No. 07A-677

IN THE

Supreme Court of the United States

ROBERT M. GATES, SECRETARY OF DEFENSE, *et al.*,
Petitioners,

v.

HAJI BISMULLAH, *et al.*, and HUZAIFA PARHAT, *et al.*,
Respondents.

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

RESPONDENTS' JOINT OPPOSITION TO THE 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 AND CONSENT TO THE MOTION FOR EXPEDITED CONSIDERATION OF THE PETITION FOR A WRIT OF CERTIORARI AND FOR EXPEDITED MERITS BRIEFING AND ORAL ARGUMENT IN THE EVENT THAT THE COURT GRANTS THE PETITION

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INTRODUCTION

Haji Bismullah, an Afghan provincial government official, and the Uighur refugees in the *Parhat* case have little in common except this: in 2006, each sought the judicial review expressly provided to him by Congress in the Detainee Treatment Act, and nearly two years later, none of their cases has advanced to a hearing and no record on review has even been produced. Each can show compelling exculpatory evidence that *was* in the possession of the U.S. government and *was not* provided to the panel convened years ago as part of his Combatant Status Review Tribunal ("CSRT"). The stay that the government requests would further delay the judicial review to which each is entitled, and if the government is correct about the record on review, no court will ever see that evidence.

For very different reasons than those posited by Petitioners,[1] Respondents[2] join in the motion for expedition. Respondents will oppose the petition for *certiorari* but agree that it should be considered on the schedule proposed and, if granted, argued and decided this term. This case should *not* be held, however, and the government's stay application should be denied. If, over Respondents' objection, *certiorari* is granted, the schedule for briefing and oral argument

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1 Petitioners here are Robert M. Gates, Secretary of Defense of the United States of America (named as Respondent in both the *Bismullah* and *Parhat* DTA actions below) and Harry B. Harris, Rear Admiral, U.S. Navy and Commander, Joint Task Force-GTMO, and Wade F. Davis, Colonel, U.S. Army and Commander, Joint Detention Operations Group (both named as Respondents in the *Parhat* cases) (hereinafter "Petitioners" or the "government").

2 Respondents here are (a) Haji Bismullah, petitioner in *Bismullah v. Gates*, No. 06-1197 (D.C. Cir. June 9, 2006), who has been imprisoned at the United States Naval Base at Guantánamo Bay, Cuba ("Guantánamo") since approximately February 2003 (he initially filed this action through his brother and next friend, Haji Mohammad Wali, also a petitioner below), and (b) the Uighur petitioners in *Parhat v. Gates*, No. 06-1397 (D.C. Cir. Dec. 4, 2006): Huzaifa Parhat, Abdusabour, Abdusemet, Hammad Mehmet, Jalal Jalaldin, Khalid Ali and Sabir Osman, each imprisoned at Guantánamo since approximately May 2002, as well as Jamal Kiyemba, next friend of Abdusabour and Khalid Ali. The Court of Appeals assigned each of the seven DTA petitioners in the *Parhat* case a separate docket number in December 2007. *See* Order, *Parhat v. Gates*, No. 06-1397 (D.C. Cir. Dec. 18, 2007) (assigning Docket Nos. 06-1397, 07-1508, 07-1509, 07-1510, 07-1511, 07-1512 and 07-1523). Hereinafter, we refer to Bismullah, Parhat, Abdusabour, Abdusemet, Mehmet, Jalaldin, Ali, and Osman collectively as "Respondents" or "DTA Petitioners."

proposed by the government should be adopted or, if feasible for the Court, *accelerated* by approximately two weeks, so that these cases can proceed to the merits as quickly as possible.

The interlocutory decision at issue, *Bismullah v. Gates*, 501 F.3d 178 (D.C. Cir. 2007) ("*Bismullah I*") (Pet'r App. 1a-54a),[3] was certainly correct, does not merit review by this Court, and will not be altered by the decisions in *Boumediene v. Bush,* No. 06-1195, and *Al Odah v. United States,* No. 06-1196. However, the stay that the government seeks would, once again, freeze judicial review of cases in which that review is years overdue. Six years into the legal battles about Guantánamo detainees, the human cost of further delay is simply too great.

PRELIMINARY STATEMENT

By requesting a stay of its threshold obligation to produce material for the record on review, Petitioners ask this Court to freeze consideration of all cases brought under the Detainee Treatment Act of 2005 ("DTA"), Pub. L. No. 109-148, 119 Stat. 2739 (Pet'r App. 103a-110a), many of which are now in their second year, and one of which is in its third. The government further makes the remarkable request that the Court stay an interlocutory order below, not just until this Court issues a decision on the petition for *certiorari*, but that the Court hold its review (and thus extend the stay) pending resolution of another case in this Court. This amounts to a request for an indefinite appellate freeze on litigation because the government finds it inconvenient. Both the request for the stay and the request for the hold should be rejected.

The government seeks this relief in aid of its petition for review of a ruling that is interlocutory, dictated by the language of the DTA and procedures issued by the Department of Defense, and vital to meaningful judicial review. The government cannot look to this Court to

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[3] The government's subsequent request for rehearing and suggestion for rehearing *en banc* of *Bismullah I* were both denied. Pet'r App. 55a-66a, *Bismullah v. Gates*, 503 F.3d 137 (2007) ("*Bismullah II*"); Pet'r App. 67a-102a, *Bismullah v. Gates*, __ F.3d __, No. 06-1197, 2008 WL 269001 (D.C. Cir. Feb. 1, 2008) ("*Bismullah III*").

rewrite statutory obligations imposed by Congress, and it should not be rewarded for asserting burdens in the Court of Appeals long after argument and invoking in this Court a statute that it never raised below at all.

The requested stay would likely delay *until at least* 2010 any ruling on the merits of a DTA case.[4] The harm caused to Respondents would be far greater than mere preservation of a harsh status quo. Most of the Respondents are held in extreme isolation; if they remain in limbo due to a litigation freeze their psychological deterioration is a virtual certainty. The practical effect of the stay will be to terminate judicial review for years and likely deepen Respondents' psychological decline irreversibly.

If DTA review is permitted to proceed, each Respondent will present a compelling case of his entitlement to relief. In Bismullah's case, senior officials in the U.S.-allied Afghan government provided documents to U.S. military officials and diplomats prior to his CSRT demonstrating that he was the innocent victim of a tribal feud. The *Parhat* Respondents point to repeated admissions by senior U.S. officials that they, like five of their identically-situated Uighur companions who were cleared by CSRTs, were never enemy combatants of the United States. None of this material was presented to Respondents' respective CSRTs. Each can also show other violations of the procedures governing their CSRTs ("CSRT Procedures").[5]

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[4] In late October 2007, after many requests and threats of motion practice, the government finally disclosed to counsel for each Respondent what the government contends should constitute the record on review in his case. Although this material did not contain the exculpatory evidence believed to be reasonably available to the government, certain, but not all, of the *Parhat* Respondents were able to point out that the theory of military detention levied against them was deficient as a matter of law. With no other practical recourse, they sought leave to file motions for judgment as a matter of law. Leave was granted to Parhat himself (no action has been taken as to the other movants), and he filed a dispositive motion. *See* Resp't App. 114a-154a, Motion for Judgment as a Matter of Law, *Parhat v. Gates*, No. 06-1397 (D.C. Cir. Jan. 7, 2008) (unclassified and cleared for public release by court security officer). This course, however, is not open to Bismullah, and would be open to few DTA petitioners. The need for the record on review, as defined by the Court of Appeals, remains urgent, and this Court should not interfere with its production.

[5] On July 7, 2004 the DoD issued an "Order Establishing Combatant Status Review Tribunal." Pet'r App. 113a. On July 29, 2004, the Secretary of the Navy issued the CSRT Procedures by way of a memorandum

The stay application should be denied, and this case should not be held, for the following reasons:

First, review on *certiorari* is inappropriate at this juncture, and thus an application in aid of the same should be rejected. The Court of Appeals' ruling is a preliminary, interlocutory order. There is literally nothing for this Court to review but a decision in a vacuum. No actual record on review has been produced in any DTA case.

Second, the ruling below was correct, making reversal exceedingly unlikely. The challenged order was compelled by a straightforward reading of the DTA and the Department of Defense procedures that governed the CSRT Procedures. The government sought below, and now seeks in this Court, to prevent the Court of Appeals from carrying out its congressionally-mandated review function by improperly limiting the record on review.

The CSRTs did not provide the kind of adversary process that generates a reliable hearing record. Their centerpiece is, instead, a "Recorder" who serves as investigator and prosecutor, and has nearly complete control over the information that reaches a CSRT hearing panel. He is tasked to obtain *all* "reasonably available" information in the possession of the U.S. government and, *inter alia*, to present all exculpatory evidence to the CSRT panel for consideration. If he fails to do so, the record before the CSRT panel will never contain this information, for the rules prohibit the detainee, who has no lawyer, from reviewing the evidence, the panel has no independent way to learn of it, and, as a practical matter, there is no other way to place extrinsic evidence before the panel. As Chief Judge Ginsburg noted, the determination of the CSRT panel was, more than anything, a product of the Recorder's information gathering and culling. The Recorder's failure to carry out his regulatory duties could be fatal to the detainee's case. The

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entitled "Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants detained at Guantánamo Naval Base, Cuba." Pet'r App. 120a. The CSRT Procedures were revised by the DoD on July 14, 2006, but the 2004 version governed each Respondent's CSRT and is applicable here.

DTA provides for judicial review of whether the result of the CSRT process was consistent with the CSRT Procedures, but the government's argument would make review moot, for it would foreclose any ability to see whether the Recorder culled reasonably available exculpatory evidence and otherwise complied with the CSRT Procedures.

Third, the balance of harms cannot support a stay. In part because of the stunning length of these imprisonments, and in part because of the unique destructiveness of isolation, delay is unconscionable. The government's burden and security concerns, raised in the main through belated affidavits, were properly addressed by the decision below and the associated protective order, and in any event, do not warrant a stay.

Fourth, there is no need to wait for a decision in *Al Odah* and *Boumediene* to rule on the petition for *certiorari*, and it would be highly inappropriate to do so. The Court of Appeals decision was based on statutory interpretation, and the outcome of *Al Odah* and *Boumediene* should not impact construction of the plain terms of the DTA.

