

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

SALIM AHMED HAMDAN,)	
Petitioner-Appellant,)	
v.)	Nos. 07-5042
DONALD H. RUMSFELD,)	
Respondent-Appellee.)	

**MOTION TO SUMMARILY AFFIRM THE DISTRICT COURT'S
DISMISSAL OF THE HABEAS PETITION**

Pursuant to this Court's order of March 22, 2007, directing the parties to file motions to govern future proceedings within thirty days of the Supreme Court's disposition of the petition for certiorari in Hamdan v. Gates, No. 06-1169, appellee hereby moves for summary affirmance of the district court judgment, dismissing petitioner's habeas case for want of jurisdiction. The reasons in support of this motion are as follows:

1. Petitioner in this case is currently being detained by the United States at the U.S. Naval Base at Guantanamo Bay, Cuba. He has been determined to be an enemy combatant by a Combatant Status Review Tribunal. Petitioner filed a habeas action in the district court challenging his detention.

While petitioner's habeas action was pending before the district court, Congress passed the Military Commissions Act of 2006 ("MCA"), Pub. L. No. 109-366, 120 Stat. 2600. Section 7(a) of the MCA amends 28 U.S.C. § 2241 to provide

that “[n]o court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.” Section 7(a) also eliminates federal court jurisdiction, except as provided by Sections 1005(e)(2) and (3) of the Detainee Treatment Act of 2005 (“DTA”), Pub. L. No. 109-148, Tit. X, 119 Stat. 2739, over “any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement” of such an alien. MCA § 7(a), 120 Stat. 2636. Accordingly, the Government moved to dismiss petitioner’s habeas case for lack of subject matter jurisdiction.

2. On December 13, 2006, the district court granted the Government’s motion and dismissed the habeas petition. See Hamdan v. Rumsfeld, 464 F. Supp. 2d 9, 19 (D.D.C. 2006). The district court held that the MCA was clearly intended to eliminate statutory jurisdiction over habeas petitions filed by aliens detained as enemy combatants. Id. at 11-12. The court further held that Congress did not intend the MCA to suspend any constitutional right to the writ of habeas corpus, but concluded that petitioner, as an alien captured and detained outside the sovereign territory of the United States, has no constitutional rights under the Suspension Clause, id. at 16-19.

Petitioner appealed from the district court's dismissal of his petition, but moved to hold his appeal in abeyance pending this Court's resolution of the related appeals of Boumediene v. Bush (Nos. 05-5062, 05-5063) and Al Odah v. United States (Nos. 05-5064, 05-5095 through 05-5116), which also address the issues of the proper construction, constitutionality, and application of Section 7 of the MCA.

3. On February 20, 2007, this Court issued its decision in Boumediene v. Bush and Al Odah v. United States, 476 F.3d 981 (D.C. Cir.), cert. denied, Boumediene v. Bush, 127 S. Ct. 1478, and Hamdan v. Gates, 127 S. Ct. 2133 (2007). This Court held that Section 7 of the MCA applies to all cases filed by aliens detained as enemy combatants, including pending habeas petitions, and eliminates federal court jurisdiction over such cases. Id. at 986; id. at 994 ("Federal courts have no jurisdiction in these cases."). This Court held that the withdrawal of habeas jurisdiction over the pending cases did not violate the Suspension Clause because the alien detainees held at Guantanamo have no constitutional rights and because the constitutional right to seek habeas review does not extend to aliens held outside United States' sovereign territory. See id. at 990-91. As a result, the Court ordered that the district courts' decisions in those detainee cases be vacated and dismissed the cases for lack of jurisdiction. See id. at 994 (noting that dismissal is the "only recourse").

4. Petitioner filed a petition for a writ of certiorari in the Supreme Court, seeking certiorari before judgment to review the district court's dismissal of his habeas petition. See Hamdan v. Gates, No. 06-1169 (filed Feb. 27, 2007).

On March 22, 2007, this Court ordered that petitioner's appeal be held in abeyance pending further order of the Court, and directed the parties to file motions governing future proceedings within thirty days of the Supreme Court's disposition of the petition for certiorari.

