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

SAIFULLAH PARACHA, Petitioner, v. ROBERT M. GATES, Secretary of Defense, Respondent.	)	No. 06-1038

MOTION FOR TEMPORARY STAY OF ORDER REQUIRING RESPONDENT TO FILE REVISED CERTIFIED INDEX

Pursuant to Federal Rule of Appellate Procedure 27, respondent Robert M. Gates, Secretary of Defense, hereby respectfully requests this Court to temporarily stay its order that respondent file "by September 13, 2007 * * * a revised certified index to the record, as record is defined in *Bismullah v. Gates*, No. 06-1197." Order (Aug. 10, 2007). While the Court has ordered the government to comply with the Court's decision in *Bismullah*, the time to seek rehearing in *Bismullah* has not elapsed – a rehearing petition in that case would be due by September 13, 2007. Respondent, therefore, seeks that the order to file a revised certified index be stayed temporarily, or extended, so that the revised certified index will be due thirty days after this Court has disposed of any timely-filed rehearing petition in *Bismullah*, or, if no rehearing

petition is filed, thirty days thereafter (*i.e.*, on October 13, 2007). If this relief is not granted, respondent requests an extension of thirty days, up to October 13, 2007, in which to file the revised certified index. A temporary stay and the requested alternative extension of time are warranted for the following reasons.

1. This case arises out of a petition for review filed by Saifullah Paracha, an enemy combatant detained at the U.S. Naval Base in Guantanamo Bay, Cuba, pursuant to Section 1005(e)(2) of the Detainee Treatment Act of 2005 (DTA). *See* Pub. L. No. 109-148, §1005(e)(2), 119 Stat. 2680, 2739-45 (2005).

Prior to *Bismullah*, respondent filed its certified index of the record in this case. The certification was of the materials that "shall constitute the record" under the procedures promulgated for Combatant Status Review Tribunal (CSRT) proceedings, to wit, a "statement of the time and place of the hearing," the "Tribunal Decision Report cover sheet," the "classified and unclassified reports detailing the findings of fact upon which the Tribunal decision was based," "copies of all documentary evidence presented to the Tribunal and summaries of all witness testimony," and any "dissenting member's summary report," as well as the audiotapes of the CSRT proceedings. CSRT Procedures, enc. 1, § I(4); *id.*, enc. 2, §§ C(8) & C(11).

In *Bismullah*, this Court held that the "record on review" in cases brought under the DTA includes materials not in the CSRT record as certified by respondent

in this case. Instead, this Court defined the record on review as consisting of "the information defined as 'Government Information'" in the CSRT procedures, "to wit, all '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.'" Protective Order in *Bismullah*, § 2.J (filed July 30, 2007) (quoting CSRT Procedures, enc. 1, § E(3)). The *Bismullah* protective order further provides that the government is to provide the record to petitioner's counsel "at the time the certified index of the record is filed in this court." *Id.*, § 5.H.

On August 10, 2007, this Court ordered that "by September 13, 2007, respondent file a revised certified index to the record, as defined in *Bismullah v. Gates*." Respondent also has until September 13, 2007 to seek rehearing in *Bismullah*.

2. Respondent submits it is appropriate to extend the deadline for filing the revised certified index of record in this matter until thirty days after this Court has disposed of any timely-filed rehearing petition in *Bismullah* or, if no rehearing petition is filed, thirty days thereafter (*i.e.*, on October 13, 2007).

First, the bell that will be rung in complying with this Court's order to submit a revised certified index (and the concomitant requirement to provide the record to petitioner's counsel) cannot be unrung if a rehearing petition is filed and this Court

determines it should rehear or otherwise clarify its ruling in *Bismullah*. And the bell that will be rung entails revealing to private counsel large quantities of highly classified national security information that counsel has no "need to know" for litigation of the case. Thus, the United States could suffer irreparable injury if a temporary stay is not granted.

Under the *Bismullah* protective order (which has not yet been entered in this case), 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." Protective Order in *Bismullah*, § 5.H. There is an extraordinary burden involved in compiling the "Record on Review," which requires multiple agencies of the United States government to conduct searches to identify all relevant and reasonably available information in their possession. Such information must be compiled before the Government may produce a certified index of that record. In addition, the record on review as defined by the *Bismullah* decision is likely to be substantial and consist of a large amount of highly classified material that has never before been reviewed with the expectation that it would be filed in court or turned over to opposing counsel. Reviewing line-by-line the classified material in that record to determine if it may be provided to cleared counsel based on a "need-to-know" determination or if, instead, it will be provided to the Court *in camera*,

imposes an additional significant burden. *See Bismullah*, Slip Op. at 17 (recognizing that the presumption that counsel "needs to know" classified material in the record "is overcome to the extent the Government seeks to withhold from counsel highly sensitive information, or information pertaining to a highly sensitive source or to anyone other than the detainee").[1]

More importantly, to the extent highly classified material is provided to counsel, the damage done to national security by such production cannot be undone in the event a rehearing petition is filed and the *Bismullah* panel reconsiders or narrows its ruling on the scope of the record. *Cf. In re England*, 375 F.3d 1169, 1176-77 (D.C. Cir. 2004) (in allowing interlocutory appeal of privilege ruling, explaining that "[d]isclosure followed by appeal after final judgment is obviously not adequate in [privilege] cases - the cat is out of the bag"). Letting the cat out of the bag is particularly inappropriate in a case like this one where national security information is at stake.

