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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 HAMDAN'S MOTION TO GOVERN FUTURE PROCEEDINGS

Petitioner Salim Ahmed Hamdan is one of a very small number of detainees who expects to face criminal trial in a military commission convened by the Military Commissions Act of 2006 ("MCA") Pub. L. No. 109-336, 120 Stat. 2600 (2006). His habeas action presents an ongoing challenge to the legality of that criminal process – a process that is empowered to impose sentences of life imprisonment or death. The District Court order in Mr. Hamdan's case and a related opinion of this Court, *Boumediene v. Bush*, 476 F.3d 981 (C.A.D.C. 2007), purport to interpret the MCA to withdraw jurisdiction over his case. The Circuit Court opinion in *Boumediene* does not squarely address whether those subject to trial before a military commission – as opposed to persons merely detained as enemy combatants – have habeas rights that remain protected by the Suspension Clause or other constitutional guarantees. Nonetheless, its sweeping language would presumably bind any subsequent panel deciding that question. Accordingly, Mr. Hamdan moves for an Order pursuant to Fed.

R. App. P. 35, seeking an initial hearing en banc to review the District Court's Order in his case and to seek overrule of the *Boumediene* decision.¹

If, in the alternative, the Circuit Court declines to hear his case en banc, Mr. Hamdan asks that the Circuit Court summarily adjudicate the issue of whether the *Boumediene* decision requires dismissal of his action, so that he may pursue further relief in the Supreme Court of the United States.

I. PROCEDURAL HISTORY.

On December 13, 2006, the District Court below, relying on MCA § 7, determined that federal courts had been stripped of jurisdiction to hear Mr. Hamdan's habeas action. *Hamdan v. Rumsfeld*, 464 F. Supp. 2d 9, 10-12 (D.D.C. 2006). The District Court further held that Mr. Hamdan could not invoke the protections of the Suspension Clause by virtue of his detention offshore at Guantanamo Bay Nava Station, Cuba and because the Government had deemed him an "enemy alien." 464 F. Supp. 2d at 16-19. The District Court rejected additional constitutional arguments Mr. Hamdan raised to challenge the MCA (Bill of Attainder, Equal Protection, and Separation of Powers) on the grounds that, pursuant to the § 7 of the MCA, it no longer had jurisdiction to consider them. *Id.* at 19, n.16.

On February 2, 2007, Mr. Hamdan was re-charged with "Conspiracy" and "Material Support for Terrorism" under the MCA. *See* 10 U.S.C. §§ 950v(25), (28). At his arraignment before the commission on June 4, 2007, the Military Judge ordered those charges dismissed without prejudice, based on the Government's failure to satisfy the MCA's jurisdictional prerequisite that Mr. Hamdan is an "unlawful enemy combatant" subject to trial before a military commission. *See* 10 U.S.C. § 948d(a). As of the date of this filing, the Government has indicated it will seek reconsideration of that June 4, 2007 Order.

¹ Mr. Hamdan has filed a Petition for Initial Hearing En Banc today along with the filing of this Motion.

Shortly after the District Court issued its ruling in Mr. Hamdan's case, on February 20, 2007, the Circuit Court released its opinion in *Boumediene v. Bush*, 476 F.3d 981 (C.A.D.C. 2007). The *Boumediene* Court, reviewing the legality of the MCA's jurisdiction stripping provisions in the context of enemy aliens detained by the Government but not facing criminal trials, likewise held that the MCA had divested the federal courts of habeas jurisdiction and that aliens detained at Guantanamo as "enemy combatants" could not invoke any constitutional protection afforded by the Suspension Clause. 476 F.3d at 990-95.² Mr. Hamdan sought review of the District Court's ruling in a Petition for Certiorari Before Judgment; on April 30, 2007 the Supreme Court denied certiorari with three Justices dissenting. *Hamdan v. Gates*, 550 U.S. – (No. 06-1169) (Apr. 30, 2007).³ Pursuant to a March 22, 2007 Order from the Circuit Court, Mr. Hamdan's appeal in this Court was held in abeyance. He was ordered to file a motion to govern future proceedings within thirty days of this Court's May 9, 2007 Order.

