

[NOT YET SCHEDULED FOR ORAL ARGUMENT]

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

HUZAIFA PARHAT, et al.)	
Petitioners,)	
v.)	No. 06-1397
)	
ROBERT M. GATES, Secretary of Defense,)	
Respondent.)	

**MOTION FOR LEAVE TO FILE AND
MOTION FOR FOURTEEN DAY EXTENSION OF TIME
WITHIN WHICH TO FILE RESPONDENT’S BRIEF**

Respondent respectfully moves this Court for a fourteen-day extension, up to and including February 20, 2008, within which to file his brief, and further moves for leave to file this request out of time.¹ The requested extension is necessary in light of this Court’s order denying respondent’s petition for rehearing *en banc* in this case (together with *Bismullah*). See *Bismullah v. Gates (Bismullah III)*, __ F.3d __, 2008 WL 269001 (D.C. Cir. February 1, 2008). The Solicitor General has now authorized the filing of a petition for a writ of *certiorari* on an expedited basis in *Bismullah*, and has further authorized seeking a stay of enforcement of the *Bismullah* decision. Preparation of the stay filing and the expedited petition for a writ of *certiorari*

¹ Counsel for petitioners (Susan Baker Manning) has informed us that petitioners oppose this motion.

require the immediate attention of the same counsel who are currently working on respondent's brief and renders the Government unable to meet the current February 6 deadline.

The reasons supporting these motions are fully set out below:

1. This case arises out of a petition for review filed by Huzaifa Parhat, an enemy combatant detained at the U.S. Naval Base in Guantanamo Bay, Cuba, pursuant to Section 1005(e)(2) of the Detainee Treatment Act of 2005. *See* Pub. L. No. 109-148, §1005(e)(2), 119 Stat. 2680, 2739-45 (2005). In the context of that action, petitioner filed a motion for judgment as a matter of law. On December 14, 2007, this Court ordered briefing on that motion, and directed petitioner to file his brief within 40 days of the Court's order, and respondent to file his brief within 30 days of petitioner's brief.

Petitioner filed his opening brief on January 7, 2008. Accordingly, pursuant to this Court's briefing order, respondent's brief is currently due on February 6, 2008.

2. On July 20, 2007, this Court issued a decision in this case, *Bismullah v. Gates*, 501 F.3d 178 (D.C. Cir. 2007) ("*Bismullah I*"). The Court held that the "record on review" in DTA actions is not limited to the record of proceedings before the CSRT, but also includes the "Government Information," – *i.e.*, the information that the CSRT was "authorized to obtain and consider." *See* 501 F.3d at 180. The

Government petitioned for rehearing and rehearing *en banc* in *Bismullah* on September 7, 2007.

The petition explained that the *Bismullah* decision adopted an overbroad definition of the record on review that is inconsistent with congressional intent, grants the detainee discovery rights that far surpass those accorded criminal defendants in the United States, and if adopted would result in great harm to the national security. It further explained that the Government has no complete record of broader “Government Information” that the *Bismullah* panel has identified as the proper record on review.

On October 3, 2007, the petition for panel rehearing was denied. *See Bismullah v. Gates*, 503 F.3d 137 (D.C. Cir. 2007) (“*Bismullah IP*”). 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 is [now] searching 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.*). On Friday, the Court, by a 5-5 vote, denied the petition for rehearing *en banc*.

3. As noted above, the Solicitor General has now authorized the filing of a petition for a writ of *certiorari* on an expedited basis in *Bismullah*. The Government plans to file the petition as early as February 14, 2008. The Solicitor General has further authorized seeking a stay from this Court (and if necessary the Supreme Court) of enforcement of the *Bismullah* decision. Preparation of the stay filing and of the expedited petition for a writ of *certiorari* is critical given the importance of the issues, the threat to national security and the deadlines in other pending DTA cases requiring the Government to produce to counsel the classified record, as defined by

Bismullah, within 14 days of the disposition of the *en banc* petition.² Thus, these tasks require (and have required since Friday) the immediate and full attention of the same counsel who are currently working on respondent's brief. These competing and urgent duties render the Government counsel unable to meet the current February 6 briefing deadline in the present case.

