

[EN BANC REHEARING DENIED FEBRUARY 1, 2008]

UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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HAJI BISMULLAH, *et al.*,

Petitioners,

v.

ROBERT M. GATES,

Respondent.

No. 06-1197

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HUZAIFA PARHAT,

Petitioner,

v.

ROBERT M. GATES,

Respondent.

No. 06-1397

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ABDUSABOUR,

Petitioner,

v.

ROBERT M. GATES,

Respondent.

No. 07-1508

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ABDUSEMET,

Petitioner,

v.

ROBERT M. GATES,

Respondent.

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No. 07-1509

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JALAL JALALDIN,  
Petitioner,  
v.  
ROBERT M. GATES,  
Respondent.

No. 07-1510

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KHALID ALI,  
Petitioner,  
v.  
ROBERT M. GATES,  
Respondent.

No. 07-1511

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SABIR OSMAN,  
Petitioner,  
v.  
ROBERT M. GATES,  
Respondent.

No. 07-1512

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HAMMAD,  
Petitioner,  
v.  
ROBERT M. GATES,  
Respondent.

No. 07-1523

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**PETITIONERS' OPPOSITION TO THE GOVERNMENT'S  
EMERGENCY MOTION FOR STAY**

**I. INTRODUCTION**

This Court has now devoted more than a year of judicial energy, three decisions and seven opinions, to providing the Executive direction on how to assemble the record on review in a case brought under the Detainee Treatment Act of 2005 (“DTA”).<sup>1</sup> It has been an exercise in abstract hypotheticals. No actual record on review has been provided or tested. The government has never disclosed what specific information would, or would not, be included in the record in any particular case. No affiant has suggested that production of the record on review *in these specific cases* would impact national security.

The first DTA case, *Paracha v. Gates*, No. 06-1138 (D.C. Cir. filed Jan. 24, 2006), has now passed its second anniversary. *Bismullah v. Gates*, No. 06-1197 (D.C. Cir. filed June 9, 2006), will soon be twenty months old. The seven Uighur Petitioners<sup>2</sup> asked for DTA relief well over a year ago, on December 4, 2006. Behind these petitioners stand one hundred and seventy others.

The threshold business in these cases is to produce the record on review. The government has delayed and obstructed that business by every imaginable liti-

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<sup>1</sup> See *Bismullah v. Gates*, 501 F.3d 178 (D.C. Cir. 2007) (“*Bismullah I*”) (defining the “Record on Review” and entering a Protective Order); *Bismullah v. Gates*, 503 F. 3d 137 (D.C. Cir. 2007) (“*Bismullah II*”) (denying rehearing); *Bismullah v. Gates*, \_\_ F.3d \_\_, 2008 WL 269001 (D.C. Cir. Feb. 1, 2008) (“*Bismullah III*”) (denying rehearing en banc).

<sup>2</sup> On December 4, 2006, the Uighur Petitioners filed a single joint petition in *Parhat v. Gates*, No. 06-1397. The Court assigned each of the seven a separate case number in December 2007. See Order, *Parhat v. Gates*, No. 06-1397 (D.C. Cir. Dec. 18, 2007) (assigning Docket Nos. 06-1397, 07-1508, 07-1509, 07-1510, 07-1511, 07-1512, and 07-1523).

gation stratagem: stay motions,<sup>3</sup> withholding the same documents it contended constituted the record,<sup>4</sup> grudging and belated disclosure of critical facts *after* briefing and oral argument,<sup>5</sup> motions for reconsideration, and for rehearing *en banc*. Now the government seeks yet another stay while it pursues yet another effort to appeal an interlocutory order. Its motion should be denied.

## II. THE GOVERNMENT IMPROPERLY ASKS THIS PANEL TO INTERFERE WITH ORDERS ISSUED BY SEPARATE PANELS OF THE COURT.

Relying on Rule 41 of the Federal Rules of Appellate Procedure, the government asks the panel to “stay the mandate” and “to stay enforcement of its ruling, including its application to all other DTA cases.” Mtn. at 1. Rule 41 is inapplicable. There is no mandate to issue because *Bismullah I* is an interlocutory order, not a judgment. *See, e.g.*, Fed. R. App. P. 41(a) (“the mandate consists of a certified copy of the judgment, a copy of the court’s opinion, if any, and any direction about costs”) (emphasis added); Black’s Law Dictionary 962 (6th ed. 1990) (defining “mandate”).

