IN THE SUPREME COURT OF THE UNITED STATES

No. 07A_____

ROBERT M. GATES, SECRETARY OF DEFENSE, ET AL., PETITIONERS

v.

HAJI BISMULLAH, ET AL.

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

APPLICATION FOR A STAY OF THE JUDGMENT OF THE
COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT
UNTIL 14 DAYS AFTER DISPOSITION OF THIS CASE

Pursuant to Rule 23 of the Rules of this Court, the All Writs Act, 28 U.S.C. 1651, and 28 U.S.C. 2101(f), the Solicitor General, on behalf of the Secretary of Defense and the other federal petitioners, respectfully applies for a stay of the judgment issued by the United States Court of Appeals for the District of Columbia on July 20, 2007, until 14 days following the disposition of this case by this Court. The government has also filed today a petition for a writ of certiorari and a motion for expedited consideration of the petition. Copies of those filings are attached to this Application as Appendices A and B.

The court of appeals rendered its judgment in this case on July 20, 2007. See Pet. App. 1a-54a. The court of appeals denied the government's petition for panel rehearing on October 3, 2007, see Pet. App. 55a-66a, and its petition for en banc rehearing on

February 1, 2008, see Pet. App. 67a-102a. (All three of those orders are included in Appendix A.) The government sought a stay of the court of appeals' judgment, and the court of appeals granted a temporary stay pending this Court's disposition of the government's stay motion on February 13, 2008. (The court's order is attached as Appendix C.) Because the court of appeals declined to grant the government a stay pending the final disposition of this case by the Court at either the certiorari or merits stage, the government is seeking to obtain that relief from this Court on an expedited basis.

This case involves an exceptionally important threshold legal question concerning the contents of the record on review in cases brought under the Detainee Treatment Act of 2005 (DTA), Pub. L. No. 109-148, § 1005(e)(2), 119 Stat. 2739, the resolution of which will apply to all actions brought under the DTA. The court of appeals held that the record on review in DTA cases is not limited to the record that was actually presented to the Combatant Status Review Tribunal (CSRT), i.e., the CSRT record, but extends to all reasonably available information in the possession of the United States government bearing on the issue of whether the detainee is an enemy combatant, regardless of whether the material was actually presented to or considered by the CSRT. As explained in the accompanying petition for a writ of certiorari (Pet. 20-32), the court of appeals fundamentally erred in so holding, and its error

places significant burdens on the government and potentially jeopardizes national security during a time of ongoing armed conflict.

The significant issue about the scope of the record on review presented in this case is intertwined with the questions presented in Boumediene v. Bush and Al Odah v. United States, Nos. 06-1195 & 06-1196 (argued Dec. 5, 2007). In those cases, this Court is considering a variety of challenges to the DTA and the Military Commissions Act of 2006 (MCA), Pub. L. No. 109-366, § 7(a), 120 Stat. 2636. As explained in the accompanying petition (Pet. 16-19), this Court's resolution of Boumediene and Al Odah will almost certainly impact the question presented in this case. As a result, the petition requests that the Court either hold the petition pending this Court's decision in Boumediene v. Bush and Al Odah v. United States, and dispose of it in accordance with the Court's decision in those cases, or grant certiorari and schedule expedited briefing and argument so that the case can be decided this Term. In either event, a stay should issue.

The standard for granting a stay is readily met in the extraordinary circumstances here. As explained in the accompanying petition, the important question presented in this case meets this Court's certiorari criteria and warrants review in its own right. Indeed, the question is interconnected with the issues on which the Court granted certiorari in Boumediene and Al Odah, which are now

pending before the Court. Although the question presented would independently merit this Court's review, the government has requested that the Court hold the petition because the Boumediene and Al Odah cases have already been briefed and argued and the decision in those cases almost certainly will inform the correctness of the decision below, and the need for the government to comply with the enormous burdens envisioned by that decision. In that regard, the fact that Boumediene and Al Odah are pending before the Court counsels strongly in favor of, not against, a stay.

