

[NO ARGUMENT SCHEDULED]

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

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SALIM AHMED HAMDAN,	)	
Petitioner-Appellee,	)	
	)	
v.	)	No. 04-5393
	)	
DONALD H. RUMSFELD,	)	
SECRETARY OF	)	
DEFENSE, et al.,	)	
Respondents-Appellants.	)	

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**RESPONDENTS' MOTION TO GOVERN FUTURE PROCEEDINGS**

On August 11, 2006, this Court ordered the parties to submit motions to govern future proceedings in light of the Supreme Court's decision in this case. Respondents-appellants, Donald H. Rumsfeld, Secretary of Defense, *et al.*, submit that, given the Supreme Court's holding that the military commission, as constituted under the November 12, 2001 military order, 66 Fed. Reg. 57833, was inconsistent with governing statutes, the district court's injunction against the commission proceedings as constituted under that order should be modified to conform to the Supreme Court's decision, or this Court should remand the case to the district court with instructions to so modify the injunction, and Hamdan's challenge to the military commission should then be deemed final. To the extent Hamdan wishes to challenge

his enemy combatant designation, he should seek review in this Court of the final Combatant Status Review Tribunal decision on that matter pursuant to the Detainee Treatment Act of 2005.

### **STATEMENT**

1. In July 2003, the President, acting pursuant to the November 13, 2001 military order, designated appellee Salim Ahmed Hamdan for trial before a military commission, finding “that there is reason to believe that [Hamdan] was a member of al Qaeda or was otherwise involved in terrorism directed against the United States.” In July 2004, Hamdan was formally charged with conspiracy to commit the offenses of attacking civilians, attacking civilian objects, murder by an unprivileged belligerent, destruction of property by an unprivileged belligerent, and terrorism. Hamdan was charged as having served as Osama bin Laden’s bodyguard, as well as his personal driver, as supporting al Qaeda by the delivery of weapons and ammunition and purchases of equipment, and as having received terrorist training himself, learning to use machine guns and other weapons at an al Qaeda training camp in Afghanistan. Hamdan was also charged as knowing that bin Laden and his associates had participated in terrorist attacks against U.S. citizens and property, including the September 11 attacks.

While detained at Guantanamo, Hamdan was given a hearing before a Combatant Status Review Tribunal (“CSRT”). The CSRT found that he is an enemy combatant who is “either a member of or affiliated with Al Qaeda,” subject to continued detention. J.A. 249.

2. Hamdan filed a petition for a writ of habeas corpus in federal district court challenging the lawfulness of the military commission proceedings constituted under the November 13, 2001 order. The petition did not challenge Hamdan’s detention as an enemy combatant, or offer any argument as to why he could not lawfully be detained as an enemy combatant. J.A. 42-66. The petition did, however, in its request for relief, ask the district court to order respondents “promptly to justify as lawful any continued detention of Mr. Hamdan.” J.A. 66. It further asked the court to retain jurisdiction “over this matter to permit Mr. Hamdan to respond to arguments advanced by Respondents on matters related to his continued detention.” *Ibid.* The petition asked the court to, “[i]n the absence of adequate justification, order Mr. Hamdan’s release.” *Ibid.*

On October 1, 2004, respondents filed a motion in the district court to clarify that the Government was not required to file any material justifying Hamdan’s detention as an enemy combatant. The motion explained that the “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.” The motion noted that in “his prayer for relief, nevertheless, petitioner requests that the Court ‘[o]rder Respondents promptly to justify as lawful any continued detention of [petitioner].’” The motion argued that because “petitioner in this case has not raised allegations or argument concerning his detention as an enemy combatant \* \* \*, no further justification of petitioner’s detention as an enemy combatant should be required at this stage of the litigation.”

On October 4, 2004, the district court granted the government’s motion. The court order provided that respondents are 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.”

3. On November 8, 2004, the district court granted Hamdan’s petition in part and enjoined the military commission proceedings against Hamdan. The court held “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 U.S.C. § 839, petitioner may not be tried by Military Commission for the offenses with which he is charged.” J.A. 371-372. The court 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.” J.A. 371. The court also ordered him released to the general detention population at the Guantanamo Bay Naval Base. J.A. 372. In granting this relief, the district court noted that “Hamdan does not currently challenge his detention as an enemy combatant in proceedings before this Court.” J.A. 415 n.18.

