Nos. 06-1195 and 06-1196

In the Supreme Court of the United States

LAKHDAR BOUMEDIENE, ET AL., PETITIONERS

v.

GEORGE W. BUSH,
PRESIDENT OF THE UNITED STATES, ET AL.

KHALED A.F. AL ODAH, NEXT FRIEND OF
FAWZI KHALID ABDULLAH FAHAD AL ODAH, ET AL.,
PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

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

MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF AND SUPPLEMENTAL BRIEF FOR RESPONDENTS

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MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF

On March 17, 2008, this Court granted petitioners' motion for leave to file a second post-argument supplemental brief. Respondents respectfully move for leave to file the attached supplemental brief responding to petitioners' brief.

Respectfully submitted.

PAUL D. CLEMENT
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MARCH 2008

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SUPPLEMENTAL BRIEF FOR RESPONDENTS

Respondents submit this supplemental brief in response to petitioners' supplemental brief addressing the District of Columbia Circuit's denial of rehearing en banc in *Bismullah* v. *Gates*, 501 F.3d 178 (2007), reh'g denied, 503 F.3d 137 (2007), and 514 F.3d 1291 (2008), petition for cert. pending, No. 07-1054 (filed Feb. 14, 2008), and the government's brief in *Parhat* v. *Gates*, No. 06-1397 (D.C. Cir. filed Feb. 7, 2008). According to petitioners, those developments show that review under

the Detainee Treatment Act of 2005 (DTA), Pub. L. No. 109-148, Tit. X, 119 Stat. 2739, is inadequate. Petitioners are incorrect, and the developments they cite in no way undermine the adequacy of DTA review, which was fully explained in the government's principal brief (at 40-61). Moreover, the implicit assumption on which petitioners' supplemental brief rests—that there is a well-understood, litigation-tested, and undisputed set of habeas procedures well adapted to this unprecedented situation—is unfounded.

1. Petitioners argue (Supp. Br. 1)[*] that the opinions accompanying the court of appeals' denial of rehearing in *Bismullah* demonstrate "the fundamental unfairness" of the procedures used by Combatant Status Review Tribunals (CSRTs) and "the inadequacy of DTA review as a substitute for common law habeas." Statements respecting the denial of rehearing en banc of course create no new law. And nothing in the *Bismullah* panel opinion, which was available and cited during the merits briefing in this case last fall—or in the court's denial of rehearing en banc or the government's petition for a writ of certiorari in *Bismullah*—suggests that the scope of DTA review is inadequate to vindicate whatever rights petitioners may have.

a. To the extent that petitioners repeat their criticisms of the CSRT procedures, those criticisms lack merit. See Gov't Br. 53-58. More to the point, the purported deficiencies in the CSRT procedures have no bearing on whether *DTA review* is inadequate, because the DTA permits a detainee to challenge any alleged procedural deficiencies in a petition for review. Under

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[*] References to "Supp. Br." are to the supplemental brief for the *Boumediene* petitioners, No. 06-1195 (filed Feb. 19, 2008).

the DTA, the District of Columbia Circuit must decide, "to the extent the Constitution and laws of the United States are applicable, whether the * * * [CSRT] standards and procedures * * * [are] consistent with the Constitution and laws of the United States." DTA § 1005(e)(2)(C)(ii), 119 Stat. 2742. The court in *Bismullah* established a protective order that gives the detainees' counsel access to classified material and allows counsel to communicate with their clients through a legal-mail system that protects attorney-client privilege. While those rules are not compelled by the terms of the DTA, the court of appeals has adopted them in order to ensure that the DTA review is fair and meaningful. Under the DTA (and *Bismullah*), petitioners can present their arguments about the CSRT procedures to the District of Columbia Circuit, and if the arguments are meritorious, that court will provide relief. That provides a complete answer to petitioners' objections to the CSRT process.

b. Petitioners renew their contention (Supp. Br. 2-4) that review under the DTA is deficient because the CSRT procedures allow the government to control what evidence is considered by the CSRT, and that the limited review under the DTA does not permit detainees "to introduce exculpatory evidence" that was not presented to the CSRT. *Id.* at 3. Petitioners are incorrect.

