No. 06-1169

In the Supreme Court of the United States

SALIM AHMED HAMDAN, PETITIONER

v.

ROBERT M. GATES, SECRETARY OF DEFENSE, ET AL.

OMAR KHADR, PETITIONER

v.

GEORGE W. BUSH,
PRESIDENT OF THE UNITED STATES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the unusual petition for certiorari in this case is authorized under this Court's rules, including Rule 12.4.

2. Whether the Military Commissions Act of 2006 (MCA), Pub. L. No. 109-366, 120 Stat. 2600, removes federal court jurisdiction over habeas corpus petitions filed by aliens detained as enemy combatants at Guantanamo Bay, Cuba.

3. Whether aliens detained as enemy combatants at Guantanamo Bay have rights under the Suspension Clause of Article I, Section 9, of the Constitution.

4. Whether, if aliens detained at Guantanamo Bay have such rights, the MCA violates the Suspension Clause.

5. Whether petitioners may challenge the adequacy of the judicial review available under the MCA and the Detainee Treatment Act of 2005, Pub. L. No. 109-148, Tit. X, § 1001 *et seq.*, 119 Stat. 2739, before they have sought to invoke, much less exhaust, such review.

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OPINIONS BELOW

The opinion of the district court (Pet. App. 1a-16a) dismissing Hamdan's petition for a writ of habeas corpus is reported at 464 F. Supp. 2d 9. The opinion of the court of appeals (Pet. App. 52a-102a) dismissing Khadr's petition for a writ of habeas corpus is reported at 476 F.3d 981. The opinion of the district court relating to Khadr is reported at 355 F. Supp. 2d 443.

JURISDICTION

The judgment of the court of appeals was entered on February 20, 2007. The petition for a writ of certiorari was filed on February 27, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and 2101(e).

STATEMENT

Petitioners are aliens detained by the Department of Defense at Guantanamo Bay, Cuba. Their detention is based on individualized determinations by military Combatant Status Review Tribunals (CSRTs) that they are properly detained as enemy combatants in the ongoing armed conflict against the al Qaeda terrorist organization and its supporters.

1. a. Petitioner Hamdan, a Yemeni national, was captured in Afghanistan in November 2001 and then transported to the Guantanamo Bay Naval Base in Cuba. Pet. App. 1a. At Guantanamo Bay, Hamdan was given a formal adjudicatory hearing before a CSRT, which determined that he is an enemy combatant. Indeed, Hamdan has admitted that he was a personal assistant to Osama bin Laden. For purposes of the CSRT, an enemy combatant is "an individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners." *Hamdan* v. *Rumsfeld*, 126 S. Ct. 2749, 2761 n.1 (2006) (quoting Memorandum from Deputy Secretary of Defense Paul Wolfowitz re: Order Establishing Combatant Status Review Tribunal (July 7, 2004)).

In July 2003, acting pursuant to an executive order providing for the establishment of military commissions to try members of al Qaeda and others involved in international terrorism against the United States, see *Deten-*

tion, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (2001), the President designated Hamdan for trial before a military commission. See *Hamdan*, 126 S. Ct. at 2760. Hamdan was charged with a conspiracy to commit attacks on civilians and civilian objects, murder by an unprivileged belligerent, and terrorism. *Id.* at 2761. The charge was based on his direct connection as bodyguard and driver to Osama bin Laden, and his participation in al Qaeda's campaign of international terrorism against the United States, including transporting weapons for al Qaeda. *Ibid.*

b. Hamdan filed a petition for habeas corpus and/or mandamus, alleging in relevant part that the President lacks authority to try him before a military commission, rather than by a court-martial convened under the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 801 *et seq.*, and that the military-commission procedures violate the Geneva Convention Relative to the Treatment of Prisoners of War of Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 (Geneva Convention). See *Hamdan*, 126 S. Ct. at 2759. The district court granted Hamdan's habeas petition and stayed the military-commission proceedings. See *id.* at 2761. The court of appeals reversed, and this Court granted review. See *id.* at 2762.

c. While Hamdan's case was pending in this Court, Congress enacted the Detainee Treatment Act of 2005 (DTA), Pub. L. No. 109-148, Tit. X, § 1001 *et seq.*, 119 Stat. 2739. Section 1005(e)(1) of that Act amended the federal habeas corpus statute to provide that "no court, justice, or judge shall have jurisdiction" to consider habeas petitions filed by aliens detained at Guantanamo Bay. DTA § 1005(e)(1), 119 Stat. 2742.