4. The Government appealed and on July 15, 2005, this Court reversed the district court’s ruling enjoining the military commission proceedings. *Hamdan v. Rumsfeld*, 415 F.3d 33 (D.C. Cir. 2005). This Court held that “Congress authorized the military commission that will try Hamdan.” *Id.* at 38. The Court also rejected the district court’s ruling, based on Article 5 of the Third Geneva Conventions<sup>1</sup> and Army Regulation 190-8, that Hamdan could not be tried by the military commission because he had not yet had his status determined by a “competent tribunal.” The Court held

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<sup>1</sup>Article 5 of the Third Geneva Convention provides:

Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4 such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.

that Article 5 was not judicially enforceable. *Id.* at 38-40. The Court further held that Army Regulation 190-8 did not provide Hamdan any basis for relief. While one subsection of the regulation requires that prisoners receive the protections of the Convention until some other legal status is determined by “competent authority,” this Court held that the President’s determination that Hamdan was not a prisoner of war under the Convention was sufficient for that purpose. *Id.* at 43. The Court further held that the commission itself could be such a competent authority. *Ibid.*

Accordingly, this Court reversed the judgment of the district court. The Court, however, stayed its mandate pending the disposition of Hamdan’s petition for Supreme Court review. On November 7, 2005, the Supreme Court granted certiorari to review this Court’s decision. *See* 126 S. Ct. 622 (2005).

5. Thereafter, Congress enacted the Detainee Treatment Act of 2005, Pub. L. No. 109-148, §§ 1001-1006, 119 Stat. 2680, 2739-45 (2005) (“DTA”). Section 1005(e)(1) of the Act eliminates district court habeas jurisdiction over writs “filed by or on behalf of an alien detained by the Department of Defense at Guantanamo Bay, Cuba.” § 1005(e)(1). Sections 1005(e)(2) and (e)(3) of the Act establish an exclusive-review mechanism in this Court. Those sections confer 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), and “exclusive jurisdiction to determine the validity of any final decision” rendered by a military commission, § 1005(e)(3)(A). Section 1005(h), titled “effective date,” provides that this Court’s exclusive jurisdiction over challenges to CSRT and military commission decisions applies to pending claims. § 1005(h)(2) (“Paragraphs (2) and (3) of subsection (e) shall apply with respect to any claim whose review is governed by one of such paragraphs and that is pending on or after the date of the enactment of this Act.”).

6. On June 29, 2006, the Supreme Court reversed this Court’s ruling. *See Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006). As an initial matter, the Supreme Court rejected the argument that the DTA deprived the Court of jurisdiction over Hamdan’s case. *Id.* at 2769. 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. *Ibid.* The Court recognized that section 1005 (e)(2) of the Act, which grants this Court “exclusive jurisdiction” to review final enemy combatant determinations and final decisions rendered by a military commission, applies to all pending claims. *Id.* at 2764. The Court held, however, that section 1005 (e)(2) did not apply to Hamdan’s challenge to the lawfulness of the military commission because there was no final decision of the military commission subject to review under that provision. *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 subsection (e)(2) or (e)(3)”) The Court expressly reserved judgment as to whether the DTA would require transfer of a district court habeas action to this Court where there already was a “final decision” of a military commission or CSRT. *Id.* at 2769 n.14.

On the merits, the Supreme Court held that the military commission convened to try Hamdan 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 applicable through Article 21. *See* 126 S. Ct. at 2786-2798.

The Supreme Court did not reach Hamdan’s argument “that Article 5 of the Third Geneva Convention requires that if there be ‘any doubt’ whether he is entitled to prisoner-of-war protections, he must be afforded those protections until his status is determined by a ‘competent tribunal,’” or his related claim under Army Regulation 190-8. *See* 126 S. Ct. at 2795 n.61. The Court explained, “[b]ecause we hold that Hamdan may not, in any event, be tried by the military commission the President has convened pursuant to the November 13 Order and Commission Order No. 1, the question whether his potential status as a prisoner of war independently renders illegal his trial by military commission may be reserved.” *Ibid.*

In its conclusion, the Court noted that its ruling did not pertain to the right of the Government to detain Hamdan as an enemy combatant. The Court states, “[i]t



bears emphasizing that Hamdan does not challenge, and we do not today address, the Government's power to detain him for the duration of active hostilities \* \* \*." *Id.* at 2798.

