

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

SALIM AHMED HAMDAN,)	
Appellee,)	
)	
v.)	No. 04-5393
)	
DONALD H. RUMSFELD,)	
SECRETARY OF)	
DEFENSE, et al.,)	
Appellants,)	
)	
RAMI BIN SAAD AL-OTEIBI,)	
Applicant for Intervention.)	

OPPOSITION TO MOTION TO INTERVENE

Appellants Donald H. Rumsfeld, Secretary of Defense, et al., hereby oppose Rami Bin Saad Al Oteibi’s motion to intervene in this appeal.

1. “The Federal Rules of Appellate Procedure do not provide for intervention on appeal except in proceedings to review agency action, but do not expressly preclude intervention in appeals from the district court.” *Building and Const. Trades Dept., AFL-CIO v. Reich*, 40 F.3d 1275, 1282 (D.C. Cir. 1994). This Court has held that it will allow “intervention at the appellate stage where none was sought in the district court only in an exceptional case for imperative reasons.” *Amalgamated Transit Union Int’l, AFL-CIO v. Donovan*, 771 F.2d 1551, 1552 (D.C. Cir.1985).

Intervention is “even more disfavored” where, “as here, the motion for leave to intervene comes after the court of appeals has decided a case.” *Id.* at 1553. “The obvious reason for the rule against belated intervention is that it is unduly disruptive and places an unfair burden on the parties to the appeal.” *Ibid.* As this Court has noted, “the few courts to face motions to intervene after an appellate court has issued a decision uniformly have rejected intervention as untimely.” *Id.* at 1553 n.5 (emphasis added).

The motion to intervene cites two cases for the proposition that intervention has been allowed on appeal after judgment. Both cases,¹ however, involved intervention in district court cases after judgment in order to permit an appeal to this Court. Here, in contrast, the appeal has been completed – the judgment was issued on July 15, 2005; the time for a party to petition for rehearing expired on August 29, 2005; and Hamdan has already sought Supreme Court review of this Court’s judgment. The applicant cites no case where intervention on appeal has been permitted after the expiration of the time for petitioning for rehearing, and to our knowledge there is none. Rather, as this Court has held, as a “general rule this court will deny motions to intervene at this late stage.” *Amalgamated Transit Union Int’l, AFL-CIO*, 771 F.2d at 1553.

¹ *Wolpe v. Poretsky*, 144 F.2d 505(D.C. Cir. 1944); *Acree v. Republic of Iraq*, 370 F.3d 41 (D.C. Cir. 2004).

Moreover, the “interest” asserted here by the putative intervenor – that the *Hamdan* decision resolved some issues regarding Common Article 3 that could affect the disposition of his own case – is an interest the applicant’s counsel knew of long ago, back when the *Hamdan* appeal was first filed. The applicant’s counsel was well aware at that time that a circuit precedent on those issues might well be established, and decided not to intervene. In doing so he effectively decided to entrust whatever interest his client might have in the precedent to the advocacy of Hamdan’s counsel (as did every other detainee with some interest in the precedent). And that is the point in time when – and the level of generality at which – a potential intervenor has to make that decision. *See Utah Ass’n of Counties v. Clinton*, 255 F.3d 1246, 1250 (10th Cir.2001) (“The timeliness of a motion to intervene is assessed in light of all the circumstances, including the length of time since the applicant knew of his interest in the case”). Otherwise, throughout an appeal and at any stage of it at which the party’s counsel makes a tactical decision with which any potential intervenor disagrees, a motion to intervene could be filed. That is not the law. For example, no one would think that someone could intervene in the case at this stage because they believe that Hamdan should have filed a petition for rehearing en banc rather than directly seeking Supreme Court review, in order to file such a petition themselves. By that same reasoning, the asserted interest in this case does not justify this effort

to intervene to reopen the appeal after the expiration of the time for petitioning for rehearing.

2. Furthermore, the applicant's claim of necessity to intervene post-judgment (and after the time for seeking rehearing or rehearing en banc has expired) does not withstand scrutiny.

In the present case, plaintiff Hamdan challenges the lawfulness of a military commission and the procedures to be employed by that military commission set to try him for war crimes. Here, in contrast, the applicant is not facing a military commission and does not claim that there are any current plans to place him before such a commission. The applicant in this case is being held at the Guantanamo Bay Naval Base pursuant to a formal adjudication by the Combatant Status Review Tribunal (CSRT) that the applicant is an enemy combatant. The CSRT procedures are quite different from the military commission procedures at issue in *Hamdan*. The applicant has filed a habeas action, pending in the district court, challenging his detention and the lawfulness of the CSRT procedures. Notably, in the present case, plaintiff Hamdan is not challenging either his detention or the CSRT procedures.

