

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

SALIM AHMED HAMDAN,

Petitioner,

v.

DONALD H. RUMSFELD, United States  
Secretary of Defense; JOHN D.  
ALTENBURG, Jr., Appointing Authority 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,

Respondents.

CIVIL ACTION NO. 1:04-cv-01519-JR

**PETITIONER'S MOTION FOR ORDER SETTING  
BRIEFING SCHEDULE ON SUBJECT MATTER  
JURISDICTION**

**I. PRELIMINARY STATEMENT**

This case returns to this Court on remand following the June 2006 decision by the Supreme Court of the United States that the military commission established by the President to try Petitioner Salim Hamdan violated both U.S. and international law. *Hamdan v. Rumsfeld*, 126 S.Ct. 2749 (2006). That decision resolved Respondents' interlocutory appeal of this Court's November 8, 2004, order halting the military commission. The November 8 order held Petitioner's other claims, including his habeas challenge to his continuing detention by U.S. military authorities, in abeyance. Petitioner's detention claim remains

unadjudicated, and litigation of that claim can now proceed following the September 22, 2006, order from the Court of Appeals remanding the case to this Court.

However, the Military Commissions Act of 2006, signed into law by the President on October 17, 2006, purports to strip this Court of subject-matter jurisdiction over Petitioner's detention claim. Petitioner believes that those jurisdictional provisions are unconstitutional on multiple grounds. Accordingly, Petitioner respectfully requests an order setting a briefing schedule on the issue of this Court's subject-matter jurisdiction over the unresolved detention claim asserted in his habeas petition. Because habeas petitions are properly afforded expedited consideration, and because Mr. Hamdan has already been held in U.S. military custody for almost five years, justice is best served by a prompt determination of whether subject-matter jurisdiction exists.

## II. FACTUAL BACKGROUND

### A. Procedural Posture

On April 6, 2004, Mr. Hamdan filed a Petition for Writ of Mandamus Pursuant to 28 U.S.C. § 1361 or, In the Alternative, Writ of Habeas Corpus ("Petition") in U.S. District Court for the Western District of Washington. Mr. Hamdan's Petition set forth two classes of claims: (i) a challenge to the legality of the military commission established to try him, and (ii) a challenge to the legality of his detention at the hands of U.S. military authorities. *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"). Mr. Hamdan specifically pled the fact of his detention as part of his Petition and contested the Government's basis for continuing to hold him. Petition at 1-2 ("Mr. Hamdan is currently being held incommunicado in pre-trial custody by United States Military Authorities, including Respondents herein, at Naval Base Guantanamo Bay."); Petition at ¶ 19 ("Mr. Hamdan is not, and never has been, an enemy alien or unlawful combatant of the United States.").

In July 2004, Petitioner filed a Motion to Authorize Limited Discovery seeking evidence relevant to Mr. Hamdan's activities, capture, and detention, for the purpose of prosecuting Petitioner's detention claim. (Ex. A to Declaration of Joseph McMillan, submitted herewith.) Shortly thereafter, Respondents filed a motion to dismiss or transfer venue to this Court, and a motion to dismiss the Petition as a matter of law. The Court ruled that Petitioner's discovery motion should be held in abeyance pending resolution of Respondents' motions. (Transcript of 7/16/04 hearing before Judge Lasnik at 8, McMillan Decl., Ex. B.)<sup>1</sup> On September 2, 2004, this case was transferred from the Western District of Washington to this Court.

On November 8, 2004, this Court granted Mr. Hamdan's Petition in part, holding that the military commission convened to try him at Guantanamo Bay, Cuba, violated U.S. law and the laws of war, and enjoining further proceedings before the commission. This resolved the challenge to the legality of the military commission. However, the Court held Mr. Hamdan's remaining claims 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[.]”).

Respondents took an interlocutory appeal pursuant to 28 U.S.C. § 1292(a)(1) to the Court of Appeals for the District of Columbia Circuit. On July 15, 2005, the Court of Appeals reversed this Court. *Hamdan v. Rumsfeld*, 415 F.3d 33 (D.C. Cir. 2005). Petitioner moved to stay the Court of Appeals' mandate, and sought review by the U.S. Supreme Court pursuant to a writ of *certiorari*. The Court of Appeals never issued its mandate, and on November 7, 2005, the Supreme Court granted *certiorari*. On June 29, 2006, the Supreme

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<sup>1</sup> Should the Court conclude that it has subject-matter jurisdiction over Petitioner's remaining detention claim, Petitioner will seek a ruling on its Motion to Authorize Limited Discovery, with proposed discovery requests slightly modified as a result of developments in the case since the Motion was filed in July 2004.

