

UNITED STATES COURT OF APPEALS  
FOR DISTRICT OF COLUMBIA CIRCUIT

AUG 29 2008

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UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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**No. 06-1197**

HAJI BISMULLAH *a/k/a* HAJI BISMILLAH, and *a/k/a* HAJI BESMELLA,  
HAJI MOHAMMAD WALI, Next Friend of HAJI BISMULLAH,  
Petitioners

v.

ROBERT M. GATES, U.S. SECRETARY OF DEFENSE,  
Respondent

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**No. 07-1508**

ABDUL SABOUR,  
Petitioner

v.

ROBERT M. GATES,  
Respondent

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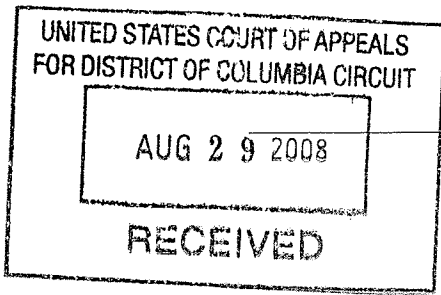
**No. 07-1509**

ABDUL SEMET,  
Petitioner

v.

ROBERT M. GATES,  
Respondent

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**No. 07-1510**

JALAL JALALDIN,  
Petitioner

v.

ROBERT M. GATES,  
Respondent

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**No. 07-1511**

KHALID ALI,  
Petitioner

v.

ROBERT M. GATES,  
Respondent

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**No. 07-1512**

SABIR OSMAN,  
Petitioner

v.

ROBERT M. GATES,  
Respondent

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**No. 07-1523**

HAMMAD MEHMET,  
Petitioner

v.

ROBERT M. GATES,  
Respondent

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**MOTION TO COMPEL FILING OF REVISED CERTIFIED INDEX TO  
RECORD AND PRODUCTION OF GOVERNMENT INFORMATION**

For the reasons set forth in Petitioners' Memorandum in Support of Motion to Compel Filing of Revised Certified Index to Record and Production of Government Information, Petitioners<sup>1</sup> respectfully request that the Court compel Respondents to file a Revised Certified Index to the Record for each of the above-captioned Petitioners within ten days and, simultaneously, to produce the classified version of the Government Information to counsel for each of the above-captioned Petitioners.

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<sup>1</sup> The government seeks to enter in Nos. 07-1509, 07-1510, 07-1511, and 07-1512, a modified form of the judgment from *Parhat v. Gates*, No. 06-1397. Government's Motion to Enter the Judgment from *Parhat v. Gates* in These Actions, With Modifications, And To Remove Case From Oral Argument Calendar (filed August 18, 2008). Petitioners consented to entry of the *Parhat* judgment, but oppose the government's requested modification. Limited Objection of Petitioners to the Government's Motion (filed August 26, 2008). If the Court enters the *Parhat* judgment in Nos. 07-1509, 07-1510, 07-1511, and 07-1512, the relief requested here will be moot with respect to those Petitioners. Petitioners Abdusabour and Hammad Memet are, on information and belief, situated legally and factually precisely as was petitioner Huzaifa Parhat, and petitioners Abdusemet, Sabir Osman, Khalid Ali and Jalal Jallaladin. However, because the government has refused to acknowledge this fact, the government information in their cases must be produced.

August 29, 2008

Respectfully submitted,

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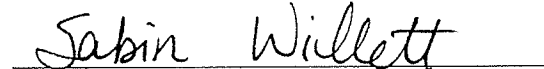
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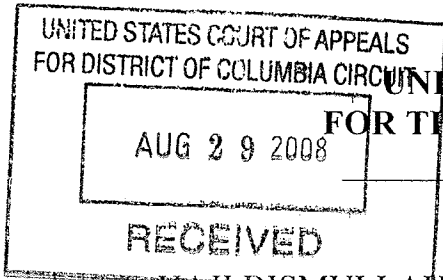
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UNITED STATES COURT OF APPEALS  
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**No. 06-1197**

~~HAJI BISMULLAH~~ *a/k/a* HAJI BISMILLAH, and *a/k/a* HAJI BESMELLA,  
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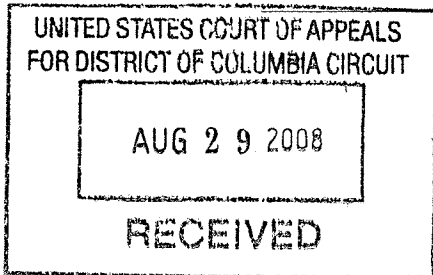
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**No. 07-1523**  
HAMMAD MEHMET,  
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**MEMORANDUM IN SUPPORT OF MOTION TO COMPEL FILING OF  
REVISED CERTIFIED INDEX TO RECORD AND PRODUCTION OF  
GOVERNMENT INFORMATION**

