

[ORAL ARGUMENT SCHEDULED ON MAY 15, 2007]

Nos. 06-1197, 06-1397

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

HAJI BISMULLAH, et al.,
Petitioners,

v.

ROBERT M. GATES, SECRETARY OF DEFENSE,
Respondent.

HUZAIFA PARHAT, et. al.,
Petitioners,

v.

ROBERT M. GATES, SECRETARY OF DEFENSE,
Respondent.

BRIEF FOR RESPONDENT
ADDRESSING PENDING PRELIMINARY MOTIONS

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici

In No. 06-1197, petitioners are Haji Bismullah, and Haji Mohammad Wali, as next friend for Haji Bismullah.

In No. 06-1397, petitioners are Huzaiifa Parhat, Abdusabour, Abdusemet, Hammad Mehet, Jalal Jalaldin, Khalid Ali, Sabir Osman, and Jamal Kiyemba, as next friend for both Abdusabour and Khalid Ali.

In both cases, respondent is Robert M. Gates, Secretary of Defense.

B. Rulings Under Review

These cases are petitions for review from the decisions of the Department of Defense Combatant Status Review Tribunals. With respect to *Bismullah*, No. 06-1197, on January 29, 2005, the Department made a final determination that Petitioner Bismullah, ISN No. 968, is an enemy combatant. See App. 212.

Parhat, No. 06-1397, involves seven different enemy combatant petitioners. The final determination for petitioner Abdusabour, ISN No. 275, was made on January 23, 2005. The final determination for petitioner Khalid Ali, ISN No. 280, was made on January 25, 2005. The final determination for petitioner Sabir Osman, ISN No. 282, was made on January 29, 2005. The final determination for petitioner Jalal Jalaldin, ISN No. 285, was made on January 23, 2005. The final determination for petitioner Abdusemet, ISN No. 295, was made on January 29, 2005. The final determination for petitioner Huzaiifa Parhat, ISN No. 320, was made on February 20,

2005. The final determination for petitioner Hammad, ISN No. 328, was made on January 27, 2005.

C. Related Cases

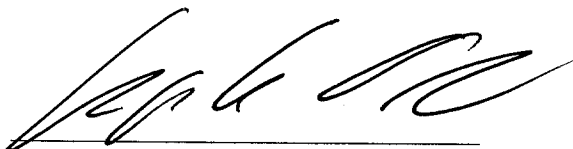
1. Petitioners in *Parhat* are parties to a pending habeas corpus case in district court. See *Kiyemba v. Bush*, No. 05-1509 (D.D.C.). In an appeal to this Court in that case, this Court held as to petitioners here that their claims are covered by Section 7 of the Military Commissions Act, and ordered that the cases be dismissed for lack of subject matter jurisdiction pursuant to *Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007) and provisions of the Military Commissions Act (28 U.S.C. § 2241(e)(1)-(2)). See *Kiyemba v. Bush*, No. 05-5487 (D.C. Cir. March 22, 2007).

2. The present cases were previously stayed pending this Court's ruling in *Boumediene v. Bush*, Nos. 05-5062, 05-5063 (D.C. Cir.) and *Al Odah v. United States*, Nos. 05-5064, 05-5095 through 05-5116 (D.C. Cir.). In its ruling in those appeals, this Court, *inter alia*, held that aliens detained at the U.S. military base at Guantanamo Bay, Cuba, do not possess rights under the U.S. Constitution. *Boumediene v. Bush*, 476 F.3d at 992. The detainees in those cases petitioned for review by the Supreme Court, which the Supreme Court denied on April 2, 2007.

3. The ruling in the present cases is likely to provide guidance for all cases filed under Section 1005(e)(2) of the Detainee Treatment Act. Currently, there are five other pending petitions filed under that statute in this Court:

- a. *Paracha v. Gates*, No. 06-1038.
- b. *Paracha v. Gates*, No. 06-1117.
- c. *Abdulzaher v. Gates*, No. 07-1031.
- d. *Madni v. Gates*, No. 07-1083.
- e. *Mahnut v. Gates*, No. 07-1066.

4. Counsel is not aware at this time of any other related cases within the meaning of D.C. Cir. Rule 28(a)(1)(C).



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GLOSSARY

ARB	Administrative Review Board
CSRT	Combatant Status Review Tribunal
DTA	Detainee Treatment Act
MCA	Military Commissions Act

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**BRIEF FOR RESPONDENT
ADDRESSING PENDING PRELIMINARY MOTIONS**

Pursuant to this Court's March 14, 2007 orders, we address the preliminary procedural motions filed in the above-captioned cases.

