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

Nos. 05-5062 & 05-5063

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

LAKHDAR BOUMEDIENE, *ET AL.*,
APPELLANTS,
V.
GEORGE W. BUSH, *ET AL.*,
APPELLEES.

RIDOUANE KHALID,
APPELLANT,
V.
GEORGE W. BUSH, *ET AL.*,
APPELLEES.

ON APPEAL FROM A DECISION OF THE
UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

SUPPLEMENTAL BRIEF OF PETITIONERS BOUMEDIENE, ET AL., AND KHALID REGARDING THE SUPREME COURT'S DECISION IN *HAMDAN V. RUMSFELD*

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GLOSSARY

Combatant Status Review Tribunal ..... CSRT

Detainee Treatment Act of 2005, Pub. L. No. 109-148 ..... the Act or DTA

Supplemental Brief of the Federal Parties
Addressing the Detainee Treatment Act of 2005 (Feb. 17, 2006) ..... Gov't DTA Br.

Corrected Supplemental Brief of Petitioners Boumediene, et al.,
and Khalid Regarding Section 1005 of the
Detainee Treatment Act of 2005 (Mar. 15, 2006) ..... Boumediene DTA Br.

Reply Brief of the Federal Parties
Addressing the Detainee Treatment Act of 2005
(Mar. 17, 2006) ..... Gov't DTA Reply Br.

Government's Supplemental Brief
Addressing *Hamdan v. Rumsfeld* (Aug. 1, 2006) ..... Gov't Supp. Br.

Respondents' Motion to Dismiss for Lack of Jurisdiction,
Hamdan v. Rumsfeld (U.S. No. 05-184)
(Jan. 2006) ..... Gov't Mot. to Dismiss in *Hamdan*

Lakhdar Boumediene, Mohammed Nechla, Hadj Boudella, Belkacem Bensayah, Mustafa Ait Idir, Saber Lahmar (the Boumediene Petitioners) and Ridouane Khalid (together Petitioners) submit this brief pursuant to this Court's order of July 26, 2006.

SUMMARY OF ARGUMENT

The Supreme Court's decision in *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006), vindicated Petitioners' position that the DTA does not apply to pending cases and does not affect the federal courts' jurisdiction over Petitioners' habeas actions. The Court decisively rejected the Government's attempt to invoke the DTA to insulate its activities at Guantanamo Bay from habeas review.

The Court rebuffed the Government's arguments based on sections 1005(e)(2) and (3) of the DTA no less than its arguments based on section 1005(e)(1). Indeed, the Court was unequivocal that creating "exclusive" review provisions in sections 1005(e)(2) and (3) did not affect jurisdiction over pending habeas cases that do not challenge "the validity of any final decision" of a CSRT or a military commission. As Petitioners have argued here and as the Supreme Court has now held, the DTA created a system in which "pending habeas actions" are "preserved" in the federal courts' traditional jurisdiction, while "more routine challenges to final decisions" rendered by CSRTs may be raised under section 1005(e)(2). *Hamdan*, 126 S. Ct. at 2769. Accordingly, the Court should decide

Petitioners' appeal and remand the case to the district court to "consider . . . the merits" of each petition for habeas relief. *Rasul v. Bush*, 542 U.S. 466, 485 (2004).

Footnote 14 of *Hamdan* reserved the question whether a habeas petition that *did* challenge the validity of a CSRT or military commission decision—if such a petition existed—might need to be transferred to this Court for adjudication under section 1005(e)(2) or (3). The footnote nowhere suggests, much less states, that the DTA has any effect on habeas actions like those of Petitioners, which do not fall under section 1005(e)(2).

The Government's supplemental brief merely adds a misreading of *Hamdan* to its previous mischaracterizations of the DTA and Petitioners' claims. *Hamdan* holds that habeas jurisdiction over pending cases is unaltered. This Court should now rule on the merits of Petitioners' appeals and reverse the judgment of the district court dismissing their habeas petitions.

ARGUMENT

HAMDAN CONFIRMED THE FEDERAL COURTS' CONTINUING HABEAS JURISDICTION AND REJECTED THE GOVERNMENT'S ARGUMENTS BASED ON THE DTA

The Supreme Court held in *Hamdan* that the DTA does not alter federal jurisdiction over habeas petitions filed by Guantanamo prisoners that were pending when the Act was passed. In so holding, the Court vindicated Petitioners' analysis of the statute before this Court, avoided any need to address the Suspension Clause, and rejected the arguments advanced here by the Government.

