

No. 06-1195

IN THE
Supreme Court of the United States

LAKHDAR BOUMEDIENE, *et al.*,
Petitioners,

v.

GEORGE W. BUSH, *et al.*,
Respondents.

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

MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF
AND SUPPLEMENTAL BRIEF FOR THE
BOUMEDIENE PETITIONERS

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**MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF
FOR THE *BOUMEDIENE* PETITIONERS**

Pursuant to Rules 25.5 and 25.6 of the Rules of this Court, Petitioners respectfully seek leave to file the attached supplemental brief.*

In its grant of certiorari, the Court stated: “As it would be of material assistance to consult any decision in *Bismullah, et al. v. Gates*, No. 06-1197, and *Parhat, et al., v. Gates*, No. 06-1397, currently pending in the United States Court of Appeals for the District of Columbia Circuit, supplemental briefing will be scheduled upon the issuance of any decision in those cases.” 127 S. Ct. 3078 (2007). The court of appeals recently issued an order denying rehearing en banc in *Bismullah* and *Parhat* that was accompanied by five separate opinions discussing the Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2680 (DTA). See *Bismullah v. Gates*, 2008 WL 269001 (D.C. Cir. Feb. 1, 2008).

In the time since the denial of rehearing, the government has petitioned for certiorari. See Pet., *Gates v. Bismullah*, No. 07-1054. The government has also filed a brief in opposition to a detainee’s motion for judgment as a matter of law under the DTA in the *Parhat* case, which further reveals the government’s starkly limited view of the court of appeals’ role under the DTA. See Corrected Resp. Br., *Parhat v. Gates*, No. 06-1397 (D.C. Cir. Feb. 7, 2008).

The *Bismullah* decision and opinions, as well as the government’s petition for certiorari in *Bismullah* and recent brief in *Parhat*, add further support to Petitioners’ argument that the DTA does not provide an adequate substitute for habeas corpus. Petitioners accordingly seek leave to file the attached brief discussing these new matters.

* Petitioners Al Odah, et al., in No. 06-1196 join in this motion.

Respectfully submitted.

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**SUPPLEMENTAL BRIEF
FOR THE BOUMEDIENE PETITIONERS**

Petitioners submit this supplemental brief to address new developments in proceedings under the Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2680 (DTA).¹

I. RECENT DEVELOPMENTS IN *BISMULLAH* UNDERSCORE THAT DTA REVIEW IS NOT AN ADEQUATE SUBSTITUTE FOR HABEAS

On February 1, 2008, the United States Court of Appeals for the District of Columbia Circuit denied the government's petition for rehearing en banc of that court's decision in *Bismullah v. Gates*, 501 F.3d 178 (D.C. Cir. 2007) (*Bismullah I*). See *Bismullah v. Gates*, 2008 WL 269001 (D.C. Cir. Feb. 1, 2008) (*Bismullah III*).² The court denied en banc rehearing more than six months after the original panel decision and more than two years after the first DTA petition was filed,³ during which time not a single hearing on the merits has taken place. The denial of rehearing leaves the panel decision in place, and so does not alter the DTA review procedures that the parties already addressed in their merits briefing in this case. See, e.g., Pet. Br. 26-33. The opinions accompanying the court's 5-5 fractured denial of rehearing do, however, underscore the fundamental unfairness of the CSRT procedures and the inadequacy of DTA review as a substitute for common law habeas.

1. *First*, several members of the lower court observed that CSRT procedures differ markedly from the hallmarks of a fair hearing under Anglo-American law. See *Bismullah III*,

¹ Petitioners Al Odah, et al., in No. 06-1196 join in this brief.

² The government's request for panel rehearing was also denied. See *Bismullah v. Gates*, 503 F.3d 137 (D.C. Cir. 2007) (*Bismullah II*).

³ See Pet. for Review, *Paracha v. Rumsfeld*, No. 06-1038 (D.C. Cir. Jan. 24, 2006).

2008 WL 269001, at *2 (Ginsburg, C.J., concurring⁴) (noting that detainees enjoy fewer procedural rights than would be afforded under the APA); *id.* at *4 (noting that more is at stake in the CSRT determination than is at stake in a probable cause determination). They recognized, for example, that CSRT determinations result from an accusatorial, rather than an adversarial, process, *see id.* at *4 (Ginsburg, C.J., concurring); *id.* at *11 (Brown, J., dissenting), and that CSRTs are presided over not by “independent decisionmaker[s],” but rather by decisionmakers who are “employed and chosen by the detainee’s accuser,” *id.* at *4 (Ginsburg, C.J., concurring).

