[ORAL ARGUMENT SCHEDULED FOR SEPTEMBER 8, 2005]

Nos. 05-5062, 05-5063

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

LAKHDAR BOUMEDIENE, et al.,
Petitioners-Appellants,

v.

GEORGE W. BUSH, et al.,
Respondents-Appellees.

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

SUPPLEMENTAL BRIEF FOR THE FEDERAL APPELLEES

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases: **Page**

Constitution:

Statutes:

Treaties:

Other Authorities:

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Appellees George W. Bush, et al., submit 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 undermines petitioners' argument that the President lacks the authority to detain petitioners as enemy combatants.

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 principal brief, petitioners' constitutional claims lack merit because the Due Process Clause is inapplicable to aliens captured abroad and

held at Guantanamo Bay, Cuba. See Brief for Appellees 13-27. 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 Brief for Appellees 23 (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' treaty-based claims.

In Hamdan, this Court 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 Appellants' Brief 30-33, 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.").

Petitioners in this case have asserted claims under the Fourth Geneva Convention rather than the Third Geneva Convention. But the two conventions are indistinguishable in all material respects, and petitioners have identified no reason why one would be judicially enforceable while the other is not. More generally, Hamdan's reasoning undermines whatever claims petitioners might have under the Fourth Geneva Convention. 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 Fourth Geneva Convention—or with respect to the International Covenant on Civil and Political Rights, on which they also

rely, see Appellants' Brief 33-34. For this reason, petitioners' treaty claims should be rejected.

III. Hamdan supports the President's authority to detain enemy combatants.

Petitioners contend that the Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (AUMF), does not authorize their detention. See Appellants' Brief 20-27. As we have explained, the detention of enemy combatants is independently justified by the President's inherent constitutional authority, even apart from the AUMF. See Brief for Appellees 55-56. But in any event, Hamdan confirms that petitioners' reading of the AUMF is unduly narrow. As Hamdan explains, the AUMF gives the President authority "'to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided' the [September 11] attacks and recognized the President's 'authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States.'" Slip op. 8 (quoting AUMF). Hamdan held that this authority includes, as "an 'important incident to the conduct of war,'" the power to seize and detain enemy combatants, and to try and punish them for violations of the laws of war. Ibid (quoting In re Yamashita, 327 U.S. 1 (1946)). This power necessarily includes the presidential authority at issue in this case.

Petitioners suggest that the AUMF is limited to those individuals who were personally involved in the September 11 attacks, see Appellants' Brief 20, or that it applies only in certain geographical areas, see id. 23. But see Curtis A. Bradley & Jack L. Goldsmith, Congressional Authorization and the War on Terrorism, 118 Harv. L. Rev. 2048, 2109, 2118 (2005) (arguing that "Congress has authorized the President to use force against all members of al Qaeda, including members who had nothing to do with the September 11 attacks and even new members who joined al Qaeda after September 11" and that "the AUMF authorizes the President to use force anywhere he encounters the enemy"). While Hamdan had no occasion to address the precise arguments advanced by petitioners here, its broad reading of the AUMF contains no suggestion of the limitations that petitioners advocate.

CONCLUSION

For the foregoing reasons, as well as for the reasons stated in our principal brief, the judgment of the district court should be affirmed.

Respectfully submitted,

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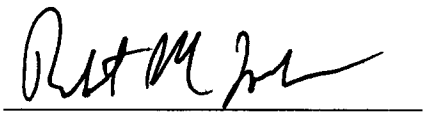
August 2, 2005

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 1,629 words (which does not exceed the 2,500-word limit set by this Court in its order of July 26, 2005).



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CERTIFICATE OF SERVICE

I certify that on August 2, 2005, I served the foregoing "Supplemental Brief for the Federal Appellees" 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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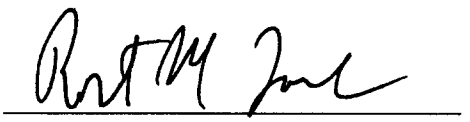

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