1. The Supreme Court applied "[o]rdinary principles of statutory construction" to conclude that section 1005(e)(1) did not repeal habeas jurisdiction. *Hamdan*, 126 S. Ct. at 2764. The Court rejected the Government's attempt to construct a general "presumption against jurisdiction" from cases such as *Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994), *Bruner v. United States,* 343 U.S. 112 (1952), and *Hallowell v. Commons,* 239 U.S. 506 (1916). 126 S. Ct. at 2764-65. The Court stated unequivocally: "we conclude that §1005(e)(1) does not strip federal courts' jurisdiction over cases pending on the date of the DTA's enactment." *Id.* at 2769 n.15. In reaching this conclusion, the Supreme Court accepted many arguments that Petitioners have made in this Court. In particular, the Court drew an appropriate "negative inference" from the omission of section 1005(e)(1) from section 1005(h)(2), *see Lindh v. Murphy*, 521 U.S. 320

(1997), and dismissed statements that were belatedly inserted into the Congressional Record as nonprobative of legislative intent. 126 S. Ct. at 2765-66 & n.10; *compare* Boumediene DTA Br. 13-15.

2. Deprived of its arguments based on section 1005(e)(1), the Government asserts that sections 1005(e)(2) and (3) *implicitly* repealed habeas jurisdiction by creating an "exclusive" review procedure in this Court. Gov't Supp. Br. 2, 7. But the Supreme Court rejected this argument as well. The Government argued in *Hamdan* that, even if section 1005(e)(1) did not exist, habeas jurisdiction would be stripped by sections 1005(e)(2) and (3) and that any challenge by a prisoner charged before a military commission must occur through the "exclusive review provision" of section 1005(e)(3), or not at all. Gov't Mot. to Dismiss in *Hamdan* 16 (asserting that Hamdan would be "required to avail himself of the exclusive review provision established with respect to military commissions in Section 1005(e)(3)" even in the absence of section 1005(e)(1)); *id.* at 17 (similar). The Government premised its argument on the same inapposite cases that it has relied on in this Court. *Compare id.* at 16-17 (citing *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994) and *FCC v. ITT World Commc'ns, Inc.*, 466 U.S. 463 (1984)) *with* Gov't DTA Br. 22 (citing the same cases) *and* Gov't Supp. Br. 7 (citing *Thunder Basin*).

The Supreme Court repeatedly rebuffed the Government's effort to transform sections 1005(e)(2) and (3) into alternative repeals of habeas. The Court recognized that while section 1005(e)(1) is a "jurisdiction-stripping" provision, sections 1005(e)(2) and (3) are not: "subsection (e)(1) strips jurisdiction while subsections (e)(2) and (e)(3) restore it in limited form." 126 S. Ct. at 2768. The Court also rejected the Government's reliance on post-debate statements of Senators Graham and Kyl, instead giving weight to Senator Levin's view that "the final version of the Act preserved jurisdiction over pending habeas cases." *Id.* at 2766 n.10.

Most importantly, the Court specifically rejected the premise that the DTA replaced habeas with a single "exclusive" review scheme. Rather, the Court found in the statute two streams of prisoner-initiated challenges, namely

> 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.

126 S. Ct. at 2769. *Hamdan*'s holding that the DTA does not displace traditional habeas in pending cases, but rather coexists alongside it, forecloses the

Government's assertion here that section 1005(e)(2) "replaces" or "precludes the exercise of" habeas jurisdiction. Gov't Supp. Br. 2, 4, 7.[1]

Petitioners' pending habeas actions are not the "routine challenges" that Congress meant to channel into this Court's specialized jurisdiction under the DTA. Petitioners challenge their indefinite detention, invoking the full breadth of inquiry permitted at common law and codified by 28 U.S.C. §§ 2241(c)(1) and (3). The Supreme Court has now held both that Guantanamo prisoners may bring such challenges, *see Rasul*, 542 U.S. at 485, and that the DTA did not strip that right, *see Hamdan*, 126 S. Ct. at 2769. For all of the reasons set forth in their prior briefs, Petitioners are therefore entitled to all of the procedural rights afforded by the habeas statute to test the legality of their Executive detention without charge or trial. *See, e.g.*, Boumediene DTA Br. 32-33.

