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

Nos. 05-5064, 05-5095 through 05-5116

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

KHALED A.F. AL ODAH, et al.,

Plaintiffs-Petitioners-Appellees/Cross-Appellants,

v.

UNITED STATES OF AMERICA, et al.,

Defendants-Respondents-Appellants/Cross-Appellees.

ON CONSOLIDATED APPEALS FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

THE GUANTANAMO DETAINEES' SUPPLEMENTAL BRIEF ADDRESSING THE EFFECT OF THE SUPREME COURT'S OPINION IN *HAMDAN V. RUMSFELD*, 126 S. CT. 2749 (2006), ON THE PENDING APPEALS

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INTRODUCTION AND SUMMARY

The Supreme Court's decision in *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006), conclusively resolves several questions relating to the maintenance and scope of the detainees' habeas corpus petitions. First, *Hamdan* held that the provisions of the Detainee Treatment Act of 2005 ("DTA") intended to strip the courts of jurisdiction over habeas and related petitions filed by detainees at Guantanamo do not apply to petitions that were pending when the DTA became effective on December 30, 2005. Therefore, the courts retain habeas jurisdiction over the present cases, all of which were pending below when the DTA became effective.

Second, *Hamdan* held that the provision in the DTA granting "exclusive" and limited judicial review in this Court of designated final military tribunal decisions does not preclude the exercise by the courts of general habeas jurisdiction over other detainee claims, particularly when that jurisdiction is invoked to challenge the very legitimacy of the process on which the government relies to justify Executive detention. Therefore, contrary to the government's contention, the courts may exercise habeas jurisdiction over the detainees' pending petitions challenging the lawfulness of their detentions and the legitimacy of the Combatant Status Review Tribunals ("CSRTs") on which the government relies to justify those detentions, despite the provision in the DTA for "exclusive" review in this Court of designated final CSRT decisions. That conclusion is also mandated by *INS v. St. Cyr,* 533 U.S. 289, 311-12 (2001), to which *Hamdan* referred.

Third, *Hamdan* held that all the detainees at Guantanamo may judicially enforce claims that the government violated Common Article 3 and other applicable law-of-war constraints in the Geneva Conventions that were incorporated in legislation and imposed by Congress on the President's war powers. Therefore, contrary to the government's contention (and one of the holdings below), all the detainees may judicially enforce their claims that the government

violated Common Article 3 and other applicable law-of-war constraints in the Geneva Conventions that were incorporated in the Authorization for Use of Military Force ("AUMF") resolution passed by Congress.

THE *HAMDAN* DECISION

Salim Ahmed Hamdan is a Yemeni national detained at Guantanamo Bay. Unlike the detainees in the present appeals, who are being held indefinitely without charge or prospect of trial, Hamdan is one of the ten detainees at Guantanamo who was charged and designated for trial by military commission created by the President's Military Order of November 3, 2001.

Hamdan's counsel filed a petition for habeas corpus challenging various aspects of his detention and his trial before a military commission. The district court granted Hamdan's habeas petition in part, this Court reversed, and the Supreme Court granted certiorari.

On December 30, 2005, while the case was pending before the Supreme Court, the DTA became effective. Section 1005(e)(1) of the DTA purports to strip the courts of jurisdiction over habeas petitions and related actions filed by Guantanamo detainees; sections 1005(e)(2) & (e)(3) vest "exclusive" jurisdiction in this Court to conduct limited review of designated final military tribunal decisions conducted under procedures implemented in accordance with the DTA. On the basis of that legislation, the government, on January 12, 2006, moved to dismiss Hamdan's case in the Supreme Court – making exactly the same arguments it made to this Court to dismiss or transfer the pending appeals.[1]

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[1] *Compare* Respondent's Motion to Dismiss for Lack of Jurisdiction in *Hamdan* ("Gov't *Hamdan* Motion") *with* Supplemental Brief of the Federal Parties Addressing the Detainee Treatment Act of 2005, filed February 17, 2006 ("Gov't DTA Supp. Br.").

First, the government argued that the "plain terms" of the DTA and Supreme Court precedents established that the jurisdiction-stripping provisions of section 1005(e)(1) applied to pending cases, including Hamdan's.[2]

Second, the government argued that, even if section 1005(e)(1) did not apply to pending cases, Hamdan "would nonetheless be required to avail himself of the exclusive review provision established with respect to military commissions in Section 1005(e)(3)."[3] The government contended that "[t]he settled rule is that when Congress creates an exclusive review mechanism, it forecloses a court from asserting jurisdiction under a more general grant of jurisdiction."[4] According to the government, Congress created such an "exclusive review mechanism" in sections 1005(e)(2) and (e)(3), which foreclosed the federal courts from asserting habeas jurisdiction over Hamdan's case.[5]

In that regard, the government also argued that reading the DTA to allow pending habeas cases to survive would be contrary to the intent of Congress to limit the judicial review available to Guantanamo detainees.[6] The government thought such a reading "would permit hundreds of pending cases – collectively involving the large majority of Guantanamo detainees and countless challenges to the operation of Guantanamo – to proceed," and "would produce an absurd result because it would require many of those cases to be carved up in order to allow them to proceed

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2 Gov't *Hamdan* Motion at 9-13.