Section 1005(e)(2) of the Act provides that the Court of Appeals for the District of Columbia Circuit "shall have exclusive jurisdiction to determine the validity of any final decision of a Combatant Status Review Tribunal that an alien is properly detained as an enemy combatant." DTA § 1005(e)(2)(A), 119 Stat. 2742. The DTA specifies that the court of appeals may determine whether a final CSRT decision "was consistent with the standards and procedures specified by the Secretary of Defense," and "to the extent the Constitution and laws of the United States are applicable, whether the use of such standards and procedures to make the determination is consistent with the Constitution and laws of the United States." DTA § 1005(e)(2)(C), 119 Stat. 2742. Section 1005(e)(3) creates a parallel exclusive-review mechanism for Guantanamo Bay detainees seeking to challenge final criminal convictions issued by military commissions. DTA § 1005(e)(3)(A), 119 Stat. 2743.

d. This Court held that Section 1005(e)(1) of the DTA, does not apply to habeas claims filed before the DTA was enacted. See *Hamdan*, 126 S. Ct. at 2762-2769. On the merits, the Court further held that the military commission convened to try Hamdan for conspiring to violate the laws of war could not proceed because it was not authorized by Congress. See *id.* at 2772-2798.

e. In the wake of this Court's decision, Congress enacted the Military Commissions Act of 2006 (MCA), Pub. L. No. 109-366, 120 Stat. 2600. Section 7(a) of the MCA, 120 Stat. 2636, amends 28 U.S.C. 2241 to provide that "[n]o court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy com-

batant or is awaiting such determination." Section 7(a) also removes federal court jurisdiction, except as provided by Section 1005(e)(2) and (3) of the DTA, over "any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement" of such an alien. MCA § 7(a), 120 Stat. 2636. The MCA further provides that these amendments "shall take effect on the date of the enactment of this Act," and that they "shall apply to all cases, without exception, pending on or after the date of the enactment of this Act, which relate to any aspect of the detention, transfer, treatment, trial, or conditions of detention of an alien detained by the United States since September 11, 2001." *Id.* § 7(b), 120 Stat. 2636.

The MCA also established a detailed regime governing the establishment and conduct of military commissions, creating within the Uniform Code of Military Justice a chapter on "Military Commissions." See MCA § 3, 120 Stat. 2600-2631 (creating 10 U.S.C. ch. 47A). That chapter establishes requirements for military commissions distinct from and in the place of the UCMJ court-martial provisions. See *id.* § 4, 120 Stat. 2631 (amending various provisions of the UCMJ pertaining to courts-martial to make clear that they do not apply to military commissions under the MCA).

f. On remand, the district court held that the MCA removes federal jurisdiction over Hamdan's habeas case, and it dismissed his petition for lack of subject-matter jurisdiction. Pet. App. 1a-16a. The court held that the MCA was intended to remove statutory jurisdiction over habeas petitions filed by aliens detained as enemy combatants. *Id.* at 3a-5a. The court further held that Congress did not intend the MCA to suspend any constitu-

tional right to the writ of habeas corpus, *id.* at 5a-11a, but concluded that Hamdan, as an alien captured and detained outside the sovereign territory of the United States, has no constitutional rights under the Suspension Clause, *id.* at 11a-15a. Accordingly, the court concluded it was without jurisdiction and dismissed petitioner's habeas petition. *Id.* at 15a-16a.

Hamdan filed a notice of appeal from the district court's dismissal of his petition, Pet. App. 30a-31a, but moved to hold his appeal in abeyance pending the court of appeals' resolution of *Boumediene* v. *Bush*, No. 05-5062 (D.C. Cir.), and *Al Odah* v. *United States*, No. 05-5064 (D.C. Cir.). Mot. to Hold Appeal in Abeyance, No. 07-5042 (D.C. Cir. filed Feb. 6, 2007). His case remains in the court of appeals.

g. On February 2, 2007, new charges were sworn against Hamdan under the MCA, charging him with conspiracy and providing material support for terrorism. Pet. App. 32a, 38a-44a.

2. a. Petitioner Khadr, a Canadian national, was seized in Afghanistan in July 2002. Pet. App. 108a-110a. He was transferred to Guantanamo Bay, where a CSRT confirmed his status as an enemy combatant, based its determination that he is "a member of, or affiliated with, al Qaida." See Factual Return, Unclassified Summary of Evidence for CSRT (D.D.C. filed Sept. 15, 2004) (No. 04-CV-1136). Evidence presented to the CSRT included Khadr's admissions that he (1) threw a grenade that killed a U.S. soldier during the battle in which he was captured; (2) attended an al Qaeda training camp in Kabul, Afghanistan, which included weapons training; and (3) worked as a translator for al Qaeda to coordinate land mine missions as acts of terrorism. *Ibid.* In addition, evidence was presented that Khadr had partici-

pated in military operations against U.S. forces, including conducting surveillance at an airport near Khost to collect information on U.S. convoy movements, and planting ten land mines against U.S. forces in the mountain region between Khost and Ghardez, where U.S. convoys travel. *Ibid.*

In July 2004, a next friend filed a habeas corpus petition on Khadr's behalf. The petition was consolidated in the district court with the habeas corpus petitions of other Guantanamo Bay detainees, and the government moved to dismiss those petitions. The district court granted the motion in part and denied it in part, concluding that the Fifth Amendment applies extraterritorially to aliens held at Guantanamo Bay, and that the CSRT procedures are constitutionally deficient under the Due Process Clause. *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 464, 468-478 (D.D.C. 2005). The district court certified its decision for interlocutory appeal.

