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

SALIM AHMED HAMDAN,	)	
Petitioner-Appellant,	)	
v.	)	Nos. 07-5042
ROBERT M. GATES,	)	
Respondent-Appellee.	)	
	)	

OPPOSITION TO PETITION FOR INITIAL HEARING EN BANC

Petitioner seeks to have his appeal, challenging the dismissal of his habeas case, heard by this Court en banc. He recognizes that this Court's recent decision in Boumediene v. Bush, 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), is controlling here. Thus, petitioner asks this Court to sit en banc to revisit its decision, less than five months after its issuance. The petition should be denied. Boumediene was correctly decided and is entirely consistent with established precedent. The Supreme Court has already twice declined to review that decision, including a petition brought by Hamdan. If Hamdan has any complaint regarding the military's designation of him as an enemy combatant, he may raise those claims in a petition to this Court under the Detainee Treatment Act of 2005 ("DTA"), Pub. L. No. 109-148, 119 Stat. 2680 (2005). There is, however, no basis to ask this Court to grant initial en banc to undo its five-month old precedent.

STATEMENT

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 ("CSRT"). Petitioner filed a habeas action in the district court challenging his detention.

On December 13, 2006, the district court dismissed the habeas petition for want of jurisdiction, pursuant to the Military Commissions Act of 2006 ("MCA"), Pub. L. No. 109-366, 120 Stat. 2600. See Hamdan v. Rumsfeld, 464 F. Supp. 2d 9, 19 (D.D.C. 2006). Petitioner appealed from the district court's dismissal of his petition, and 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, 06-5095 through 05-5116).

2. 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. 2007). This Court held that Section 7 of the MCA applies to all cases filed by aliens detained as enemy combatants at Guantanamo, 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 the 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 it dismissed the cases for lack of jurisdiction. See id. at 994 (noting that dismissal is the "only recourse").

3. In light of the Boumediene precedent, the Government moved for summary affirmance of the district court's dismissal of petitioner's habeas case. In response, petitioner asks this Court to hear his appeal en banc, so that the full Court may overrule Boumediene, which petitioner contends is wrongly decided.

ARGUMENT

This Court's recent decision in Boumediene is entirely consistent with established precedent, both of the Supreme Court and this Court. Indeed, the Supreme Court has twice

declined to review that decision. Accordingly, there is no reason for this Court to revisit its decision.

This Court correctly held in Boumediene that the MCA does not violate the Suspension Clause. As aliens outside the sovereign territory of the United States, Guantanamo detainees have no rights under the Suspension Clause, and, in any event, the habeas rights protected by that provision would not extend to aliens detained at Guantanamo Bay as enemy combatants. Moreover, the Court's holding that the MCA eliminates jurisdiction over pending habeas actions brought by Guantanamo detainees, which would include petitioner's habeas case, is compelled by the plain language of the statute. As petitioner himself recognizes (at 2), Boumediene plainly controls his appeal and forecloses any argument that he is entitled to constitutional habeas rights.[1]

1. Relying on settled precedent of the Supreme Court, this Court correctly held that the MCA does not violate the Suspension Clause. Over 50 years ago, the Supreme Court held that aliens outside the sovereign territory of the United States have no constitutional right to habeas corpus under the Suspension Clause, particularly during times of armed conflict. See Johnson v. Eisentrager, 339 U.S. 763, 777 (1950) (aliens detained outside the United States are not "entitled, as a constitutional right, to sue in some court of the United States for a writ of *habeas corpus*."). The Supreme Court concluded that, because the

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[1] Petitioner contends that Boumediene did not specifically address some of his constitutional arguments. But the decision in Boumediene necessarily encompasses (and resolves) those arguments. In any event, as explained below, petitioner cannot invoke any constitutional rights to challenge his detention as an enemy combatant.

petitioner in that case had no constitutional rights, the denial of habeas review did not violate either the Suspension Clause or the Fifth Amendment. Id. at 777-79, 784-85. In rejecting the assertion of a constitutional habeas right, the Supreme Court emphatically stated that such an entitlement "would hamper the war effort." Id. at 779.

