No. 07-416

In the Supreme Court of the United States

ABU ABDUL RAUF ZALITA, PETITIONER

v.

GEORGE W. BUSH,
PRESIDENT OF THE UNITED STATES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether, notwithstanding the express terms of the Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600, the district court had jurisdiction to enter an injunction barring petitioner—an alien detained as an enemy combatant at Guantanamo Bay—from being released from United States custody and returned to his home country.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-2a) is unreported. The order of the district court (Pet. App. 3a-5a) is also unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 25, 2007. On July 18, 2007, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including September 21, 2007, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is a Libyan citizen who is detained as an enemy combatant at the United States Naval Base at

Guantanamo Bay, Cuba. Petitioner has been given a formal adjudicatory hearing before a Combatant Status Review Tribunal (CSRT), and the CSRT determined that he is an enemy combatant because he is "a member of, or affiliated with al Qaida, the Taliban, and associated forces that are engaged in hostilities against the United States." Factual Return to Pet. for Writ of Habeas Corpus Exh. A, encl. 1, at 1. Unclassified evidence presented to the CSRT indicated that petitioner was a member of the Libyan Islamic Fighting Group, a known terrorist organization. *Ibid.* He received weapons training from that group, traveled to Tora Bora in December 2001, and then fled to Pakistan, where he was captured. *Ibid.* The CSRT's conclusion was further supported by classified material. *Ibid.*

2. In June 2005, petitioner filed a petition for a writ of habeas corpus in the United States District Court for the District of Columbia. On December 8, 2006, the Department of Defense gave petitioner 30 days' notice that it intended to transfer him out of United States custody and return him to his home country of Libya. Petitioner then sought and obtained an injunction prohibiting the planned transfer absent an additional 60 days' notice. Minute Order (Feb. 15, 2007). On February 20, 2007, in compliance with that order, respondents provided the additional 60 days' re-notice of transfer. Thereafter, petitioner asked the district court to enjoin the planned transfer altogether.

3. The district court denied the motion for an injunction. Pet. App. 3a-5a. It relied on *Boumediene* v. *Bush*, 476 F.3d 981, 988 (D.C. Cir.), cert. granted, 127 S. Ct. 3078 (2007), in which the court of appeals held that Section 7 of the Military Commissions Act of 2006 (MCA), Pub. L. No. 109-366, 120 Stat. 2635, divests the district

courts of jurisdiction over habeas petitions filed by Guantanamo Bay detainees. In addition, the court explained, *Boumediene* held "that '[s]ection 7(a) of the MCA eliminates jurisdiction over non-habeas claims by aliens detained as enemy combatants.'" Pet. App. 4a (brackets in original) (quoting *Boumediene*, 476 F.3d at 986 n.1).

Petitioner appealed the district court's denial of his motion for injunctive relief and concurrently sought from the district court an injunction barring his transfer during the pendency of his appeal. The district court denied that relief, but on Friday, April 20, 2007, it granted petitioner a temporary injunction barring his transfer until Monday, April 23, 2007, so that the court of appeals could consider petitioner's motion for an injunction barring his transfer pending consideration of his appeal. Minute Order (Apr. 20, 2007). On April 23, the court of appeals issued an "administrative injunction" enjoining the transfer of petitioner to Libya until further order.

4. Two days later, on April 25, 2007, the court of appeals denied petitioner's motion and dismissed his appeal for lack of jurisdiction. Pet. App. 1a-2a. Petitioner then filed an emergency application in this Court for an injunction barring his transfer. *Zalita* v. *Bush*, No. 06A1005 (filed Apr. 25, 2007). On May 1, 2007, this Court denied the application.

ARGUMENT

The court of appeals and the district court correctly determined that petitioner is not entitled to an order barring his transfer out of United States custody to his home country, because Congress has explicitly withdrawn jurisdiction from the courts to block the transfer

of detainees from Guantanamo Bay. In addition, because this petition involves a challenge to a transfer decision, it is not necessary to hold this case for the Court's decision in *Boumdiene* v. *Bush*, No. 06-1195, which does not present any transfer issue. Further review is not warranted.

