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August 30, 2006

Mr. Mark J. Langer  
Clerk of the Court  
United States Court of Appeals  
for the District of Columbia Circuit  
333 Constitution Avenue, N.W.  
Washington, D.C. 20001

**Re: No. 04-5393  
Civ. Action No. 1:04-cv-01519-JR  
Petitioner-Appellee's Motion to Govern Further Proceedings**

Dear Mr. Langer:

Please find enclosed an original and four copies of both Petitioner-Appellee's Motion to Govern Further Proceedings and the Declaration of Joseph M. McMillan filed on behalf of Salim Ahmed Hamdan.

Thank you for your assistance.

Very truly yours,

  
Jena A. MacLean

[/DA062420.006]

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Perkins Coie LLP and Affiliates

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

SALIM AHMED HAMDAN,

*Petitioner-  
Appellee,*

v.

DONALD H. RUMSFELD, *et al.*,

*Respondents*

No. 04-5393

[Civ. Action No. 04-cv-01519-JR]

**PETITIONER HAMDAN'S MOTION TO GOVERN FURTHER PROCEEDINGS**

On June 29, 2006, four and a half years after Mr. Hamdan was detained and turned over to United States custody, the U.S. Supreme Court resolved the issues on appeal in this case and directed that the matter be "remanded for further proceedings." *Hamdan v. Rumsfeld*, 126 S.Ct. 2749, 2798 (2006). Accordingly, Petitioner Salim Hamdan moves for an order remanding this case to the United States District Court for the District of Columbia to permit that court to adjudicate in the first instance the remaining detention-related claim set forth in Hamdan's habeas Petition.

The Government's appeal in this case was taken pursuant to 28 U.S.C. § 1292(a), seeking review of the District Court injunction that halted Hamdan's trial by military commission. In such cases, settled law establishes that the district court retains jurisdiction over claims unrelated to the injunction. Here, the District Court issued a precisely worded order that resolved certain claims (those related to the military commission), while holding others, including the claim relating to Hamdan's continuing detention at the Guantanamo Bay Naval Station, in abeyance. The Government sought interlocutory review of only the military commission claims decided by the District Court's November 8, 2004, ruling, and neither this Court nor the Supreme Court ever heard, much less adjudicated, the detention claim that

remains in abeyance below and within the District Court's continuing jurisdiction. No fact-finding has occurred in connection with that remaining claim. Early in this case (approximately two years ago), Hamdan moved for leave to conduct limited discovery to examine, *inter alia*, the factual basis for the Government's detention of Mr. Hamdan, but that motion has yet to be ruled on. Hamdan intends to seek a ruling on that motion from the District Court following remand.

Basic jurisdictional principles confirm that the District Court is the proper forum for the fact-finding that is essential to resolution of the remaining claims, and for initial consideration of any legal issues in dispute between the parties. The intervening passage of the Detainee Treatment Act of 2005, Pub. L. No. 109-148, Div. A, Tit. X, 119 Stat. 2739 ("DTA"), did not divest the District Court of jurisdiction and does not require this Court to depart from its normal procedure – which is to return the case to the District Court for findings of fact and resolution of the remaining claim challenging the lawfulness of Hamdan's continued detention. That time-tested, standard procedure serves not only the interests of justice but also those of judicial efficiency, permitting well-developed factual records to guide proper appellate review.

**I. HAMDAN'S CHALLENGE TO HIS DETENTION REMAINS BEFORE THE DISTRICT COURT.**

On April 6, 2004, Hamdan filed a Petition for Writ of Mandamus Pursuant to 28 U.S.C. § 1361 or, In the Alternative, Writ of Habeas Corpus ("Petition"). Mr. Hamdan's Petition set forth two classes of claims: (i) a challenge to the military commission process established to try him, and (ii) a challenge to his ongoing detention. *See* Petition ¶¶ 50-51, Prayer for Relief ¶¶ 7-8 (asking that the Court "Order Respondents to promptly justify as lawful any continued detention of Mr. Hamdan"). His Petition was filed in the Western District of Washington but was transferred to the D.C. District Court on September 2, 2004.

Initially, Hamdan's challenge to his detention was necessarily a later-in-time aspect of his challenge to the military commissions. There was no question that (1) *if* the tribunals were lawful; and (2) *if* Hamdan were lawfully subject to their jurisdiction; then Hamdan's challenge to his detention was without merit. Because of the primacy of the military commission issue, both sides sought to sever this case from the coordinated proceedings in the other Guantanamo cases that did not involve military commissions, which at that point were consolidated before Judge Green. Sept. 20, 2004, Joint Letter from Counsel to Judge Green, Declaration of Joseph M. McMillan ("McMillan Decl."), Ex. A. Judge Green complied with this joint request, ordering oral argument on the Government's motion to dismiss to proceed before Judge Robertson (to whom the case had been assigned initially following the transfer from the Western District of Washington). September 24, 2004, Order, McMillan Decl., Ex. B. Judge Green also ruled that, in light of the different posture of the *Hamdan* case and the pendency of the Government's motion to dismiss, the Government was "not required...to file a response addressing enemy combatant status issues...or a factual return providing the factual basis for petitioner's detention as an enemy combatant, pending further order of the Court." October 4, 2004, Order, McMillan Decl., Ex. C. This was in marked contrast to the other detainee cases, where, as Judge Green noted, "respondents chose to submit as factual support for their detention of petitioners the records of the CSRT proceedings," including "the full, classified versions [of the CSRT proceedings] for the Court's *in camera* review." *In re Guantanamo Detainee Cases*, 355 F. Supp.2d 443, 451-52 (D.D.C. 2005). Thus, at no point in this case has any evidence been introduced going to the factual basis for Mr. Hamdan's detention. The Government has acknowledged this in a filing with Judge Green on October 1, 2004, stating that in *Hamdan* "respondents filed a return and cross-motion to dismiss *addressed solely to petitioner's detention pursuant to military commission proceedings* on August 6, 2004, prior to the transfer of the case to [the D.C.

District] Court." Respondents' Unopposed Motion for Clarification Regarding Submission of a Response and Factual Return ¶ 4 (emphasis added), McMillan Decl., Ex. D.

Consistent with this separate status and the lack of any anticipated factual discovery pending the resolution of the military commission issues, Judge Green issued an Order on October 20, 2004, stating that "this action shall not be governed by the Protective Order entered in the coordinated proceedings relating to Guantanamo detainee petitions, pending further action by the Court." McMillan Decl., Ex. E.

On November 8, 2004, the D.C. District Court resolved certain claims challenging the military commission process and granted Hamdan's Petition in part. The District Court held Hamdan's remaining claims, including those concerning his indefinite detention, in abeyance. *Hamdan v. Rumsfeld*, 344 F. Supp. 2d 152, 173-74 (D.D.C. 2004) ("[T]he petition of Salim Ahmed Hamdan for habeas corpus is granted in part...petitioner's remaining claims are in abeyance[.]"). Pursuant to 28 U.S.C. § 1292(a)(1), the Government sought interlocutory review of District Court's order halting the military commission. D.C. Circuit Court of Appeals Brief for Appellants at 2 ("This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1292(a)(1).") (December 8, 2004). This Court reversed the District Court. *Hamdan v. Rumsfeld*, 415 F.3d 33 (D.C. Cir. 2005). This Court did not hear, much less adjudicate, Hamdan's distinct claims challenging his detention. The Supreme Court, in turn, reversed this Court, similarly deciding only Petitioner's challenge to the military commission process. It then directed that the case be remanded for further proceedings. 126 S.Ct. at 2798.