3 *Id.* at 16.

4 *Id.*

5 *Id.* at 17.

6 *Id.* at 20.

under the exclusive review procedure in the District of Columbia Circuit (for claims 'governed by' the CSRT review procedure) and general habeas review (for all other claims)."[7]

The Supreme Court carefully considered and *rejected* each of those arguments. First, the Supreme Court held, on the basis of the language and drafting history of section 1005(e)(1), as well as the clear intent of Congress, that section 1005(e)(1) "does not strip federal courts' jurisdiction over cases pending on the date of the DTA's enactment."[8]

Second, the Supreme Court found no "dual jurisdiction" problem in holding that the courts retained habeas jurisdiction over Hamdan's pending petition despite the provisions in sections 1005(e)(2) & (e)(3) vesting "exclusive" jurisdiction in this Court to review designated final decisions of the CSRTs and military commissions.[9] The Court pointed out that Hamdan was not challenging a final military commission decision but the legitimacy of the commission.[10] Responding directly to the government's contention that a dual system of review would be "absurd," it concluded: "There is nothing absurd about a scheme under which pending habeas 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."[11]

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7 Gov't *Hamdan* Motion at 20.

8 126 S. Ct. at 2764-69 & n.15

9 *Id.* at 2768.

10 *Id.* at 2769.

11 *Id.*

Third, after deciding that it retained jurisdiction and that abstention was not appropriate,[12] the Supreme Court ruled on the merits that the President's authority to convene military commissions, whatever its source, is constrained by Article 21 of the Uniform Code of Military Justice ("UCMJ"),[13] which preserves the President's power to convene military commissions "with the express condition that the President and those under his command comply with the law of war."[14] In the words of the Court: "The UCMJ conditions the President's use of military commissions on compliance not only with the American common law of war, but also with the rest of the UCMJ itself, insofar as applicable, and with the 'rules and precepts of the laws of nations,' ... including, *inter alia*, the four Geneva Conventions signed in 1949."[15] The Court held that the military commission convened by the President lacked power to proceed against Hamdan because, by excluding Hamdan from certain phases of his trial and denying him access to all the evidence against him, the commission's procedures violated both the UCMJ's proscription against unnecessary departures from the procedures governing courts-martial and also Common Article 3 of the Geneva Conventions.[16]

In so holding, the Supreme Court rejected this Court's conclusion that *Johnson v. Eisentrager*, 339 U.S. 763, 789 n.14 (1950) prevented Hamdan from judicially enforcing his rights under the Geneva Conventions.[17] The Supreme Court concluded that, even assuming the

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12 126 S. Ct. at 2769-72.

13 10 U.S.C. § 821.

14 126 S. Ct. at 2774.

15 *Id.*

16 *Id.* at 2786-93, 2795-98. The Supreme Court did not address Hamdan's separate argument that the failure by the government to conduct a prisoner of war status hearing for him in accordance with Article 5 of the Third Geneva Convention independently rendered his trial by military commission illegal. *Id.* n.61.

17 *Id.* at 2793-94.

Geneva Conventions, standing alone, did not furnish Hamdan with any rights enforceable in court, Hamdan could enforce in court the President's compliance with the laws of war, including the Geneva Conventions, that were incorporated in the UCMJ and made binding on the President.[18] The Supreme Court also "disagree[d]" with this Court's conclusion that the Geneva Conventions did not apply to Hamdan because he was captured in connection with the United States' war with Al Qaeda and "the war with al Qaeda evades the reach of the Geneva Conventions," concluding that the Conventions did apply to Hamdan.[19]

ARGUMENT

I. *HAMDAN* MAKES CLEAR THAT THE DTA DOES NOT DEPRIVE THE COURTS OF HABEAS JURISDICTION IN THESE PENDING CASES

The government concedes, as it must, that *Hamdan* "forecloses" its previous argument that section 1005(e)(1) stripped the courts of habeas jurisdiction over cases pending at the time the DTA was enacted.[20] Because each of the present cases was pending at the time the DTA was enacted, the courts retain habeas jurisdiction over them.

