

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

SAIFULLAH PARACHA,

Petitioner,

v.

ROBERT M. GATES, Secretary of Defense,

Respondent.

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) No. 06-1038
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)

**REPLY TO PETITIONER'S OPPOSITION TO MOTION FOR STAY
OF ORDER REQUIRING RESPONDENT TO FILE A REVISED
CERTIFIED INDEX**

Pursuant to Federal Rule of Appellate Procedure 27, respondent Robert M. Gates hereby respectfully files this reply to petitioner's opposition to a stay of the Court's order requiring respondent to file a revised certified index in this case by September 13, 2007.

1. Respondent explained in its request for a stay that there is an extraordinary burden in compiling the record on review, as defined in Bismullah v. Gates, No. 06-1197 – which is a prerequisite to preparing the certified index – and that a temporary stay of the order requiring production of the certified index is therefore warranted. Petitioner contends that the Court should disregard that burden because the Government did not produce any declarations to support it.

The Government, however, will be filing extensive declarations, signed by high-level officials, including the Deputy Secretary of Defense, the Director of the

National Security Agency, and the Director of the Central Intelligence Agency, in support of its petition for rehearing in Bismullah (to be filed on Sept. 7, 2007). Those declarations will explain in detail and substantiate the Government's assertions regarding the extraordinary burdens and the national security risks that would be brought to bear if the Government were required to produce the "record" pursuant to the Court's decision in Bismullah. At a minimum, therefore, this Court should grant a temporary stay until the Court has an opportunity to examine those declarations and assess for itself the likelihood of harm in requiring the Government to produce the record and certified index by September 13.

2. Petitioner further contends that production of the Government Information to cleared counsel cannot constitute irreparable injury, even if the Court, on rehearing of Bismullah, were subsequently to determine that such production is not legally required. That is incorrect.

Some of the material contained at issue involves highly classified material that, even within the intelligence agencies, is closely held. As will be explained in the declaration of the Central Intelligence Agency accompanying the Government's rehearing petition in Bismullah, producing such sensitive information to the Court and counsel in this and in many of the other more than 130 other DTA cases would have results that would be harmful to national security. The declaration will explain

that such disclosure to court and counsel of these materials would violate confidences, reveal sources and methods, and could deter sources and other entities from cooperating with our Government and from providing information in the future.

In addition, the more widely classified information is disseminated, the greater the risk of inadvertent or intentional disclosure. That is why even within the intelligence agencies, where the employees have extensive training in the handling of classified material, the information is limited to a small group of individuals.

At bottom, the Government has a very real and significant interest in safeguarding classified information by limiting its disclosure. That interest is impaired even by disclosure to an individual with a security clearance, if it turns out that there is no need for that individual to have access to the classified information.

3. Finally, petitioner argues that because the Government is already in the midst of compiling the record, there is no need for a stay in this case. As the Government explained in its motion (at 9), however, regardless of whether rehearing of Bismullah is granted, production of the record and certified index in this case by September 13 is simply not feasible. The Government does not have the “Government Information” readily available, but instead must gather and index the record materials, which is an onerous and time-consuming process involving, inter alia, line-by-line review of classified documents by intelligence analysts to determine

which information counsel has a “need to know.” The Court’s timeline for production of the record and certified index does not provide the Government sufficient time to carefully and conscientiously conduct this task, to ensure that all appropriate information is produced and that “highly sensitive information” that counsel has no “need to know” is properly withheld, in accordance with the Court’s decision in Bismullah. See Slip Op. at 17. As we explained in our supplemental filing, the current deadlines cannot possibly be met without compromising both the reliability of the production and national security interests. At a minimum, therefore, a thirty-day extension is warranted.

CONCLUSION

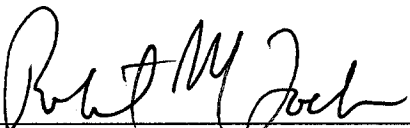
For the foregoing reasons, respondent respectfully requests that its obligation to file a revised certified index be stayed until thirty days after this Court has disposed of the Government's rehearing petition in Bismullah. In the alternative, the Government seeks a thirty-day extension of time.

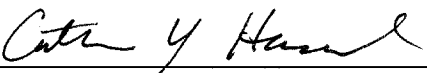
Respectfully submitted,

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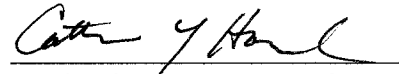
SEPTEMBER 2007

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of September, 2007, I served the foregoing Reply to Petitioner's Opposition to Motion for Stay of Order Requiring Respondent to File a Revised Certified Index, by causing an original and four copies to be served on the Court via hand delivery and one copy to be sent to the following counsel via e-mail and first-class U.S. mail:

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