No. _____

IN THE
Supreme Court of the United States

SALIM AHMED HAMDAN, PETITIONER, V. ROBERT GATES, ET AL., RESPONDENTS	OMAR KHADR, PETITIONER, V. GEORGE W. BUSH, ET AL. RESPONDENTS

On Petition for Writ of Certiorari and Writ of Certiorari Before Judgment to the United States Court Of Appeals For The District Of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI AND WRIT OF CERTIORARI BEFORE JUDGMENT

NEAL K. KATYAL
Counsel of Record
600 New Jersey Ave., NW
Washington, D.C. 20001
(202) 662-9000

HARRY H. SCHNEIDER
JOSEPH M. MCMILLAN
CHARLES C. SIPOS
Perkins Coie LLP

LAURENCE H. TRIBE
KEVIN K. RUSSELL
Harvard Law School
Supreme Court Litigation Clinic

LT. CMDR. CHARLES SWIFT
Office of Military Commissions

Attorneys for Salim Hamdan

MUNEER I. AHMAD
RICHARD J. WILSON
KRISTINE A. HUSKEY
American University Washington College of Law
Int'l Human Rights Law Clinic
Washington, D.C. 20016
(202) 274-4147

LT. COL. COLBY C. VOKEY
USMC, Regional Defense Counsel

LT. CMDR. WILLIAM C. KUEBLER
Office of Military Commissions

Attorneys for Omar Khadr

Date: February 27, 2007

QUESTIONS PRESENTED

This case presents a question that is also presented by petitions for certiorari anticipated in *Boumediene v. Bush*, No. 05-5062 (D.C. Cir., Feb. 20, 2007) and *Al Odah v. United States*, No. 05-5063 (D.C. Cir., Feb. 20, 2007):

1. Do individuals detained as alleged enemy combatants at the Guantanamo Bay Naval Base in Cuba have access to habeas corpus under the Constitution or by statute?

In addition, this case presents two further questions, which make this case a logical and necessary companion to the *Boumediene* and *Al Odah* petitions:

2. Is the Military Commissions Act of 2006 ("MCA"), which purports to strip federal courts of habeas jurisdiction with respect to Guantanamo Bay detainees, unconstitutional because it violates separation of powers, the Bill of Attainder Clause, and Equal Protection guarantees?

3. Even if the MCA validly withdraws habeas jurisdiction over petitions filed by individuals detained as alleged enemy combatants, are the petitioners in this case who are facing criminal *prosecution* before military tribunals – and sentences of life imprisonment and death – nevertheless protected by fundamental rights secured by the Constitution, including the right to challenge the jurisdiction of such a tribunal via the writ of habeas corpus?

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 14.1, the following list identifies all of the parties appearing here and in the court below.

Petitioner Salim Ahmed Hamdan is a citizen of Yemen who is currently detained at the Guantanamo Bay Naval Station.

Petitioner Omar Khadr is a citizen of Canada who is currently detained at the Guantanamo Bay Naval Station.

The Respondents in the United States Court of Appeals for the District of Columbia Circuit are Donald H. Rumsfeld, former United States Secretary of Defense; John D. Altenburg, Jr., former 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, former Commander Joint Task Force, Guantanamo, Camp Echo, Guantanamo Bay, Cuba; Colonel Nelson J. Cannon, former Commander of Camp Delta; and George W. Bush, President of the United States.

The parties before the Court have changed due to a series of personnel adjustments. Donald H. Rumsfeld, the Secretary of Defense, left office on December 15, 2006, and his successor, Robert M. Gates, took office on December 18, 2006. John D. Altenburg, Jr., the Appointing Authority for Military Commissions, left office on November 10, 2006, and his successor, Susan J. Crawford, took office as Convening Authority for Military Commissions on February 7, 2007. Brigadier General Jay Hood, the Commander Joint Task Force, Guantanamo, transferred command to Rear Admiral Harry B. Harris on March 31, 2006. Colonel Nelson has been replaced by Dennis Wade.

Pursuant to Rule 29.6, Petitioners state that no parties are corporations.

CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations and Rules

Constitutional Provisions

Other Authorities

Salim Ahmed Hamdan and Omar Khadr petition for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The opinion of the district court in Petitioner Hamdan's case with respect to which a writ of certiorari before judgment is sought (App. A, *infra*) is reported at 464 F. Supp. 2d 9 (2006). The opinion of the circuit court in the case in which Petitioner Khadr was a party (App. G, *infra*) is not yet reported but available at 2007 WL 506581.

JURISDICTION

In petitioner Hamdan's case, the judgment of the district court was entered on December 13, 2006. *See* App. A, *infra*, at 1a. Petitioner timely filed his notice of appeal (App. D, *infra*) on February 5, 2007. The case was docketed in the court of appeals on February 6, 2007, as No. 07-5042. The jurisdiction of this Court is invoked under 28 U.S.C. §§ 1254(1) and 2101(e).

In petitioner Khadr's case, the judgment of the court of appeals was entered on February 20, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Under Sup. Ct. R. 12.4, "[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." As petitioners have confirmed with the Clerk's Office of the Court, this Petition satisfies this Rule because both Petitioners seek a writ of certiorari to the D.C. Circuit. Their cases are presented together in a single Petition because both face charges before military commissions at Guantanamo Bay.

RELEVANT LEGAL PROVISIONS

The relevant legal provisions are reproduced in Appendix C.

