

ORAL ARGUMENT NOT YET SCHEDULED

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

SAIFULLAH PARACHA,)	
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)	
Petitioner,)	
)	
)	
v.)	Case No. 06-1038
)	
)	
ROBERT M. GATES,)	
)	
)	
Respondent.)	

**SUPPLEMENTAL OPPOSITION TO
GOVERNMENT’S MOTION TO STAY ORDER
REQUIRING FILING OF CERTIFIED INDEX**

In its reply in support of its pending stay motion in this case, the government advised the Court that it would be soon be petitioning for *en banc* rehearing in *Bismullah*. (Resp’t’s Reply to Pet’r’s Opp. to Stay Mot. at 1-2.) The government promised that it would submit declarations with the petition that would explain and substantiate the government’s claim that producing the record on review in this case as mandated by *Bismullah* would be burdensome and jeopardize national security. (*Id.* at 2.)

The government has now filed its *Bismullah* rehearing petition and supporting declarations. The petition and declarations confirm that the government's pending stay motion in this case should be denied.

1. The government's rehearing petition asks this Court to narrow its construction of the DTA to relieve the government of the burden it claims it faces in complying with the DTA as construed. The declarations of FBI Director Robert S. Mueller and Deputy Secretary of Defense Gordon R. England address in specific terms *Bismullah*'s supposed production burden.¹ Director Mueller cites the need for FBI agents to work "after normal business hours and on weekends" to conduct ACS searches. (Mueller Decl. ¶ 9.) Deputy Secretary England likewise complains of the "immense burden" that *Bismullah* supposedly imposes. (England Decl. ¶ 7.) As Deputy Secretary England's declaration shows, however, any such burden is entirely of DoD's own making:

The "Government Information" with respect to a detainee . . . was not amassed into a single, reproducible file. Nor are there reliable records of the precise materials that were in fact examined by a Recorder in every case. Thus, it is not possible to recreate easily

¹ The Hayden declaration asserts vaguely that the *Bismullah* search burden will divert the CIA from its primary mission. (Hayden Decl. ¶ 18.) The Alexander (NSA) and McConnell (DNI) declarations make no claim of burden.

or with any precision the information that was reviewed by the Recorders in performing their duties.

(England Decl. ¶ 4.) In a post-argument declaration submitted by the government in *Bismullah*, relied on by Deputy Secretary England (*id.*), Rear Admiral James M. McGarrah, the former Director of OARDEC, similarly confessed:

OARDEC made an effort to retain the Government Information . . . compiled for each CSRT. It is my understanding that despite their efforts, some of these electronic files became corrupted following a technical change-over from one computer system to another in 2005. This has made it difficult to fully recreate the electronic files of Government Information compiled for each tribunal. I also understand that OARDEC is currently working to retrieve stored data from system archives to see if it is possible to recreate the files. As of this date, OARDEC is uncertain whether this is possible.

(McGarrah Decl. ¶ 16.) *See also Bismullah*, slip op. 13 n.* (opinion of the Court); *id.* at 3 n.1 (Rogers, J., concurring) (citing Decl. of Stephen Abraham).

Consistent with these declarations, the government stresses in its *Bismullah* rehearing petition that the Government Information “is [not] sitting in a file drawer and readily available for production. . . . [I]n fact, the material is not readily available, nor can it reasonably be recompiled.” (*Bismullah* Reh’g Pet. 1.) “The reality is that there is no readily accessible set of Government Information for completed CSRTs.” (*Id.* at 9.) “[I]t is impossible to recreate with

any precision the information that was reviewed by the Recorder in performing his duties.” (*Id.* at 10.)

That the government may face difficulties in meeting its production obligation under the DTA, as construed by this Court, is not an argument against the Court’s construction of the statute. It is merely an argument that the Court should narrow its construction of the statute to allow the government to avoid the supposed difficulties. But it is not the fault of this Court or Congress that the government faces these difficulties. As the government’s own declarations establish, the government created these difficulties for itself. The Court should not alter its construction of the DTA to accommodate the fact that the DoD was sloppy. Nor should petitioner, who is now entering his fourth year of captivity, be made to pay for the DoD’s careless mistakes.

