SCHEDULED FOR ORAL ARGUMENT ON MARCH 8, 2005

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

SALIM AHMED HAMDAN,	)	
	)	
Petitioner-Appellee,	)	
	)	
v.	)	No. 04-5393
	)	[Civ. Action No. 04-CV-1519 (JR)]
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-Appellants.	)	
	)	

RESPONDENTS-APPELLANTS' OPPOSITION TO
PETITION FOR INITIAL HEARING EN BANC

Respondents-appellants, Donald H. Rumsfeld, United States Secretary of

Defense, *et al.*, respectfully oppose Salim Ahmed Hamdan's Petition for Hearing En Banc. The Government's appeal is currently pending before a panel of this Court, where it has been briefed on an expedited basis and will be argued on March 8, 2005. Although the questions presented in the case are important and serious ones — as in countless serious and important cases this Court hears — they can and should be resolved by the panel under established principles of law and consonant with the holdings of the Supreme Court and this Court. Hamdan, having refused to consent to expedition of the appeal, cannot now reasonably demand immediate en banc review, before the panel even renders its judgment in the case. The Supreme Court recently denied Hamdan's petition for review before judgment because he could not show undue prejudice or any other cogent reason for bypassing expedited review by this Court. *Hamdan v. Rumsfeld*, ___ S. Ct. ___, No. 04-702, 2005 WL 88926 (U.S. Jan. 18, 2005). Similarly, there is no merit to Hamdan's attempt to avoid expedited review by the panel.

STATEMENT

1. On November 8, 2004, the district court granted in part the habeas corpus petition of Salim Ahmed Hamdan. Hamdan is a trained al Qaeda member/affiliate who joined forces with Osama bin Laden in 1996, serving as the personal driver for bin Laden and other high-ranking al Qaeda members and associates. *See* Joint Appendix (J.A.) 192-193. Hamdan delivered weapons, ammunition or other supplies to al Qaeda members and associates. *See* J.A. 193. He was trained to use rifles, handguns and machine guns at an al Qaeda camp in Afghanistan. *See* J.A. 193.

Hamdan was captured as part of the U.S. military operation in Afghanistan in late 2001. He was subsequently transferred to the detention facility at the U.S. Naval Base at Guantanamo Bay, Cuba. On July 3, 2003, the President issued a

finding "that there is reason to believe that [Hamdan] was a member of al Qaida or was otherwise involved in terrorism directed against the United States," and designated Hamdan for trial by military commission. *See* J.A. 374-375.

Hamdan filed a petition for mandamus or habeas corpus, which the district court granted in part on November 8, 2004. *See* J.A. 416-417. The court held that al Qaeda members and affiliates are covered by the Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949 (hereafter the "Geneva Convention"), and that the Geneva Convention is self-executing and grants Hamdan rights enforceable in federal court. Based on its construction of the Geneva Convention and U.S. Army regulations, the court held that Hamdan has the right to be treated as a prisoner of war (until determined otherwise by "a competent authority"), and that he cannot be tried for his war crimes by the currently constituted military commission. The court further held that, under the Uniform Code of Military Justice, Hamdan can only be tried by a military commission that affords him the full rights a U.S. service member would receive in a court-martial. The court enjoined the ongoing military commission proceedings against Hamdan and ordered him released to the general detention population at the Guantanamo Bay Naval Base. J.A. 416-417.

2. The Government appealed the district court's November 8 order and moved to expedite the appeal. Hamdan's counsel, however, refused to consent to expedition, reserving the right to oppose the government's motion. Nonetheless, the Court granted expedition on November 17, and the appeal was fully briefed by January 10, 2005. Oral argument has been scheduled for March 8, 2005, before Judge Randolph, Judge Roberts, and Judge Williams.

