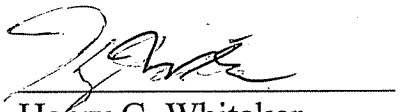

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