STATEMENT OF JURISDICTION

These petitions for review were filed in this Court pursuant to Section 1005(e)(2) of the Detainee Treatment Act of 2005 ("the DTA"), Pub. L. No. 109-148, tit. X, § 1005(e)(2), 119 Stat. 2680, 2739, which grants exclusive jurisdiction to this Court to review the "final decision" of a Combatant Status Review Tribunal

(“CSRT”) that “an alien is properly detained as an enemy combatant.” The petition in *Bismullah* was filed on June 9, 2006 on behalf of one petitioner. The petition in *Parhat* was filed on December 4, 2006 on behalf of seven petitioners. The DTA does not contain a time limit for filing a petition; these petitions are accordingly timely under either 28 U.S.C. § 1658 (four-year limit after claim accrues) or § 2401 (six-year limit after claim accrues).

STATEMENT OF THE ISSUES

These cases involve this Court’s review of military determinations, based partially upon classified information, that petitioners are enemy combatants. The procedural motions now before the Court raise several issues.

1. To deal with the obvious national security implications arising in the context of review of decisions made by the U.S. military, based on classified information, regarding alien enemy combatant detainees held at a secure naval installation outside the United States, the Government has proposed a protective order that would: allow qualified private counsel access to classified information; create a confidential legal mail system so that counsel can consult with detainees on matters directly relating to their challenges to CSRT determinations; and allow a limited number of in-person visits between counsel and a represented detainee.¹ The

¹ The Government’s proposed order is reprinted in the Appendix filed in this Court with petitioners’ opening brief (see App. 72-135), and is discussed below.

Government has done so even though neither the Constitution nor the governing DTA requires access to classified information or enemy combatant detainees.

The first question presented is whether this Court should enter the Government's proposed protective order or instead, as petitioners request, should impose in these special proceedings the protective order used in the procedurally very different district court habeas litigation, which created substantial disagreements and security problems in its implementation.

2. This Court's review under the DTA of final CSRT determinations follows a familiar administrative-type review model. The second question presented is whether this review is to occur on the basis of the record before the CSRT or whether, instead, this Court should allow petitioners to engage in wide-ranging discovery, and should attempt to engage in its own factfinding.

3. The third question presented is closely related to the second one, and concerns whether this Court should agree with petitioners' proposal to appoint a special master to enable the type of fact exploration that petitioners urge.

4. The fourth question presented is whether the *Parhat* petition, which comprises seven enemy combatant challenges to seven different CSRT determinations, should be divided into individual DTA petitions.

PERTINENT STATUTORY PROVISION

Section 1005(e)(2) of the DTA, as amended by Section 10 of the Military

Commissions Act of 2006 (“the MCA”), § 7, Pub. L. No. 109-366, 120 Stat. 2600, is reprinted in full in the Addendum to this brief.

STATEMENT OF THE CASE

As described above, this brief addresses solely procedural motions in two actions filed under the DTA. Pursuant to this Court’s orders of March 14, 2007, we are not here responding to petitioners’ factual assertions (many of which the Government disputes), or addressing the merits of petitioners’ DTA challenges.

STATEMENT OF FACTS

A. The Combatant Status Review Tribunals (“CSRTs”)

1. On September 11, 2001, members of the al Qaeda terrorist network hijacked four commercial airliners, and crashed three of them into targets in the Nation’s financial center and its seat of government. The attacks killed almost 3,000 people, injured thousands more, destroyed billions of dollars in property, and exacted a heavy toll on the Nation’s infrastructure and economy.

The President took immediate action to prevent additional attacks, and Congress swiftly approved his use of “all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001.” Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

The President ordered U.S. Armed Forces to subdue both the al Qaeda terrorist

network and the Taliban regime harboring it in Afghanistan. Active combat with al Qaeda, the Taliban, and associated forces remains ongoing. During these operations, the United States and its allies, consistent with the law and settled practice of armed conflict, seized many hostile persons and detained a small proportion of them as enemy combatants. Approximately 385 of these enemy combatants are being held at the U.S. Naval Base at Guantanamo Bay, Cuba. Each of the Guantanamo Bay detainees was captured abroad and is a foreign national.

2. In 2004, the Supreme Court held in *Rasul v. Bush*, 542 U.S. 466, 484 (2004), that Guantanamo detainees could seek in federal district court relief under the general habeas jurisdiction statute, 28 U.S.C. § 2241. Hundreds of habeas actions were filed in the district court by or on behalf of Guantanamo detainees. District Judge Green, in coordinating these many cases, ordered the Government to file factual returns – generally containing classified information – in many of the habeas cases, and ordered that the returns be provided to counsel for the detainees. *Rasul v. Bush*, No. 04-1254, Order at 8 (D.D.C. Sept. 20, 2004). In order to address civilian counsel access to classified materials and other matters relating to access to detainees at Guantanamo, the district court entered a protective order in November 2004 (“the Habeas Protective Order”). *In re Guantanamo Detainee Cases*, No. 02-299, et al., Amended Protective Order (D.D.C. Nov. 8, 2004).