1. The MCA provides that "[n]o court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination." MCA § 7(a), 120 Stat. 2636. It further states that "no court, justice, or judge shall have jurisdiction to hear or consider any other action against the United States or its agents relating to any aspect of the detention, *transfer*, treatment, trial, or conditions of confinement" of such an alien. *Ibid*. (emphasis added).

This petition for a writ of certiorari stems from the district court's denial of petitioner's motion to enjoin his potential transfer from Guantanamo Bay to Libya and the court of appeals' order stating that it lacked jurisdiction to accord such relief. In seeking injunctive relief, petitioner directly challenges an "aspect of the * * * transfer * * * of an alien who is * * * detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant." MCA § 7(a), 120 Stat. 2636. Petitioner does not dispute that the MCA applies to his case. Thus, the district and circuit courts correctly held that they lacked jurisdiction to grant the relief sought.

2. It is not necessary to hold this petition pending the disposition of *Boumediene*. In particular, petitioner errs in asserting (Pet. 11-12) that "[i]f the Court [in

Boumediene] concludes that Guantanamo detainees have [a right to habeas relief in district court], Petitioner unquestionably would be entitled to challenge his anticipated transfer to Libya." The questions presented in *Boumediene* are whether Section 7(a) of the MCA removes federal court jurisdiction over habeas petitions filed by aliens detained as enemy combatants at Guantanamo Bay; whether those aliens have rights under the Suspension Clause; and if so, whether the MCA violates the Suspension Clause. Although petitioner did file a habeas petition, the relief he currently seeks—an injunction barring his transfer from Guantanamo—is not governed only by the first part of Section 7(a) of the MCA. In addition, it is a challenge to an "aspect of the * * * *transfer* * * * of an alien" governed by the second part of Section 7(a) (emphasis added). *Boumediene* does not involve a challenge to the second part of Section 7(a) of the MCA or the issue of whether courts may lawfully block a potential transfer. Even if the MCA's removal of federal court jurisdiction over habeas petitions seeking release were held to be unconstitutional, that holding would not affect the independent provision of the MCA that expressly removes jurisdiction over any claims regarding *transfers*. See MCA § 7(a), 120 Stat. 2635.

Moreover, the fact that petitioner seeks to block a potential transfer *out of* United States custody further distinguishes his claims from those raised in *Boumediene* and from traditional habeas claims more generally. Petitioner's request for injunctive relief raises no issues under the Suspension Clause. Habeas has traditionally afforded a mechanism for challenging one's detention, not for challenging one's transfer or release *out of* custody. See, *e.g.*, *Wilkinson* v. *Dotson*, 544 U.S. 74,

79 (2005) (explaining that the "core" relief afforded by the writ of habeas corpus is "immediate release or a shorter period of detention"); *id.* at 86 (Scalia, J., concurring); *Preiser* v. *Rodriguez*, 411 U.S. 475, 499-500 (1973); *Cochran* v. *Buss*, 381 F.3d 637, 639 (7th Cir. 2004).

3. Petitioner suggests (Pet. 13-23) that the MCA is unconstitutional because it violates separation of powers principles or the Due Process Clause. Those claims lack merit. As to separation of powers, petitioner's argument fails to take account of the Constitution's express grant of authority to Congress to define the jurisdiction of the lower federal courts. See U.S. Const. Art. I, § 8, Cl. 9; *id.* Art. III, § 1; see also *Sheldon* v. *Sill*, 49 U.S. (8 How.) 441 (1850). And as to due process, it is well established that the Fifth Amendment, including its Due Process Clause, does not apply to aliens, like petitioner, who have no presence in any territory over which the United States is sovereign. See *Johnson* v. *Eisentrager*, 339 U.S. 763, 784-785 (1950); see also *United States* v. *Verdugo-Urquidez*, 494 U.S. 259 (1990) ("[W]e have rejected the claim that aliens are entitled to Fifth Amendment rights outside the sovereign territory of the United States" in "emphatic" terms.). Because the United States is not sovereign over Guantanamo Bay, the Fifth Amendment therefore does not protect petitioner. See Gov't Br. at 68-71, *Boumediene*, *supra*.[1]