STATEMENT OF FACTS

I. The Men

A. Bismullah

Haji Bismullah is an Afghan national long opposed to the Taliban. When the Taliban seized power in 1996, Bismullah, then 15 years old, fled to a refugee camp in Pakistan, where he remained until late 2001, when the U.S. commenced its military campaign against the Taliban. Bismullah and his brothers answered Hamid Karzai's call for patriots to return to Afghanistan and help U.S. and coalition forces defeat the Taliban. After the Taliban's defeat, Karzai assumed the presidency, and under his leadership, Afghanistan became a U.S. ally. Bismullah's elder

brother, Haji Mohammed Wali,[6] was appointed a senior spokesman and aide to the Governor of Helmand Province, Sher Mohammed Akhundzada. Bismullah was appointed chief of transportation for the Greshk district in Helmand province. Resp't App. 221a-223a, Declaration of Haji Mohammed Wali ¶¶ 6-13, *Bismullah v. Gates*, No. 06-1197 (D.C. Cir. June 9, 2006) ("Wali Decl. I"); Resp't App. 269a-271a, Declaration of Sher Mohammed Akhundzada ¶¶ 6-13, *Bismullah v. Gates*, No. 06-1197 (D.C. Cir. Aug. 7, 2006) ("Akhundzada Decl.").

In February 2003, Bismullah went to the local U.S. military base in Greshk to vouch for an Afghan official who had been detained in a case of mistaken identity (and was later released). When Bismullah arrived, the U.S. military detained him, on information and belief, based on a false accusation by members a rival clan who had held Bismullah's government post under the Taliban and sought to reclaim it. The rival clan members thereafter boasted publicly of their success in causing Bismullah's arrest. Resp't App. 223a-225a, Wali Decl. I ¶¶ 14-21; Resp't App. 271a-274a, Akhundzada Decl. ¶¶ 14-25.

Immediately after Bismullah's arrest, Afghan government officials notified American officials that Bismullah had been mistakenly detained. Despite these appeals, including one by Sher Mohammed Akhundzada (then the Governor of Helmand province and now a member of the Afghan Senate), Bismullah was transferred to Bagram Air Base and a few weeks later sent to Guantánamo. Resp't App. 225a-227a, Wali Decl. I ¶¶ 21-26; Resp't App. 274a-276a, Akhundzada Decl. ¶¶ 25-31.

During the time between Bismullah's arrest and his CSRT, numerous Afghan officials met with and submitted petitions and statements to U.S. commanders and diplomatic officials in Afghanistan—including Lieutenant General Daniel McNeill, other U.S. military officials, and

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[6] Haji Mohammed Wali is Bismullah's next friend in this action.

U.S. Ambassador to Afghanistan Zalmay Khalilzad—attesting to Bismullah's innocence and urging his release. None of that relevant exculpatory evidence was presented at Bismullah's CSRT hearing, and none is in his CSRT Record of Proceedings.[7] In addition, Bismullah requested that his brother Haji Mohammed Wali—who could vouch for his innocence and for the U.S. officials' receipt of exculpatory evidence—be called as a witness at his CSRT hearing. Wali was deemed not reasonably available, despite the fact that he was a senior spokesman to Governor Akhundzada and was routinely quoted in American and European media.[8] Resp't App. 226a-228a, Wali Decl. I ¶¶ 25-32; Resp't App. 236a-237a, Declaration of Haji Mohammed Wali ¶¶ 1-2, *Bismullah v. Gates*, No. 06-1197 (D.C. Cir. Aug. 7, 2006) ("Wali Decl. II"); Resp't App. 275a-276a, Akhundzada Decl. ¶¶ 27-31.

B. The Uighurs

The *Parhat* Respondents are Uighurs, a Muslim minority group from western China that historically has been oppressed by the communist regime. *See* Resp't App. 13a-14a, Parhat Pet. ¶¶ 35-38. Each *Parhat* Respondent fled China to escape that oppression.[9] All eventually made their way to a Uighur village—termed a "camp" by the government—in Afghanistan. None fought against the United States or coalition forces, and none supported forces hostile to the United States. They fled U.S. bombing to Pakistan, where bounty-hunters sold them to the U.S.

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7 The government contends in error that the record on review in a DTA action should be limited to this very narrow Record of Proceedings, described *infra* at 15.

8 These are examples of the ways in which Bismullah's CSRT was inconsistent with the CSRT Procedures. Bismullah reserves the right to present additional bases for relief, including that allegations made against him actually related to other Guantánamo detainees also named Bismullah.

9 The United States has long condemned China's human rights abuses of the Uighurs. According to the State Department, former prisoners "reported credibly that officials used electric shocks, prolonged periods of solitary confinement, incommunicado detention, beatings, shackles, and other forms of abuse. . . . Deaths in custody due to police use of torture to coerce confessions from criminal suspects continued to occur." Department of State, Country Reports on Human Rights Practices-2004-China, § 1(c) (Feb. 25, 2005), *available at* http://www.state.gov/g/drl/rls/hrrpt/2004/41640.htm.

military, and were transferred to Guantánamo in mid-2002. *See* Resp't App. 14a-18a, *id.* ¶¶ 39-45, 51-56.

In September, 2002, the so-called "East Turkestan Islamic Movement" was designated by the State Department as a "terrorist organization." Resp't App. 24a, *id.* ¶ 77.[10] Although Congress never authorized the use of military force against this group, certain Uighurs, including the *Parhat* Respondents, are now being held on the theory that they were members of "ETIM" and had attended an "ETIM camp." Resp't App. 42a, *id.* ¶ 139.

But this is pretextual, for the military determined that the men were not enemy combatants long before anyone imagined a CSRT process. For example, in 2003, a colonel wrote of Parhat, "it appears unlikely that Parhat will be determined to be an individual subject to the President's military order of 13 Nov. 2001. I recommend the release of Parhat under a conditional release agreement."[11] Additional exculpatory evidence does not appear in his CSRT Record of Proceedings, however, and would not be available to the Court of Appeals under the government's theory.[12] For example, in August 2005, Ambassador Pierre Prosper stated that the government had already attempted to place the Uighurs in "about 25 countries."[13] It is

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10 Citing public statements by senior U.S. officials, the *Parhat* DTA petition details how this political concession was made to induce Chinese cooperation with Iraq invasion plans. Resp't App. 21a-24a, Parhat Pet. ¶¶ 66-77.

11 Cited in Resp't App. 128a-129a, Brief in Support of Motion for Judgment as a Matter of Law at 5-6, *Parhat v. Gates*, No. 06-1397 (D.C. Cir. Jan. 7, 2008) (unclassified and cleared for public release by court security officer).

12 The *Parhat* Respondents were companions of five other Uighurs whom CSRT panels determined *not* to be enemy combatants. This determination inspired vigorous efforts by the Pentagon to change the results through second panels. This Court is familiar with one such case, involving a sixth companion. *See generally* Petition for Original Writ of Habeas Corpus, *In re Petitioner Ali*, No. 06-1194 (U.S. Feb. 12, 2007). Noting that "the Uighurs are all considered the same," a Pentagon official wrote more than three years ago, "By properly classifying them as EC, then there is an opportunity to (1) further exploit them here in GTMO and (2) when they are transferred to a third country, it will be controlled transfer in status. The consensus is that all Uighurs will be transferred to a third country as soon as the plan is worked out." *Id.* at 8.

13 National Public Radio, Morning Edition, "Chinese Detainees at Guantánamo Get Hearing" (Aug. 25, 2005) (interview with Pierre-Richard Prosper, U.S. Ambassador-at-Large for War Crimes Issues).

implausible that the State Department's blandishments to allies did not contain admissions regarding the *Parhat* Respondents' non-combatant status. The *Parhat* DTA petition cited other public exculpatory statements made by senior officials, including State Department spokesman Richard Boucher and Navy Secretary Gordon England. Resp't App. 27a-29a, *id.* ¶ 89. The records underlying these admission were "reasonably available" to the government, but none would be part of the government's posited record on review.

II. The CSRT Procedures And Judicial Review Under The DTA

Despite the overwhelming evidence of each Respondent's non-enemy, non-combatant status, the government continues to hold him captive based on the finding of a CSRT panel that he is an "enemy combatant." Created by the government within weeks of this Court's decisions in *Rasul v. Bush,* 542 U.S. 466 (2004), and *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), the CSRTs were apparently intended to insulate detention at Guantánamo from further legal challenge.[14] In enacting the DTA in 2005, Congress—cognizant of the CSRT Procedures—granted detainees a right to judicial review of the legality of their detention. Specifically, Congress directed the Court of Appeals to decide:

> (i) whether the status determination of the Combatant Status Review Tribunal with regard to such alien was consistent with the standards and procedures specified by the Secretary of Defense for 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); and
>
> (ii) to the extent the Constitution and laws of the United States are applicable, whether the use of such standards and procedures to make the determination is consistent with the Constitution and laws of the United States."

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[14] *See* Christopher Marquis, *The Reach of War: Justice; Pentagon Will Permit Captives at Cuba Base to Appeal Status*, N.Y. TIMES, July 8, 2004.

Pet'r App. 107a-108a, DTA § 1005(e)(2)(C)(i)-(ii). Thus, irrespective of the applicability of the Constitution or federal law, each detainee has a statutory right to challenge (1) whether his status determination was consistent with the CSRT Procedures, and (2) whether his CSRT status determination was based on a preponderance of the evidence. The CSRT Procedures cover a range of actions, many of which occur prior to the hearing, that are to be performed by the military officials who participate in the Tribunal.

The government urged the Court of Appeals to presume its faithful compliance with the CSRT Procedures, even claiming entitlement to the "strongest sort of presumption of regularity."[15] But after being pressed by the court at oral argument, the government—through a post-argument declaration submitted by Rear Admiral James M. McGarrah—revealed that the actual conduct of the CSRTs bore little resemblance, in a number of critical respects, to the CSRT Procedures.[16] Additional declarations subsequently filed in other cases by or on behalf of military officials who participated in the CSRT process disclose the variance from the CSRT Procedures to be even greater than the government acknowledged.[17] Elements of the CSRT Procedures of particular relevance to the government's motions are summarized below.

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15 Respondent's Motion to Stay Proceedings, *Parhat v. Gates*, No. 06-1397, at 4 (D.C. Cir. Jan. 10, 2007).

16 Admiral McGarrah served as Director of the Office for Administrative Review of the Detention of Enemy Combatants ("OARDEC") from July 2004 until March 2006, during which time OARDEC conducted 558 CSRTs. Declaration of Rear Admiral (Retired) James M. McGarrah, Pet'r App. 225a-239a ("McGarrah Decl.").