3. On November 22, 2004, Hamdan filed a petition for certiorari before judgment in the U.S. Supreme Court and also sought to expedite consideration of

the petition. *See Hamdan v. Rumsfeld*, No. 04-702 (U.S.). The Government opposed the petition, explaining that there was no need to short-circuit the process of orderly review in this Court. The Government noted that Hamdan had not shown irreparable harm of a nature that would warrant immediate review; that the legal issues involved in the case would benefit from consideration by this Court; and that review by this Court could obviate the need for Supreme Court intervention. The Supreme Court denied expedited consideration of the petition, and then denied the petition for certiorari on January 18, 2005.

ARGUMENT

Petitioner seeks the exceptional remedy of initial hearing en banc despite the fact that an appeal is pending before a panel of this Court on a highly expedited basis, with argument scheduled in just six weeks, in which the petitioner will have an ample opportunity to raise his arguments for affirmance. There is no irreparable harm that might warrant circumventing this orderly review process, as petitioner prevailed in the district court and has received interim injunctive relief. Nor are petitioner's arguments of a type that require consideration by the en banc Court in the first instance. Initial hearing en banc is typically reserved for cases in which an appellant claims that panel review would be futile because he challenges binding Circuit precedent; neither the Government nor Hamdan makes such a claim in this case. The issues presented in this case are both serious and significant, but panels of this Court routinely hear and consider cases of similar importance. *E.g.*, *Eisentrager v. Forrestal*, 174 F.2d 961 (D.C. Cir. 1949) (challenge to detention of civilians convicted of war crimes), *rev'd sub nom. Johnson v. Eisentrager*, 339 U.S. 763 (1950); *In re Sealed Case*, 838 F.2d 476 (D.C. Cir.) (authority of independent counsel), *rev'd sub nom. Morrison v. Olson*, 487 U.S. 654 (1988); *LoBue v. Christopher*, 82 F.3d 1081 (D.C. Cir. 1996) (constitutionality of extradition statute);

In re Sealed Case, 148 F.3d 1073 (D.C. Cir.) (validity of Secret Service privilege), *cert. denied*, 525 U.S. 990 (1998); *Center for National Security Studies v. Department of Justice*, 331 F.3d 918 (D.C. Cir. 2003) (access to names of persons detained after 9/11 attacks), *cert. denied*, 540 U.S. 1104 (2004). Notably, all three of the enemy combatant cases heard last term by the Supreme Court involved panel opinions rather than the extraordinary initial en banc procedure that petitioner proposes. *See Al Odah v. United States*, 321 F.3d 1134 (D.C. Cir. 2003), *rev'd sub nom. Rasul v. Bush*, 124 S. Ct. 2686 (2004); *Hamdi v. Rumsfeld*, 316 F.3d 450 (4th Cir. 2003), *vacated*, 124 S. Ct. 2633 (2004); *Padilla v. Rumsfeld*, 352 F.3d 695 (2d Cir. 2003), *rev'd*, 124 S. Ct. 2711 (2004). Hamdan's petition for initial hearing en banc is without merit, and should be denied.

1. Hamdan's primary argument for initial hearing en banc rests on the "exceptional importance" of this litigation and the legal issues presented. Pet. 6. In so arguing, Hamdan relies upon statements made by the Government regarding the need for expedition of the panel appeal. While we fully agree that the district court's erroneous rulings "represent an unprecedented judicial intrusion into the prerogatives of the President," Pet. 7, the Executive has decided that the appropriate avenue to redress that intrusion is through expedited appellate review by a panel of this Court. As the judges on this Court are well aware, the Court routinely deals with highly significant cases through the usual process of three-judge panel decisions. Furthermore, if a panel of this Court reverses the district court, no further review by the en banc Court or by the Supreme Court may be required. Hamdan's attempt to evade expedited panel review is wholly unwarranted.

