

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.

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MOTION FOR ORDER GOVERNING PROCEEDINGS

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Attorneys for Petitioner

The petitioner, through counsel, Stephen R. Sady and Steven T. Wax, respectfully moves this Court for an Order setting an expedited schedule for disposition of this case involving steps that would permit resolution of the first four jurisdictional claims, which assert that the Combatant Status Review Tribunal did not constitute a competent tribunal to make an enemy combatant determination, followed, if necessary, by resolution of the remaining claims based on production of all the information the CSRT is authorized to obtain and to consider pursuant to the procedures specified by the Department of Defense, as follows:

- calendar forthwith for immediate disposition the fully briefed motion filed on April 12, 2007, to proceed on the original petition, to expedite, and to calendar specially for oral argument upon which the Court deferred consideration by its Order of May 1, 2007;
- order the government to file an answer within 20 days either admitting or controverting under oath each statement of material facts set out in pages 13 to 26 of the Petition and responding to each of the first four claims;
- order the petitioner to file within ten days of the answer a reply limited to consideration of the first four claims based on admissions in the government's answer and, to the extent material facts relevant to one or more of the jurisdictional claims are sufficiently controverted, setting the matter forthwith for an evidentiary hearing to resolve disputed jurisdictional facts;
- order the government to file all the information the CSRT is authorized to obtain and to consider seven days before any evidentiary hearing, if an evidentiary hearing is needed, or seven days after any ruling adverse to the petitioner on the first four claims;

- order a briefing schedule of 21 days for opening brief, 14 days for response, and 7 days for reply to address the remaining claims if the Court's resolution of the first four claims does not result in a grant of relief.

The government will determine its response to the proposed schedule upon review of the pleadings.

On April 12, 2007, the petitioner submitted a Petition For Immediate Release And Other Relief Pursuant To The Detainee Treatment Act. The first four claims assert unique issues regarding the lack of Department of Defense jurisdiction over the petitioner because 1) the CSRT relied on the products of Taliban torture in violation of Article 15 of the Convention Against Torture; 2) the temporal nexus for jurisdiction required by the laws of war and *Hamdan v. Rumsfeld*, 126 S.Ct. 2749 (2006), is lacking because the petitioner was a Taliban torture victim and political prisoner for over 18 months before the Authorization for the Use of Military Force; 3) because the petitioner initially approached the United States to report human rights violations, including federal crimes committed against Americans, his detention violates United States laws and constitutional provisions relating to federal witnesses; and 4) a Taliban torture victim and political prisoner does not meet any definition of enemy combatant.

On April 18, 2007, the petitioner moved the Court for an order to proceed on the petition as filed, to set for expedited consideration, and to calendar the matter for oral argument. On April 23, 2007, the government filed an opposition, asserting that the Court should await the outcome of *Bismullah* and *Parhat* and that additional time would be needed. The petitioner replied on April 24, 2007, that the petitioner established the factors supporting a motion to expedite, that the Respondent had all the material establishing the petitioner's claims of innocence and lack of Department of Defense jurisdiction since September 2006, and that the petitioner raised questions distinct from those at issue in *Bismullah* and *Parhat*.

The Court entered an order on May 1, 2007, deferring consideration of the motion until this Court decided *Bismullah* and *Parhat* and instructing that governing motions be filed within 14 days. This Court issued its opinion on July 20, 2007, in *Bismullah v. Gates*, 2007 WL 2067938 (D.C. Cir. 2007). The pressing need for expedited briefing and resolution continues.

The *Bismullah* opinion did not resolve issues central to the present case because none of Abdul Rahim's first four claims were at issue. The present case is unique because the petitioner's CSRT testimony has been corroborated by public records and sworn testimony that the government has had in its possession since September 21, 2006, when the summary judgment motion was filed in the District

Court in *Ginco v. Bush*, Civil No. 05-1310-RJL. Further, unlike the *Bismullah* and *Parhat* petitioners, the DTA filings to date as well as access to counsel have been governed by Judge Leon's protective order and memorandums of understanding, which are in place and render unnecessary any delay or complication based on a new protective order limited solely to DTA matters.<sup>1</sup> Especially with the grant of certiorari in *Boumediene v. Bush*, 2007 WL 1854132 (U.S., June 29, 2007), the habeas protective order will continue to provide protection for the security interests at issue in this proceeding. In this case, counsel has had access to the client under the district court protective order and has filed, and can continue to file, pleadings in this Court based on that order.

