



"unlawful" enemy combatant.<sup>2</sup> On May 15, 2007, the Government provided notice to Petitioners and the Court of its intention to transfer Rahman out of Guantanamo Bay and release him to the Government of Tunisia.

A 20-year prison sentence awaits Rahman in Tunisia. The Tunisian Government promulgated the Tunisian Patriot Act in 2003,<sup>3</sup> nearly two years after Rahman was captured and detained by the United States. Rahman was prosecuted, in absentia, in Tunisia in 2005 for violations of the newly-enacted Tunisian Patriot Act, and was convicted and sentenced to 20 years' imprisonment. Rahman's ex post facto prosecution and conviction, he contends, offend the norms of the United States Constitution as well as international law. He further maintains that the Tunisian Government passed the Tunisian Patriot Act at the behest of the United States Government, and that his prosecution pursuant to that Act was based solely on the very evidence which led to his detention in Guantanamo, but was deemed insufficient to hold him as an unlawful enemy combatant. The fact that he has been cleared by the United States Government

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<sup>2</sup> The Government points out that a CSRT proceeding resulted in a finding that Rahman was an enemy combatant, although it does not expressly dispute Rahman's statement that the CSRT never found him to be an "unlawful" enemy combatant.

<sup>3</sup> The Tunisian Patriot Act is alleged to be similar to the USA Patriot Act of 2001. See Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 ("USA PATRIOT Act"), Pub. L. No. 107-56, 115 Stat. 272 (codified as amended in scattered sections of 18 U.S.C.).

raises serious doubts about his Tunisian conviction. Moreover, he contends that the United States Government knew of his prosecution in Tunisia and did nothing to inform him, thereby ensuring that he would be deprived of any opportunity to defend himself.

Rahman suffers from serious health problems. His aortic heart valve was replaced when he lived in Italy, and he has an intracardiac pacemaker and a stent. He experiences frequent chest pains and intense heart palpitations. His kidney problems, urinary problem, and joint problems cause him severe pain. Rahman also suffers from chorea, rheumatic fever, uncompensated congestive heart failure, hypertension, anxiety, depression and fatigue. In light of those health problems, Rahman argues that transfer to Tunisia, which will result in his imprisonment, amounts to a death sentence because he will not receive adequate treatment. Tunisian prisons have been cited by the United Nations High Commission on Human Rights as having "inhuman living conditions."

Rahman has presented evidence that he would face a serious threat of torture if rendered to a Tunisian prison. He cites to reports of international organizations that document torture of prisoners and police brutality in Tunisia. Rahman's serious health problems, his Tunisian ex poste facto conviction in absentia, and his allegations of the indiscriminate use of torture in Tunisian prisons demonstrate the devastating and irreparable harm he is likely to face if transferred.

On June 29, 2007, the Supreme Court granted certiorari to review the merits of our Court of Appeals' decision in Boumediene v. Bush, 476 F.3d 981 (D.C. Cir. 2007) ("Boumediene"). Boumediene v. Bush, 127 S. Ct. 3078, 2007 WL 1854132 (2007); Al Odah v. United States, 127 S. Ct. 3067, 2007 WL 681992 (2007). The petitions for certiorari challenge, inter alia, the Court of Appeals' decision that aliens captured or detained by the United States outside of the United States do not have a constitutional or common law right to challenge their detentions via habeas corpus petitions. See Petition for a Writ of Certiorari at i, Al Odah v. United States (No. 06-1196)). The resolution of that question is likely to directly affect the outcome of the instant case.

The Supreme Court's decision to grant certiorari in Boumediene constituted a reversal of its previous denial of certiorari. Such reversals are rare. To grant certiorari on rehearing requires the votes of five justices, not just the four required to grant certiorari on an initial application. See Sup. Ct. R. 44.1. Although the agreement of five justices on certiorari certainly does not predict the outcome on the merits, it does demonstrate the Supreme Court's recognition of the importance of the case. Boumediene v. Bush, 127 S. Ct. 1478 (2007). Rule 10 of the Supreme Court Rules provides for a grant of certiorari where "an important question of federal law that has not been, but should be, settled by th[e Supreme] Court, or has decided an important federal

question in a way that conflicts with relevant decisions of th[e Supreme] Court.”<sup>4</sup> The extraordinary grant of certiorari on rehearing indicates the Supreme Court’s view that this case raises an important federal question, and that there is a need for comprehensive and thorough reexamination of the Court of Appeals’ decision.