II. INITIAL EN BANC REVIEW SHOULD BE ORDERED TO OVERRULE THIS COURT'S *BOUMEDIENE* DECISION.

Although the charges against him are presently dismissed, Mr. Hamdan nonetheless expects to face trial before a military commission pursuant to the MCA and his case, therefore, is focused at present on a jurisdictional challenge to the military commission. The District Court opinion in Mr. Hamdan's case effectively forecloses that challenge, by reading

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 Mr. Hamdan's Petition for Certiorari Before Judgment was joined by Petitioner Omar Khadr, a Petitioner in the *Boumediene* case who also faces trial before a military commission. Mr. Khadr sought certiorari from the *Boumediene* decision, and his Petition was joined to Mr. Hamdan's pursuant to Sup. Ct. R. 12.4. Mr. Khadr's Petition for Certiorari was denied simultaneously with the denial of Mr. Hamdan's Petition for Certiorari Before Judgment.

the MCA § 7 to withdraw habeas jurisdiction over Mr. Hamdan's case both as a matter of statutory and constitutional law. The District Court concluded:

Congress's removal of jurisdiction from the federal courts was not a suspension of habeas corpus within the meaning of the Suspension Clause (or, to the extent that it was, it was plainly unconstitutional, in the absence of rebellion or invasion), but Hamdan's statutory access to the writ is blocked by the jurisdiction-stripping language of the Military Commissions Act, and he has no constitutional entitlement to habeas corpus. Hamdan's habeas petition must accordingly be dismissed for want of subject matter jurisdiction.

Hamdan, 464 F. Supp. 2d 19. Indeed, the District Court considered the divestiture of its jurisdiction so complete, that it failed to reach several additional constitutional challenges to the MCA raised by Mr. Hamdan. *Id.* at 19, n.16. Absent an ability to do so in the federal courts now, Mr. Hamdan's only recourse is to challenge the jurisdiction of the commission on a post-conviction basis, a remedy that is of little value once his trial has already been conducted. *See Rafeedie v. INS*, 880 F.2d 506, 517-18 (D.C. Cir. 1989) (describing as a "significant and irreparable injury" the defendant having to preview his defense in a trial that may be subsequently invalidated). Indeed, the Supreme Court has already determined in Mr. Hamdan's case that where the jurisdiction of the commission is in question, both Hamdan and the government "have a compelling interest in knowing in advance whether [the Petitioners] may be tried by a military commission that is arguably without basis in law." *Hamdan v. Rumsfeld*, 125 S. Ct. 2749, 2772 (2006).

The Court in *Boumediene* did not purport to consider the difference in the scope of habeas afforded those detained as enemy combatants, and habeas afforded those facing trial before arguably unlawful criminal courts.⁴ Nonetheless, the *Boumediene* opinion is written in language that any subsequent panel would presumably read to foreclose any and all

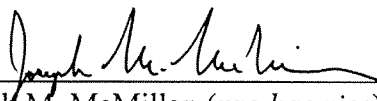
⁴ Judge Rogers, in dissent, indicated that there may be a material difference between the scope of habeas available to those facing criminal trials, and those merely detained. *Boumediene*, 476 F.3d at 1005 n.9 (Rogers, J., dissenting).

constitutional claims of a habeas petitioner. 476 F.3d at 992 (“Precedent in this circuit also forecloses the detainees’ claims to constitutional rights.”). Whether the *Boumediene* decision, as controlling precedent in this Circuit, forecloses habeas rights to challenge the jurisdiction of a military commission is an issue of “exceptional importance” which merits en banc review. Fed. R. App. P. 35(a)(2); *Ex Parte Quirin*, 317 U.S. 1, 19 (1942) (addressing the public importance of the jurisdictional issues presented in *Quirin*). Moreover, *en banc* review is needed to overrule *Boumediene* if, as it appears, its broad holding applies to Hamdan’s challenge to the jurisdiction of his commission. Fed. R. App. P. 35(b)(1). As set forth in his Petition for Initial Hearing *En Banc* filed with the Court today, the issues presented by Mr. Hamdan’s case warrant the full Circuit’s review.

CONCLUSION

Mr. Hamdan respectfully requests that the Court Order initial en banc review to determine the applicability of the *Boumediene* decision to military commission cases, and, if necessary, to overrule it. In the alternative, that Court should summarily adjudicate that question, without the delay of additional briefing by the parties, so that Mr. Hamdan may seek further review in the Supreme Court of the United States at the earliest available opportunity.

Respectfully submitted this 8th day of June, 2007.

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CERTIFICATE OF SERVICE

I hereby certify that on this June 8, 2007, I caused copies of the foregoing Motion to Govern Future Proceedings to be sent by hand delivery to the Court and the following counsel of record:

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