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<sup>3</sup> *See Parhat v. Gates*, No. 06-1397 (Opposition To Motions for Entry of Protective Order and for Order Setting Procedures and Cross Motion to Enter Proposed Protective Order and to Stay Proceedings, filed Dec. 29, 2006).

<sup>4</sup> Despite repeated requests, the government refused to produce the CSRT hearing record for *any* Petitioner for nearly eleven months, and it *still* has not disclosed the CSRT hearing record for some.

<sup>5</sup> *See, e.g.*, Motion for Leave to File Declaration Describing Process of Compiling CSRT Record (requesting leave to file—more than two weeks *after* oral argument—the Declaration of Admiral James A. McGarrah admitting, among other things, multiple failures to adhere to CSRT standards and procedures) (filed June 1, 2007); Petition for Rehearing and Suggestion for Rehearing En Banc (arguing for the first time that compiling the Government Information would be burdensome, despite having previously argued that it had already been compiled in a routine process entitled to a presumption of regularity. and submitting new declarations from intelligence officials (filed Sept. 7, 2007).

*Bismullah I* is also the law of this Circuit. Unless the Supreme Court grants *certiorari* (a doubtful proposition) and reverses (even more doubtful) this Court is obligated to follow it. *See, e.g., United States v. Alaw*, 327 F.3d 1217, 1220 (D.C. Cir. 2003) (“the law of the circuit doctrine . . . prevents a new appellate panel from declining to follow the legal rulings of the panel in a prior appeal”); *Investment Co. Inst. v. FDIC*, 728 F.2d 518, 526 (D.C. Cir. 1984) (same). In at least six cases, panels of this Court have issued orders requiring the government to file a revised certified index of record within fourteen days of the Court’s disposition of the *en banc* petition. Mtn. at 5. Under the Protective Order, the government is required to provide the Record on Review to security-cleared counsel at the same time. *Bismullah I*, 501 F.3d at 202 (Protective Order § 7(H) (“The Record on Review must be provided to Petitioner’s Counsel at the time the certified index of the record is filed in this court or as otherwise ordered by the court.”)). Those panels have made it abundantly clear that they are not amenable to further delay.

Respondent is directed to file a revised certified index to the record within 14 days of the court’s disposition of the petition for rehearing and rehearing *en banc* filed September 7, 2007, in *Bismullah v. Gates*, No. 06-1197. **Any motion for extension of time to file the revised certified index will be highly disfavored.**

*Paracha v. Gates*, No. 06-1038 (Order of Sept. 12, 2007) (Henderson, Tatel, and Kavanaugh, J.J.) (emphasis added). Similar orders were entered in Nos. 07-1066, 07-1340, 07-1341, 07-1101, and 07-1098. This panel is not sitting in the above cases, but even if it were, the government’s effort to circumvent those orders, without any notice to counsel in at least some of those cases, should not be tolerated.

### **III. THE GOVERNMENT HAS NOT JUSTIFIED A STAY.**

In considering whether a stay is appropriate (including a stay of a mandate) pending disposition of an appeal to a federal court of appeals or disposition of a pe-

tion for writ of certiorari, courts apply the standard employed by the Supreme Court under 28 U.S.C. § 2101(f) and Supreme Court Rule 23. That standard requires the stay applicant to demonstrate: “(1) a reasonable probability that four Justices would vote to grant certiorari; (2) a significant possibility that the Court would reverse the judgment below; and (3) a likelihood of irreparable harm, assuming the correctness of the applicant’s position, if the judgment is not stayed.” *Packwood v. Senate Select Comm. on Ethics*, 510 U.S. 1319, 1319-20 (1994) (Rehnquist, C.J., in chambers, denying application to stay district court order enforcing subpoenas pending appeal) (citation omitted); see *Edwards v. Hope Med. Group for Women*, 512 U.S. 1301, 1302 (1994) (Scalia, J., in chambers, denying application to stay district court order pending appeal). The applicant must “rebut the presumption that the decisions below—both on the merits and on the proper interim disposition of the case—are correct.” *Planned Parenthood of Southeastern PA v. Casey*, 510 U.S. 1309, 1310 (1994) (Souter, J., in chambers, denying application to stay mandate pending filing of petition certiorari for certiorari) (quoting *Rostker v. Goldberg*, 448 U.S. 1306, 1308 (1980)).<sup>6</sup> A court (or Justice) deciding a stay application must also “balanc[e] the stay equities.” *California v. American*

