[ORAL ARGUMENT HELD ON SEPTEMBER 8, 2005 AND MARCH 22, 2006]

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

LAKHDAR BOUMEDIENE, et al.,	)	
	)	
Appellants,	)	
	)	
v.	)	No. 05-5062
	)	consolidated with
GEORGE W. BUSH, President of the United States, et al.,	)	No. 05-5063
	)	
Appellees.	)	
	)	
KHALED A. F. AL ODAH, et. al.,	)	
	)	
Appellees-Cross-Appellants,	)	
	)	
v.	)	No. 05-5064
	)	consolidated with
	)	Nos. 05-5095 - 05-5116
UNITED STATES OF AMERICA, et al.,	)	
	)	
Appellants-Cross-Appellees.	)	

GOVERNMENT'S SUPPLEMENTAL BRIEF ADDRESSING
HAMDAN V. RUMSFELD

Pursuant to this Court's order of July 26, 2006, we address here the impact of the recent Supreme Court decision *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006), on the above-captioned appeals.

As we explain below, the Supreme Court's decision does not speak to the

substantive legal claims asserted by the detainees here. In *Hamdan,* the Court expressly stated it was not addressing the power of the Government to detain Hamdan, or any other detainee, as an enemy combatant. *See* 126 S. Ct. at 2798. Nor did the Court address any constitutional claim or issue.

The Supreme Court's ruling does address the Detainee Treatment Act of 2005, Pub. L. No. 109-148, §§ 1001-1006, 119 Stat. 2680, 2739-45 (2005) ("DTA"). The Court held that section 1005(e)(1) of that Act does not apply to habeas claims filed prior to the enactment of the DTA. But the Court specifically recognized that section 1005 (e)(2) of the Act, which grants this Court "exclusive jurisdiction" to review final enemy combatant determinations, applies to all pending cases. The Court also expressly reserved judgment as to whether the DTA would require transfer of an action where there already is a "final decision" of a Combatant Status Review Tribunal ("CSRT") "to the District of Columbia Circuit." *See* 126 S. Ct. at 2769 n.14. That issue remains open here, and for the reasons set forth in our prior supplemental briefs regarding the DTA, this Court should hold that the exclusive-review scheme enacted by the DTA to govern review of final CSRT decisions precludes the exercise of jurisdiction under more general grants of jurisdiction, including habeas corpus, and mandates transfer of petitioners' claims to this Court.

The *Hamdan* decision also has no bearing on the treaty claims asserted by the detainees in these cases. The Court did not disturb the established rule that treaties are presumed not to create judially enforceable rights by private parties, nor did the Court refute the more specific statement in *Johnson v. Eisentrager*, 339 U.S. 763 (1950), that the 1929 Geneva Convention are not judicially enforceable. Instead, the Court assumed that the Conventions created no judicially enforceable right absent a statutory provision incorporating them. Accordingly, the decision is fully consistent with the argument in our merits brief that the treaty claims in these cases are not judicially enforceable. In any event, as shown in our prior briefing, those treaty claims are insubstantial.

I. The DTA's Exclusive Review Scheme is Expressly Applicable to Pending Cases.

1. In *Hamdan*, the Supreme Court held that the military commission convened to try Salim Hamdan, a Yemeni national, for conspiring to violate the laws of war was not authorized by Article 21 of the Uniform Code of Military Justice ("UCMJ") and was inconsistent with Article 36(b) of the UCMJ and common Article 3 of the 1949 Geneva Conventions, which it held to be judicially enforceable through Article 21.

The court also addressed whether section 1005(e)(1) of the DTA deprived it of jurisdiction over Hamdan's case. That provision expressly amends the habeas statute, 28 U.S.C. § 2241, to state that "no court, justice, or judge shall have jurisdiction to

hear or consider" habeas corpus cases or any other actions filed by detainees at Guantanamo Bay, Cuba, except as provided by the DTA itself. § 1005(e)(1).

Section 1005(e)(2) of the Act replaces habeas jurisdiction with an exclusive-review mechanism in this Court. It confers upon this Court "exclusive jurisdiction to determine the validity of any final decision of a Combatant Status Review Tribunal that an alien is properly detained as an enemy combatant." § 1005(e)(2)(A). Section 1005(e)(2) also specifies the governing "scope of review," by stating that this Court may determine whether a final CSRT decision "was consistent with the standards and procedures specified by the Secretary of Defense," and "to the extent the Constitution and laws of the United States are applicable, whether the use of such standards and procedures to make the determination is consistent with the Constitution and laws of the United States." § 1005(e)(2)(C).