STATEMENT

Respondents have detained Petitioners at Guantanamo Bay, deemed them "enemy combatants," charged Hamdan with "Conspiracy" and "Providing Material Support for Terrorism,"

charged Khadr with those crimes in addition to others, and plan to try them before military commissions. On a previous appeal, while Hamdan faced essentially the same "Conspiracy" charge, this Court held that his claims under the Geneva Conventions and Uniform Code of Military Justice ("UCMJ") were meritorious. However, upon remand, the district court held that Congress has now stripped it of jurisdiction to consider Hamdan's habeas petition. The circuit court issued a similar ruling dismissing Khadr's habeas petition.

1.a. *Petitioner Hamdan*: Over five years ago, indigenous forces seized Hamdan in Afghanistan while he was attempting to evacuate his family to Yemen, his native land. He was turned over to U.S. military personnel in exchange for a bounty, interrogated for months, and then brought to Guantanamo Bay. Many reports of mistreatment have emerged from Guantanamo. Detainees have been beaten, deprived of sleep for weeks, and subjected to sexual humiliation and religious degradation.[1]

b. Over a year after Hamdan was transferred to Guantanamo, in July 2003, the President asserted that Petitioner was subject to his November 13, 2001 Military Order. He was placed in solitary confinement, and military defense counsel was appointed for the purpose of negotiating a guilty plea. The demand by Hamdan that charges be preferred and a speedy trial held under the UCMJ was rejected. He remained in solitary confinement for ten months, until October 2004.

---

[1] United Nations investigators issued a report in February 2006, concluding that interrogation and detention practices at Guantanamo amounted to torture and calling for the camp's closure. U.N. Econ. & Soc. Council, Comm'n on Human Rights, *Situation of Detainees at Guantanamo Bay*, ¶¶ 53, 86, 96, U.N. Doc. E/CN.4/2006/120 (Feb. 15, 2006). More than 25 detainees have attempted suicide, and 3 detainees hanged themselves in their cells in June 2006. James Risen & Tim Golden, *Three Prisoners Commit Suicide at Guantanamo*, N.Y. Times, June 11, 2006, at 1. In one regularly utilized procedure, detainees were forced to strip to their underwear in rooms maintained at an excessively cold temperature, shackled to floor bolts, and bombarded with loud rap music and strobe lights. Neil A. Lewis, *Broad Use of Harsh Tactics Is Described at Cuba Base*, N.Y. Times, Oct. 17, 2004, at 1. Another FBI report revealed that soldiers and interrogators had kicked the Koran, stood on it, and wrapped duct tape around a bearded detainee's head when he quoted from the Koran. Dan Eggen, *FBI Reports Duct-Taping, "Baptizing" at Guantanamo*, Wash. Post, Jan. 3, 2007, at A1.

c. Meanwhile, in April 2004, Hamdan's military counsel filed a petition for a writ of habeas corpus in federal district court. In July 2004, Hamdan was finally charged with a single count of conspiracy. Ultimately, in June 2006, this Court ruled that Petitioner could not be tried by military commission. *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006). This Court held that the Geneva Conventions applied because the jurisdictional statute for military commissions incorporated the laws of war, that Common Article 3 applied in the armed conflict in which Hamdan was captured, and that it entitled him to trial by "a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples." *Id.* at 2795. A plurality of the Court also held that conspiracy is not a cognizable offense under the laws of war. *Id.* at 2775-86.

d. On remand from this Court, the district court interpreted § 7 of the Military Commissions Act of 2006 ("MCA") to require dismissal of Hamdan's habeas petition. The President signed the MCA into law on October 17, 2006. Pub. L. No. 109-366, 120 Stat. 2600. Under the MCA, alien detainees designated as "unlawful enemy combatants" by Combatant Status Review Tribunals ("CSRTs") are subject to trial by military commission. MCA § 3(a) (adding 10 U.S.C. § 948(c),(d)). CSRT determinations are "dispositive for purposes of jurisdiction for trial by military commission." *Id.*

In addition, the MCA purports to strip jurisdiction over any habeas action brought by an alien "determined by the United States to have been properly detained as an enemy combatant or…awaiting such determination." MCA § 7(a). Nor may the courts hear "any other action against the United States or its agents relating to any aspect of the detention, transfer, trial, or conditions of confinement" of such an alien, except for a limited review allowed under the Detainee Treatment Act of 2005, Pub. L. No. 109-148, div. A, tit. X, 119 Stat. 2739 (2005) ("DTA"). *Id.* A separate MCA provision strips jurisdiction over claims relating to "the prosecution, trial, or judgment" of a commission. MCA § 3(a) (adding 10 U.S.C. § 950j(b)).

The MCA and DTA allow for only a narrow, *post hoc* review of a subset of detainee claims before the D.C. Circuit. Only after military commission proceedings are finalized (with

no timetable for such finalization) may the D.C. Circuit consider "whether the final decision was consistent with the standards and procedures specified" by the MCA, or consistent with federal law and the Constitution, to the extent that they apply. MCA § 3(a) (adding 10 U.S.C. § 950(g)). There is no provision for review of factual conclusions; rather, "the Court of Appeals may act only with respect to matters of law." *Id.* In like manner, the D.C. Circuit may hear claims filed after a final decision of a CSRT. The scope of review is similarly restricted, but the court may review whether the decision was "supported by a preponderance of the evidence." MCA § 7(a); DTA § 1005(e).