To date, no court has passed on Hamdan's claims challenging his continued detention, a claim properly presented in his initial Petition. Petition ¶¶ 50-51, Prayer for Relief ¶¶ 7-8. The District Court held that claim in abeyance pending the outcome of Hamdan's challenge to the commission process. 344 F. Supp. 2d at 173-74. Mr. Hamdan's claims regarding the military commission have been fully adjudicated. However, he remains in indefinite detention at Guantanamo Bay Naval Station, Cuba. The District Court never developed a

factual record relating to Hamdan's detention claim, providing scant basis for this Court to resolve it as a matter of first impression. *See, e.g., Zivotofsky ex rel. Ari Z. v. Sec'y of State*, 444 F.3d 614, 619-20 (D.C. Cir. 2006) (remanding case to district court for development of a more complete factual record, even where question of law was at issue). Because the District Court is in a better position to develop a factual record on Hamdan's remaining claim, this case should be remanded. In short, the District Court is the proper forum for initial consideration of the prayer in the Petition that the Government "justify as lawful any continued detention of Mr. Hamdan." Petition, Prayer for Relief ¶ 7.

## **II. THE DISTRICT COURT HAS JURISDICTION OVER HAMDAN'S REMAINING CLAIM AND IS THE PROPER COURT TO HEAR THAT CLAIM.**

It is settled law that when a trial court resolves some but not all claims in a case, and interlocutory appeal is sought on the adjudicated claims, the district court retains jurisdiction over claims that are not the subject of the appeal. *E.g., Taylor v. Sterrett*, 640 F.2d, 663, 668 (5th Cir. 1981) ("[W]here an appeal is allowed from an interlocutory order, the district court may still proceed with matters not involved in the appeal."); *Ex parte National Enameling*, 201 U.S. 156, 160 (1906) ("The case, except for the hearing on the appeal from the interlocutory order, is to proceed in the lower court as though no such appeal had been taken, unless otherwise specially ordered.").<sup>1</sup>

Here, the Government sought interlocutory review of the District Court's injunction, and the District Court therefore retains jurisdiction over the detention-related claim that was not part of that injunction. The District Court's November 8, 2004, injunction addressed only

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<sup>1</sup> In habeas actions in particular, where a petition has multiple claims the district court retains jurisdiction over those claims it has held in abeyance while other claims are pending elsewhere. *See In re Bowen*, 436 F.3d 699, 703 n.2 (6th Cir. 2006) ("Under the stay and abeyance procedure, district courts retain jurisdiction over mixed petitions and stay further proceedings pending the complete exhaustion of state remedies.") (citing *Duncan v. Walker*, 533 U.S. 167, 182-83 (2001) (Stevens, J., concurring)).

the military commission and Hamdan's "pre-commission segregation." November 8, 2004, Order, McMillan Decl., Ex. F.

The district court's continuing jurisdiction over unadjudicated claims follows logically from the longstanding principle that appellate courts should not decide in the first instance claims that the district court never adjudicated.

It is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below... [Remand] is essential in order that parties may have the opportunity to offer all the evidence they believe relevant to the issues.... Moreover, even assuming that there is no such evidence, petitioner should have the opportunity to present whatever legal arguments he may have.

*Singleton v. Wulff*, 428 U.S. 106, 120 (1976) (reversing, for abuse of discretion, adjudication by the court of appeals of a claim not decided in the first instance in the district court) (internal quotation marks and citation omitted). When issues of fact remain, as they do with Hamdan's detention claim, remand to the district court is proper because it is the function of district courts to hear and decide factual issues. See *Pullman-Standard v. Swint*, 456 U.S. 273, 291-92 (1982) ("When an appellate court discerns that a district court has failed to make a finding because of an erroneous view of the law, the usual rule is that there should be a remand for further proceedings to permit the trial court to make the missing findings"); *DeMarco v. United States*, 415 U.S. 449, 450 n.\* (1974) ("[F]actfinding is the basic responsibility of district courts, rather than appellate courts, and the Court of Appeals should not have resolved in the first instance this factual dispute which had not been considered by the District Court."); see also 5A J. MOORE & J. LUCAS, MOORE'S FEDERAL PRACTICE § 52.06 [2] (1982) ("Where the trial court fails to make findings, or to find on a material issue, and an appeal is taken, the appellate court will normally vacate the judgment and remand the action for appropriate findings to be made."). Decisions of this Court similarly hold that remand to the district court is appropriate for resolution of claims not resolved below prior to appeal. E.g., *Women's Equity Action League v. Bell*, 743 F.2d 42, 44 (D.C. Cir. 1984) ("[I]t is our

general practice to allow full development and presentation in the district court of matters that surface initially on appeal.").

Here, no fact-finding whatsoever has taken place with respect to Hamdan's challenge to his detention – a claim properly presented in his Petition and held in abeyance by the District Court below. Petition ¶¶ 50-51, Prayer for Relief ¶¶ 7-8; *Hamdan*, 344 F. Supp. 2d at 173-74. Important issues of fact are unresolved. The Government has yet to adduce any evidence in the District Court that Mr. Hamdan is an enemy combatant in an ongoing war, or that his detention is necessary to prevent him from rejoining active hostilities. Nor has the Government presented any other facts that might justify his continued detention.<sup>2</sup> Moreover, since Mr. Hamdan was apprehended in Afghanistan in November 2001, no court has passed on the question of whether "active hostilities" are under way, which is the fundamental predicate of any war-time detention. *Hamdi v. Rumsfeld*, 542 U.S. 507, 520 (2005) ("It is a clearly established principle of the law of war that detention may last no longer than active hostilities."). The evidence on these issues should be considered by the District Court in the first instance. *DeMarco*, 415 U.S. at 450 n.\*<sup>3</sup>

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<sup>2</sup> The Government has stated that sometime in the fall of 2004 a Combatant Status Review Tribunal ("CSRT") determined that Hamdan was an enemy combatant "affiliated" with al Qaeda. However, no evidence concerning this finding has been introduced in this case, at either the district court or appellate court levels. Indeed, counsel for the Government represented to the District Court in October 2004 that the CSRT had "zero effect" on its motion to dismiss. Transcript of 10/25/04 Hearing at 12-14, McMillan Decl., Ex. G. As noted above, early in the case Hamdan sought leave to conduct limited discovery, including discovery on the facts and information relevant to his continued detention by the Government, but that motion, filed when the case was pending before the U.S. District Court for the Western District of Washington, was held in abeyance when the Government moved for transfer of venue. Transcript of 7/16/04 Hearing, McMillan Decl., Ex. H.

<sup>3</sup> In *Rasul v. Bush*, 542 U.S. 466, 487 (2004) the Supreme Court observed that district courts were the proper forum for the adjudication of as yet unheard habeas claims stemming from alleged unlawful detention at Guantanamo. *Rasul*, 542 U.S. at 487 (2004) ("[W]e reverse the judgment of the Court of Appeals and remand for the District Court to consider in the first instance the merits of petitioners' claims.") (emphasis added).



### III. THE DTA DID NOT DIVEST THE DISTRICT COURT OF JURISDICTION.

The only possible ground for declining to follow the normal procedure of remand to the District Court is the intervening passage of the DTA, signed into law on December 30, 2005, while Hamdan's case was before the Supreme Court. However, the DTA is inapplicable to Hamdan's detention-related claim because that claim is not a challenge to the validity of a final decision of a CSRT as contemplated by the DTA. In fact, Mr. Hamdan filed his challenge before the CSRT was even invented by the Department of Defense—this lawsuit was filed on April 6, 2004, and the CSRT procedure was established several months later, in July 2004. Thus, there is nothing to detract from the Supreme Court's jurisdictional ruling that the DTA's general jurisdiction-stripping provision (§ 1005(e)(1)) does not reach previously-filed habeas cases, like this one, that were pending on the date of enactment of the DTA.

