

[ORAL ARGUMENT NOT YET SCHEDULED]

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

ZAYN AL ABIDIN MUHAMMAD )  
HUSAYN (ISN # 10016), )  
Prisoner, Camp VII )

*Petitioner.* )

v. )

No. 07-1520

ROBERT M. GATES, )  
Secretary, United States )  
Department of Defense )  
1000 Defense Pentagon )  
Washington, D.C. 20301-1000 )

*Respondent.* )

**OPPOSITION TO MOTION STAY ORDER  
TO FILE CERTIFIED INDEX OF RECORD**

Petitioner has been a prisoner in the secret custody of the Central Intelligence Agency ("CIA") and the Department of Defense for nearly six years after he was wrongfully attacked at a guest house in Pakistan. On or about March 28, 2002, Petitioner was living in Pakistan. That day, he was attacked and shot three times by Pakistani and United States forces. Wounded and in critical condition, with gunshot wounds to the groin, thigh, and stomach, Petitioner became a prisoner in a secret program conducted by the CIA initiated after

September 11, 2001 in which alleged suspects were jailed and systematically tortured at secret prisons outside the United States. For a time, Petitioner remained in a coma.

Since March 2002, Petitioner has been held *incommunicado* in the unlawful custody of the CIA at various sites around the world, including Pakistan, Thailand, Diego Garcia, Poland, Northern Africa (most probably Morocco), and other locations around the world. During his captivity, Petitioner has been subjected to various forms of torture over extended periods of time, including, but not limited to, waterboarding, isolation, exposure to temperature extremes, and sleep and sensory deprivation. Indeed, the government has admitted to waterboarding Petitioner. The government also has admitted videotaping hundreds of hours of Petitioner's torture and interrogations and destroying same.

The Supreme Court issued its opinion in *Hamdan v. Rumsfeld*, 126 S. Ct 2749, 2764-69 (2006). Among other things, the *Hamdan* Court ruled that the Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2740, 10 U.S.C. § 801 (2006), did not deprive the federal courts of jurisdiction over *habeas* cases brought by individuals imprisoned at Guantánamo and that prisoners in the custody of the CIA were still protected by Common Article 3 of the Geneva Conventions. Following the decision, the CIA realized that it was exposed to potential criminal liability for the commission of war crimes for the deliberate, systematic torture of

individuals in its custody and refused to continue the program. Only then was Petitioner transferred to the custody of the military and taken to the U.S Naval Air Station, Guantánamo Bay, Cuba (“Guantánamo”).

Currently, Petitioner is being held in Respondent’s unlawful custody at Guantánamo. Respondent Gates, U.S. Secretary of Defense, is either ultimately responsible for or has been charged with the responsibility of maintaining the custody and control of Petitioner at Guantánamo. Petitioner filed this action under the Detainee Treatment Act of 2005 (“DTA”) on December 17, 2007. The government seeks a stay. Petitioner opposes any stay. By any calculus, his treatment, torture, and the deliberate destruction of relevant evidence require that the case proceed apace.

### **ARGUMENT**

The government’s motion for a stay should be denied. First and foremost, as a matter of basic fairness, Petitioner should not be required to wait any longer for his DTA case to proceed. Petitioner has been in the custody of the CIA and the Department of Defense for nearly six years. Most of that time, his detention was kept secret, even from the Red Cross. The delay that the government seeks would continue to deprive Petitioner of a forum to vindicate his remedies under the habeas statute, precisely as the government has long intended. Although the

government may face inconvenience if Petitioner's case is allowed to proceed, it faces no irreparable injury.

Based on its behavior and actions in other DTA cases, it is now clear that the government never had any intention of complying with the Court's previous orders regarding the production of documents, including, *inter alia*, a certified index. The government should not now be heard to request a further stay, and the Court should not reward the government's lack of candor by granting one.

This Court, moreover, has already twice rejected the government's claim of irreparable injury – that requiring the government to provide the record on review as defined in *Bismullah* would endanger national security. See *Bismullah v. Gates*, 501 F.3d 178, 187-88 (D.C. Cir. 2007) (*Bismullah I*); *Bismullah v. Gates*, 503 F.3d 137, 140-41 (D.C. Cir. 2007) (*Bismullah II*). As Chief Justice Ginsburg stated: “The panel . . . accommodated, to the full extent requested by the Government, its position that certain types of Government Information cannot be disclosed to the petitioners' counsel without jeopardizing national security.” *Bismullah III*, 2008 WL 269001, at \*4-5 (opinion of Ginsburg, C.J., joined by Rogers, Tatel & Griffith, JJ.) (concurring in denial of rehearing *en banc*).

The government should not be heard to complain that gathering the information required for judicial review in this case under *Bismullah* would pose insuperable practical challenges. In its previous stay motion, the government

implicitly represented that it could prepare the record required by *Bismullah I* in this case within 30 days of the Court's disposition of the *Bismullah* rehearing petition. The government never hinted that it would comply with that deadline only if the Court resolved the rehearing petition *in the government's favor*. Here is what the government said:

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 the present case*, to determine what issues will arise in compiling and producing the “Record on Review” as defined in *Bismullah*. The material that is being reviewed – which is for the most part highly sensitive intelligence information – was never before reviewed in anticipation that it might be filed in court or turned over to private civilian counsel. The goal of this process is two-fold: First, to compile and prepare the records *as required in Bismullah* – which includes identifying “reasonably available information \* \* \* bearing on the issue of whether the detainee” is an enemy combatant and then reviewing that material line-by-line for sensitivity as part of the “need-to-know” determination. Second, to determine whether the government needs to seek rehearing in *Bismullah* and, if it so determines, to allow the government to present in *Bismullah* its explanation as to why that ruling should be reheard, narrowed, or clarified.

Motion for Temporary Stay, at 8 (emphasis added). *See also id.* at 5 n.1 (“This court should not require that process to commence until the rehearing question is finally resolved in *Bismullah*.”).

Finally, the government urged that the Court should grant the “temporary stay” to *avoid* delay:

Because compiling and processing the record is onerous, the government does not want to conduct it only to find out it has misinterpreted its obligation to produce the record – a result that, given the time needed to correct such an error, would likely create more delay than would be created by granting the temporary stay requested here.

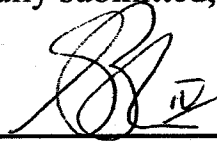
*Id.* at 7. The government is being disingenuous with this Court.

### CONCLUSION

For the foregoing reasons, the government's motion should be denied.

Dated: February 12, 2008  
Washington, District of Columbia

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

The undersigned attorney certifies that on the 12th day of February, 2008, I served the foregoing Opposition To Motion Stay Order To File Certified Index Of Record with the Court Security Office as required by the Protective Order.



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George Brent Mickum IV