The district court on remand in this case first held that the MCA removed statutory habeas jurisdiction. While noting that "Congress must articulate specific and unambiguous statutory directives to effect a repeal" of habeas jurisdiction, *INS v. St. Cyr*, 533 U.S. 289, 299 (2001), the court nevertheless rejected Petitioner's argument that § 7(b) of the MCA does not clearly apply retroactively to pending habeas petitions. App. 4a-6a.

The district court next held that the MCA did not suspend the constitutional right to habeas. Because the conditions for suspension did not exist and Congress "made no findings of the predicate conditions," it found no suspension. *Id.* 11a-12a.

Nevertheless, the district court held that the general availability of constitutional (as opposed to statutory) habeas was of no help to Hamdan because, as an alien enemy, he was not entitled to seek the writ. Despite this Court's statement in *Rasul v. Bush*, 542 U.S. 466, 481 (2004), that its interpretation of the habeas statute was "consistent with the historical reach of the writ of habeas corpus," the district court dismissed as dicta *Rasul*'s discussion of habeas petitions brought by aliens detained in territory under the jurisdiction and control of the Executive in England and the United States. App. 12a-13a.

Rather than following *Rasul*, the district court relied on *Johnson v. Eisentrager*, 339 U.S. 763 (1950), where this Court held that German citizens convicted of war crimes in post-World War II China and imprisoned in Germany had no right to the writ. The district court held that Guantanamo "lies outside the sovereign realm, and only U.S. citizens there may claim entitlement to a *constitutionally* guaranteed writ." App. 16a.

Having decided that it had been "divested of jurisdiction," the court opined that it could not consider Hamdan's remaining constitutional challenges. It thus declined to consider the inadequacy of the MCA's review compared to constitutional habeas review, or Hamdan's contentions that the MCA interferes with the judicial function by nullifying this Court's ruling that the Geneva Conventions apply, and that it violates the Bill of Attainder and Equal Protection Clauses. App. 16a.

e. On February 2, 2007, charges of "Conspiracy," and "Providing Material Support for Terrorism" were sworn against Hamdan pursuant to the MCA. App. 32a.

2.a. *Petitioner Khadr:* In July 2002, U.S. forces seized Petitioner Omar Khadr in Afghanistan, when he was fifteen years old. After detaining and interrogating him for several months, U.S. military forces transferred him to Guantanamo Bay, where he remains to this day. In July 2004, following this Court's decision in *Rasul*, Khadr filed a habeas petition. His case was transferred to Judge Joyce Hens Green for coordination with other Guantanamo cases. On January 31, 2005, Judge Green denied the Government's motion to dismiss these cases, and held that the petitioners, including Khadr, were protected by the Constitution. *See In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443 (D.D.C. 2005). In a second, related case, Judge Richard Leon granted the government's motion to dismiss. *See Khalid v. Bush*, 355 F. Supp. 2d 311 (D.D.C. 2005). Both cases were consolidated before the D.C. Circuit.

b. In July 2005, over three years after Khadr was taken into U.S. custody, the President determined that he was subject to the November 13, 2001 Military Order. On the afternoon of November 7, 2005, the same day that this Court granted certiorari in *Hamdan*, the government announced charges against Khadr. His habeas petition was then amended to reflect his changed circumstances and to contest his detention pending trial by military commission. Commission proceedings against Khadr began in January 2006, but were terminated upon this Court's decision in *Hamdan*.

c. On February 2, 2007, new charges were sworn against Khadr. These include charges of "Conspiracy" and "Providing

Material Support for Terrorism," identical to those sworn against Hamdan. App. 103a.

d. On February 20, 2007, the D.C. Circuit issued its decision in the consolidated appeals from Judges Green and Leon, dismissing the cases for lack of jurisdiction in light of § 7 of the MCA. App. 71a-72a. The court held that the MCA stripped the federal courts of jurisdiction over the detainees' habeas actions. *Id*. The court assumed that the Suspension Clause only protects the writ as it existed in 1789, and found no Suspension Clause violation because the writ in that era would not have been available to persons held "at an overseas military base" such as Guantanamo. App. 62a-64a. It further held that the "Constitution does not confer rights on aliens without property or presence within the United States." App. 66a.

e. The claims presented by the *Boumediene* and *Al-Odah* petitioners, and the circuit court's decision, do not include or address pre-trial challenges to the jurisdiction of a military commission, which is a central feature of this petition.[2] *Boumediene* and *Al-Odah* do not implicate the MCA's military commission provisions, as almost all of those detainees, unlike Hamdan, are not facing charges—a distinction that they relied on to assert that they stand in a more favorable jurisdictional position than Hamdan.[3] Moreover, the detainees in those cases did not assert—and the circuit court did not address—the separation of powers, Bill of Attainder, or Equal Protection violations raised by Hamdan below. Recognizing that Hamdan's Petition involves a challenge to the jurisdiction of the commissions not present in *Boumediene* and *Al Odah*, Khadr –

---

[2] Indeed, in discussing the inadequacies of the CSRTs as compared to habeas review, the dissent in *Boumediene* drew a distinction between the detainees in that case and individuals (such as Hamdan and Khadr) who are "facing an imminent trial." App. 91a & n.9 (Rogers, J., dissenting).

[3] *Al Odah* petitioner David Hicks has also been charged under the MCA, but the *Al Odah* and *Boumediene* appeals only challenged the legitimacy of the CSRTs as a basis for non-commission petitioners' continuing detention, not the jurisdiction of a military commission. The circuit court's opinion does not address the effect of these petitioners' status as pre-commission detainees, nor does the dissent.