Although the Supreme Court concluded in *Hamdan* that Congress, by the way it worded the DTA, specifically intended that the courts should retain habeas jurisdiction over pending cases,[21] the government seeks to do an end-run around that conclusion by arguing, yet again, that the courts have no habeas jurisdiction. The government argues that the grant by sections 1005(e)(2) and (e)(3) of "exclusive" jurisdiction to this Court to review designated final CSRT

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18 126 S. Ct. at 2794.

19 *Id.* at 2794-95.

20 Government's Supplemental Brief addressing *Hamdan v. Rumsfield* ("Gov't *Hamdan* Supp. Br.") at 6.

21 126 S. Ct. at 2766 n.10 ("statements made by Senators preceding passage of the Act lend further support to what the text of the DTA and its drafting history already make plain," namely, "that the final version of the Act preserved jurisdiction over pending habeas cases").

and military commission decisions "precludes the exercise of jurisdiction under more general grants of jurisdiction, including habeas corpus."[22] Thus, as construed by the government, the DTA *would* effectively strip the courts of habeas jurisdiction over the pending cases, notwithstanding *Hamdan*'s contrary holding.

Of course, the Supreme Court rejected that very argument in *Hamdan* itself. But the government argues that *Hamdan* is distinguishable.[23] It says that, unlike Hamdan, who was not challenging a final CSRT or military commission decision, the present detainees "necessarily" are challenging the final CSRT decisions made against them.[24] To support its contention, the government relies on footnote 14 in the *Hamdan* opinion, in which the Court noted:

> There 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.[25]

As demonstrated below, the government is mistaken. The detainees in the present cases are *not* challenging any final CSRT decisions (all of which were reached well after these cases were filed). Instead, they are challenging the basic lawfulness of their detentions. To the extent the detainees are contesting anything about the CSRTs, they are challenging not the CSRT decisions, but the very legitimacy of the CSRT as a justification for Executive detention. That type of challenge, as the Supreme Court made clear in *Hamdan*, is "particularly" suited for habeas review and is open to the detainees in these pending cases even after enactment of the

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22 Gov't *Hamdan* Supp. Br. at 7.

23 *Id.* at 5-7.

24 *Id.* at 7.

25 126 S. Ct. at 2769 n.14.

DTA.[26] Moreover, displacing the courts' existing habeas jurisdiction to hear and decide these claims and transferring these cases to this Court for the circumscribed review available under the DTA would be directly contrary to the Supreme Court's decision in *St. Cyr*, and would also raise serious constitutional questions under the Suspension Clause.

A. These Cases Do Not Challenge Subsequent Final CSRT Decisions But The Basic Legality Of The Detentions

These cases are not collateral attacks on prior CSRT decisions. None of the petitions in these cases even *mentions* a CSRT decision. There is good reason for that; these petitions were all filed *before* any CSRT decision was reached. Indeed, the *Al Odah* case was filed more than two years before the CSRTs were even created. Seven of the other cases also were filed before the CSRTs were created. All eleven were filed before the military even issued the procedures that currently govern the CSRTs.[27]

The detainees in the pending petitions challenge the lawfulness of their detentions – not the subsequent CSRT decisions, which the government submitted under the habeas statute as its

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[26] 126 S. Ct. at 2769. Notably, in his dissent, Justice Scalia disagreed with the interpretation of the *Hamdan* decision that the government now advocates. Justice Scalia was quite clear the Court's decision "supplants this exclusive-review mechanism with a dual-review mechanism for petitioners who were expeditious enough to file applications challenging the CSRTs or military commissions before December 30, 2005." *Id.* at 2815. Justices Thomas and Alito joined in this dissent. *Id.* at 2810. Thus, all eight Justices who participated in the *Hamdan* decision understood its effect to be that habeas jurisdiction would be preserved over pending claims regardless of the "exclusive" review provisions of sections 1005(e)(2) & (e)(3).

[27] The Deputy Secretary of Defense issued a memorandum order creating the CSRTs on July 7, 2004, the Secretary of the Navy issued a memorandum setting forth the CSRT procedures on July 29, 2004, and final CSRT decisions began to be filed in September 2004. *See* Public Joint Appendix at 83, 86, 1309. *Rasul*, Civil Action No. 02-0299 (CKK), was filed February 19, 2002; *Al Odah*, Civil Action No. 02-0828 (CKK), was filed May 1, 2002; *Habib*, Civil Action No. 02-1130 (CKK), was filed June 10, 2002; *Kurnaz*, Civil Action No. 04-1135 (ESH), was filed July 2, 2004; *O.K.*, Civil Action No. 04-1136 (JDB), was filed July 2, 2004; *Begg*, Civil Action No. 04-1137 (RMC), was filed July 2, 2004; *El Banna*, Civil Action No. 04-1144 (RWR), was filed July 6, 2004; *Gherebi*, Civil Action No. 04-1164 (RBW), was filed in the Central District of California in 2003, transferred to the court below, and re-filed July 12, 2004; *Anam*, Civil Action No. 04-1194 (HHK) was filed July 15, 2004; *Almurbati*, Civil Action No. 04-1227 (RBW), was filed July 22, 2004; and *Abdah*, Civil Action No. 04-1254 (HHK), was filed July 27, 2004.