Moreover, Hamdan's counsel affirmatively refused to consent to an expedited appeal schedule, expressly reserving the right to *oppose* our motion to expedite the appeal. Hamdan apparently has had a change of heart, as he now claims that

expedited review by a panel would be too slow and that this case should immediately proceed to consideration by the full Court. Notably, Hamdan did not file his petition for initial hearing en banc until *after* this Court announced the panel members. This belated request came more than a month after this Court granted expedited review and well after the Government had already filed its opening brief. Hamdan's newfound need for urgency in this Court's review therefore rings hollow.

2. Hamdan also suggests that initial en banc review is justified by his irreparable harm as a result of his continued detention. This argument is a non sequitur. Hamdan's military trial has been enjoined, and the legal claims advanced in his federal-court petition do not address the validity of his continuing detention as an enemy combatant, but rather challenge his trial by military commission. *See* J.A. 56-64.

Hamdan is an alien with no ties to the United States who is being detained by the U.S. military as an al Qaeda combatant and whose status as such as was confirmed by a Combatant Status Review Tribunal. He therefore is subject to continued detention as an enemy combatant regardless of the outcome of his legal challenge to his trial by military commission. *See Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2643 (2004) (plurality opinion) (concluding that Congress through the Authorization for the Use of Military Force has authorized the detention of even American citizens who are determined to be enemy combatants, whether that determination is the product of "concession or * * * some other process that verifies this fact with sufficient certainty"); *id.* at 2679 (Thomas J., dissenting).

Notably, the district court's order granting Hamdan's petition in part did not order his release. To the contrary, the district court recognized that "the Supreme Court made it clear, in *Hamdi*, that, whether or not Hamdan has been charged with a crime, he may be detained for the duration of the hostilities in Afghanistan if he has

been appropriately determined to be an enemy combatant." J.A. 415; *see also Khalid v. Bush*, ___ F. Supp.2d ___, No. Civ. 1:04-1166 (RSL), 2005 WL 100924, at *1 (D.D.C. Jan. 19, 2005) (holding that enemy combatants lacked any "viable legal theory" to challenge the legality of their detention, and dismissing habeas corpus petitions brought by aliens detained at Guantanamo).

Hamdan suggests that success in this suit could nonetheless entitle him to be evaluated and released under the Defense Department's "Annual Review Procedure." Wholly apart from the fact that petitioner has no right to such a review, he also cannot show any reasonable likelihood of release following such a review. Within just the past few months, Hamdan was evaluated by a Combatant Status Review Tribunal, which found that he was a member or affiliate of al Qaeda. As such, he is indisputably subject to detention pending active hostilities in Afghanistan, which are likely to continue for at least the immediately foreseeable future.

Thus, whether or not Hamdan prevails in this case, and whether or not he prevails in his war crime trial, he may still be detained by the United States as an enemy combatant. Accordingly, there is no justification for the extraordinary step of initial en banc review based upon Hamdan's continued detention.

3. Initial en banc review is typically reserved for exceptional cases in which an appellant asserts that panel review would be useless because he is challenging an otherwise binding Circuit precedent. In this appeal, however, neither the Government nor Hamdan makes such a claim. Nor is there a pending en banc case raising the same question, as was true in *Legal Assistance for Vietnamese Asylum Seekers v. Department of State*, 104 F.3d 1349, 1351 (D.C. Cir. 1997), in which initial hearing en banc was thus determined to be appropriate.