Moreover, counsel for Hicks has represented that he strongly supports the granting of certiorari in the Khadr and Hamdan cases.

whose case was consolidated with *Al Odah* before the circuit court – joins in this Petition pursuant to Sup. Ct. R. 12.4.

REASONS FOR GRANTING THE PETITION

I. The Questions Presented Are Exceptionally Important and Ripe for Review, and the Case Is a Necessary Counterpart to Others Likely to Be Reviewed.

Certiorari before judgment may be granted when a "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. *See* U.S. Pet. for Cert. Before J., *United States v. Fanfan*, No. 04-105, *cert. granted*, 125 S. Ct. 12 (2004). This case satisfies that standard.

A. First, this Petition presents the important question of whether the courts have any jurisdiction—constitutional or statutory—to consider habeas petitions filed by detainees at Guantanamo Bay. The scope of habeas jurisdiction is a matter of profound national and international importance. Habeas review is crucial to our carefully attuned separation of powers. *See Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004) (noting the "necessary role" of the Great Writ in "maintaining this delicate balance of governance, serving as an important judicial check on the Executive's discretion in the realm of detentions"). The writ's importance is at its apogee when it is the only means available to stop an illegal trial where a man's life is at stake.

Access to the federal courts via habeas is determinative of a further essential question: whether the political branches can circumvent the Constitution and decisions of this Court to institute criminal prosecutions before military tribunals, summary proceedings regarded with the utmost suspicion by our Founders. *Hamdan*, 126 S. Ct. at 2759 ("trial by military commission is an extraordinary measure raising important questions about the balance of powers in our constitutional structure"); *id.* at 2800 (Kennedy, J., concurring) ("Trial by military commission raises separation-of-powers concerns of the highest order."); *Loving v. United States*, 517 U.S. 748, 760 (1996) ("the Framers harbored a deep distrust of executive military power and military tribunals"). As the War on Terror

enters its sixth year, this Court's guidance is needed on whether the judiciary can be summarily removed from its traditional role in safeguarding liberty and preserving the balance of power.

B. Second, this case serves as a necessary counterpart to petitions for certiorari that will soon be filed in the recently decided *Al Odah* and *Boumediene* cases. Each case challenges in some form the constitutionality of the MCA and the scope of constitutional protections at Guantanamo. However, standing alone, *Al Odah* and *Boumediene* do not provide this Court with the opportunity to evaluate these claims fully.

The petitioners in *Al Odah* and *Boumediene* are challenging the adequacy of the CSRTs, contending that they failed to provide the process due to anyone detained indefinitely without charge. Those cases have focused on the CSRTs and the rights of persons who do not face commissions. *See Boumediene*, App. 53a-54a (describing the issue presented as whether habeas extends to aliens "detained as enemy combatants").[4] By contrast, Hamdan commenced this action primarily as a jurisdictional challenge to a military commission, a challenge he now renews in light of the charges preferred against him under the MCA. Khadr is also facing charges before a military commission – indeed, potentially capital charges –and joins Hamdan in this challenge. Thus, unlike *Al Odah* and *Boumediene*, this case presents the question of whether the Great Writ still serves as a vehicle to challenge, on a pre-trial basis, the jurisdiction and legitimacy of a criminal tribunal, as this Court held it did just a few months ago in this very case.[5]

---

[4] Several decisions distinguish between those facing commissions and CSRTs. *E.g.*, *supra* note 3; *Hamdan*, 126 S. Ct. at 2798. ("Hamdan does not challenge, and we do not today address, the Government's power to detain him"); *id.* at 2817 (Scalia, J., dissenting) ("The vast majority of pending petitions, no doubt, do not relate to military commissions at all, but to more commonly challenged aspects of 'detention' such as the terms and conditions of confinement."); *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 447 n.7 (D.D.C. 2005), *overruled by Boumediene, supra*.

[5] Because detention raises different concerns than punishment, consideration of Petitioners' case is necessary to review fully the constitutionality of the MCA. *E.g.*, *Hamdi*, 542 U.S. at 593 (Thomas, J., dissenting) (drawing the "punishment-nonpunishment distinction"); Amicus Br. of the Military Attorneys Assigned to the Def. in the Office of Military

This case differs in the additional respect that Hamdan and Khadr face prosecution in a process that permits the introduction of testimony extracted through coercion, tries them on alleged offenses defined *ex post facto* (one of which a plurality of this Court has already stated does not violate the laws of war), and strips them of the right to invoke treaty-based defenses that this Court has already ruled apply. *Al Odah* and *Boumediene* do not implicate the Ex Post Facto Clause, nor do they test whether a decision of this Court affording Petitioners treaty-based rights can be side-stepped by a subsequent jurisdictional statute, one which, with respect to Hamdan at least, essentially nullifies the law of the case.

As set forth below, Petitioners contend that such a maneuver impermissibly interferes with the judicial function in contravention of *United States v. Klein*, 80 U.S. 128 (1871).

In addition, the *Al Odah* and *Boumediene* petitioners, unlike Hamdan below, do not argue that the MCA offends Bill of Attainder and Equal Protection guarantees. Consideration of this case is therefore necessary to review fully the MCA's constitutionality. *Cf. Gratz v. Bollinger*, 539 U.S. 244, 259-60 (2003) (certiorari before judgment granted to "address the constitutionality of the consideration of race in university admissions in a wider range of circumstances").[6]

This Court has often granted certiorari before judgment in order to bring before it a logical companion to another important case in which certiorari has been granted. For

---

Commissions, *Al Odah*, No. 03-343, at 5-7.