factual returns to the existing petitions. Indeed, the CSRT decisions were issued only after the Supreme Court had confirmed that the detainees had the right to pursue their habeas claims in the court, and after the Court had already remanded for the district court to consider the merits of their claims.[28]

B. *Hamdan* Makes Clear That A Challenge To The Legitimacy Of The CSRT Process Itself Is Cognizable In Habeas

The DTA does not prevent the detainees in the present appeals from challenging the legitimacy of the past CSRT process that was applied to them. As the district court found, that process was totally inadequate; it "deprive[d] the detainees of sufficient notice of the factual bases for their detention and den[ied] them a fair opportunity to challenge their incarceration," and it improperly allowed for the use of statements obtained through torture and coercion.[29]

That sort of challenge – to "the very legitimacy of the tribunals" themselves – could not be brought under the government's interpretation of the exclusive review provisions of subsection (e)(2), which limits this Court to inquiring into whether the CSRTs followed their own procedures.[30] However, that sort of challenge is precisely the type that the Court in

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28 *Rasul v. Bush*, 542 U.S. 466 (2004).

29 *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 468, 472 (D.D.C. 2005).

30 Although section 1005(e)(2)(C)(i) authorizes this Court to decide whether a CSRT status determination "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)," the government has construed this as allowing merely a review "of the legal adequacy of the CSRT standards and procedures" and precluding any review of factual determinations. *See* Gov't DTA Supp. Br. at 51-53. Similarly, although section 1005(e)(2)(C)(ii) authorizes this Court to decide "whether the use of such standards and procedures to make the determination is consistent with the Constitution and laws of the United States," that is only "to the extent the Constitution and laws of the United States are applicable." The government consistently has argued that the Constitution is not applicable to the detainees. *See, e.g.*, Gov't DTA Supp. Br. at 45-47.

Hamdan made clear is preserved for the detainees in habeas, as opposed to "more routine challenges to final decisions rendered by those tribunals [that] are carefully channeled to a particular court and through a particular lens of review."[31]

C. The Detainees Cannot Challenge Final CSRT Decisions Under The Act Because The Procedures Mandated By The Act For Reaching Those Decisions Still Have Not Been Issued

There is an additional and independent reason why section 1005(e)(2) cannot bar the detainees' habeas corpus claims in the courts. Section 1005(e)(2) has no application to CSRT decisions issued before the Secretary of Defense promulgates and implements the new CSRT procedures required by sections 1005(a) & (b) of the DTA.[32] Section 1005(e)(2)(B)(ii) of the DTA limits this Court's jurisdiction to the review of final decisions of CSRTs that have been conducted "pursuant to applicable procedures specified by the Secretary of Defense." Those procedures must include three vital safeguards absent from the procedures governing the CSRTs conducted for the Guantanamo detainees in the present appeals: (i) the official in the Defense Department who has "final review authority" of the CSRT's decision "shall be a civilian officer" whose appointment is made by the President, by and with the advice and consent of the Senate

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31 126 S. Ct. at 2769. Contrary to the government's assertions, habeas has never been dependent upon the Constitution for its enforcement. *See St. Cyr*, 533 U.S. at 302-03 (the Supreme Court's early cases "contain no suggestion that habeas relief in cases involving executive detention was only available for constitutional error"); *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 93-94 (1807) ("for the meaning of the term habeas corpus, resort may unquestionably be had to the common law"). Habeas review traces its roots deeply into the history of the common law, antecedent to the Constitution and to statute. *See Rasul*, 542 U.S. at 473. As the Supreme Court made clear in *Rasul*, these detainees have the right to habeas review of Executive detention imposed upon them. An inquiry into the basis of the detention and the legal adequacy of the procedures – not merely into whether the procedures were followed as a formal matter – is an essential element of habeas. Without such a review, the government could detain anyone, including an innocent shepherd, simply because military personnel perceive the person to "look like an enemy combatant" (*see* Tr. of Oral Argument, Sept. 8, 2005, at 49) and could justify such detention merely by presenting such unchallenged "evidence" according to its own unilaterally issued CSRT procedures.