The CSRT procedures permit detainees to testify, seek the testimony of relevant and reasonably available witnesses, and seek and obtain other relevant and reasonably available evidence. 06-1196 Pet. App. 143-144. In addition, the recorder is required to present to the CSRT any exculpatory information that is reasonably available. *Id.* at 165. Petitioners' contention (Supp. Br. 2) that the CSRT record is "a one-sided body * * * of

evidence * * * with no meaningful input" from detainees is therefore a gross mischaracterization of the CSRT procedures. Moreover, petitioners ignore the Department of Defense's procedure regarding "new evidence," which expressly permits submission of exculpatory evidence that was not presented to the CSRT.

As explained in the government's principal brief (at 56 n.30), if a detainee presents factual information that "was not previously presented to the detainee's CSRT" and that is "material to the factual question of whether the detainee" is an enemy combatant, the Deputy Secretary of Defense "will direct that a CSRT convene to reconsider the basis of the detainee's [enemy combatant] status in light of the new information." See Office for the Administrative Review of the Detention of Enemy Combatants, DoD, *OARDEC Instruction 5421.1, Procedure for Review of "New Evidence" Relating to Enemy Combatant (EC) Status* paras. 4(a)(1) and (2), 5(b) (May 7, 2007) <http://www.defenselink.mil/news/May2007/New%20Evidence%20Instruction.pdf>. The resulting CSRT decision, if adverse to the detainee, would in turn be subject to DTA review. Thus, petitioners' assertion (Supp. Br. 4) that the detainees "are left completely without a remedy" if their CSRTs excluded proffered evidence is incorrect.

c. Petitioners contend (Supp. Br. 4) that the court of appeals' handling of *Bismullah* demonstrates that DTA review will proceed more slowly than habeas because "the D.C. Circuit will continue to engage in divided, incremental decisionmaking on threshold procedural issues," and that "DTA petitions will surely languish for years before the court of appeals reaches the merits in even a *single* case." That contention lacks merit. There is no reason DTA review cannot proceed expeditiously.

Moreover, putting the "habeas" label on these unprecedented proceedings challenging the detention of captured enemy combatants (and adding district courts as well as the court of appeals to the mix) will not eliminate the difficult and sensitive legal issues raised by these cases.

Once the basic ground rules for DTA review have been reviewed by this Court in cases like *Bismullah*, there is no reason why DTA review cannot proceed in a more expeditious fashion. Moreover, even if this Court grants certiorari to review the decision in *Bismullah* (and grants the government's stay application), DTA review may proceed in the interim on the basis of the classified record of proceedings before the CSRT—which the government has already produced in *Bismullah*. For example, expedited merits briefing is already proceeding in *Parhat* on the basis of the classified CSRT record in that case, and the court has scheduled oral argument for April 4. There is no reason that briefing could not proceed, where appropriate, in other DTA cases.

Likewise, petitioners err in assuming that habeas review of enemy-combatant detentions would be particularly expeditious. As discussed in the government's principal brief (at 60) and at oral argument (Tr. 40, 49, 70), there is no precedent governing habeas review of aliens detained as enemy combatants outside the sovereign territory of the United States. Accordingly, even if this Court were to determine both that petitioners have a constitutional right to habeas corpus and that the alternative mechanism for review established by Congress is constitutionally inadequate, a host of threshhold issues would need to be resolved concerning the nature of the resulting habeas proceedings. For example, the dis-

trict courts would have to determine whether habeas would involve de novo review of evidence (as opposed to deferential review of the military's enemy-combatant determination); whether detainees would be entitled to discovery, and if so what the scope of such discovery would be; and whether the detainees would be provided access to classified evidence. Those are just a few of many fundamental and unprecedented issues that would be presented by habeas review. Unlike the DTA, which suggests answers to some of these questions, nothing in the habeas statute would provide courts with any guidance. And there can be little doubt that the district courts' resolution of many, if not all, of those issues would be appealed (by either side). Thus, if anything, habeas proceedings, by involving the district courts, would entail even greater delay than DTA review.

