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

KHALED A. F. AL ODAH, et. al., Petitioners-Appellees, v. UNITED STATES OF AMERICA, et al., Respondents-Appellants.	Nos. 05-5064, 05-5095, 05-5096, 05-5099, 05-5100, 05-5101, 05-5102, 05-5105, 05-5106, 05-5107, 05-5108, 05-5109, 05-5110, 05-5112, 05-5113, 05-5114, 05-5115, 05-5116
SAIFULLAH PARACHA, et al., Petitioners-Appellants, v. GEORGE W. BUSH, et al., Respondents-Appellees.	Nos. 05-5194, 05-5333

OPPOSITION TO PETITIONERS' MOTION TO RECALL MANDATES

In light of the Supreme Court's grant of certiorari to review this Court's decision in Boumediene v. Bush, 476 F.3d 981 (D.C. Cir.), cert. granted, ___ S. Ct. ___, 2007 WL 1854132 (June 29, 2007), petitioners move to recall the mandates in the above-captioned cases, which require the district courts to dismiss petitioners' habeas cases for lack of jurisdiction pursuant to Boumediene. Recalling the mandate, however, is appropriate only in exceptional circumstances, which are not present here. Accordingly, this Court should deny petitioners' motion.

Petitioners urge this Court to recall the mandates for two reasons. First, petitioners oppose dismissal of their district court habeas actions, which petitioners implicitly concede would be required pursuant to the mandates. Second, petitioners

seek to preserve a number of orders entered by the district courts in the context of their habeas actions. Petitioners contend that, if their habeas cases are dismissed and those orders vacated, they will be irreparably harmed. That argument lacks merit.

Regardless of whether the mandates are recalled or remain in effect, the Court's judgment in Boumediene is binding as the law of the Circuit, unless and until the Supreme Court reverses that decision. See Ayuda, Inc. v. Thornburgh, 919 F.2d 153, 154 (D.C. Cir. 1990) (Henderson, J., concurring) ("[o]nce [an] opinion [is] released it [becomes] the law of this circuit"); Maxwell v. Snow, 409 F.3d 354, 358 (D.C. Cir. 2005) ("this Court is bound to follow circuit precedent until it is overruled either by an en banc court or the Supreme Court"); Chambers v. United States, 22 F.3d 939, 942 n.3 (9th Cir. 1994) ("In this circuit, once a published opinion is filed, it becomes the law of the circuit until withdrawn or reversed by the Supreme Court or an en banc court."), vacated on other grounds, 47 F.3d 1015 (1995).[1] Thus, the district courts are bound by this Court's decision in Boumediene, which precludes them from exercising jurisdiction over petitioners' habeas cases or maintaining any orders entered in those

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[1] See also Vo Van Chau v. Department of State, 891 F. Supp. 650, 654 (D.D.C. 1995) ("defendants argue that this Court is not bound to follow LAVAS, since the mandate in LAVAS has not yet issued from the Court of Appeals. This argument has no merit. The District Court 'is bound by the principle of stare decisis to abide by a recent decision of one panel of [the Court of Appeals] unless the panel has withdrawn the opinion or the court en banc has overruled it.'") (quoting Association of Civilian Technicians, Montana Air Chapter v. FLRA, 756 F.2d 172, 176 (D.C.Cir.1985)).

cases. See 476 F.3d at 986, 994.

Moreover, recall of the mandate is appropriate "only in exceptional circumstances." N. Cal. Power Agency v. NRC, 393 F.3d 223, 225 (D.C. Cir. 2004). The fact that the district courts, absent a recall of the mandates, may dismiss petitioners' habeas cases pursuant to Boumediene while that case is pending before the Supreme Court does not constitute irreparable injury that warrants such relief. If the Supreme Court ultimately reverses Boumediene and such relief is appropriate, petitioners could seek to reinstitute their habeas cases.

Indeed, a number of other habeas actions and appeals therefrom (including the Government's appeals) have already been dismissed by this Court and the district court, pursuant to the Military Commissions Act of 2006 ("MCA"), Pub. L. No. 109-366, 120 Stat. 2600, and Boumediene. See, e.g., Kiyemba v. Bush, Nos. 05-5487, et al. (D.C. Cir. Mar. 22, 2007); Al Ginco v. Bush, Nos. 05-5191, et al. (D.C. Cir. June 7, 2007); Awad v. Bush, No. 05-2379 (D.D.C. April 5, 2007). Those dismissals would remain in effect even if the mandates were recalled in these cases. Recalling the mandates here would therefore create inconsistent results for similarly situated cases, which counsels against recalling the mandates. And, as noted above, if the Supreme Court ultimately reverses this Court's decision, appropriate remedial action could then be taken as to all of the habeas cases and appeals.