The Government may argue that Hamdan's continued detention is justified by a finding of combatancy made by a CSRT in the fall of 2004. CSRTs were established by the Government in response to the Supreme Court's rulings in *Rasul* and *Hamdi*, which held that federal courts have jurisdiction to hear habeas claims filed by Guantanamo detainees, and that those detainees must be given a meaningful opportunity to challenge the asserted bases for their detention before a neutral fact-finder. However, the procedures for these early CSRTs did not permit counsel for the detainees to attend, did not include certain safeguards later required by the DTA, and did not give the detainees an adequate opportunity to obtain witnesses or evidence to establish their non-combatancy.<sup>4</sup> In fact, the record reveals that Mr.

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<sup>4</sup> See, e.g., F. Stockman and D. Walsh, *Detainees Not Given Access to Witnesses*, Boston Globe, June 18, 2006, available at [http://www.boston.com/news/world/middleeast/articles/2006/06/18/detainees\\_not\\_given\\_access\\_to\\_witnesses/](http://www.boston.com/news/world/middleeast/articles/2006/06/18/detainees_not_given_access_to_witnesses/), explaining that while the Government routinely claimed that it could not locate witnesses who might help detainees prove their assertions of innocence, a Globe reporter was able to locate three such witnesses sought by one detainee within a

Hamdan's CSRT suffered from numerous problems along these lines. *See* Transcript of 10/25/04 Oral Argument before Judge Robertson at 57-58, McMillan Decl., Ex. G.<sup>5</sup> The CSRTs largely rubber-stamped the previous determinations of the military that all, or almost all, of the detainees were enemy combatants (despite statements from knowledgeable sources refuting such findings).<sup>6</sup> In other detainee litigation, Judges Leon and Green of the D.C. District Court issued conflicting rulings regarding the adequacy of these early CSRT procedures. Those conflicting judgments are currently on appeal before this Court.

Of course, should this Court follow normal procedures and remand this case to the District Court, that Court could continue to hold Mr. Hamdan's detention claim in abeyance while these conflicting decisions are decided in the Court of Appeals and, if necessary, reviewed in the Supreme Court. However, even if it ultimately decided to hold a judgment on the merits in abeyance, the District Court could begin the process of conducting the now-severely tardy discovery process. Whether the merits are ultimately decided by the District Court or some higher court, starting discovery now—nearly five years after Mr. Hamdan's capture—is the prudent course, promoting not only fairness but judicial efficiency.

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three-day period of time. In fact, one of those witnesses was teaching at the National Defense University in Washington D.C.

<sup>5</sup> At oral argument on the legal issues surrounding the military commission, counsel for Hamdan informed the Court: "With respect to the Combatant Status Review Tribunal, we haven't heard the results until this moment that he has been denied or he has been labeled an enemy combatant. We were actually barred [from] participation before that Combatant Status Review Tribunal. We asked to be part of it, and we were barred. We were also barred from presenting exculpatory evidence in that proceeding. We had evidence showing that Mr. Hamdan was not an enemy combatant and, as I understand it, that was not permitted." McMillan Decl., Ex. G.

<sup>6</sup> *See, e.g.*, the October 6, 2004, statement from Brig. Gen. Martin Lucenti, Jr., the deputy commander at Guantanamo: "Of the 550 [detainees] that we have, I would say most of them, the majority of them, will either be released or transferred to their own countries.... Most of these guys weren't fighting. They were running." *Most at Guantanamo to be Freed or Sent Home, Officer Says*, The Washington Post, October 6, 2004, at A16, available at <http://www.washingtonpost.com/ac2/wp-dyn/A9626-2004Oct5?language=printer>.

Additional delay in discovery prejudices Mr. Hamdan, as memories fade, exculpatory evidence is lost, and witnesses become unavailable for any number of reasons.

In any event, those early CSRT findings relating to Mr. Hamdan were never made part of the record in the District Court in his case, and Judge Robertson never determined that they provided an adequate basis for Hamdan's continuing detention. For the reasons explained below, the DTA does not bar the District Court from now addressing that issue, or otherwise inquiring into the facts relevant to the detention.

The portion of the DTA addressing judicial review of CSRTs is § 1005(e)(2). Section 1005(e)(2)(A) confers exclusive jurisdiction on the D.C. Circuit to determine the validity of final CSRT decisions concerning combatancy, subject to the limitations in subsections (B), (C) and (D). The limitation in subsection (B) implies that the CSRT to be reviewed must have been conducted pursuant to standards and procedures that the Secretary of Defense was required to issue within 180 days of the enactment of the DTA, standards set forth elsewhere in the Act (specifically, in §§ 1005(a) and (b)). The limitation in subsection (C) is that the scope of judicial review is restricted to consideration of whether the CSRT's determination "was consistent with the standards and procedures specified by the Secretary of Defense for Combatant Status Review Tribunals," and "whether the use of such standards and procedures to make the determination is consistent with the Constitution and laws of the United States." The DTA not only directed the Secretary of Defense to submit standards and procedures for the CSRTs to Congress, it also prescribed certain safeguards that did not exist in the early CSRTs, including requirements that (1) a civilian official, whose appointment is subject to Senate confirmation, review CSRT determinations, (2) the procedures provide for periodic review of new evidence, and (3) the CSRTs assess whether evidence against the detainee was obtained through coercion, and the probative value (if any) of any such evidence. Subsection (C) also requires that the CSRT's conclusion "be supported by a preponderance of the evidence." Subsections (B) and (C) have meaning only if they limit judicial review to final

decisions of CSRTs conducted pursuant to the standards and procedures that the Secretary of Defense was directed to issue. Mr. Hamdan never appeared before a CSRT conducted pursuant to the DTA (*i.e.*, containing the above-mentioned safeguards), and therefore section 1005(e)(2) – which governs review of the decisions of such CSRTs – does not apply to him. In other words, Hamdan's remaining challenge to his detention is not a challenge to a final decision of a "CSRT" of the type covered in § 1005(e)(2) of the DTA.

Because Hamdan's remaining claim is not governed by § 1005(e)(2), the Supreme Court's decision in *Hamdan* indicates that the DTA does not divest the district court of jurisdiction over that claim. 126 S.Ct. at 2769. The Court in *Hamdan* unequivocally stated: "we conclude that § 1005(e)(1) does not strip federal courts' jurisdiction over cases pending on the date of the DTA's enactment." *Id.* at 2769 n.15. The Court rejected the Government's argument that the DTA carried an immediate "presumption against jurisdiction." Rather, the Court held that the DTA's deliberate omission of § 1005(e)(1) from the effective date provision of § 1005(h)(2) created a "negative inference" that the DTA did not apply to pending cases.<sup>7</sup> 126 S.Ct. 2765-66. Hence, the Court held that, standing alone, § 1005(e)(1) does not act as a jurisdictional bar in cases like this one that were pending at the time of the DTA's enactment.<sup>8</sup>

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<sup>7</sup> There is a similar negative inference that operates to clarify which CSRTs are governed by § 1005(e)(2). Specifically, only one of the statutory criteria mentioned above – that relating to the use of evidence obtained through coercion – is excepted from the criteria that must be in place for all CSRTs as that term is used in the DTA. The coercion standard is expressly made applicable to CSRTs "*beginning on or after the date of enactment of this Act.*" Sec. 1005(b)(2) (emphasis added). The negative inference is that all the other procedural protections, including the civilian review official and the periodic review of new evidence, must be present in any CSRT within the scope of § 1005(e)(2)'s exclusive review procedure. Because those safeguards were not in place for the early CSRT before which Hamdan appeared, that proceeding was not a "CSRT" whose decision is governed by § 1005(e)(2).

<sup>8</sup> Mr. Hamdan's petition, which included at the time of filing a challenge to his detention, was filed on April 6, 2004, nearly sixteen months before the December 30, 2005 passage of the DTA.