2. Petitioners argue (Supp. Br. 5-6) that the government's brief in *Parhat* shows that DTA review is not an adequate substitute for habeas. To the contrary, the briefing in *Parhat* demonstrates that in the context of DTA review, a detainee—represented by counsel with access to the classified CSRT record—can raise the critical and fundamental issues bearing on the validity of his detention as an enemy combatant. For instance, Parhat has challenged whether an individual who is not a member of al Qaida or the Taliban, and who purportedly did not intend to support those groups, can nevertheless be detained as an enemy combatant; whether an individual who himself does not directly engage in hostilities against the United States can be detained; whether the President's powers under Article II of the Constitution provide an independent basis for Parhat's detention; and whether the appropriate relief under the DTA is remand or release. The resolution of those issues will facilitate

the resolution of many other detainees' cases. The DTA therefore provides meaningful review of whether a detainee is properly held as an enemy combatant.

a. Petitioners object (Supp. Br. 5-6) that the government has sought deferential review of the CSRTs' factual determinations. In their view, such review is an inadequate substitute for habeas. But as explained in the government's principal brief (at 43-46, 58-59), petitioners' conception of common law habeas review—the baseline against which the DTA's adequacy must be measured—is seriously flawed. Contrary to petitioners' suggestion (Supp. Br. 6), common law habeas in the context of wartime detentions did not involve "plenary review" but was in fact extraordinarily limited. Indeed, even outside of the military context, habeas review of executive detention decisions did not provide plenary review of the facts. Thus, the government's argument in *Parhat* that the court of appeals should deferentially review the CSRT's factual findings in no way undermines the effectiveness of the DTA as a substitute for habeas review and is in no way inconsistent with the government's arguments in *Boumediene*. See Tr. 44-46.

b. Petitioners further argue (Supp. Br. 6-7) that because the government contends that the appropriate remedy under the DTA ordinarily would be remand, and because the government has the "alternative" of convening new CSRTs, see *Bismullah*, 503 F.3d at 141, "this structure cannot lead to a judicial order of release and is thus no substitute for habeas." (Supp. Br. 7) That is incorrect.

As the government has explained, the DTA does not expressly authorize the District of Columbia Circuit to order release. If the court of appeals were to find a deficiency in a CSRT's enemy combatant determination, the

court in the first instance should remand the case to the CSRT for new proceedings, consistent with general administrative law principles. See Gov't Br. at 55, *Parhat* v. *Gates*, No. 06-1397 (D.C. Cir. filed Feb. 7, 2008); *Occidental Petroleum Corp.* v. *SEC*, 873 F.2d 325, 346-347 (D.C. Cir. 1989) ("proper course" is to "remand the matter to the agency for further proceedings" when flaws in the agency's procedures lead to an "inadequa[te] * * * administrative record"). Even in a conventional habeas setting, when a petition is successful, the typical relief is retrial, not outright release. But if the ultimate ability to order release is necessary to ensure the adequacy of the DTA procedures, nothing in the DTA precludes that remedy, and the All Writs Act, 28 U.S.C. 1651, would affirmatively authorize it. See Tr. 35-36.

Whatever the circumstances in which an order of release might be appropriate, a finding that a CSRT record is insufficient to support an enemy combatant determination *vel non* should not customarily result in such an order. Under the CSRT procedures, in order to protect classified and sensitive information, the Recorder need not present to the Tribunal *all* of the material supporting a finding that the detainee is an enemy combatant. Rather, the Recorder presents to the CSRT "such evidence in the Government Information as may be sufficient to support the detainee's classification as an enemy combatant." 06-1196 Pet. App. 160, 165. In any given case there may well be additional, but highly sensitive, evidence against a petitioner that was never presented to the CSRT. Accordingly, in the event of an appellate finding of insufficient evidence, the Department of Defense should have an opportunity on remand to consider whether to submit the additional evidence or discharge the detainee.

As noted, however, if this Court were to determine that the power to order release under the DTA is necessary to uphold that statute—because, for example, the DTA would be an inadequate substitute for habeas unless it authorized release—then nothing in the DTA precludes that relief. See Tr. 35-36. But even if courts are recognized to have the authority to order release, in the ordinary case, remand, rather than release, would be the appropriate remedy when the court finds a deficiency in a CSRT ruling. See Gov't Br. at 54-58, *Parhat*, *supra* (No. 06-1397).