Nor does vacatur of various district court orders, concomitant with dismissal of petitioners' habeas cases, warrant recall of the mandates. Petitioners contend that the district court protective order must be preserved so that counsel has continued access to the detainees, and to ensure that no records are destroyed. But there is no need to maintain the district court protective order because this Court will be issuing its own protective order. More than 125 detainees, including some of petitioners, have already filed cases under the Detainee Treatment Act of 2005 ("DTA"), Pub. L. No. 109-148, 119 Stat. 2680, which are currently pending in this Court, and the remaining petitioners may file DTA actions at any time. In the context of those actions, a protective order will be entered by this Court, which, inter alia, will govern counsel access to petitioners. Although the precise scope and terms of an appropriate protective order is pending before this Court in the consolidated cases of Bismullah v. Gates, No. 06-1197, and Parhat v. Gates, No. 06-1397 (argued on May 15, 2007), the Government has agreed to immediate entry of its proposed protective order, which, inter alia, provides for counsel access now, until this Court issues a decision in those cases. See, e.g., U.S. Brief (corrected) at 72 in Bismullah and Parhat (requesting Court to enter proposed protective order). Nothing prevents petitioners from agreeing to the Government's proposed protective order on an interim basis to avoid any alleged harm that might be caused by vacatur of the district court protective

order.[2] Indeed, this Court has acted promptly to enter that order as an interim measure in a number of DTA cases.

Petitioners further contend that they will be irreparably harmed by vacatur of district court orders requiring the Government to provide thirty days' notice to the court and counsel prior to any transfer of a detainee from Guantanamo Bay. As we have previously explained to this Court, however, see, e.g., Al-Harbi v. Gates, No. 07-1095, Opposition to Petitioners' Motion for Thirty Days' Advance Notice of Transfer at 16-17 (filed June 8, 2007), the Department of Defense does not transfer detainees to another country where it is more likely than not that they would be tortured. Such transfers would be flatly contrary to United States policy. Thus, lack of a thirty-day notice order does not pose a risk of irreparable harm.

In any event, independent of its elimination of habeas jurisdiction, the MCA also eliminates federal jurisdiction over any claims "which relate to any aspect of the

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[2] To the extent petitioners are concerned about unwarranted destruction of documents, the Government has previously explained in Bismullah and Parhat (letter dated June 8, 2007), that the provision in its proposed protective order regarding destruction of documents containing classified information after the termination of the cases will not endanger any future record review of petitioners' detention. The government explained that it will maintain records of material filed in court and served on counsel for the government, and that the protective order provision does not apply to Department of Defense records, including records generated during the CSRT process. The government further explained that it would not seek destruction of materials in concluded district court cases covered by the habeas protective order where a DTA petition has been brought in this Court.

detention, transfer, treatment, trial, or conditions of detention of an alien detained by the United States since September 11, 2001." See MCA § 7(a) (emphasis added). Thus, the MCA expressly precludes the courts from entering or enforcing thirty-day notice orders. And, even if the Supreme Court were to reverse this Court's decision in Boumediene that section 7 of the MCA eliminates federal jurisdiction over pending petitions for habeas corpus, 476 F.3d at 986, 994, the MCA would nevertheless preclude the district courts or this Court from granting or enforcing a thirty-day notice order. Indeed, the petitioners in Boumediene have not raised any challenge to that provision of the MCA in their certiorari petition. Moreover, prior to the enactment of the MCA, traditional habeas jurisdiction did not extend to claims regarding transfer or conditions of confinement, but was limited to challenging the fact of detention or its duration. See, e.g., Wilkinson v. Dotson, 544 U.S. 74, 85-87 (2005) (Scalia, J., concurring); Bell v. Wolfish, 441 U.S. 520, 526 n.6 (1979); Preiser v. Rodriguez, 411 U.S. 475, 499-500 (1973); Cochran v. Buss, 381 F.3d 637, 639 (7th Cir. 2004). Thus, the Supreme Court's grant of certiorari has no bearing on the fact that the MCA bars petitioners' claims relating to transfer.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 13, 2007, I filed and served the foregoing Opposition to Petitioner's Motion to Recall Mandates 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 U.S. mail:

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