4. In any event, petitioner's claim would also fail on the merits because the extraordinary relief he seeks

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[1] In any event, even aliens admitted to the United States do not have a due process right to avoid removal based on a claimed possibility of persecution or torture. See *Enwonwu* v. *Gonzales*, 438 F.3d 22, 29-30 (1st Cir. 2006); *Kamara* v. *Attorney Gen.*, 420 F.3d 202, 217 (3d Cir. 2005).

would conflict with separation of powers principles. The Executive's efforts to arrange for transfers of wartime detainees and to ensure that another country provides adequate assurances regarding its treatment of transferees is a quintessential function of foreign and military affairs within the sole province of the Executive. The process is "delicate, complex, and involve[s] large elements of prophecy. [It] should be undertaken only by those directly responsible to the people." *Chicago & S. Air Lines, Inc.* v. *Waterman S.S. Corp.*, 333 U.S. 103, 111-112 (1948); cf. *Crosby* v. *National Foreign Trade Council*, 530 U.S. 363, 381 (2000).

The order petitioner seeks would directly intrude upon foreign and military affairs and, in particular, the government's ability to resettle wartime detainees. As explained in detail in the declarations of Ambassador Pierre-Richard Prosper and Deputy Assistant Secretary of Defense for Detainee Affairs Matthew C. Waxman, the United States has developed an elaborate inter-agency process to govern the transfer of an enemy combatant from Guantanamo Bay to the control of another country, typically the enemy combatant's home country. See Declaration of Matthew C. Waxman ¶¶ 6-7 (Waxman Decl.); Declaration of Pierre-Richard Prosper ¶¶ 3-4, 7 (Prosper Decl.) (Gov't Opp. to Pet. Mot. for Temporary Restraining Order Exhs. 1, 2). Repatriations and transfers of wartime detainees are typically the result of sensitive negotiations among Executive Branch officials with senior officials of foreign governments. See Waxman Decl. ¶¶ 6-7; Prosper Decl. ¶¶ 5-8.[2]

[2] As explained in more detail in the opposition to petitioner's motion for an emergency injunction, it is the policy of the United States not to repatriate or transfer a detainee to a country where the United States believes it is more likely than not that the individual will be tortured.

Entertaining petitioner's claim would require the Court to insert itself into extremely sensitive diplomatic matters. It would involve scrutiny of United States officials' assessments of the possibility of torture in a foreign country, including judgments regarding the state of diplomatic relations with a foreign government, the reliability of representations from a foreign government, and the adequacy of assurances provided and a foreign government's capability to fulfill them. Prosper Decl. ¶ 8.

In addition, requiring the United States "to disclose outside appropriate Executive branch channels its communications with a foreign government" could make that government "reluctant in the future to communicate frankly with the United States concerning such issues." Prosper Decl. ¶ 10. And "review in a public forum of the Department's dealings with a particular foreign government regarding transfer matters would seriously undermine our ability to investigate allegations of mistreatment or torture that come to our attention and to reach acceptable accommodations with other governments to address those important concerns." *Ibid.*; see, *e.g.*, *Chi-*

Waxman Decl. ¶ 6; Prosper Decl. ¶ 4. If a transfer is deemed otherwise appropriate, assurances regarding the detainee's treatment are sought from the country to which the transfer of the detainee is proposed. Waxman Decl. ¶¶ 6-7; Prosper Decl. ¶ 6. If the assurances obtained from the receiving government are not sufficient when balanced against treatment concerns, the United States would not transfer a detainee to the control of that government. Waxman Decl. ¶ 7; Prosper Decl. ¶ 8. Indeed, the Department of Defense has decided in the past not to transfer detainees to their country of origin because of mistreatment concerns. *Ibid.* Petitioner is therefore incorrect when he asserts (Pet. 12)—as he did in his application to this Court seeking an injunction barring his transfer pending his appeal—that "[a]bsent a grant of certiorari and an order holding this case in abeyance, Petitioner will likely * * * face torture and persecution."

cago & S. Air Lines, Inc., 333 U.S. at 111 ("It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret. * * * [E]ven if courts could require full disclosure, the very nature of executive decisions as to foreign policy is political, not judicial."). Thus, even if the district court had jurisdiction, petitioner would not be entitled to the extraordinary injunction he seeks.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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