

UNITED STATES COURT OF APPEALS
FOR DISTRICT OF COLUMBIA CIRCUIT

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

SALIM AHMED HAMDAN,

*Petitioner-
Appellee,*

v.

ROBERT GATES, *et al.*,

Respondents

No. 07-5042

[Civ. Action No. 1:04-cv-01519-JR]

**PETITIONER SALIM AHMED HAMDAN'S
PETITON FOR INITIAL HEARING EN BANC**

Pursuant to Fed. R. App. P. 35, Petitioner Salim Ahmed Hamdan respectfully submits this Petition for Initial Hearing En Banc.

INTRODUCTORY STATEMENT PURSUANT TO F.R.A.P. 35(b)

Rule 35 allows for initial hearing en banc when either (1) consideration by the full court is necessary to secure and maintain the uniformity of the court's decisions; or (2) the proceeding involves one or more questions of exceeding importance. Fed. R. App. P. 35(b)(1). Petitioner Hamdan's appeal, which appears to have been only one vote away from obtaining certiorari by the Supreme Court of the United States on certiorari *before* judgment, *Hamdan v. Gates*, 127 S. Ct. 2133, 2134 (2007), satisfies both requirements and initial hearing en banc is therefore appropriate and necessary.¹

¹ This Motion for Initial Hearing En Banc is timely pursuant to F.R.A.P. 35(c) which provides that such a motion is timely if filed "by the date when appellee's brief is due." No briefing has been ordered for Hamdan's appeal. Along with the filing of this Motion, Petitioner Hamdan is also filing a Motion to Govern Future Proceedings recommending initial en banc review.

First, the opinion of the panel in *Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007), holding that detainees at the Guantanamo Bay Naval Station in Cuba have neither statutory nor constitutional habeas rights would presumably be binding on any three-judge panel to hear Hamdan's appeal in this case. Because the *Boumediene* decision's language is so broadly written that it potentially conflicts with the Supreme Court's opinion in *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006) and *Rasul v. Bush*, 542 U.S. 466, 481-82 (2004), *en banc* hearing is appropriate. *En banc* consideration may either confine the *Boumediene* decision's broad language to non-military commission cases or call the holding into question altogether.

Second, this case challenges the constitutionality of the Military Commissions Act of 2006 ("MCA"), Pub. L. No. 109-336, 120 Stat. 2600 (2006), and raises multiple issues of exceptional importance, including:

1. Whether Petitioner, an individual detained as an alleged enemy combatant at Guantanamo Bay, has access to statutory habeas corpus, particularly to challenge an illegal trial scheme before that trial takes place.
2. Whether the MCA, which purports to strip federal courts of habeas jurisdiction with respect to Guantanamo Bay detainees, unconstitutionally violates separation of powers, the Bill of Attainder Clause, and Equal Protection guarantees.
3. Whether Petitioner, even if stripped of the statutory right of habeas by the MCA, is protected by fundamental rights secured by the Constitution, including the right to challenge the jurisdiction of that commission via the writ of habeas corpus.

STATEMENT OF THE CASE

Over five years ago, indigenous forces seized Hamdan in Afghanistan, where he was turned over to the U.S. military for a bounty, interrogated for months, and then brought to Guantanamo Bay. In July 2003, the President asserted that Hamdan was subject to his November 13, 2001 Military Order providing for trial by military commission. Hamdan's demand that charges be preferred and a speedy trial held under the UCMJ was rejected. In

April 2004, Hamdan's military counsel filed a petition for a writ of habeas corpus in federal district court. Ultimately, in June 2006, the Supreme Court ruled that Hamdan could not be tried by a military commission. *Hamdan*, 126 S. Ct. 2749. The Court held that the Geneva Conventions applied because the jurisdictional statute for military commissions incorporated the laws of war, that Common Article 3 applied in the armed conflict in which Hamdan was captured, and that it entitled him to trial by "a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples." *Id.* at 2795.

On October 17, 2006 the President signed the MCA into law. Under the MCA, "alien unlawful enemy combatants" are subject to the jurisdiction of military commissions. 10 U.S.C. § 948(c), (d). The determination of "unlawful" combatancy may be made by a Combatant Status Review Tribunal ("CSRT") or "another competent tribunal." *Id.* Once made, those determinations are "dispositive for purposes of jurisdiction[.]" *Id.* In addition, the MCA purports to strip jurisdiction over any claims relating to "the prosecution, trial or judgment" of a commission. 10 U.S.C. § 950j(b).

