

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

Respondent.

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) No. 06-1038
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2. As we explained in our motion, the same rationale and harms relied upon by this Court in granting a stay during the pendency of rehearing en banc apply equally and fully to support the stay sought during the pendency of the petition for writ of certiorari. Since the original stay filings in this case, there have been two

important clarifications from the *Bismullah* panel that further support a stay. First, in denying rehearing, the panel made clear that the record must be the historical “Government Information” collected and reviewed by the Recorder. *Bismullah v. Gates*, 503 F.3d 137, 141 (D.C. Cir. 2007). Second, the panel held that if 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.” *Ibid.*

The panel’s first clarification raises substantial doubt as to whether the Government could in fact produce a reconstructed record that would satisfy the Court’s ruling. And the second clarification (in combination with the first) raises the very distinct prospect that, if the *Bismullah* ruling were to stand, new tribunal proceedings would be necessary. If a stay is denied, as petitioner requests, the Government would be required to immediately consider the alternative set out by the panel. That choice, however, should not now be pressed upon the Government until the Supreme Court has had a chance to rule on the Government’s petition.

3. Petitioner does not argue that there would be undue delay in waiting for the Supreme Court to decide whether to grant the petition. Nor does he argue that the Supreme Court is unlikely to grant the petition. Rather, petitioner presumes the Court

will grant the petition and he is concerned about the delay that may occur while the Court disposes of the merits of the case.

Notably, the Government has argued that question of what constitutes the record in DTA cases presents a threshold, fundamental issue, and that proceeding based on the *Bismullah* ruling would endanger national security. If, in response to those arguments, the Supreme Court grants the petition, it would be wholly appropriate for this Court to stay this case until after the issuance of the Supreme Court's decision.

4. Finally, in an effort to highlight why the delay would be unfair, petitioner points out that this Court has previously set a briefing schedule for this case to proceed based on the actual record presented to the tribunal. That briefing schedule was scuttled at petitioner's request. See Petitioner's Motion to Vacate Briefing Schedule and Withdraw Brief in light of *Bismullah* (filed on July 26, 2007). He sought to delay his case, as a litigation strategy, and asked that the case be held pending the outcome of *Bismullah*.¹ The critical record issues presented in *Bismullah*

¹ We note that, while petitioner's opposition again tries to paint him as a businessman who was erroneously captured, the CSRT record reveals that (1) petitioner was involved in an al Qaeda plot to smuggle explosives into the United States; (2) petitioner held and managed large amounts of al Qaeda money given to him by known al Qaeda operatives; and (3) petitioner recommended to an al Qaeda operative that nuclear weapons be used against U.S. troops and suggested where such weapons might be obtained.

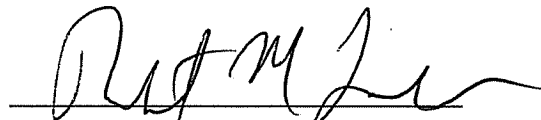
have now been decided by this Court. But the same logic supporting petitioner's request for delay in this case pending the outcome of *Bismullah* equally counsels awaiting a brief period to find out whether the Supreme Court will grant the Government's petition.

CONCLUSION

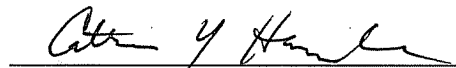
For the foregoing reasons, and the reasons set forth in the Government's motion for stay, the Government respectfully requests that the Court stay the order to file a certified index of record until 30 days after final disposition of the Government's petition for certiorari to be filed in *Bismullah*.

Respectfully submitted,

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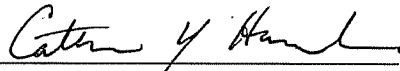
February 12, 2008

CERTIFICATE OF SERVICE

I hereby certify that on February 12, 2008, I filed and served the foregoing Reply in Support of 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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