ORAL ARGUMENT NOT YET SCHEDULED

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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

OPPOSITION TO GOVERNMENT'S MOTION TO STAY ORDER REQUIRING FILING OF CERTIFIED INDEX

The government's motion should be denied. Paracha has waited long enough for his case to proceed. The equities strongly militate against the requested stay in any of the permutations outlined by the government.

1. The government claims that it needs the requested stay because the production of Government Information mandated by this Court in *Bismullah v. Gates*, --- F.3d ----, 2007 WL 2067938 (D.C. Cir. 2007), is burdensome. (Stay Mot. 4-5.) The government, however, offers only general assertions by counsel in support of its claims of burden. These assertions, moreover, are un-

supported by affidavits or other evidence. Such unsupported assertions by counsel are not sufficient. *See Centinela, S.A. de C.V. v. Bacardi & Co. Ltd.*, 242 F.R.D. 1, 10 (D.D.C. 2007) (objecting party must prove production burden through affidavits or other evidence); *see also Brown v. INS*, 775 F.2d 383, 388 (D.C. Cir. 1985) (evidence, not assertions of counsel, is required to establish that deportation would result in exceptional and extremely unusual hardship). Indeed, the government has acknowledged that the asserted burdens "may not be viewed as unmanageable in this . . . case." (Mot. 5 n.1.) The fact that the production mandated by *Bismullah might* be burdensome cumulatively in all DTA cases is no reason to make Paracha suffer in *his* case.

2. The government also claims that producing the Government Information would cause the government irreparable injury because once it has produced the information to counsel, the bell cannot be unrung if this Court should grant the government's petition for rehearing *en banc* in *Bismullah* and, on rehearing, narrow the scope of the required production. This claim of irreparable injury is a makeweight because there is no "bell" to be unrung.

The mere fact that counsel will have seen information later deemed to be beyond the scope of the government's production obligation does not constitute

irreparable injury. The government cites *In re England*, 375 F.3d 1169 (D.C. Cir. 2004), a privilege case. (Stay Mot. 5.) In a privilege case, however, the irreparable injury is the disclosure of privileged information to persons beyond the boundaries of the privilege. Here, the government would be producing Government Information only to counsel who have the necessary clearances and have signed the protective order prescribed by the Court. Such counsel *qualify* for access to the information and thus are not beyond the boundaries of the "privilege." Additionally, *Bismullah* provides that the Court may allow the government, upon an adequate showing, "to withhold from counsel highly sensitive information, or information pertaining to a highly sensitive source." *Bismullah*, 2007 WL 2067938, at *8.

3. Finally, the government claims that a stay is warranted to spare it the "onerous" task of "compiling and processing" that record while there is the prospect that the Court, on rehearing, will narrow the government's production obligation. (Stay Mot. 7.) As noted, however, the government has not demonstrated by any competent evidence that the task is "onerous," and the Court also has no way of knowing just how "onerous" the task would be. The government also argues that it should be spared having to produce the Government

Information mandated by *Bismullah* lest it be required to redo its work if this Court, on rehearing, redefines the record on review. (Stay Mot. 6-7.) That argument, however, is inconsistent with the government's representation that it is already "expending considerable resources actively gathering and reviewing material that might [*sic*] be treated as part of the record in this case and other cases filed under the DTA." (*Id.* at 8.). Moreover, the government's argument proves too much. Even if this Court redefines the record in a DTA case, there will continue to be disputes about the government's production obligations. Indeed, the government states that it has selected "test cases to determine what issues will arise in compiling and producing the "Record on Review" as defined in *Bismullah*." (*Id.*) The government has no intention of producing any information other than Government Evidence unless and until it is specifically ordered to produce the particular information, and experience teaches that the government will return again and again to this Court to "clarify" the government's production obligations. The Court ultimately may need to appoint a special master to resolve these issues. That is no reason to bring this case to a halt.

4. The equities strongly tip in favor of proceeding on the schedule set by the Court in its August 10, 2007 order. Paracha has been imprisoned at Guantánamo since September 2004. He has been held in solitary confinement ever since. Although he filed a habeas petition in the District Court in November 2004, the action has been stalled by the pendency of *Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007), *cert. granted*, 127 S. Ct. 3067 (2007).

Paracha filed this action under the Detainee Treatment Act of 2005 ("DTA") on January 24, 2006, less than a month after the President signed the legislation. Not until April 9, 2007, however, did this Court set a briefing schedule in this case, and now that schedule, necessarily, has been superseded.

Under the new briefing schedule, with Paracha's reply brief due on December 7, 2007, it is unlikely that this Court will decide Paracha's case before the summer of 2008. If the government loses and seeks certiorari, the Supreme Court would not act on the petition before late September 2008; and if the Supreme Court grants the petition, it likely would not issue its decision until late in the spring of 2009, more than four-and-one-half years after Paracha arrived at Guantánamo.

The government's arguments in support of a stay are unsubstantiated and insubstantial. It is high time to put Paracha's convenience above that of the government, and his need for expeditious consideration of his case above the government's desire for unending delay.

WHEREFORE, the government's motion should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that today, September 4, 2007, I served the foregoing **Opposition to Government's Motion to Stay Order Requiring Filing of Certified Index** on the following by first-class mail:

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