Second, several members of the D.C. Circuit noted that under the CSRT procedures, “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, [and] no right to confront the witnesses against him.” *Bismullah III*, 2008 WL 269001, at *4 (Ginsburg, C.J., concurring). And although the Recorder has an obligation to make available to the CSRT all exculpatory evidence, the concurring judges further noted that, in practice, “the Recorder has not always fulfilled his obligations under the DOD Regulations.” *Id.* at *3 n.5.

Third, several members of the court of appeals observed that under the Defense Department rules, a detainee has “no lawyer to help him prepare his case.” *Bismullah III*, 2008 WL 269001, at *4 (Ginsburg, C.J., concurring). Instead, detainees have access only to “Personal Representatives whose sole duty is to assist, not defend, them.” *Id.* at *11 (Brown, J., dissenting).

2. As Petitioners have pointed out, these unfair CSRT procedures yield “a one-sided body of hearsay and second-hand summaries of evidence collected by the government with no meaningful input from the petitioner.” Pet. Br. 27.

⁴ Parenthetical notations of “concurring” and “dissenting” refer to statements of concurrence in and dissent from the denial of rehearing en banc.

The limited nature of DTA review, as interpreted by the D.C. Circuit in *Bismullah*, ensures that petitioners will have no opportunity to cure those deficiencies before the court of appeals.

The D.C. Circuit has held that the “record on review” is limited to “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.” *Bismullah I*, 501 F.3d at 180; *see also Bismullah II*, 503 F.3d at 142. Thus, detainees have no ability under the DTA to introduce exculpatory evidence if, for whatever reason, that evidence was not “reasonably available” to the government at the time of the CSRT hearing.

And as limited in scope as DTA review is under the *Bismullah* decisions, several members of the D.C. Circuit would contract that scope of review still further. Four judges would have held that the record on review should consist solely of the information that the Recorder actually forwarded to the CSRT panel. *Bismullah III*, 2008 WL 269001, at *8 (Randolph, J., joined by Sentelle, Henderson & Kavanaugh, JJ., dissenting).⁵

For purposes of this case, however, it does not matter which interpretation of the DTA record prevails in *Bismullah*. Even under the *Bismullah* panel’s view, which formed the backdrop for the merits briefing in this case, DTA petitioners cannot identify for the court exculpatory evidence that was not deemed “reasonably available” to the government at the time the CSRT was conducted. Thus, petitioners who can establish with extrinsic evidence that the government’s allegations against them are false⁶ are left without a

⁵ In its recently-filed petition for certiorari in *Bismullah*, the government continues to urge the adoption of this most narrow interpretation of the scope of DTA review. *See* Pet. 20-21, *Gates v. Bismullah*, No. 07-1054 (U.S. Feb. 14, 2008).

⁶ *See, e.g.*, Tr. 75-76 (discussing case of Murat Kurnaz); 06-1196 *El-Banna* Pet. Br. 36; *see also In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 470-71 (D.D.C. 2005).

remedy. See *Bismullah I*, 501 F.3d at 180 (limiting record on review under DTA to that information reasonably available to the government). Even prisoners who were able to identify for the CSRTs specific witnesses or exculpatory evidence—such as Petitioners Mohamed Nechla, who sought to introduce testimony by a former employer, and Hadj Boudella, who wished to introduce a decision of the Supreme Court of the Federation of Bosnia and Herzegovina—are left completely without a remedy if (as occurred) their CSRTs determined, utterly implausibly, that the proffered evidence was not “reasonably available.” See Pet. Br. 5. That is hardly a vision consistent with common law habeas.⁷

Finally, the fractured nature of the D.C. Circuit’s recent action does not bode well for the future of DTA proceedings. There is ample reason to believe that the D.C. Circuit will continue to engage in divided, incremental decisionmaking on threshold procedural issues on which Congress has provided no guidance, thus making DTA review far less speedy than the centuries-old remedy of habeas. See, e.g., *Bismullah III*, 2008 WL 269001, at *6 (Henderson, J., dissenting) (“[W]e are now only at the *preliminary stage* of that determination, that is, resolving procedural motions.”) (emphasis added). Judge Brown noted that it will take some time for the D.C. Circuit to determine the content of the “reasonably available” standard set forth in *Bismullah*, an issue that leaves “much to litigate.” *Id.* at *11 (dissenting opinion). DTA petitions will surely languish for years before the court of appeals reaches the merits in even a *single* case, let alone in the more than 180 other DTA cases that are currently pending. See Pet. 15,

⁷ If the interpretation of the DTA advanced by the government (and reflected in Judge Randolph’s dissent) ultimately prevails, even exculpatory evidence in the possession of the government could not be considered on DTA review if it had not previously been presented to the CSRT panel. See *Bismullah III*, 2008 WL 269001, at *9 (Randolph, J., dissenting) (stating that the “exculpatory and incriminatory” information in the government’s possession that was not produced to the CSRT panel “cannot be used in our judicial review of the Tribunal’s status determination”).