17 *See, e.g.*, Resp't App. 283a-297a, Declaration of Stephen Abraham, Lieutenant Colonel, United States Army Reserve, *Al Odah v. Gates*, No. 07-1134 (D.C. Cir. June 15, 2007) ("Abraham Decl. I"); Resp't App. 298a-310a, Declaration of William J. Teesdale, Esq., *Hamad v. Bush*, No. 05-1009 (D.D.C. Sept. 4, 2007) ("Teesdale Decl."); Resp't App. 311a-331aDeclaration of Stephen Abraham, *Hamad v. Gates*, No. 07-1098 (D.C. Cir. Nov. 9, 2007) ("Abraham Decl. II"). The declarations of Admiral McGarrah and the other CSRT participants directly contradict representations made by the government's attorneys in briefing and at oral argument. *Cf.*, Resp't App. 183a, Transcript of Oral Argument *Bismullah v. Gates*, Nos. 06-1197 and 06-1397, at 29 (May 15, 2007) (attributing selection of evidence to the Recorder); Corrected Brief for Respondent Addressing Preliminary Procedural Motions, *Bismullah et al v. Gates*, Nos. 06-1197 and 06-1397, at 9 (Apr. 10, 2007) (attributing collection and examination of Government Information to the Recorder) with Resp't App.290a, Abraham Decl. I ¶ 5 ("[T]he Government Evidence was not compiled personally by the CSRT Recorder, but by other individuals in OARDEC.").

A. The CSRT Participants

A panel composed of three military officers presided over each detainee's status hearing and issued a determination as to the detainee's status, subject to approval of the CSRT Director. Pet'r App. 125a-126a, CSRT Procedures, Encl. 1 § C(1)-(3). The panel was to be aided by a Recorder, also a military officer, and preferably a member of the JAG Corps, who effectively acted as investigator, prosecutor, and clerk of the Tribunal. Pet'r App. 145a-147a, *id.*, Encl. 2 § C. A non-lawyer Personal Representative, who was a military officer but not a member of the JAG Corps, was to "assist" the detainee but not act as the detainee's "advocate." Pet'r App. 148a, 153a, *id.*, Encl. 2 §§ A(1) & D ¶ 8. The process established by the CSRT Procedures was expressly "non-adversarial." Pet'r App. 124a, *id.* Encl. 1 § B.

B. The Evidence

1. The Government Information

The CSRT Procedures mandated a thorough search for relevant information in the government's possession. The Recorder, who must hold at least Top Secret security clearance, was required, prior to the hearing, to "obtain and examine the Government Information." Pet'r App. 144a-145a, CSRT Procedures, Encl. 2 §§ A(2), C(1). The CSRT Procedures define the "Government Information" 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, including information generated in connection with the initial determination to hold the detainee as an enemy combatant and in any subsequent reviews of that determination, as well as any records, determinations, or reports generated in connection with such proceedings (cumulatively called hereinafter the "Government Information").

Pet'r App. 129a, *id.*, Encl. 1 § E(3). The Recorder was required not merely to *review* the Government Information, but to *collect* it, in part to allow the Personal Representative to review

it too: "The detainee's Personal Representative shall be afforded the opportunity to review the Government Information." Pet'r App. 132a, *id.*, Encl. 1 § F(8); *see also* Pet'r App. 133a, *id.*, Encl. 1 § G(4) ("The Director, CSRT, will schedule a Tribunal hearing for a detainee within 30 days after the detainee's Personal Representative *has reviewed* the Government Information[.]") (emphasis added). If an agency from which evidence was sought declines to provide information requested by the Recorder on behalf of the Tribunal, the agency was required either to provide "an acceptable substitute" or a certification that "none of the withheld information would support a determination that the detainee is not an enemy combatant." Pet'r App. 129a, *id.*, Encl. 1 § E(3), E(3)(a).

The McGarrah and Abraham declarations[18] reveal that, in practice, the task of identifying the Government Information was delegated to Pentagon contractors who had little or no intelligence experience and received limited training.[19] Pet'r App. 227a-228a, McGarrah Decl. ¶¶ 4-5; Resp't App. 291a, Abraham Decl. I ¶ 5; Resp't App. 322a, Abraham Decl. II ¶ 36. Far from having access to all reasonably available information in the government's possession, the contractors were given direct access only to limited portions of, at most, two databases within the Department of Defense that only included information classified at the Secret level and below. Pet'r App. 230a, McGarrah Decl. ¶¶ 7(a); Resp't App. 292a, Abraham Decl. I ¶ 9. The contractors could, if they so chose, request additional information from outside agencies, but

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18 Colonel Abraham was assigned to OARDEC from September 2004 until March 2005, and responsible for coordinating with government agencies to gather or validate information relating to detainees for use in CSRTs. Resp't App. 290a, Abraham Decl. I ¶¶ 3-4.

19 The declarations the government submitted to the Court of Appeals in support of its request for rehearing recite the danger of permitting access to classified information to Secret-cleared attorneys who hold Top Secret level security clearance, have executed a protective order and are officers of the Court. *See* Pet'r App. 182a-224a, Hayden Decl., Mueller Decl., Alexander Decl., McConnell Decl., England Decl. Yet the entire universe of CSRT information appears to have been collected by contractors with two-weeks' training. Either the Government Information was never gathered according to the CSRT Procedures, or the government's professions of alarm are tactical.

because they had no direct tasking authority, whether an agency responded depended largely on "whether anyone at the agency was inclined to do so." Resp't App. 319a, Abraham Decl. II ¶ 22. In practice, OARDEC rarely lodged a request sufficiently in advance of a CSRT to allow a timely response, Resp't App. 319a, 320a, *id.* ¶¶ 23, 27, and in most instances it received either a negative response (i.e., "no information available") or no response at all. Resp't App. 319a, 317a, *id.* ¶¶ 24, 27. Requests for the required certification that no exculpatory information was being withheld were routinely refused or ignored. Resp't App. 293a, Abraham Decl. I ¶¶ 12-14.

2. The Government Evidence

The CSRT Procedures required the Recorder to cull from the Government Information the so-called Government Evidence for presentation to the hearing panel. Pet'r App. 138a, CSRT Procedures, Encl. 1 § H(4). The Government Evidence was effectively the government's case against a detainee. *See* Pet'r App. 138a, *id.* (defining Government Evidence as "such evidence in the Government Information as may be sufficient to support the detainee's classification as an enemy combatant, including the circumstances of how the detainee was taken into the custody of U.S. or allied forces"). In large part, the information selected as the Government Evidence consisted of "finished intelligence products of a generalized nature—often outdated, often 'generic,' [and] rarely specifically relating to the individual subjects of the CSRTs or to the circumstances of those individuals' status." Resp't App. 291a-292a, Abraham Decl. I ¶ 8; *see also* Resp't App. 324a-325a, Abraham Decl. II ¶ 43. "Information relating to the credibility of a source was omitted, making sources appear authoritative even when they were suspect."[20] Resp't App. 326a, Abraham Decl. II ¶ 50. Such omissions were

[20] The absence of reliable source references in the inculpatory material make exculpatory material even more essential. For instance, an accusation against a group could be repeated without disclosing that it originated with that group's political opponent or an openly hostile government. Resp't App. 326a, Abraham Decl. II ¶ 50.

particularly damaging because of the presumption in the CSRT Procedures that inculpatory evidence put forth by the government was genuine and accurate. Pet'r App. 136a, CSRT Procedures, Encl. 1 § G11.

3. Exculpatory Evidence

If the Government Information included any exculpatory evidence, the Recorder was required by the CSRT Procedures to provide all of it to the hearing panel. Pet'r App. 138a, CSRT Procedures, Encl. 1 § H(4) ("In the event the Government Information contains evidence to suggest that the detainee should not be designated as an enemy combatant, the Recorder *shall* also separately provide such evidence to the Tribunal.") (emphasis added). Because detainees had neither counsel nor the right to know the evidence against them, Pet'r App. 131a, *id.*, Encl. 1 §§ F(3-4), the proper application of the CSRT Procedures depended heavily on the Recorder's diligent performance of this duty.[21] Indeed, "the Recorder's failure to adhere to the DoD Regulations can influence the outcome of the proceeding to a degree that a prosecutor or an agency staff member cannot; as a practical matter, the Recorder may control the outcome." Pet'r App. 79a, *Bismullah III*, 2008 WL 269001, at *4.

The government has admitted that it sometimes declined to present to the CSRT panel exculpatory information that it unilaterally deemed duplicative, as well as exculpatory information that did not relate to a specific allegation advanced against a detainee in the Government Evidence. Pet'r App. 236a, McGarrah Decl. ¶ 13. This was a plain violation of procedures, but it could never be established in a DTA proceeding with the government's version of the record on review.

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[21] Although the CSRT Procedures permit the detainees to submit exculpatory evidence on their own behalf, with no more than 40 days' notice of a CSRT proceeding—and, in practice, as little as a week—a detainee subject to Guantánamo's strict communication restrictions had no realistic prospect of requesting and obtaining evidence, particularly from remote locations overseas. Pet'r App. 133a, CSRT Procedures, Encl. 1 § G(2); Resp't App. 327a, Abraham Decl. II ¶ 55.

4. Witness Testimony

The CSRT Procedures permitted detainees to request witnesses. Detainees requested testimony from fellow detainees as well as witnesses from outside Guantánamo who were permitted to testify by telephone or video. Pet'r App. 136a, CSRT Procedures Encl. 1 § G(9)(c) as well as fellow detainees. Pet'r App. 135a-136a, CSRT Procedures, Encl. 1 § G(9). In practice, although some non-detainee witness requests were transmitted to the State Department, not a single witness from outside Guantánamo was ever produced for testimony before a CSRT. Resp't App. 328a, Abraham Decl. II ¶ 58; Resp't App. 305a, Teesdale Decl. ¶ 7(i); Mark Denbeaux et al., *No-Hearing Hearings: CSRT, the Modern Habeas Corpus?* at 1 (Nov. 17, 2006), *available at* http://law.shu.edu/news/final_no_ hearing_hearings_report.pdf.

C. The CSRT Record Of Proceedings

The proceedings before the CSRT panel were memorialized in a Record of Proceedings prepared by the Recorder. Pet'r App. 146a, CSRT Procedures, Encl. 2 § C(8). The Record of Proceedings did *not* include any relevant documents or information in the government's possession, or even in the Recorder's possession, that were not presented to the CSRT panel. The government urges that the record on review in DTA actions should nonetheless be confined to the CSRT Record of Proceedings, an approach that, as shown above, would obscure from judicial review whatever happened before the hearing, and would protect from scrutiny any material that the Recorder failed to assemble, cull, or present in violation of the CSRT Procedures.

III. Procedural History

Bismullah filed his DTA petition on June 9, 2006. The *Parhat* Respondents filed on December 4, 2006. Respondents separately moved to compel production of the records on review and both cases were stayed without resolution of the motions. Early in 2007, the Court of

Appeals ordered that the question of the scope of the record on review be jointly briefed. Oral argument was held on May 15, 2007. After oral argument, the government submitted Admiral McGarrah's declaration, for the first time disclosing irregularities in the conduct of the CSRT process. Pet'r App. 225a-239a, McGarrah Decl.