Furthermore, as explained in the petition (at 20-28), the court of appeals' decision is fundamentally flawed. The court of appeals incorrectly expanded the record on review beyond any known administrative or judicial context to include material that was not actually presented to the tribunal whose decision is being reviewed. Indeed, the court's decision effectively grants to foreign nationals held abroad as enemy combatants in an ongoing war greater rights to record review in court than that possessed by United States citizens in the conventional criminal context.

Finally, the balance of harms weighs in favor of a stay in this case to maintain the status quo. If forced to comply with the court of appeals' judgment, the government either will have to undertake a massive information-gathering effort in an attempt to create a "record" that would satisfy the court of appeals, or

undertake mass voluntary remands and conduct new CSRTs. The huge diversion of limited government resources required for either alternative, as well as the significant disclosure of sensitive information required under the first alternative, pose grave risks to our Nation's security in a time of war. There is no reason to place those burdens on the government prior to this Court's disposition of this case, especially where any efforts the government expends may be rendered either pointless or misdirected once this Court decides Boumediene and Al Odah. A stay until 14 days following the final disposition of this case by this Court on certiorari or the merits is therefore warranted.

STATEMENT

As explained in the petition, respondents are foreign nationals captured abroad and detained at the naval base at Guantanamo Bay. Pet. App. 3a. Each of them has been adjudicated by a CSRT to be an enemy combatant. Ibid. Under the Detainee Treatment Act of 2005 (DTA), Pub. L. No. 109-148, 119 Stat. 2739, those determinations are subject to judicial review in the United States Court of Appeals for the District of Columbia Circuit.

Respondents sought review of their CSRT determinations in the D.C. Circuit under the DTA and requested wide-ranging discovery. Pet. App. 2a-3a. In order to evaluate respondents' discovery requests, the court of appeals defined "the record to which th[e] court must look as it reviews a CSRT's determination." Id. at 10a.

The court held that the record on review "consists of all the information a Tribunal is authorized to obtain and consider," called the "Government Information," which 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." Id. at 2a. That is, the court defined the record for judicial review to include not only the evidence actually presented to and considered by the CSRT, but also every piece of potentially relevant, reasonably available information possessed by each and every government agency. Id. at 2a, 13a-14a.

The government sought rehearing, explaining that it does not have a file containing this type of "record" for each detainee's case, as the court defined it; that records of materials actually obtained by the recorder were not retained; and that creating and producing such a "record" would require an enormous outlay of government resources and, in conjunction with the panel's treatment of classified information, could jeopardize national security. Pet. App. 182a-224a (declarations). The panel denied rehearing, but it recognized that its holding would require the government to expend significant resources to either recreate an expanded "record" for each detainee or "convene a new CSRT" for each detainee. Id. at 62a-63a.

The en banc court of appeals denied a request for expedited rehearing on a 5-5 vote. The judges issued five separate opinions explaining their votes, Pet. App. 67a-102a, in which they expressly noted the need for this Court to address the question presented in this case expeditiously, particularly because it is interconnected with the questions presented in Boumediene and Al Odah. See id. at 82a (Ginsburg, J., concurring in denial of rehearing en banc); id. at 83a (Garland, J., concurring in denial of rehearing en banc); id. at 89a n.6 (Henderson, J., dissenting from denial of rehearing en banc); id. at 96a (Randolph, J., dissenting from denial of rehearing en banc).

On February 4, 2008, the government filed in the court of appeals an application for a stay pending disposition of the expedited petition for a writ of certiorari in this case. On February 13, 2008, the court of appeals granted the motion in part, staying its judgment pending this Court's disposition of the government's stay motion. Under the court's order, the government must produce the record that was actually assembled and used by the CSRT, but it is not obligated to comply with the extraordinary additional duties established by the Bismullah decision unless or until the Court rejects the stay request. The court of appeals did not stay execution of the judgment pending this Court's disposition of the government's petition for a writ of certiorari, however.

The government has filed herewith a petition for a writ of certiorari to review the judgment of the court of appeals and a motion for expedited consideration of that petition.