Section 1005(e)(3) creates an exclusive-review mechanism for Guantanamo detainees seeking to challenge criminal convictions rendered by military commissions. It confers upon this Court "exclusive jurisdiction to determine the validity of any final decision" rendered by a military commission, § 1005(e)(3)(A), and it specifies a "scope of review" analogous to that provided for CSRT determinations. § 1005(e)(3)(D).

The *Hamdan* Court held that section § 1005(e)(1) does not apply to habeas

petitions that were pending in court when the DTA was enacted. *See* 126 S. Ct. at 2769 n.15 ("we conclude that § 1005(e)(1) does not strip federal courts' jurisdiction over cases pending on the date of the DTA's enactment"). Of great significance here, the Court, however, specifically recognized that sections 1005(e)(2) and 1005(e)(3) of the DTA, which establish in this Court the exclusive-review scheme applicable to final CSRT and military commission decisions, *do* apply to all pending cases. *Id.* at 2764 ("paragraphs (2) and (3) of subsection (e) are expressly made applicable to pending cases"); *id.* at 2769 ("Congress here expressly provided that subsections (e)(2) and (e)(3) applied to pending cases"). In permitting Hamdan's habeas action to proceed, the Court reasoned that there was no danger of "dual jurisdiction" in the district court and this Court over a final military commission ruling, because there has been no final commission ruling yet in Hamdan's case. *See* 126 S. Ct. at 2768. The Court concluded: "Because Hamdan, at least, is not contesting any final decision of a CSRT or military commission, his action does not fall within the scope of subsections (e)(2) or (e)(3)." *Id.* at 2769.

As to cases, such as the ones presented in these appeals, where there already is a "final decision" of a military commission or a CSRT, the Court expressly reserved judgment. *See* 126 S. Ct. at 2769 n.14. The Court stated as to such cases, "[w]e express no view about whether the DTA would require transfer of such an

action to the District of Columbia Circuit." *Ibid.*

2. In the Government's supplemental brief to this Court addressing the effects of the DTA, our lead argument was that, regardless of section 1005(e)(1), this Court's exclusive jurisdiction to review final CSRT decisions as set forth in section 1005(e)(2) – which expressly applies to pending cases (*see* § 1005(h)(2)) – precludes the exercise of district-court jurisdiction over the detainees' claims of unlawful detention. *See* U.S. Supp. Br. 21-28. We also argued that the DTA barred "the exercise of other jurisdiction in these cases in a second, independent way as well." *Id.* at 28. We contended that, even apart from the exclusive-review scheme set forth in section 1005(e)(2), section 1005(e)(1) applied to Guantanamo detention cases pending on the date of its enactment, and thereby deprived the district courts of jurisdiction over such cases. *Id.* at 28-36.

In construing section 1005(e)(1) to be inapplicable to cases pending on the date of its enactment, *Hamdan* forecloses our secondary argument based on that provision. However, *Hamdan* in no way undermines our former, primary argument based on the exlusive-review scheme set forth in section 1005(e)(2) to govern review of final CSRT decisions.

By its terms, section 1005(e)(2) of the DTA states that this Court "shall have exclusive jurisdiction to determine the validity of any final decision of a Combatant

Status Review Tribunal that an alien is properly detained as an enemy combatant." § 1005(e)(2)(A). Each of the detainee-petitioners in these appeals has been determined, in a "final decision" of a CSRT, to be an enemy combatant. *Hamdan* in no way undermines our argument that these petitioners, in challenging the lawfulness of their detention as enemy combatants, are necessarily challenging the "validity" of the final CSRT decisions that each of them "is properly detained as an enemy combatant." § 1005(e)(2)(A). Petitioners' claims thus fall squarely within the substantive scope of section 1005(e)(2). Moreover, *Hamdan* in no way undermines our argument about the temporal scope of section 1005(e)(2). To the contrary, the Supreme Court in *Hamdan* confirmed what the test of the DTA makes clear: that section 1005(e)(2) was "expressly made applicable to pending cases." 126 S. Ct. at 2764; *see* § 1005(h)(2).

Finally, *Hamdan* in no way undermines our contention that an exclusive-review scheme such as that provided under section 1005(e)(2), where applicable, precludes the exercise of jurisdiction under more general grants of jurisdiction, including habeas corpus. *See, e.g.*, 5 U.S.C. § 703; *Thunder Basin Coal Co.* v. *Reich*, 510 U.S. 200, 207-09 (1994); *Lopez* v. *Heinauer*, 332 F.3d 507, 511 (8th Cir. 2003). These principles continue to control these putative appeals.