A. *Bismullah I*

On July 20, 2007, the Court of Appeals panel unanimously[22] held that the record on review included "such 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." Pet'r App. 2a-15a, *Bismullah I*, 501 F.3d at 180, 181, 184-86 (citing CSRT Procedures, Encl. 1 § E(3), Encl. 2 § C(1)). To address security concerns, the court issued a robust protective order, on which it invited and received government comment, which permitt*ed* *in camera* and *ex parte* review by the court for "highly sensitive information, or information pertaining to a highly sensitive source or to anyone other than the detainee." Pet'r App. 17a, *Bismullah I*, 501 F.3d at 187; *see also* Pet'r App. 32a-54a, *id.* at 194-204 (Protective Order). Despite the ruling and the protective order, no record on review was actually produced to Respondents—not the record on review as defined by the court, nor even the version for which the government advocated.

B. *Bismullah II*

Instead, in September, the government moved for rehearing and rehearing *en banc*, reiterating its earlier arguments, and for the first time making a factual proffer concerning burden and national security, in the form of the declarations of various senior officials. Pet'r App. 182a-224a, Hayden Decl., Mueller Decl., Alexander Decl., McConnell Decl., England Decl. The

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[22] Judge Henderson, who later dissented from the denial of the *en banc* petition, voted with the majority in *Bismullah I* and *Bismullah II*.

government argued—again, for the first time—that compiling the Government Information would "impose[] an enormous burden on the Government" (in stark contradiction of its claim that the document collection was so routine as to be entitled to a presumption of regularity) and would cause "exceptionally grave damage to national security." Pet. for Reh'g & Reh'g En Banc at 7, *Bismullah et al. v. Gates*, Nos. 06-1197, 06-1397 (D.C. Cir. Sept. 7, 2007). The panel unanimously denied reconsideration, pointing out that, in defining the record on review, *Bismullah I* had simply "adopt[ed] the definition of Government Information exactly as it appears in the DoD Regulations themselves." Pet'r App. 59a, *Bismullah II*, 503 F.3d at 140. The Court also noted its view that the security concerns had been fully addressed. "In *Bismullah I*, we dealt with the government's concern about disclosure by providing, just as the government urged, that it may withhold from the [Respondents'] counsel any Government Information that is either 'highly sensitive information, or . . . pertain[s] to a highly sensitive source or to anyone other than the detainee.'" Pet'r App. 64a, *id.* at 142. The Court also pointed out that the government had changed its position. At oral argument, it claimed that "only a small amount" of information would be so sensitive that it would need to be withheld from detainee's counsel, but in its petition for rehearing, it argued that significant portions of the Government Information would need to be submitted *ex parte*. Pet'r App. 64a, *id.*

C. *Bismullah III*

Still the record on review was not produced to any Respondent.[23] On February 1, 2008, the full Court of Appeals denied the government's request for rehearing *en banc*. Chief Judge Ginsburg, writing for himself and three other judges, set out at length the basis for the decision, responding once again to the government's arguments, and as well to a novel argument never

[23] *See supra* note 4. On information and belief, the government has withheld such records from many DTA petitioners, all of whose cases are effectively frozen.

raised by the government, which appeared for the first time in Judge Randolph's dissent—that 28 U.S.C. § 2112(b) defines the record on review in a DTA action. *See* Pet'r App. 71a, *Bismullah III*, 2008 WL 269001, at *1. Judge Garland separately noted the harmful effect of further delay. *See* Pet'r App. 83a, *id.*, 2008 WL 269001, at *6.

D. Proceedings In This Court

Following the denial of rehearing *en banc*, the government petitioned for *certiorari* review, and filed its Stay Application and Motion for Expedition.

ARGUMENT

I. A Stay Would Harm The Interests Of Justice And Serve No Legitimate Purpose

A. The Governing Standard

The government asks this Court to stay the panel's preliminary, interlocutory order in *Bismullah I* under the standard set forth in *Edwards v. Hope Med. Group for Women*, 512 U.S. 1301 (1994) (Scalia, J., in chambers), which requires the government to demonstrate that there is "[1] a reasonable probability that certiorari will be granted, [2] a significant possibility that the judgment below will be reversed, and [3] a likelihood of irreparable harm (assuming the applicant's position is correct) if the judgment below is not stayed." *Id.* at 1302.

Edwards, however, dealt with an application to stay a *final judgment* pursuant to 28 U.S.C. § 2101(f), not a preliminary procedural ruling as is the circumstance presented here. *See id.*; *Ohio Citizens for Responsible Energy, Inc. v. Nuclear Regulatory Comm'n*, 479 U.S. 1312, 1312 (1986) (Scalia, J., in chambers) ("[I]t is only the execution or enforcement of final orders that is stayable under § 2101(f)."). Under the present circumstances, an original writ of injunction, pursuant to the All Writs Act, 28 U.S.C. § 1651(a), would be required and that "demands a significantly higher justification than that [for] § 2101(f)." *Ohio Citizens*, 479 U.S. at 1312; *see* GRESSMAN, ET AL., SUPREME COURT PRACTICE § 17.4 (9th ed. 2007). Such

injunctive relief is to be granted "sparingly and only in the most critical and exigent circumstances, and only where the legal rights at issue are indisputably clear." *Ohio Citizens*, 479 U.S. at 1312 (internal quotation marks and citations omitted); *see also Brown v. Gilmore*, 533 U.S. 1301, 1301 (2001) (Rehnquist, C.J., in chambers) (denying injunction pending *certiorari* because applicants' "position is less than indisputable"). Furthermore, "the applicant must demonstrate that the injunctive relief is necessary or appropriate in aid of the Court's jurisdiction." *Id.* (citing 28 U.S.C. § 1651(a); internal quotation marks and alterations omitted). The government cannot meet this exceedingly stringent standard.

Even if § 2101(f) governed the analysis (and, by its terms, it does not) each factor weighs against a stay. The government has not demonstrated "(1) a reasonable probability that four Justices would vote to grant certiorari; (2) a significant possibility that the Court would reverse the judgment below; and (3) a likelihood of irreparable harm, assuming the correctness of the applicant's position, if the judgment is not stayed." *Packwood v. Senate Select Comm. on Ethics*, 510 U.S. 1319, 1319 (1994) (Rehnquist, C.J., in chambers) (citation omitted). Nor has the government "rebut[ted] the presumption that the decision[] below . . . [was] correct," *Planned Parenthood of Southeastern PA v. Casey*, 510 U.S. 1309, 1310 (1994) (Souter, J., in chambers) (citing *Rostker v. Goldberg*, 448 U.S. 1306, 1308 (1980) (Brennan, J., in chambers)), or shown that the equities mandate the injunctive relief it seeks, *California v. Am. Stores Co.*, 492 U.S. 1301, 1307 (1989) (O'Connor, J., in chambers); *see Barnes v. E-Systems, Inc. Group Hosp. Med. & Surgical Ins. Plan*, 501 U.S. 1301, 1304-05 (1991) (Scalia, J., in chambers).

B. The Government Has Demonstrated Neither A Reasonable Probability That *Certiorari* Review Of Its Petition Would Be Granted Nor A Significant Possibility That The Supreme Court Would Reverse The Challenged Order

In *Bismullah I*, the court reached a sound conclusion based on the plain language of the DTA. In *Bismullah II*, the court provided the Executive with further direction. In *Bismullah III*,

the *en banc* Court of Appeals refused the government's rehearing request, with four judges expressly finding that if the record on review consisted merely of the CSRT Record of Proceedings, judicial review would be impossible, a fifth voting against further delay, and a sixth observing that it "seems improbable that the government need turn over only the Record of Proceedings complied after the CSRT." Pet'r App. 100a, *Bismullah III*, 2008 WL 269001, at *11 (Brown, J., dissenting). The government has not met its burden to show that this Court would grant *certiorari* review of the court's interlocutory order or that there is a significant possibility of reversal if it did.

1. *Certiorari* Review Of The *Bismullah I* Interlocutory Order Is Unwarranted

The challenged order, undeniably procedural and interlocutory, is the type of decision that the Court declines to review prior to final judgment. *See Mazurek v. Armstrong*, 520 U.S. 968, 975 (1997) ("we are ordinarily reluctant to exercise our *certiorari* jurisdiction [prior to the entry of a final judgment]"); *Societe Nationale Industrielle Aerospatiale v. United States Dist. Ct.*, 482 U.S. 522, 527 (1987) ("immediate appellate review of an interlocutory discovery order is not ordinarily available"); *Denver v. New York Trust Co.*, 229 U.S. 123, 133 (1913).

The Court of Appeals' direction to the government on how to assemble the record on review in a DTA action is the kind of interlocutory order that falls well outside the normal scope of *certiorari* grants. *See Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916); *Va. Military Inst. v. United States*, 508 U.S. 946 (1993) (Scalia, J., concurring in denial of *certiorari*). Not only is the *Bismullah I* decision an interlocutory order, but the parties can do no more than speculate about its effect, because there is no *actual* record on review in any case. As Circuit Judges Rogers (who voted against *en banc* consideration) and Brown (who voted for it) agreed, the question of what actually would go into a record on review remains a subject for

further litigation in that court. Pet'r App. 30a, *Bismullah I*, 501 F.3d at 193; Pet'r App. 99a, *Bismullah III*, 2008 WL 269001, at *1.

2. The Panel's Decision Was Correct On The Merits

(a) The Panel Correctly Construed The DTA

The "cardinal rule" of statutory interpretation is that "courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-254 (1992). "[W]hen the 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).

The judiciary's role reviewing the CSRTs is plain on the face of the DTA,[24] yet the court will be incapable of discharging its mandate without access to the Government Information. Indeed, the Court of Appeals itself held that without the Government Information, it would be unable to "review [the Recorder's] compliance with [the government's] procedures," determine whether "the Recorder withheld exculpatory evidence from the Tribunal in violation of the specified procedures," or "consider whether a preponderance of the evidence supports the Tribunal's status determination."[25] Pet'r App. 4a, *Bismullah I*, 501 F.3d at 181 (citing CSRT Procedures, Encl. 1 § E(3), Encl. 2 § C(1)); Pet'r App. 14a-15a, *id.*, 501 F.3d at 185-86. As the court reiterated three months later, "[w]hether the Recorder selected to be put before the Tribunal all exculpatory Government Information, as required by the DoD Regulations, and whether the

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[24] For this reason, the government's reliance on the legislative history is misplaced. *United States v. Gonzales*, 520 U.S. 1, 6 (1997) ("Given the straightforward statutory command, there is no reason to resort to legislative history."); *see* Petition for a Writ of Certiorari at 23-24 ("Cert. Pet.").