[6] Simultaneous consideration is necessary for the additional reason that the litigating positions of the *Al Odah* and *Boumediene* detainees and Petitioners are at times adverse. The former have argued that those facing military commissions have a weaker claim for habeas review than those who are merely detained. *See, e.g.*, Supp. Br. of Pet'rs Boumediene, et al., and Khalid, at 18, *Boumediene v. Bush*, No. 05-5062 (D.C. Cir. Nov. 1, 2006) ("The common law accorded persons who—like Petitioners—had no reasonable prospect of a trial a significantly broader inquiry on habeas than was available to persons awaiting trial on a criminal charge."); Guantanamo Detainees' Supp. Brief, at 13, *Al Odah v. United States*, No. 05-5064 (D.C. Cir., Nov. 1, 2006). By contrast, Petitioners contend that those facing prosecution are protected by the Great Writ in full measure. *See* Br. for Pet. at 8, *Hamdan*, 126 S. Ct. 2749 (2006) (No. 05-184).

example, in *United States v. Fanfan*, *rep. sub nom. United States v. Booker*, 543 U.S. 220 (2005), the Court granted certiorari before judgment to hear the case with *Booker*, since both presented the issue of sentencing in federal courts not "based solely upon the guilty verdict." *Id.* at 229. Likewise, the Court granted certiorari before judgment in *Gratz*, 539 U.S. at 259-60, to consider the case alongside *Grutter v. Bollinger*, 539 U.S. 306 (2003), since both involved challenges to affirmative action policies at the University of Michigan. These recent precedents reflect this Court's long history of granting certiorari before judgment to consider similar cases simultaneously.[7]

C. Third, this Court has also granted certiorari before judgment when questions of great importance required prompt resolution. This is such a case, as demonstrated by the actions of this Court in the past. *See, e.g.*, *Ex parte Quirin*, 317 U.S. 1 (1942) (certiorari before judgment in a case involving a military commission); *Wilson v. Girard*, 354 U.S. 524 (1957) (certiorari before judgment to determine whether the Constitution applies extraterritorially to restrain military trials); *Kinsella v. Krueger*, 351 U.S. 470 (1956) (same); *Dames & Moore v. Regan*, 453 U.S. 654 (1981) (certiorari before judgment in a case impacting sensitive foreign policy matters); *McCulloch v. Sociedad Nacional*, 372 U.S. 10, 17 (1963) (same); *The Three Friends*, 166 U.S. 1 (1897) (same); *United States v. Nixon*, 418 U.S. 683, 686 (1974) (certiorari before judgment in a case raising separation of powers questions); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (same).

---

[7] *E.g.*, *New Haven Inclusion Cases*, 399 U.S. 392 (1970) (consolidated litigation); *United States v. Thomas*, 362 U.S. 58 (1960) (considered with *United States v. Raines*, 362 U.S. 17 (1960)); *Taylor v. McElroy*, 360 U.S. 709 (1959) (considered with *Greene v. McElroy*, 360 U.S. 474 (1959)); *Kinsella v. Krueger*, 351 U.S. 470 (1956) (considered with *Reid v. Covert*, 351 U.S. 487 (1956)); *Bolling v. Sharpe*, 347 U.S. 497 (1954) (considered with *Brown v. Bd. of Educ.,* 344 U.S. 1 (1952)); *Porter v. Dicken*, 328 U.S. 252 (1946) (considered with *Porter v. Lee*, 328 U.S. 246 (1946)); *Rickert Rice Mills v. Fontenot*, 297 U.S. 110 (1936) (considered with *United States v. Butler*, 297 U.S. 1 (1936)); *see also* Lindgren & Marshall, *The Supreme Court's Extraordinary Power to Grant Certiorari Before Judgment in the Court of Appeals*, 1986 Sup. Ct. Rev. 259, 297 (1986).

D. This Court has also granted certiorari before judgment in cases that, like Hamdan's, were returning to the Court a second time for clarification of the scope or meaning of its prior ruling.[8] In this case, certiorari before judgment is necessary to ensure that any trials that do occur comport with the rule of law and with "judicial guarantees which are recognized as indispensable by civilized peoples." This Court should resolve—for the benefit of Respondents as well as Petitioners—whether the United States is bound by the Constitution in the criminal trials it is about to initiate, or instead can proceed in defiance of the judgment of our Founders, treaty obligations, rulings of this Court, and international law to maintain "law-free zones" in territories long subject to exclusive U.S. control. To decline to grant certiorari in this case as a necessary companion to *Al Odah* and *Boumediene* would allow the Government to initiate criminal proceedings under a cloud of uncertainty and potential illegitimacy, to the great detriment of our standing in the world as a country committed to the rule of law.[9]

---

[8] *See, e.g.*, *Ins. Group v. Denver & Rio Grande W. R.R.*, 329 U.S. 607 (1947) (prior cases: 329 U.S. 708 (1946) and 328 U.S. 495 (1946)); *Piedmont & N. Ry. v. ICC*, 286 U.S. 299 (1932) (prior case: 280 U.S. 469 (1930)); *Fetters v. United States*, 283 U.S. 812 (1931) (prior case: *Mathues v. United States*, 282 U.S. 802 (1930)); *St. Louis, Kansas City R.R. v. Wabash R.R.*, 217 U.S. 247 (1910) (prior case: *Joy v. St. Louis*, 138 U.S. 1 (1891)).

