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

Nos. 05-5062, 05-5063 & 05-064, 05-095 through 05-5116

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

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LAKHDAR BOUMEDIENE, et al.,
Appellants,
v.
GEORGE W. BUSH, President of the United States, et al.,
Appellees.

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KHALED A. F. AL ODAH, et. al.,
Appellees-Cross-Appellants,

v.
UNITED STATES OF AMERICA, et al.,
Appellants-Cross-Appellees.

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# GOVERNMENT'S SUPPLEMENTAL REPLY BRIEF ADDRESSING *HAMDAN v. RUMSFELD*

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## GLOSSARY

AUMF ..... Authorization for Use of Military Force

CSRT ..... Combatant Status Review Tribunal

DTA ..... Detainee Treatment Act

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In our opening brief, we explained that the Supreme Court in *Hamdan* v. *Rumsfeld*, 126 S. Ct. 2749 (2006), held that section 1005(e)(1) of the Detainee Treatment Act of 2005, Pub. L. No. 109-148, §§ 1001-1006, 119 Stat. 2680, 2739-45 (2005) ("DTA"), which repeals habeas jurisdiction, does not apply to petitions that were pending in court when the DTA was enacted, 126 S. Ct. at 2769 n.15, but that DTA sections 1005(e)(2) and 1005(e)(3), which provide for exclusive review in this Court of claims challenging final CSRT or military commission decisions, do apply to pending claims, *id.* at 2764, 2769. Moreover, the *Hamdan* Court expressly declined to decide whether the DTA's exclusive-review scheme requires

pending cases within the scope of sections 1005(e)(2) and (e)(3) to be transferred to this Court. *Id.* at 2769 n.14. Furthermore, because Hamdan's claims did not constitute challenges to a final tribunal decision under sections 1005(e)(2) or 1005(e)(3), the Court did not address the substantive scope of those provisions. Accordingly, petitioners, who are being detained as enemy combatants pursuant to final CSRT decisions, can find no support in *Hamdan* for their primary assertion here that their cases are outside the scope of section 1005(e)(2).

## I. *HAMDAN* DOES NOT SUPPORT PETITIONERS' CLAIMS THAT THEY ARE OUTSIDE THE SCOPE OF SECTION 1005(e)(2).

A. Petitioners concede, as they must, that this Court's exclusive jurisdiction over final CSRT decisions under section 1005(e)(2) applies to all pending cases. *See* Boumediene Supp. Br. at 6 n.1. The Act expressly states and *Hamdan* explicitly recognized that the DTA's exclusive review applies to all pending claims challenging the validity of final CSRT or military commission decisions. *See* DTA § 1005(h)(2); *Hamdan*, 126 S. Ct. 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"). Petitioners' primary response in their supplemental briefs is to, once again, argue that the CSRTs conducted were flawed, did not comport with new CSRT rules, and should not be deemed final CSRT decisions within the meaning of section 1005(e)(2). These arguments, on which *Hamdan* has no bearing, were raised in the detainees' prior supplemental briefs regarding the impact of the DTA, and are fully rebutted in the

Government's brief (*see* U.S. Supp. Br. re the DTA at 23-28 (filed on February 17, 2006)).

B. Petitioners contend (Boumediene Supp. Br. at 1, 5-6; Al Odah Supp. Br. at 4, 9) that the Supreme Court in *Hamdan* concluded that the DTA provides for dual jurisdiction by dividing detainees' pending habeas claims into two categories: (1) actions "that challenge the very legitimacy of the tribunals" and (2) "routine challenges" to final CSRT or military commission decisions. 126 S. Ct. at 2769. Petitioners argue that the Court determined that the DTA provides this Court with exclusive jurisdiction only over the latter, limited category of cases, and that the district courts retain habeas jurisdiction over the remainder.

Petitioners cannot, and in fact make no effort to, square this argument with the language of the DTA. The statute contains no qualifier limiting exclusive review to "routine challenges." To the contrary, it states that this Court "shall have exclusive jurisdiction to determine the validity of any final decision" of a CSRT, DTA §1005(e)(2)(A), and it authorizes this Court to review all statutory and constitutional challenges to the CSRT process, as well as more specific claims that a particular CSRT failed to adhere to the proper standards, DTA § 1005(e)(2)(C).

Petitioners are simply wrong to the extent that they claim that their broad challenges to the legitimacy of the CSRT and its procedures, and their narrower challenges to the factual determinations of individual CSRTs, are all somehow outside the scope of review under section 1005(e)(2). *See* Al Odah Supp. Br. at 9 & n.30. As we have explained, this Court's review under section 1005(e)(2) extends to claims challenging whether CSRT procedures are "consistent with the Constitution and laws of the United States," to the extent those are

applicable, § 1005(e)(2)(C)(ii); whether each individual CSRT adhered to those procedures in making its determination, § 1005(e)(2)(C)(i); and whether the determination of each CSRT was consistent with the requirement of evidentiary support by a "preponderance of the evidence," *id.* Petitioners point out that the Government has argued that they have no enforceable due process rights. The fact that a court may ultimately conclude that petitioners' constitutional claims lack merit, however, in no way supports petitioners' contention that the DTA itself precludes review of broad constitutional challenges to the CSRTs.