Moreover, the Court's holding that § 1005(e)(3) did not create an exclusive review process for military commissions strongly suggest that, in similar fashion, § 1005(e)(2) does create an exclusive review process for all possible challenges to CSRTs. The Court explicitly rejected the notion that the DTA creates an exclusive form of habeas review for detainees, observing instead that two channels of review exist:

[The DTA creates] a scheme under which pending actions – particularly those, like this one, that challenge the very legitimacy of the tribunals whose judgments Congress would like to have reviewed – are preserved, and more routine challenges to final decisions rendered by those tribunals are carefully channeled to a particular court and through a particular lens of review.

126 S.Ct. at 2769. The holding in *Hamdan* that the scheme established in the DTA co-exists with traditional habeas review forecloses any argument that § 1005(e)(2) comprehensively precludes the District Court's more expansive habeas review of Hamdan's detention claim.<sup>9</sup> As noted above, Hamdan's challenge to his detention is not a challenge to a CSRT conducted pursuant to the DTA, but rather a broad challenge to his continuing detention requiring the full inquiry afforded under the habeas statute, 28 U.S.C. § 2241(c)(1) and (3), and available at common law. Evidence that might be presented at a hearing relating to his detention is broader than the narrow inquiry authorized by § 1005(e)(2)(C) of the DTA.

Furthermore, there can be no meaningful dispute that the District Court retains jurisdiction to determine its own jurisdiction, *see, e.g., Consol. Edison Co. of N.Y. v. Bodman*, 449 F.3d 1254, 1257 (D.C. Cir. 2006). In particular, the District Court would retain

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<sup>9</sup> Nor is this Court's decision on remand from the Supreme Court in *Empagran S.A. v. F. Hoffman-LaRoche, Ltd.*, 388 F.3d 337 (D.C. Cir. 2004) (per curiam), to the contrary. Although *Empagran* held that this Court need not remand a question as to subject-matter jurisdiction to the District Court, the decision was explicit both that (1) *neither* party had sought remand to the District Court; and (2) that the Supreme Court had *itself* suggested that the D.C. Circuit, rather than the District Court, resolve the jurisdictional question on remand. *See id.* at 344-45 (citing *F. Hoffman-LaRoche, Ltd. v. Empagran S.A.*, 542 U.S. 155, 175 (2004)). Because neither of these conditions is present here, and because, unlike in this case, the jurisdictional question on remand in *Empagran* in no way turned on an underdeveloped factual record, that decision is inapposite.

jurisdiction to decide whether section 1005(e)(2) of the DTA, in vesting exclusive jurisdiction in this court over challenges to final decisions CSRTs, serves to preclude its consideration of Hamdan's claims on remand.<sup>10</sup>

The necessity of remanding to the District Court to determine this threshold jurisdictional question is only more evident in light of the language of § 1005(e)(2). Section 1005(e)(2)(A) provides that "the United States Court of Appeals for the District of Columbia Circuit 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." DTA § 1005(e)(2)(A), 119 Stat. at 2742. That review, however, is confined to deciding

- (i) whether the status determination of the Combatant Status Review Tribunal with regard to such alien was consistent with the standards and procedures specified by the Secretary of Defense for Combatant Status Review Tribunals (including the requirement that the conclusion of the Tribunal be supported by a preponderance of the evidence and allowing a rebuttable presumption in favor of the Government's evidence); and
- (ii) 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.

DTA § 1005(e)(2)(C), 119 Stat. at 2742. Because Hamdan was never provided with an opportunity to provide factual support for his underlying challenge to his detention, the record is manifestly unclear, at this stage in the proceedings, whether Hamdan's remaining

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<sup>10</sup> If § 1005(e)(2) does not divest the District Court of jurisdiction, then it would retain jurisdiction notwithstanding § 1005(e)(1) of the DTA, which the Supreme Court held did not apply to Hamdan's claims. *See Hamdan*, 126 S. Ct. at 2762-69. That is to say, in light of the Supreme Court's holding that § 1005(e)(1) does not apply to this case, the District Court would lack jurisdiction if—and only if—Hamdan's claims fell entirely within § 1005(e)(2), and § 1005(e)(2) were constitutional as applied to Hamdan.

claims fall within § 1005(e)(2)(C)'s exclusive review provision. If they do not, then the District Court should have the first opportunity to determine whether § 1005(e)(2) nevertheless deprives it of jurisdiction, and, if so, whether it is therefore unconstitutional as so applied, since Hamdan's claims would therefore also fall outside the scope of *this* Court's review. *Cf. Webster v. Doe*, 486 U.S. 592, 603 (1988) (noting "the 'serious constitutional question' that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim").

Either way, there is every reason to allow the District Court to reach these complicated questions first, on a more complete factual record, rather than to pretermitt its consideration. Indeed, even if the District Court ultimately concludes that the DTA *does* divest it of jurisdiction over Hamdan's remaining claims, nothing would prevent that Court from transferring the proceedings to this Court under the authority of 28 U.S.C. § 1631.<sup>11</sup> *See generally Prof. Managers' Ass'n v. United States*, 761 F.2d 740, 745 n.5 (D.C. Cir. 1985) (per curiam) (summarizing the purpose of § 1631). That is to say, there is no means by which further remand to the District Court might ultimately frustrate this Court's review. To the contrary, the development of an appropriate factual record will only facilitate resolution of the complicated jurisdictional questions, whether by the District Court or ultimately by this Court, that remain on remand.

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<sup>11</sup> Section 1631 specifies that:

Whenever a civil action is filed in a court as defined in section 610 of this title or an appeal, including a petition for review of administrative action, is noticed for or filed with such a court and that court finds that there is a want of jurisdiction, the court shall, if it is in the interest of justice, transfer such action or appeal to any other such court in which the action or appeal could have been brought at the time it was filed or noticed, and the action or appeal shall proceed as if it had been filed in or noticed for the court to which it is transferred on the date upon which it was actually filed in or noticed for the court from which it is transferred.

In addition, a ruling by this Court consistent with the Supreme Court's reasoning in *Hamdan* would avoid the Suspension Clause issue raised by the limited review afforded under § 1005(e)(2)(C). That limited review provides neither an adequate nor an effective alternative to the full factual and legal inquiry afforded under habeas,<sup>12</sup> and accordingly runs afoul of the Suspension Clause. *See Swain v. Pressley*, 430 U.S. 372, 381 (1977) (examining the adequacy of a collateral review scheme to determine if it was commensurate with the scope of habeas review, or alternatively, an unconstitutional suspension of the Great Writ). It is a longstanding canon of statutory construction that, if at all possible, legislation should be interpreted in a manner that avoids such serious constitutional questions. *DeBartolo Corp. V. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) ("This cardinal principle...has for so long been applied by this Court that it is beyond debate."). The stature of the Great Writ and the sharply circumscribed review afforded under § 1005(e)(2)(C) combine to strongly militate against any reading of the DTA that would strip the District Court of jurisdiction over Hamdan's remaining habeas claim in this case. *See INS v. St. Cyr*, 533 U.S. 289, 300 (2001) (the Court is "obligated to construe the statute to avoid such problems.").

A remand to the District Court is also consistent with the filing of the United States Government in the court below, and with principles of pendent jurisdiction more generally. The Government has, in the wake of *Hamdan*, already indicated that the *Hamdan* case stands on a different jurisdictional footing:

This motion is without prejudice to respondents' position that the [District] Court lacks jurisdiction in these cases, aside from *Hamdan v. Rumsfeld*, No. 04-CV-1519 (JR), in light of the Detainee Treatment Act of 2005, Pub. L. No.

---

<sup>12</sup> For example, § 1005(e)(2)(C) makes no provision for discovery by the detainee to allow the development of evidence in his favor, or for the production of that evidence or the testing of the Government's evidence in an evidentiary hearing. Such rights are absolutely essential to any meaningful challenge to the lawfulness of the detention.