ARGUMENT

"The practice of the Justices has consistently been to grant a stay only when * * * [t]here [is] a reasonable probability that certiorari will be granted, a significant possibility that the judgment below will be reversed, and a likelihood of irreparable harm * * * if the judgment below is not stayed." Edwards v. Hope Med. Group for Women, 512 U.S. 1301, 1302 (1994) (Scalia, J., in chambers). Those criteria are amply satisfied here.

1. The government's petition for certiorari readily satisfies the customary criteria for plenary review. The question presented is extraordinarily important and, indeed, is intertwined with issues on which this Court has already granted plenary review in Boumediene v. Bush and Al Odah v. United States. This Court recognized as much when granting review in Boumediene and Al Odah, see Boumediene, 127 S. Ct. 3078 (2007), as did the judges of the court of appeals when denying the government's expedited petition for rehearing en banc on a 5-5 vote, see Pet. 17. The decision below will govern all cases brought by detainees at the Guantanamo Bay Naval Base pursuant to the DTA, which currently includes cases pending on behalf of more than 180 detainees. And, as summarized below and explained in more detail in the accompanying petition for

certiorari, the decision below not only risks harm to the national security, but rests on serious legal error.

Although the question presented would merit certiorari in its own right, the government has recommended that this Court merely hold this petition pending its decision in Boumediene and Al Odah, because those cases have already been briefed and argued and are awaiting decision. The fact that this case has reached the Court at a time when a hold may make more sense than plenary review does not, however, detract from the certworthiness of the question presented in Bismullah. To the contrary, the fact that the important question presented by this case is interconnected with the issues pending in Boumediene and Al Odah is a factor that weighs heavily in favor of granting a stay.

a. In Boumediene v. Bush and Al Odah v. United States, this Court is considering a variety of challenges to the restrictions on judicial review Congress enacted in the DTA and the Military Commissions Act of 2006 (MCA), Pub. L. No. 109-366, § 7(a), 120 Stat. 2636. In particular, this Court is reviewing the court of appeals' holding that the DTA is the only means by which Guantanamo Bay detainees may challenge their detention as enemy combatants in federal court and is considering the detainees' challenges to the adequacy of judicial review under the DTA. Pet. at i, Boumediene v. Bush, No. 06-1195 (argued Dec. 5, 2007); Pet. at i, Al Odah v. United States, No. 06-1196 (argued Dec. 5, 2007); see

also Boumediene v. Bush, 476 F.3d 981 (D.C. Cir.), cert. granted, 127 S. Ct. 3078 (2007).

As this Court recognized when granting certiorari in Boumediene and Al Odah, the questions presented in those cases are intertwined with the question presented here, see Boumediene, 127 S. Ct. 3078, and this Court's decision in Boumediene and Al Odah will almost certainly directly impact this case. For example, if this Court reaches the adequacy of the DTA procedures in Boumediene and Al Odah, it may have occasion to interpret the scope of the DTA procedures, including the scope of the record on review, in order to avoid any constitutional difficulties with the MCA's limitation on habeas corpus review. Such a resolution would essentially decide or at least shed light on the very issues presented in this case in ways that may obviate the need for a remand or change the scope of the government's task on remand. Either way, a prompt consideration of whether to grant or hold the petition in this case would be appropriate.

If, on the other hand, this Court determines that detainees do not have Suspension Clause rights, it would not need to consider the adequacy of the DTA procedures in the first instance, but instead could permit the court of appeals to revisit its ruling on the scope of the record for judicial review in light of the Court's explanation of what rights (if any) detainees have to judicial review. Alternatively, this Court could accept review in this case

to clarify the appropriate procedures for DTA review, without further delay. Finally, if this Court rejects the adequacy of DTA review altogether, there would be little practical value in performing the remand option provided by the court below. In any event, this Court's decision in Boumediene and Al Odah is likely to directly inform the question in this case.