## ARGUMENT

1. This Court ordered the parties to address how this case should proceed in light of the Supreme Court's ruling. As discussed above, the Supreme Court held that the military commission as constituted under the November 13, 2001 military order was inconsistent with the governing statutes. Given that holding, the district court's injunction against the commission proceedings constituted under that order should now be modified to bar the proceedings based on the reasons set forth by the Supreme Court.

In modifying the injunction, the portion of the district court's order barring the military commission "unless and until a competent tribunal determines that petitioner is not entitled to the protections afforded prisoners-of-war status," J.A. 371, should be vacated. That holding was rejected by this Court, and the Supreme Court did not reach the issue. The Supreme Court explained, "[b]ecause we hold that Hamdan may not, in any event, be tried by the military commission the President has convened pursuant to the November 13 Order and Commission Order No. 1, the question whether his potential status as a prisoner of war independently renders illegal his trial by military commission may be reserved." *See* 126 S. Ct. at 2795 n.61. Given this

Court's reversal of the district court on the issue, and the Supreme Court's statement that the issue should be reserved for the future, the proper course of action is to vacate that portion of the district court's order and to reserve that issue for another day.

With those modifications to the district court's injunction, Hamdan's challenge to the military commission constituted under the November 13, 2001 military order should now be deemed final. No military commission proceeding against Hamdan can be conducted absent a change either in the governing military commission orders or in the relevant statutes. If and when such a change is finalized, Hamdan should be required, to the extent he has any objection to a newly constituted commission, to file a new action at that stage.

2. In addition, if Hamdan wishes to challenge his detention as an enemy combatant, such a claim must now be asserted in this Court under the DTA. As the Government has explained in its supplemental briefs (addressing *Hamdan* and the DTA) filed in *Al Odah v. United States* (Nos. 05-5064, 05-5095 through 05-5116) and *Boumediene v. Bush* (Nos. 05-5062, 05-5063), challenges to a detainee's detention as an enemy combatant are now within this Court's exclusive jurisdiction as established by the DTA. That exclusive jurisdiction expressly applies to all pending claims. *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"). Thus, whether challenges to a detainee's detention as an enemy combatant were pending on the date

of the enactment of the DTA or filed thereafter, they must now be asserted in this Court under the DTA.

Accordingly, if this Court deems the district court habeas petition to be insufficient to present a challenge to his detention as an enemy combatant, then Hamdan, if he wishes to pursue such a challenge, must file a new petition under the DTA in this Court. That would appear to be the proper result given that Hamdan's current habeas petition contained no argument regarding enemy combatant designation (J.A. 42-66), and, given the observations of the district court that "Hamdan does not currently challenge his detention as an enemy combatant in proceedings before this Court," J.A. 415 n.18, and Supreme Court that "Hamdan does not challenge\* \* \* the Government's power to detain him for the duration of active hostilities." 126 S. Ct. at 2798.

If, on the other hand, this Court deems the habeas petition in this case to have adequately raised a challenge to Hamdan's detention as an enemy combatant, it should now transfer that aspect of his case to this Court for adjudication under the DTA.

In either case, however, the result is the same in that any enemy combatant claim must be pursued by Hamdan in this Court under the DTA.

## CONCLUSION

For the foregoing reasons, the district court's injunction against the commission proceedings constituted under the November 13, 2001 military order should now be modified to conform to the Supreme Court's ruling, or the case should be remanded to the district court with instructions to so modify the injunction, and, to the extent Hamdan wishes to challenge his enemy combatant designation, he should seek review in this Court of the final CSRT decision pursuant to the terms of the DTA.

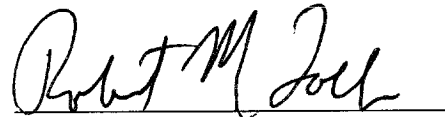
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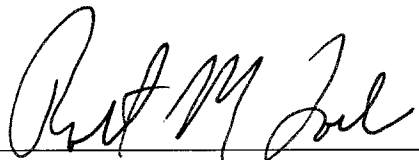
## CERTIFICATE OF SERVICE

I hereby certify that on August 30, 2006, I served the foregoing “RESPONDENTS’ MOTION TO GOVERN FUTURE PROCEEDINGS” upon counsel of record by causing copies to be sent by first-class mail and by e-mail transmission to lead counsel:

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