Gates v. Bismullah, No. 07-1054 (U.S. Feb. 14, 2008) (“*Bismullah* Pet.”).

The disposition of the government’s certiorari petition in *Bismullah* has no bearing on the Court’s decision in this case, because the government seeks only to *restrict* the scope of DTA review in *Bismullah* and thus make it a *less adequate* substitute for habeas. Nothing in the government’s certiorari petition would in any way strengthen the government’s arguments in this case. Rather, all signs show that DTA proceedings will continue for years before any petitioner receives a meaningful hearing on the merits.⁸

II. THE GOVERNMENT’S ARGUMENTS OPPOSING DTA RELIEF IN *PARHAT* REINFORCE PETITIONERS’ OBJECTIONS TO THE DTA

The government’s recent advocacy in another phase of the *Parhat* case—in which Mr. Parhat has sought DTA relief on the basis of the CSRT panel record (*i.e.*, under the cabined view of the DTA record advanced by the government)—also demonstrates the inadequacy of the DTA remedy.

The government has repeatedly argued in *Parhat* that the D.C. Circuit must defer to the CSRT on both factual determinations and the legal interpretation of the standard of detainability under the AUMF. *See* Corrected Resp. Br. 11, 25, 40, *Parhat v. Gates*, No. 06-1397 (D.C. Cir. Feb. 7, 2008) (“Gov’t *Parhat* Br.”). This is in stark contrast to common law habeas, where the court defers to neither the jailer’s interpretation of his legal authority nor his view of the evidence. *See, e.g., Bushell’s Case*, 124 Eng. Rep. 1006, 1007 (C.P. 1670) (“[O]ur judgment ought to be grounded upon our own inferences and understandings, and not upon [the detaining au-

⁸ The D.C. Circuit ordered the government to produce the DTA record as defined in *Bismullah* in several pending DTA cases no later than February 15, 2008. *See* Application for Stay of Judgment 16-17, *Gates v. Bismullah*, No. 07-1054 (U.S. Feb. 14, 2008). Although neither the Court nor the D.C. Circuit has suspended the orders in those cases, the government has not, to Petitioners’ knowledge, produced the DTA record as required. The government’s professed inability to do so further shows the inadequacy of the DTA process.

thority's]."); Sharpe, *Habeas Corpus in Canada*, 2 Dalhousie L.J. 241, 253 & n.62 (1975) (“[T]he court decided for itself on the evidence[.]”); *see also Frank v. Mangum*, 237 U.S. 309, 346 (1915) (Holmes, J., dissenting) (Habeas “cut[] through all forms” and “[came] in from the outside, not in subordination to the proceedings.”).

Moreover, although the Solicitor General stated repeatedly during oral argument in this case that the DTA permits review of “preponderance claims,” *see* Tr. 32, 56, 57, 64, the government *now* advocates that the DTA allows only for deferential review of whether the CSRT understood and applied the preponderance standard, not judicial review of whether the CSRT determination is actually supported by a preponderance of the evidence. *See* Gov’t *Parhat* Br. 16-17, 23. Thus, in the government’s view, the D.C. Circuit cannot grant relief under the DTA even if it believes the evidence tilts substantially against the CSRT determination.

Indeed, the government argues that the D.C. Circuit is not permitted even to “reweigh the evidence or the credibility of witnesses.” Gov’t *Parhat* Br. 23. Again, this is in contrast to the practice of plenary review at common law habeas in cases where the petitioner had no previous adversarial proceeding. *See* Pet. Br. 23-24. And if the D.C. Circuit cannot weigh evidence or evaluate credibility, it is highly unlikely that any DTA case could ever succeed. Except in the rare case where the government alleges no connection to a nation, organization, or person against whom military force was authorized, the government will almost always have some evidence—even if only an unsigned intelligence report that contains naked, unsourced assertions—that, if assumed to be credible, could support an enemy-combatant determination. An inability to assess credibility turns the “rebuttable presumption in favor of the Government’s evidence” (Pet. App. 82a) into an irrebuttable presumption.