b. In addition, the question presented is important in its own right. As explained in the accompanying petition (Pet. 28-32), petitions for review under the DTA have already been filed on behalf of more than 180 detainees, and the court of appeals' ruling addressing the scope of the "record on review" will apply in each of those cases. Unfortunately, as the government has explained, it does not currently have files that contain the "record" for each detainee as the court of appeals envisioned it. Thus, to comply with the court of appeals' conception of the record on review, the government would be required to divert a significant portion of its intelligence, law enforcement, and military resources to either creating new "records" for DTA litigation or to conducting entirely new CSRT hearings for those detainees. As the leaders of the Nation's intelligence community have attested, see Pet. App. 182a-214a, and as several judges of the court of appeals recognized in opinions dissenting from the denial of rehearing, see id. at 88a (Henderson, J., dissenting from denial of rehearing en banc); id. at 95a-96a (Randolph, J., dissenting from denial of hearing en

banc), that diversion of resources from critical national security duties during ongoing armed conflict threatens national security. This Court thus likely would conclude that the question presented must be conclusively resolved before any of more than 180 DTA currently pending can proceed and before the government is put to the dilemma created by the court of appeals.

In sum, given that the question presented is exceptionally important and is intertwined with issues on which this Court has already granted plenary review, the government's petition clearly satisfies the Court's certiorari requirements.

c. In addition, the court of appeals' decision is fundamentally flawed on its merits. As the government explained in the accompanying petition (Pet. 20-28), the court of appeals adopted a conception of the record on review that is contrary to basic principles of judicial review, contrary to CSRT procedures, contrary to the scheme envisioned by Congress in the DTA, and contrary to the decision of a plurality of this Court in Hamdi v. Rumsfeld, 542 U.S. 507 (2004).

It is a fundamental principle of judicial review that the record on review is generally limited to the materials presented to the initial decisionmaker. In the administrative agency context, for example, the court's "reviewing function is * * * ordinarily limited to consideration of the decision of the agency or court below and of the evidence on which it was based." United

States v. Carlo Bianchi & Co., 373 U.S. 709, 714-715 (1963) (emphasis added). The Defense Department's CSRT procedures reflect that view as well, stating that the record of a CSRT proceeding consists of the evidence submitted to the tribunal by the recorder and the detainee, the tribunal's ruling, and the audio file of proceedings. Pet. App. 140a-141a. CSRT procedures specifically distinguish between "Government Information" -- all of the "reasonably available information in the possession of the U.S. Government bearing on" the question whether a detainee is an enemy combatant, Pet. App. 129a -- and "Government Evidence" -- the evidence that the recorder presents to the CSRT to support the detainee's classification as an enemy combatant, id. at 138a -- and make clear that the "record" consists only of the latter. And that understanding of the record is consistent with Congress's view of the scope of judicial review available under the DTA. See DTA § 1005(e)(2), 119 Stat. 2742 (listing the two narrow questions the court of appeals may consider on judicial review); see also 152 Cong. Rec. S10,403 (daily ed. Sept. 28, 2006) (statement of Sen. Cornyn).

The court of appeals nonetheless adopted an unprecedented definition of the record on review, holding that the record for the court's review of a CSRT hearing consists of all Government Information, including information not actually presented to the tribunal. Pet. App. 38a, 58a. That holding has no precedent in

any administrative or judicial context, much less in the extraordinary military and national security context in which this case arises.

The court of appeals provided two justifications for its ruling, neither of which is correct. First, the court stated that it cannot determine whether the recorder withheld any potentially exculpatory evidence, in violation of CSRT procedures, without being able to examine for itself all relevant, reasonably available information in the government's possession. Pet. App. 11a-16a. That explanation incorrectly conflates the question of what constitutes the administrative record in a DTA case and what is the appropriate process and remedy in the event a detainee alleges that the Department of Defense failed to comply with its own rules requiring inclusion of exculpatory evidence in the administrative record. Moreover, as the criminal context amply demonstrates, there is no need to disturb ordinary conceptions of record review to ensure that exculpatory information is not improperly withheld. See Brady v. Maryland, 373 U.S. 83 (1963). Second, the court of appeals reasoned that production of all Government Information was necessary for the Court to "consider whether a preponderance of the evidence supports the Tribunal's status determination." Pet. App. 14a-15a. That reasoning, too, is mistaken, because it is well-settled that the "preponderance of the evidence" standard refers to the evidence presented to the court, not to some other

set of information. See, e.g., Gould v. United States, 160 F.3d 1194, 1197 (8th Cir. 1998).

