[ORAL ARGUMENT NOT YET SCHEDULED]

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

HASSAN ABDUL SAID and SAMI AL HAJJ, as Next Friend, Petitioners, v. ROBERT M. GATES, Respondent.	No. 08-1183

MOTION TO HOLD IN ABEYANCE OR IN THE ALTERNATIVE DISMISS WITHOUT PREJUDICE

Pursuant to Federal Rule of Appellate Procedure 27 and D.C. Circuit Rule 27, respondent hereby moves for an order holding this case in abeyance pending the conclusion of the habeas proceedings that petitioner may now initiate. In the alternative, the Court should dismiss the present case without prejudice. As discussed below, the Supreme Court's recent decision in *Boumediene v. Bush*, No. 06-1195 (June 12, 2008), revives the habeas proceeding previously initiated by petitioners in those cases. The Court held that the review provided under the Detainee Treatment Act (DTA) in this Court is inadequate and that habeas review is required to satisfy the detainee's constitutional habeas rights. To avoid the duplicative proceedings and a

waste of scarce judicial and governmental resources, the present case should either be held in abeyance, or be dismissed without prejudice to reinstatement, pending the completion of habeas proceedings that petitioner may now initiate.

1. Petitioner Hassan Abdul Said (ISN 435), is a detainee at the United States Naval Base at Guantanamo Bay, Cuba ("Guantanamo"). He brought the instant petition for review under the Detainee Treatment Act of 2005 ("DTA"), Pub. L. No. 109-148, 119 Stat. 2680, challenging the determination of the Combatant Status Review Tribunal ("CSRT") that he is an enemy combatant.

While filing DTA petitions, the detainees have consistently argued that the DTA review in this Court from the CSRT determinations is a wholly inadequate process. *See, e.g.*, Pet. Reply Br., *Boumediene v. Bush*, No. 06-1195 (S. Ct.), 15 ("the DTA does not provide meaningful review at a meaningful time"); Oral Arg. Trans., *Boumediene v. Bush*, No. 06-1195 (S. Ct.), 20 ("there is no prospect * * * that the DTA proceedings will be conducted with alacrity or certainty"); Pet. Reply Br., *Al Odah v. United States*, No. 06-1996 (S. Ct.), 15 ("DTA review is inadequate and ineffective").

2. On June 12, 2008, the Supreme Court, in *Boumediene v. Bush*, No. 06-1195, held that the Constitution guarantees detainees at Guantanamo the right to challenge their detentions by seeking writs of habeas corpus. The Court also rejected the

Government's argument that the DTA was an "adequate substitute" for habeas proceedings. The Court identified several perceived shortcomings with the DTA and held that it was an inadequate mechanism for the detainees to challenge the lawfulness of their detention. *See* slip op. at 58-67. The Court further made clear that, while the DTA and the CSRT process "remain intact," the habeas proceedings for the petitioners in those cases should move forward now, whether or not the detainee has filed a petition for review under the DTA. *Id.* at 66 ("the petitioners in these cases need not exhaust the review procedures in the Court of Appeals before proceeding with their habeas actions in the District Court").

3. Petitioner in this case has not yet filed a petition for habeas review in the district court, but we anticipate that, in light of the Supreme Court's *Boumediene* ruling, he will soon do so. As we explain below, if filed, that habeas proceeding should move forward while this DTA case should be placed on hold.

4. At present there are more than 190 detainees who have petitioned for review under the DTA. Given that the Supreme Court has deemed the review provided by the DTA to be inadequate and has required that the habeas actions filed by these detainees move forward, it makes sense to hold the DTA actions in abeyance. Litigation in both the 190 DTA cases and the more than 200 habeas cases simultaneously would waste scarce judicial and governmental resources.

a. In addition to DTA cases filed in this Court, there are more than 100 pending appeals taken as part of the habeas litigation. Now that *Boumediene* has been decided, it is imperative that those appeals, many of which have been on hold for more than one year, move forward to resolution. We also anticipate that, because the Supreme Court did not fully delineate the nature and extent of the habeas review to be afforded the detainees (*see* slip op. 58 ("[w]e need not explore it further at this stage")), there will be a number of important legal issues regarding those proceedings that will require this Court's expeditious review. Thus, we respectfully submit that this Court and the parties should focus their resources and attention to addressing these habeas matters, as opposed to proceeding with the DTA review in over 190 cases (especially in light of *Bismullah v. Gates*, 501 F.3d 178 (D.C. Cir. 2007), *petition for cert. filed*, 76 U.S.L.W. 3456 (U.S. Feb. 14, 2008) (No. 07-1054)), when the Supreme Court has deemed that review inadequate. *See Envt'l Defense Fund v. Reilly*, 909 F.2d 1497, 1507 (D.C. Cir. 1990) (discussing "the longstanding policy of the law to avoid duplicative litigative activity").

b. This is particularly true in regard to the significant military and intelligence resources that have been devoted in preparing records and reviewing classified filings to facilitate the DTA review in this Court. In order for the habeas proceedings to move forward at the pace anticipated by the Supreme Court, those defense and

intelligence resources must now be focused exclusively on preparing factual returns for the district court proceedings and clearing filings for those more than 200 cases. Permitting the "inadequate" DTA cases to continue at the same time as the habeas cases would divert these necessary resources from the urgent and vital task at hand in the habeas proceedings.

c. Permitting both the habeas and DTA cases to move forward at the same time would be inconsistent with the underlying intent of Congress in enacting both the DTA and the Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (MCA). Congress was concerned that the Guantanamo detainees were "swamping the system" with legal challenges, 151 Cong. Rec. S12732 (Nov. 14, 2005) (Sen. Graham), and enacted both the DTA and the MCA to limit the types of challenges that could be brought and to channel all of the challenges to detention at Guantanamo into one forum. *See* 152 Cong. Rec. H7938 (daily ed. Sept. 29, 2006) (Rep. Hunter) ("The practical effect of this amendment will be to * * * consolidate all detainee treatment cases in the D.C. Circuit"). Moreover, one of the primary motivations for the MCA, which both limited and consolidated review in one court, was to avoid disruptions of military operations. *See* 152 Cong. Rec. S10403 (Sept. 28, 2006) (Sen. Cornyn). Holding the DTA cases in abeyance, while the habeas cases move forward,

would, to the extent possible, minimize the disruption to military operations and help avoid the detainee cases from "swamping" the judicial system.

CONCLUSION

For the foregoing reasons, the Court should hold this case in abeyance pending the conclusion of litigation relating to the petition for habeas corpus to be filed by petitioner. In the alternative, the Court should dismiss the present case without prejudice.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 18, 2008, I served the foregoing Motion to Hold in Abeyance or in the Alternative Dismiss Without Prejudice by causing an original and four copies to be delivered to the Court and one copy to the following counsel of record via e-mail and express delivery service:

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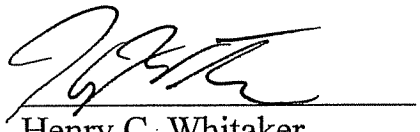

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