109-148, tit. X, 119 Stat. 2680 ("the Act"). ... While the petitioner in *Hamdan* escaped the Act by virtue of the fact that his challenge did not involve a final decision of a military commission within the exclusive jurisdiction of the Court of Appeals under § 1005(e)(3), the [Supreme] Court reserved the question of the effect of the exclusive review provisions of the Act on other cases, stating that "[t]here may be habeas cases that were pending in the lower courts at the time the DTA was enacted that do qualify as challenges to 'final decision[s]' within the meaning of subsection (e)(2) or (e)(3). We express no view about whether the DTA would require transfer of such an action to the District of Columbia Circuit." *Hamdan*, slip op. at 18 n.14. The cases at bar, aside from *Hamdan*, are just such cases, *i.e.*, challenges to petitioners' designation as enemy combatants through Combatant Status Review Tribunals, and given the Act's investment of exclusive review in the Court of Appeals, the District Court lacks jurisdiction over the cases for it is well-settled that an exclusive-review scheme, where applicable, precludes the exercise of jurisdiction under more general grants of jurisdiction, including *habeas corpus*.

Brief of the United States, *Hicks v. Bush* (and other cases), Case 1:02-cv-00299-CKK, July 7, 2006, at 2 n.3 (emphasis added).<sup>13</sup> This Court has recognized the propriety, if not the necessity, of remanding cases to the District Court where the Government has taken inconsistent litigation positions, so as to allow for the development of a more complete record and resolution in the first instance of the legal claims at issue. *See, e.g., Venetian Casino Resort, LLC v. EEOC*, 409 F.3d 359, 367 (D.C. Cir. 2005) ("On remand, the District Court's first task will be to ascertain the contours of the precise [EEOC] policy at issue. If [plaintiff's] allegations turn out to be correct, the District Court must determine in the first instance whether the policy is contrary to law.").

Finally, the Supreme Court's footnote 14, which observed that there "may be" pending petitions that "qualify as challenges to 'final decisions' within the meaning of" §§ 1005(e)(2) or (3), does not remotely imply that challenges to detention such as Mr. Hamdan's are so "qualified." 126 S.Ct. at 2769 at n.14. Rather, that footnote merely raised the possibility that

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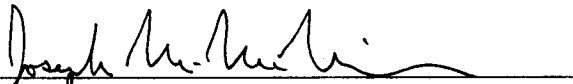
<sup>13</sup> Available at [http://www.scotusblog.com/movabletype/archives/gov\\_mot\\_20060707.pdf](http://www.scotusblog.com/movabletype/archives/gov_mot_20060707.pdf).

such claims may exist, but that issue was not before the Court and no decision concerning it occurred. In this case, Mr. Hamdan's challenge to his detention is not a claim governed by § 1005(e)(2) and jurisdiction over that claim remains undisturbed in the District Court.

### CONCLUSION

For all the foregoing reasons, Mr. Hamdan respectfully requests that the Court remand this case to the U.S. District Court for the District of Columbia for resolution by Judge Robertson of the remaining challenge to Petitioner's continuing detention.

Respectfully submitted this 30<sup>th</sup> day of August, 2006.

/s/ 

Joseph M. McMillan (*pro hac vice*)

Charles C. Sipos (*pro hac vice*)

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Lt. Commander Charles D. Swift  
Office of the Chief Defense Counsel  
for Military Commissions  
2521 South Clark Street, Suite 750  
Arlington, VA 22202

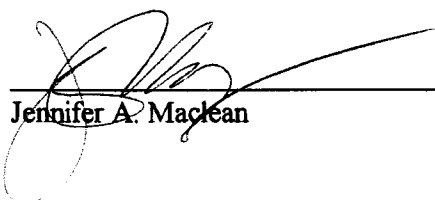
*Attorneys for Petitioner Salim Ahmed Hamdan*

**CERTIFICATE OF SERVICE**

I hereby certify that on this August 30, 2006, I caused copies of the foregoing Motion to Govern Further Proceedings to be sent by hand delivery to the Court and the following counsel of record:

Robert M. Loeb  
Attorney, Appellate Staff  
Civil Division, Room 7263  
U.S. Department of Justice  
950 Pennsylvania Ave., NW  
Washington, DC 20530-0001

Sharon Swingle  
Attorney, Appellate Staff  
Civil Division, Room 7250  
U.S. Department of Justice  
950 Pennsylvania Ave., NW  
Washington, DC 20530-0001

  
\_\_\_\_\_  
Jennifer A. Maclean

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

SALIM AHMED HAMDAN,

*Petitioner-  
Appellee,*

v.

DONALD H. RUMSFELD, *et al.*,

*Respondents*

No. 04-5393

[Civ. Action No. 04-cv-01519-JR]

**DECLARATION OF JOSEPH M. MCMILLAN IN SUPPORT OF PETITIONER  
HAMDAN'S MOTION TO GOVERN FURTHER PROCEEDINGS**

I, Joseph McMillan, am one of the attorneys representing Petitioner-Appellee Salim Ahmed Hamdan. I make this declaration based on personal knowledge and I am competent to do so.

1. Attached as Exhibit A is a true and correct copy of a joint letter from Petitioner-Appellee's counsel and Respondents' counsel to Judge Joyce Hens Green of the United States District Court for the District of Columbia dated September 20, 2004.

2. Attached as Exhibit B is a true and correct copy of the Order Setting Briefing Schedule for Motion to Dismiss and Granting Motion for Leave to File Brief as Amicus Curiae issued by Judge Joyce Hens Green of the United States District Court for the District of Columbia dated September 24, 2004.

3. Attached as Exhibit C is a true and correct copy of the Order Granting Respondents' Unopposed Motion for Clarification Regarding Submission of a Response and Factual Return issued by Judge Joyce Hens Green of the United States District Court for the District of Columbia dated October 4, 2004.

4. Attached as Exhibit D is a true and correct copy of Respondents' Unopposed Motion for Clarification Regarding Submission of a Response and Factual Return filed in the United States District Court for the District of Columbia dated October 1, 2004.

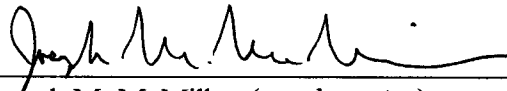
5. Attached as Exhibit E is a true and correct copy of the Order Granting Petitioner's Unopposed Motion That Case Not Be Governed by Protective Order Entered in Consolidated Proceedings issued by Judge Joyce Hens Green of the United States District Court for the District of Columbia dated October 20, 2004.

6. Attached as Exhibit F is a true and correct copy the Order issued by Judge James Robertson of the United States District Court for the District of Columbia dated November 8, 2004.

7. Attached as Exhibit G are true and correct copies of selected pages of the Transcript of Motions Hearing before Judge James Robertson of the United States District Court for the District of Columbia dated October 25, 2004.

8. Attached as Exhibit H are true and correct copies of selected pages of the Transcript of Proceedings before Judge Robert Lasnik of the United States District Court Western Washington dated July 16, 2004.

Respectfully submitted this 30<sup>th</sup> day of August, 2006.