Almost immediately, serious problems and disagreements arose over the

implementation of the Habeas Protective Order. For example, the parties disputed whether the order incorporated the standard “need-to-know” requirement that is a part of the Executive Order governing access to classified information. See *In re Guantanamo Detainee Cases*, No. 02-299, et al., Order (Jan. 31, 2006). That dispute led to an appeal to this Court (see *Al Odah v. United States*, Nos. 05-5117 through 05-5127), which has not been resolved.

In addition, conduct by private attorneys involving mail and visits to the military base at Guantanamo resulted in “situations threatening the safety and security of [Guantanamo military] personnel and detainees as a result of inadequacies in the Protective Order.” App. 137.² These problems are described in part in the declaration of U.S. Navy Commander Patrick McCarthy (App. 136-40). As Commander McCarthy notes, his declaration recounts “only a sampling of the problems we have experienced at Guantanamo Bay under the Protective Order.” App. 140.

Commander McCarthy describes how security procedures were broken by private attorneys through, among other acts, taking photographs or making sound recordings while on the base. App. 137-40. Further, the sheer number of civilian attorney visits, which were not limited by the Habeas Protective Order, “consumed

² “App. ___” citations refer to pages in the Appendix filed by petitioners in this Court with their opening brief.

enormous resources and disrupted day-to-day operation of the base.” 152 Cong. Rec. S10269 (Sen. Kyl). Congress recognized that the system of habeas litigation was extraordinarily burdensome and was causing serious problems in the war effort against al Qaeda and the Taliban.

3. In response, Congress enacted the DTA and the MCA. These statutes provide for exclusive review in this Court of CSRT decisions, and repeal habeas jurisdiction and the district court habeas system that Congress found so problematic. Under the DTA, this Court’s task is to directly review the military determination that a petitioner is an enemy combatant. DTA § 1005(e)(2).

Enemy combatant determinations are made by Department of Defense CSRTs, which are modeled on the tribunals created under Article 5 of the Third Geneva Convention, implemented by Army Regulation 190-8. That process under the Geneva Convention provides for a tribunal of three military officers to determine a person’s status.

4. Each Guantanamo detainee (including the petitioners here) received a formal adjudicatory hearing before a CSRT. The CSRT procedures relevant to the petitioners here³ were established under orders by the Deputy Secretary of Defense and the Secretary of the Navy (see App. 1, 5), acting under authority designated by

³ Revised CSRT procedures were issued in July 2006: <http://www.defenselink.mil/news/Aug2006/d20060809CSRTProcedures.pdf>.

the Secretary of Defense. These procedures have been recognized by Congress. DTA § 1005(e)(2) (authorizing and detailing court “Review of Decisions of Combatant Status Review Tribunals”).

CSRT procedures were created “to determine, in a fact-based proceeding, whether the individuals detained * * * at the U.S. Naval Base Guantanamo Bay, Cuba, are properly classified as enemy combatants and to permit each detainee the opportunity to contest such designation.” App. 5. They define an enemy combatant as an “individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners.” App. 1; see App. 8. Enemy combatants “include[] any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces.” App. 1, 8.

a. These procedures created CSRTs composed of “three neutral commissioned officers” who were not involved in the “apprehension, detention, interrogation, or previous determination of status of the detainee.” App. 1-2; see App. 8. One of the tribunal members must be a Judge Advocate. App. 2. Each tribunal “determine[s] whether a preponderance of the evidence supports the conclusion that each detainee meets the criteria to be designated as an enemy combatant,” and shall “make a written assessment as to each detainee’s status.” App. 8; see App. 3. “[T]here shall be a rebuttable presumption in favor of the Government’s evidence.” *Ibid.*; see App. 13.

A CSRT is “free to consider any information it deems relevant,” and “may consider hearsay evidence, taking into account the reliability of such evidence in the circumstances.” App. 13.

b. Another military officer served as the Recorder, who provides the CSRT with the information generated with regard to a detainee. App. 2. The Recorder thus obtained and examined “the Government Information” (App. 17), defined 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” (App. 10).

The Recorder presented to the CSRT “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 custody of U.S. or allied forces.” App. 17. If the Government Information “contains evidence to suggest that the detainee should not be designated as an enemy combatant, the Recorder shall also provide such evidence to the Tribunal.” *Ibid.*

The Recorder also made a record of the proceedings, which consists of all the documentary evidence presented to the Tribunal, the transcript of all witness

testimony, a written report of the Tribunal's decision, and an audio recording of the proceedings (except proceedings involving deliberation and voting by the members).