This case cries out for resolution without delay. As set out in the Petition, there are four fundamental flaws that establish the Department of Defense's assertion of jurisdiction is baseless and that no competent tribunal has designated Abdul Rahim as an enemy combatant. On these preliminary questions, the Court should rule based on the statement of material facts that the government has not denied in the nine months the relevant documents have been filed with both the Department of Justice and the Department of Defense and which, given the requirements of candor, the

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<sup>1</sup> Unlike the present case, the attorneys for the petitioners in *Bismullah* did not enter a protective order or sign memorandums of understanding in a parallel habeas corpus case.

petitioner believes cannot reasonably be controverted. Any one of the four jurisdictional claims would entitle the petitioner to relief. As in any case, the rational allocation of scarce resources favors attempting to resolve the case on the narrowest and simplest bases before requiring more resource-intensive treatment.

If the material facts need supplementation and the Court does not resolve the case based on any of the four jurisdictional bases for relief, the facts established by the petitioner would entitle him to full production of all the information the CSRT is authorized to obtain and to consider pursuant to the procedures specified by the Department of Defense. The jurisdictional questions support a particularized showing that, if the Court does not grant relief based on the first four issues, full discovery should be provided to allow articulation in greater detail regarding the procedural objections and the legally insufficient basis for an enemy combatant finding as argued in Claim 5. Not only were the procedural rules not followed, resulting in extreme prejudice, the balance of the information and evidence in the government's possession falls far short of the statutory requirement for an enemy combatant finding.

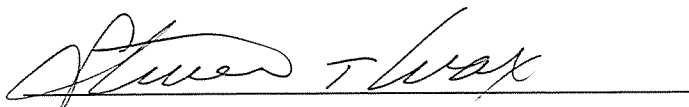
The proposed scheduling allows for the Court to most effectively allocate its resources. First, the Court should grant expedited treatment based on the Petition filed on April 12, 2007. Second, the Court should require the Respondent to either

controvert or proceed on the facts as alleged in the statement of facts. The parties should brief and provide oral argument on any of the first four claims that are not so controverted that an evidentiary hearing is required. Third, if an evidentiary hearing is required or if none of the first four claims provide a basis for relief, then the Court should order full production of the CSRT discovery, especially exculpatory material as described in the Petition, and schedule briefing and argument on the merits of all claims not resolved based on the statement of material facts.

While the DTA process is new, this Court can draw on analogous procedures from habeas corpus and other civil cases favoring speedy resolution of DTA claims. The schedule Abdul Rahim suggests parallels the procedures employed in many civil actions. His petition includes claims that are susceptible of prompt resolution on the existing record. Because “the most elemental of liberty interests” is at stake (*Foucha v. Louisiana*, 504 U.S. 71, 80 (1992)), this Court should address the claims that are susceptible of resolution without additional fact development or procedural wrangling and determine whether Department of Defense jurisdiction is lacking based on any of the first four claims. Only if the Court determines that it cannot expeditiously resolve the case in favor of Abdul Rahim would it be necessary to spend additional time in discovery, evidentiary hearings, arguments about the scope of review, and other procedural issues.

For the foregoing reasons and those set out in his earlier pleadings, the petitioner requests this Court to follow the procedures and schedule suggested herein and to resolve the merits of his case without delay.

RESPECTFULLY SUBMITTED this 23rd day of July, 2007.



Steven T. Wax  
Federal Public Defender



Stephen R. Sady  
Chief Deputy Federal Public Defender

## CERTIFICATE OF SERVICE

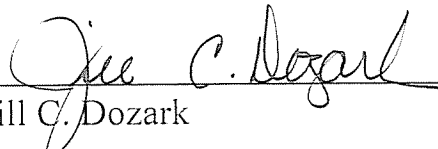
I hereby certify that on July 23, 2007, I filed and served the foregoing Motion for Order Governing Proceedings by causing two copies to be delivered to the Privilege Review Team via Federal Express, with the original and four copies to be forwarded to the Court, and one copy to be conformed and returned 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:

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