Last term, this Court and the parties before it dedicated substantial attention to, without finally resolving, many of the same questions presented in this Petition: Petitioner's right to seek the Writ and the constitutional validity of an attempt to suspend it. *See Petrs. Mo. Expedite*, at 8.

[9] "Hamdan and the Government both have a compelling interest in knowing in advance whether Hamdan may be tried by a military commission that arguably is without any basis in law." *Hamdan*, 126 S. Ct. at 2772. Consider, for example, the circumstances Petitioners face. They have been held in U.S. custody for approximately five years, including extended periods in solitary confinement. It is impossible for them to plan for their trials, as they do not even know if due process and other fundamental rights secured by the Constitution will govern their trials and punishment. Such uncertainty, in turn, makes a plea nearly impossible. Ordinary criminal trials apply fixed rules in advance. Here, everything about the trials, including the most basic question of all—does the Constitution apply to them—are in doubt.

II. The Courts Below Erred in Creating a Legal Black Hole at Guantanamo Exempt from the Great Writ.

Regardless of whether the MCA strips the federal courts of statutory jurisdiction, Petitioners' claims are cognizable under the writ of habeas corpus preserved by the Constitution. The Constitution provides that "[t]he privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it." Art. I, § 9, cl. 2. This Court should make clear that, contrary to the rulings of the district and circuit courts, the detention and trial of alleged enemies held for years at Guantanamo is reviewable under the Great Writ, the "highest safeguard of liberty" in our system. *Smith v. Bennett*, 365 U.S. 708, 712 (1961).

"Habeas corpus is…a writ antecedent to statute,…throwing its roots deep into the genius of our common law….The writ appeared in English law several centuries ago [and] became an integral part of our common-law heritage by the time the Colonies achieved independence." *Rasul*, 542 U.S. at 473-74. The Founders ensured that the availability of the writ was not dependent upon executive or legislative grace. *St. Cyr*, 533 U.S. at 304 n.24. Thus, the right to habeas exists even in the absence of statutory authorization, and may be suspended only by explicit congressional action under strictly limited conditions.

The conclusion that Petitioners have a constitutional right to habeas follows from the history of the writ and this Court's precedents, which establish that (1) their claims fall within the scope of the writ as it existed in 1789, (2) their status as alleged enemy combatants presents no bar, and (3) the right to habeas under the Constitution reaches to Guantanamo Bay.

A. Petitioners' claims falls squarely within the scope of the habeas inquiry historically available under the common law. This Court has recognized that "at the absolute minimum, the Suspension Clause protects the writ 'as it existed in 1789.'" *St. Cyr*, 533 U.S. at 301 (quoting *Felker v. Turpin*, 518 U.S. 651, 664 (1996)).[10] *Rasul* applied the pre-MCA habeas statute to

[10] *Boumediene* "truncated" *St. Cyr*'s analysis by eliminating the key words "at an absolute minimum." App. 82a n.5 (Rogers, J., dissenting). Indeed, several cases look to the writ as it has evolved, not as it existed in

Guantanamo detainees because that construction was consistent with the "historical reach of the writ," which was available even "where ordinary writs did not run [in] all…dominions under the sovereign's control." *Rasul*, 542 U.S. at 481-82. *Rasul*'s understanding was correct; the courts below erred on this point.

The writ has been a vehicle for challenges to executive detention since 1340. William F. Duker, *A Constitutional History of Habeas Corpus* 24 (1980). Indeed, it is in this context that its protections "have been strongest." *St. Cyr*, 533 U.S. at 301; *see also Swain*, 430 U.S. at 386 (Burger, C.J., concurring) ("[T]he traditional Great Writ was largely a remedy against executive detention."); Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv. L. Rev. 441, 475 (1963) ("[t]he classical function of the writ of habeas corpus was to assure the liberty of subjects against detention by the executive or the military....").[11]

Moreover, the writ historically has been available to test the detention of alleged enemy aliens and prisoners of war, as illustrated by *King v. Schiever*, 97 Eng. Rep. 551 (K.B. 1759). In *Schiever*, an English court reviewed the sworn statements supporting the habeas petition of a seaman from a neutral nation

---

1789. *E.g., Felker*, 518 U.S. at 663-64 (1996) ("[W]e assume for purposes of decision here, that the Suspension Clause of the Constitution refers to the writ as it exists today, rather than as it existed in 1789."); *Swain v. Pressley*, 430 U.S. 372, 380 n.13 (1977) (citing Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142, 171 (1970)) (noting that "Judge Friendly observed that '[w]hat Congress has given, Congress can *partially* take away,'" an observation "more cautious than the conclusion that Congress may *totally* repeal all post-18th Century developments in this area of the law") (emphasis added by the Court).

[11] *Boumediene's* discussion of English history, App. 63a-65a, rested on treatises that describe efforts by the Earl of Clarendon to evade the writ by sending prisoners overseas. In passages omitted in *Boumediene*, the treatises go on to explain that Parliament put an end to that practice in 1679. 2 Henry Hallam, *The Constitutional History of England* 230-32 (1989) (1827); Duker, *supra*, at 52-58; Johan Steyn, *Guantanamo Bay: The Legal Black Hole*, 52 Int'l & Comp. L.Q. 1, 8 (2004) ("In 1679 this loophole was blocked by section 11 of the Habeas Corpus Amendment Act 1679. For more than three centuries such stratagems to evade habeas corpus have been unlawful in England."). The Framers did not incorporate Clarendon's habeas into the Suspension Clause, but rather the more robust writ that emerged by 1679.