b. In 2005, the President designated Khadr for trial by military commission, and the government charged petitioner. Military-commission proceedings began in January 2006 but were terminated upon this Court's decision in *Hamdan*. On February 2, 2007, new charges were sworn against Khadr under the MCA, including charges of murder, attempted murder, and providing material support for terrorism. Pet. App. 103a, 112a, 114a-115a.

c. The court of appeals dismissed the detainees' habeas cases, including that of Khadr, for lack of jurisdiction. See *Boumediene* v. *Bush*, No. 06-1195, and *Al Odah* v. *United States*, No. 06-1196; Pet. App. 52a-102a. The court held that the MCA applies to the detainees' pending habeas cases—each of which "relates to an 'as-

pect' of detention and * * * deals with the detention of an 'alien' after September 11, 2001," *id.* at 58a—and thus removes federal court jurisdiction over their petitions, *id.* at 58a-61a. The court rejected petitioners' argument that Section 7(b)'s effective-date provision applies only to non-habeas detention-related cases specified in Section 7(a) (28 U.S.C. 2241(e)(2)). Pet. App. 58a-60a. The court explained that Section 7(b) specifies the effective date of Section 7(a), which removes federal jurisdiction over *both* habeas and all other detention-related claims in "all cases, without exception." *Id.* at 59a.

The court of appeals further held that the MCA is consistent with the Suspension Clause, for two reasons. First, as aliens outside the sovereign territory of the United States, petitioners have no constitutional rights under that clause. Pet. App. 66a (citing, *e.g.*, *Johnson* v. *Eisentrager*, 339 U.S. 763 (1950)). Second, even if petitioners had constitutional rights under the Suspension Clause, the clause would not protect a right to the writ in these circumstances. As the court explained, "the Suspension Clause protects the writ 'as it existed in 1789,'" *id.* at 62a, but "the history of the writ in England prior to the founding" shows that "habeas corpus would not have been available in 1789 to aliens without presence or property within the United States." *Id.* at 64a-65a.

The court further explained that this Court's decision in *Eisentrager* "ends any doubt about the scope of common law habeas." Pet. App. 65a. In *Eisentrager*, this Court stated that it was aware of "no instance where a court, in this or any other country where the writ is known, has issued it on behalf of an alien enemy who, at no relevant time and in no stage of his captivity, has

been within its territorial jurisdiction. Nothing in the text of the Constitution extends such a right, nor does anything in our statutes." *Ibid.* (quoting *Eisentrager*, 339 U.S. at 768).

The court of appeals held that petitioners' reliance on this Court's decision in *Rasul* v. *Bush*, 542 U.S. 466 (2004), was misplaced. Pet. App. 65a. The court explained that *Rasul* interpreted only the statutory right to habeas, so it "could not possibly have affected the constitutional holding of *Eisentrager*," *id.* at 67a n.10, in which the Court explicitly held that aliens detained outside the sovereign territory of the United States do not have a constitutionally protected right to the writ, see 339 U.S. at 781.

Having concluded that the MCA removes jurisdiction in petitioners' cases, the court vacated the district court's decision and dismissed the cases for want of jurisdiction. Pet. App. 71a-72a.

Judge Rogers dissented. She agreed that Congress intended the MCA to withdraw federal jurisdiction over the detainees' claims, but she found the statute to be inconsistent with the Suspension Clause, because "Congress has neither provided an adequate alternative remedy * * * nor invoked the exception to the Clause by making the required findings to suspend the writ." Pet. App. 73a.

ARGUMENT

The extraordinary petition for a writ of certiorari and a writ of certiorari before judgment here combines the cases of two different petitioners who are parties to two separate cases in different procedural postures be-

low, and who have raised different claims.[1] For one petitioner (Hamdan), petitioners seek a writ of certiorari before judgment. For the other petitioner (Khadr), petitioners seek review of a judgment that is already the subject of petitions for writs of certiorari pending before this Court in *Boumediene*, No. 06-1195, and *Al Odah*, No. 06-1196. Khadr was represented by the lawyers for the *Boumedine* detainees in the court of appeals and did not join with Hamdan until the unusual petition filed in this Court. There is no reason to grant petitioners' requests. The petition should be denied or, in the alternative, held pending *Boumediene* and *Al Odah*.

Hamdan seeks a writ of certiorari before judgment to review the district court's decision dismissing his habeas petition for lack of jurisdiction. This Court's rules make clear that such a petition "will be granted only upon a showing that the case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court." Sup. Ct. R. 11. That exceptionally high threshold is not remotely met here.