Although the issues raised in the appeal are important, Hamdan presents no

good reason to bypass expedited review by the panel. Hamdan asserts that the importance of the issues is comparable to that in other cases in which this Court has granted en banc review, but he neglects to mention that each case he cites was initially heard by a panel of this Court, with en banc review granted only *after* the panel had decided the case. *See Ruggiero v. FCC*, 278 F.3d 1323 (D.C. Cir. 2002) (panel decision), *reh'g en banc granted*, 2002 WL 1359486; *Duncan v. Washington Metro. Area Transit Auth.*, 201 F.3d 482 (D.C. Cir. 2000) (panel decision), *reh'g en banc granted*, 2000 WL 360095; *Hoffman Plastic Compounds, Inc. v. NLRB*, 208 F.3d 229 (D.C. Cir. 2000) (panel decision), *reh'g en banc granted*, 2000 WL 985015; *United States v. McCoy*, 280 F.3d 1058 (D.C. Cir. 2002) (panel decision), *on reh'g en banc*, 240 F.3d 35 (D.C. Cir. 2002); *United States v. Schaffer*, 214 F.3d 1359 (D.C. Cir. 2000) (panel decision), *reh'g en banc granted*, 2000 WL 1769692; *Air Line Pilots Ass'n, Int'l v. Northwest Airlines, Inc.*, 199 F.3d 477 (D.C. Cir. 1999) (panel decision), *on reh'g en banc*, 211 F.3d 1312 (D.C. Cir. 2000).

Hamdan also relies on *In re Cheney*, No. 02-5354 (D.C. Cir.), as support for his assertion that initial hearing *en banc* is appropriate. In that case, however, a panel of this Court had held that "binding" Circuit precedent required it to apply the "*de facto* membership" doctrine. *See* 334 F.3d at 1107 (citing and discussing *Association of Am. Physicians & Surgeons, Inc. v. Clinton*, 997 F.2d 898 (D.C. Cir. 1993)). The Supreme Court subsequently granted certiorari and, in relevant part, instructed this Court to "reexamine" the validity of its holding on remand. 124 S. Ct. at 2593. It was thus appropriate for this Court to sit en banc on remand to consider whether *AAPS* had been rightly decided as an original matter, unconstrained by any effect of *AAPS* as Circuit precedent. No similar concerns are present here, where no party is asking this Court to overrule its prior decisions and the validity of prior Circuit precedent has not been called into question.[1]

4. Although raising important issues of law and policy, this appeal can be resolved in the Government's favor by applying legal principles from established Circuit and Supreme Court precedent. Depending on the outcome and rationale of the panel ruling, furthermore, it is possible that no further review by this Court or the Supreme Court would be needed. Until panel review is complete, it is premature to determine whether en banc review will be warranted.

If, for example, the panel were to reverse the district court on the threshold abstention issue, it could avoid addressing several other legal issues identified by Hamdan as necessitating en banc review. Similarly, although, as petitioner notes, the district court's ruling that the Geneva Convention creates judicially enforceable private rights is inconsistent with a decision by the Fourth Circuit, that conflict will disappear if the panel of this Court agrees with the Fourth Circuit on that issue. Thus, while it is possible that the panel's ruling could necessitate further review, speculation is not an appropriate ground for seeking to cut off expedited panel review.

5. At bottom, all of the claims made by Hamdan to support initial en banc review were also made in Hamdan's petition for certiorari before judgment. The Supreme Court rejected both Hamdan's claimed need for expedited treatment of his petition and his argument that this case was so exceptional that it required bypassing the ordinary appellate procedures. Just as the Supreme Court has concluded that the

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[1] We note that in *United States v. Microsoft Corp.*, No. 00-5212, this Court granted initial en banc review, but that case of exceptional importance would otherwise have been effectively immune from en banc review because of "the number of judges of this court disqualified from participation." June 13, 2000 Order. Under the then-applicable Circuit rule, the large number of recused judges precluded the possibility of "any en banc rehearing of a panel decision." *Ibid.* That unusual situation has no application here.

issues presented do not warrant immediate review in that forum, so too should this Court reject Hamdan's extraordinary request for initial hearing en banc.

CONCLUSION

For the foregoing reasons, this Court should deny the petition for initial hearing en banc.

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CERTIFICATE OF SERVICE

I hereby certify that, on January 27, 2005, copies of the foregoing "RESPONDENTS-APPELLANTS' OPPOSITION TO PETITION FOR INITIAL HEARING EN BANC," were served upon the following counsel of record by hand delivery (or FedEx delivery as indicated):

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