(Sweden) deemed a prisoner of war after he was captured aboard a French privateer during the Seven Years' War. *Id.* at 552. This Court in *Rasul* correctly read *Schiever* as proof that suspected enemy aliens can invoke habeas.[12]

Early American courts similarly recognized that habeas extends to enemy aliens. *See, e.g.*, *Lockington's Case*, Bright. (N.P.) 269 (Pa. 1813) (considering petition of a British citizen imprisoned during the War of 1812); *Laverty v. Duplessis*, 3 Mart. (o.s.) 42, 1813 WL 757 at *1 (La. 1813) (summarizing the district court's decision to release the petitioner on habeas because he had been incorrectly classified as an enemy alien).

Further, Guantanamo clearly falls within the geographic coverage of the common-law writ, which historically had an "extraordinary territorial ambit." *Rasul*, 542 U.S. at 482 n.12 (quoting R. Sharpe, *Law of Habeas Corpus* 188-89 (2d ed. 1989)). In the eighteenth century, habeas extended beyond the Kingdom of England; it was "a writ of such a sovereign and transcendent authority, that no privilege of person or place can stand against it. It runs, at the common law, to all dominions held of the Crown. It is accommodated to all persons and places." *Opinion on the Writ of Habeas Corpus*, 97 Eng. Rep. 29, 36 (H.L. 1758). Lord Mansfield stated there was "no doubt" the writ could issue in any territory "under the subjection of the Crown," even if that territory was "no part of the realm." *King v. Cowle*, 97 Eng. Rep. 587, 598 (K.B. 1759). The writ extended to India well before Britain's 1813 assertion of sovereignty.[13] In short, habeas jurisdiction turns on control, not sovereignty.[14]

---

[12] Notwithstanding *Rasul*, the *Hamdan* district court deemed it unclear whether *Schiever* ultimately dismissed the habeas petition on jurisdictional or substantive grounds. App. 12a-13a. But if *Schiever* was jurisdictional, the English court would have simply accepted the Crown's assertion that the prisoner was an enemy alien and dismissed the petition outright. Instead, the court reviewed the evidence presented by the petitioner before concluding that he was lawfully detained. 97 Eng. Rep. at 552. *The Three Spanish Sailors' Case*, 96 Eng. Rep. 775 (C.P. 1779), provides another example of a prisoner of war invoking the writ. As in *Schiever*, the court maintained jurisdiction to review the evidence, noting that the prisoners, "upon their own showing, are alien enemies and prisoners of war." *Id.* at 776.

[13] By 1775, judges began to issue common-law habeas writs to British subjects as well as "natives." *E.g.*, N. Hussain, *The Jurisprudence of*

B. The courts below held that Petitioners are not entitled to the constitutionally guaranteed writ based on a misreading of *Johnson v. Eisentrager*, 339 U.S. 763, 770 (1950), and an erroneous belief that Petitioners' detention outside the "sovereign realm" of the United States mandates dismissal. App. 15a-16a. In fact, as this Court held earlier with respect to the Geneva Conventions, *Eisentrager* "does not control this case." *Hamdan*, 126 S. Ct. at 2794. Rather, it is distinguishable on multiple grounds, including: (1) Petitioners are not nationals of countries at war with the United States; (2) they dispute their status as alleged enemy combatants; (3) the United States exercises exclusive jurisdiction and control at Guantanamo, and (4) in *Eisentrager* this Court *reached the merits* of the habeas petitions, despite language in the opinion that questioned the basis for jurisdiction.[15]

Emergency: Colonialism and the Rule of Law 81 (2003); B.N. Pandey, *The Introduction of English Law into India* 151 (1967). But until the Act of 1813, 53 Geo. 3, c. 155, the Moghul Emperor retained "formal sovereignty," 4 *The Cambridge History of the British Empire* 592, 595 (1929). *See also Boumediene,* App. 83a (Rogers, J., dissenting).

[14] For instances in which the writ issued from a court in England to locations outside the realm but under the control of the Crown, *see King v. Salmon*, 84 Eng. Rep. 282 (K.B. 1669) (writ issued to Channel Island of Jersey on behalf of individual committed on "suspicion of treason"); *King v. Overton*, 82 Eng. Rep. 1173 (K.B. 1668) (writ issued to Jersey); Sir Matthew Hale, *The History of the Common Law of England* 120 (1739) (writ issued to Channel Islands). *See also Bourn's Case*, 79 Eng. Rep. 465, 466 (K.B. 1619) (writ issued to Calais); M. Bacon, *A New Abridgement of the Law*, Tit. Habeas Corpus (B) (7th ed. 1832) (same).

[15] *Eisentrager* does not stand for the proposition that courts are closed to those in Petitioners' position. Rather, the petitioners in *Eisentrager* were provided a full hearing, with the Court carefully considering the substance of petitioners' claims before rejecting them *on the merits*. This Court recognized as much last term in *Hamdan*, noting that in *Eisentrager* "[w]e rejected [petitioners' Geneva Convention] claim on the merits because the petitioners (unlike Hamdan here) had failed to identify any prejudicial disparity 'between the Commission that tried [them] and those that would try an offending soldier of the American forces of like rank.'" 126 S. Ct. at 2793. While *Eisentrager* did discuss at length whether enemy aliens were afforded access to American courts, it stated that "the doors of our courts have not been summarily closed upon these prisoners" and that it heard and considered "all contentions they have seen fit to advance" before concluding that no basis for

Indeed, in *Rasul*, this Court expressly recognized many of the factual distinctions that render *Eisentrager* inapposite:

> Petitioners in these cases differ from the *Eisentrager* detainees in important respects: They are not nationals of countries at war with the United States, and they deny that they have engaged in or plotted acts of aggression; …they have never been afforded access to any tribunal, much less charged with and convicted of wrongdoing; and for more than two years they have been imprisoned in territory over which the United States exercises exclusive jurisdiction and control.