On remand from the Supreme Court, the district court interpreted § 7 of the MCA to require dismissal of Hamdan's habeas petition. *Hamdan v. Rumsfeld*, 464 F. Supp. 2d 9 (D.D.C. 2006). The district court first held that the MCA removed statutory habeas jurisdiction. *Id.* at 12. It next held that the MCA did not suspend the constitutional right to habeas because the conditions for suspension did not exist and Congress "made no findings of the predicate conditions." *Id.* at 16. Nevertheless, the district court held that the general availability of constitutional (as opposed to statutory) habeas was of no help to Hamdan because, as an enemy alien at Guantanamo, he had no right to seek the writ. The district court dismissed as dicta the Supreme Court's statement that its interpretation of the habeas statute in *Rasul*, 542 U.S. at 481 was "consistent with the historical reach of the writ of habeas corpus." *Id.* at 16-17. Instead of following *Rasul*, the district court relied on *Johnson v. Eisentrager*, 339 U.S. 763 (1950), where the Court held that German citizens convicted of war

crimes in post-World War II China and imprisoned in Germany had no right to the writ. *Id.* at 18-19. Having decided that it had been “divested of jurisdiction,” the court opined that it could not consider Hamdan’s remaining constitutional challenges. *Id.* at 19, n.16.

On February 20, 2007 this Court issued its decision in *Boumediene v. Bush*, 476 F.3d 981 (C.A.D.C. 2007). The Court in *Boumediene* likewise determined that MCA § 7 had statutorily removed jurisdiction over habeas petitions brought by “enemy combatants” held at Guantanamo Bay. 476 F.3d at 984, 987-88. The *Boumediene* Court went on to hold that persons held “at an overseas military base” such as Guantanamo could not lay claim to any constitutional protections on the rationale that “the Constitution does not confer rights on aliens without property or presence within the United States.” *Id.* at 990-991. Although the *Boumediene* appeal, by its own terms, dealt with habeas challenges brought by those subject to detention pursuant to a CSRT, the Court’s opinion appears to reach broadly to cut off any habeas claim by any alien held at Guantanamo. *Id.*

Hamdan, joined by a Petitioner from the *Boumediene* appeal, Omar Khadr, sought certiorari in a combined Petition for Certiorari Before Judgment and Petition for Certiorari filed February 27, 2007. On April 30, 2007, the Supreme Court denied Hamdan’s Petition for Certiorari Before Judgment, with three Justices dissenting. *Hamdan*, 127 S. Ct. at 2134 (Souter, J., Breyer, J., Ginsburg, J., dissenting).²

During the pendency of Hamdan’s civil case and appeal, commission proceedings were resumed against him pursuant to the MCA.³ As mentioned, § 948d(a) of the MCA

² The *Boumediene* petitioners likewise sought, and were denied, certiorari. *Boumediene v. Bush*, 127 S. Ct. 1478 (2007) (Stevens, J., denying certiorari). Those petitioners have petitioned for reconsideration of the Court’s denial of certiorari; on June 4, 2007, the Government was invited to file a response to that petition. 551 U.S. – (Jun. 4, 2007).

³ Commission proceedings were also resumed against Omar Khadr in April 2007. He filed an Emergency Motion to Stay Military Commission Proceedings in this Court on May 23, 2007. That Motion was denied in a May 20, 2007 per curiam Order stating “This court is without jurisdiction to grant the requested relief. See 10 U.S.C. § 950j(b).” *Khadr v. Gates*, No. 07-1156 (May 30, 2007 Order). His charges before the commission have been dismissed without prejudice for the same reason as those against Hamdan. See *infra* at pp. 5-6.

purports to subject “alien unlawful enemy combatants” to the jurisdiction of military commissions. On February 2, 2007, charges of “Conspiracy” and “Providing Material Support for Terrorism” were sworn against Hamdan, and formally served on May 14, 2007. Hamdan moved to dismiss for lack of jurisdiction, based on the Government’s failure to show that he was, in fact, an “unlawful enemy combatant” subject to the commission’s jurisdiction. At his arraignment on June 4, 2007, the Military Judge agreed, and ordered all charges against Hamdan dismissed without prejudice. *See* Declaration of Joseph M. McMillan in Support of Petition for Initial Hearing En Banc, Exhibit A.⁴

The Military Judge found that Hamdan’s CSRT, which was convened for the sole and limited purpose of determining whether he was an “enemy combatant” subject to continued detention, could not be retroactively converted into a finding that Hamdan was an “*unlawful* enemy combatant” as required by the MCA. Nor, according to the Military Judge, was the President’s February 7, 2002 memo, setting forth the Executive’s unilateral determination that all “Taliban detainees are unlawful combatants,” sufficient to provide the necessary “individualized determination that *this accused* actually supported or engaged in hostilities [against the United States].” Ex. A at 3 (emphasis added). The Military Judge ruled that, before the Commission could properly assert jurisdiction, an individualized determination of “unlawful” enemy combatancy was required.