[25] The court rightly recognized that, in order to perform its congressionally-imposed duty, "the court must be able to view the Government Information with the aid of counsel for both parties; a detainee's counsel who has seen only the subset of the Government Information presented to the Tribunal is in no position to aid the court." Pet'r App. 14a, *Bismullah I*, 501 F.3d at 185.

preponderance of the evidence supported the conclusion of the Tribunal, cannot be ascertained without consideration of all the Government Information." Pet'r App. 58a, *Bismullah II*, 503 F.3d at 139-40. The Chief Judge then explained in his *Bismullah III* concurrence that to rely on a more narrow record would "render utterly meaningless judicial review intended to ensure that status determinations are made 'consistent with' the DoD Regulations." Pet'r App. 78a, *Bismullah III*, 2008 WL 269001, at *4.

Undergirding the court's decision was its correct understanding of the fundamental differences between the CSRT process and agency process. None of the safeguards that provide assurance of the reliability of agency hearing records was present in the CSRTs. Pet'r App. 14a, *Bismullah I*, 501 F.3d at 185-86 (CSRT process lacked the "transparent features of the ordinary administrative process"). Detainees were forbidden from seeing the evidence against them and hence were unable to lodge responses in the record. *See* Pet'r App. 78a, *Bismullah III*, 2008 WL 269001, at *4 (Ginsburg, C.J., concurring in denial of rehearing *en banc*). Exculpatory information might reach the CSRT panel only through (i) the fortuity of its presence in government hands, and (ii) the faithful conduct of the Recorder. Since "a CSRT's status determination is the product of a necessarily closed and accusatorial process in which the detainee seeking review will have had little or no access to the evidence the Recorder presented to the Tribunal, little ability to gather his own evidence, no right to confront the witnesses against him, and no lawyer to help him prepare his case, and in which the decisionmaker is employed and chosen by the detainee's accuser," to allow the government to withhold the Government Information from the court and Respondents' counsel "would be to proceed as though the Congress envisioned judicial review as a mere charade when it enacted the DTA." Pet'r App.

79a, *id.* (citing CSRT Procedures, Encl. 1 §§ A, B, C(1), C(3), E(2), E(4), F, G(2), G(8), G(9), H(7)).

The government never explained how the court was to carry out its review function under its theory of the record, except by presumption of regularity. The court rejected this theory, rightly noting that it made the presumption irrebutable, because without the Government Information, the Recorder's actions would forever remain secret. Pet'r App. 14a-15a, *Bismullah I*, 501 F.3d at 185-86. Moreover, whatever notion of regularity that survived the "unsettling" factual record disclosed in the pleadings below, Pet'r App. 30a-31a, *id.* at 193-94 (Rogers, J., concurring), seems to have been destroyed in the *certiorari* petition, in which the government asserts that it is "likely" that it cannot comply with the court's order and collect the Government Information as defined in the DTA, suggesting that it did not comply with the CSRT Procedures in 2004. Cert. Pet. at 19.[26]

In sum, the ruling was the product of exhaustive judicial consideration. It follows necessarily from the text of the statute, and is necessary to meaningful judicial review of the CSRTs. Reversal is exceedingly unlikely.

(b) This Court Cannot Overturn The Express Mandate Of Congress

The Court cannot relieve a party from requirements imposed by Congress even if it believes the requirements are "unnecessarily inefficient and burdensome." *EchoStar Satellite L.L.C. v. FCC*, 457 F.3d 31, 41 (D.C. Cir. 2006); *see also South Coast Air Quality Mgmt. Dist. v. EPA*, 472 F.3d 882, 895 (D.C. Cir. 2006) (rejecting agency's attempt to adopt "far less burdensome" requirements because agency "cannot replace Congress's judgment with its own").

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[26] *See also Bismullah III* at *3 n.5, Pet'r App. 76a. ("The record before the court suggests the Recorder has not always fulfilled his obligations under the DoD Regulations").

Grounded in the separation of powers doctrine, this principle applies equally in this Court. *See Vance v. Bradley*, 440 U.S. 93, 97 (1979) ("The Constitution presumes that . . . even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted."). A litigant unsatisfied with the terms of a statute should address himself to Congress, not this Court. *Dodd v. United States*, 545 U.S. 353, 359-360 (2005) ("It is for Congress, not this Court, to amend the statute. . .").[27]

The government now claims that the review specified by § 1005(e)(2)(C)(i) is too broad and might—hypothetically—endanger national security. Unsatisfied with a law that Congress enacted at its bidding, the government asks this Court to rewrite the language that Congress enacted and did not change when it amended other portions of the DTA several months after *Bismullah* first raised the issue of the record on review. *See* Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2635-36 (amending portions of the DTA). The government has had ample opportunity to raise its hypothetical concerns regarding the scope of the record on review under the DTA with Congress. Rather than having done so, or doing so now, it seeks to have this Court interpret a congressionally-created right of action in such a way as to render the text of the statute meaningless.

C. Principles of Administrative Law And Criminal Law Do Not Limit The Record On Review

1. The Government's Section 2112(b) Argument Was Waived And Is Inapposite Because The CSRT Is Not An Agency

After three rounds of briefing and an argument below, the government argues for the first time in this Court that 28 U.S.C. § 2112(b) defines the record on review in a DTA case. The

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[27] The litigant in question here is the executive branch. It has no difficulty in seeking legislation: indeed, it procured enactment of both the DTA and the MCA. Any question as to the burden of those statutes on the executive should be taken to Congress, not the judiciary.

issue was first raised by Judge Randolph in his dissent from the denial of *en banc* review, over four months after the final round of briefing.[28] The government's *repeated* failure to raise this argument below precludes it from doing so for the first time here. It is a longstanding rule that if a "question was not raised in the Court of Appeals [it] is not properly before" this Court. *Delta Airlines v. August*, 450 U.S. 346, 362 (1981). The reason is plain: "The Government's failure to raise its argument in the Court of Appeals deprived respondent of the ability to address significant matters that might have been difficult points for the Government." *United States v. United Foods, Inc.*, 533 U.S. 405, 416-17 (2001). Since Respondents were never given an opportunity to contest this assertion, the government has waived its right to raise it here.

Even if this Court were to consider on *certiorari* a newly-minted argument, § 2112(b) is wholly inapplicable in the CSRT context as the DTA provides for court review of whether the determination was consistent with the CSRT "standards and procedures," as well as review of the final determination of the Tribunal. "Irrespective, therefore, of what § 2112 might say in general about the scope of a record on review, the DTA requires that the record on review of a CSRT's status determination include all the Government Information, regardless whether it was all put before the Tribunal." Pet'r App. 76a, *Bismullah III*, 2008 WL 269001, at *3.

Moreover, as Chief Judge Ginsburg recognized, the CSRT is not an "agency, board, commission, or officer" covered by § 2112. Section 2112(b) does not define the record on review because a military department is not an agency under Title 28. *See* Pet'r App. 72a, *id.* at *2; 28 U.S.C. § 451 (construing "agency"). If the CSRT were considered to be an agency, then, "[n]ot coming within any exclusion from the" Administrative Procedure Act, the government

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[28] Evidently recognizing the waiver problem, Judge Randolph labored to find the issue preserved in a reference to Fed. R. App. P. 16. *See* Pet'r App. 91a, *Bismullah III*, 2008 WL 269001, at *6 n.1 (Randolph, J. dissenting). There is no reference to 28 U.S.C. § 2112 in the text of the rule. The government never argued that the word "agency" in section 2112 embraces CSRT proceedings. The panel did not raise the point either.

would be required to grant to detainees "the significant procedural rights" afforded by the APA, a result "completely inconsistent with the . . . procedural framework for CSRTs established by the DoD Regulations." Pet'r App. 74a, *Bismullah III*, 2008 WL 269001, at *2. In short, "a CSRT can be structured as it is under the DoD Regulations only because it is not a court martial, not a military commission, and not an agency" under § 2112 and the APA.[29] Pet'r App. 75a, *id.*

Section 2112 could not be applied even by analogy because of the significant differences between the agency processes subject to review under § 2112 and the CSRTs, which resulted in a materially less reliable record of proceedings:

> Unlike the final decision rendered in a criminal or an agency proceeding, which is the product of an open and adversarial process before an independent decisionmaker, a CSRT's status determination is the product of a necessarily closed and accusatorial process in which the detainee seeking review will have had little or no access to the evidence the Recorder presented to the Tribunal, little ability to gather his own evidence, no right to confront the witnesses against him, and no lawyer to help him prepare his case, and in which the decisionmaker is employed and chosen by the detainee's accuser.

Pet'r App. 78a, *id.* at *4 (Ginsburg, C.J., concurring). The CSRTs are also not entitled to the presumption of regularity granted to agencies. Not only do the CSRT Procedures not ensure a real opportunity for the detainee to defend himself or develop the record, but the filed declarations make clear that those Procedures were not even followed. *See, e.g.*, Pet'r App. 30a, *Bismullah I*, 501 F.3d at 193 ("the Executive acknowledged that it has not utilized the procedure for compiling the CSRT record that the Department of Defense specified"); Pet'r App. 236a-237a, McGarrah Decl. ¶ 13 (admitting that certain exculpatory information was never presented to the CSRT panel); Resp't App. 326a, Abraham Decl. II ¶ 51 (describing the lack of "a rational

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[29] The government has not asserted that the CSRT is an "agency" under the Administrative Procedure Act. *See* 5 U.S.C. § 551(1).

system for pursuing leads that might have resulted in the discovery of exculpatory evidence"). *See LeBoeuf, Lamb, Greene & MacRae, L.L.P. v. Abraham*, 347 F.3d 315, 320 (D.C. Cir. 2003) (limiting review to the administrative record in cases where "agency is entitled to a presumption of regularity").

2. Even If The CSRT Were An Agency, The Agency Record Would Include The Government Information

Even if a DTA action were considered analogous to review of an administrative agency decision (which it cannot be, given the structure of the CSRTs and the language of the DTA), the "agency record" for purposes of the DTA would certainly include the Government Information. First, the record should include the "evidence . . . *before the* agency, board, commission, or *officer concerned.*" 28 U.S.C. § 2112(b) (emphasis added). Because the CSRT Procedures include the Recorder as an integral part of the CSRT, the relevant record would be the universe of material before the Recorder, which is the Government Information. *See, e.g.*, Pet'r App. 116a, CSRT Procedures, Encl. 1 § G(7) ("The Tribunal, through *its* Recorder, shall have access to and consider any reasonably available information . . .") (emphasis added); *see also* Pet'r App. 129a, *id.*, Encl. 1 § E(3). Second, a reviewing court may determine that the "agency record" consists of *all* of the evidence that "was directly or indirectly considered" by the agency, whether or not before the agency decisionmaker that issued the decision on review. *Bar MK Ranches v. Yuetter*, 994 F.2d 735, 739 (10th Cir. 1993) ("the agency appeal record is usually different that the record considered [by the agency decisionmaker.]"). Since the Recorder was a part of—indeed, the cornerstone of the purported "agency" under this hypothesis—the Government Information would be part of the "agency" record.

