[ORAL ARGUMENT NOT SCHEDULED]

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

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

MOTION TO STAY ORDER TO FILE CERTIFIED INDEX OF RECORD

This Court previously ordered that the certified index of record, as defined in *Bismullah v. Gates*, 501 F.3d 178 (D.C. Cir. 2007), *as amended*, 503 F.3d 137 (D.C. Cir. 2007), be filed "within 14 days of the court's disposition of the petition for rehearing en banc in *Bismullah*." For the reasons set forth below, respondent respectfully requests that the Court stay the filing of a certified of index of record, currently due February 15, pending the disposition of the Government's petition for certiorari in *Bismullah v. Gates*, D.C. Cir. No. 06-1197 (Feb. 1, 2008).

1. In *Bismullah*, the Government sought rehearing of this Court's holding that "the record on review must include all the Government Information," which the

controlling Department of Defense Regulations define 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." 501 F.3d 178, 181, 185-86 (D.C. Cir. 2007). This Court denied panel rehearing on October 3, 2007. *See* 503 F.3d 137, 138-39 (D.C. Cir. 2007).

2. In numerous pending DTA cases in which a certified record, as defined in *Bismullah*, had been due (including this case), the Government had moved to stay the requirement of filing a certified index pending a decision on the then-pending petition for rehearing en banc. In addition to a number of individual motions, the Government filed an omnibus motion to stay the filing of a certified index in approximately 64 pending DTA cases. As detailed in the petition for rehearing, the *Bismullah* decision adopts an overbroad definition of the record on review that is inconsistent with congressional intent, grants the detainee greater discovery than is accorded to a criminal defendant in the United States, and if adopted, would result in great harm to the national security. While an index of the record of proceedings – the record that was presented to the tribunal – is readily available, the Government has no complete record of broader "Government Information" that the *Bismullah* panel has identified as the proper record on review.

The *Bismullah* panel has recognized these realities. In its supplemental opinion on rehearing, the panel acknowledged that, because the government did not possess

the historical record of what material was "reasonably available" to the Recorder at the time of the tribunals, the government would have to "'search[] for all relevant information without regard to whether it is reasonably available,'" because it "'can conceive of no other comprehensive method to ensure that [it] identif[ies] information that the Recorder could have examined.'" *Bismullah*, 503 F.3d at 141. The panel also recognized that it was reasonable that the Government did not keep such records at the time. (*Id.*) ("We note in the Government's defense that CSRTs made hundreds of status determinations, including those under review in the present cases, before the DTA was enacted in December 2005 and therefore without knowing what the Congress would later specify concerning the scope and nature of judicial review."). The panel nevertheless held that production of those materials was essential to its review. The panel noted, however, that if the Government cannot "reconstruct the Government Information," then the government has an "alternative": "It 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.*).

3. In an evenly split decision issued February 1, 2008, the full Court denied the Government's petition for rehearing en banc by a 5 to 5 vote. Judge Ginsburg, with whom Judges Rogers, Tatel, and Griffith joined, issued an opinion concurring in a denial of rehearing en banc. Judge Henderson, in whose opinion Judges Sentelle,

Randolph, and Kavanaugh joined, dissented from the denial of rehearing en banc. Judge Randolph, in whose opinion Judges Henderson, Sentelle, and Kavanaugh joined, dissented from the denial of rehearing en banc. Judge Brown filed a separate dissenting opinion and Judge Garland wrote separately "without reaching the merits" to make clear that he joined in the denial of rehearing en banc only because granting the petition would delay a decision of the Court.

4. As noted, the Court in this case ordered that the certified index of record, as defined in *Bismullah*, be filed within 14 days of the denial of rehearing *en banc*. Absent a stay, the certified index therefore would be due February 15, 2008.

However, the Solicitor General has decided to file a petition for a writ of certiorari in *Bismullah* on an expedited basis. On February 4, 2008, the Government filed in this Court an emergency motion to stay the mandate in *Bismullah* and for a stay of enforcement in all related cases pending disposition of the Government's petition for certiorari or, in the alternative, for a temporary stay of enforcement while the Supreme Court considers the Government's stay request. If the Court grants that motion, it would be unnecessary to act upon the motion for a stay in this individual case.