## Introduction

More than a year ago, this Court concluded that the text of the Detainee Treatment Act of 2005 (“DTA”) and the Department of Defense’s procedures for Combatant Status Review Tribunals (“CSRT Procedures”) required the government to produce the “Government Information” to Petitioners’ counsel so that the Court could determine whether the government had complied with its own CSRT Procedures. Following that July 2007 order, the government time and again represented to this Court that it was diligently collecting the Government Information, even while it engaged in a series of challenges to the Court’s decision.

On June 23, 2008, the Supreme Court granted the government’s petition for *certiorari*, vacated the prior decisions of this Court and remanded the case. On August 22, 2008, this Court reinstated the government’s obligation to produce the Government Information. Undeterred, the government has declined a request by counsel to produce the Government Information.

For the reasons set forth below, Petitioners<sup>1</sup> respectfully request that the

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<sup>1</sup> The government seeks to enter in Nos. 07-1509, 07-1510, 07-1511, and 07-1512, a modified form of the judgment from *Parhat v. Gates*, No. 06-1397. Government’s Motion to Enter the Judgment from *Parhat v. Gates* in These Actions, With Modifications, And To Remove Case From Oral Argument Calendar (filed August 18, 2008). Petitioners consented to entry of the *Parhat* judgment, but oppose the government’s requested modification. Limited Objection of Petitioners to the Government’s Motion (filed August 26, 2008). If the Court enters the *Parhat* judgment in Nos. 07-1509, 07-1510, 07-1511, and 07-1512, the relief requested here will be moot with respect to those Petitioners. Petitioners Abdusabour and Hammad Memet are,

Court compel Respondents to file a Revised Certified Index to the Record for each of the above-captioned Petitioners within ten days and, simultaneously, to produce the classified version of the Government Information to counsel for each of the above-captioned Petitioners, in accordance with the Court's decisions in *Bismullah v. Gates*, 501 F.3d 178 (D.C. Cir. 2007) ("*Bismullah I*"), *Bismullah v. Gates*, 503 F.3d 137 (D.C. Cir. 2007) ("*Bismullah II*") and Order, *Bismullah v. Gates*, No. 06-1197 (D.C. Cir. Aug. 22, 2008).<sup>2</sup>

### **Procedural Background**

Petitioners in these cases filed their DTA petitions in June 2006 (*Bismullah*) and December 2006 (the Uighur Petitioners<sup>3</sup>). More than a year ago, in July 2007, this Court settled a preliminary procedural issue and ruled that the

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on information and belief, situated legally and factually precisely as was petitioner Huzaifa Parhat, and petitioners Abdusemet, Sabir Osman, Khalid Ali and Jalal Jallaladin. However, because the government has refused to acknowledge this fact, the government information in their cases must be produced.

<sup>2</sup> We have been advised by the government that it will not produce the Government Information until a mandate issues. As the Court's August 22 Order is interlocutory in nature and does not divest this Court of jurisdiction, it is effective immediately without issuance of a mandate. *See N. Cal. Power Agency v. NRC*, 393 F.3d 223, 224 (D.C. Cir. 2004) (issuance of mandate occurs only at the "end of appellate jurisdiction").

<sup>3</sup> Other than Haji Bismullah, all Petitioners are ethnic Uighurs who were co-petitioners in *Parhat v. Gates*, No. 07-1397 (D.C. Cir.), until the Court ordered that each be assigned a separate docket number. *See Bismullah I*, 501 F.3d at 191. All of the Uighur Petitioners were companions of Parhat at all relevant times.



government was obligated to produce the “Government Information”<sup>4</sup> to enable the Court “to review compliance with [CSRT] procedures.” *Bismullah I*, 501 F.3d at 185. Respondents were ordered to provide Petitioners’ counsel with the Government Information at the time they filed the certified index to the record. *See id.*, 501 F.3d at 202 (Protective Order ¶ 7.H).

The government has spent the past year seeking unsuccessfully to reverse the Court’s decision, which was grounded in the unambiguous text of the DTA and the CSRT Procedures themselves. On October 3, 2007, the panel rejected the government’s rehearing petition. *See Bismullah II*. On February 1, 2008, this Court denied the government’s motion for rehearing *en banc*, concluding for the third time that the record on review must include all the Government Information. *See Bismullah v. Gates*, 514 F.3d 1291 (D.C. Cir. 2008) (“*Bismullah III*”).