Hamdan is unable to show irreparable harm of a nature that would warrant immediate review. He can pursue any challenge to his detention (or any subsequent conviction by a military commission) under the exclusive judicial review procedures established by the MCA and DTA, and the basic issues raised by the petition are al-

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[1] As discussed below, the peculiar "joint" petition for a writ of certiorari in this case does not satisfy the terms of Supreme Court Rule 12.4. At a minimum, there is a serious question as to whether the petition is appropriate under that rule. That question, which the Court would have to resolve, provides an additional and independently sufficient reason to deny review. See pp. 22-23, *infra*; see also Opp. to Mot. to Expedite 4-5.

ready pending before the Court in *Boumediene* and *Al Odah*. To the extent that Hamdan seeks to raise different issues from those presented by *Boumediene* and *Al Odah*, those issues should be presented to the court of appeals in the first instance and, in any event, are meritless. Nor is Hamdan entitled to have this Court review his petition under the standard applicable to a petition for a writ of certiorari *after* judgment, see Sup. Ct. R. 10, simply by attaching his petition to that of Khadr; indeed, there is serious doubt as to whether his attempt to do so is even authorized by this Court's rules. Thus, Hamdan's petition for a writ of certiorari before judgment should be denied. That is true even if this Court were to grant the petition for a writ of certiorari as to Khadr.

Khadr's petition for a writ of certiorari to review the judgment of the court of appeals should also be denied. For the reasons set out in our brief in opposition to the petition for a writ of certiorari in *Boumediene*, No. 06-1195, and *Al Odah*, No. 06-1196 (filed Mar. 21, 2007), the issues raised by the petition do not warrant this Court's review at this time. In the DTA, Congress has provided a means by which petitioners can obtain judicial review of the validity of their detention, as well as of any convictions by military commissions, should they occur. DTA § 1005, 119 Stat. 2740-2744. Petitioners contend that this review mechanism is deficient in various respects, but their claims are not ripe because petitioners have not even attempted to pursue review under the DTA. An effort to seek DTA review would not only allow petitioners to challenge the scope of review available under the DTA but also give concrete guidance as to the extent of that review. As in *Boumediene* and *Al Odah*, there is

no need for this Court to assess the adequacy of DTA review before it has even taken place.

In any event, if this Court were to grant review in *Boumediene* and *Al Odah,* Khadr—a party to the *Boumediene* case—presumably would be permitted to file a brief as a respondent supporting petitioners in those cases, raising any arguments that are properly presented by those cases. In addition, Hamdan would be free to file an amicus brief presenting any additional perspective that he believes that the Court should have in deciding those cases. Therefore, even if the Court were to grant review in *Boumediene* and *Al Odah*, there would be no reason to grant this extraordinary petition and, to the extent that petitioners seek to raise different issues than those presented in *Boumediene* and *Al Odah*, to further complicate the task before the Court.

1. As respondents explained in detail in the brief in opposition to the petition for a writ of certiorari in *Boumediene* and *Al Odah*, the decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. The court's holding that the MCA removes jurisdiction over the detainee's habeas actions was unanimous and is compelled by the plain language of the statute. See Br. in Opp. at 9-12 *Boumediene, supra* (No. 06-1195). Relying on the settled precedent of this Court, the court of appeals also correctly held that the MCA does not violate the Suspension Clause. As aliens outside the sovereign territory of the United States, the detainees have no rights under the Suspension Clause, and, in any event, the habeas rights protected by that provision would not extend to aliens detained at Guantanamo Bay as enemy combatants. See *id.* at 19-28.

Congress has afforded petitioners—aliens detained at Guantanamo Bay as confirmed enemy combatants in the ongoing armed conflict against the al Qaeda terrorist organization and its supporters—an unprecedented degree of access to our courts in wartime. No other captured enemy combatants in the history of this country, or any other, have enjoyed such privileges. The court of appeals has correctly concluded that the detainees must exercise their statutory right of judicial review through the procedures established by Congress. Petitioners have failed to demonstrate a sufficiently compelling basis for this Court to review the court of appeals' decision—or, in Hamdan's case, the district court's decision—before they have even attempted to invoke the procedures that Congress has afforded. And, in any event, any review in this Court should await a case in which a detainee has actually invoked his right of judicial review under the DTA, and in which this Court may consider the judicial review available under the DTA on a developed and concrete record, rather than in the abstract.

If this Court does grant review in *Boumediene* and *Al Odah*, then it may be appropriate to hold this petition pending the disposition of those cases. But as we explain below, whether or not this Court grants review in *Boumediene* and *Al Odah*, there is no occasion to grant certiorari and hear these cases on the merits.

2. Hamdan's petition does not satisfy the extraordinarily high standard for granting a petition for a writ of certiorari before judgment. See Sup. Ct. R. 11.

a. Hamdan does not even allege that any irreparable harm will result as a consequence of waiting to seek certiorari after the court of appeals reviews the district court's dismissal of his habeas petition. Particularly in

light of Hamdan's ability to seek review under the DTA and the MCA, Hamdan cannot demonstrate any irreparable harm from the delay of his habeas action.

Under the DTA, Hamdan may seek review in the D.C. Circuit of the CSRT's determination that he is an enemy combatant. See DTA § 1005(e)(2), 119 Stat. 2741-2742. Section 1005(e)(2)(C) of the DTA specifies the D.C. Circuit's "[s]cope of review" of the CSRT's enemy combatant determination. The court must consider "whether the status determination of the [CSRT] with regard to such alien was consistent with the standards and procedures specified by the Secretary of Defense for [CSRTs] (including the requirement that the conclusion of the Tribunal be supported by a preponderance of the evidence and allowing a rebuttable presumption in favor of the Government's evidence)." DTA § 1005(e)(2)(C)(i), 119 Stat. 2742. The court also must consider, "to the extent the Constitution and laws of the United States are applicable, whether the use of such standards and procedures to make the determination is consistent with the Constitution and laws of the United States." *Id.* § 1005(e)(2)(C)(ii), 119 Stat. 2742. Thus, the statute allows for ample judicial review both of the procedures used by the CSRTs and of the evidentiary sufficiency of their determinations.