The Supreme Court has reaffirmed Eisentrager's holding that aliens outside the United States have no rights under the Constitution. See United States v. Verdugo-Urquidez, 494 U.S. 259, 273 (1990) ("Not only are history and case law against [the alien], but as pointed out in [Eisentrager], the result of accepting his claim would have significant and deleterious consequences for the United States in conducting activities beyond its boundaries."); Zadvydas v. Davis, 533 U.S. 678, 693 (2001) (citing Eisentrager and Verdugo-Urquidez for the proposition that "[i]t is well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders.").

This Court has consistently applied these precedents in various contexts. See, e.g., 32 County Sovereignty Comm. v. Dep't of State, 292 F.3d 797, 799 (D.C. Cir. 2002) (a "'foreign entity without property or presence in this country has no constitutional rights, under the due process clause or otherwise'") (quoting People's Mojahedin Org. of Iran v. Dep't of State, 182 F.3d 17, 22 (D.C. Cir. 1999)) (emphasis added); cf. Jifry v. FAA, 370 F.3d 1174, 1182 (D.C. Cir. 2004) ("The Supreme Court has long held that non-resident aliens who have insufficient contacts with the United States are not entitled to Fifth Amendment protections.").

As the Court in Boumediene correctly recognized, 476 F.3d at 992, the detainees held at Guantanamo Bay, Cuba are manifestly outside of the United States. Pursuant to the terms of written agreements between this Nation and Cuba, the United States operates a naval base at Guantanamo Bay over which it exercises only control, but "not 'ultimate sovereignty.'"[2] See Rasul v. Bush, 542 U.S. 466, 475 (2004) (emphasis added); see also Eisentrager, 339 U.S. at 778, 784 (holding that because the aliens "at no relevant time were within any territory over which the United States is sovereign," application of the Fifth Amendment would be impermissibly "extraterritorial"). Courts repeatedly have concluded that provisions such as these do not effect a transfer of sovereignty. See Vermilya-Brown Co. v. Connell, 335 U.S. 377, 383, 390 (1948) (concluding that leased military base in Bermuda, over which the United States had "substantially the same" rights as it has over the base in Guantanamo Bay, was "beyond the limits of national sovereignty"); United States v. Spelar, 338 U.S. 217, 218, 221-22 (1949) (holding that the "foreign country" exception to the Federal Tort Claims Act applied to a U.S. military base in Newfoundland because the governing lease, the terms of which were "the same" as the ones at issue in Vermilya-Brown, had "effected no transfer of sovereignty"). With respect to Guantanamo Bay specifically, the Eleventh Circuit has held

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[2] See Lease of Lands for Coaling and Naval Stations, Feb. 23, 1903, U.S.-Cuba, T.S. No. 418 (6 Bevans 1113) (Lease); Lease of Certain Areas for Naval or Coaling Stations, July 2, 1903, U.S.-Cuba, T.S. No. 426 (6 Bevans 1120) (Supplemental Lease); Treaty on Relations with Cuba, May 29, 1934, U.S.-Cuba, 48 Stat. 1682, T.S. No. 866. Under the terms of those agreements, "the United States recognizes the continuance of the ultimate sovereignty of the Republic of Cuba" over the leased area, and "Cuba consents" to United States control over that area, but only "during the period" of the lease. Lease art. III. Moreover, the lease prohibits the United States from establishing certain "commercial" or "industrial" enterprises over that area, see id. art II.

that aliens there "have no First Amendment or Fifth Amendment rights." Cuban Am. Bar Ass'n v. Christopher, 43 F.3d 1412, 1428 (11th Cir. 1995); see also id. at 1425 ("We disagree that 'control and jurisdiction' is equivalent to sovereignty.").

This characterization of Guantanamo Bay, consistent with the views of the Executive Branch, is also appropriate because the "determination of sovereignty over an area is for the legislative and executive departments." Vermilya-Brown, 335 U.S. at 380; see also People's Mojahedin, 182 F.3d at 24 ("'Who is the sovereign, de jure or de facto, of a territory, is not a judicial, but a political question.'") (quoting Jones v. United States, 137 U.S. 202, 212 (1890)). If courts were to second-guess an Executive-Branch determination regarding who is sovereign over a particular foreign territory, they would not only undermine the President's "lead role * * * in foreign policy," First Nat'l City Bank v. Banco Nacional de Cuba, 406 U.S. 759, 767 (1972), but also "compromise the very capacity of the President to speak for the Nation with one voice in dealing with other governments." Crosby v. National Foreign Trade Council, 530 U.S. 363, 381 (2000); see also American Ins. Ass'n v. Garamendi, 539 U.S. 396, 413 (2003). Accordingly, Boumediene's holding that the aliens detained at Guantanamo are outside the sovereign territory of the United States and therefore have no constitutional right to habeas, is compelled by this precedent.