The Government responds that despite the Supreme Court’s grant of certiorari, the Court of Appeals’ decision in Boumediene controls until the Supreme Court has ruled. However, the Court of Appeals’ decision, on July 27, 2007, to affirmatively withdraw the mandate in Boumediene suggests, at a minimum, the Court of Appeals’ inclination to await the Supreme Court’s final ruling.

In addition, it is well-settled that an appellate decision is not final until the mandate is issued. Fed. R. App. P. 41(c) advisory committee’s note, 1998 amendment (“A court of appeals’ judgment or order is not final until issuance of the mandate; at that time the parties’ obligations become fixed.”). Absent a mandate, whether because it has not yet issued or because it has been withdrawn, the court of appeals retains jurisdiction and the decision may be modified or rescinded. See Deering Milliken, Inc. v. FTC, 647 F.2d 1124, 1129 (D.C. Cir. 1978). Recalling the mandate sends a strong signal that the decision may well be

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<sup>4</sup> The two other Rule 10 considerations are not applicable to this case.

modified or rescinded, and deprives a previously final decision of its finality. See Calderon v. Thompson, 523 U.S. 550, 557-58 (1998).

When these two factors--the Supreme Court's highly unusual grant of certiorari on rehearing and the Court of Appeals' withdrawal of the mandate in Boumediene--are considered together, they cast a deep shadow of uncertainty over the jurisdictional ruling of that decision. Given this procedural posture, and the dire irreparable harm Rahman fears, it is imperative that the Court protect its jurisdiction until the Supreme Court issues a definitive ruling in Boumediene.

It is well-settled that this Court has jurisdiction to determine its own habeas jurisdiction. See Hamdan v. Rumsfeld, 126 S. Ct. 2749 (2006); Rasul v. Bush, 542 U.S. 466 (2004); United States v. Ruiz, 536 U.S. 622, 627 (2002) ("[A] federal court always has jurisdiction to determine its own jurisdiction."). The Court also has the related power, pursuant to the All Writs Act, 28 U.S.C. § 1651, to "issue all writs necessary or appropriate in aid of [its] jurisdiction . . . ." See also United States v. United Mine Workers, 330 U.S. 258, 290 (1947) ("[T]he District Court unquestionably had the power to issue a restraining order for the purpose of preserving existing conditions pending a decision upon its own jurisdiction."). Our Court of Appeals has already declined to vacate decisions of this District Court granting such interim

relief. See Al Genco v. Bush, No. 06-5191, slip op. at 2 (D.C. Cir. June 7, 2007). That consolidated appeal considered the decision of a judge of this District Court to issue a 30-day notice order in order to protect the court's jurisdiction. Significantly, our Court of Appeals considered the validity of that 30-day notice order after issuance of its decision in Boumediene, and it declined to vacate the District Court ruling. See id. It may be inferred from that ruling that the Court has the power to grant the injunction requested in this case to preserve the status quo pending the Supreme Court's decision in Boumediene.

In view of the grave harm Rahman has alleged he will face if transferred, it would be a profound miscarriage of justice if this Court denied the Motion based on the Court of Appeals' decision in Boumediene and the Supreme Court later reversed or modified that decision. At that point, the damage would have been done. As then-Chief Judge Wald observed regarding an appeal of a district court injunction, a justice system that did not allow courts to "provide interim relief to ensure the survival in the coming months of the alien claimants in this case" pending the Supreme Court's decision in a separate controlling case would be "a cruel and irrational system of justice indeed." Ayuda v. Thornburgh, 919 F.3d 153, 154, 156 (D.C. Cir. 1990) (Wald, C.J., dissenting).

Finally, the Government suffers absolutely no harm from entry of the Preliminary Injunction, whereas the failure to grant Rahman

the interim relief he seeks--relief necessary to ensure his survival until the Supreme Court rules--would be irreparable if Boumediene is reversed.

Accordingly, it is hereby

**ORDERED** that Petitioner's Motion for Preliminary Injunction Pursuant to FRCP 56(a) is **granted**.

October 2, 2007

/s/ \_\_\_\_\_  
Gladys Kessler  
United States District Judge

**Copies to: Attorneys of Record via ECF**