32 *See* The Guantanamo Detainees' Second Supplemental Brief Addressing the Effect of the Detainee Treatment Act of 2005 on this Court's Jurisdiction Over the Pending Appeals ("Detainees DTA Supp. Br.") at 15-22.

(section 1005(a)(2)); (ii) there must be "periodic review of any new evidence that may become available relating to the enemy combatant status of a detainee" (section 1005(a)(3)); and (iii) the CSRTs, in making their status determinations, must, "to the extent practicable, assess – (A) whether any statement derived from or relating to such detainee was obtained as a result of coercion; and (B) the probative value (if any) of any such statement" (section 1005(b)).[33]

The Secretary of Defense was required by section 1005(a)(1) to submit to Congress the new CSRT procedures within 180 days of the enactment of the DTA on December 30, 2005. That deadline has come and gone, and the Secretary has not submitted or promulgated the new CSRT procedures. Until the Secretary obeys the mandate of section 1005(a)(1) and issues new CSRT procedures that include the safeguards mandated by the DTA, no final CSRT decisions under these procedures can be rendered, and the Guantanamo detainees in the present appeals cannot seek review of any final CSRT decisions under section 1005(e)(2). Therefore, the government's interpretation of section 1005(e)(2) would unfairly and erroneously deprive the Guantanamo detainees of *any* judicial review of their detention.[34]

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[33] This third safeguard interlocks with sections 1002 and 1003 of the DTA (collectively known as the "McCain Amendment") that prohibit interrogation of detainees not authorized by the U.S. Army Field Manual and also prohibit "cruel, inhuman, or degrading treatment or punishment" of detainees. *See* Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2680, 109th Cong. §§ 1002-1003 (2005).

[34] Although the government has argued in the past that the requirements of section 1005(e)(2)(B)(ii) are satisfied by review of the CSRTs conducted under the old, pre-DTA procedures, that argument makes no sense. Congress' insistence that the Secretary of Defense issue new CSRT procedures containing the three vital safeguards absent from the old procedures plainly shows Congress was dissatisfied with those old procedures. It is illogical to assume that, after calling upon the Secretary (in section 1005(b)) to issue procedures requiring the CSRTs to assess whether evidence was obtained through coercion, Congress (in section 1005(e)) would have directed this Court to review CSRTs conducted without that assessment. Had Congress intended such an illogical result, it would have stricken from section 1005(e)(2)(A), which provides for review of "any" final CSRT decision, the limiting words "[s]ubject to subparagraph[ ] (B) ..." *Hamdan* teaches that individual provisions of the DTA should be construed consistent with congressional intent and not in disharmony with other provisions. 126 S. Ct. at 2769.

D. *St. Cyr* Mandates Full Habeas Review For The Guantanamo Detainees

The government's "exclusive" jurisdiction argument also is refuted by the Supreme Court's decision in *INS v. St. Cyr*, 533 U.S. 289 (2001), to which *Hamdan* referred.[35] In *St. Cyr* the government argued that four separate provisions in the Antiterrorism and Effective Death Penalty Act of 1996 and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, providing for "exclusive" judicial review in the courts of appeals of final agency orders, precluded the courts' exercise of general habeas jurisdiction.[36] Although the language in those four provisions was extremely broad, covering "judicial review of all questions of law and fact" and providing that, "[n]otwithstanding any other provision of law, no [other] court shall have jurisdiction to review any final order,"[37] the Supreme Court held that the language was insufficient to revoke general habeas jurisdiction.

Exclusive review provisions, although perhaps sufficient to displace other types of general jurisdiction, are not sufficient to displace habeas jurisdiction. There must be "a clear statement of congressional intent to repeal habeas jurisdiction."[38] As *St. Cyr* emphasized: "Implications from statutory text or legislative history are not sufficient to repeal habeas jurisdiction; instead, Congress must articulate specific and unambiguous statutory directives to effect a repeal."[39]

The Supreme Court made clear in *Hamdan* that there is no clear statement in the DTA repealing habeas jurisdiction in pending cases. Neither section 1005(e)(1), nor the exclusive

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35 126 S. Ct. at 2769.

36 533 U.S. at 310-11.

37 *Id.* at 311.

38 *Id.* at 298.

39 *Id.* at 299.

review provisions in sections 1005(e)(2) and (e)(3), displaces the courts' habeas jurisdiction in the present cases.

