IN THE SUPREME COURT OF THE UNITED STATES

No. 07A677

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

v.

HAJI BISMULLAH, ET AL.

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

REPLY IN SUPPORT OF 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

The Solicitor General has requested a stay of the court of appeals' judgment so that the government is not subjected to the extraordinary burdens and risks to national security that compliance with the judgment would entail while the Court assesses this case on an expedited basis. The requested stay is both modest in scope and vital to national security. The stay sought is only a stay of the portion of the decision below requiring production of materials within the government's possession that were not presented to the Combatant Status Review Tribunals (CSRTs). The materials presented to the CSRTs -- including classified materials -- were provided to respondents months ago, and DTA review may proceed based on those records. Equally important, the government seeks a stay only to permit expedited consideration of the petition

and disposition of the petition after this Court decides the pending Boumediene and Al Odah cases. The stay would be for a matter of months, not years. And yet this modest stay will allow the government to avoid a costly enterprise with significant risks to national security that all may be deemed effectively moot in a matter of months.

Respondents do not dispute the importance of the question presented in this case, and they cannot dispute that both Judges of the court of appeals and Members of this Court have recognized that this case is intertwined with Boumediene v. Bush, No. 06-1195 (argued Dec. 5, 2007), and Al Odah v. United States, No. 06-1196 (argued Dec. 5, 2007), and is worthy of this Court's attention. And respondents make no serious attempt to dispute the severe harms that will result from the court of appeals' judgment, which the government has established through detailed, sworn declarations from the leaders of the Nation's intelligence community.

Under the circumstances, the requested stay is warranted. Particularly because the government has requested (and respondents have consented to) expedited consideration of this case by this Court, the relatively small delay -- a matter of months, not "years" (Stay Opp. 3) -- that will be caused by this Court's consideration of the important question presented or decision to hold this case pending its decision in Boumediene and Al Odah is

far outweighed by the serious harms that would result from enforcing the judgment of the court of appeals now.

ARGUMENT

A stay is warranted in this case because this case meets the Court's certiorari criteria, there are (at a minimum) serious doubts as to the validity of the judgment below, and there is a likelihood of irreparable harm to the government if the judgment below is not stayed. E.g., Edwards v. Hope Med. Group for Women, 512 U.S. 1301, 1302 (1994) (Scalia, J., in chambers). Indeed, the government has demonstrated that this case raises "the most critical and exigent circumstances," Williams v. Rhodes, 89 S. Ct. 1, 2 (1968) (Stewart, J., in chambers), because if the government must comply with the court of appeals' judgment now, while Boumediene and Al Odah are still pending, it could be forced to jeopardize national security and devote enormous resources to an undertaking that could be mooted or redirected by this Court's decision in Boumediene and Al Odah. The sensible course is for this Court to grant a stay while it considers and disposes of this case on the expedited basis agreed to by the parties.

1. The government is seeking a stay in this case so that it is not required to choose between assembling the unprecedented "record" envisioned by the court of appeals or seeking remands for new CSRT hearings while this Court considers how to proceed with this case. Stay Mot. 15-17. Contrary to respondents' contention

(Stay Opp. 3), that does not mean that none of the materials presented to the CSRT will be available to respondents until after this Court's disposition of this case, nor does it mean that issuance of a stay would "terminate judicial review for years." The government has already provided each of the respondents in this case the evidence that was presented to and considered by the CSRT, including classified material (which is not typically provided to private counsel). See Stay Opp. 3 n.4 (acknowledging this fact).[1] Moreover, shortly after receiving those classified CSRT records, five of the respondents asked the court of appeals to dispose of their cases based upon those classified CSRT records. In the first of those cases, Parhat v. Gates, No. 06-1397, the D.C. Circuit ordered immediate merits briefing, set an expedited schedule and ordered that the case be set for oral argument as soon as the reply brief was filed (which it was on February 20).

Under those circumstances, with government production of the CSRT record of proceedings complete and DTA review able to proceed, respondents cannot credibly claim (Stay Opp. 2, 29-30) that a stay would "freeze judicial review" in these cases for years and that "every DTA petitioner" is now "prevent[ed] * * * from obtaining

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[1] The unclassified materials from the CSRT records of proceedings were produced to respondents over a year ago. The classified materials from the CSRT records of proceedings could not be produced until an amended protective order was in place, so they were not produced until October 2007. See Amended Per Curiam Protective Order, Bismullah v. Gates, No. 06-1197 (D.C. Cir. Oct. 23, 2007).

the record on review or proceeding to any relief on the merits." In all likelihood, the effect of granting a stay in this case would be to delay compliance -- for a matter of months -- only with the portion of the court of appeals' order requiring the government to attempt to assemble the materials that the recorder may have considered but did not present to the CSRT, while permitting DTA review to go forward on the basis of the actual record compiled by the CSRT.

