

[ORAL ARGUMENT HELD ON DECEMBER 8, 2005]

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

SAIFULLAH PARACHA, et al.,)	
)	
Petitioners-Appellants,)	
)	Nos. 05-5194
GEORGE W. BUSH, et al.,)	05-5211
)	05-5333
Respondents-Appellees.)	(consolidated)

RESPONDENT’S MOTION TO GOVERN FURTHER PROCEEDINGS

Pursuant to this Court’s order dated September 7, 2007, the Government hereby files this motion to govern further proceedings in the above-captioned cases. For the reasons set forth below, this Court should order supplemental briefing to address the impact of the Supreme Court’s decision in *Boumediene v. Bush*, 553 U.S. ____ (2008), on these consolidated habeas appeals.

STATEMENT

1. Petitioner, Saifullah Paracha, is an alien detained as an enemy combatant by the Department of Defense at the U.S. Naval Station in Guantanamo Bay, Cuba. On November 17, 2004, a petition for a writ of habeas corpus was filed on petitioner’s behalf in the district court.

Petitioner filed two appeals and a petition for a writ of mandamus with regard to that habeas action. One appeal (No. 05-5194) challenged a district court order staying his case pending this Court's resolution of the related habeas appeals in *Al Odah v. United States*, Nos. 05-5064, 05-5095 through 05-5116 (D.C. Cir.), and *Boumediene v. Bush*, Nos. 05-5062, 05-5063 (D.C. Cir.), and denying his motion to vacate the court's Protective Order. Petitioner also filed a petition for a writ of mandamus (No. 05-5211) in this Court seeking the same relief. Petitioner's second appeal (No. 05-5333) challenged the district court's denial of his motion for a preliminary injunction regarding his conditions of confinement.¹

This Court consolidated petitioner's appeals and mandamus petition. The consolidated cases were fully briefed and argued before this Court on December 8, 2005. On April 19, 2006, this Court issued an order deferring consideration of the pending motions in these appeals until after this Court's resolution of the *Boumediene* and *Al Odah* appeals.

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 Military Commissions Act of 2006 ("MCA"), Pub. L. No. 109-366,

¹In the context of these appeals, Paracha also filed several motions challenging his conditions of confinement, including his medical treatment at Guantanamo Bay.

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 cases. *See* 476 F.3d at 994. 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 990-993. As a result, the Court ordered that the district courts' decisions in those detainee cases be vacated and ordered the district courts to dismiss the cases for lack of jurisdiction. *See id.* at 994.

On April 9, 2007, the Court issued its judgment in this case. Pursuant to its decision in *Boumediene*, the Court ordered that petitioner's habeas cases (Nos. 05-5194 and 05-5333) be remanded to the district court with instructions to dismiss the habeas petitions for lack of jurisdiction. The Court further ordered that petitioner's motions relating to his conditions of confinement be dismissed for lack of jurisdiction, pursuant to section 7(a) of the Military Commissions Act. The Court also dismissed the petition for a writ of mandamus (No. 05-5211) as moot.

Prior to this Court's issuance of the mandate, however, the Supreme Court granted certiorari to review this Court's decision in *Boumediene*. *See Boumediene*

v. *Bush*, ___ S. Ct. ___, 2007 WL 1854132 (June 29, 2007). Petitioner also filed a petition for a writ of certiorari seeking review of this Court's judgment ordering the district court to dismiss his habeas petition. *See Paracha v. Bush*, No. 07-153 (S. Ct.). As a result, on September 7, 2007, this Court issued an order staying the mandate pending further order of the Court. That order directed the parties to file motions to govern further proceedings within 30 days of the Supreme Court's decision in *Boumediene*.

3. On June 12, 2008, the Supreme Court reversed and remanded this Court's decision in *Boumediene*, and held that section 7 of the Military Commissions Act of 2006 (MCA), 28 U.S.C.A. § 2241(e) (Supp. 2007), is not a bar to subject matter jurisdiction in district court habeas challenges to detention filed by detainees at Guantanamo Bay. *See Boumediene v. Bush*, 553 U.S. ___ (2008).

4. On June 23, 2008, the Supreme Court granted Paracha's petition for a writ of certiorari, vacated this Court's judgment, and remanded his case to this Court for further consideration in light of its decision in *Boumediene*. *See Paracha v. Bush*, ___ S. Ct. ___, No. 07-153, 2008 WL 2484721 (June 23, 2008).

ARGUMENT

IN LIGHT OF THE SUPREME COURT'S DECISION IN *BOUMEDIENE* AND ITS ORDER VACATING THIS COURT'S JUDGMENT, THIS COURT SHOULD ORDER SUPPLEMENTAL BRIEFING TO ASSIST THE COURT IN DETERMINING WHAT ISSUES MUST BE DECIDED AND/OR RECONSIDERED, AND THE MERITS OF THOSE ISSUES.

At the time this Court issued its judgment in this case, the Court was bound by its decision in *Boumediene*, which held that federal courts lack jurisdiction over habeas petitions brought by Guantanamo detainees. Accordingly, this Court remanded petitioner's habeas cases to the district court, with instruction to dismiss, without reaching the merits of his appeals. In light of the Supreme Court's reversal of that decision, which provides that aliens at Guantanamo Bay have a constitutional right to seek a writ of habeas corpus challenging their detention, and the Supreme Court's grant of certiorari in this case, vacating this Court's judgment and remanding the case for further consideration, this Court must reconsider its judgment.