Accordingly, respondent requests a fourteen-day extension of time, up to and including February 20, 2008, within which to file his brief. The additional 14-day extension here will permit counsel to perform these necessary tasks in *Bismullah/Parhat*, while also filing a thorough and complete response brief in this case.

4. The Government has not sought any prior extensions in regard to the briefing set by this Court. Further, the two weeks sought should not delay oral argument significantly, if at all, in this matter.

² 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); *Thabid v. Gates*, No. 07-1341 (Order of Sept. 26, 2007); *Chaman v. Gates*, No. 1101 (Order of Nov. 28, 2007); *Hamad v. Gates*, No. 07-1098 (Order of Oct. 31, 2007). There is also a pending omnibus stay motion, seeking a stay of the requirements of filing a certified index and the production of the record as defined by *Bismullah*, filed in regard to 62 DTA cases. In the absence of a stay, the Government would immediately need to consider the *Bismullah* panel's proposed alternative of convening new CSRTs. See *Bismullah II*, 503 F.3d 137, 141 (D.C. Cir. 2007).

5. Petitioner will no doubt argue that the short extension requested unduly delays his right to release. The extension requested is, however, reasonable given that even if petitioner were to prevail on his legal arguments here, the proper result would not be release, but instead remand for a new CSRT hearing.

In his brief to this Court, petitioner here argues that his affiliation with a group that fought side-by-side with al Qaeda and the Taliban, and his military training at a Taliban and al Qaeda sponsored military training camp are not enough to consider him an enemy combatant. He argues that to be an enemy combatant a detainee must have: 1) been a member of the Taliban or al Qaeda, 2) been involved in direct and active participation in battlefield activities; *and* 3) had a mens rea showing a desire to attack the United States. Our brief will explain why these asserted limitations are wholly without merit. Even if, however, the Court were to adopt one or all of petitioner's positions (which are all contrary to the law of war), the Government would have to be given an opportunity to conduct a new CSRT hearing in conformity with those standards. The novel (and unfounded) rules suggested by petitioner were not in place at the time of his prior CSRT, and the Government must have the opportunity to submit evidence to the tribunal under those standards. Thus, even in the highly unlikely event that petitioner were to prevail, the result would not be release (as petitioner has requested), but rather a remand for a new CSRT hearing.

We further note that independent of this Court's ruling on the legal issues presented by petitioner here, there is the distinct possibility that, if a stay is denied in *Bismullah*, there may be, in accord with the suggestion of the *Bismullah* panel, new CSRT hearings in this and in the other 180 DTA cases. If a new CSRT is conducted, that new record, and not the one subject to the current briefing, would control. This possibility might counsel against proceeding with this briefing (at least until the outcome of *Bismullah* is known), and certainly supports, at a minimum, the grant of the requested 14-day extension of time.

6. Respondent moves for leave to file this requests out of time. Typically, extension motions are due five days prior to a briefing deadline. Here, because the critical event occurred on Friday of last week, Government counsel was unable to file this extension motion prior to today.

CONCLUSION

For the foregoing reasons, this Court should grant the motion for leave to file and should further grant the Government a fourteen-day extension, up to and including February 20, 2008, within which to file its brief.

Respectfully submitted,

DOUGLAS N. LETTER

A handwritten signature in black ink, appearing to read "R M Loeb", written over a horizontal line.

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CERTIFICATE OF SERVICE

I hereby certify that on February 4, 2008, I caused copies of the foregoing Motion for Leave to File and Motion for Fourteen-Day Extension of Time Within Which to File Respondent's Brief to be sent by U.S. Mail and electronic mail:

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