Nonetheless, the applicant claims that the Court's ruling in the present case prejudices his claim in district court because he is asserting in his district court habeas case, among many other things, a claim based upon the 1949 Geneva Convention (Geneva Convention Relative to the Treatment of Prisoners of War (Aug. 12, 1949,

T.I.A.S. No. 3364, 6 U.S.T. 3316)). In this respect, the applicant is no different from the hundreds of other detainee enemy combatants being held at Guantanamo, and his rationale would permit intervention by any or all of the detainees in this appeal.

In any event, the applicant's rationale for permitting intervention is fatally flawed. One of Hamdan's arguments was that the procedures to be used at his trial would not conform with Article 3 of the Geneva Convention. This Court rejected that argument. It held that the Geneva Convention is not judicially enforceable and that Article 3 is inapplicable because it is limited, by its own terms, to "armed conflict not of an international character." 415 F.3d at 41-42. Judge Williams agreed with the majority that the Convention was not judicially enforceable, but disagreed with the majority on the applicability of the Convention to the conflict with al Qaeda. *Id.* at 44.

The applicant surmises that if, Judge Roberts recuses himself,² then the Article 3 ruling would become the decision of only one panel member and not binding on the district court. The applicant explains, "[t]here would thus be no majority decision binding on the district court with respect to the applicability of the Third Geneva Convention." Motion at 3. This statement avoids the obvious fact that, while there

² Because the motion for recusal has not been filed by the Court and we understand will not be filed absent grant of the motion to intervene, we do not respond to that motion at this time.

was a difference of opinion on the applicability of Article 3 to the conflict with al Qaeda, the Court unanimously held that the Convention is not judicially enforceable. Thus, whether Article 3 of the Convention is applicable or not, the district court could not grant the applicant habeas relief based upon rights asserted under the Convention. Thus, tellingly, the applicant does not claim that, if he obtains the relief requested in his motion to intervene, it would support his habeas claim for release from detention. Rather, he is left only with the highly speculative assertion that other signatory countries would be in a better position to demand enforcement of the Convention absent this Court's alternative ruling. Motion at 3.

Moreover, while arguably relevant to Hamdan's claims in regard to the procedural rights at his military commission trial, Article 3 does not support a claim for release by the applicant, or the other enemy combatant detainees at Guantanamo. Indeed, in the thorough briefing of the *Al Odah* and *Boumediene* appeals,³ the detainees do not make an affirmative argument for a right of release under Article 3. Thus, the applicant here has no claim that the disposition of the Article 3 issue by the *Hamdan* panel prejudices his habeas claim for release.

³ *Al Odah v. United States*, Nos. 05-5064, 05-5095 through 05-5116 (D.C. Cir.), and *Boumediene v. Bush*, No. 05-5062, 05-5063 (D.C. Cir.) set for argument before the D.C. Circuit on September 8, 2005.

Such weak, speculative, attenuated, and contingent claims of interest do not provide the type of clear impairment of interest required to support a claim of intervention under Rule 24(a) of the Federal Rules of Civil Procedure. *See Donaldson v. United States*, 400 U.S. 517, 531 (1971) (“interest” “obviously” means “a significantly protectable interest”); *Diamond v. Charles*, 476 U.S. 54, 75 (1986) (O’Connor, J., concurring) (“the “significantly protectable interest” required under *Donaldson* is a “direct and concrete interest that is accorded some degree of legal protection”). *Compare Chiles v. Thornburgh*, 865 F.2d 1197, 1214 (11th Cir. 1989) (permitting intervention based on potential *stare decisis* effect where their claims involved “the very transaction which is the subject of the main action”). Here, where the applicant is not seeking district court intervention, but rather the extraordinary relief of intervention post-judgment and post-rehearing time in the court of appeals, the interests asserted plainly are insufficient.

3. Finally, having obtained this Court’s ruling, plaintiff Hamdan has already sought immediate Supreme Court review. Hamdan filed a petition for a writ of certiorari on August 8, and the Government’s opposition to that petition is due September 7. Grant of this motion, seeking to reopen and amend or vacate this Court’s judgment, could potentially disrupt Hamdan’s attempt to seek immediate Supreme Court review and could also delay the Government’s ability to restart

Hamdan's commission process that was derailed by the district court injunction, which has now been reversed by this Court. Such delay is wholly unwarranted.

CONCLUSION

For the foregoing reasons, the motion to intervene should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 8, 2005, I served the foregoing “OPPOSITION TO MOTION TO INTERVENE” upon counsel of record by causing copies to be sent by first-class mail and by e-mail transmission to lead counsel:


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A handwritten signature in cursive script, appearing to read "Robert M. Loeb".

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