Insofar as this Court's judgment ordered petitioner's habeas petitions challenging his detention dismissed for lack of jurisdiction, it is clear that that portion of the judgment is now incorrect under the Supreme Court's decision in *Boumediene*. That decision makes plain that petitioner, an alien detained at Guantanamo Bay, has a constitutional right to seek a writ of habeas corpus to challenge his detention. Thus,

because this Court now has jurisdiction over petitioner's habeas appeals challenging his detention, this Court must reach the merits of the appeals, at least to the extent the issues presented continue to present a live controversy. Given that the merits of these appeals were briefed and argued prior to *Boumediene*, supplemental briefing by the parties would likely assist the Court in deciding this case.

While these appeals have been pending before the Court, both the Supreme Court and this Court have issued several significant rulings that may be relevant to the disposition of the issues in these appeals. The parties have not yet had an opportunity to fully brief the merits of these appeals in light of those rulings. Accordingly, it would be appropriate for this Court to order supplemental briefing in this case, so that the parties can argue the legal issues presented here under now-governing law.

For example, this Court must determine whether its dismissal of petitioner's conditions-of-confinement claims for lack of jurisdiction under section 7(a) of the MCA remains correct, notwithstanding *Boumediene*. Although the Supreme Court held that section 7 of the MCA is not a bar to subject matter jurisdiction in habeas actions brought by Guantanamo detainees challenging their detention, the Court did not hold that there is jurisdiction over actions brought by Guantanamo detainees challenging their conditions of confinement. Nothing in *Boumediene* suggests that

that limitation on the jurisdiction of the federal courts is invalid. The Court, in fact, explicitly declined to address whether conditions-of-confinement claims are part of the Guantanamo detainees' constitutional right to habeas. Slip Op. at 64. In our supplemental briefing to this Court we will explain that Section 7 remains valid insofar as it bars claims relating to conditions of confinement and it continues to bar the assertion of jurisdiction over such claims here.

Supplemental briefing should also address Paracha's assertion of constitutional rights. *Boumediene* did not determine whether detainees have any constitutional rights beyond the privilege of the writ of habeas corpus, such as due process rights, on which they could premise a constitutional challenge to their conditions of confinement. If this Court holds that it does have jurisdiction, notwithstanding Section 7 of the MCA, it will have to address what constitutional rights relating to conditions of confinement, if any, petitioner possesses. If this Court finds that petitioner possess such rights, it would then have to address the standard under which such claims are reviewed. *See, e.g., Bell v. Wolfish*, 441 U.S. 520, 535, 539 (1979) (in the domestic context, where a prisoner brings a pre-trial challenge to the conditions of his detention, review is limited to "whether those conditions amount to punishment"). Because these legal questions were either not presented, or were in a different posture, at the time the parties previously briefed and argued this case, the

parties should have an opportunity to address them in supplemental briefs.

Moreover, quick action on this appeal is warranted. The Supreme Court clearly intended that habeas proceedings move forward promptly. *See Boumediene*, Slip Op. at 65-66 (“detainees in these cases are entitled to a prompt habeas corpus hearing”). One aspect of moving forward is the speedy resolution of this and other habeas appeals raising key preliminary issues. Therefore, this Court should order supplemental briefing and decide this issue, which will provide guidance to the district court for other such conditions-of-confinement claims.

Supplemental briefing is also warranted to address whether any of the issues in these appeals have been rendered moot since the original briefing and argument. For example, petitioner’s appeal of the district court’s stay order, which stayed his habeas petition pending this Court’s resolution of *Boumediene*, may now be moot, given that the terms of that stay order have expired. Indeed, if any of the issues have become moot, this Court lacks Article III jurisdiction to address them. Accordingly, supplemental briefing would also assist this Court in assuring itself of its jurisdiction before proceeding to the merits of any given issue.

If this Court orders supplemental briefing, respondent respectfully proposes that petitioner be ordered to file his brief first, within 14 days of this Court’s order, followed by respondent’s answering brief, to be filed 14 days thereafter. Because

petitioner is in the best circumstances to know his claims and which claims he wishes to continue to press in these appeals, it makes sense for petitioner to proceed first. If the Court concludes that additional oral argument should be held, respondent asks that such argument take place during the Court's first fall sitting, allowing the Court to resolve these issues without delay.

CONCLUSION

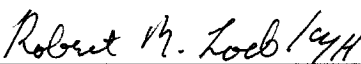
For the foregoing reasons, this Court should order supplemental briefing in these appeals.

Respectfully submitted,

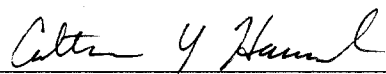
GREGORY G. KATSAS
Assistant Attorney General

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 7236
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530*

CERTIFICATE OF SERVICE

I hereby certify that on July 10, 2008, I served the foregoing Respondent's Motion To Govern Further Proceedings by causing an original and four copies to be served on the Court via hand delivery and one copy to be sent to the following counsel via e-mail and first-class U.S. mail:

Gaillard T. Hunt
Law Office of Gaillard T. Hunt
10705 Tenbrook Drive
Silver Spring, MD 20901
301-530-2807
gthunt@mdo.net

David H. Remes
Jason M. Knott
COVINGTON & BURLING LLP
1201 Pennsylvania Ave., NW
Washington, DC 20004-2401
202-662-6000
dremes@cov.com
jknott@cov.com


Catherine Y. Hancock
Counsel for Appellees/Respondent