C. Petitioners argue that adjudication of their claims in this Court, pursuant to section 1005(e)(2), would be contrary to *INS* v. *St. Cyr*, 533 U.S. 289 (2001). They contend (Al Odah Supp. Br. at 12) that *Hamdan* concluded that the DTA contains no clear statement, as is required by *St. Cyr*, to repeal habeas jurisdiction over pending cases. The *Hamdan* Court, however, expressly declined to rely upon *St. Cyr*'s clear statement rule in construing section 1005(e)(1), *see* 126 S.Ct. at 2764 ("[w]e find it unnecessary to reach either of these arguments"), and it nowhere applied that rule in order to construe section 1005(e)(2).

In any event, the issue here is not whether habeas jurisdiction is repealed (an issue already decided in *Hamdan*); it is whether petitioners' habeas cases must be channeled to a particular forum for review under the DTA's exclusive-review scheme. *See Hamdan*, 126 S. Ct. at 2768 (recognizing that sections 1005(e)(2) and (e)(3) do not repeal habeas jurisdiction, but "restore it in limited form" in another forum). *St. Cyr*'s requirement of a clear statement, therefore, is irrelevant. And, as several courts of appeals have held in

addressing the very exclusive-review provisions at issue in *St. Cyr*, channeling detention challenges to an exclusive appellate forum precludes the exercise of general habeas jurisdiction. *See, e.g.*, *Laing* v. *Ashcroft*, 370 F.3d 994, 999-1000 (9th Cir. 2004).

Moreover, contrary to petitioners' suggestion (Al Odah Supp. Br. at 6), the Government's argument that the exclusive-review scheme requires transfer of the pending habeas cases to this Court is not an "end-run around" *Hamdan*. As discussed in our opening supplemental brief, while *Hamdan* held that section 1005(e)(1) does not apply to pending cases, the Court did not construe section 1005(e)(2) (other than to confirm its applicability to pending cases), and it expressly left open the question of whether claims within the scope of section 1005(e)(2) should be transferred to this Court. *Hamdan*, 126 S. Ct. 2769 n.14 ("We express no view about whether the DTA would require transfer" to this Court of claims within the scope of section 1005(e)(2)); *see also id.* at 2769 ("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).").

Petitioners further err in suggesting (Boumediene Supp. Br. at 10-11; Al Odah Supp. Br. at 12-13) that the grant of exclusive review to this Court to review the final CSRT decisions is tantamount to a "repeal" of jurisdiction over pending cases. Transferring to this Court all pending cases within the scope of section 1005(e)(2), however, does not effect any such "repeal" of jurisdiction. Regardless of whether the exclusive-review scheme is characterized as a substitute for habeas or as a "limited form" of habeas jurisdiction, 126 S. Ct. at 2768, there is judicial review of petitioners' pending challenges to their detention.

Under either characterization, sections 1005(e)(2) and 1005(e)(3) simply channel such review to this Court. Thus, transferring petitioners' cases to this Court for a "limited form" of habeas review, or an adequate alternative thereto, in no way undermines *Hamdan*'s holding that section 1005(e)(1) does not apply to pending cases, and that cases outside the scope of sections 1005(e)(2) and 1005(e)(3) may therefore proceed under the district courts' general habeas jurisdiction.

D. Petitioners further contend that their claims are not within the scope of section 1005(e)(2) because they challenge the lawfulness of their detention rather than the final decision of the CSRT. But the Executive Branch's authority to detain enemy combatants was explicitly upheld in *Hamdi* v. *Rumsfeld*, 542 U.S. 507, 518-19 (2004), and is not at issue here. Thus, as explained in our supplemental brief addressing the DTA, in contending that their detention is unlawful, petitioners necessarily challenge the "validity" of final CSRT decisions that each of them is – and may properly be detained as – an enemy combatant. Petitioners' contrary construction, which would make section 1005(e)(2) inapplicable to any claim cast as a challenge to detention rather than to a final CSRT decision, would reduce that provision to a mere pleading formality.

The fact that petitioners filed their habeas cases prior to the final decisions of the CSRT does not make section 1005(e)(2) inapplicable. Sections 1005(e)(2) and 1005(e)(3) do not turn on when a claim is filed, but rather "apply with respect to any claim * * * that is pending on or after the date of the enactment" of the DTA. DTA § 1005(h)(2). In *Hamdan*, the Court explained that section 1005(e)(3) was inapplicable because Hamdan had not yet

received a final decision, 126 S. Ct. at 2769, not because his habeas case was filed prior to a final decision.