In addition, if Hamdan is convicted by a military commission, he may seek review under the DTA of that final conviction. See DTA § 1005(e)(3), 119 Stat. 2743. The D.C. Circuit will review the final conviction to determine whether it was consistent with the applicable standards and procedures, and with federal law and the Constitution, to the extent that they apply. *Ibid.*

Thus, the MCA and DTA, while removing habeas jurisdiction, afford Hamdan an unprecedented level of

judicial review for an alien captured as an enemy combatant during an armed conflict. As part of that DTA review, Hamdan can challenge the lawfulness of the CSRT process or military-commission proceeding. The scope of DTA review is greater than that traditionally afforded in habeas review of convictions for war crimes by a military commission. As this Court has explained, habeas review in that context does not examine the guilt or innocence of the defendant, nor does it examine the sufficiency of the evidence. Rather, it is limited to the question whether the military commission had jurisdiction. See *In re Yamashita*, 327 U.S. 1, 8 (1946); *Ex parte Quirin*, 317 U.S. 1, 25 (1942); see also *Eisentrager*, 339 U.S. at 786; *id.* at 797 (Black, J. dissenting) (extent of review "is of most limited scope"); cf. *Hamdi* v. *Rumsfeld*, 542 U.S. 507, 535 (2004) (plurality opinion) (recognizing that "the full protections that accompany challenges to detentions in other settings may prove unworkable and inappropriate in the enemy-combatant setting").

Under *Yamashita*, habeas review encompassed only the threshold jurisdictional question whether the offense and offender were triable by military commission. 327 U.S. at 8. There was no review of other legal questions, compliance with the military's own procedures, or evidentiary sufficiency—all of which the DTA and MCA permit. See DTA § 1005(e)(2)(C)(1), 119 Stat. 2742. Review under the DTA is also fully consistent with traditional habeas practice outside the military tribunal context. In *INS* v. *St. Cyr*, 533 U.S. 289 (2001), this Court explained that under traditional habeas review, "pure questions of law" are generally reviewable, but, "other than the question whether there was some evidence to support the order, the courts generally did not

review the factual determinations made by the Executive." *Id.* at 305-306. Accordingly, petitioner cannot claim any irreparable harm in having to seek review under the MCA and DTA, rather than through habeas, while he waits for the court of appeals to review the district court's dismissal of his habeas action.

Furthermore, Congress has now made clear its preference that review of the military-commission process take place like review of most criminal proceedings, that is, on appeal from a judgment of conviction. See MCA § 9. In its decision invalidating the earlier military-commission system, this Court emphasized the lack of "specific congressional authorization." *Hamdan*, 126 S. Ct. at 2775; see *id.* at 2799 (Breyer, J., concurring) ("The Court's conclusion ultimately rests upon a single ground: Congress has not issued the Executive a 'blank check.' * * * Nothing prevents the President from returning to Congress to seek the authority he believes necessary."); *ibid.* (Kennedy, J., concurring) ("Where a statute provides the conditions for the exercise of governmental power, its requirements are the result of a deliberative and reflective process engaging both of the political branches."). Congress's actions in joining with the Executive Branch to provide a military-commissions process reflecting the considered judgments of both political Branches of government have greatly reduced any asserted need for this Court's review, much less the need for expedited review before any commission proceedings have even begun. See *Schlesinger* v. *Councilman*, 420 U.S. 738, 754-755 (1975).[2]

[2] In a letter sent to the Clerk after the petition for a writ of certiorari was filed, Hamdan asserts that a guilty plea entered by one of the petitioners in *Al Odah*, David Hicks, will preclude consideration of challenges to the military-commission scheme. See Letter from Neal

b. Petitioners argue (Pet. 7) that "[t]he scope of habeas jurisdiction is a matter of profound national and international importance," counseling in favor of this Court's immediate review. That consideration by itself is insufficient to "justify deviation from normal appellate practice and to require immediate determination in this Court." Sup. Ct. R. 11. As respondents explained in the brief in opposition to the petition for a writ of certiorari in *Boumediene* and *Al Odah*, Congress has provided a means by which petitioners can obtain judicial review of the validity of their detention and any criminal conviction. See *Boumediene* Br. in Opp. at 12-19. And the

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Katyal, Counsel of Record, to the Honorable William K. Suter, Clerk of the Court (Mar. 28, 2007) (*Letter*). That guilty plea has not yet been accepted by the military-commission judge. Whether or not Hicks's petition remains live or is withdrawn or mooted, and whether or not the Court grants this extraordinary petition, Khadr remains a party to the judgment in *Boumediene* and *Al Odah*. What precludes either Hicks or Kahdr from specifically raising unique issues about the MCA as it applies to detainees awaiting a military-commission trial is that those issues were neither pressed nor passed on below. Granting this extraordinary petition will not change that fact. Granting certiorari before judgment in *Hamdan* will put those issues before the Court, but without the benefit of consideration by the court of appeals. In all events, Hamdan does not satisfy the standards for certiorari before judgment, and no purpose would be served by injecting collateral, but relatively undeveloped, issues into the consideration of *Boumediene* and *Al Odah*.