App. 2, 9; see App. 18.

c. The detainee may participate in the CSRT proceedings in several ways.

First, a personal representative was assigned to each detainee and performs several functions on behalf of the detainee. This personal representative is a military officer who "assist[s] the detainee in connection with the [CSRT] review process." App. 1. The representative "explain[s] the nature of the CSRT process to the detainee." App. 19; see App.20-21 (guidelines for explaining CSRT process). The personal representative reviews any reasonably available, relevant information in the possession of the Department of Defense, and may share unclassified information with the detainee. App. 1. And the personal representative assists the detainee in collecting relevant and reasonably available information, and in presenting information to the tribunal. App. 19. The personal representative may also "comment upon classified information * * * that bears upon the presentation made on the detainee's behalf." App. 20.

Second, the detainee was provided an interpreter, and may attend all CSRT proceedings, except the deliberations and voting by the CSRT, or for testimony and other matters "that would compromise national security if held in the presence of the detainee." App. 2; see App. 11.

Third, the detainee has the right to testify or otherwise address the Tribunal in oral or written form, but cannot be compelled to testify, and may “introduce relevant documentary evidence.” App. 3. The CSRT may be “postpone[d] * * * to provide the detainee or his Personal Representative a reasonable time to acquire evidence deemed relevant and necessary to the Tribunal’s decision.” App. 12.

Fourth, the detainee may call reasonably available, relevant witnesses. App. 2; see App. 11. The CSRT shall “determine the reasonable availability of witnesses.” App. 2-3. If a witness is not available, “written statements * * * may be submitted” instead. App. 3; see App. 11. The CSRT President must “document the basis for [the] decision” that a witness is not reasonably available or relevant, including “efforts undertaken to procure the presence of the witness and alternatives considered or used in place of that witness’s in-person testimony.” App. 13.

d. A “Legal Advisor” to the CSRT “review[s] each Tribunal decision for legal sufficiency.” App. 9. This legal review must “specifically address Tribunal decisions regarding reasonable availability of witnesses and other evidence.” App. 16. Further, the Legal Advisor is available to advise on legal, evidentiary, procedural, or other matters. App. 9.

After reviewing the CSRT decision, the Legal Advisor forwards the record and Tribunal recommendation to the Director, CSRT, who reviews the Tribunal’s decision and “may approve the decision and take appropriate action, or return the record to the

Tribunal for further proceedings.” App. 16. Once the Director approves a decision, “the case is considered final.” App. 16.

Out of 558 CSRTs conducted as of March 2005, 38 resulted in determinations that detainees no longer met the criteria to be enemy combatants. See CSRT Summary, <http://www.defenselink.mil/news/Mar2005/d20050329csrt.pdf>.

e. After a CSRT makes its determination, detainees have an opportunity to present new evidence to the Defense Department relating to their status. In the DTA, Congress required that new evidence reviews be conducted periodically when new information relating to the status of a detainee becomes available. See DTA § 1005(a)(1) & (3) (directing Secretary to promulgate procedures that, among other things, “provide for periodic review of any new evidence that may become available relating to the enemy combatant status of a detainee”).

The Department’s Administrative Review Board (“ARB”) procedures provide for the annual consideration whether continued detention of an enemy combatant is appropriate. See ARB Mem., Enc. 13 (July 14, 2006) (latest version of ARB procedures) (<http://www.defenselink.mil/news/Aug2006/d20060809ARBProceduresMemo.pdf>). In the ARB proceedings, the detainee is allowed to “present information relevant to his continued detention, transfer, or release.” *Ibid.* The ARB process does not reevaluate a detainee’s enemy combatant status, but instead determines whether an enemy combatant “should be released, transferred, or continue

to be detained” based on several factors, including whether the detainee “represents a continuing threat.” ARB Mem., § 1.a.

“[N]ew information” presented during an ARB that “relat[es] to the enemy combatant status” of a detainee also “shall be brought to the attention of the Deputy Secretary of Defense * * * as soon as practicable.” ARB Mem., Enc. 13. The Deputy Secretary of Defense “shall review the new evidence” and decide whether to “direct that a [CSRT] * * * convene to reconsider the basis of the detainee’s enemy combatant status in light of the new information.” *Ibid.* New information also may be considered outside of the ARB process. See generally DTA § 1005(a)(3).⁴

B. Petitioners’ Circumstances and These Cases

Petitioner Bismullah was captured in Afghanistan in 2003, and has been detained as an enemy combatant since that time.⁵ In a hearing held on November 30, 2004, a CSRT determined that he is an enemy combatant. In June 2006, Haji

⁴ Once a detainee has been identified for release pursuant to an ARB, he might not be immediately transferred out of Guantanamo, because it could be difficult to locate a country that will accept him. A CSRT based on new material could be convened while the detainee is awaiting release, because the purpose of a CSRT – to determine if an individual was properly classified as an enemy combatant – is different from the purpose of an ARB.

