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

MAHMOAD ABDAH, et al.,	)	
Petitioners-Appellees,	)	
v.	)	Nos. 05-5115, 05-5116
GEORGE W. BUSH, et al.,	)	
Respondents-Appellants.	)	
	)	

OPPOSITION TO PETITIONERS' MOTION TO WITHHOLD ISSUANCE OF THE MANDATE

Petitioners request this Court to stay the mandate indefinitely in Al Odah v. United States and Boumediene v. Bush, 476 F.3d 981 (D.C. Cir. 2007), pending (1) petitioners' filing of petitions for review under the Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2680 ("DTA"), (2) this Court's resolution of those petitions, (3) petitioners' potential filing of a petition for a writ of certiorari in the Supreme Court after this Court's disposition of those petitions, and (4) the Supreme Court's resolution of such a petition for certiorari. Such an open-ended stay of the mandate is contrary to this Court's rules and precedent, and would thwart an Act of Congress by unduly hampering the proper means of litigation that Congress has afforded to petitioners to challenge their detention. Accordingly, the Government opposes any stay of the mandate.

1. 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 Military Commissions Act of 2006 ("MCA"), Pub. L. No. 109-366, 120 Stat. 2600 (2006), applies to all cases filed by aliens detained as enemy combatants, including pending habeas petitions, and eliminates federal court jurisdiction over such habeas cases. Id. at 986; id. at 994 ("Federal courts have no jurisdiction in these cases."). This Court further held that the withdrawal of habeas jurisdiction over the pending cases does 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. The detainees did not file a rehearing petition in this Court, and the time for filing such a petition has now expired.

The Supreme Court denied the detainees' petition for certiorari on April 2, 2007. See Boumediene v. Bush, Nos. 06-1195, 06-1196, ___ S. Ct. ___, 2007 WL 957363. Absent petitioners' motion for a stay, the mandate in the Al Odah and Boumediene appeals would issue on April 13, 2007. See Fed. R. App. P. 41(b) (mandate "must" issue seven calendar days after time to file rehearing petition expires).

2. Petitioners, detainees at Guantanamo Bay in two of the Al Odah appeals (Nos. 05-5115, 05-5116), seek to stay the mandate in Al Odah and Boumediene until some undetermined time in the future. They contend that, once they have exhausted their remedies under the DTA in this Court, they might file a petition for certiorari, the Supreme Court might grant their petition, and, within the scope of its review, might review this Court's jurisdictional ruling in Al Odah and Boumediene. Accordingly, petitioners argue (Mot. at 3) that "it would be premature for this Court to allow issuance of the mandate" and thereby give effect to this Court's judgment. Moreover, petitioners complain (id. at 4) that, if their habeas claims are dismissed pursuant to the Court's judgment, they may not be able to seek review of those dismissals in the Supreme Court after they have exhausted their DTA remedies, because the Supreme Court will be limited to reviewing this Court's DTA determinations.

3. Petitioners' motion is baseless.[1] Federal Rule of Appellate Procedure 41 permits a party to move for a stay of the mandate pending the filing of a petition for

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[1] In the event the Court disagrees and decides to stay the mandate as to the above-captioned appeals, the Court should not stay the mandate as to the other appeals consolidated in the Al Odah and Boumediene cases. Petitioners in those other appeals have not requested such relief, nor have they indicated that they will file petitions for review under the DTA or that they will seek Supreme Court review of this Court's DTA determinations.

a writ of certiorari in the Supreme Court. See Fed. R. App. P. 41(d). The motion "must show that the certiorari petition would present a substantial question and that there is good cause for a stay." Fed. R. App. P. 41(d)(2)(A). If the Court grants such a stay, it must not exceed 90 days, unless there is good cause, or a petition for certiorari is filed with the Supreme Court, in which case the stay continues until the Supreme Court disposes of the petition. Fed. R. App. P. 41(d)(2)(B).