---

Joseph M. McMillan (*pro hac vice*)  
PERKINS COIE LLP  
607 Fourteenth Street, N.W., Suite 800  
Washington, D.C. 20005-2011  
(202) 628-6600  
(202) 434-1690 (facsimile)

*Attorney for Petitioner Salim Ahmed Hamdan*

**CERTIFICATE OF SERVICE**

I hereby certify that on this August 30, 2006, I caused copies of the foregoing Declaration of Joseph M. McMillan in Support of Petitioner Hamdan's Motion to Govern Further Proceedings to be sent by hand delivery to the Court and the following counsel of record:

Robert M. Loeb  
Attorney, Appellate Staff  
Civil Division, Room 7263  
U.S. Department of Justice  
950 Pennsylvania Ave., NW  
Washington, DC 20530-0001

Sharon Swingle  
Attorney, Appellate Staff  
Civil Division, Room 7250  
U.S. Department of Justice  
950 Pennsylvania Ave., NW  
Washington, DC 20530-0001

  
\_\_\_\_\_  
Jennifer A. Maclean

# **EXHIBIT A**



U.S. Department of Justice

Civil Division

---

Washington, D.C. 20530

September 20, 2004

By Hand-Delivery

The Honorable Joyce Hens Green  
Senior United States District Judge  
c/o Sheldon Snook, Administrative Assistant to the Chief Judge  
United States Courthouse  
333 Constitution Ave., N.W. Room 4106  
Washington, D.C. 20001

Re: Guantanamo Bay Detainee Cases: *Hamdan v. Rumsfeld*, 04-CV-1519 (JR)

Dear Judge Green:

We are writing regarding the scheduling of briefing and argument in the above-named case, which was recently transferred to this Court from the Western District of Washington. A status conference was held in the case on September 14, 2004, before Judge Robertson. At that conference, Judge Robertson explained that the case would be transferred to Your Honor for the scheduling of further proceedings. As explained below, the parties have reached an agreement regarding scheduling in the case and seek the Court's guidance regarding formalizing that schedule and proceeding in the case.

This case is brought by a Guantanamo Bay detainee who is primarily challenging the legality of his trial by a military commission, which is currently scheduled for early December 2004. The case was originally filed in the Western District of Washington on April 6, 2004, and assigned to Judge Robert Lasnik. Pursuant to a schedule ordered by Judge Lasnik, respondents filed a return and cross-motion to dismiss on August 6, 2004. Briefing on that motion to dismiss had not been completed when Judge Lasnik transferred the case to this Court.

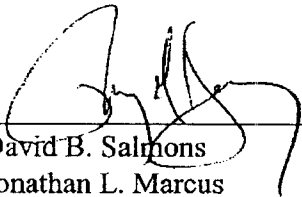
In order to complete the briefing in the case, the parties have agreed that petitioner shall file his Reply to Respondents' Return and Opposition to the Cross-Motion to Dismiss by September 30, 2004, and respondents shall file their Reply in Support of the Cross-Motion to Dismiss by October 14, 2004.

**EXHIBIT A**



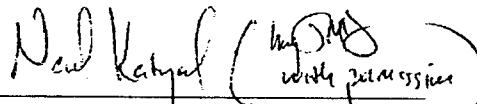
The parties request a conference with the Court on this matter to formalize this schedule and to ascertain how the case should proceed, with respect to oral argument and otherwise, once this briefing is complete. It should be noted that counsel for petitioner seeks oral argument on the case before Judge Robertson at the earliest available time following the submission of the briefs.

Respectfully submitted,



David B. Salmons  
Jonathan L. Marcus  
Terry M. Henry  
United States Department of Justice  
20 Massachusetts Ave., N.W. Room 7144  
Washington, DC 20530  
Tel.: (202) 514-4107  
Fax: (202) 616-8470

Attorneys for Respondents



Neal Katyal  
600 New Jersey Ave., NW  
Washington, DC 20001  
Tel.: (202)662-9000

Attorney for Petitioner

cc: Judge Robertson

# **EXHIBIT B**

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

SALIM AHMED HAMDAN,	)	
	)	
Petitioner,	)	
	)	
v.	)	Civil Action No. 04-CV-1519 (JR)
	)	
DONALD RUMSFELD,	)	
Secretary of Defense, <i>et al.</i> ,	)	
	)	
Respondents.	)	
	)	

**ORDER SETTING BRIEFING SCHEDULE FOR MOTION TO DISMISS AND  
GRANTING MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE**

Presently pending in this case is a joint request from counsel for petitioner and respondents proposing a briefing schedule regarding Respondents' Return to Petition and Cross Motion to Dismiss. Also pending is an Unopposed Motion of Washington Legal Foundation and Allied Educational Foundation for Leave to File a Brief as *Amici Curiae* in Support of Respondents' Cross Motion to Dismiss.

Upon consideration of these matters, as the coordinating Judge in the Guantanamo Bay detainee cases, and after consultation with Judge Robertson, it is hereby

ORDERED that the agreed briefing schedule is approved. Petitioner shall file his Reply to Respondents' Return and Opposition to the Cross Motion to Dismiss by September 30, 2004 and respondents shall file their Reply in Support of the Cross Motion to Dismiss by October 14, 2004. Oral argument before Judge Robertson on the cross motion to dismiss shall be set as soon as possible after briefing is complete. It is further



# **EXHIBIT C**

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

_____	)	
SALIM AHMED HAMDAN,	)	
	)	
Petitioner,	)	
	)	
v.	)	Civil Action No. 04-CV-1519 (JR)
	)	
DONALD RUMSFELD,	)	
Secretary of Defense, <i>et al.</i> ,	)	
	)	
Respondents.	)	
_____	)	

**ORDER**

Having considered Respondents' Unopposed Motion for Clarification Regarding Submission of a Response and Factual Return, it is hereby

ORDERED that Respondents' motion is GRANTED. Respondents are not required, under the Court's September 20, 2004 Coordination Order Setting Filing Schedule and Directing the Filing of Correspondence Previously Submitted to the Court, to file a response addressing enemy combatant status issues on October 4, 2004, or a factual return providing the factual basis for petitioner's detention as an enemy combatant, pending further order of the Court.

IT IS SO ORDERED.

October 4, 2004

\_\_\_\_\_  
/s/  
JOYCE HENS GREEN  
United States District Judge

**EXHIBIT C**

# **EXHIBIT D**

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

---

SALIM AHMED HAMDAN,	)	
	)	
Petitioner,	)	
	)	
v.	)	Civil Action No. 04-CV-1519 (JR)
	)	
DONALD RUMSFELD,	)	
Secretary of Defense,	)	
<i>et al.</i> ,	)	
	)	
Respondents.	)	

---

**RESPONDENTS' UNOPPOSED MOTION FOR CLARIFICATION  
REGARDING SUBMISSION OF A RESPONSE AND FACTUAL RETURN**

Respondents, by and through undersigned counsel, hereby respectfully request clarification as to whether the Court's orders to date require that respondents file a response to the petition in this case on October 4, 2004 addressing the issue of petitioner's detention as an enemy combatant and a factual return regarding the bases for that detention by the week of October 18, 2004. The grounds for this motion, and the position of petitioner's counsel on the matter, are set forth below.

1. This case is a petition for a writ of habeas corpus or mandamus by an alien detained at Guantanamo Bay, and is one of fourteen cases pending in this Court brought on behalf of alien enemy combatants held at Guantanamo Bay in connection with hostilities involving al Qaeda, the Taliban, and their supporters.
2. The case was originally filed in April 2004 in the Western District of Washington, but was transferred to this Court and, on September 2, 2004, assigned to Judge Robertson. Judge Robertson then transferred the case to Senior Judge Joyce Hens Green for coordination and

**EXHIBIT D**



management, as well as for resolution of common issues where consent is obtained from the transferring Judge, pursuant to an August 17, 2004 Order by the Calendar and Case Management Committee and a September 14, 2004 Resolution of the Executive Session of the Court.

3. Petitioner, who is detained as an enemy combatant, has also been designated as a defendant for trial by a military commission. His petition raises only legal claims pertaining to his detention pursuant to military commission proceedings. He has not raised allegations or argument concerning his detention as an enemy combatant, apart from the military commission proceedings. In his prayer for relief, nevertheless, petitioner requests that the Court “[o]rder Respondents promptly to justify as lawful *any* continued detention of [petitioner].” Petition at p. 25, ¶ 7 (emphasis added).

