[ORAL ARGUMENT NOT YET SCHEDULED]

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

CHAMAN, Petitioner, v. ROBERT M. GATES, Respondent.	)	No. 07-1101

MOTION TO STAY ORDER TO FILE CERTIFIED INDEX OF RECORD AS DEFINED IN *BISMULLAH* AND TO STAY BRIEFING SCHEDULE

On August 24, 2007, the Court ordered that respondent file, by October 25, 2007, a certified index to the record as defined in *Bismullah v. Gates*, No. 06-1197 (D.C. Cir. Jul. 20, 2007). The Court's August 24, 2007 Order in this case also established a briefing schedule, with the brief of petitioner due November 26, 2007. The Government has filed a timely petition for rehearing and rehearing en banc from the *Bismullah* decision. On October 3, 2007, the *Bismullah* panel denied the petition for panel rehearing, and issued a supplemental opinion on that date. As of the date of filing of this motion, the petition for rehearing en banc remains pending. In this motion, respondent moves to stay the order to file a *Bismullah* certified index of record and to stay the briefing schedule pending the

Court's disposition of the pending petition for rehearing en banc in *Bismullah* and subsequent order in this case.

In orders predating the panel's October 3, 2007 opinion on rehearing, the Court has stayed its orders to produce a revised certified index of record in *Paracha v. Gates*, No. 06-1038; *Mahnut v. Gates*, No. 07-1066; *Nasser v. Gates*, No. 07-1340 and *Thabid v. Gates*, No. 07-1341, pending disposition of the Government's petition for rehearing en banc in *Bismullah*. In all these cases, the Court ordered Respondent to file the certified index of the record, as defined in *Bismullah*, within 14 days of disposition of the petition for rehearing en banc. Respondent respectfully requests a stay also be entered in this case but urges the Court not to require that Respondent to file the *Bismullah* certified index within 14 days of any decision on the petition for rehearing en banc. Rather, the Court should leave any such filing subject to further order of the Court. As detailed below, any such 14-day requirement does not accord the government sufficient time either to produce the record under the Court's original *Bismullah* opinion, issued July 20, 2007, or to decide whether to employ the "alternative" approach of convening a new CSRT in these cases, as explained in the panel's October 3, 2007 opinion denying rehearing. The issue should be considered in light of panel's opinion on rehearing.

1. On July 20, 2007, a panel of this Court held in *Bismullah* that the record on review in Detainee Treatment Act cases consists of Government Information. *See Bismullah*, No. 06-1197, Slip op., at 15. On August 24, 2007, this Court ordered respondent in this case to file by October 25, 2007, a certified index of record as "record" is defined in *Bismullah*. Under the terms of the protective order entered by the Court in *Bismullah* on July 30, 2007, and entered by the Court in this case on August 23, 2007, respondent is required to provide the record on review 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, ¶ 5(H). Respondent accordingly construes the Court's order to file a new certified index of record by October 25, 2007, also to require the production of the record as defined by *Bismullah* to petitioner's counsel on that date.

2. We believe that the *Bismullah* decision adopts an overbroad definition of the record on review under the Detainee Treatment Act that could result in great harm to the national security. For that reason, the United States Government filed a petition for rehearing and rehearing en banc in *Bismullah* on September 7, 2007.

As the Government explained in that petition and the accompanying declarations,[1] the *Bismullah* decision could have severe and unprecedented

[1] The *Bismullah* petition for rehearing was accompanied by declarations from Michael V. Hayden, Director, Central Intelligence Agency (classified and

consequences for the ability of the United States Government to protect our national security. Hayden Unclass. Dec. ¶ 15. Requiring the production of "Government Information" to the Court and potentially to counsel "could seriously disrupt the Nation's intelligence gathering programs by, for example, discouraging cooperation by foreign governments and other critical intelligence sources." Petition for Rehearing, at 2. Furthermore, "the production of the sensitive classified material at issue could cause 'exceptionally grave damage to national security,'" *id.* (quoting Hayden Unclass. Dec. ¶ 15). The "Government Information" in a DTA case "is not readily available, nor can it reasonably be recompiled." Petition for Rehearing, at 1. Providing the information that *Bismullah* requires will necessitate searching all relevant Department of Defense "components and all relevant federal agencies in an effort to recreate a 'record' that is entirely different from the record before the tribunal that made the decision at issue in a DTA case." *Id.* at 1-2. Before respondent can produce that "record," all classified information will need to be reviewed on a line-by-line basis by teams of intelligence analysts in order to determine whether counsel has a "need to know"

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public versions); Gordon England, Deputy Secretary of Defense; Keith Alexander, Director, National Security Agency (classified and public versions); Robert Mueller, Director, Federal Bureau of Investigation (classified and public versions); and J. Michael McConnell, Director of National Intelligence. Those declarations set out in detail the potential harms that would result from complying with the Court's order to produce the record as defined in *Bismullah*.

that information. Hayden Unclass. Dec. ¶ 15. This process will be extraordinarily time-consuming and burdensome for the responsible agencies, disrupting their ability to carry out normal anti-terrorism efforts. Hayden Unclass. Dec. ¶ 19; England Dec. ¶¶ 7-9.