E. Construing The DTA To Revoke Habeas Jurisdiction Would Raise Serious Constitutional Concerns

Because the Court in *Hamdan* determined that the DTA did not strip the courts of jurisdiction over pending cases, it found no need to consider the canon of constitutional avoidance or the implications of a contrary decision under the Suspension Clause.[40] However, construing the DTA as the government urges – as precluding the courts from exercising habeas jurisdiction – would raise serious Suspension Clause issues.[41]

Congress may substitute a collateral procedure for habeas, but only if the substitute procedure is "neither inadequate nor ineffective to test the legality of a person's detention."[42] As interpreted by the government, the exclusive review provisions in section 1005(e)(2) of the DTA are neither an adequate nor effective substitute for habeas, particularly for these detainees who are being held indefinitely without charge, rather than temporarily pending a forthcoming trial or military tribunal. As the detainees have explained before, in these circumstances of indefinite Executive detention without prospect of a prompt trial or tribunal proceeding, habeas at common law would require a searching judicial inquiry into the legal and the factual justification for the detention, including the opportunity to traverse the government's return, to present evidence, and

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40 *See* 126 S. Ct. at 2764, 2769. In *St. Cyr*, the Supreme Court did point out that a construction of the statutes at issue precluding habeas review "would give rise to substantial constitutional questions" under the Suspension Clause, and it sought to construe the statutes to avoid those problems. *St. Cyr*, 533 U.S. at 300.

41 *See* Detainees DTA Supp. Br. at 29-43.

42 *Swain v. Pressley*, 430 U.S. 372, 381 (1977).

to obtain judicial resolution of disputed facts.[43] As written and interpreted by the government, the limited judicial review procedures in section 1005(e)(2) would not allow that and would restrict this Court to an inquiry into whether the CSRTs followed their own procedures.

Indeed, as the government interprets it, that provision would preclude the Court from going behind the CSRTs to determine if the government's definition of "enemy combatant" status is a legally sufficient basis for each detention and if the CSRT procedures were, in fact, fair, adequate, and legitimate. That, however, is a fundamental requirement of habeas. As Justice Holmes memorably wrote :

> [H]abeas corpus cuts through all forms and goes to the very tissue of the structure. It comes in from the outside, not in subordination to the proceedings, and although every form may have been preserved opens the inquiry whether they have been more than an empty shell.[44]

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[43] Detainees' DTA Supp. Br. at 37-38; Supplemental Brief *Amici Curiae* of British and American Habeas Scholars at 12. The government has argued, both in court and in the press, that these requirements for habeas cannot possibly apply to everyone picked up in connection with armed conflicts in which the United States is involved. *They would not.* Indeed, it is likely the present habeas cases never would have been filed, and it is likely most of the detainees at Guantanamo never would have been detained, if the government simply had followed its own long-standing procedures, set forth in Army Regulation 190-8, for holding hearings in the field close to the time and place of capture for any detainee whose status was in doubt. The military followed these procedures in each conflict in which the United States was involved since the Viet Nam war, but unaccountably did not do so in Afghanistan. During the Gulf War, for example, the government held 1,196 individual hearings to assess the status of captured persons; 886 of the detainees in those hearings were found not to be combatants at all but displaced civilians or refugees, and the remaining 310 were found to be "privileged" or legal combatants. Dep't of Defense, *Report on the Conduct of the Persian Gulf War, Final Report to Congress* (April 1992), *cited in* David Cole, *Enemy Aliens* at 42 n.69 (New Press 2003). Because the military followed Army Regulation 190-8 in prior conflicts, innumerable innocent civilians picked up by mistake were released and no habeas actions were filed. In the future, hopefully, the military will again follow its procedures and hold those hearings. Abiding by these procedures, in combination with the new CSRT procedures (if they are ever issued by the Secretary of Defense), should prevent the mistakes that have been made at Guantanamo and provide the process due people detained.

[44] *Frank v. Morgan*, 237 U.S. 309, 346 (1915) (Holmes, J., dissenting). Justice Holmes' dissenting opinion was later made the law of the land in *Moore v. Dempsey*, 261 U.S. 86 (1923). *See Fay v. Noia*, 372 U.S. 391, 411 n.22 (1963). His words frequently have been quoted with approval. *See, e.g., Harris v. Nelson*, 394 U.S. 286, 291 n.2 (1969); *Chatman-Bey v. Thornburgh*, 864 F.2d 804, 807 (D.C. Cir. 1988) (en banc).

Any review process that limits the courts to determining whether the jailer has followed its own rules, and precludes an inquiry into whether the rules themselves are adequate and more than an empty shell, cannot be an adequate or effective substitute for habeas.