If the government had provided the prisoners with a meaningful opportunity to rebut the evidence against them; if the government had employed a fair process for determining whether a prisoner was properly held as an “enemy combatant”; if the government had used a less sweeping, subjective definition of “enemy combatant”; and if the government had simply created a “[d]ocumented account” (England Decl. ¶ 7) of the information made available to (and

withheld from) the Recorder with respect to a prisoner, the government would not now be facing the burden of establishing, *post hoc*, that a final decision of a CSRT was supported by a preponderance of the evidence. The government did none of these things. The government must now face the consequences.

2. The government's rehearing petition also asks this Court to narrow its construction of the DTA to avoid disclosure to counsel of sensitive information. The declarations submitted by the government in support of its petition rehearse at great length the national security threat that such disclosure supposedly would present. But, again, the fact that *Bismullah* may require the government to disclose sensitive information – however sensitive – is not an argument against the Court's construction of the DTA or for lessening the government's burden of justifying petitioner's imprisonment. As discussed in petitioner's opposition to the government's stay motion in this case, *Bismullah* safeguards the national security. *See Bismullah*, slip op. 15-18. And, as discussed, the government's difficulties here are a consequence of its own failure to provide a CSRT system that could determine, fairly and reliably, whether a prisoner is properly held as an "enemy combatant."

3. The government complains in its rehearing petition that its production obligation under the DTA, as construed by the Court, goes beyond what due process would require under *Brady v. Maryland*, 373 U.S. 83 (1963). (Resp't's Reh'g Pet. 5-6.) The analogy breaks down, however, because – as the government never tires of asserting – the CSRT was designed to be a “non-adversarial proceeding” (England Mem. at 4), and prisoners were therefore never afforded protections remotely comparable to the panoply of protections provided criminal defendants.

The government's analogy might be more apt if the CSRT system had afforded prisoners, for example, a neutral, independent tribunal; the assistance of counsel; and the right to examine the evidence to be used against them, to confront their accusers, to compel the production of favorable witnesses, and to exclude hearsay evidence and evidence procured by torture, coercion, or blandishments. These protections provide a criminal defendant with something approaching a level playing field even if the government fails to produce *Brady* material. Moreover, if the government fails to produce *Brady* material, it faces meaningful sanctions in appropriate circumstances. *See, e.g., Youngblood v. West Virginia*, 126 S. Ct. 2188, 2190 (2006). The CSRT system afforded pris-

oners no such protections and provided no sanctions for the government's failure to produce the equivalent of *Brady* material. But for the DTA review process, there would be no way of knowing *whether* any "*Brady* violations" occurred. As the Court explained in *Bismullah*, even if the Recorder's actions were entitled to a "presumption of regularity," that presumption would be irrebuttable "if neither petitioners' counsel nor the court could ever look behind the presumption to the actual facts." *Bismullah*, slip op. 13-14.

4. In its pending stay motion, the government acknowledged that the *Bismullah* production burden in this case "may not be viewed as unmanageable." (Resp't's Stay Mot. at 5 n.1.) The government further acknowledged that it had already "expended significant resources actively gathering and reviewing material that might be treated as part of the record in this case." (*Id.* at 8.) The government's declarations in support of its *Bismullah* petition indicate that the government is well on its way to completing its compilation of the pertinent materials in this case. Deputy Defense Secretary England acknowledged that OARDEC has *already* devoted a substantial number of man-hours to gathering information pertinent to petitioner's case (England Decl. ¶ 16), and Director Mueller implied that the FBI has *already* conducted the ACS search for

petitioner, albeit working “after normal business hours and on weekends” (Mueller Decl. ¶ 9). The government’s compilation of the information required to meet the September 13 deadline thus appears to be nearing completion.

For this and the other reasons stated above, and in petitioner’s earlier submissions, the government’s pending stay motion should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that today, September 10, 2007, I served the foregoing **Supplemental Opposition to Government's Motion to Stay Order Requiring Production of Certified Index** on the following by email by arrangement with the government:

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