Respondents then filed a petition for a writ of *certiorari* seeking interlocutory review of the determination in *Bismullah I* and *Bismullah II* and a motion for a stay. Respondents also requested and received in this Court a stay of their production obligations, pending the Supreme Court’s ruling on their stay

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<sup>4</sup> “Government Information” is defined by the CSRT Procedures 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,” including information generated in connection with the initial determination to hold the detainee as an enemy combatant and in any subsequent reviews of that determination, as well as any records, determinations, or reports generated in connection with such proceedings. *See Bismullah*, 501 F.3d at 180; CSRT Procedures, Encl. 1 § E(3).

motion. On June 23, the Supreme Court granted the writ, vacated *Bismullah I* and *Bismullah II* and remanded for further proceedings. *Gates v. Bismullah*, 128 S. Ct. 2960 (2008). The Supreme Court also denied the government's stay motion, thereby dissolving the stay issued by this Court. *Id.*

On August 22, 2008, this Court granted Petitioners' motion to reinstate the Court's decisions in *Bismullah I* and *Bismullah II*, thereby restoring the government's obligation to produce the Government Information. Order, *Bismullah v. Gates*, No. 06-1197 (D.C. Cir. Aug. 22, 2008). The government has refused a request by Petitioners' counsel to produce the Government Information.

### **Argument**

The Court should require the government to produce the Government Information immediately. Petitioners have been detained for years under extraordinarily harsh conditions; production of the Government Information is a necessary predicate for consideration of their claims under the DTA, and Respondents should not be permitted to delay further the Court's consideration of the merits in these cases. This Court defined the record on review over a year ago, holding that "to review compliance with [CSRT] procedures, the court must be able to view the Government Information with the aid of counsel for both parties." *Bismullah I*, 501 F.3d at 185. Over ten months ago, the panel directed the government "either to reassemble the Government Information ... or ... convene a new CSRT, taking care this time to retain all the Government Information." *Bismullah II*, 503 F.3d at 142. Over six months ago, this Court insisted

for the third time that “the DTA requires that the record on review of a CSRT’s status determination include all the Government Information, regardless [of] whether it was all put before the Tribunal,” adding that “there can be no doubt that all the issues presented in the parties’ procedural motions have been aired and fully considered.” *Bismullah III*, 514 F.3d at 1295-96, 1298.

The Court has reinstated its decisions in *Bismullah I* and *Bismullah II* and no stay is in effect in any of these cases. The government is now obliged to produce the Government Information, thereby enabling the Court to consider these cases on their merits, as Congress intended.

Based on its own representations, the government should already have the Government Information compiled for each Petitioner. In its motions for re-hearing and in other submissions during the past twelve months, the government made multiple representations concerning its ongoing efforts to collect the Government Information in these cases:

- “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 this case -- to determine what issues will arise in compiling and producing the ‘Record on Review’ as defined in *Bismullah*.”

Opposition to Dates Proposed in Motion for Entry of Scheduling Order, *Bismullah v. Gates*, No. 06-1197 (D.C. Cir. Aug. 22, 2007), at 7.

- “Contrary to petitioner’s suggestion, the government is not dragging its feet in preparing the record in these cases. Numerous government entities are currently engaged in a large-scale production effort, gathering and reviewing materials that might be treated as part of the re-

cord in this and similar cases. . . . Although the relevant government entities are proceeding expeditiously with this process, the difficulty of the process renders the schedule proposed by petitioners unreasonable.”

Supplemental Opposition to Dates Proposed in Motion for Entry of Scheduling Order, *Bismullah v. Gates*, No. 06-1197 (D.C. Cir. Aug. 31, 2007), at 4.

- “The Director of OARDEC has directed six DoD intelligence agencies, the Office of Military Commissions, and five Combatant Commands to identify, assemble and provide information from which the ‘Government Information’ for certain individuals detained at U.S. Naval Base Guantanamo Bay, Cuba can be derived. OARDEC has conducted the same search of its own files for original documents falling within this definition. . . . Searches were initially undertaken with respect to six detainees currently held as enemy combatants at U.S. Naval Base, Guantanamo Bay, Cuba who have filed petitions under the Detainee Treatment Act....

In addition, a number of outside agencies, including the CIA, FBI, State Department and Department of Homeland Security, as well as the National Security Agency (NSA) within DoD, were separately tasked in the context of this litigation with searching for and assembling information from which ‘Government Information’ can be derived.”