Hamdan also asserts that, because the D.C. Circuit has stayed proceedings pending the disposition of his petition for a writ of certiorari, "there is no prospect of any prompt development in the Court of Appeals on the questions presented by this Petition." *Letter*. That statement is correct but incomplete. The D.C. Circuit stayed proceedings in Hamdan's case, but it did so at Hamdan's request. See Mot. to Hold Appeal in Abeyance (D.C. Cir. filed Feb. 6, 2007) (No. 07-5042). Hamdan can hardly complain that the court of appeals granted his motion.

exclusive judicial review procedures established by Congress exceed any judicial review that any captured enemy combatants have enjoyed in wartime. Petitioners demonstrate no compelling basis for this Court to review the court of appeals' decision before petitioners have even attempted to invoke the procedures that Congress has afforded.

Petitioners contend that this Court has previously granted certiorari before judgment in similar cases that involve important issues requiring prompt resolution, but those cases are inapplicable here. See Pet. 10 (citing cases). Several of the cited cases are ones in which the government sought or acceded to a request for certiorari before judgment because the Executive determined that the district court's decision would affect the government's interests or the national security in such a way so as to require this Court's immediate intervention. See, *e.g.*, *United States* v. *Nixon*, 418 U.S. 683, 686 (1974); *Wilson* v. *Girard*, 354 U.S. 524 (1957); *Kinsella* v. *Krueger*, 351 U.S. 470, 473 (1956); *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 937 (1952) (per curiam). The Executive, unlike a private litigant, has the responsibility to oversee this Nation's foreign relations and undertake military operations in an ongoing international armed conflict, and is, therefore, uniquely positioned to make such a determination.

In both *Dames & Moore* v. *Regan*, 453 U.S. 654 (1981), and *McCulloch* v. *Sociedad Nacional*, 372 U.S. 10 (1963), on which petitioners rely, the Court granted certiorari before judgment where the district court's order, if affirmed, would have resulted in a circuit split. The district court's decision in *Hamdan*, however, is entirely consistent with the D.C. Circuit's decision in *Boumediene*. In addition, in *Dames & Moore* the Court

determined that certiorari before judgment was appropriate because resolution of the relevant issue would affect a number of pending cases in various lower courts. See *Dames & Moore*, 453 U.S. at 660 (noting "lower courts had reached conflicting conclusions on the validity of the President's actions"); see also *Mistretta* v. *United States*, 488 U.S. 361, 371 (1989) (granting certiorari before judgment to determine constitutionality of sentencing guidelines where there was "disarray among the Federal District Courts"). That is not the case here. And although this Court granted certiorari before judgment in *Ex parte Quirin*, *supra*, the petitioners there faced imminent execution. Hamdan does not face such a fate.[3]

Moreover, none of the cases cited by Hamdan involved situations where this Court had before it petitions for writs of certiorari that presented the same threshold issues seeking review of a court of appeals decision. Whatever the merits of Hamdan's request for certiorari before judgment in the abstract, his request is seriously undermined by the pending petitions in

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[3] While these cases in which the Court has granted certiorari before judgment are clearly distinguishable, the most apposite precedent is the Court's rejection of Hamdan's earlier effort to seek certiorari before judgment. See *Hamdan* v. *Rumsfeld*, 543 U.S. 1096 (2005) (No. 04-702). Indeed, despite the obvious importance of the novel questions raised in the context of the war on terror, this Court has routinely declined efforts to seek certiorari before judgment or in other interlocutory postures. See, *e.g.*, *Qassim* v. *Bush*, 126 S. Ct. 1771 (2006) (No. 05-892); *Padilla* v. *Hanft*, 545 U.S. 1123 (2005) (No. 04-1342); see also *In re Paracha*, 127 S. Ct. 1298 (2007) (No. 06-8449) (petition for writ of mandamus); *Moussaoui* v. *United States*, 544 U.S. 931 (2005) (No. 04-8385) (petition for writ of certiorari to review decision of court of appeals in interlocutory appeal).