3. The Government's Attempts To Analogize The CSRTs To Other Types Of Proceedings Are Inapposite

The question before the Court is one of statutory interpretation, which is why the Court of Appeals repeatedly rejected attempts to analogize the CSRT process to other statutory or regulatory proceedings. "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 the requirements of the Due Process Clause are "irrelevant for the same reason that Army Regulation 190-8 is irrelevant . . . the DTA requires that the record on review include all the Government Information." Pet'r App. 59a-60a, *Bismullah II*, 503 F.3d at 140.[30] As the Court of Appeals noted, if the CSRTs fell within the ambit of any of the structures to which the government attempts to analogize them, the detainee would be entitled to a host of due process protections of which he is deprived under the CSRT Procedures.[31] *See* Pet'r App. 74a, 75a, 78a, *Bismullah III*, 2008 WL 269001, at *2 & n.4, *4.

The government's invocation of *Brady v. Maryland*, 373 U.S. 83 (1963), is unavailing for the same reason. The obligation to turn over exculpatory material in *Brady* arises in a criminal proceeding in which the defendant has a full panoply of constitutional protections—most importantly, every opportunity to confront incriminatory evidence and respond to it. A detainee has none of that. DTA litigation is not a criminal proceeding, it is civil litigation. The DTA requires the Court of Appeals to assess whether the determinations of the CSRTs were reached in

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30 The government assiduously avoids army regulations when it comes to the treatment of the Guantánamo detainees. Nor would Regulation 190-8, which governs battlefield captures by U.S. forces, bear remotely on the majority of the Guantánamo population, who are civilians seized by foreigners and held on the basis of hearsay.

31 For example, the CSRT provides for a rebuttable presumption that the Government Evidence is "genuine and accurate." Pet'r App. 136a, CSRT Procedures, Encl. 1 § G(11). In contrast, Army Regulation 190-8 provides for no such presumption, presumably allowing the tribunal in this context to independently question the credibility of the evidence before it. *See* Army Regulation 190-8, ch. 1 § 1-6 (1997); *see also* Brian M. Christensen, *Comment: Extending Hamdan v. Rumsfeld to Combatant Status Review Tribunals*, 2007 B.Y.U. L. Rev. 1365, 1392 (2007).

accordance with the CSRT Procedures. The Procedures include many pre-hearing steps, the review of the Government Information for exculpatory evidence being among the most important. To assess compliance with that obligation, the record on review must include the Government Information. To invoke *Brady* in a Respondent's seventh year of uncharged imprisonment is beyond absurd.[32]

Finally, the situation presented here is not analogous to that confronted by this Court in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), which concerned the due process rights of a citizen-detainee held on U.S. soil. The *Hamdi* plurality—which was interpreting the Constitution, not implementing a statute—applied the balancing test set forth in *Mathews v. Eldridge*, 424 U.S. 319 (1976), which calls for the weighing of private interests against governmental burdens. *See Hamdi*, 542 U.S. at 529-33. The Court's path here is instead dictated by the mandate of the DTA that the Court of Appeals exercise meaningful oversight of the government's compliance with the CSRT Procedures. The Government Information is plainly required for the judiciary to be able to fulfill that role, irrespective of the alleged burden on the government.[33]

II. The Balance Of Equities Compels Denial Of A Stay

A. The Practical Impact Of The Government's Requested Stay

The government never speaks of the practical effect of its preferred course. Here is a reasonable forecast. A stay would enter now. That would prevent almost every DTA petitioner

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32 In her dissenting opinion, Judge Henderson inaccurately analogizes the CSRT to a preliminary hearing for a criminal defendant, on the assumption that detainees would then be tried by a military commission just as criminal defendants have a full trial. Pet'r App. 85a, *Bismullah III*, 2008 WL 269001, at * 6. The Government has stated that only a small subset of Guantánamo detainees will be tried by military commission. For most detainees, the determination by the CSRT is the only basis for their detention. *See, e.g.*, Pet'r App. 80a, *id.* at *4 n.8 (Ginsburg, C.J., concurring in denial of rehearing *en banc*).

33 The government's embrace of *Hamdi* is curious. The accusations against him, all of which came from a government-controlled record, were alarming. Yet after remand from this Court, when a district judge demanded that he be produced for a hearing, the government quickly and quietly released him to the Kingdom of Saudi Arabia. JOSEPH MARGULIES, GUANTÁNAMO AND THE ABUSE OF PRESIDENTIAL POWER 156 (2006). Unlike Bismullah and the Uighurs, Yaser Hamdi is a free man today.

from obtaining the record on review or proceeding to any relief on the merits.[34] If the Court then held the case pending *Boumediene*, it is all but certain that *Bismullah* would not be briefed and argued this term. Briefing and argument likely would not be completed until the fourth quarter, perhaps late in the quarter, of 2008. There would be no decision until, at the earliest, late in the first, or early in the second quarter of 2009. The *question presented* would then be resolved, but that would mean little. As two judges on the Court of Appeals acknowledged, additional questions remain about the content of the record on review.[35] Pet'r App. 30a, *Bismullah I*, 501 F.3d at 193 ("[d]isputes about what qualifies as 'reasonably available,' already a key point of contention...cannot be decided today"); Pet'r App. 99a, *Bismullah III*, 2008 WL 269001, at *11 ("[t]he panel assumes the phrase 'reasonably available' adequately defines the scope of the record...However, because the record so defined does not arise naturally from the proceedings, the panel may have left much to litigate."). If the Court affirmed, questions would still arise over what information was "reasonably available" to the government. Reversal would lead to motions by litigants to supplement the record on review at least to the extent of exculpatory evidence that they believe exists in the Government Information. Disputes like that would likely take the parties through 2009, and beyond.

As appears likely from the petition for *certiorari*, the government would continue to refuse to produce records on review, and would instead hold hundreds of new CSRTs. It would then be obliged to complete the very task it says it cannot effectively do now: assemble all the

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34 *See supra* n.4. The government has fiercely resisted disclosing the CSRT Record of Proceedings to counsel to DTA petitioners in scores of cases (including, for example, the Bingham firm in the case of Uighur Abdul Nassar, a companion of Parhat). *See* Motion to Compel Respondent to Produce Complete Combatant Status Review Tribunal Hearing Record, *Nassar v. Gates*, No. 07-1340 (D.C. Cir. Jan. 23, 2008)).

35 In addition, in *Bismullah I*, The court denied DTA Petitioners' motions to compel additional discovery without prejudice to renewal "because they had not made a showing sufficient to justify compelling discovery at this stage of these proceedings." Pet'r App. 15a, *Bismullah I*, 501 F.3d at 186.

Government Information, cull the Government Evidence, and present that and all exculpatory evidence for consideration.[36] This process would certainly consume the balance of 2009, perhaps much longer. That means, *at best*, that DTA review of adverse determinations by the new CSRTs would commence in 2010, with seven of these Respondents then commencing their *ninth* year of captivity at Guantánamo, and Bismullah his seventh. Given the near certainty of further appellate review, a Respondent who was never an enemy combatant in the first place would likely not obtain relief until the ninth or tenth year of his imprisonment. He would have eclipsed all military detention in our nation's history.

Thus, a stay at this stage means a potentially catastrophic delay. The normal efficiencies that emerge from fidelity to the final judgment rule—abandonment by the government of meritless cases, appellate decisions reasoned from actual decisions, and speed—will all be lost.

B. A Stay Will Cause Grievous Harm To Respondents

Absent from the government's account of its own burdens is *any* recognition of the cost to Respondents of the proposed stay. It would not simply impose on Respondents the harshness of the status quo, and it would not simply prolong for years imprisonment that Respondents believe the DTA review would now show to be unlawful. A stay would in fact work affirmative and profound injury to Respondents' already-fragile psychological condition. Shortly after the *Parhat* Respondents filed their DTA petition in late 2006, a new isolation regime was imposed upon them, and, on information and belief, continues to be imposed now. It involves almost complete isolation, which results in irreparable psychological degradation. Because of the unique psychological impairment caused by prolonged isolation, and because the DTA

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[36] The government says it is "likely" that it cannot comply with the decision, Cert. Pet. at 19, ironically claiming that it cannot provide the record on review for the cause of action the government claims is an 'adequate substitute' for *habeas corpus*.

apparently affords no judicial remedies related to conditions of confinement, the government's proposed stay will work grave and irreparable injury on Respondents.

Respondents have spent years at Guantánamo, where the conditions of confinement are far harsher than those of almost any federal prison,[37] *see*, *e.g.*, 28 C.F.R. § 544.32,[38] and would be unthinkable under the regulations provided by the service field manuals for the confinement of the enemy. *See*, *e.g.*, Army Regulation 190-8 §§ 3.4, 3.5 & 4.1;[39] Military Police Internment/Resettlement Operations, No. FM 3-19.40.[40] Since 2006, many detainees, including on information and belief all of the *Parhat* Respondents,[41] have been transferred to the new and astonishing regimen of isolation in Camps 5 and 6. There they have been isolated in small, solid-walled cells. Each day they pass 22 hours in complete isolation, without natural sunlight or air, without companions, conversation, or activities of any kind. For two hours out of 24, they can be shackled and led to the "rec area," a 3 x 4 meter space surrounded by two-story concrete walls and topped with wire mesh. These two hours afford their only chance of sunlight. The odds of a glimpse of sunlight are poor—rec time regularly happens at night, often after midnight. Rec time is also a detainee's only opportunity to speak to another human being. Counsel have observed profound deterioration in the psychological health of Respondents since their Camp 6

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37 Only the regimen at the Administrative Maximum, or "ADMAX," facility in Florence, Colorado, where dangerous convicted mass murderers are held, approaches them.

38 Requiring federal prisons to provide leisure activities to prisoners including participation in games, sports, hobbycrafts, music programs, social and cultural organizations, movies, and stage shows to meet the social, physical, psychological, and overall wellness needs of inmates.

39 Requiring the military to allow enemy prisoners of war to have a job, pursue social leisure activities, plant gardens, play musical instruments and read newspapers.