Declaration of Hon. Gordon R. England, Deputy Secretary of Defense, September 7, 2007, at ¶¶ 5-6, submitted in support of Respondents’ Petition for Rehearing and Suggestion For Rehearing En Banc, *Bismullah v. Gates*, No. 06-1197 (D.C. Cir. Sept. 7, 2007).

- “In an effort to comply with the Bismullah panel ruling, in a limited set of DTA cases, the Government is undertaking entirely new searches of all relevant DOD components and all relevant federal agencies in an effort to capture information regarding the detainee that is relevant to the CSRT determination under review.”

Omnibus Motion to Stay Orders to File Certified Index of Record (D.C. Cir. Sept. 27, 2007), at 30 (filed, to the best of our knowledge, in over 60 DTA cases).

- “[S]ignificant military and intelligence resources ... have been devoted in [*sic*] preparing records and reviewing classified filings to facilitate the DTA review in this Court.”

Motion to Hold in Abeyance or in the Alternative Dismiss Without Prejudice, *Bismullah v. Gates*, No. 06-1197 (D.C. Cir. June 18, 2008), at 4 (filed, to the best of our knowledge, in all pending DTA cases).

Taking the government at its word, Respondents have been “expending significant resources” for over a year to assemble the Government Information and should, therefore, be able to produce it to these Petitioners within ten days. Petitioners are requesting only production of the classified version of the Government Information within ten days so that if the government has not yet conducted a classification review of the Government Information, counsel’s access to the material is not delayed while that process takes place.<sup>5</sup>

Given the passage of over a year and its repeated assurances, the government cannot now be heard to seek additional time to recompile the Government Information. If the government had initially compiled and retained the Government Information as required, producing the record now would be ministerial. *See* CSRT Procedures, Encl. 1 § F(8) (requiring compilation of the Government Information so that the Personal Representative can review it); *see also* CSRT Procedures, Encl. 1 § G(4) (“The Director, CSRT, will schedule a Tribunal

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<sup>5</sup> With respect to Bismullah, the government either should have collected the Government Information with respect to his first CSRT in 2004 or should have collected the Government Information for his second CSRT, which the government promised this Court in May would be held “expeditiously.” Resp’ts’ Notice of New CSRT Hearing, *Bismullah v. Gates*, No. 06-1197 (D.C. Cir. May 8, 2008), Ex. A ¶ 5.

hearing for a detainee within 30 days after the detainee's Personal Representative has reviewed the Government Information[.]").

In addition to this mandate inherent in the CSRT Procedures, the government had a legal obligation to maintain the Government Information as relevant to an anticipated court challenge by imprisoned detainees. *See Silvestri v. Gen. Motors Corp.*, 271 F.3d 583, 591 (4<sup>th</sup> Cir. 2001) (party has a "duty to preserve material evidence . . . not only during litigation but also . . . [during] that period before the litigation when a party reasonably should know that the evidence may be relevant to anticipated litigation"). The CSRT Procedures that governed these Petitioners' CSRTs were promulgated on July 29, 2004, 31 days after the Supreme Court decisions in *Rasul v. Bush*, 542 U.S. 466 (2004) and *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), so it was clear when the CSRTs were held that the decisions would be subject to litigation.

Furthermore, the government has demonstrated the ability to devote substantial resources to this task when necessary by holding CSRTs for 558 detainees in less than six months, *see* Sec'y of Navy Gordon England, Special Briefing on Combatant Status Review Tribunals (Mar. 29, 2005), *available at* <http://www.defenselink.mil/transcripts/transcript.aspx?transcriptid=2504>, and recently assigning approximately fifty attorneys to litigate the detainees' habeas cases, *see* Reply in Supp. of Resp't's Mot. to Hold in Abeyance, *Bismullah v. Gates*, No. 06-1197 (D.C. Cir. July 14, 2008).

### **Conclusion**

For the reasons stated above, Petitioners respectfully request that the Court compel Respondents to file a Revised Certified Index to the Record for each of the above-captioned Petitioners within ten days and, simultaneously, to produce the classified version of the Government Information to counsel for each of the above-captioned Petitioners.

August 29, 2008

Respectfully submitted,

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*Counsel for the Uighur Petitioners*



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The undersigned hereby certifies that a true and correct copy of the foregoing  
**MOTION TO COMPEL FILING OF REVISED CERTIFIED INDEX TO RECORD  
AND PRODUCTION OF GOVERNMENT INFORMATION** was served on August 29,  
2008, via first class U.S. mail, postage prepaid, on the following:

Robert Loeb, Esq.  
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Bonnie Lee Powell