Boumediene and *Al Odah*. At a minimum, those cases present the same threshold questions as Hamdan's case.

c. Contrary to petitioners' assertion (Pet. 8-9), this petition is not a necessary counterpart to *Boumediene* and *Al Odah*. The fact that petitioners here are subject to trial by military commission does not make their cases distinguishable from that of the detainees in *Boumediene* and *Al Odah*. Both Hamdan and Khadr are aliens detained as enemy combatants at Guantanamo Bay and are therefore in exactly the same position as the detainees in *Boumediene* and *Al Odah* insofar as they challenge their detention as enemy combatants, or the application of the jurisdiction-removing provision of the MCA to their cases. Petitioners provide no reason why the reasoning of the court of appeals' decision would not apply to them. Indeed, despite Khadr's protestation that he is differently situated, he filed the same brief and made the same arguments before the D.C. Circuit as the other *Al Odah* detainees. He made no arguments based on the fact that he was likely to be charged before a military commission, and he concedes (Pet. 6-7) that the arguments he advances here were not raised in *Boumediene* and *Al Odah*. Thus, it comes as no surprise that the court of appeals' opinion treated his case the same as the cases of the other detainees. As one of the petitioners in the *Al Odah* appeals, he is expressly covered by the court of appeals' judgment in that case; retaining new counsel and joining a petition filed on behalf of a detainee who was not a part of his case does not give him any license to make arguments concerning commission detainees that he did not properly raise in *Al Odah*.

Thus, even if the Court grants review in *Boumediene* and *Al Odah*, there is no reason for the Court to grant review in this case, which raises the same legal issues,

particularly insofar as a grant of certiorari would require the extraordinary step of granting review before judgment. That is particularly true given that, if the Court were to grant in *Boumediene*, Khadr presumably still could file a brief as a respondent in support of petitioners.

Petitioners contend that their petition raises legal issues beyond those presented and decided in *Boumediene* and *Al Odah*, see Pet. 9 (raising constitutional challenges to the MCA under the Bill of Attainder and Equal Protection guarantees), necessitating this Court's review in this case. Those arguments are at the periphery of the legal challenges raised to the MCA. In any event, the court of appeals in *Boumediene* and *Al Odah* determined that Guantanamo Bay detainees, as aliens detained outside the sovereign territory of the United States, lack constitutional rights. Pet. App. 66a. That holding forecloses petitioners' far-fetched claim that the MCA violates the Constitution's prohibition on bills of attainder or its guarantee of equal protection.

To the extent that the court of appeals' decision did not decide the specific constitutional issues that petitioners wish to raise at this time (or effectively interject into *Boumediene* and *Al Odah*), that fact counsels against this Court's grant of certiorari. The Court should not resolve those claims in the first instance but should wait for the benefit of an opinion from the court of appeals.[4]

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[4] In any event, petitioners' claims lack merit. Section 7 of the MCA does not contain either of the required elements of a bill of attainder: it neither singles out petitioner nor does it impose punishment. 120 Stat. 2635-2636. The MCA does not apply "either to named individuals or to easily ascertainable members of a group." *United States* v. *Lovett*, 328 U.S. 303, 315 (1946); see *Foretich* v. *United States*, 351 F.3d 1198, 1217 (D.C. Cir. 2003) ("Both 'specificity' and 'punishment' must be

d. Finally, Hamdan may not avoid his burden to demonstrate extraordinary circumstances warranting certiorari *before* judgment by latching onto Khadr.

As an initial matter, it is not clear that the petitions of Hamdan and Khadr are properly joined under this Court's Rule 12.4. That rule, in relevant part, provides that, "[w]hen *two or more judgments* are sought to be reviewed on a writ of certiorari to the same court and involve identical or closely related questions, a single petition for a writ of certiorari covering all the judgments suffices." (emphasis added). Here, however, there is only one judgment—that entered in *Boumediene* and *Al Odah*—since Hamdan petitions for a writ of certiorari before judgment. This Court's rules do

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shown before a law is condemned as a bill of attainder."). Rather, Section 7 of the MCA is a jurisdictional provision that applies to an open-ended class of individuals: aliens determined by administrative processes to be enemy combatants or who are being held as enemy combatants while awaiting such determinations. MCA § 3, 120 Stat. 2600-2631. Moreover, that provision simply specifies the forum in which permissible claims by enemy combatants must be brought and clarifies the scope of that review. It does not impose any of the types of punishment that this Court has found to be covered by the Bill of Attainder Clause. See *Selective Serv. Sys.* v. *Minnesota Pub. Interest Research Group*, 468 U.S. 841, 852 (1984); *Nixon* v. *Administrator of Gen. Servs.*, 433 U.S. 425, 474 (1977). Even assuming Hamdan has constitutional rights under the Fifth Amendment, his equal-protection claim likewise fails. The MCA does not deprive aliens of any fundamental constitutional habeas right, because even if aliens held outside the Untied States as enemy combatants have a constitutional right to habeas, the MCA provides adequate and appropriate substitute relief. Further, Hamdan is not a member of a suspect class—federal classifications on the basis of alienage are subject only to rational-basis review. See *Matthews* v. *Diaz*, 426 U.S. 67 (1976).

not authorize combining a petition for a writ of certiorari before judgment with a petition for a writ of certiorari.

Moreover, although Khadr is permitted to file a petition separate from the other petitioners in *Al Odah*, see Sup. Ct. R. 12.4 ("Parties interested jointly, severally, or otherwise in a judgment may petition separately for a writ of certiorari."), Hamdan cannot avail himself of the lower standard governing certiorari after judgment simply by combining his petition with that of Khadr. Because Hamdan fails to demonstrate extraordinary circumstances warranting certiorari before judgment, the petition should be denied as to him.