2. Moreover, both the government and respondents are taking steps to bring this case to an expeditious resolution in this Court. Although respondents speak of years of additional delay, that ignores the fact that they have consented to expedited consideration of the petition for a writ of certiorari and have requested even more expedited consideration of the merits of this case than the government requested, see Stay Opp. 1-2, so that this case can be decided before this Term ends. Even if this Court were to hold this case pending its decision in Boumediene and Al Odah and then grant the petition, vacate the decision below, and remand the case to the court of appeals, briefing in the court of appeals could proceed on an expedited basis. And the Court's decisions in Boumediene and Al Odah presumably will streamline, perhaps substantially, the issues in the subsequent litigation. Thus, the delay at issue would be a matter of months, not years. And, again, it is only delay in producing that portion of the "record" (as

envisioned by the court of appeals) that was not presented to or considered by the CSRT; DTA review currently may proceed on the basis of the evidence actually before the CSRTs.

3. A stay is amply justified in this case because the government will be unable to obtain meaningful review of this case at a later point in time. Respondents compare (Stay Opp. 20-21) the decision below to an interlocutory discovery order to suggest that certiorari review is unwarranted. That comparison is inapt. This case is ripe for review in all pertinent respects: The court of appeals has definitively ruled on a question of law that is of fundamental importance to determining the nature and scope of DTA review, and if the government is not able to obtain review at this juncture, it will be denied any meaningful review at all. Moreover, the government's stay request seeks only to maintain the status quo (in aid of this Court's jurisdiction) until this Court has an opportunity to act on the petition, a status quo in which respondents have received the actual CSRT records of proceedings and DTA review can proceed. In any event, it is well-established that certiorari review is available for interlocutory judgments, especially where "there is some important and clear-cut issue of law that is fundamental to the further conduct of the case" and the decision below "will have immediate consequences for the petitioner." Robert L. Stern et al., Supreme Court Practice 259

(8th ed. 2002) (citing cases). It is difficult to imagine more compelling circumstances than those present here.

4. Much of respondents' argument (Stay Opp. 21-29) concerns whether the court of appeals correctly decided the merits of the dispute about the scope of the record on review.[2] That extensive

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[2] Respondents also devote much of their brief (Stay Opp. 5-15, 22-23) to protestations of innocence and distortion of the facts regarding the CSRT process provided. This brief is not the place to respond to each of those misstatements of the record. But it is important to note that respondents' claims that they and the other detainees are all innocent civilians is without basis. For example, in the recent merits briefing in Parhat, the government has explained that Parhat underwent military training at an al Qaeda and Taliban sponsored military training camp before he was captured by coalition forces. The classified brief (which will be made available to this Court upon request) details facts about the camp and persons trained there, and about the organization of which Parhat was a member. See Classified Gov't Br. 5-7, 9-10, 18-24, Parhat v. Gates, supra (filed Feb. 2, 2008); Classified App. 20-21, 24, 36-37, 42-44, 49-52, 74, 82-83, 86, 100, Parhat v. Gates, supra (filed Jan. 7, 2008). Those facts, which were in the CSRT record of proceedings and have been provided to counsel, demonstrate that Parhat is indeed an enemy combatant. And there is similar evidence with respect to Bismullah. The unclassified CSRT record shows that Bismullah was a member of the Taliban; received AK-47s, vehicles, and communications devices from that group; was affiliated with Fidayan Islam, a terrorist group, that targeted U.S. and coalition forces; and was directed by that group to identify and kill those Afghanis who supported U.S. forces. See Unclassified CSRT Record, Bismullah v. Gates, No. 06-1197, encl. (1) at 1, encl. (3) at 5-6 (D.C. Cir. filed May 8, 2007).