Even if Guantanamo Bay were somehow treated as sovereign United States territory (contrary to Rasul, 542 U.S. at 475), that fact would not be sufficient to confer on aliens detained there as enemy combatants in war time any constitutional right to challenge their detention. In Verdugo-Urquidez, the Supreme Court held that aliens "receive constitutional

protections when they have come within the territory of the United States and developed substantial connections with this country." 494 U.S. at 271 (emphases added); see People's Mojahedin, 182 F.3d at 22. Those substantial connections must be voluntary and continual. Thus, the Supreme Court further held that "lawful but involuntary" presence in the United States 'is not of the sort to indicate any substantial connection with our country" for constitutional purposes. Verdugo-Urquidez, 494 U.S. at 271. Further, even an alien who is in this country voluntarily may abandon any applicable constitutional rights if his presence and connections are not sustained. See United States v. Yakou, 428 F.3d 241, 248 (D.C. Cir. 2005) (an individual loses his legal permanent resident status by "engag[ing] in an abandoning act, like departing the United States for more than a 'temporary visit abroad,' 8 U.S.C. § 1101(a)(27)(A)"). As an alien detained involuntarily as an enemy combatant in war time, petitioner is not entitled to any constitutional right to challenge his detention, regardless of the legal status of Guantanamo.

Petitioner argues that "[b]ecause the Boumediene decision's language is so broadly written [] it potentially conflicts with the Supreme Court's opinion" in Rasul. Pet. at 2 (emphasis added). But any potential conflict between Boumediene and Rasul is based on a misreading of that precedent, as this Court explained in rejecting the same argument raised by petitioners in Boumediene.

Petitioner suggests (at 8-9) that Boumediene's holding that aliens detained as enemy combatants at Guantanamo have no constitutional right to habeas is contrary to the Supreme Court's decision in Rasul. But, as this Court correctly explained in Boumediene, in

extending habeas corpus to aliens at Guantanamo, the Supreme Court in Rasul relied entirely on the federal habeas statute. See Boumediene, 476 F.3d at 984-85 (Rasul held "that the habeas statute extended to aliens at Guantanamo"); id. at 985 ("the Court determined that the district court's jurisdiction over the detainees' custodians was sufficient to provide subject matter jurisdiction under § 2241."). This Court explained that the "Rasul decision, resting as it did on statutory interpretation, could not possibly have affected the constitutional holding of Eisentrager" that aliens outside the sovereign territory of the United States have no constitutional right to habeas. Id. at 992 n.10.

Petitioner alternatively contends (at 9-10) that Rasul effected a major constitutional overruling through its discussion of common-law habeas by concluding that, at common law, habeas jurisdiction would have extended to aliens in controlled jurisdictions outside the sovereign territory of England. He further contends that Boumediene is inconsistent with that conclusion. In fact, however, what the Supreme Court said was that "[a]t common law, courts exercised habeas jurisdiction over the claims of aliens detained within sovereign territory of the realm, as well as the claims of persons detained in the so-called 'exempt jurisdictions,' where ordinary writs did not run, and all other dominions under the sovereign's control." 542 U.S. at 481-82 & nn.11-13 (footnotes omitted). The cited cases involving "persons" outside the "sovereign territory of the realm" all involved British subjects. See id. at 481-82 nn. 12-13. The Supreme Court thus rested not on the historic availability of habeas to aliens abroad, but on its historic availability to citizens abroad in controlled territories, plus the fact that the habeas "statute draws no distinctions between

Americans and aliens." See id. at 481-82.

This Court recognized that fact in Boumediene, explaining that none of the common-law cases discussed by the Supreme Court "involved an alien outside the territory of the sovereign." 476 F.3d at 989. Accordingly, this Court concluded that, "given the history of the writ in England prior to the founding, habeas corpus would not have been available in 1789 to aliens without presence or property within the United States." Id. at 990. That holding is in no way inconsistent with the Supreme Court's ruling in Rasul.

Indeed, the Boumediene petitioners, as well as this petitioner, pressed these alleged inconsistencies in their petitions for certiorari, yet the Supreme Court twice declined to review the decision in Boumediene. See Boumediene v. Bush, 127 S. Ct. 1478 (2007); Hamdan v. Gates, 127 S. Ct. 2133 (2007).