3. Thus, the habeas claims in these appeals should still be transferred to this

Court and adjudicated pursuant to section 1005(e)(2). As explained in our supplemental brief, that provision permits review of the Fifth Amendment and other questions raised and fully briefed in these appeals. *See* § 1005(e)(2)(C) ("to the extent the Constitution and laws of the United States are applicable, [Court will review] whether the use of such standards and procedures to make the determination is consistent with the Constitution and laws of the United States"). The transfer of jurisdiction should not delay prompt resolution of those issues by this Court.

II. Petitioners' Geneva Convention Claims Are Not Judicially Enforceable And Are Meritless.

In *Hamdan*, the Court also addressed Geneva Convention claims in the specific context of criminal proceedings before military commissions. First, the Court held that the claims raised by Hamdan were judicially enforceable through Article 21 of the UCMJ, which the Court construed as restricting military commissions to cases involving "offenders or offenses that by statute or by the law of war may be tried by * * * military commissions," 10 U.S.C. § 821. *See Hamdan*, 126 S. Ct. at 2794 (Geneva Conventions "are, as the Government does not dispute, part of the law of war" referenced in Article 21). Next, the Court held that Common Article 3 of the Conventions, which applies only to armed conflicts "not of an international character," nonetheless governs the ongoing conflict between the United States and Al Qaeda. *See id.* at 2794-96. Finally, the Court held that military commissions are

not a "regularly constituted court," within the meaning of Common Article 3, absent adequate justification for any deviation in military-commission procedures from the procedures applicable to courts-martial. *See id.* at 2796-98. None of these holdings affects the Geneva Convention questions presented in these appeals.

First, with respect to judicial enforceability, the Supreme Court did not disturb the venerable rule that treaties are presumed *not* to create rights judicially enforceable by private parties. *See, e.g., Head Money Cases*, 112 U.S. 580, 597-98 (1884); *Holmes v. Laird*, 459 F.2d 1211, 1220-22 (D.C. Cir. 1972). Nor did *Hamdan* disturb the more specific statement in *Johnson* v. *Eisentrager*, 339 U.S. 763 (1950), that the Geneva Conventions of 1929 were not judicially enforceable by private parties. *See id.* at 789 n.14 ("It is * * * the obvious scheme of the Agreement that responsibility for observance and enforcement of these rights [under the Geneva Convention] is upon political and military authorities. Rights of alien enemies are vindicated under it only through protests and intervention of protecting powers as the rights of our citizens against foreign governments are vindicated only by Presidential intervention."). Nor did *Hamdan* suggest that the (former) Geneva Conventions of 1929 and the (present) Geneva Conventions of 1949 are meaningfully distinguishable for present purposes. To the contrary, the Supreme Court in *Hamdan* expressly "assume[d]" that "'the obvious scheme' of the 1949 Conventions is identical in all

relevant respects to that of the 1929 Convention." 126 S. Ct. at 2794. Moreover, the Court further "assume[d]" that this enforcement "scheme would, absent some other provision of law, preclude Hamdan's invocation of the Convention's provisions as an independent source of law binding the Government's actions and furnishing petitioner with any enforceable right." *Ibid.* Given those express assumptions, nothing in *Hamdan* undermines our contention that the Geneva Conventions create no rights judicially enforceable by private parties. For that reason, and those stated at length in our merits briefs, the treaty claims in these cases are not judicially enforceable.

In any event, nothing in *Hamdan* even arguably undermines our contention that the treaty claims raised here are meritless. The Court in *Hamdan* explicitly limited its substantive treaty holding to a provision in Common Article 3 addressed to "the passing of *sentences* and the carrying out of *executions* without previous judgment pronounced by a regularly constituted court affording all of the judicial guarantees which are recognized as indispensable by civilized peoples." 6 U.S.T. 3316, 3318 (1956) (emphases added). On its face, that provision addresses only the imposition of criminal punishment as opposed to the detention of enemy combatants – a question the Court expressly declined to consider, *see* 126 S. Ct. at 2798. The Court also did not consider any provision specific to the Fourth Geneva Convention, and it expressly

declined to consider any question regarding what constitutes a "competent tribunal" within the meaning of Article 5 of the Third Geneva Convention. *See id.* at 2795 n.61. Accordingly, *Hamdan* simply does not address the specific treaty claims raised by the petitioners in these cases, which lack merit for the reasons explained in our prior briefs.

Respectfully submitted,

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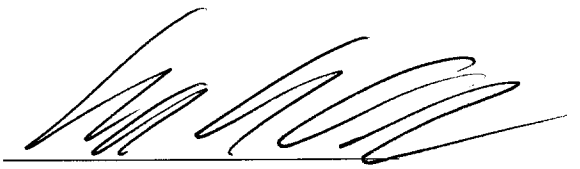

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