Petitioners, however, filed a petition for certiorari, which the Supreme Court has already denied. See Boumediene v. Bush, Nos. 06-1195, 06-1196, ___ S. Ct. ___, 2007 WL 957363 (April 2, 2007). Thus, petitioners have no basis to move for a stay of the mandate pending a petition for certiorari. And, as noted, petitioners did not file a timely petition for rehearing with this Court, which is the only other basis for staying the mandate under Rule 41.

Petitioners' speculation that they may file a second petition for certiorari to review this Court's resolution of their yet-to-be-filed DTA petitions provides no basis to stay the mandate in these appeals. If petitioners do file petitions for review under the DTA and obtain an adverse decision from this Court, petitioners may, at that time, petition the Supreme Court to review this Court's ruling on their DTA petition and appropriate issues involved in that matter. Because, in the context of a DTA petition, this Court must consider, "to the extent the Constitution and laws of the United States

are applicable, whether the use of such standards and procedures to make the [CSRT] determination is consistent with the Constitution and laws of the United States," DTA, § 1105(e)(2)(C), review by the Supreme Court of a DTA case may include review of whether the CSRT standards and procedures are constitutionally adequate.

Contrary to petitioners' contention (Mot. at 3), there is nothing "premature" about issuing the mandate in Al Odah and Boumediene. Issuance of the mandate is part of the normal course of events after the court of appeals enters a final judgment, especially after the Supreme Court has already denied review. The mandate here would in no way prevent petitioners from pursuing their remedies under the DTA (or from later filing a petition for certiorari to review this Court's resolution of a DTA petition). And, petitioners' mere disagreement with this Court's final judgment in Al Odah and Boumediene is no reason to decline to give that final judgment effect.[2]

4. Petitioners' reliance on cases where habeas actions brought pursuant to 28 U.S.C. § 2254 have been stayed in federal court, rather than dismissed, pending exhaustion of remedies in state court, is misplaced. Filing a DTA petition is not merely an exhaustion requirement for the detainees' habeas cases. Rather, as this

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[2] Petitioners' contrary argument, based on statements of various Justices in connection with the denial of certiorari in Boumediene, fails to account for the repeated statements of the Supreme Court that denials of certiorari and, concomitantly, opinions accompanying denials of certiorari, lack precedential value altogether. See, e.g., Teague v. Lane, 489 U.S. 288, 296 (1989).

Court held in Boumediene, Section 7 of the MCA eliminates federal court jurisdiction over habeas petitions filed by the detainees at Guantanamo Bay. See 476 F.3d at 986, 994. Thus, petitioners have no right to pursue their habeas cases, even after they pursue their remedies under the DTA. The cases petitioners cite are not to the contrary. See Rhines v. Weber, 544 U.S. 269, 276 (2005) (noting that federal courts' authority to enter stays in habeas related matters is constrained by applicable statutes). Accordingly, there is no reason not to dismiss petitioners' pending habeas cases.

5. Finally, a stay of the mandate will further complicate litigation of the detainees' challenges to their detention. If the mandate does not issue, the district court might not dismiss the pending habeas actions, and petitioners might attempt to continue to litigate their habeas cases in the district court at the same time as they pursue actions in this Court under the DTA. As all three judges in Boumediene found, that double-track litigation would be contrary to Congress' intent in the MCA, which was to withdraw federal court jurisdiction over the detainees' habeas cases. See 476 F.3d at 986; id. at 994 (Rogers, J., dissenting). Moreover, such litigation would impose substantial and unnecessary burdens on both the Court and the parties, and could frustrate implementation of this Court's review of petitioners' final CSRT determinations under the DTA and MCA.

CONCLUSION

For the foregoing reasons, we respectfully request that the Court deny the petitioners' motion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 11, 2007, I filed and served the foregoing Opposition to Petitioners' Motion to Withhold Issuance of the Mandate 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 hand delivery or Federal Express, as specified below.

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