The “remedy” that awaits petitioners at the conclusion of the DTA epic is likely no remedy at all. Although the Solicitor General ventured at oral argument in this case that the DTA presents “no obstacle” to a remedy of release (Tr. 35),

the government argues in *Parhat* that the appropriate remedy where the record on review does not support an enemy combatant determination, or even where the CSRT applied an illegal substantive standard of detention, is a remand for a new CSRT in which the government may have another try—more than six years after the fact. *See* Gov’t *Parhat* Br. 55-57.⁹ Furthermore, under the prevailing *Bismullah* decisions, the government has the option of either collecting Government Information for DTA review *or* convening a new CSRT, complete with all of the procedural inadequacies cited above. *See Bismullah III*, 2008 WL 269001, at *3 (Ginsburg, C.J., concurring). So construed, this structure cannot lead to a judicial order of release and is thus no substitute for habeas.¹⁰

Indeed, DTA petitioners may not actually obtain DTA review at all. The government has indicated that, in light of its professed inability (or refusal based on national security concerns) to comply with DTA procedures, it may instead choose to seek remand for all DTA petitioners for new CSRTs. *See Bismullah* Pet. 14 (arguing that *Bismullah* requires either “a massive and practically infeasible attempt to recreate the Government Information” or “an en masse remand of DTA cases for an additional round of CSRT proceedings”); *id.* at 19 (discussing the “likely event” that the government “cannot comply” with what it describes as *Bismullah*’s “extraordinary record production” demands). But remands for new CSRTs will merely provide the government with opportunities for more delays. *See, e.g.*, Objection to Status Report & Second Supplement to Emergency Mot. for

⁹ *See also Bismullah* Pet. 27 (suggesting that the appropriate remedy where a petitioner challenges either procedural failings or the sufficiency of the evidence is remand).

¹⁰ Also in *Parhat*, the government persists in its argument that subjective intent is irrelevant to the substantive standard of detainability. *See* Gov’t *Parhat* Br. 47-50. This confirms a point on which the government remained silent in its merits briefing in this case: a little old lady in Switzerland who passively, and without knowledge, provided nonmilitary support to a group engaging in terrorism, is nonetheless detainable. Nothing in the AUMF or the laws of war supports this extreme position. *See* Pet. Br. 34.

Immediate Equitable Relief 1-2, *Al Gingo v. Gates*, No. 07-1090 (D.C. Cir. Feb. 6, 2008) (noting, in the one case in which the government has ordered a new CSRT, that the government initially promised the D.C. Circuit to convene the CSRT “in late October,” but the CSRT hearing had still not been held as of February 6).

In any event, it is difficult to see how new CSRTs could be conducted—much less with any speed—given that they would require the very same action that the government now claims it cannot and will not perform, namely canvassing the Government Information, culling all exculpatory evidence, and preserving the same for review by the court of appeals. *See Bismullah II*, 503 F.3d at 142. Thus, a remand for a new CSRT merely postpones the issue, thereby making any promise of review under the DTA all the more illusory. Moreover, if the government truly cannot assemble the record as described in *Bismullah I*, then it cannot comply with the regulations setting forth the CSRT procedures. In light of the apparent impossibility of complying with the CSRT procedures, it is difficult to imagine how the DTA can possibly serve as an adequate substitute for common law habeas. *See Bismullah III*, 2008 WL 269001, at *17 (Ginsburg, J., concurring) (suggesting that the government’s proposed understanding of the record under the DTA would not provide for “meaningful” review of CSRT determinations).

Not only will successful DTA petitioners face merely another flawed CSRT on remand, but the government may well charge them with an entirely new set of allegations (backed up by yet more secret evidence) when the new CSRT is instituted.¹¹ Thus, a petitioner who successfully challenges a

¹¹ For example, in *Al Gingo*, although the petitioner offered extrinsic evidence and governing law demonstrating that the CSRT had erred in finding him an enemy combatant, and the petitioner sought expedited DTA review of that determination, the government obtained a remand for a new CSRT. *See* Objection to Status Report and Second Supplement to Emergency Mot. for Immediate Equitable Release 1-2, *Al Gingo v. Gates*, No. 07-1090 (D.C. Cir. Feb. 6, 2008). Six years after first incarcerating the peti-

CSRT determination under the DTA will find himself before yet another CSRT with new evidentiary allegations that, once again, he must face without the aid of counsel or access to outside evidence. A successful challenge to the second CSRT determination under the DTA would, no doubt, yield a third CSRT with still new allegations. Petitioners who, in good faith, sought their freedom through the CSRT/DTA process will instead find themselves caught in an infinite loop of anticipation and despair. This is certainly not an adequate substitute for habeas, and nothing about the recent disposition of *Bismullah* obscures that central fact.

tioner, the government substituted new allegations before the new CSRT. *See id.* at 6-7.

Respectfully submitted.

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