E. Petitioners suggest (Al Odah Supp. Br. at 13-15 & n.43) that the DTA's exclusive-review scheme (whether characterized as a substitute for habeas jurisdiction or a "limited form" of habeas) is constitutionally inadequate under the Suspension Clause because the DTA assertedly limits review solely to the question whether the CSRT has followed its procedures. As an initial matter, we have already explained that the DTA expressly provides for review of constitutional and other legal challenges to the adequacy of CSRT procedures. *See* DTA § 1005(e)(2)(C)(ii). Moreover, petitioners seem to concede (Al Odah Supp. Br. at 14 n.43) that the procedures afforded by Army Regulation 190-8 would be adequate. But as explained at length in our merits briefs, the CSRT procedures themselves were modeled on Army Regulation 190-8, and afford even greater procedural protection. *See, e.g.*, U.S. Brief in Al Odah at 32-35.

As we explained in our prior briefing (*see* U.S. Supp. Br. re the DTA at 49-53; U.S. Supp. Reply Br. re the DTA at 24-27), review under section 1005(e)(2) is more than sufficient to satisfy any constitutional rights that petitioners might have under the Suspension Clause. The DTA permits detainees to claim that the final decision of a CSRT was not "supported by a preponderance of the evidence." DTA § 1005(e)(2)(C)(i). This provision plainly authorizes some form of limited record review to determine whether a CSRT decision is supported by sufficient evidence. As we explained in our DTA supplemental brief (at 51-52), both at common law and in review of military tribunals during armed conflict, habeas

petitioners are not even entitled to such a sufficiency review. *See, e.g., St. Cyr*, 533 U.S. at 305-06 (under traditional habeas review, "other than the question whether there was some evidence to support the order, the courts generally did not review the factual determinations made by the Executive"); *Yamashita* v. *Styer*, 327 U.S. 1, 8 (1946); *Ex parte Quirin*, 317 U.S. 1, 25 (1942).

Moreover, as petitioners concede, the DTA even permits review of whether a CSRT determination was consistent with tribunal standards and procedures. *See* DTA § 1005(e)(2)(C)(i). Under prior habeas law, petitioners would have been denied review of such claims, even in the context of capital convictions. *See Yamashita*, 327 U.S. at 23 ("the [military] commission's rulings on evidence and on the mode of conducting these proceedings against petitioner are not reviewable by the courts"). Thus, even apart from the fact that petitioners have no Suspension Clause rights as aliens held outside sovereign United States territory, the scope of review afforded under the DTA is more extensive than that afforded by traditional habeas standards. Moreover, petitioners' arguments about the scope of review under section 1005(e)(2) and the Suspension Clause have nothing to do with *Hamdan*, but simply rehash their previous erroneous arguments regarding the DTA and the Suspension Clause.

## II. *HAMDAN*'S HOLDING REGARDING COMMON ARTICLE 3 OF THE GENEVA CONVENTIONS HAS NO APPLICATION TO PETITIONERS' TREATY CLAIMS.

Contrary to petitioners' suggestion, *Hamdan* did not issue a broad holding that the Geneva Conventions are generally judicially enforceable by private parties. Indeed, the

Court explicitly assumed that the opposite is true. *See* 126 S. Ct. at 2794 ("assum[ing]" that "absent some other provision of law," the Geneva Conventions do not "furnish[] petitioner with any enforceable right"). Thus, the Court in *Hamdan* held only that common Article 3 of the Geneva Conventions is "part of the law of war" incorporated in Article 21 of the Uniform Code of Military Justice, and is therefore enforceable as a "condition upon which the [military commission] authority set forth in Article 21 is granted." 126 S. Ct. at 2794. *Hamdan*, therefore, did not even hold that common Article 3 is itself judicially enforceable. But in any event, petitioners raise no substantive arguments under common Article 3. Thus, *Hamdan* simply does not even arguably address the merits of their treaty claims, which are insubstantial for the reasons explained in our prior briefs.

Petitioners further argue that the AUMF, like the Uniform Code of Military Justice, incorporates the Geneva Conventions, and that the President's powers are thereby constrained by the Geneva Conventions. The AUMF, however, contains no such limitations. To the contrary, the AUMF authorizes the President to use "all necessary and appropriate force." Moreover, the AUMF was enacted specifically to ensure that the President could take whatever actions were necessary to protect the United States in the wake of the September 11 attacks, including against persons he determined aided in the attacks. The notion that the AUMF, therefore, was intended to provide enemy combatants with rights, or a means to enforce any rights, is therefore absurd. But even if the AUMF did incorporate the substantive restrictions of the Geneva Conventions, the AUMF provides no means for judicially enforcing those restrictions. Moreover, petitioners' AUMF argument has no

connection to *Hamdan*, but simply interjects a new (and meritless) argument at a belated stage in these proceedings.

## CONCLUSION

For the foregoing reasons and those stated in our prior briefs, this Court should order the district court to transfer the pending appeals to this Court for consideration as petitions for review under section 1005(e)(2) of the DTA, and proceed to decide the pending legal questions to the extent permitted by section 1005(e)(2)(C)(ii).

Respectfully submitted,

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I hereby certify that I have on this 15th day of August 2006, served a copy of the foregoing supplemental reply brief on the following counsel by causing a copy to be sent by electronic mail and by first class mail, postage prepaid to:

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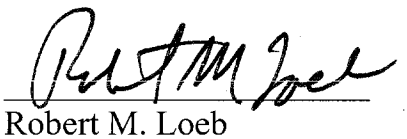

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