40 Requiring enemy prisoners of war to live and eat communally.

41 Counsel's most recent information is that all of the *Parhat* Respondents are held in Camp 6. However, the government sometimes moves detainees and does not inform counsel.

transfers. They demonstrate anger, listlessness, hopelessness. Some have reported hearing voices.[42]

The psychological injury to all Respondents from their detention is so profound as to raise serious questions whether, by the time the stay is lifted and his case finally decided, a Respondent entitled to judicial relief will have become insane. The question is not rhetorical. The *Parhat* Respondents have now begun a seventh year of incarceration, and Bismullah a fifth. The Camp 6 isolation regimen appears to cause the same psychological injuries—paranoia, depression, and an inability to distinguish fact from fancy—that American servicemen suffered when their North Korean captors imposed similar isolation upon them in 1952.[43]

Counsel are particularly fearful that Respondent Abdusemet, No. 07-1509, may become insane. Abdusemet—like all but one of the other Uighur DTA Petitioners—has long been officially cleared for release by the military's Annual Review Board. He presents a compelling case that he was never an enemy combatant.[44] Even in January 2007, Abdusemet showed signs of serious psychological injury. His foot shook uncontrollably, his affect was flat, he confessed to hearing voices in his head.[45] Other Respondents, who we believe also present powerful cases of innocence, are experiencing similar psychological injuries.

Equally profound is the concern that delay means more detainees will die at Guantánamo. Recent events show that this point is not rhetorical either. In December, 2007, a detainee died.

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42 *See* Resp't App. 83a, Petitioners' Emergency Motion for Leave to Supplement the Record on Pending Motions with January 20, 2007 Declaration of Sabin Willett, *Parhat v. Gates*, No. 06-1397 (D.C. Cir. Jan. 22, 2007) ("Willett Decl."). Bismullah is believed to be currently held in a different camp at Guantánamo. After counsel protested in 2007, on information and belief, the Uighurs were briefly transferred out of Camp 6, but later in the year most were returned there and are believed to be there now.

43 *Id.*

44 The Protective Order prevents us from reprising the particulars in a public filing, but they were set out in a classified filing in the Court of Appeals. Motion for Leave to file Motion for Summary Disposition, *Parhat v. Gates*, No. 06-1397 (D.C. Cir. Dec. 6, 2007), and related motion lodged therewith.

45 Resp't App. 83a, Willett Decl.¶¶ 30, 42.

The account of how he came to Guantánamo mirrors Bismullah's uncannily.[46] Suicide is an even greater risk. Many detainees believe, after years of delay, that judicial review is an illusion, and thus that suicide (which injures no one but themselves) is the only escape. In June 2006, three detainees succeeded in committing suicide.[47] Scores more have attempted it and are attempting it now through the last election left to them: declining to eat. Under the stay and hold approach proposed by the government, it is likely that at least some DTA petitions will, in the future, have to be dismissed as moot because the petitioner took his life in despair while waiting for judicial review.

C. The Government Has Not Demonstrated "Critical And Exigent Circumstances" That Would Result In Irreparable Injury Absent A Stay

The government has not shown that it will be irreparably injured absent a stay. It complains of the time and effort required to comply, and makes a generalized appeal to national security. These assertions are unsupported by any argument based on the specific facts of these particular cases.

Time and effort are not irreparable injury, and do not warrant a stay. *See Renegotiation Bd. v. Bannercraft Clothing Co.*, 415 U.S. 1, 24 (1974); *Commonwealth Oil Refining Co. v. Lummus Co.*, 82 S. Ct. 348 (1961) (Harlan, J., in chambers). Moreover, it is likely that most of the Government Information is readily available, including apprehension reports, interrogations logs and the interrogators' "knowledgeability briefs" regarding Respondents.[48] The relevant time period is also quite narrow—from the time of Respondents' arrests in 2002 and 2003 to the dates

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46 *See* Carlotta Gall & Andy Worthington, *Time Runs Out For An Afghan Held By The U.S.*, N.Y. TIMES, February 5, 2008, at A1.

47 Josh White, *Three Detainees Commit Suicide at Guantánamo*, WASH. POST, June 11, 2006, at A01.

48 *See, e.g.*, Memo. in Supp. Pet. Mot. for Preservation Order, *El Banna v. Bush*, No. 04-CV-1144 (D.D.C. Dec. 5, 2005) (RWR) (detailing the types of documents regarding Guantánamo detainees believed to be in the government's possession).

of their CSRTs in 2004. These Respondents themselves gave the government specific guidance as to where to look for additional evidence. *See, e.g.*, Petitioners' Joint Opposition to Petition for Rehearing 12, n.10.

Furthermore, the government was able to devote sufficient resources to collecting information and holding 558 CSRTs (albeit improperly) within just a few months, beginning in August 2004, when national security concerns were identical if not more severe.[49] The government's conduct of so many CSRTs in such short order in 2004 suggest either that it is distorting the burden of collecting the Government Information for litigation advantage now, or that in 2004 it never reviewed and compiled the Government Information as was its obligation under the CSRT Procedures. If the latter is true, it is even more urgent to proceed now with all possible dispatch, because Respondents are not imprisoned pursuant to properly-conducted CSRTs.

If a burden exists at all, it is due to the government's failure to comply with its own CSRT Procedures and litigation obligations. The government knew at the time that the conduct of the CSRTs would be subject to judicial review. Although the DTA had not yet been enacted, the CSRTs were *implemented* in response to this Court's decision in *Rasul*, a *habeas* action by a Guantánamo detainee challenging his detention. *See* Christopher Marquis, *The Reach of War: Justice; Pentagon Will Permit Captives at Cuba Base to Appeal Status*, N.Y. TIMES, July 8, 2004; *see also Silvestri v. Gen. Motors Corp.*, 271 F.3d 583, 591 (4th Cir. 2001) (party has a "duty to preserve material evidence . . . not only during litigation but also . . . [during] that period before the litigation when a party reasonably should know that the evidence may be relevant to anticipated litigation"). Had the government complied with its own regulations then, the effort to

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[49] *See, e.g.*, Sara Wood, Tribunals Held for High-Value Detainees at Guantánamo, March 12, 2007, *available at* http://www.defenselink.mil/news/newsarticle.aspx?id=3346.

produce the required record now would be routine. The failure of the government to maintain records in 2004 should not relieve it of its statutory obligations today. [50] *Cf. Complete Auto Transit, Inc. v. Reis*, 451 U.S. 401, 428 (1981) (Burger, C.J., joined by Rehnquist, J. dissenting) ("One must resist the temptation to recall the youth who, having deliberately murdered both parents, pleads for the court's mercy as an orphan.").

Nor do the government's generalized assertions concerning possible breaches of national security justify a stay. The challenged order *already* provides extraordinary protection to the government, including that the government may submit *ex parte* for *in camera* review portions of the Government Information which, if disclosed, arguably would pose a risk to national security. *See* Pet'r App. 1a, *Bismullah I*; Protective Order ¶ 4.B; Pet'r App. 81a-82a, *Bismullah III,* 2008 WL 269001, at *5 (Ginsburg, J, concurring in denial of rehearing *en banc*). Courts have "long held the view that *in camera* review is a highly appropriate and useful means of dealing with claims of governmental privilege." *Kerr v. United States Dist. Court*, 426 U.S. 394, 405-06 (1976); *United States v. Nixon*, 418 U.S. 683, 706 (1974). In addition, the CSRT Procedures permit an agency to withhold particularly sensitive information as long as it provides an adequate substitute or certifies that the withheld material is not exculpatory. Pet'r App. 128a, CSRT Procedures, Encl. 1 § D(2); Pet'r App. 81a, *Bismullah III*, 2008 WL 269001, at *5 ("[A]n 'originating agency' may, pursuant to the DoD Regulations, 'decline[ ] to authorize [classified information] for use in the CSRT process,' presumably for reasons of national security, in which

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[50] In briefing below, but not here, the government suggested that a significant part of the alleged burden was reviewing material to determine what would have been available to the Recorder at the time of the CSRTs in 2004. Pet. for Reh'g and Suggestion for Reh'g En Banc at 10; *see also* Pet'r App. 62a, *Bismullah II*, 503 F.3d at 141 (quoting government as searching for information "that the Recorder could have examined") If that is the source of the burden, it is easily alleviated by producing all evidence that is currently reasonably available. If DTA Petitioners want to introduce a specific piece of evidence in the DTA proceedings, the parties may argue then whether it was reasonably available at the time of the CSRT.

case that classified information is deemed "not reasonably available" and accordingly is not Government Information.") (citing CSRT Procedures).

Counsel for both Bismullah and the *Parhat* Respondents have been granted Top Secret security clearance. The government has never suggested that they have ever engaged in a security breach. Despite the government's generalized concerns about the impact of the Court of Appeals' decision on intelligence gathering, Pet'r App. 31a, the versions of the declarations that counsel have seen do not explain how any sources of intelligence would even be aware that intelligence they had provided years earlier had been produced in DTA actions. Because these cases are at the most preliminary stage and those declarations were submitted for the first time in support of the petition for rehearing *en banc*, there has been no opportunity to test them. Such generalized assertions are not sufficient reason to grant a stay pending *certiorari* review of a preliminary, interlocutory ruling.

In fact, the declarations provided to security-cleared counsel did not discuss the DTA Petitioners in these cases at all. Based on statements by the government, we understand that the Top Secret-SCI versions provided to the Court of Appeals did not either.[51] The government should, at this point, have some sense of how burdensome collection of the Government Information for these Respondents would be, but such information is absent from the papers submitted to the Court. Indeed, seven months ago, in seeking to delay production of the Government Information, the government told the Court of Appeals that "many government entities are currently expending significant resources actively gathering and reviewing material that might be treated as part of the record in this case and other cases filed under the DTA" and

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[51] Reply to Petitioners' Opposition to Motion for Leave to File *Ex Parte/In Camera* Top Secret-SCI Declarations for Judges' Review Only at 3, *Bismullah v. Gates*, Nos. 06-1197, 06-1397 (D.C. Cir. Sept. 21, 2007) (the submitted declarations "do not address the particulars of petitioners' cases or the particular counsel in these cases."); *see also* Pet'r App. 56a, *Bismullah II*, 503 F.3d at 138 n.1 (denying leave to file a declaration *ex parte*).

that "[c]ompilation and review of the record . . . is proceeding expeditiously in this and other cases." Resp't Opp. to Dates Proposed in Mot. for Entry of Scheduling Order at 7-8 (filed Aug. 22, 2007). Yet the government's submissions to this Court contain no information about any burden associated with these Respondents.

D. A Stay Would Harm The Interests Of Other Detainees

For obvious reasons, entry of a stay in this case would cast a cloud, if not an affirmative injunction against the efforts of any detainee to obtain relief pursuant to the DTA, whether or not a party to this case. Many detainees may have different, or even more compelling grounds for relief. All detainees should be permitted to press their claims before the Court of Appeals without any further delay.