The Government insinuates that habeas jurisdiction might be preserved only in cases brought prior to a "final decision" of a CSRT or military commission, as Hamdan's was. *See* Gov't Supp. Br. 5. This contention fails for two reasons. First, even if the Government's reading of *Hamdan* were correct—and it is not—

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[1] The Government dwells on the Supreme Court's recognition that section 1005(e)(2) applies to pending cases, suggesting that this development is of "great significance." Gov't Supp. Br. 5; *see also id.* at 7. On the contrary, Petitioners have never disputed that section 1005(e)(2) would apply to pending cases that properly fell within its scope (should any exist). *See* Boumediene DTA Br. 33. That basic fact resolves nothing, since the instant petitions do not fall within the scope of section 1005(e)(2).

Petitioners stand in the same position as Hamdan in this regard. These petitions were filed before Petitioners' CSRTs were convened and long before those CSRTs issued any decision; none even mentions a CSRT. *See* Boumediene DTA Br. 2, 31-32. It was the Government that rapidly churned through hundreds of CSRTs and proffered the resulting records as factual returns to these petitions. *Hamdan* establishes that such extraordinary procedural alchemy cannot substitute a narrow review of CSRT records for the broad substantive and procedural protections of the habeas statute, which the Supreme Court guaranteed to Guantanamo prisoners over two years ago in *Rasul*.

Second, the Supreme Court rejected the Government's section 1005(e)(2) argument not only because Hamdan's case posed no danger of "dual jurisdiction," but also because the Government's "more general suggestion" that the DTA did not allow two streams of review "not only is belied by the legislative history . . . but is otherwise without merit." 126 S. Ct. at 2768-69. This "more general" reasoning applies both to cases where there is no "final decision" (such as Hamdan's) and also to pending habeas cases challenging detention and seeking release. Such habeas petitions are "preserved" regardless of whether the Government's procedures have produced a "final decision." *Cf. Hamdan*, 126 S. Ct. at 2810 (Scalia, J., dissenting) ("[T]he Court today concludes that . . . *every* 'court, justice, or judge' before whom such a habeas application was pending

on December 30 has jurisdiction to hear, consider, and render judgment on it."); *id.* at 2817-18 (observing that the "vast majority of pending petitions, no doubt, do not relate to military commissions at all, but to more commonly challenged aspects of 'detention'" and that the Court's holding "retains jurisdiction over cases sufficiently numerous to keep the courts busy for years to come").[2]

3. Footnote 14 of the *Hamdan* opinion cannot rescue the Government. There, the Court merely speculated that there "may be" pending petitions that, unlike Hamdan's and the Petitioners' here, "qualify as challenges to 'final decision[s]' within the meaning of" section 1005(e)(2) or (3). 126 S. Ct. at 2769 n.14. The Court expressed no position on whether section 1005(e)(2) or (3) would require the transfer to this Court of "such an action"—*i.e.*, an action that "qualif[ied] as" a challenge to a final decision of a CSRT or military commission. *Id.* Because the instant petitions do not so "qualify," footnote 14 is irrelevant.

Ignoring both the Court's language and its reasoning, the Government argues (Supp. Br. 7) that *any* challenge to detention by a Guantanamo prisoner

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[2] In another case before this Court, the Government attempts to rewrite the DTA by asserting that section 1005(e)(2) covers pending actions that challenge "detention as enemy combatants." Reply Br. for Appellants and Br. for Cross-Appellees 2, 5, *Kiyemba v. Bush* (Nos. 05-5487 *et al.*) (Aug. 2, 2006). Congress could easily have drafted section 1005(e)(2) as the Government wishes, but it did not. Review under that section only covers challenges to the "validity of a final decision" of a CSRT, not challenges to detention. The Court should disregard any similar effort by the Government to misrepresent the DTA in this case.