5. In the prior motions to stay the filing of the certified index, we have explained that a stay of the index to the record was required (1) because of the difficulty in attempting to reconstruct the historical Government Information, (2)

because production of such an index of the Government Information, and the record covered thereby, under these circumstances would require a dangerous, long-term, massive displacement of limited intelligence, military, and law enforcement resources, and (3) because producing the record, as defined by the *Bismullah* panel, would cause severe national security harms. We explained that all requirements to produce the index and the record should be stayed while the record issue remained pending before the Court. Based on those facts, this Court issued orders, in this case and several other DTA cases, staying the Government's obligation to file a certified index of record pending disposition of the petition for rehearing and the petition for rehearing en banc. *See Paracha v. Gates*, No. 06-1038 (Order of Sept. 12, 2007); *Mahnut v. Gates*, No. 07-1066 (Order of Sept. 26, 2007); *Nasser v. Gates*, No. 07-1340 (Order of Sept. 26, 2007); and *Thabid v. Gates*, No. 07-1341 (Order of Sept. 26, 2007).

The same reasons which supported the grant of a stay while the Government petitioned for *en banc* review, equally counsel a temporary stay in this case while the Government seeks Supreme Court review in a highly expedited fashion. As noted above, a petition for writ of certiorari will be filed on February 14. The stay motion filed in *Bismullah* (attached) sets out in full why a stay of the enforcement of that decision is critical pending the disposition of the petition.

A stay is also needed in order to provide the Government time to decide whether to adopt in this (and in other cases) the alternative course of action suggested by the

panel in its October 3, 2007 supplemental opinion (*i.e.*, new tribunal proceedings). The fact remains, as detailed in our prior stay motions and in the *Bismullah* petition, that the Government has no readily available mechanism for identifying the historical "Government Information" in these cases. As the panel recognized on rehearing, the process identifying information that the Recorder could have examined, would in practice require the Government to search for all possibly relevant information "without regard to whether it is reasonably available." *Bismullah*, 503 F.3d at 141. That is an enormous undertaking, as all members of this Court now recognize. Even assuming *arguendo* that it could be done, any attempt to do so in these approximately 180 DTA cases would cause a massive and dangerous displacement of intelligence, military, and law enforcement resources.

Indeed, these considerations were expressly noted by the separate statements filed with this Court's February 8, 2007 order denying rehearing en banc. *See* Statement of Ginsburg, J., slip op. at 10-11 (concurring in the denial of rehearing en banc) (acknowledging the difficulties and risks associated with the assembly and disclosure of Government Information); Statement of Henderson, J., slip op. at 4 (dissenting from denial of rehearing en banc) (noting that "*Bismullah II*, however, may be unrealistically sanguine about the Government's resulting burden if the presumption is that it must disclose all Government Information except what fits within the exceptions"); Statement of Randolph, J., slip op. at 6 (dissenting from

denial of rehearing en banc) (noting that "we can also be sure that its [Government Information] assembly and filing in this court, and potential sharing with private counsel, gives rise to a severe risk of a security breach"); Statement of Brown, J., slip op. at 1 (dissenting from the denial of rehearing en banc) (noting that the assembly of Government Information requires "searching laboriously through 'all relevant federal agencies' to make sure it gathers at least that much information."). If an index is required at this juncture, the Government would be required to now consider the alternative set out by the panel. That choice, however, should not now be foisted upon the Government at this preliminary stage of these proceedings. Rather, consideration of that alternative would be appropriate after the Supreme Court has acted on the Government's petition for a writ of certiorari to be filed in *Bismullah*.

6. We ask that the Court should stay the requirement to file the certified index in this case until 30 days after either the Supreme Court's decision in *Bismullah*, should the Court grant certiorari, or the Supreme Court's denial of the Government's petition for certiorari. If the Supreme Court denies the petition for certiorari or affirms *Bismullah*, we anticipate that 30 days will be sufficient time for the Government to decide either to seek further order from this Court on the record in this particular case or to conduct a new tribunal proceeding in this case (which would obviate the pending case and the need to produce the certified index of the record), the alternative course of action suggested by the *Bismullah* panel. *See* 503 F.3d at 141.

CONCLUSION

For the foregoing reasons, the Government respectfully requests that the Court stay the order to file a certified index of record until 30 days after final disposition of the Government's petition for certiorari to be filed in *Bismullah*.

Respectfully submitted,

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February 8, 2008

CERTIFICATE OF SERVICE

I hereby certify that on February 8, 2008, I filed and served the foregoing Motion to Stay Order to File Certified Index of Record by causing an original and four copies to be delivered to the Court via hand delivery, and by causing one paper copy to be delivered to the following lead counsel of record via e-mail and U.S. Mail:

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