Court reversed the Court of Appeals and “remanded for further proceedings.” *Hamdan v. Rumsfeld*, 126 S.Ct. 2749, 2798 (2006). On September 22, 2006, the Court of Appeals vacated its judgment and remanded the case to this Court for further proceedings. (9/22/06 Remand Order, McMillan Decl., Ex. C.) To date, no court has adjudicated Petitioner’s claim challenging his continued detention, a claim properly presented in his initial Petition. Petition ¶¶ 50-51, Prayer for Relief ¶¶ 7-8.

**B. The Military Commissions Act of 2006**

On October 17, 2006, the President signed into law the Military Commissions Act of 2006. Military Commissions Act of 2006 (“MCA”), S. 3930, 109th Cong. (2006) (McMillan Decl., Ex. D). Section 7 of the Act amends the habeas statute by inserting a new section (e), as follows:

**SEC. 7. HABEAS CORPUS MATTERS**

(A) In General. – Section 2241 of title 28, United States Code, is amended...by inserting the following new subsection (e):

“(e)(1) No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

(2) Except as provided in paragraphs (2) and (3) of section 1005(e) of the Detainee Treatment Act of 2005 (10 U.S.C. 801 note), no court, justice, or judge shall have jurisdiction to hear or consider any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.”

(b) Effective Date. – The amendment made by subsection (a) shall take effect on the date of the enactment of this Act, and shall apply to all cases, without exception, pending on or after the date of the enactment of this Act which relate to any aspect of the detention, transfer, treatment, trial, or conditions of detention of an alien detained by the United States since September 11, 2001.

MCA, Section 7 (McMillan Decl. Ex. D at 36-37).

Petitioner in this case is a citizen of Yemen, and not a citizen of the United States. This satisfies the definition of an “alien” under the MCA. MCA, § 948a (3) (McMillan Decl., Ex. D at 2). As noted above, the remaining claim in this case relates to Petitioner’s ongoing detention at the hands of U.S. military authorities. Accordingly, the amendment to the habeas statute set forth in the MCA puts in question this Court’s subject matter jurisdiction over Petitioner’s remaining claim.

However, the jurisdiction-stripping provisions of the MCA are of doubtful constitutionality. Senators from both sides of the aisle, although unsuccessful in passing an amendment to strike the habeas stripping provision in Section 7, recognized that it violated the Suspension Clause. 152 CONG. REC. S10356 (daily ed. Sept. 28, 2006) (Statement of Sen. Leahy) (“The bill before the Senate would not merely suspend the great writ, the great writ of habeas corpus, it would eliminate it permanently.”); 152 CONG. REC. S10360 (Statement of Sen. Feingold) (“[Section 7] is unacceptable, and it almost surely violates our Constitution.”); 152 CONG. REC. S10364 (Statement of Sen. Smith) (“I simply feel this particular provision [Section 7] in this bill ought to be taken out. We ought not to suspend the writ of habeas corpus.”); 152 CONG. REC. S10368 (Statement of Sen. Specter) (“What this bill would do in striking habeas corpus would take our civilized society back some 900 years to King John at Runnymede which led to the adoption of the Magna Charta in 1215, which is the antecedent for habeas corpus and was the basis for including in the Constitution of the United States the principle that habeas corpus may not be suspended.”)<sup>2</sup>

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<sup>2</sup> Senator Specter subsequently stated that the habeas-stripping provision in the MCA was “patently unconstitutional on its face,” and that he believed “the court will clean it up.” C. Babington and J. Weisman, *Senate Approves Detainee Bill Backed by Bush*, Washington Post, Sept. 29, 2006, at A1, available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/09/28/AR2006092800824.html>.