II. *HAMDAN* SUPPORTS THE GUANTANAMO DETAINEES' CONTENTION THAT THEY STATED COGNIZABLE GENEVA CONVENTIONS CLAIMS

A. *Hamdan* Holds That The Geneva Conventions Are Judicially Enforceable Through Applicable Legislation As Part Of The Law Of War

As noted earlier, the Supreme Court held in *Hamdan* that the Geneva Conventions are judicially enforceable through legislation that incorporates law-of-war constraints on the President's war powers.[45] Specifically, the Court held that "[t]he UCMJ conditions the President's use of military commissions on compliance not only with the American common law of war, but also with the rest of the UCMJ itself, insofar as applicable, and with the 'rules and precepts of the law of nations,' including, *inter alia*, the four Geneva Conventions signed in 1949" (citing references omitted).[46] On the basis of this holding, the Court enforced Hamdan's

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45 *Hamdan*, 126 S. Ct. at 2794. The government argues that *Hamdan* did not "disturb" a footnote in *Johnson v. Eisentrager*, 339 U.S. 763, 789 n.14 (1950) suggesting in dicta that the Geneva Conventions of 1929 (which were in force prior to the more robust Geneva Conventions of 1949) were not enforceable by private parties. Gov't *Hamdan* Supp. Br. at 9. To the contrary, *Hamdan* expressly rejected this Court's conclusion that judicial enforcement of Geneva Conventions rights was precluded by this *Eisentrager* footnote. 126 S. Ct. at 2794. Furthermore, and contrary to the government's misleading suggestions (*see* Gov't *Hamdan* Supp. Br. at 8-9), the Supreme Court did not rule that the scheme of the 1949 Conventions "is identical in all relevant respects" to the scheme of the 1929 Conventions considered in Eisentrager. *Id.* & n.57. In fact, *Hamdan* casts serious doubt on the precedential value of that "curious" footnote ("[w]hatever else might be said about the *Eistentrager* footnote, it does not control this case"). 126 S. Ct. at 2794. Although the Supreme Court did not decide whether the footnote would have any application to the 1949 Geneva Conventions, it specifically acknowledged the International Committee of the Red Cross's Commentary on the Geneva Conventions explaining that the 1949 Geneva Conventions were written "first and foremost to protect individuals, and not to serve State interests." *Id.* n.57. The Supreme Court gave the *Eisentrager* footnote no further consideration, because it found that Congress had implemented the 1949 Geneva Conventions by conditioning the Executive's authority to hold military commissions on adherence to the law of war.

46 126 S. Ct. at 2789.

habeas claim that the military commission before which he was being tried was in violation of Common Article 3 of the Geneva Conventions and, therefore, was illegal.[47]

Although the government concedes that *Hamdan* held Common Article 3 "to be judicially enforceable through Article 21" of the UCMJ,[48] it erroneously claims that "nothing in *Hamdan* even arguably undermines our contention that the treaty claims raised here are meritless."[49] To the contrary, to the extent the President's authority to detain individuals who fought against the United States in Afghanistan is derived from the AUMF, it plainly follows from *Hamdan* that the Geneva Conventions are judicially enforceable because they are incorporated in the AUMF. This bears directly on the litigated issue of whether the detainees' Geneva Conventions claims are cognizable.

B. The Courts May Enforce Geneva Convention Constraints On The President's War Powers That Are Incorporated In The AUMF

The Supreme Court's plurality opinion in *Hamdi v. Rumsfeld*, 542 U.S. 507, 517 (2004), accepted the President's claim that the legislative source of his power to detain individuals who fought against the United States in Afghanistan is the AUMF. By its terms, the AUMF "constitute[s] specific statutory authorization within the meaning of section 5(b) of the War Powers Resolution."[50] The War Powers Resolution of 1973, in turn, explicitly preserves the provisions of existing treaties.[51] The plurality in *Hamdi* noted that the AUMF "authorizes the President to use 'all necessary and appropriate force'" against those responsible for the 9/11

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47 126 S. Ct. at 2793-98.

48 Gov't *Hamdan* Supp. Br. at 3.

49 *Id.* at 10.

50 115 Stat. 224, 107th Cong. § 2(b) (2000 ed., Supp. III).

51 *See* War Powers Resolution, H.R.J. Res. 542, 93d Cong. § 8(d)(1) (1973).

terrorist attacks.[52] Because "individuals who fought against the United States in Afghanistan as part of the Taliban, an organization known to have supported the Al Qaeda terrorist network responsible for those attacks, are individuals Congress sought to target in passing the AUMF," the plurality concluded that their detention "is so fundamental and accepted an incident to war as to be an exercise of the 'necessary and appropriate force' Congress has authorized the President to use."[53]

The *Hamdi* plurality also made clear that the AUMF incorporates the law-of-war constraints found in the Geneva Conventions. For example, responding to Hamdi's contention that Congress had not authorized his indefinite detention, the plurality said "[c]ertainly, we agree that indefinite detention for the purpose of interrogation *is not authorized"* (emphasis added),[54] specifically citing the Geneva Conventions for the principle that "detention may last no longer than active hostilities."[55] The Court in *Hamdan* was equally clear as to the Geneva Conventions' centrality to the law of war and their role in constraining the President's exercise of war powers.[56] More importantly, the Court in *Hamdan* expressly held that Common Article 3 of the Geneva Conventions applies to all the detainees at Guantanamo and may be judicially enforced through applicable legislation.[57]

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52 542 U.S. at 518. *See also Hamdan*, 126 S. Ct. at 2775 ("we assume that the AUMF activated the President's war powers").