2. The court of appeals also correctly held that the MCA removes federal jurisdiction over detainees' pending habeas petitions. Section 7 of the MCA unequivocally eliminates federal court jurisdiction over detainees' claims, including petitioner's, except as provided by section 1005(e)(2) and (e)(3) of the DTA. 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 as an enemy combatant. In addition, section 7(a) eliminates federal jurisdiction over " any other action * * * relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement" of such an alien. MCA, § 7(a). The statute further provides that both of these amendments "shall take effect on the date of the enactment of this Act,"

and that they "shall apply to all cases, without exception, pending on or after the date of the enactment of this Act, which relate to any aspect of the detention, transfer, treatment, trial, or conditions of detention of an alien detained by the United States since September 11, 2001." MCA, § 7(b).

As this Court explained, "[t]he detainees' lawsuits fall within the subject matter covered by the amended [Section] 2241(e); each case relates to an 'aspect' of detention and each deals with the detention of an 'alien' after September 11, 2001. The MCA brings all such 'cases, without exception' within the new law." Boumediene, 476 F.3d at 987. This Court's conclusion that the MCA applies to the detainees' habeas cases is unassailable and provides no basis for further review. Indeed, even the dissenting judge on the panel agreed with the majority that "Congress intended to withdraw federal jurisdiction" through the MCA. Id. at 999.

Petitioner contends (at 12-13) that application of the MCA to pending cases is inconsistent with the Supreme Court's decision in Hamdan v. Rumsfeld, 126 S. Ct. 2749 (2006), because it "runs up against the presumption against retroactivity, of which the Supreme Court took notice earlier in this case." As this Court properly recognized, however, the Supreme Court's decision in Hamdan, applying the presumption against retroactivity to the Detainee Treatment Act, was dependent upon the specific language of that Act, as well as its legislative history. See 476 F.3d at 985. In contrast, the language of Section 7(b) of the MCA, which "applies to 'all cases, without exception' relating to any aspect of detention," id. at 987, "could not be clearer." Id. at 986. As this Court stated, "It is almost

as if the proponents of these words were slamming their fists on the table shouting 'When we say "all," we mean all –without exception.'" Id. at 987; id. at 986 n.2 ("Everyone who has followed the interaction between Congress and the Supreme Court knows full well that one of the primary purposes of the MCA was to overrule Hamdan."). Accordingly, this Court properly concluded that the presumption against retroactivity was inapplicable to the MCA.

3. The petition should be rejected for another reason. As we explained in detail in our briefs to this Court in Boumediene, even if an alien held abroad as an enemy combatant could assert constitutional habeas rights (contrary to this Court's holding and to the Supreme Court's decision in Eisentrager), there would still be no Suspension Clause violation here. Under Swain v. Pressley, 430 U.S. 372, 381 (1977), Congress may freely repeal habeas jurisdiction if it provides an adequate substitute. Here, Congress has afforded petitioner an adequate and effective substitute remedy in section 1005(e)(2)(C) of the DTA. The statutory review for constitutional and other legal claims afforded by the DTA provides petitioner with greater rights of judicial review than the habeas review traditionally afforded to those convicted of war crimes by a military commission.

The Supreme Court has held that habeas review in that context does not examine the guilt or innocence of the defendant, nor does it examine the sufficiency of the evidence. Rather, it is limited to the question whether the military commission had jurisdiction over the charged offender and offense. See Yamashita v. Styer, 327 U.S. 1, 8 (1946) ("If the military tribunals have lawful authority to hear, decide and condemn, their action is not subject to judicial review merely because they have made a wrong decision on disputed facts.

Correction of their errors of decision is not for the courts but for the military authorities which are alone authorized to review their decisions"); id. at 17 ("We do not here appraise the evidence on which petitioner was convicted" because such a question is "within the peculiar competence of the military officers composing the commission and were for it to decide"); Ex parte Quirin, 317 U.S. 1, 25 (1942) ("We are not here concerned with any question of the guilt or innocence of petitioners"); see also Eisentrager, 339 U.S. at 786.