⁵ In their opening brief, petitioners make various assertions concerning their activities and their captures, as well as conditions at Guantanamo. The Government strongly disputes many of these claims and will present its response in the actual CSRT review proceedings before this Court. Pursuant to this Court’s briefing order, such a factual discussion does not belong in this brief addressing the pending procedural motions.

Mohammad Wali filed a petition for review in this Court under the DTA. Wali states that he is Bismullah's brother, and is acting as his "next friend." Pet. at 6-7. Counsel has been allowed to visit Bismullah in person twice at Guantanamo (in June and August 2006), but has not submitted anything to this Court signed by Bismullah to suggest that Bismullah supports this lawsuit or wants counsel to represent him.

Parhat includes seven petitioners, who are ethnic Uighurs, alleging that they were captured in Pakistan in approximately December 2001. Pet. ¶ 54. Each was determined to be an enemy combatant in separate CSRT proceedings. See *id.* ¶ 137. These petitioners were each involved in a habeas case in district court that this Court recently ordered to be dismissed. See *Kiyemba v. Bush*, No. 05-5487 (D.C. Cir. March 22, 2007).

Petitioners seek to recreate in this Court the defunct habeas litigation regime that Congress emphatically rejected. Specifically, petitioners would have this Court reimpose the Habeas Protective Order and provide for discovery and a factfinding mechanism through appointment of a special master. Indeed, petitioners have specifically nominated Magistrate Judge Kay for this position, the same magistrate judge who was active in the habeas litigation regime. We instead propose a protective order designed for the new DTA proceedings exclusively in this Court, and assert that this Court's review is to be undertaken on the basis of the records developed by the CSRTs.

SUMMARY OF ARGUMENT

In considering the numerous motions pending before the Court, it is essential to keep in mind what this litigation is actually about. At bottom, there is only one question presented: Should petitioners, who are detainees captured on a battlefield during a time of war, be given unprecedented access to our Nation's courts and to classified information, even after Congress emphatically rejected such an approach?

Ignoring the obvious answer to this question, petitioners seek three decisions from this Court in an attempt to recreate the habeas regime that Congress recently abolished. First, petitioners move for the entry of the district court protective order, which has no legal basis and has been proven to be flawed, unworkable, and violative of basic principles of separation of powers. Second, petitioners request extensive discovery and detailed fact-finding that is inconsistent with this Court's historical review of agency decisions and Congress's intent in enacting the DTA. Third, petitioners seek the appointment of a special master (indeed, the same special master who handled the district court proceedings) to assist with this free-wheeling factual exploration. As explained below, this court should reject every one of these interrelated requests.

I. First, this Court should reject petitioners' request for the district court Habeas Protective Order. The Court should adopt the Government's procedural order that: (1) provides properly cleared counsel access to most classified information in

a CSRT record; (2) creates a confidential legal mail system for counsel to consult with detainees regarding their DTA cases; (3) allows a sufficient number of in-person counsel visits to detainee clients at Guantanamo; and (4) in suits filed by “next friends” or pro se petitioners, permits counsel a lengthy visit to Guantanamo in person to seek authorization to represent the detainee.

There are strong reasons for this Court to refuse to reimpose the Habeas Protective Order in these new proceedings. First, the Habeas Protective Order is not appropriate for review under the DTA, a different review statute that calls for a different protective order. Second, the Habeas Protective Order had policing and enforcement difficulties in its confidential legal mail system, and allowed limitless in-person lawyer visits to Guantanamo. These provisions caused serious security and resource problems at Guantanamo – problems that Members of Congress specifically identified in replacing the habeas litigation regime. Third, Congress unambiguously rejected the Habeas Protective Order regime when it repealed habeas jurisdiction and replaced it with CSRT review by this Court. Finally, the order proposed by the Government provides for meaningful participation by counsel and places proper emphasis on protecting national security

The Government’s reasonable proposal obviates a separation of powers clash because it enables this Court to properly perform its CSRT review function by allowing appropriate private counsel participation, while protecting essential security

interests in wartime. Petitioners' objections to the proposed order are meritless. First, a confidential legal mail system with a careful definition of legal mail and an enforcement mechanism is needed because of past abuses that threatened security at Guantanamo and to limit use of the confidential mail system to correspondence directly related to this Court's DTA review. Second, the number of in-person counsel visits to the Guantanamo military facility is limited to three, a plainly sufficient system for litigating the straightforward administrative review based upon the agency record, provided for by Congress. And the proposal to allow a single separate visit to seek authorization to represent a detainee ensures detainees an opportunity to consult with counsel in "next friend" suits. At the same time, the limits we propose respect detainee decisions not to authorize representation, and reduce the burden created at Guantanamo by the habeas regime.

