

In the
United States Court of Appeals
for the
District of Columbia Circuit

GEORGE W. BUSH, ET AL.,

Respondents-Appellants,

v.

JAMAL KIYEMBA, ET AL.,

Petitioners-Appellees.

ON APPEAL FROM A FINAL JUDGMENT OF THE
UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

**PETITION FOR REHEARING EN BANC OF
PANEL'S ORDER GRANTING A STAY PENDING APPEAL**

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), undersigned counsel certifies as follows:

(A) Parties and *Amici*

The parties, intervenors, and *amici* appearing before the district court and this Court in this action are:

Petitioners-Appellees Jamal Kiyemba,¹ as next friend, Abdul Nasser, Abdul Sabour, Abdul Semet, Hammad Memet, Huzaifa Parhat, Jalal Jalaldin, Khalid Ali, Sabir Osman, Ibrahim Mamet, as next friend, Edham Mamet, Abdul Razakah, Ahmad Tourson, Arkina Amahmuc, Bahtiyar Mahnut, Ali Mohammad, Thabid, Abdul Ghaffar, and Adel Noori;

Respondents-Appellants George W. Bush, Donald Rumsfeld, Jay Hood, and Mike Bumgarner.

(B) Rulings Under Review

The ruling at issue for purposes of the instant Petition for Rehearing En Banc is the motion panel's order dated October 20, 2008 granting Respondents-Appellants' Motion for Stay Pending Appeal. The ruling at issue on this merits of this appeal is the district court's final judgment, applicable to all Petitioners-Appellees, granting Huzaifa Parhat's Motion for Judgment on his Habeas Petition Ordering Release into the Continental United States, entered in *Kiyemba v. Bush*, No. 05-1509, *Mamet v. Bush*, 05-1602, *Kabir v. Bush*, No. 05-1704, *Razakah v. Bush*, No. 05-2370, *Thabid v.*

¹ Each Petitioner-Appellee also directly authorized counsel to act in these cases.

Bush, No. 05-2398, *Gaffar v. Bush*, No. 08-1310 (D.D.C. Oct. 8, 2008) (Urbina, J.).

(C) Related Cases

An appeal on a different issue (prior notice of transfer) is currently pending before the Court in *Kiyemba v. Bush*, No. 05-5487, as is Petitioner's Motion for Contempt in *Parhat v. Gates*, No. 06-1397 (judgment for Petitioner: June 20, 2008). All Petitioners-Appellees other than Ali Mohammad filed DTA Petitions in this Court: *Parhat v. Gates*, No. 06-1397 (judgment for Petitioner: June 20, 2008); *Semet v. Gates*, No. 07-1509 (judgment for Petitioner: Sept. 12, 2008); *Jalaldin v. Gates*, No. 07-1510 (judgment for Petitioner: Sept. 12, 2008); *Ali v. Gates*, No. 07-1511 (judgment for Petitioner: Sept. 12, 2008); *Osman v. Gates*, No. 07-1512 (judgment for Petitioner: Sept. 12, 2008); *Mahnut v. Gates*, No. 07-1066; *Mahmud v. Gates*, No. 07-1110; *Abdurahman v. Gates*, No. 07-1303; *Nasser v. Gates*, No. 07-1340; *Thabid v. Gates*, No. 07-1341; *Amhud v. Gates*, No. 07-1342; *Razakah v. Gates*, No. 07-1350; *Sabour v. Gates*, No. 07-1508; *Memet v. Gates*, No. 07-1523; *Tourson v. Gates*, No. 08-1033; *Noori v. Gates*, No. 08-1060.



Susan Baker Manning (Bar No. 50125)

PETITION FOR EN BANC REVIEW AND VACATUR OF STAY ORDER

On October 20, the motions panel issued an order (“Stay Order”) granting the Government’s Motion for Stay Pending Appeal (“Stay Motion”), with Judge Rogers issuing a statement in dissent. *See* Exhibit 1 hereto. The Stay Order concerns an issue of exceptional importance and conflicts with the Supreme Court’s decision in *Hilton v. Braunskill*, 481 U.S. 770 (1987), which held, *inter alia*, that Fed. R. App. P. 23(c) “creates a presumption of release from custody” pending appellate review in *habeas* cases, and that Fed R. App. P. 24(d) “creates a presumption of correctness” as to a district court’s release order, which can be overcome only upon “special reasons shown.” 481 U.S. at 774. The Stay Order also contravenes the Supreme Court’s decision in *Boumediene v. Bush*, 128 S. Ct. 2229 (2008), holding, among other things, that (i) these “exceptional circumstances,” 128 S. Ct. at 2263, demand prompt review and resolution of the *habeas* cases filed by the men imprisoned at Guantánamo, *id.* at 2275; (ii) “the *habeas* court must have the power to order the conditional release of an individual unlawfully detained,” *id.* at 2266; and (iii) “the costs of delay can no longer be borne by those who are held in custody,” *id.* at 2275.

Pursuant to Federal Rules of Appellate Procedure 35(a) and 35(b), Petitioners-Appellees (“Petitioners”) request expedited en banc review and vacatur of the Stay Order. As grounds for and in support of this request, Petitioners rely on

Appellees' Opposition to Motion for Stay Pending Appeal, filed October 14, 2008 ("Stay Opposition"), and further state as follows:

1. Petitioners have been imprisoned at Guantánamo for almost seven years. All are situated similarly to Petitioner Huzaifa Parhat, whose release or transfer was ordered by this Court on June 20, 2008. *Parhat v. Gates*, 532 F. 3d 834 (D.C. Cir. 2008). The district court ordered the release of Parhat and the other Petitioners on October 7, 2008. Parhat and the other Petitioners remain imprisoned at Guantánamo.