More generally, petitioners' effort to use the government's arguments made to a court of appeals that has already accepted the constitutionality of the DTA to undermine the government's arguments in this Court that the DTA can be construed to avoid constitutional difficulty is unavailing. Not only are the cases in fundamentally different postures, but more importantly this Court in resolving the case can resolve definitively what factors DTA review must have to avoid constitutional difficulty. If it does so, it will streamline further litigation under the DTA, which should allow for expeditious disposition of the detainees' DTA cases.

3. Finally, petitioners' assertion (Supp. Br. 7) that "DTA petitioners may not actually obtain DTA review at all" is baseless. If review and a stay are denied in *Bismullah*, the government would have to decide whether to pursue the alternative option spelled out by the District of Columbia Circuit of conducting new CSRTs. See *Bismullah*, 503 F.3d at 141. Even under that scenario, however, petitioners would be able to seek DTA review in the court of appeals if those new CSRTs determine that petitioners are enemy combatants.

Petitioners argue (Supp. Br. 8) that convening new CSRTs would entail the same obligation to collect the Government Information, and therefore the same delay, that the government would face were it to proceed with the current DTA cases under the court of appeals' ruling in *Bismullah*. Petitioners misunderstand the court of appeals' opinions and the nature of the burdens created by those decisions. In its supplemental opinion on rehearing, the Bismullah panel made clear that the Government Information it was requiring to be produced was the historical record of "reasonably available" material that was, in fact, reviewed and collected by the Recorder at the time of the tribunals. See *Bismullah*, 503 F.3d at 141-142. The government, however, has no reliable mechanism for identifying the historical "Government Information." As a result, as the panel acknowledged, the government was required to "search[] for all relevant information without regard to whether it is reasonably available," because it "can conceive of no other comprehensive method to ensure that [it] identif[ies] information that the Recorder could have examined." *Id.* at 141 (citation omitted). The panel also recognized—"in the Government's defense"—that it was reasonable that the government did not keep such records at the time. *Ibid.* ("We note in the Government's defense that CSRTs made hundreds of status determinations, including those under review in the present cases, before the DTA was enacted in December 2005 and therefore without knowing what the Congress would later specify concerning the scope and nature of judicial review."). The panel nevertheless held that production of those materials was required under its construction of the DTA and the existing rules governing CSRTs. The panel noted, however, that if the government cannot

"reconstruct the Government Information," then the government has an "alternative": "It can abandon its present course of trying to reconstruct the Government Information by surveying all relevant information in its possession without regard to whether that information is reasonably available, and instead convene a new CSRT." *Ibid.*

Convening new CSRTs, therefore, would not entail a reconstruction of the *historical* Government Information. As explained in the petition for a writ of certiorari in *Bismullah*, reconstruction of the historical record, where there is no reliable mechanism of identifying or limiting its contents, is extraordinarily time-consuming and resource intensive, and would "divert a significant portion of [the government's] intelligence, law enforcement, and military resources." Pet. at 15, *Bismullah*, *supra* (No. 07-1054). If the government were now to conduct new CSRTs under the *Bismullah* decision, it would not be facing the challenge of trying to reconstruct a *historical* record that no longer exists. Rather, the Department of Defense would proceed anew under the then-applicable CSRT rules and gather and retain the material that is called for by the rules and that pertains to the detainee's enemy combatant status. Those inquiries are much less time consuming than the reconstruction effort, which, as the court of appeals recognized, led the government to search "for all relevant information without regard to whether it is reasonably available." *Bismullah*, 503 F.3d at 141. Moreover, the government would know what its recordkeeping obligations were in advance. The government would retain the record when conducting new CSRTs, obviating any need for a post-hoc reconstruction of the record. Convening new CSRTs, therefore, would not involve the same delay

that would be required to proceed with the current DTA cases under *Bismullah*.

* * * * *

For the foregoing reasons, as well as for the reasons stated in our principal brief and first supplemental brief, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

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