II. Second, petitioners' request for discovery should be denied. Review in this case is of a final agency decision, and it is well established that such review is normally based on the record developed by the relevant agency. This scope of review is confirmed by: Congress's decision to lodge review in this Court and not a district court; the legislative history of the DTA and MCA; the applicable Federal Rules of Appellate Procedure; and the point that a factfinding role by this Court would lead to more extensive review than has ever historically been provided under the habeas statute in this context.

The fact that the DTA authorizes procedural challenges does not necessitate or justify factfinding by this Court. Most procedural challenges, including every challenge cited by petitioners, should be reviewable on the basis of the agency record, as the CSRT procedures provide that the foundation for key procedural decisions, such as evidentiary rulings, must be reflected in the CSRT record. Even in rare instances in which a procedural challenge cannot adequately be reviewed based upon that record, this Court's precedents call for a remand to the agency, not factfinding in the first instance by a court. Such principles should apply with even more force here, where the military is entitled to the highest level of deference in establishing and applying procedures used in connection with the detention of the enemy during wartime.

Petitioners are also flatly wrong in suggesting that discovery must be allowed because of their desire to show that CSRT Recorders failed to properly compile the records; rather, a strong showing of bad faith must be presented before this Court will look behind an agency's compilation of the record. Such a showing has not been made here.

III. Third, petitioners request for appointment of a special master should be declined. These cases are standard administrative law matters that should not necessitate the assistance of a special master. Indeed, such an appointment would constitute an improper step down the path to recreating the habeas litigation regime

rejected by Congress.

IV. Finally, the *Parhat* petition, which comprises seven separate challenges to seven separate CSRT determinations, should be divided into individually distinct DTA proceedings.

ARGUMENT

I. **The Nature of this Dispute Requires Carefully Circumscribed Review by this Court and Careful Procedures for Counsel Access.**

The scope of this Court's review and every procedural issue before the Court must be viewed under the appropriate analytical lens. That lens consists of several elements, including: (1) the historically narrow role for the courts in evaluating wartime-detention decisions (see, e.g., *Yamashita v. Styer*, 327 U.S. 1, 12 (1946)); (2) the recent plurality decision in *Hamdi v. Rumsfeld*, 542 U.S. 507, 538 (2004), confirming this limited roll even with respect to the detention of U.S. citizens; (3) Congress's enactment of the DTA and the MCA, eliminating habeas review for Guantanamo detainees; (4) the fact that Guantanamo detainees do not possess any constitutional rights; and (5) long-standing separation of powers principles, which preclude the courts from aggressively stepping in to impose onerous procedural requirements on the Executive Branch during a time of war.

A. The power to make war includes at its core the power to detain enemy fighters. As the Supreme Court has explained, "[t]he war power * * * is not limited

to victories in the field, but carries with it the inherent power to guard against the immediate renewal of the conflict.” *Yamashita*, 327 U.S. at 12; *Hamdi*, 542 U.S. at 519 (“detention to prevent a combatant’s return to the battlefield is a fundamental incident of waging war”). The process granted to members of military forces captured on a foreign battlefield typically is that reflected in Article 5 of the Geneva Convention and Army Regulation 190-8, which provide, as do the CSRTs, for a military tribunal to determine the status of a detainee, and afford detainees neither a right to counsel nor access to classified information (nor, for that matter, review by a federal court). See Army Reg. 190-8, § 1-6.e(3) & (5); *Hamdi*, 542 U.S. at 538 (plurality op.) (reasoning that constitutional due process standards “could be met by an appropriately authorized and properly constituted military tribunal” under Army Reg 190-8).

These military procedures do not include a judicial review mechanism. And there is no significant history of federal court involvement in military determinations to hold enemy combatants abroad during ongoing hostilities. See *Johnson v. Eisentrager*, 339 U.S. 763, 774 (1950) (“[e]xecutive power over enemy aliens, undelayed and unhampered by litigation, has been deemed, throughout our history, essential to war-time security”); *Hamdi*, 542 U.S. at 524 (dissent could “point to no case or other authority for the proposition that those captured on a foreign battlefield * * * cannot be detained outside the criminal process”); 152 Cong. Rec. S10404 (Sen.

Sessions) (recalling that “[w]e held very large numbers of enemy soldiers in this country during World War II” but “[t]hey did not sue our Government seeking release”).