[Hamdan] is either entitled to the protections accorded to a Prisoner of War, or he is an alien unlawful combatant subject to the jurisdiction of a Military Commission, or he may have some other status. The Government having failed to determine, by means of a competent

⁴ Hamdan’s charges were not sworn or referred until after the district court’s ruling on remand, thus, the district court did not have occasion to consider the legality of the MCA’s attempted jurisdiction-strip for those facing trial. Similarly, the petitioners in *Boumediene* did not present a challenge to the MCA based on its applicability to those facing charges before a military commission. Although the district court and *Boumediene* decisions could be read to withdraw jurisdiction over the habeas petitions of any persons held at Guantanamo, neither court has directly addressed the jurisdictional question of whether those facing trial before a military commission are entitled to habeas to test the validity and jurisdiction of the commission created to try them.

tribunal, that the accused is an “unlawful enemy combatant” using the definition established by Congress, it has not shown, by a preponderance of the evidence, that the accused is subject to the jurisdiction of this Commission.

Id. at 4. The Government has stated it will move to reconsider the Military Judge’s Order.

ARGUMENT

I. Initial hearing en banc is necessary to overrule *Boumediene* and secure the uniformity of this Court’s decisions.

Federal Rule of Appellate Procedure 35 allows for initial hearing en banc when consideration by the full court is “necessary to secure or maintain uniformity of the court’s decisions” including where “a panel decision conflicts with a decision of the United States Supreme Court.” Fed. R. App. Proc. 35(a), (b)(1)(a). Here, en banc review is necessary because the panel decision of this Court in *Boumediene* is wrongly decided and in conflict with the Supreme Court’s decisions in *Hamdan*, 126 S. Ct. 2749 and *Rasul*, 542 U.S. at 481-82. And because the language of the panel’s opinion in *Boumediene* is overly broad in scope, that wrongly-decided case would most likely serve to bind any panel assigned to hear Hamdan’s case. The *Boumediene* panel framed the issue before the court as whether “federal courts have jurisdiction over petitions for writs of habeas corpus filed by aliens captured abroad and detained as enemy combatants at the Guantanamo Bay Naval Base in Cuba.” *Boumediene*, 476 F.3d at 984, 987-88. That question does not distinguish between those detainees challenging the CSRT process and a detainee challenging the legality of a military commission trial, and is therefore broad enough to cover Hamdan’s claims. Further, the panel broadly held that there was no general constitutional right of habeas distinct from the statutory grant, a holding that would also cover Hamdan’s claim on that point. *Id.* at 988 n.5. Thus, without *en banc* review, any panel of this Court assigned to hear Hamdan’s appeal will most likely be bound by *Boumediene*. *LaShawn A. v. Barry*, 87 F.3d 1389, 1395 (D.C. Cir. 1996)

(en banc) (one three-judge panel may not overrule a prior panel's decision, only the full court en banc may do so).

To be sure, Hamdan's case differs from that of the *Boumediene* appellants in that he raises a challenge to the legality of his impending military trial under the MCA while the latter challenged only the legality of the CSRT process.⁵ As was demonstrated at Hamdan's arraignment, however, the MCA's slipshod creation of a new criminal court and the aggressive manner in which its jurisdiction may be asserted by the Executive, counsel even more strongly for *en banc* review in this case than in *Boumediene*.

Because *Boumediene* was wrongly decided, is in conflict with the Supreme Court's decision in *Rasul*, and yet would bind any panel assigned to hear Hamdan's appeal, this Court should grant the petition for initial hearing en banc to overrule or limit *Boumediene*.

A. The *Boumediene* panel erred in creating a legal black hole at Guantanamo, at least for those facing *criminal* sanctions.

Regardless of whether the MCA strips the federal courts of statutory jurisdiction to consider habeas petitions filed by Guantanamo detainees, Hamdan's petition is cognizable under the writ of habeas corpus conferred by the Constitution. The Constitution provides that "[t]he privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it." Art. I, § 9, cl. 2. This Court should make clear that, contrary to the *Boumediene* panel's ruling, the detention and trial of alleged enemy combatants held for years at Guantanamo is subject to judicial review under the

⁵ The MCA purports to strip jurisdiction over any habeas action brought by an alien "determined by the United States to have been properly detained as an enemy combatant or . . . awaiting such determination." MCA § 7(a). Nor may the courts hear "any other action against the United States or its agents relating to any aspect of the detention, transfer, trial, or conditions of confinement" of such an alien, except for a limited review allowed under the Detainee Treatment Act of 2005, Pub. L. No. 109-148, div. A, tit. X, 119 Stat. 2739 (2005) ("DTA"). *Id.* A separate MCA provision strips jurisdiction over claims relating to "the prosecution, trial, or judgment" of a commission. MCA § 3(a) (adding 10 U.S.C. § 950j(b)).