E. There Is No Reason To Link This Appeal To The Disposition Of *Boumediene*

The question presented in the government's petition for *certiorari* is not, as the government contends, "intertwined" with the questions being decided in *Boumediene* and *Al Odah*. *See* Cert. Pet. at 16-19. It is true that, as this Court has recognized, *Boumediene*, 127 S. Ct. 3078, the issue decided by the Court of Appeals in *Bismullah*—how the government should be directed to compile the DTA record on review—had implications for one minor aspect of the Court's analysis of the adequacy of the DTA remedy as an alternative to common-law *habeas*. The *Bismullah I* decision was issued well before the merits briefing and oral argument in *Boumediene*, and this Court has already had the benefit of the Court of Appeals' interpretation of the DTA and the parties' arguments based on it. *See, e.g.*, *Boumediene* Pet. Br. at 7-8, 26-33; *Boumediene* Govt. Br. at 41 & n.16, 59 & n. 41.

The government implies that because statutory construction in *Bismullah* might bear on the constitutional issue in *Boumediene,* it follows that a constitutional decision in *Boumediene* would inform statutory construction in *Bismullah.* But that is incorrect. To read an act of

Congress in *Bismullah*, the Court of Appeals did not need to explore the constitutional rights of Guantánamo detainees or rest on the Suspension Clause. The Court simply interpreted the DTA based on its text and function. Whether or not Congress had power to strip *habeas corpus*, and whether or not the DTA, with its myriad limitations (regardless of the record on review) can adequately substitute for *habeas*, the scope of review in a DTA case turns on the statute. The government suggests that the Court of Appeals could be invited to "revisit" its interpretation of the DTA in light of the holding of *Boumediene*, Cert. Pet. at 13, but it has shown no reason why reconsideration would be necessary or appropriate.

The government suggests that the Court might well construe the DTA in *Boumediene* to "avoid" any constitutional difficulty. But that possibility does not warrant a stay; if anything, it counsels prompt production of the record on review. The government has not explained how the Court might attempt to save the constitutionality of a statute challenged as an inadequate substitute for *habeas* by interpreting that statute to provide a substitute even less adequate. Neither a remand of *Boumediene* for a *habeas* hearing (following a reversal), nor a finding that the DTA can fairly be construed to provide the additional protections needed to satisfy the Constitution would support narrowing the definition of the record on review in a DTA case.

Moreover, if the government prevails in *Boumediene*, there will be no avoidance issue and no need or opportunity for the Court to comment on the DTA. The government suggests that such a ruling would "highlight the importance of the procedures for DTA review," Cert. Pet. at 13—an odd observation, given that Respondents have always recognized the DTA's "importance" and consistently sought (so far without success) to have a prompt hearing on the merits in the Court of Appeals. If the DTA's "importance" has not been evident to the government before, it is difficult to see why the "highlighting" of it would require

reconsideration of *Bismullah I* in the Court of Appeals. Indeed, the government's position—that it may prevail in *Boumediene*—only underscores the critical importance of requiring the government to fulfill its obligations under the DTA, for DTA review may well be the only judicial review to which the detainees are entitled. Further delay in allowing them access to that sole remedy is unconscionable.

Finally, contrary to the government's insinuation, Cert. Pet. at 14, no aspect of *Boumediene* would require the government to institute new CSRTs, and no party to *Boumediene* has asked for new CSRTs. The only decision that contemplates new CSRTs is *Bismullah II*, which mentioned the possibility only as an alternative to production of the Government Information as required under the DTA.[52] *Boumediene* provides no possible justification for postponing the government's obligations to produce Government Information in pending DTA cases as required by *Bismullah I*.

The government's assertion that it cannot decide whether to hold new CSRTs in lieu of producing the Government Information until the Court issues its decision in the *Boumediene/Al Odah* cases is another desperate effort to avoid its obligations under the DTA. The government need not await any decision to hold new CSRTs; its own regulations purport to authorize new CSRT hearings at the government's discretion.[53] *See* Department of Defense, Procedure for Review of "New Evidence" Relating to Enemy Combatant (EC) Status at 3 ¶ 5d (May 7, 2007).

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52 The concept of new CSRTs seems to be the government's preference. *See* Cert. Pet., at 19. But it has never made sense. If a new CSRT is convened, the government will have the same regulatory obligation to assemble the Government Information, and the same obligation to place all exculpatory evidence before the panel. The posited burdens in assembling this material would be unchanged. The "risks" to national security in affording counsel access to material in subsequent DTA review would be the same. It would be no easier to assemble the material for a CSRT in 2009 than it would be to assemble it in a record on review in a DTA case now.

53 While the Court of Appeals has clearly indicated that "re-doing" CSRTs is an option for the government, Respondents confess that they have never understood the logic of that suggestion. Whatever burden searching the Government Information may entail, it will have to be undertaken just as surely in a second CSRT as it would be in culling the record on review for DTA review. While it may not be possible to

If collecting the Government Information will take as long as the government has asserted, then any new CSRT hearings would not be held until well after this Court issues its opinion in *Boumediene*. Given how quickly the CSRT Procedures were issued after the *Hamdi* and *Rasul* decisions, the government could decide now to hold new CSRTs, begin to collect the Government Information and, if the Court's opinion in *Boumediene* has implications for the protections given to detainees at CSRT hearings, have more than sufficient time to issue new rules and procedures before the hearings are held.[54]

F. Premature Review Disserves the Interests Of The Judiciary

The government's effort to seek certiorari review at this juncture ignores a core proposition of appellate review, that the administration of justice is served only when courts of original jurisdiction develop full records and *decide cases* based on those records, and is disserved by piecemeal appeals. This idea finds expression in, but is not limited to the final judgment rule, 28 U.S.C. § 1291. In the leading decision of *Cobbledick v. United States*, 309 U.S. 323 (1940), Justice Frankfurter explained:

> Since the right to a judgment from more than one court is a matter of grace and not a necessary ingredient of justice, Congress from the very beginning has, by forbidding piecemeal disposition on appeal of what for practical purposes is a single controversy, set itself against enfeebling judicial administration . . . . To be effective, judicial administration must

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duplicate precisely what the Recorder saw in a 2004 CSRT, DTA review could certainly proceed now. Assuming that Government Information has not been destroyed, a faithful compilation of the Government Information would permit the Court of Appeals to assess whether the Recorder's shortfalls were material, by comparing exculpatory evidence in the Government Information, if any, with the CSRT Record of Proceedings, and considering the preponderance of the evidence question on the basis of the record on review.

54 The government's ability to conduct new CSRTs seems to vary with its litigation position. In September 2007, the government sought a stay of the DTA action filed by Abdulrahim Abdul Razak al Ginco on the basis that a new CSRT for al Ginco would be convened within sixty days. *See* Declaration of Frank Sweigert at ¶ 5, *Al Ginco v. Gates*, No. 07-1090 (D.C. Cir. Sept. 13, 2007). According to a status report filed by the government with the court on February 14, 2008, the CSRT hearing was scheduled for February 14, five months later, although there is not yet confirmation that the hearing occurred. Status Report, *Al Ginco v. Gates*, No. 07-1090 (D.C. Cir. Feb. 14, 2008).

> not be leaden-footed. Its momentum would be arrested by permitting separate reviews of the component elements in a unified cause.

309 U.S. at 325.

Encouraging finality is "crucial to the efficient administration of justice," and reflects a congressional policy that is "inimical to piecemeal appellate review of trial court decisions which do not terminate the litigation." *Flanagan v. United States*, 465 U.S. 259, 264 (1984) (quoting *United States v. Hollywood Motor Car Co.*, 458 U.S. 263, 265 (1982)). *See also Canter v. Am. Ins. Co.*, 28 U.S. 307, 318 (1830) (Story, J.) (prohibiting fragmentary review is "of great importance to the due administration of justice," as successive appeals would lead to great delays and "oppressive expenses" for the parties); *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 123-24 (1945).

The Guantánamo litigation has been a laboratory for what happens when the rule is ignored, and the results are stark proof of the rule's soundness. In 2004, this Court in plain words directed the district courts to "consider in the first instance the merits" of the *habeas* cases. *Rasul*, 542 U.S. at 485. District judges declined to do so (even when they found good claims had been stated).[55] The result was that cases did not proceed through the system, facts were not found, innocent detainees suffered, the Executive never obtained the credibility it might have obtained from judicial confirmation of the legitimacy of detention in specific cases, the Congress enacted legislation premised on the CSRT process without knowing what actually had been happening in that process, and the judicial branch now finds itself, more than two years after the DTA was enacted, without a single case scheduled for decision on a full record.

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[55] *See In re Guantanamo Detainee Litigation*, Nos. 02-CV-0299 (CKK) et al., 2005 U.S. Dist. LEXIS 5295 (D.D.C. Feb. 3, 2005) (staying *habeas* cases after finding that good claims had been stated). All judges in the district followed Judge Green's approach of issuing a threshold stay.

The Court should not encourage more of this enervating, piecemeal debate. Cases need decisions.

CONCLUSION

If six years of Guantánamo litigation have demonstrated anything, it is that clashing viewpoints based on pleadings and hypotheses will never be resolved through more preliminary rulings on pleadings and hypotheses. Only decisions on the merits, based on full records, will elucidate the law. Respondents therefore request that the stay application, and the request to hold, be denied. They have no objection to the Motion for Expedition.

February 20, 2008

Respectfully submitted,

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No. 07A-677

IN THE

Supreme Court of the United States

ROBERT M. GATES, SECRETARY OF DEFENSE, *et al.*,
Petitioners,

v.

HAJI BISMULLAH, *et al.*, and HUZAIFA PARHAT, *et al.*,
Respondents.

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

APPENDIX TO RESPONDENTS' JOINT OPPOSITION TO THE 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 AND CONSENT TO THE MOTION FOR EXPEDITED CONSIDERATION OF THE PETITION FOR A WRIT OF CERTIORARI AND FOR EXPEDITED MERITS BRIEFING AND ORAL ARGUMENT IN THE EVENT THAT THE COURT GRANTS THE PETITION

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IN THE

Supreme Court of the United States

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

v.

HAJI BISMULLAH, ET AL.

CERTIFICATE OF SERVICE

It is hereby certified that all parties required to be served have been served with copies of the Respondents' Joint Opposition to the 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 and Consent to the Motion for Expedited Consideration of the Petition for a Writ of Certiorari and for Expedited Merits Briefing and Oral Argument in the Event that the Court Grants the Petition, via email and first-class mail, postage prepaid, this **20th day of February, 2008**.

[See Attached Service List]

Pursuant to 28 U.S.C. § 1746, I certify under penalty of perjury that the foregoing is true and correct.

Executed on February 20th, 2008.

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