4. Pursuant to a schedule ordered by the Western District of Washington, respondents filed a return and cross-motion to dismiss addressed solely to petitioner’s detention pursuant to military commission proceedings on August 6, 2004, prior to the transfer of the case to this Court.

5. On September 20, 2004, the parties submitted a joint letter to the Court requesting a schedule for the completion of briefing with respect to respondent’s cross-motion to dismiss. That same day, the Court issued an order requiring respondents to file and serve in all coordinated Guantanamo Bay detainee cases by October 4, 2004, responsive pleadings showing why the writs of habeas corpus and the relief sought by petitioners should not be granted. The Court also required respondents to submit factual returns for each detainee pertaining to the detention as an enemy combatant no later than the week of October 18, 2004. See Coordination

Order Setting Filing Schedule and Directing the Filing of Correspondence Previously Submitted to the Court (filed Sept. 20, 2004) (attached as Ex. A).

6. On September 24, 2004, the Court accepted the parties proposed briefing schedule with respect to the cross-motion to dismiss. See Order Setting Briefing Schedule for Motion to Dismiss and Granting Motion for Leave to File Brief as Amicus Curiae (filed Sept. 24, 2004) (attached as Ex. B).

7. Apart from his challenge to his detention pursuant to the military commission proceedings, petitioner in this case has not raised allegations or argument concerning his detention as an enemy combatant. Thus, the issues raised by the petition are addressed in respondent's cross-motion to dismiss, and no further justification of petitioner's detention as an enemy combatant should be required at this stage of the litigation. Nonetheless, the September 20, 2004 order requiring a factual return and pleading demonstrating why no relief should be granted, was filed in all the Guantanamo Bay cases and, on its face, is applicable to this case. Some question exists regarding respondents obligations with respect to this case under the September 20 and September 24, 2004 orders, but perhaps the best reading of the Court's September 24, 2004 order regarding separate briefing in this case is that it supercedes the Court's general briefing schedule contained in the September 20, 2004 order. Thus, if that reading is correct, respondents would not file in this case the unified response intended to be filed in the other coordinated Guantanamo Bay detainee cases addressing challenges in those cases to the petitioners' detention as enemy combatants, nor would respondents submit a factual return in this case.

8. With respect to the position of petitioner's counsel, petitioner's counsel has authorized us to state on their behalf that respondents have filed a return to Hamdan's petition, and that the only further briefing appropriate in this case is respondents' reply in support of its cross-motion to dismiss, as stated in the Court's September 24, 2004 order.

Petitioner's counsel objects to any other briefing by Respondents in this matter at this time.

9. Accordingly, respondents respectfully request clarification that the government need not file a response addressing enemy combatant status issues on October 4, 2004, or a factual return providing the factual basis for petitioner's detention as an enemy combatant no later than the week of October 18, 2004. A proposed order is attached.

Dated: October 1, 2004

Respectfully submitted,

PETER D. KEISLER  
Assistant Attorney General

KENNETH L. WAINSTEIN  
United States Attorney

THOMAS R. LEE  
Deputy Assistant Attorney General

DOUGLAS N. LETTER  
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(202) 514-7280

/s/ Terry M. Henry

JOSEPH H. HUNT (D.C. Bar No. 431134)

VINCENT M. GARVEY (D.C. Bar No. 127191)

TERRY M. HENRY

PREEYA M. NORONHA

ANDREW I. WARDEN

Attorneys

United States Department of Justice

Civil Division, Federal Programs Branch

20 Massachusetts Ave., N.W. Room 7144

Washington, DC 20530

Tel.: (202) 514-4107

Fax: (202) 616-8470

Attorneys for Respondents

# **EXHIBIT E**

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

_____	)	
SALIM AHMED HAMDAN,	)	
	)	
Petitioner,	)	
	)	
v.	)	Civil Action No. 04-CV-1519 (JR)
	)	
DONALD RUMSFELD,	)	
Secretary of Defense, <i>et al.</i> ,	)	
	)	
Respondents.	)	
_____	)	

**ORDER GRANTING PETITIONER'S UNOPPOSED  
MOTION THAT CASE NOT BE GOVERNED BY PROTECTIVE  
ORDER ENTERED IN CONSOLIDATED PROCEEDINGS**

UPON CONSIDERATION of Petitioner's Unopposed Motion for Order that Case Not Be Governed by Protective Order Entered in Consolidated Proceedings, and all record materials relating to the motion,

IT IS HEREBY ORDERED on this 20th day of October 2004, that Petitioner's Unopposed Motion regarding the Protective Order is hereby GRANTED. Accordingly, this action shall not be governed by the Protective Order entered in the coordinated proceedings relating to Guantanamo detainee petitions, pending further action by the Court.

IT IS SO ORDERED.

\_\_\_\_\_/s/\_\_\_\_\_  
JOYCE HENS GREEN  
United States District Judge

October 20, 2004

**EXHIBIT E**

# **EXHIBIT F**

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

SALIM AHMED HAMDAN, :  
 :  
 Plaintiff, :  
 :  
 v. : Civil Action No. 04-1519 (JR)  
 :  
 DONALD H. RUMSFELD, :  
 :  
 Defendant. :  
 :

ORDER

For the reasons set forth in the accompanying memorandum opinion it is

**ORDERED** that the petition of Salim Ahmed Hamdan for habeas corpus [1-1] is **granted in part**. It is

**FURTHER ORDERED** that the cross-motion to dismiss of Donald H. Rumsfeld [1-84] is **denied**. It is

**FURTHER ORDERED** that, unless and until a competent tribunal determines that petitioner is not entitled to the protections afforded prisoners-of-war under Article 4 of the Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949, he may not be tried by Military Commission for the offenses with which he is charged. It is

**FURTHER ORDERED** that, unless and until the rules for Military Commissions (Department of Defense Military Commission Order No. 1) are amended so that they are consistent with and not contrary to Uniform Code of Military Justice Article 39, 10

EXHIBIT F



U.S.C. § 839, petitioner may not be tried by Military Commission for the offenses with which he is charged. It is

**FURTHER ORDERED** that petitioner be released from the pre-Commission detention wing of Camp Delta and returned to the general population of Guantanamo detainees, unless some reason other than the pending charges against him requires different treatment. And it is

**FURTHER ORDERED** that petitioner's remaining claims are **in abeyance**, the Court having abstained from deciding them.

JAMES ROBERTSON  
United States District Judge

# **EXHIBIT G**

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

-----x  
SALIM HAMDAN, :  
: :  
Plaintiff, : :  
: :  
vs. : CV No. 04-1519  
: :  
DONALD RUMSFELD, et al., :  
: :  
Defendants. : :  
-----x

Washington, D.C.  
October 25, 2004  
1:06 p.m.

Transcript of Motions Hearing  
Before the Honorable James Robertson  
United States District Judge

APPEARANCES:

For the Plaintiff: BENJAMIN SHARP, ESQ.  
CHARLES SWIFT, ESQ.  
JOSEPH McMILLAN, ESQ.  
NEAL KATYAL, ESQ.

For the Defendants: JONATHAN MARCUS, ESQ.  
TERRY HENRY, ESQ.

Court Reporter: SUSAN HARRIS  
Miller Reporting Company  
735 8th Street, S.E.  
Washington, D. C. 20003  
(202) 546-6666

1 THE COURT: Free access to religious  
2 materials?

3 MR. MARCUS: I believe so.

4 THE COURT: Okay.

5 MR. MARCUS: And the second fact I wanted  
6 the Court to be aware of is we adverted in our  
7 reply brief to a Combatant Status Review Tribunal  
8 that was held on October 3rd. And the finding that  
9 that tribunal made has been finalized, and the  
10 tribunal did find, did confirm, Mr. Hamdan's status  
11 as an enemy combatant, as either a member of or  
12 affiliated with al Qaeda.

