

**[MOTIONS PREVIOUSLY DECIDED: NO ORAL ARGUMENT ON THE
MERITS YET SCHEDULED]**

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

No. 06-1397

HUZAIFA PARHAT, ET AL.,

PETITIONERS

V.

ROBERT M. GATES, ET AL.

RESPONDENTS

**PETITIONERS' EMERGENCY MOTION FOR ENTRY OF SCHEDULING
ORDER AND REQUEST FOR EXPEDITION**

Pursuant to Circuit Rule 27(f), Petitioners¹ move for entry of a scheduling order on an expedited basis. An expedited ruling on this motion is necessary (i) in order to secure the Government's full compliance with a previous order of this Court, and (ii) because delay is working unconscionable harm on the Petitioners.

1. This motion requires no great exposition nor citations to authorities. Almost a month ago, the Court issued an opinion; ten days later, an order. The Government has not complied with either. Its noncompliance works needless harm on innocent men and stalls resolution of the case.

2. On July 20, 2007, the Court ruled as to the "Record on Review" and resolved the procedures for deciding DTA actions. *Bismullah v. Gates*, - -- F.3d ---, 2007 WL 2067938 (July 20, 2007) ("Opinion"). On July 30, it entered a protective order (the "Protective Order") that requires the Government to provide counsel with the Record on Review so that the case may be briefed and decided. *Bismullah v. Gates*, ___ F.3d ___, 2007 WL

¹ In its July 20, 2007 opinion, this Court ordered that this DTA action be divided into seven separate actions, one for each Petitioner. Counsel are informed and believe that that the Clerk's office has not yet assigned separate docket numbers, and accordingly file this motion in case no. 06-1397.

2207923 (July 30, 2007). Despite several requests, none of this information has been provided. A scheduling order is urgently needed.

3. Petitioners, now in their sixth year of lawless imprisonment, first sought judicial relief in July, 2005, a year after the Supreme Court's decision in *Rasul v. Bush*, 542 U.S. 466 (2004). See Petition for Writs of Habeas Corpus, *Kiyemba v. Bush*, No. 05-1509 (D.D.C. July 29, 2005). The district court judge stayed their case. Memorandum Order, *Kiyemba v. Bush*, No. 05-1509 (D.D.C. Sept. 13, 2005). Petitioners appealed the stay in *Kiyemba v. Bush*, case nos. 05-5487 and 05-5488, arguing that the stay was unlawful. Their appeal was ultimately dismissed for lack of subject matter jurisdiction. Judgment, *Kiyemba v. Bush*, Nos. 05-5487 and 05-5488 (D.C. Cir. Mar. 22, 2007).

4. In 2006, Congress enacted the Military Commission Act and changed the law while Petitioners' *habeas* case was unlawfully stayed. Petitioners had no recourse other than to file a DTA petition. They did so on December 4, 2006, see Petition for Immediate Release, *Parhat v. Gates*, No. 06-1397 (D.C. Cir. Dec. 4, 2006), and promptly moved for expedited review, see Emergency Motion, *Parhat v. Gates*, No. 06-1397 (D.C. Cir. Dec. 22, 2006).

5. Seven months later, the Court ruled that the Record on Review includes the “Government Information, that is, all ‘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.’” *Bismullah*, 2007 WL 2067938, at *13.

6. The Protective Order confirms that the “‘Record on Review’ means the information defined as the Government Information.” *Bismullah*, 2007 WL 2207923, at *3 (Protective Order at §2.J). Under the Protective Order, the “Record on Review must be provided to Petitioner’s Counsel at the time the certified index of the record is filed in this court, or as otherwise ordered by the court.” *Id.* at *6 (Protective Order at §5.H). Pursuant to Circuit Rule 17(b), the Department of Defense was obligated to file the certificate forty days after the petition was filed. That date passed in January, 2007.

7. Neither the Opinion nor the Protective Order has been modified or stayed.

8. On July 30, Petitioners wrote to Respondents, requesting the Record on Review, and providing detailed information as to items that counsel are informed and believe, based on their case preparation to date,

should exist in the Government Information. *See* Exhibits 1-7. On July 31, counsel wrote again, noting that the classified information previously provided to the Court should immediately be provided. *See* Exhibit 8. No information has been provided in response to these requests.² Indeed, the Government refuses to confirm whether the Record on Review has been compiled, or if the Government has begun to compile it, or if the Government intends ever to compile it.³

9. Based on the Opinion and Protective Order, the Court entered a scheduling order in *Paracha v. Gates*, another DTA case, ordering the Government to file the Certified Index of the Record on Review by September 13, 2007. *See* Order, *Paracha v. Gates*, No. 06-1038 (Aug. 10,

² The Government has indicated only that it would provide the Classified Information provided to the Court on May 8—but it has tied that concession to a *further amendment to the Protective Order*. Counsel are working with the Government to try to accommodate its Protective Order concerns, but the Government has no right to ignore the existing order and make its disclosure obligations hostage to further concessions.

³ Respondent not only has refused to provide access to any of the Record on Review, but has refused to describe the scope of its search for documents, the types of documents that Respondent will collect, and when Petitioner's counsel may be allowed access to documents. Indeed, Respondent has indicated in another DTA action that Respondent may oppose compiling the complete Record on Review. *See* Opp. To Mot. for Production Of Information And Other Procedural Relief, *Al-Haag v. Gates*, no. 07-1165 (Aug. 6, 2007).

2007). The Court also entered a revised schedule for briefing the merits.

See id.

10. A similar schedule for the filing of a Certified Index of the Record on Review is warranted in this case, and—pursuant to the Protective Order—the simultaneous provision of the Record to Petitioners. The Court’s holding that the Record on Review includes the Government Information should come as no surprise to the Government—Petitioners have argued for the past year that the Record on Review includes the Government Information.

11. For the foregoing reasons, Petitioners propose entry of the following scheduling order in each of their cases, similar in nature to the schedule entered in *Paracha*, subject to the terms of the Protective Order:

Government files Revised Certified Index to Record :
September 13, 2007;

Government provides Petitioners’ counsel with Record on Review:
September 13, 2007;

Petitioners file and serve their Briefs on the merits:
October 1, 2007;

The Government files and serves its Brief in Response:
October 31, 2007; and

Petitioners file and serve their Reply Briefs:
November 14, 2007.

Petitioners' further request that oral argument be scheduled for the first available date following the filing of the Petitioners' Reply Briefs.

For the foregoing reasons, Petitioners respectfully request entry of Petitioners' proposed scheduling order.

Dated: August 15, 2007

Respectfully submitted,



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Certificate of Service

I, Erika Tillery, certify that copies of this motion were on August 15, 2007 served electronically and by hand delivery on counsel for Respondents:

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