Under Yamashita, therefore, there was no review of non-jurisdictional legal questions, compliance with the military's own procedures, or evidentiary sufficiency – all of which the DTA and MCA permit. See DTA, § 1005(e)(2)(C)(i) (permitting review of whether the CSRT, in reaching its decision, complied with its own procedures, "including the requirement that the conclusion of the Tribunal be supported by a preponderance of the evidence"). Thus, the DTA review provided by Congress far surpasses the type of habeas review available under Yamashita, and is plainly an adequate and effective substitute remedy for any applicable habeas right. See Swain, 430 U.S. at 381.

The review provided under the DTA is also fully consistent with traditional habeas practice outside the military tribunal context. In INS v. St. Cyr, this Court explained that, under traditional habeas review, "pure questions of law" are generally reviewable, but, "other than the question whether there was some evidence to support the order, the courts generally did not review the factual determinations made by the Executive." St. Cyr, 533 U.S. 289, 305-06 (2001). The DTA review fully satisfies that standard. Thus, even if habeas precedent developed in the non-military context were to be applied, application of the MCA and DTA

to petitioner would not violate the Suspension Clause.

4. The fact that petitioner, unlike some of the other aliens detained as enemy combatants at Guantanamo, is subject to prosecution before a military commission, does not warrant reconsideration of these issues by the entire Court. Indeed, in deciding Boumediene, this Court was certainly aware of the fact that some of the aliens detained at Guantanamo would be so prosecuted. Indeed, one of the petitioners before the Court in the Boumediene and Al Odah appeals was Omar Khadr, who was also subject to trial by military commission. Yet the panel carved out no exception for those individuals in its opinion, nor found that those individuals were somehow entitled to constitutional rights. Nor would there have been any basis for this Court to do so. No precedent of this Court or the Supreme Court suggests that aliens detained as enemy combatants outside the sovereign territory of the United States are entitled to habeas or other constitutional rights simply because they are subject to prosecution for war crimes. To the contrary, the petitioners in Eisentrager were convicted by a military commission, yet the Supreme Court still held that they had no right to habeas. See 339 U.S. at 766, 781.

Moreover, Khadr, joined by Hamdan, sought a writ of certiorari and specifically raised the issue of whether the MCA can constitutionally be applied to individuals subject to military commissions, as opposed to those individuals detained solely as enemy combatants. See Hamdan v. Gates, S. Ct. No. 06-1169. The Supreme Court, however, denied their petition, see Hamdan v. Gates, 127 S. Ct. 2133 (2007).

In any event, any complaint that the MCA is unconstitutional as applied to petitioner

may be pursued before this Court in a petition for review under section 1005(e)(3) of the DTA from the final decision of the military commission. That provision confers jurisdiction on this Court to review, inter alia, whether the commission's standards and procedures are "consistent with the Constitution and laws of the United States," to the extent they are applicable. DTA, § 1005(e)(3)(D)(ii). Petitioner's complaint, therefore, may be adequately addressed in the context of this Court's review of a final decision by a military commission, and provides no basis for this Court to hear en banc petitioner's appeal from the dismissal of his habeas petition.

5. In sum, petitioner provides no explanation as to why this Court should reconsider Boumediene, less than five months after the decision was issued. Petitioner points to no new circumstances that undermine the reasoning or holding of this Court's decision in Boumediene. Principles of *stare decisis*, therefore, counsel against revisiting this Court's final decision. And, as noted above, the Supreme Court has twice considered the same arguments raised by petitioner here, and has twice declined to review this Court's decision, including declining a petition filed by Hamdan. See Boumediene v. Bush, 127 S. Ct. 1478 (2007); Hamdan v. Gates, 127 S. Ct. 2133 (2007). In denying review, the Supreme Court recognized that the appropriate step for detainees post-Boumediene is to exhaust their remedies under the DTA. See 127 S. Ct. at 1478 (statement of Stevens & Kennedy, J.J., respecting the denial of certiorari). That is what petitioner here should now do. In that context, petitioner can challenge his designation as an enemy combatant in this Court, as well as the process used to render that determination. See DTA, § 1005(e)(2)(C).

Thus, there is no basis for petitioner to seek initial en banc consideration of its less than five-month old precedent. Rather, he should seek review under the statutory scheme established by Congress.

CONCLUSION

For the foregoing reasons, this Court should deny the petition for initial en banc.

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CERTIFICATE OF SERVICE

I hereby certify that on June 28, 2007, I filed and served the foregoing Opposition to Petition for Initial Hearing En Banc 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:

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