[ORAL ARGUMENT SCHEDULED FOR SEPTEMBER 8, 2005]

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.,
Petitioners-Appellees/Cross-Appellants,

v.

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

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

SUPPLEMENTAL BRIEF FOR THE UNITED STATES, ET AL.

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SUPPLEMENTAL BRIEF FOR THE UNITED STATES, ET AL.

The United States submits this supplemental brief in response to this Court's order of July 26, 2005, which directed the government to file a brief "addressing the effect of this court's opinion in Hamdan v. Rumsfeld, No. 04-5393 (D.C. Cir. July 15, 2005)." Hamdan significantly undercuts the claims advanced by petitioners in this case. Specifically, it bolsters our argument that the Due Process Clause of the Fifth Amendment is inapplicable to aliens captured abroad and held at Guantanamo

Bay, Cuba. In addition, Hamdan forecloses petitioners' Geneva Convention claims altogether by holding that the Geneva Convention does not create judicially enforceable rights, and its rationale is fully applicable to petitioners' other treaty-based claims. Finally, Hamdan bars petitioners' claims based on Army regulations relating to the treatment of detainees.

STATEMENT

In Hamdan v. Rumsfeld, ___ F.3d ___, 2005 WL 1653046, No. 04-5393 (D.C. Cir. July 15, 2005), this Court upheld the legality of the use of military commissions to try alien enemy combatants for violations of the laws of armed conflict. Hamdan himself, who served as the personal driver for Osama bin Laden and other high ranking al Qaeda members and associates, was captured during military operations in Afghanistan and was transferred to a detention facility at Guantanamo Bay, Cuba. In July 2003, the President issued a 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," and designated Hamdan for trial by military commission. Slip op. 4. In July 2004, Hamdan was 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 filed a petition for a writ of habeas corpus in federal district court to challenge the commission proceedings. The district court granted the petition in part. Invoking various provisions of the Third Geneva Convention, that court enjoined the ongoing military commission proceedings against Hamdan and ordered him released to the general detention population at the Guantanamo Bay Naval Base.

This Court reversed. It held that the Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (AUMF), among other provisions, "authorized the military commission that will try Hamdan." Slip op. 9. It further held that the district court had erred in determining that the Third Geneva Convention creates judicially enforceable rights, see slip op. 10-13, and that members and affiliates of al Qaeda qualify for prisoner-of-war status under the Geneva Convention, see slip op. 13-14. Next, this Court stated that, contrary to Hamdan's argument, the Supreme Court's decision in Rasul v. Bush, 124 S. Ct. 2686 (2004), considered only the "'narrow' question" of the scope of statutory habeas jurisdiction, and the fact "[t]hat a court has jurisdiction over a claim does not mean the claim is valid." Slip op. 11, 13. And it held that military commissions need not follow the procedural rules laid out for courts-martial in the Uniform Code of Military Justice. See slip op. 17-18.

ARGUMENT

I. Hamdan undermines petitioners' claims based on the Due Process Clause of the Fifth Amendment.

As we explained in our opening brief, petitioners' constitutional claims lack merit because the Due Process Clause is inapplicable to aliens captured abroad and held at Guantanamo Bay, Cuba. See Opening Brief for the United States 15-29. Both the Supreme Court and this Court have been "emphatic" in rejecting "the claim that aliens are entitled to Fifth Amendment rights outside the sovereign territory of the United States." United States v. Verdugo-Urquidez, 494 U.S. 259, 269 (1990); see also Johnson v. Eisentrager, 339 U.S. 763, 781-85 (1950). Under Eisentrager, the applicability of the Fifth Amendment turns on whether the United States is sovereign over a territory, not whether it merely exercises control there. See id. at 778; see also Verdugo, 494 U.S. at 269.

Petitioners do not contend that the United States is sovereign at Guantanamo Bay, but instead rely on an expansive reading of the Supreme Court's decision in Rasul v. Bush, 124 S. Ct. 2686 (2004). In Rasul, the Court held that jurisdiction under the habeas statute extends to claims brought by detainees at Guantanamo Bay. Petitioners attach dispositive significance to a footnote in Rasul stating that their allegations "unquestionably describe 'custody in violation of the Constitution or laws or treaties of the United States.' 28 U.S.C. § 2241(c)(3)." 124 S. Ct. at

2698 n.15. In their view, this footnote implicitly overruled the Fifth Amendment holdings of Eisentrager and its progeny.

Hamdan undermines petitioners' implausible reading of Rasul. In Hamdan, this Court explained that Rasul addressed only the scope of statutory habeas jurisdiction, leaving Eisentrager's substantive holdings intact. As the Court stated, Rasul decided a "'narrow' question: whether federal courts had jurisdiction under 28 U.S.C. § 2241 'to consider challenges to the legality of the detention of foreign nationals' at Guantanamo Bay." Slip op. 11 (quoting Rasul, 124 S. Ct. at 2690). The Court further stressed: "That a court has jurisdiction over a claim does not mean that the claim is valid. See Bell v. Hood, 327 U.S. 678, 682-83 (1946)." Slip op. 13; compare Opening Brief for the United States 24 (citing Bell for the proposition that "[t]o say that these allegations are sufficient for jurisdictional purposes, a reading of footnote 15 strongly suggested by context, establishes only that they are not 'wholly insubstantial' or 'frivolous' on the merits"). Thus, Hamdan supports our argument that Rasul did not alter the established principle that the Fifth Amendment is inapplicable to aliens who are outside the sovereign territory of the United States.