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[1] While these burdens may not be viewed as unmanageable in this one case, over 130 DTA actions have been filed. In many of those cases, petitioners have moved, sometimes on an emergency basis, for the production of the record, or the Court has already entered the *Bismullah* protective order. This Court should not require that process to commence until the rehearing question is finally resolved in *Bismullah*.

Second, respondent is considering whether to file a petition for rehearing asking the Court to clarify or narrow its ruling in *Bismullah*. Such a rehearing petition would raise "a serious legal question," justifying issuance of a temporary stay here. *Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 844 (D.C. Cir. 1977). A clarification in *Bismullah* could markedly alter the scope of the record in this case (and others) that is being gathered and reviewed for intelligence sensitivity.

It is already evident that the parties disagree as to the scope of the record specified in *Bismullah*, and this Court will need to resolve that dispute. Detainee counsel in various cases have already presented their gloss on what constitutes the record under *Bismullah* – a gloss that would entail a massive production effort equivalent to discovery in normal civil litigation (but without the protections and privileges that serve to limit those discovery obligations). For example, petitioner's counsel in this case seeks, inter alia, all information relating to "negotiations with the governments of Thailand and Pakistan regarding Petitioner's arrest and locations (including dates) of Petitioner's detention"; "[a]ll information relating to any investigation into financial transactions related to Petitioner"; and "[a] list of all sources searched during the production of the Government Information." *See* Letter of Aug. 10, 2007 (attached). Counsel does not even limit that request to information

"bearing on the issue of whether the detainee meets the criteria to be designated as an enemy combatant," which this Court in *Bismullah* recognized as the appropriate limit to any production. *See Bismullah*, Slip Op. at 3.

These varied interpretations of the *Bismullah* decision are at loggerheads. Producing and preparing a record pursuant to one interpretation would put at risk sensitive information and waste substantial resources in circumstances where the panel in *Bismullah*, if given an opportunity to clarify its ruling, may limit its scope. Because compiling and processing the record is onerous, the government does not want to conduct it only to find out it has misinterpreted its obligation to produce the record – a result that, given the time needed to correct such an error, would likely create *more* delay than would be created by granting the temporary stay requested here.

Third, this Court in *Bismullah* specifically recognized that it would entertain a petition for rehearing. Order in *Bismullah*, No. 06-1197 (entered July 20, 2007) ("[t]he time for filing a petition for rehearing will not begin to run, nor will such a petition be entertained, until the order to show cause is discharged"). It does not make sense to implement that ruling in this case until such a rehearing petition has been discharged, if one is filed. Moreover, the *Bismullah* case has served as a lead case in creating procedures to govern DTA actions, and the Court should be given the

opportunity to consider a rehearing petition before its decision is implemented in this case and others.

To be sure, the government is not sitting on its hands in the interim – many government entities are currently expending significant resources actively gathering and reviewing material that might be treated as part of the record in this case and other cases filed under the DTA. The government has begun this process by selecting test cases, including the present case, to determine what issues will arise in compiling and producing the "Record on Review" as defined in *Bismullah*. The material that is being reviewed – which is for the most part highly sensitive intelligence information – was never before reviewed in anticipation that it might be filed in court or turned over to private civilian counsel. The goal of this process is two-fold: First, to compile and prepare the records as required in *Bismullah* – which includes identifying "reasonably available information * * * bearing on the issue of whether the detainee" is an enemy combatant and then reviewing that material line-by-line for sensitivity as part of the "need-to-know" determination. Second, to determine whether the government needs to seek rehearing in *Bismullah* and, if it so determines, to allow the government to present in *Bismullah* its explanation as to why that ruling should be reheard, narrowed, or clarified.

Fourth, even if this Court does not think it necessary to await rehearing in *Bismullah*, respondent needs more time to gather and index the record materials, as well as review the materials that would need to be turned over to counsel. As we have explained, even under a narrow interpretation of *Bismullah*, the record is likely to comprise large quantities of material that have never been reviewed or assessed with an eye to whether they are too sensitive to provide to opposing counsel. Some of this material is likely classified at levels higher than "secret," including at classification levels provided to some of the most sensitive government information, release of which would be most damaging to the nation's security.[2] Identifying and compiling the relevant and reasonably available information in the possession of the government, and then conducting a review for "need to know," even in this case alone, is an onerous and time-consuming process that will take substantial resources of and coordination by several agencies in the government. The review of such information is vital for protection of national security and must be conducted based on a line-by-line review by a trained intelligence analyst. For some highly sensitive information, substitutions for that information or certificates may need to be prepared. CSRT Procedures, enc. 1, § D(2). Compilation and review of the record, as we have

[2] Counsel would need to qualify for the appropriate security clearance to review such material. Counsel has sought and the government is currently processing their request for higher security clearances.

explained, is proceeding expeditiously in this and other cases. However, at the very least, the government requests an additional thirty days to conduct that required process.

