

No. 07-1090

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

ABDULRAHIM ABDUL RAZAK AL GINCO,

Prisoner, Guantánamo Bay Naval Station, Guantánamo Bay, Cuba,

Petitioner,

v.

ROBERT M. GATES,

Secretary of Defense of the United States of America,

Respondent.

PETITIONER'S OPPOSITION TO RESPONDENT'S MOTION TO
GOVERN FURTHER PROCEEDINGS

Steven T. Wax
Federal Public Defender
Stephen R. Sady
Chief Deputy Federal Public Defender
101 SW Main Street, Suite 1700
Portland, Oregon 97204
Telephone: (503) 326-2123
Facsimile: (503) 326-5524

Attorneys for Petitioner

The petitioner, Abdulrahim Abdul Razak Al Ginco, through his attorneys, Steven T. Wax and Stephen R. Sady, oppose the Respondent's Motion to Govern Further Proceedings on the following grounds:

- 1) Because this Court's decision in *Bismullah v. Gates*, 2007 WL 2067038 (D.C. Cir. July 20, 2007), did not address the record in the context of extrinsic evidence establishing lack of initial Department of Defense jurisdiction, this Court is free to decide in the first instance whether and how such evidence should be handled;
- 2) This Court did not address in *Bismullah* the application of a protective order in the context of a pre-existing District Court protective order under which all proceedings can be conducted without the need for a different or narrower order and under which pleadings have already been filed with this Court;
- 3) The *Bismullah* decision did not involve a request for expedited disposition based on a showing of immediate and irreparable harm by the Petitioner, so expedited and bifurcated proceedings should be addressed in the first instance;

- 4) *Bismullah* did not address the scope of the record under circumstances in which the Petitioner presented affirmative evidence of lack of initial jurisdiction and actual innocence;
- 5) The Court in *Bismullah* did not address the question of whether the government must file an answer or other form of response where, based on the Petitioner's statement of material facts, the Petitioner would be entitled to immediate relief;
- 6) The Respondent's invocation of Rule 15(a) is inapt because the DTA proceedings are *sui generis* and not an appeal from an agency decision; and
- 7) Contrary to the Respondent's statement, the petition comports with the Federal Rules of Appellate Procedure because, as stated in the Motion to Expedite filed contemporaneously with the petition:

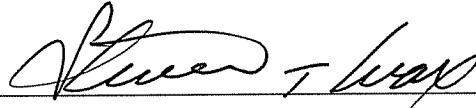
Based on adaption of the existing rules, and with consultation with the Clerk's office, the Petition incorporated the essentials for consideration of Abdul Rahim's claims: the requisite certificates; the procedural history; the factual development; the issues presented by the individual claims; and the constitutional concerns raised by failure to implement the DTA to provide review commensurate with traditional habeas corpus. Under the circumstances of this case, especially given the absence of rules governing this atypical proceeding, the Court should proceed on the Petition filed to avoid unnecessary delay

and to permit full exposition of the merits based on the strong evidence of factual innocence.

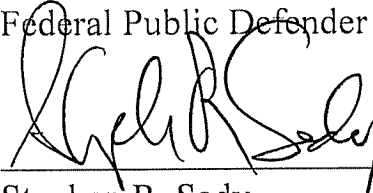
Motion to Proceed on the Original Petition, to Expedite Briefing, and to Calendar Specially for Oral Argument at 1-2.

For the foregoing reasons and those stated in the Motion to Proceed on the Original Petition, to Expedite Briefing, and to Calendar Specially for Oral Argument and the Motion to Govern Proceedings, the Court should adopt the schedule proposed by the Petitioner.

RESPECTFULLY SUBMITTED this 14th day of August, 2007.



Steven T. Wax
Federal Public Defender



Stephen R. Sady
Chief Deputy Federal Public Defender

CERTIFICATE OF SERVICE

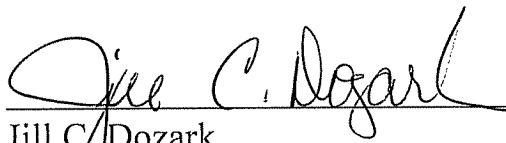
I hereby certify that on August 14, 2007, I filed and served the foregoing Petitioner's Opposition to Respondent's Motion to Govern Further Proceedings by causing two copies to be delivered to the Privilege Review Team via Federal Express, with the original and four copies to be forwarded to the Court, and one copy to be conformed and returned to our office.

I further certify that upon receiving clearance from the Privilege Review Team, one copy will be forwarded to the following counsel of record via U.S. mail:

Matthew M. Collette
Peter Douglas Keisler
Douglas N. Letter
August Edward Flentje
Robert M. Loeb
Catherine Y. Hancock
U.S. Department of Justice
Civil Division, Appellate Staff
950 Pennsylvania Avenue, NW
Washington, D.C. 20530-0001

Judry Laeb Subar
U.S. Department of Justice
Federal Programs Branch
20 Massachusetts Avenue, NW
Room 7342
Washington, DC 20530

Terry Marcus Henry
U.S. Department of Justice
P.O. Box 883
20 Massachusetts Avenue, NW
Suite 7144
Washington, DC 20044



Jill C. Dozark