Respondents also erroneously treat statements made by government officials about whether to release Parhat and the other Uighur respondents as demonstrating that it is unlawful to hold them as enemy combatants. Whether an individual is an enemy combatant is an issue entirely separate from whether the military, within its discretion, decides that continued detention of that individual by the United States is not warranted. Throughout our Nation's history, individuals captured and detained as enemy combatants have routinely been released prior to the cessation of hostilities if it can be determined that they pose no ongoing threat. See, e.g., George G. Lewis & John Mewha, History of

discussion only underscores the importance and complexity of the issues involved, which suggest a substantial probability that this Court will grant review. See Stay Mot. 8-15. Moreover, although a full response to respondents' merits arguments must wait for another time, respondents have not disputed -- and cannot dispute -- that the court of appeals' conception of the record on review goes well beyond any known administrative or judicial context. Despite the fact that Congress intentionally provided only narrow review of CSRT determinations in the DTA, the court of appeals found that Guantanamo Bay detainees are entitled to procedural protections greater than those afforded by the Constitution to United States citizens in the criminal context, see Brady v. Maryland, 373 U.S. 83 (1963), and when they fight for the enemy in times of war, see Hamdi v. Rumsfeld, 542 U.S. 507, 513-539 (2004). At the very least, the 5-5 split in the court of appeals on rehearing en banc, Pet App. 67a-102a, as well as the fact that one Judge on the original court of appeals panel believed the case should be reheard en banc, id. at 83a-89a (Henderson, J., dissenting from denial of rehearing en banc), clearly demonstrate that there are serious questions about the correctness of the decision below.

Prisoner of War Utilization by the United States Army 1776-1945, at 25, 76, 97-98 (1955). That same practice is applicable here and is consistent with the United States' statements that it does not want to hold detainees at Guantanamo Bay any longer than necessary.

5. Although the question presented in the petition is important in its own right, there is even greater cause for this Court's intervention because the question presented here is interconnected with the questions now pending before the Court in Boumediene and Al Odah. Stay Mot. 9-12. This Court recognized that interconnection in granting review in Boumediene and Al Odah, 127 S. Ct. 3078 (2007), and several Judges of the court of appeals recognized it as well in their opinions on denial of rehearing en banc. See Pet. App. 82a (Ginsburg, J., concurring in denial of rehearing en banc); id. at 83a (Garland, J., concurring in denial of rehearing en banc); id. at 89a n.6 (Henderson, J., dissenting from denial of rehearing en banc); id. at 96a (Randolph, J., dissenting from denial of rehearing en banc).

Respondents hypothesize (Stay Opp. 38-41) various ways in which this Court might decide Boumediene and Al Odah that would minimize the decision's impact on this case. But, as the government has explained (Stay Mot. 9-11), the Court's resolution of Boumediene and Al Odah almost certainly would have a material impact on the resolution of the question presented by this case. For example, the Court may have occasion to interpret the scope of the DTA procedures, including the scope of the record on review, in order to avoid any constitutional difficulties with the MCA's limitation on habeas review. In any event, the critical fact, as the government has explained (Stay Mot. 9-11, 15-17), is that it

would make no sense to require the government to expend the substantial resources required to comply with the decision below before this Court decides Boumediene and Al Odah.

6. The balance of harms in this case clearly favors the entry of a stay. As the government has explained, Pet. 28-32, and the court of appeals itself acknowledged, Pet. App. 62a-63a, the decision below puts the government to the dilemma of either engaging in a practically infeasible attempt to recreate the information the recorder might have reviewed, which would require substantial effort and cause grave national security risks, or conducting mass remands of DTA cases for an additional round of CSRT proceedings in the midst of an ongoing armed conflict.[3] Sworn declarations of the leaders of the Federal Bureau of Investigation, the Central Intelligence Agency, the National Security Agency, and the Director of National Intelligence detail the perils of either

[3] Contrary to respondents' contention (Stay Opp. 30-31, 40 n.52), it is not the case that the latter option would entail the same reconstruction of the "record" as the former option. If the government were to conduct new CSRTs at this point under the Bismullah decision, the government would at least know what its recordkeeping obligations were in advance. As the Bismullah panel itself recognized, at the time of the original CSRT determinations, the government had no reason to believe that it would be required to produce information that was not presented to or considered by the CSRTs. See Pet. App. 62a (noting, "in the Government's defense," that when the CSRT determinations were made, the government had no reason to know what the court "would later specify concerning the scope and nature of judicial review"). Nor obviously is the universe of evidence necessarily the same today as it was at the time of the original CSRTs.

course. Pet. App. 182a-214a. Several Judges of the court of appeals also expressed concern about those serious risks. See id. at 88a (Henderson, J., dissenting from denial of rehearing en banc); id. at 95a-96a (Randolph, J., dissenting from denial of hearing en banc). In light of the substantial compliance burdens and national security risks that would be imposed by the decision below, and in light of the relatively short delay requested by the government's motion, a stay is warranted.

CONCLUSION

For the reasons stated above and in the government's original stay application, petitioners respectfully request that the Court grant a stay of the court of appeals' judgment until 14 days following the final disposition of this case.

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Counsel of Record

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