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<sup>6</sup> Rule 41(d)(2)(A) of the Federal Rules of Appellate Procedure provides that a party seeking to stay the mandate pending the filing of a petition for certiorari must demonstrate that “the certiorari petition would present a substantial question and that there is good cause for a stay.” Fed. R. App. P. 41(d)(2)(A). Circuit courts applying this rule have employed the same standard applied by the Justices of the Supreme Court. See, e.g., *Nanda v. Bd. of Trs. of the Univ. of Illinois*, 312 F.3d 852, 853-54 (7th Cir. 2002) (Ripple, J., in chambers) (denying motion to stay mandate pending certiorari). This Court has declined to reach the issue of the existence of a “substantial question” where the movant fails to show irreparable harm during the pendency of the petition. See *Judicial Watch, Inc. v. Nat’l Energy Policy Dev. Group*, Nos. 02-5355 & 02-5356, 2003 WL 22319584, at \*1 (D.C. Cir. Sept. 30, 2003); *United States v. Microsoft Corp.*, 2001 WL 931170, at \*1 (D.C. Cir. Aug. 17, 2001) (same).

*Stores Co.*, 492 U.S. 1301, 1307 (1989) (O'Connor, J., in chambers); see *Barnes v. E-Systems, Inc. Group Hosp. Med. & Surgical Ins. Plan*, 501 U.S. 1301, 1304-05 (1991) (Scalia, J., in chambers).

But section § 2101(f) applies only to cases in which the lower court has issued a “final judgment or decree” that “is subject to review by the Supreme Court on writ of certiorari.” *Ohio Citizens for Responsible Energy, Inc. v. Nuclear Regulatory Comm’n*, 479 U.S. 1312 (1986) (Scalia, J., in chambers) (“[I]t is only the execution or enforcement of *final* orders that is stayable under § 2101(f).”). Where section 2101(f) does not apply, an original writ of injunction, pursuant to the All Writs Act, 28 U.S.C. § 1651(a), is required. *Id.* Such injunctive relief is to be granted “sparingly and only in the most critical and exigent circumstances, and only where the legal rights at issue are indisputably clear.” *Id.* (internal quotation marks and citations omitted). Furthermore, “the applicant must demonstrate that the injunctive relief is necessary or appropriate in aid of the Court’s jurisdiction.” *Id.* (citing 28 U.S.C. § 1651(a); internal quotation marks and alterations omitted).

Each relevant factor weighs against a stay in this case. Nor is there any justification for granting a stay under the authority of the All Writs Act, with its even more stringent standards.<sup>7</sup>

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<sup>7</sup>Fed. R. App. 8 and D.C. Cir. R. 8(a)(1) apply to motions to stay or enjoin judgments and orders of the *district court*, and so do not govern here. Even if these rules did apply, however, the government has not satisfied their requirements (similar to those of Fed. R. App. P. 41(d)(2)(A), 28 U.S.C. § 2101(f) and Supreme Court Rule 23), or the more onerous requirements of 28 U.S.C. § 1651(a), for the reasons discussed below.

**A. The Government Has Not Met Its Burden To Demonstrate Both A Reasonable Probability That Certiorari Review Of Its Petition Would Be Granted And A Significant Possibility That The Supreme Court Would Reverse The Challenged Order.**

No purpose is served by reprising the exhaustive analysis contained in this Court's two decisions in these cases, nor in the statements appended to the denial of *en banc* review. The panel reached a sound conclusion based on the statute, declined to reconsider, and the *en banc* Court refused the rehearing request. Under the plain terms of the DTA, there is no basis to argue that the Supreme Court would grant certiorari review of the panel's interlocutory order or that there is a significant possibility of reversal if it did.