Finally, the decision below is in significant tension with the decision of a plurality of this Court in Hamdi v. Rumsfeld. As explained in the accompanying petition (Pet. 28), the Hamdi plurality rejected the "extensive discovery of various military affairs" ordered by the district court in that case, 542 U.S. at 513-514, 528, 532-533, yet the decision below would require essentially the same type of far-ranging judicial review. The fact that the court of appeals' decision in this case categorically imposes on the military -- with respect to foreign nationals held abroad -- record production demands that far exceed those invalidated by the plurality with respect to the citizen enemy combatant in Hamdi thus suggests a significant possibility that the government would prevail on the merits of this case.

2. The public interest and balance of equities decisively favor granting a stay. There is no reason to require the government to be put on the horns of the dilemma created by the court of appeals' decision in this case while the Boumediene and Al Odah cases are pending before this Court or before this Court considers this case on its merits on an expedited basis. As discussed in the petition, the decision below forces the government to engage in a practically infeasible attempt to recreate the Government Information the recorder might have reviewed under the

court of appeals' decision at the risk of great harm to national security, or conduct mass remands of DTA cases for an additional round of CSRT proceedings in the midst of an ongoing armed conflict. Because the court of appeals' decision is seriously flawed and because it is possible that this Court's decision in Boumediene and Al Odah will obviate the need for either course, there is no reason to put the government to that choice while those cases are pending. And even if the Court's decision in Boumediene and Al Odah is adverse to the government and the government is required to convene new CSRT proceedings, there is no reason to require the government to undertake that task before it has the benefit of this Court's guidance on what procedures are required. Moreover, in addition to consuming a massive amount of time and resources, conducting new CSRTs for hundreds of detainees in the absence of definitive guidance from this Court would unnecessarily delay the detainees' ability to seek federal court review of their enemy combatant status, thereby hampering the system of review established by Congress in the DTA.

Absent a stay, the government soon will be required to produce the "record," as defined by the court of appeals, for the seven respondents involved in this case.[1] Moreover, absent a stay, the

[1] Under the stay granted by the court of appeals, and the stay requested herein, the government remains obligated to comply with any existing deadlines to produce the record actually compiled and relied upon by the CSRT -- i.e., the proper "record on review" under the government's view. The government has already produced

government will be required under current obligations to produce similar "records" by February 15, 2008, in cases involving six other detainees. See Paracha v. Gates, D.C. Cir. No. 06-1038; Mahnut v. Gates, D.C. Cir. No. 07-1066; Nasser v. Gates, D.C. Cir. No. 07-1340; Thabid v. Gates, D.C. Cir. No. 07-1341; Chaman v. Gates, D.C. Cir. No. 07-1101; and Hamad v. Gates, D.C. Cir. No. 07-1098. The government has filed an omnibus motion to stay the filing of the "records" in approximately 64 pending DTA cases, and that motion is still pending. Unless a stay is granted in this case, the court of appeals likely will require the government to produce the "records" in the 64 related cases in short order.

Accordingly, a stay until 14 days following the final disposition of this case is warranted. The 14 days' additional time beyond the disposition of this case is the minimum period necessary so that the government may assess the Court's order or decision, consult with all affected components of the Department of Justice and other agencies, and decide how to comply with the Court's order or decision. Given the enormity of the dilemma created by the court of appeals' decision and the possibility that this Court's action in Boumediene and Al Odah (and in this case) may create additional options to consider, such a stay is warranted.

---

to counsel in Bismullah and Parhat a classified version of the CSRT record of proceedings for all of the respondents in those cases.

CONCLUSION

For the reasons stated, petitioners respectfully request that the Court grant a stay of the court of appeals' judgment until 14 days following the final disposition of this case.

PAUL D. CLEMENT
Solicitor General
Counsel of Record

FEBRUARY 2008