13 THE COURT: And when did that happen?

14 MR. MARCUS: I'm not sure of the precise  
15 date it was finalized, but the preliminary finding  
16 was on October 3rd, and then I believe a couple  
17 weeks later it was finalized.

18 THE COURT: Well, as I don't have to tell  
19 you, that finding is of some importance, but the  
20 record before me contains nothing about the makeup  
21 of the tribunal, the hearing before the tribunal or  
22 anything except all I have is your statement which,  
23 of course, is true, but I think you need to augment  
24 the record to explain what happened and describe  
25 what happened.

1           MR. MARCUS: Your Honor, if you like, we  
2 could supplement the record with the findings. Our  
3 position is it's not strictly necessary to the  
4 resolution of the issues before you. The  
5 petitioner is going to be receiving a trial before  
6 a military commission on December 7th, and so we  
7 don't believe that the Combatant Status Review  
8 Tribunal finding really should necessarily play any  
9 role in this Court's decision regarding abstention.

10           In the event--

11           THE COURT: Does the--well, let me ask you  
12 this, Mr. Marcus--does the finding have any  
13 bearing, in your view, on the question of whether  
14 or not Hamdan is entitled to POW status?

15           MR. MARCUS: It doesn't, in our view,  
16 because, in our view, there was, before the  
17 hearing, no doubt had arisen as to his status.  
18 This just confirmed his status, so we don't believe  
19 it affects that determination.

20           THE COURT: But this doesn't even add  
21 anything to that finding. It has zero effect. In  
22 other words, if you were right about his POW status  
23 before you're still right, and if you're wrong,  
24 you're still wrong. It doesn't make any difference  
25 what happened in the Combatant Status Review Panel,

1 right?

2 MR. MARCUS: For purposes of this, yes.  
3 For purposes of this hearing, this motion, that's  
4 correct.

5 THE COURT: Fine. And while we're getting  
6 these housekeeping matters out of the way, there is  
7 one more. The respondents argue that this really  
8 ought to be a case only against Donald Rumsfeld,  
9 the secretary of defense, and not against the  
10 president and lots of other people. I haven't  
11 heard any complaint from the plaintiffs about that  
12 or from the petitioners about that.

13 MR. MARCUS: You might.

14 THE COURT: If it's not a settled issue,  
15 we'll wait until it's your turn.

16 Go ahead, Mr. Marcus.

17 MR. MARCUS: May it please the Court,  
18 Jonathan Marcus, on behalf of respondents.

19 Petitioner was captured in Afghanistan  
20 during the ongoing armed conflict with al Qaeda and  
21 is scheduled to go to trial before a military  
22 commission on December 7th for an offense against  
23 the law of war. Petitioner has pressed numerous  
24 legal challenges to the president's authority to  
25 subject him to such a trial, and respondents have

1 is in or out of solitary. He may be in solitary in  
2 Camp Delta. We don't really fully understand  
3 whether he has access to sunlight, religious  
4 materials, all the other questions Your Honor  
5 asked. So, at this point, we can't really address  
6 his conditions of confinement.

7 With respect to the CSRT, we have not--

8 THE COURT: Excuse me. I want to assure  
9 Mr. Marcus that the fact that the fan just stopped,  
10 so that everybody can hear this next speaker, was  
11 not conspiratorial.

12 [Laughter.]

13 THE COURT: It's just the GSA.

14 Go on, Professor.

15 MR. KATYAL: With respect to the Combatant  
16 Status Review Tribunal, we haven't heard the  
17 results until this moment that he has been denied  
18 or he has been labeled an enemy combatant. We were  
19 actually barred participation before that Combatant  
20 Status Review Tribunal. We asked to be part of it,  
21 and we were barred.

22 We were also barred from presenting  
23 exculpatory evidence in that proceeding. We had  
24 evidence showing that Mr. Hamdan was not an enemy  
25 combatant and, as I understand it, that was not

1 permitted.

2           Indeed, what was permitted was a letter  
3 from Commander Swift. He wrote to Mr. Hamdan  
4 saying things like, "Don't talk to this tribunal  
5 because I'm not allowed to be there." That  
6 evidence was--that letter to Mr. Hamdan, as I  
7 understand it, was read into the tribunal  
8 proceeding itself, even though Commander Swift was  
9 told that this would be attorney-client and  
10 protected as such.

11           So, at this moment in time, Your Honor,  
12 it's very hard for us to really assess the  
13 implications of the CSRT, and we believe that your  
14 order bars really discussion of that.

15           With respect to the question of Secretary  
16 Rumsfeld and who can be sued, we didn't address  
17 that because, as I understand it, it was only in  
18 the reply brief of the respondents to dismiss  
19 President Bush and the other respondents. If we  
20 were to address it, I think our position would be  
21 that President Bush should remain as a defendant in  
22 this lawsuit because, after all, it is his  
23 presidential order that is at issue here that we are  
24 challenging, as well as his July 3rd, 2003,  
25 determination that Mr. Hamdan is subject to the



# **EXHIBIT H**

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UNITED STATES DISTRICT COURT  
WESTERN WASHINGTON  
AT SEATTLE

Lieutenant Commander CHARLES SWIFT, )  
a resident of the State of Washington,) )  
as next friend for SALIM AHMED HAMDAN,) )  
Military Commission Detainee, ) )  
Camp Echo, ) )  
Guantanamo Bay Naval Base, ) )  
Guantanamo Bay, Cuba, ) )

Petitioner, )

-vs-

) CASE NO. CO4-777L

DONALD H. RUMSFELD, United States )  
Secretary of Defense; JOHN D. )  
ALTENBURG, JR., Appointing Authroity )  
for Military Commissions, Department )  
of Defense; Brigadier General THOMAS )  
L. HEMINGWAY, Legal Advisor to the )  
Appointing Authority for Military )  
Commissions; Brigadier General JAY )  
HOOD, Commander Joint Task Force, )  
Guantanamo, Camp Echo, Guantanamo )  
Bay, Cuba; GEORGE W. BUSH, President )  
of the United States, )

Defendant, )

Verbatim of Proceedings  
before  
THE HONORABLE ROBERT S. LASNIK

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Date: Friday, July 16, 2004  
Reported By: Susan A. Zielie, CCR, RPR

1 MR. KIPNIS: Yes, sir.

2 THE COURT: Then, Mr. Schneider, do you think that  
3 your team can respond to the motion in a week?

4 MR. SCHNEIDER: Yes.

5 THE COURT: So, if it's filed today, then a  
6 response from the petitioners by the 23rd.

7 And, Mr. Kipnis, when would you need for a reply?

8 MR. KIPNIS: Is the 23rd a Friday, Your Honor?

9 THE COURT: Yes.

10 MR. KIPNIS: If we could have until the following  
11 Tuesday, I think that should be sufficient.

12 THE COURT: Tuesday the 27th. And I will commit to  
13 get a decision out by let's say Monday, August 2nd. And I'll  
14 try for sooner. And that way, I think if we -- in the  
15 meantime, to the extent there are discovery motions, I think  
16 those should be held in abeyance until we decide this issue.  
17 The 20 pages is fine for the motion, and I'm not going to put  
18 a limit on the response, but it should be proportionate.

19 In regard to delaying the schedule we're under now,  
20 just to give the Government a little bit of a breather,  
21 what's due on the July 28th, I'll extend to one week, to  
22 Wednesday, August 4th. And then the reply which is now --  
23 Jeremy, what day?

24 THE LAW CLERK: Reply would now be due the 11th.

25 THE COURT: August 11th?