### III. ARGUMENT

#### A. The Court Has a Duty to Assure Itself That Subject-Matter Jurisdiction Exists Before Reaching the Merits of Petitioner's Detention Claim

If any question concerning subject-matter jurisdiction arises during the pendency of a case, a federal court is obligated to assure itself that such jurisdiction exists, even if the parties do not raise the issue. *Liberty Mut. Ins. Co. v. Wetzel*, 424 U.S. 737, 740 (1976); *Rafeedie v. I.N.S.*, 880 F.2d 506, 536 (D.C. Cir. 1989) (“The Supreme Court has often stated that a court is obliged to reach questions of subject matter jurisdiction *sua sponte*, and may undertake review of the merits of a dispute only if the court is satisfied such jurisdiction exists”) (Silberman, J., dissenting); *Denton v. Merit Sys. Protection Board*, 768 F.2d 422, 423 (D.C. Cir. 1985) (“At the outset, it is incumbent upon us to determine whether we in fact have subject matter jurisdiction.... Though the parties have not raised the question, ... we are obviously under a duty to make that determination *sua sponte*.”)

In this case, the Court's subject-matter jurisdiction over Petitioner's remaining detention claim has been put in question by the recent enactment of the MCA.

#### B. The Court Should Consider Briefing From the Parties On the Question of Subject Matter Jurisdiction

Petitioner contends that Section 7 of the MCA is unconstitutional on multiple grounds and does not strip this Court of jurisdiction to consider Petitioner's detention claim. The Constitution provides a right to habeas relief independent of statutory authorization, a privilege that has not been validly suspended. *Rasul v. Bush*, 542 U.S. 466, 473-78 (2004) (“Habeas corpus is a writ antecedent to statute, ... throwing its roots deep into the genius of our common law.”) (holding that detainees in military custody at Guantanamo Bay, Cuba, have a right to bring habeas actions in the federal courts). In addition, the distinction drawn by the MCA between aliens and U.S. citizens violates Equal Protection guarantees. These issues and others raised by the MCA are complex and of the utmost importance to the preservation of liberty and the proper separation of powers under the U.S. Constitution.

Accordingly, it is appropriate and customary for the Court to allow the parties to brief the issue of whether subject-matter jurisdiction exists over Petitioner's remaining claim. *See, e.g., Athens Comm. Hosp., Inc. v. Schweiker*, 686 F.2d 989, 992 (D.C. Cir. 1982); *Amusement and Music Operators Ass'n v. Copyright Royalty Tribunal*, 636 F.2d 531, 533 n. 2 (D.C. Cir. 1980).

**IV. CONCLUSION**

For the foregoing reasons, Petitioner respectfully requests that the Court set a briefing schedule whereby the parties simultaneously submit initial briefs, followed by responses, on the question of this Court's subject-matter jurisdiction over Petitioner's detention claim. A Proposed Order setting forth such a schedule is submitted herewith.

Respectfully submitted this 17th day of October, 2006.

**LIEUTENANT COMMANDER CHARLES SWIFT**

By /s/ Lieutenant Commander Charles Swift  
Lieutenant Commander Charles Swift  
N.C. Bar #21084

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Harry H. Schneider, Jr. (*pro hac vice*)  
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By /s/ Neal Katyal

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Attorneys for Petitioner Salim Ahmed Hamdan



**CERTIFICATE OF SERVICE**

I hereby certify that on October 17, 2006, copies of the foregoing **Petitioner's Motion for Order Setting Briefing Schedule on Subject Matter Jurisdiction**, together with the supporting **Proposed Order** were served by electronic mail and facsimile, upon the following:

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CIVIL ACTION NO. 1:04-cv-01519-JR

**[PROPOSED] ORDER GRANTING PETITIONER'S  
MOTION SETTING BRIEFING SCHEDULE**

UPON CONSIDERATION of Petitioner Salim Ahmed Hamdan's Motion for Order Setting Briefing Schedule, any responses thereto, and all record materials relating to the motion;

IT IS HEREBY ORDERED that the parties shall submit simultaneous briefing concerning this Court's continuing subject matter jurisdiction. Both Petitioner's and Respondents' opening briefs will be filed on [DATE \_\_\_\_\_], with oppositions filed simultaneously by Petitioner and Respondents fourteen (14) days thereafter.

It is FURTHER ORDERED that page limits for the briefing shall be as determined by LCvR 7(e), with briefs not to exceed 45 pages for each party's opening and opposition brief.

ORDERED this \_\_\_\_\_ day of \_\_\_\_\_, 2006.

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Honorable James Robertson  
United States District Court Judge