Most precedents dealing with court review of military detainees involve circumstances where the military has imposed criminal sanctions (see, e.g., *Yamashita*, 327 U.S. at 5); in those circumstances, habeas review is extraordinarily narrow. Normally, habeas courts provide only the most limited factual review of Executive Branch detention determinations. *INS v. St. Cyr*, 533 U.S. 289, 305-06 (2001). (“writ of habeas corpus has always been available to review the legality of Executive detention,” but, “other than the question whether there was some evidence to support the order, the courts generally did not review the factual determinations made by the Executive”). In the context of wartime military criminal sanctions, judicial involvement is even more deferential. At most, “courts may inquire whether the detention complained of is within the authority of those detaining the petitioner,” and such determinations are “not subject to judicial review merely because they have made a wrong decision on disputed facts.” *Yamashita*, 327 U.S. at 8, 23.

B. It is with this background in mind that the Supreme Court in *Hamdi* addressed the process due a U.S. citizen to challenge a military determination that he is an enemy combatant. Nothing in that opinion suggests process remotely comparable to that sought by petitioners in this Court, nor does it support their

criticisms of the CSRT procedures. Indeed, the Supreme Court plurality spoke favorably about the Army procedures upon which the CSRT proceedings are based and share most important elements.

The Court plurality began by stating that the Due Process Clause would be satisfied by a straightforward and rudimentary procedure fashioned for wartime detention: “notice of the factual basis for his [enemy combatant] classification, and a fair opportunity to rebut the Government’s factual assertions before a neutral decisionmaker.” 542 U.S. at 533. Within that general framework, the proceedings “may be tailored to alleviate their uncommon potential to burden the Executive.” *Ibid.* To that end, “[h]earsay * * * may * * * be accepted,” and there may be “a presumption in favor of the Government’s evidence.” *Id.* at 533-34. This evidence may consist of “documentation regarding battlefield detainees already * * * kept in the ordinary course of military affairs.” *Id.* at 534. This documentation can be presented by having a “knowledgeable affiant * * * summarize these records to an independent tribunal.” *Id.* at 535.

Courts, in reviewing “an administrative record developed after an adversarial proceeding” with “process at least of the sort” detailed above, have properly utilized the “‘some evidence’ * * * standard of review.” *Id.* at 537. To this end, while not specifically resolving the viability of the Army Regulation 190-8 process under the Due Process Clause, the Court explained that it was “possibl[e] that the [due process]

standards we have articulated could be met by an appropriately authorized and properly constituted military tribunal.” *Id.* at 538. Indeed, the Court explained, specifically citing Army Regulation 190-8, that “military regulations *already provide for such process* in related instances.” *Ibid.* (emphasis added). And, even when there was *no* formal administrative process, the Court expressly rejected “extensive discovery of various military affairs” in a federal court. *Id.* at 528. Instead, it stated that the “factfinding process [must be] both prudential and incremental.” *Id.* at 539. Rather than discovery, the Court stated that a habeas petitioner should be allowed simply “to present his own factual case to rebut the Government’s return.” *Id.* at 538.

C. The Defense Department established the CSRT procedures using this baseline set forth by the Supreme Court. And it is the limited administrative review model of a formal military determination – as opposed to the habeas court’s review directed by the Supreme Court when no formal military process had been conducted – that Congress authorized in enacting the DTA and the MCA. Indeed, the construction of the CSRTs mirrors in many respects (and are more protective than in certain respects) the procedures described by the Supreme Court as “already” existing in Army Reg. 190-8 and calling for administrative-type court review (542 U.S. at 538).⁶ The review scheme enacted by Congress seems plainly designed to invoke the

⁶ Army Reg. 190-8, like the CSRT process, provides for a tribunal composed of three military officers (Army Reg. 190-8 § 1-6(c)); provides that proceedings involving classified information are not open to the detainee (*id.* § 1-6(e)(3), (5));

Supreme Court plurality's identification of review of such determinations upon the administrative record developed by the military. *Hamdi*, 542 U.S. at 537-38.

D. While the military and statutory procedures were based on the Court's plurality decision in *Hamdi* and Army Regulation 190-8, unlike the situation in *Hamdi*, the Constitution does not apply in the circumstances at bar. *Boumediene v. Bush*, 476 F.3d 981, 991 (D.C. Cir. 2007). Thus, not only is there plainly no right to counsel under the Sixth Amendment in these circumstances, the Due Process Clause also cannot here provide such a right or require other procedures. See *Boumediene*, 476 F.3d at 991 ("the [Supreme] Court concluded that with respect to aliens, 'our rejection of extraterritorial application of the Fifth Amendment was emphatic'"); see also *id.* at 1011 (Rogers, J., dissenting) (Guantanamo "detainees cannot rest on due process under the Fifth Amendment" because "the Constitution does not afford rights to aliens in this context"). Instead, whatever right petitioners "enjoy in regard to these cases are therefore statutory rights only." *People's Mojahedin Organization of Iran v. U.S. Dept. of State*, 182 F.3d 17, 22 (D.C. Cir. 1999).