II. Hamdan forecloses petitioners' claims under the Third Geneva Convention, and significantly weakens their other treaty-based claims.

In Hamdan, this Court squarely held that the Third Geneva Convention does not create judicially enforceable rights. See slip op. 13 ("We therefore hold that the 1949 Geneva Convention does not confer upon Hamdan a right to enforce its provisions in court."). It also rejected the argument, advanced by petitioners here, see Appellees' Brief 62-64, that the habeas statute permits courts to enforce treaty rights that otherwise would not be judicially enforceable. See slip op. 13 ("The availability of habeas may obviate a petitioner's need to rely on a private right of action . . . but it does not render a treaty judicially enforceable."). These holdings are binding on this panel and are dispositive of petitioners' claims under the Third Geneva Convention.

Moreover, even if the Convention were judicially enforceable, alternative holdings in Hamdan would foreclose petitioners' claims on the merits. Hamdan held that the Convention does not apply to al Qaeda and its members, since that organization is not one of the "High Contracting Parties" to the Convention. Slip op. 14. Nor could Hamdan qualify for prisoner-of-war status as "a member of a group" that meets the requirements of Article 4(A)(2) of the Convention—requirements that include displaying "a fixed distinctive sign recognizable at a distance" and conducting "operations in accordance with the laws

and customs of war." Ibid. The President has determined that neither al Qaeda detainees nor Taliban detainees qualify for prisoner-of-war status, see Addendum to Opening Brief for the United States 9a-10a, and petitioners do not, and could not, challenge that manifestly correct foreign-policy judgment of the Commander-in-Chief. These holdings in Hamdan therefore provide alternative bases for rejecting petitioners' Geneva Convention claims.

Petitioners have also asserted claims under treaties other than the Third Geneva Convention, including the Fourth Geneva Convention, see Appellees' Brief 70, the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, see id. at 71, the Convention for Elimination of the Worst Forms of Child Labor, see ibid, and the International Covenant on Civil and Political Rights, see id. at 72 n.65. Hamdan's reasoning undermines all of these claims. Hamdan explained that "this country has traditionally negotiated treaties with the understanding that they do not create judicially enforceable individual rights." Slip op. 10. That is because, "[a]s a general matter, a 'treaty is primarily a compact between independent nations,'" so "[i]f a treaty is violated, this 'becomes the subject of international negotiations and reclamation,' not the subject of a lawsuit." Ibid. (quoting Head Money Cases, 112 U.S. 580, 598 (1884)). Therefore, "'[i]nternational agreements, even those directly

benefitting private persons, generally do not create private rights or provide for a private cause of action in domestic courts.'" Ibid. (quoting Restatement (Third) of the Foreign Relations Law of the United States § 907 cmt. a, at 395 (1987)). Petitioners have made no effort to overcome this presumption against judicial enforceability with respect to the treaties on which they rely. For this reason, those treaty claims should be rejected.

III. Hamdan forecloses petitioners' claims based on Army regulations.

Petitioners have claimed that Army Regulation 190-8 entitles them to be treated as prisoners of war. See Appellee Brief 75. As we have explained, even if their interpretation of the regulation were correct, the regulation could not override the President's contrary determination that al Qaeda and Taliban detainees are not entitled to prisoner-of war status. See Opening Brief 64. This Court accepted this argument in Hamdan when it held that the regulation only "requires that prisoners receive the protections of the Convention 'until some other legal status is determined by competent authority.'" Slip op. 19. The Court went on to conclude that "[n]othing in the regulations, and nothing Hamdan argues, suggests that the President is not a 'competent authority' for these purposes." Ibid.

Petitioners have not explained exactly what procedures they believe are guaranteed to them by Army Regulation 190-8. But even assuming that petitioners

have a right to have their status determined by a "competent tribunal," the Hamdan Court held that a military commission was such a tribunal because, as specified by Army Regulation 190-8, it was "composed of three commissioned officers, one of whom must be field-grade." Ibid. The Combatant Status Review Tribunals (CSRTs) that have determined petitioners' status as enemy combatants also meet these requirements. See JA 1194 ("Each tribunal shall be composed of a panel of three neutral commissioned officers . . . . The senior member of each Tribunal shall be an officer serving in the grade of O-6 and shall be its President. The other members of the Tribunal shall be officers in the grade of O-4 and above."). Although the CSRTs did not specifically address petitioners' prisoner-of-war status, they did find petitioners to be enemy combatants by virtue of their association with Taliban or al Qaeda forces, see JA 1187, and this, combined with the President's determination concerning those groups, removes any doubt as to their prisoner-of-war status. Hamdan thus forecloses petitioners' claims under Army Regulation 190-8.

CONCLUSION

For the foregoing reasons, as well as for the reasons stated in our principal briefs, the district court's order should be reversed insofar as it denies the Government's motions to dismiss, and the cases should be remanded with instructions to dismiss.

Respectfully submitted,

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August 2, 2005

CERTIFICATE OF COMPLIANCE

I certify, pursuant to Fed. R. App. P. 32(a)(7)(C) and D.C. Circuit Rule 32(a), that the foregoing brief is proportionally spaced, has a typeface of 14 points and contains 1,826 words (which does not exceed the 2,500-word limit set by this Court in its order of July 26, 2005).

Robert M. Loeb

CERTIFICATE OF SERVICE

I hereby certify that on August 2, 2005, I served the foregoing "Supplemental Brief for the United States" upon counsel of record by causing copies to be sent by first-class mail and by e-mail transmission to lead counsel for each case:

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