**1. The challenged order is compelled by the DTA.**

The DTA provides a process for Guantanamo detainees to petition for independent and meaningful review of the CSRT determination that they are enemy combatants, DTA § 1005(e)(2)(A), and grants this Court jurisdiction to resolve issues of fact and law in these original actions, DTA § 1005(e)(2)(C). As the Court recognized, its oversight function would be impossible without the production of the Government Information, defined in the government's own procedures as the evidence required to be collected by the government. *Bismullah I*, 501 F.3d at 181 (citing CSRT Procedures, Encl. 1 § E(3), Encl. 2 § C(1)). Without reviewing the Government Information, the Court could not fulfill its statutorily mandated role because it would be unable to "review [the Recorder's] compliance with [Respondent's] procedures," determine whether "the Recorder withheld exculpatory evidence from the Tribunal in violation of the specified procedures," or "consider whether a preponderance of the evidence supports the Tribunal's status determination." *Bismullah I*, 501 F.3d at 185-86.

**2. Neither this Court nor the Supreme Court can overturn the express mandate of Congress.**

The government's burden argument is legally insufficient and, indeed, irrelevant, as the Court cannot relieve a party from requirements imposed by Congress even if it believes the requirements are "unnecessarily inefficient and burdensome." *EchoStar Satellite L.L.C. v. FCC*, 457 F.3d 31, 41 (D.C. Cir. 2006); *see also South Coast Air Quality Mgmt. Dist. v. EPA*, 472 F.3d 882, 894 (D.C. Cir. 2006) (rejecting agency's attempt to adopt "far less burdensome" requirements because agency "cannot replace Congress's judgment with its own"); *American Maritime Assoc. v. Blumenthal*, 590 F.2d 1156, 1168 (D.C. Cir. 1978). Grounded in the separation of powers doctrine, this principle applies equally in the Supreme Court. *See Vance v. Bradley*, 440 U.S. 93, 97 (1979) ("The Constitution presumes that . . . even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted.").

**3. Neither certiorari nor a stay of the panel's interlocutory order is appropriate.**

The challenged order, undeniably procedural and interlocutory, is the type of decision that the Supreme Court declines to review prior to final judgment. *See Mazurek v. Armstrong*, 520 U.S. 968, 975 (1997) ("we are ordinarily reluctant to exercise our *certiorari* jurisdiction . . . prior to the entry of a final judgment"); *Societe Nationale Industrielle Aerospatiale v. United States Dist. Ct.*, 482 U.S. 522, 527 (1987) ("immediate appellate review of an interlocutory discovery order . . . not ordinarily available"); *Denver v. New York Trust Co.*, 229 U.S. 123, 133 (1913).

Not only is *Bismullah I* interlocutory, but the parties can do no more than speculate about the effect of the decision, because there are no *actual* records to review, and no actual document identified in Petitioners' cases that an affiant alleges would have any impact on national security.<sup>8</sup> This Court's direction to the Executive on how to assemble the record on review in a DTA action is the kind of interlocutory order that falls well outside the normal scope of *certiorari* grants, *see Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916); *Virginia Military Inst. v. United States*, 508 U.S. 946 (1993) (Scalia, J., concurring in denial of *certiorari*).

The Supreme Court's forthcoming decision in *Boumediene v. Bush* should not limit the scope of the record on review in a DTA action. The question before the Supreme Court is the constitutionality of the DTA provisions stripping district courts of the jurisdiction to hear habeas claims by Guantanamo detainees. Petitioners will have a statutory right to DTA review regardless of that decision.

**B. The Government Has Not Demonstrated That It Will Be Irreparably Harmed Absent A Stay.**

The government has not shown that it will be irreparably injured absent a stay. It complains of the time and effort required to comply, and makes a generalized appeal to national security. These assertions are unsupported by any argument based on the specific facts of these particular cases.

Time and effort are not irreparable injury, and do not warrant a stay. *See Renegotiation Bd. v. Bannerkraft Clothing Co.*, 415 U.S. 1, 24 (1974); *Commonwealth Oil Refining Co. v. Lummus Co.*, 82 S. Ct. 348 (1961) (Harlan, J., in cham-

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<sup>8</sup> The materials provided to security-cleared counsel did not discuss Petitioners in these cases at all. We trust that Top Secret-SCI versions provided to the Court did not either, in part because the panel deemed them irrelevant and refused to consider them. *Bismullah II*, 503 F.3d at 138 n.1.