2. For more than three years, the Government avoided making any substantive response in Petitioners' *habeas* cases by obtaining stays in the district court. As to ten Petitioners, the Government never filed a return at all. As to all of them, it abandoned the sole basis for imprisonment on September 30, 2008.

3. In hearing Petitioner's Motion for Judgment Ordering Release, the district judge carefully considered the question of risk to the public, and invited the Government to present any evidence of such risk. The Government presented none. *No evidence was presented to the district court that any Petitioner (i) has ever been an "enemy combatant," or (ii) presents a risk to the public if released.*

4. These points, and the other issues presented by the Government's Stay Motion and this petition for en banc review are well framed by the Stay Motion (attached hereto as Exhibit 2), Petitioners' Stay Opposition and exhibits thereto

(attached hereto as Exhibit 3), and the Government's Reply (attached hereto as Exhibit 4).

5. As Judge Rogers explained in her dissenting statement, the Stay Order is erroneous and departs radically from the rule of release-pending-appeal set forth in Fed. R. App. P. 23(c) and the Supreme Court's decision in *Hilton v. Braunskill*, 481 U.S. 770 (1987).

6. The stay granted last evening means, conservatively, three more months of imprisonment at Guantánamo. Oral argument is scheduled for November 24, 2008. A decision is unlikely to issue before January 2009.

7. Procedural imprisonment may last much longer, however, if en banc review follows the panel's review on the merits of these appeals. The prospect of such review seems likely, given the remarkable facts and procedural history of the case, its posture as the first merits disposition to follow the Supreme Court's June 12, 2008 decision in *Boumediene v. Bush*, 128 S. Ct. 2229 (2008), and the release issue presented. En banc delays could add many more months of purely procedural imprisonment, as shown by the history of the Court's decisions in *Bismullah v. Gates*, in which Parhat and seven other Appellees were petitioners. *Bismullah v. Gates*, 501 F.3d 178 (D.C. Cir. 2007); *Bismullah v. Gates*, 503 F.3d 137 (D.C. Cir. 2008); *Bismullah v. Gates*, 514 F.3d 1291 (D.C. Cir. 2008). In that

case, the en banc process prolonged beyond a full year a decision on a gating matter—the record on review—and the question remains unresolved today.

8. Hundreds of *habeas corpus* actions are getting underway in the district court. The grant of the stay here has rewarded the Government for its utter failure to litigate facts before the district court; has interminably delayed the processing of seventeen *habeas* cases; and will encourage copy-cat *de novo* litigation in the Circuit. The situation presents both a substantive issue and a litigation-management issue of exceptional importance appropriate for prompt resolution by the entire Court. *See Boumediene*, 128 S. Ct. at 2271 (“[W]hen the judicial power to issue *habeas corpus* properly is invoked the judicial officer must have adequate authority to make a determination in light of the relevant law and facts and to formulate and issue appropriate orders for relief, including, if necessary, an order directing the prisoner’s release.”); *id.* at 2266 (“the *habeas* court must have the power to order the conditional release of an individual unlawfully detained”); *id.* at 2275 (“the costs of delay can no longer be borne by those who are held in custody”); *id.* at 2263 (recognizing that these are “exceptional circumstances”).

9. Petitioner Parhat has filed a motion to hold the Government in contempt for its failure to release him pursuant to the Court’s June 20, 2008 order in *Parhat v. Gates*, 532 F. 3d 834 (D.C. Cir. 2008). That motion presents

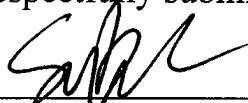
substantial issues as to the Secretary of Defense's willful violation of a final, unstayed judicial order. The matter would be substantially mitigated, if not mooted altogether, by vacatur of the Stay Order. Maintenance of the stay will require the Court to resolve that motion.

10. As Judge Rogers explained, no harm will come to the public, and certainly no irreparable harm to the Government, should Petitioners, after seven years, be permitted to abide the merits decision in these consolidated appeals outside the Guantánamo prison.

WHEREFORE, Petitioners request that the en banc Court of Appeals reconsider and vacate the Stay Order entered by the motions panel on October 20, 2008, and grant to them such other and further relief as may be just and proper.²

October 21, 2008

Respectfully submitted,



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² The Court has discretion to determine the merits of these consolidated appeals en banc in the first instance. *See* Circuit Handbook of Practice and Internal Procedures, § XIII.B.2 at 58; *see also* Fed. R. App. P. 35(d). Such a course would expedite the ultimate decision on the merits, and, in conjunction with a vacatur of the Stay Order, accommodate any Government concern that the duration of pre-merits-review release be as limited as possible. As Judge Rogers pointed out, the district court can further accommodate any legitimate Government concerns by imposing further conditions of release, including reporting requirements and limitations on travel.

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CERTIFICATE OF SERVICE

I hereby certify that on October 21, 2008, I filed and served the foregoing Petition For Rehearing En Banc Of Panel's Order Granting A Stay Pending Appeal by causing an original and nineteen copies to be delivered to the Court via hand delivery, and by causing copies to be delivered to the following counsel of record by electronic service simultaneously with the filing of the motion and by overnight delivery:

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