3. For the reasons set forth in our brief in opposition in *Boumediene*, the petition should also be denied as to Khadr. Khadr has presented no "compelling reasons" that distinguish him from the petitioners in *Boumediene* and warrant this Court's immediate review.

Petitioners complain that review of military-commission convictions under the DTA and MCA is not an adequate substitute for habeas for a number of reasons. These arguments add little to the arguments that have already been presented by the petitioners in *Boumediene* and *Al Odah* and that could be considered by the Court if it were to grant review in those cases. In any event, petitioners' arguments lack merit.

First, petitioners contend (Pet. 21) that habeas review permits pre-trial claims, whereas review under the DTA and MCA is limited to review of final convictions. This claim lacks merit. In the absence of clear statutory direction, courts have a limited equitable discretion to abstain from pre-trial review. See, *e.g.*, *Schlesinger* v. *Councilman*, 420 U.S. 738 (1975). But Congress can, as it has here, jurisdictionally bar a party's claims until an administrative or military ruling becomes final. See

McCarthy v. *Madigan*, 503 U.S. 140, 144 (1992); *Booth* v. *Churner*, 532 U.S. 731, 741 n.6 (2001). In *Thunder Basin Coal Co.* v. *Reich*, 510 U.S. 200, 207 (1994), the Court explained, "[w]hether a statute is intended to preclude initial judicial review is determined from the statute's language, structure, and purpose, its legislative history." In the MCA, the intent of Congress is clear to remove jurisdiction over the charged detainees' claims, except as they may be asserted in the D.C. Circuit under Section 1005(e)(3) of the DTA. See MCA § 7(a), 120 Stat. 2636 (barring habeas claims and any claims relating to, *inter alia*, "trial," except as provided by § 1005(e) of the DTA). Similarly without merit is petitioner's suggestion that the government may attempt to preclude judicial review of final decisions of the military commission by purposely failing to finalize the military commission's judgment. See Pet. 21. This claim is entirely speculative and is inconsistent with the presumption of regularity and good faith to which government proceedings are entitled. See *United States* v. *Armstrong*, 517 U.S. 456, 464 (1996).

Second, petitioners assert (Pet. 21-22) that the scope of review under the DTA and the MCA is narrower than that afforded in habeas, particularly as the MCA excludes conditions-of-confinement claims. But a habeas action is not an appropriate vehicle for challenging conditions of confinement, rather than the fact of detention or its duration. See, *e.g.*, *Wilkinson* v. *Dotson*, 544 U.S. 74, 85-87 (2005) (Scalia, J., concurring); *Bell* v. *Wolfish*, 441 U.S. 520, 526 n.6 (1979); *Preiser* v. *Rodriguez*, 411 U.S. 475, 499-500 (1973); *Cochran* v. *Buss*, 381 F.3d 637, 639 (7th Cir. 2004).

Third, petitioners argue (Pet. 22) that it is unclear whether the D.C. Circuit's review encompasses constitu-

tional claims. In fact, the DTA makes clear that detainees may raise claims that the standards and procedures followed by CSRTs or military commissions are not consistent with the Constitution, to the extent that it is applicable. See DTA § 1005(e)(2) and (e)(3), 120 Stat. 2631. Respondents' position is that petitioners have no constitutional rights in this context, but petitioners can plead their arguments to the contrary to the D.C. Circuit. That court should resolve that issue, at least in the first instance.

Fourth, petitioners claim (Pet. 23) that the MCA precludes them from raising treaty claims, which they previously would have been permitted to raise in a habeas action. That is also an issue that should be litigated in the D.C. Circuit in the first instance in the context of a petition for review. In any event, however, any constitutional right to common-law habeas would certainly not include the right to press claims under treaties that do not provide judicially enforceable rights to private parties. Thus, even if petitioners have constitutional habeas rights, Congress' amendment of the habeas statute to remove habeas jurisdiction over actions brought by aliens detained as enemy combatants, including any treaty claims, raises no Suspension Clause issues. And contrary to petitioners' assertion, the MCA does not abrogate the Geneva Conventions, but simply clarifies that the Geneva Conventions are not judicially enforceable by private parties. See MCA § 5(a), 120 Stat. 2631. There cannot possibly be any constitutional impediment to Congress limiting enforcement of a treaty to diplomatic and non-judicial processes. Indeed, that is the norm for treaties. See, e.g., *Holmes* v. *Laird*, 459 F.2d 1211, 1220-22 (D.C. Cir. 1972).

Finally, petitioners argue (Pet. 24) that review under the MCA is inadequate because it precludes review of the sufficiency of the evidence. But as we have explained, see pp. 15-16, *supra*, habeas review in this context does not provide for the examination of the sufficiency of the evidence.

CONCLUSION

The petition for a writ of certiorari should be denied. In the alternative, the petition should be held pending the disposition of *Boumediene* v. *Bush*, No. 06-1195, and *Al Odah* v. *United States*, No. 06-1196, and then disposed of as appropriate in light of those decisions.

Respectfully submitted.

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