3. These considerations have already led the Court to stay the obligation to file the *Bismullah* record in several cases pending disposition of the Government's petition for rehearing en banc. On September 11, 2007, this Court granted the Government's motion to stay the order to produce a revised certified index of record in *Paracha v. Gates*, No. 06-1038, until 14 days following the Court's disposition of the petition for rehearing en banc in *Bismullah*. On September 26, 2007, similar orders staying the Government's obligation to file the index under *Bismullah* were entered in *Mahnut v. Gates*, No. 07-1066; *Nasser v. Gates*, No. 07-1340 and *Thabid v. Gates*, No. 07-1341. Unlike the order in *Paracha*, the Court's order in *Mahnut, Nasser* and *Thabid* added an additional sentence stating that "[a]ny motion for extension of time to file the revised certified index will be highly disfavored."[2]

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[2] On September 27, 2007, the Government filed an "Omnibus Motion to Stay Orders to File Certified Index of Record" in numerous DTA cases in which the Court's initial docketing order required the government to file a certified index of record on or after the date of this Court's decision in *Bismullah*. Like *Paracha*, *Nasser*, *Mahnut* and *Thabid*, this case was not included within that omnibus motion as the order to file the index in this case was not issued pursuant to the

4. As in the foregoing cases, the Government seeks a stay in this case pending the Court's disposition of the pending petition for rehearing en banc. However, the Court should not impose the same 14-day time period to file the record index. Similarly, the Court should not provide that any further motion for an extension would be "disfavored," as in *Mahnut*, *Nasser* and *Thabid*. Requiring the submission of a certified index within 14 days of disposition of the petition for rehearing en banc would impose an impossible burden on the Government, especially if the same order is entered in all the pending DTA appeals in which a certified index is due. As detailed below, it also imposes an insufficient deadline, as a practical matter, for the Government to decide whether to employ the "alternative" approach, identified in the panel's October 3, 2007 opinion, of convening a new CSRT in these cases.

As is clear from the declarations submitted in support of rehearing en banc in *Bismullah*, it is a massive undertaking just to produce the record in a single DTA case. The same resources necessary to compile those records in this case are currently engaged in compiling the record in *Paracha*, *Mahnut, Nasser, Tabid* and other DTA appeals. In addition, the petitioners in *Bismullah v. Gates*, No. 06-

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Court's initial docketing order. Rather, the order in this case was part of a briefing schedule issued in response to the motions to govern further proceedings, filed by the petitioner on July 27, 2007, and by the Government on August 3, 2007. This Court has yet to act on the omnibus motion.

1197, and *Parhat v. Gates*, No. 06-1397, have filed motions in which petitioners seek production of the records in those cases. Those motions have been opposed by the Government on the same general grounds that support this motion for a stay. The *Bismullah* and *Parhat* cases alone involve an additional eight detainees, with eight separate records. Similar requests can be expected in the other DTA appeals, of which approximately 150 have been filed to date.

As detailed above, it would be impossible, as a practical matter, for the Government to produce the *Bismullah* records in all these cases within 14-days of any disposition of the petition for rehearing en banc. Accordingly, if rehearing en banc is denied, the certified index to the record in these cases should be filed in accordance with a future order that should issue after the rehearing en banc petition is decided by the Court. In the interim, the Court should stay the briefing schedule and the order to produce a certified index of record in this case.

The 14-day time period is also insufficient under the "alternative" approach set forth in panel's October 3, 2007 supplemental opinion on rehearing. In that opinion, the panel ruled that "if the Government cannot, within its resource constraints, produce the Government Information collected by the Recorder with respect to a particular detainee, then this court will be unable to confirm that the CSRT's determination was reached in compliance with the DoD Regulations and

applicable law." (Slip op. at 8). The panel then suggested an "alternative," stating that the Government "can abandon its present course of trying to reconstruct the Government Information by surveying all relevant information in its possession without regard to whether that information is reasonably available, and instead convene a new CSRT." (*Id.*). Yet, even that alternative requires a detailed and extended analysis of the cases that cannot be reasonably accomplished within 14 days following a decision on the petition for rehearing en banc. The Government would need sufficient time to make an assessment of this case and other DTA cases so as to make a determination on whether to convene a "new CSRT" in accordance with the panel's suggested alternative.

CONCLUSION

For the foregoing reasons, the Government respectfully requests that the Court stay the order to file a certified index of record and stay the briefing schedule pending disposition of the Government's rehearing petition in *Bismullah* and subsequent order by the Court in this case.

Respectfully submitted,

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OCTOBER 2007

CERTIFICATE OF SERVICE

I certify that on October 11, 2007, I served the foregoing MOTION TO STAY ORDER TO FILE REVISED CERTIFIED INDEX OF RECORD AS DEFINED IN *BISMULLAH* AND TO STAY BRIEFING SCHEDULE upon counsel of record by causing a copy to sent by express, overnight delivery service to:

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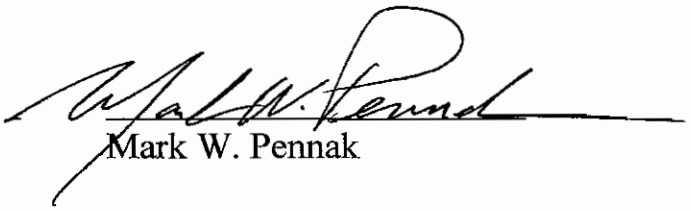

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