Conclusion

In light of these issues and concerns, the government requests that its obligation to file a revised certified index be stayed until either thirty days after the time for rehearing has passed in *Bismullah* if no rehearing petition is filed (*i.e.*, on October 13, 2007), or thirty days after this Court has disposed of any timely-filed rehearing petition in *Bismullah*. In the alternative, the government seeks a thirty-day extension of time.

Respectfully submitted,

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AUGUST 2007

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of August, 2007, I served the foregoing MOTION FOR TEMPORARY STAY OF ORDER REQUIRING RESPONDENT TO FILE 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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August 10, 2007

BY FIRST-CLASS AND ELECTRONIC MAIL

Robert M. Loeb, Esq.
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Re: *Paracha v. Gates*, Case No. 06-1038 (D.C. Cir.)

Dear Bob:

In *Bismullah v. Gates*, Nos. 06-1197, 06-1397, 2007 WL 2067938 (D.C. Cir. Jul. 20, 2007), the D.C. Circuit ruled that petitioners in actions brought under the DTA are entitled to review the Government Information, 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." *Id.* at *1. The Court further indicated that Government Information should also include at least such information as would be necessary for Petitioner's counsel to assess whether Petitioner's status determination "was made 'consistent with the standards and procedures specified by the Secretary of Defense . . . .'" *Id.* at *6 & 6 n.*.

We therefore expect that Respondent's production of the Government Information will include, but should not be limited to, the following materials:

1. All information in the U.S. Government's possession indicating that Petitioner is not an enemy combatant.

2. All information relating to interrogations of Petitioner, whether at Guantánamo or elsewhere, by U.S. military, intelligence or law-enforcement personnel, by U.S. contractors, or by foreign nationals.

3. The circumstances under which Petitioner provided any evidence used to support the determination that he was an enemy combatant, including whether he was subject to coercion, torture, or threat of harsh treatment at the time. *See* DTA § 1005(a).

4. All information relating to Petitioner's arrest and detention, including negotiations with the governments of Thailand and Pakistan regarding Petitioner's arrest and locations (including dates) of Petitioner's detention.

5. With regard to any individual who provided evidence used to support the determination that Petitioner was an enemy combatant:

   a. The identity of the individual;

   b. All information related to whether the individual was subject to coercion, torture, or threat of harsh treatment at the time he made any statement related to Petitioner. *See* DTA § 1005(a);

   c. All documents[1] describing the conduct and/or content of any interrogation of that individual, including but not limited to interrogation logs; and

   d. All documents assessing or referring to the reliability of information received from that individual relating to Petitioner or in general.

6. All documents describing any interrogation that discussed, described, mentioned, or related to Petitioner, including:

   a. any assessments of reliability of the individual interrogated;

   b. any information related to whether statements made with regard to Petitioner were made under coercion or threat of harsh treatment; and

   c. any information related to whether or not a statement derived from such interrogation was used to support the determination that Petitioner was an enemy combatant.

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[1] The term "document" in this letter shall include writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations stored in any medium from which information can be obtained.

7. Information generated in connection with any initial determination that Petitioner was an enemy combatant and in any reviews of that determination, including documents generated in such proceedings. *See* CSRT Procedures Encl. (1) § E.3.

8. All information relating to any investigation into financial transactions related to Petitioner.

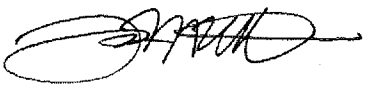
9. A list of all sources searched during the production of the Government Information. In the event that any information is excluded from the Government Information as not "reasonably available," Respondent should provide an index of all such information and an explanation of why it is not "reasonably available."

10. Any information related to any phase of Petitioner's CSRT proceeding, including records, notes, memoranda and correspondence of the Tribunal members, Recorders, Personal Representatives, or other persons who participated in the CSRT proceeding, including requests for information, requests to locate a witness for testimony, documents reflecting the collection of evidence and selection of evidence presented to the Tribunal, and documents reflecting preparation of the CSRT hearing records.

Please advise me as soon as possible, and in any case by August 20, 2007, when this material will be available. We understand that the government has proposed producing the Government Information in each DTA cases in stages, giving it first to the petitioners who filed first, including Paracha. *See* Opp. to Mot. for Produc. of Information and Other Procedural Relief at 3, *Al-Haag v. Gates*, No. 07-1165 (D.C. Cir. filed Aug. 6, 2007). If this proposal is accepted and Respondent fails to promptly provide the Government Information to Petitioner's counsel, this delay will harm not only Petitioner but all other DTA petitioners as well.

Please feel free to contact us if you would like to discuss our expectations for Respondent's production or any other issue related to Petitioner. I will be out of the office next week; if you need to speak with us during that time, please contact David Remes at (202) 662-5212.

Very truly yours,



Jason M. Knott