"necessarily" qualifies as a challenge to a CSRT decision. The Government's *post hoc* CSRT procedures, hastily assembled and unfairly conducted over two years after Petitioners were imprisoned at Guantanamo, cannot diminish the scope of the petitions at issue here. The Government's footnote 14 argument is foreclosed by the main text of the opinion, which envisions that pending habeas actions will be "preserved" and only "more routine challenges to final decisions" will be subject to the DTA's new review procedures. 126 S. Ct. at 2769. In describing the two types of challenge, the Supreme Court used the word "tribunals," indicating that both avenues of review—pending habeas actions and specialized review in this Court—existed not only for persons subject to military commission proceedings, but also for persons subject to other "tribunals," namely Combatant Status Review Tribunals. *Id.* It would be absurd to hold that section 1005(e)(2) eliminated habeas jurisdiction entirely, whereas section 1005(e)(3)—which "mirrors paragraph (2) in structure," *id.* at 2763, and also applies to pending cases, *see* DTA § 1005(h)(2)—preserved it. *See Clark v. Martinez*, 543 U.S. 371, 378 (2005) ("To give these same words a different meaning for each category would be to invent a statute rather than interpret one.").

The footnote 14 discussion focusing on habeas petitions that "qualify as challenges to 'final decisions' within the meaning of subsection (e)(2) or (e)(3)" necessarily addresses only challenges limited to the issues encompassed by those

subsections. *Hamdan*, 126 S. Ct. at 2769 n.14. The Supreme Court recognized sections 1005(e)(2) and (3) authorize only "limited" review of CSRT and commission decisions, in contrast to the broad challenge to detention permitted on habeas. *Id.* at 2763, 2767-68; *see also id.* at 2807 (Kennedy, J., concurring in part); Gov't DTA Br. 39. The Supreme Court was also aware that most, if not all, pending Guantanamo habeas petitions raise issues exceeding the "limited" review envisioned in sections 1005(e)(2) and (3). *See, e.g.,* Gov't Mot. to Dismiss in *Hamdan* 20 (acknowledging that many of the "hundreds of pending cases" raise claims not governed by the DTA that are subject to "general habeas review"). By hazarding only that there "may be" habeas petitions that fell within those sections, the Court acknowledged the possibility that *all* pending petitions may fall outside the DTA's narrow scope of review. *Hamdan*, 126 S. Ct. at 2769 n.14. The language chosen by the Court forecloses the argument that *every* habeas petition filed by a Guantanamo prisoner "necessarily" falls under section 1005(e)(2) or (3). Gov't Supp. Br. 7.

4. The Government's argument that section 1005(e)(2) repealed habeas jurisdiction fails for other reasons as well. As Petitioners have previously noted (and as the Government ignores here), habeas jurisdiction cannot be repealed by implication. "Congress must articulate specific and unambiguous statutory directives to effect a repeal." *INS v. St. Cyr*, 533 U.S. 289, 299 (2001); *see*

Boumediene DTA Br. 27-30. Any suggestion that section 1005(e)(2) met *St. Cyr*'s requirement through the reference to habeas jurisdiction in section 1005(e)(1), *see* Gov't DTA Reply Br. 4-5, fails in light of *Hamdan*'s holding that section 1005(e)(1) does not repeal habeas in pending cases. The cases cited by the Government (Supp. Br. 7) do not alter this conclusion. *See* Boumediene DTA Br. 29-30 & n.10. Moreover, Congress could not have repealed habeas jurisdiction—even had it wished to—without violating the Suspension Clause, since the limited review under section 1005(e)(2) does not provide an adequate substitute for habeas. *See id.* at 33-56.

CONCLUSION

For the foregoing reasons and those stated in prior briefs, the DTA does not affect this Court's jurisdiction over Petitioners' appeal or the district court's jurisdiction over their habeas petitions, and the judgment of the district court dismissing their habeas petitions should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Dawn Canady, hereby certify that on August 8, 2006, I filed and served the foregoing brief by causing an original and fourteen copies to be delivered by hand to the Court and by causing two copies of the brief to be delivered to the following counsel by email transmission and by hand delivery:

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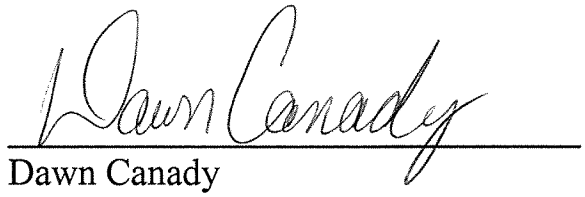

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