The Supreme Court denied the petition for certiorari on April 30, 2007. See Hamdan v. Gates, 127 S. Ct. 2133 (2007).

5. Pursuant to Section 7 of the MCA and this Court's holding in Boumediene, there is no federal court jurisdiction over the underlying district court claims filed by this petitioner, who, like the petitioners in Al Odah and Boumediene, is an alien detained at Guantanamo Bay as an enemy combatant. The Supreme Court's refusal, twice, to review the decision in Boumediene underscores the fact that that decision is binding, and that petitioner has no legal grounds to postpone dismissal of his habeas case. See Boumediene, 127 S. Ct. 1487 (2007); Hamdan v. Gates, 127 S. Ct. 2133 (2007).¹ If petitioner wishes to challenge his enemy combatant status, his

¹ Petitions for rehearing of the Supreme Court's order denying certiorari in Boumediene are currently pending (S. Ct. Nos. 06-1195, 06-1196). On June 4, 2007, the Supreme Court issued an order inviting the Government to file a response to the

exclusive remedy is to seek review in this Court pursuant to the Detainee Treatment Act of 2005, Pub. Law No. 109-148, § 1005(e), 119 Stat. 2680, 2739-45 (2005). There is, however, no jurisdiction over his district court case. Accordingly, the district court's judgment, dismissing the habeas petition, should be summarily affirmed.

Moreover, this Court has a duty to examine its own jurisdiction to hear cases pending before it. See, e.g., FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 230-31 (1990). For the same reasons that this Court determined that the district courts lack jurisdiction over the underlying habeas petitions, this Court lacks jurisdiction over the appeals arising from those habeas cases, including the above-captioned appeal. See Boumediene, 476 F.3d at 986 (MCA provides that no court shall have jurisdiction over detainees' habeas actions or any other case relating to their detention).

Accordingly, because it is clear now that there is no federal court jurisdiction over petitioner's habeas case or his appeal, the "only recourse" is to affirm the district court's dismissal of the habeas petition for want of the jurisdiction. Boumediene, 476 F.3d at 994. Indeed, this Court has recognized as much by dismissing for lack of jurisdiction other detainees' habeas cases, pursuant to Boumediene. See Zalita v. Bush, No. 07-5129 (Order of Apr. 25, 2007); Paracha v. Bush, Nos 05-5194, et al.

petitions within thirty days.

(Order of Apr. 9, 2007); Kiyemba v. Bush, Nos. 05-5487, et al. (Order of Mar. 22, 2007).

CONCLUSION

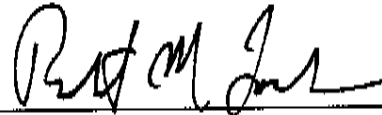
For the foregoing reasons, we respectfully request that the Court summarily affirm the district court judgment dismissing the habeas petition for want of subject matter jurisdiction.

Respectfully submitted,

PETER D. KEISLER
Assistant Attorney General

JONATHAN F. COHN
Deputy Assistant Attorney General

DOUGLAS N. LETTER
(202) 514-3602



ROBERT M. LOEB
(202) 514-4332



CATHERINE Y. HANCOCK
(202) 514-3469

Attorneys, Appellate Staff
Civil Division, Room 7268
U.S. Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530-0001

CERTIFICATE OF SERVICE

I hereby certify that on June 8, 2007, I filed and served the foregoing Motion to Summarily Affirm the District Court's Dismissal of the Habeas Petition by causing an original and four copies to be delivered to the Court via hand delivery, and by causing one paper copy to be delivered to lead counsel of record via Federal Express or hand delivery, as specified below:

Benjamin S. Sharp
Perkins Coie
607 14th St., NW
Washington, DC 20005-2011
202-628-6600

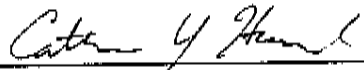
(hand delivery)

Neal K. Katyal
Georgetown University Law Center
600 New Jersey Ave., NW
Suite 312
Washington, DC 20001
202-662-9535

(hand delivery)

Joseph M. McMillan
Perkins Coie
1201 Third Avenue
40th Floor
Seattle, WA 98101-3099
206-583-8888

(Federal Express)


Catherine Y. Hancock