And in evaluating the scope of these "statutory rights," national security and separation of power concerns play a dominant role. *Ibid.* In *People's Mojahedin*, this

allows a detainee to call "reasonably available" witnesses or submit written statements if the witness is not available (*id.* § 1-6(e)(6)); does not provide for counsel (see *id.* § 1-6); allows, but does not compel, the detainee to testify (*id.* § 1-6(e)(7)-(8)); imposes a preponderance of the evidence standard (*id.* § 1-6(e)(9)); and provides for a recorder to prepare the tribunal record (*id.* § 1-6(f)-(g)).

Court addressed judicial review of administrative determinations in an area, like this one, fraught with national security implications and where the Constitution did not apply. (That case involved judicial review of a decision by the Secretary of State designating an entity as a Foreign Terrorist Organization pursuant to 8 U.S.C. § 1189.) This Court was careful to engage in a circumscribed form of administrative review – review based only upon the record prepared by the State Department, and review that declined to address issues of “national security” and “foreign policy decisions,” which were “beyond the judicial function for a court to review.” *Id.* at 23. This Court also explained that it would not judge the “the quality of the information in the reports [on which the Secretary based her terrorist designation] * * * something we have no way of judging.” *Id.* at 25. Instead, this Court explained that “our only function is to decide if the Secretary, on the face of things, had enough information before her to come to the conclusion that the organizations were foreign and engaged in terrorism.” *Ibid.*

This sort of limited review role is also envisioned by the DTA. Review in the case at bar, where the *Hamdi* plurality identified (542 U.S. at 543-44) and Congress specifically endorsed (DTA § 1005(e)(2)(C)(i)) a presumption in favor of the Government’s evidence, should be of a similarly limited scope. See 152 Cong. Rec. S10403 (Sen. Cornyn) (“Weighing of the evidence is a function for the military when the question is whether someone is an enemy combatant. Courts simply lack the

competence – the knowledge of the battlefield and the nature of our foreign enemies – to judge whether particular facts show that someone is an enemy combatant”). Given the presumption, this Court should evaluate whether the CSRT had “enough information before” it to conclude that the detainee is an enemy combatant, without judging the quality of that evidence. *People’s Mojahedin*, 182 F.3d at 25.

E. The final element that informs the Court’s inquiry here is provided by background separation of powers principles. This case involves matters at the very core of the Executive Branch’s authority – the conduct of war and detention of enemy belligerents to prevent their return to the battlefield. The procedures established by the Department of Defense for determining enemy combatant status as well as the procedures utilized by this Court in reviewing those determination touch upon an array of core Executive Branch functions: the detention of the enemy in wartime; the operation of a secure naval facility overseas; civilian access to enemy detainees; and the handling of classified national security information generated in connection with these detentions.

In each of these areas, the President’s authority is at its apex and separation of powers principles call for the highest level of deference to the Executive Branch. See *Hamdi*, 542 U.S. at 531 (plurality op.) (“core strategic matters of warmaking” such as the detention of enemy combatants “belong in the hands of those who are best positioned and most politically accountable for making them”); *Department of Navy*

v. *Egan*, 484 U.S. 518, 527 (1988) (“authority to classify and control access to information bearing on national security * * * flows primarily from [Article II’s] constitutional investment of power in the President and exists quite apart from any explicit congressional grant”); *Holy Land Foundation v. Ashcroft*, 333 F.3d 156, 164 (D.C. Cir. 2003). Furthermore, the President’s authority is underscored by Congress’s express acknowledgment of the CSRT procedures for the designation of enemy combatants and recognition that the procedures are to be “specified by the Secretary of Defense” (DTA § 1005(e)(2)(C)(I)). See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) (“[w]hen the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum”).

Moreover, difficult separation-of-powers questions would arise if a court attempted to *compel* disclosure of national security information or *order*, in the face of the Government’s opposition, civilian access to detained enemy combatants at a secure military facility. See *Stillman v. C.I.A.*, 319 F.3d 546, 548 (D.C. Cir. 2003). Separation of powers principles also preclude this Court from stepping too far down the path of administering the process of detaining the enemy. *Hamdi*, 542 U.S. at 531 (plurality op.). Cf. *People’s Mojahedin*, 182 F.3d at 22. These questions are obviated, however, because the Government has here proposed procedures explained below that will allow counsel to meaningfully participate in this action and allow this Court