53 542 U.S. at 518.

54 *Id.* at 521. For that reason, the plurality intimated that the government's authority to continue to detain would depend on what "the record establishes." *Id.*

55 *Id.* at 520 (citing to Article 118 of the Geneva Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 3406, T.I.A.S. No. 3364 (1955)). *See also id.* at 551 (Breyer, J., concurring).

56 126 S. Ct. at 2794 ("regardless of the nature of the rights conferred on Hamdan [by the Geneva Conventions], they are, as the Government does not dispute, part of the law of war ... [a]nd compliance with the law of war is the condition upon which the authority set forth in Article 21 is granted").

Accordingly, under *Hamdan* the courts may judicially enforce the claims of the present detainees that the government violated Common Article 3 and other applicable law-of-war constraints in the Geneva Conventions that are incorporated in the AUMF.

C. *Hamdan* Requires Reversal Of The District Court's Dismissal Of Geneva Convention Claims By Detainees Allegedly Affiliated With Al Qaeda

Hamdan requires reversal of the portion of the district court's opinion dismissing the Geneva Convention claims of the detainees in the present appeals who the government alleges are affiliated with Al Qaeda. Although the district court denied the government's motion to dismiss the Geneva Convention claims of detainees who the government alleges are affiliated with the Taliban,[58] it granted the government's motion to dismiss the Geneva Convention claims of detainees who the government alleges are affiliated with Al Qaeda, agreeing with the government that the Geneva Conventions did not cover those detainees.[59] But the Supreme Court in *Hamdan* squarely rejected this distinction, disagreeing with this Court "that the war with al Qaeda evades the reach of the Geneva Conventions."[60] *Hamdan* expressly holds that Common Article 3 of the Geneva Conventions applies to and is judicially enforceable by *all* the Guantanamo detainees.[61]

Accordingly, the district court's dismissal of the Geneva Convention claims of the detainees who the government alleges are affiliated with Al Qaeda must be reversed.[62]

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57 126 S. Ct. at 2796-98

58 355 F. Supp. 2d at 479.

59 *Id.* at 479-80.

60 126 S. Ct. at 2794-95.

61 126 S. Ct. at 2796-98.

62 The district court sustained some of the detainees' claims under Article 5 of the Geneva Conventions. 355 F. Supp. 2d at 478-80. Although the Supreme Court did not reach the merits of the identical Article 5 claim raised in *Hamdan* (*see* 126 S. Ct. at 2795 n.61), nothing in

CONCLUSION

The Supreme Court's decision in *Hamdan* establishes that the courts retain habeas jurisdiction over the present detainees' pending claims, and that the present detainees have stated cognizable Geneva Conventions claims that are judicially enforceable through the AUMF.

Respectfully submitted,

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Hamdan casts doubt on whether such a claim is judicially enforceable. For that matter, nothing in *Hamdan* detracts from the detainees' arguments below and in this Court that, independent of the AUMF, the government is constrained by the habeas statute to abide by international law and that it failed to do so.

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)(C) OF THE FEDERAL RULES OF APPELLATE PROCEDURE AND CIRCUIT RULE 32(a)

I certify that, in accordance with Fed. R. App. P. 32(a)(7)(C) and D.C. Circuit Rule 32(a), the foregoing Guantanamo Detainees' Supplemental Brief Addressing the Effect of the Supreme Court's Opinion in *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006) on the Pending Appeals is proportionally spaced and has a typeface of 12 point. This brief is 19 pages long (which is within the page limit authorized by this Court in its Order of July 26, 2006).

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CERTIFICATE OF SERVICE

I certify that today, August 8, 2006, I served the foregoing Guantanamo Detainees' Supplemental Brief Addressing the Effect of the Supreme Court's Opinion in *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006) on the Pending Appeals on the government by causing copies to be sent, via the Court Security Officer, to the following counsel of record for the government:

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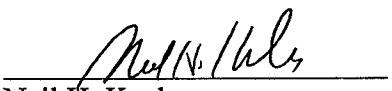

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