542 U.S. at 476. Under these facts, habeas jurisdiction is proper, as "nothing in *Eisentrager*…categorically excludes aliens detained in military custody outside the United States from the 'privilege of litigation' in U.S. courts." *Id.* at 484.[16]

This Court's understanding in *Rasul* and *Hamdan* was correct: *Eisentrager* presented a unique factual situation, and its holding does not govern here. The *Eisentrager* petitioners were German nationals convicted by a military commission in China. The commission was established with the consent of the Chinese Government.[17] Following their convictions, they were

---

issuing the writ appeared. 339 U.S. at 780-81. Indeed, *Eisentrager* engaged in precisely the same habeas inquiry into the jurisdiction of the military commission that the Court had previously provided in *Quirin*, *Yamashita*, and *Duncan v. Kahanamoku*, 327 U.S. 304 (1946). That inquiry focused on "the lawful power of the commission to try the petitioner for the offense charged." 339 U.S. at 787 (quoting *In re Yamashita*, 327 U.S. 1, 8 (1946)).

[16] The *Hamdan* district court relied on the fact that in *Eisentrager* it was immaterial whether the petitioners were in the service of a German civilian or military institution. But that was because the petitioners were *indisputably German nationals*, 339 U.S. at 765, and that status alone rendered them enemies of the United States as a matter of law, *id.* at 773-75 & n.6. In addition, *Eisentrager* emphasized that rather than simply being citizens of a nation at war with the United States, "these prisoners were actual enemies, active in the hostile service of an enemy power. There is no fiction about their enmity." *Id.* at 778. By contrast, Petitioners here are citizens of Yemen and Canada, nations not at war with the United States, and they do not share the presumptive enemy affiliation of the *Eisentrager* petitioners. *See Boumediene*, App. 95a ("These detainees are citizens of friendly nations…[including] Canada [and] Yemen[.]") (Rogers, J., dissenting).

[17] *Eisentrager*, Index to Pleadings, Ex.4—Message of 6 July 1946 to

detained at Landsberg Prison in occupied Germany, where the United States shared jurisdiction over detentions with the other Allies.[18] Based on this relatively dense legal landscape, the Government claimed in *Eisentrager* that "[t]he rights of these enemy aliens all flow from and must be vindicated within the framework of the system established for the occupation of their country…. They are foreigners in a foreign land, held in that foreign land by the sovereignty now governing it as a result of war, defeat, surrender, and occupation.… [Their] legal status does not differ from that of Germans now detained in Germany by German authorities. Like such prisoners, or like Englishmen in England, or Frenchmen in France, they must look to the rights and remedies open to them under their country's present laws and government," not the American Constitution. U.S. Br., *Eisentrager* 1950 WL 78514, at *65-67 (1950) (No. 306).

In contrast, Guantanamo is "territory over which the United States exercises plenary and exclusive jurisdiction." *Rasul*, 542 U.S. at 475. It is "in every practical respect a United States territory." *Id.* at 487 (Kennedy, J., concurring). There is neither shared control by multiple sovereigns, nor an underlying legal framework apart from the Constitution. Guantanamo in 2007 is not remotely analogous to occupied Germany in 1947, and the arguments counseling denial of the writ in *Eisentrager*—unwillingness to interfere with the multiple sovereigns and the textured, distinctive legal system inherent in military occupation—are absent in the unique case of Guantanamo.

Finally, *Eisentrager* predicated the denial of habeas relief on three facts that are missing here: (1) the petitioners there had never been within the habeas jurisdiction of the United States, (2) the Court's previous determination that the World War II military commissions were "lawful tribunal[s]," and (3) the Court's judgment on the merits that the *Eisentrager* petitioners had been charged with a recognized war crime. *Id.* at 786-87.

First, not only are Petitioners within the territorial

Gen. Wedemeyer from Joint Chiefs of Staff. J.A. 167.

[18] *See Basic Principles for Merger of the Three Western German Zones of Occupation and Creation of an Allied High Commission, reprinted in Documents on Germany*, 1944-1970, Comm. on Foreign Relations, 92nd Cong., (Comm. Print 1971), at 150-51.

jurisdiction of the United States, for years the Government held them within the statutory jurisdiction of the federal *courts*. *Compare Eisentrager*, 339 U.S. at 768 (emphasizing that the "alien enemy …in no stage of his captivity[] has been within its territorial jurisdiction"), *with Rasul*, 542 U.S. at 475-84 (holding that habeas jurisdiction extended to Guantanamo). The Administration continued to hold Petitioners at Guantanamo for years after *Rasul*. Textually, there was nothing to "suspen[d]" in *Eisentrager*, as the Court found that the writ had never protected the petitioners. Here, by contrast, this Court has already found that the writ protects the very subject of this Petition.

Second, *Eisentrager* was decided after *Quirin* and *Yamashita*, where this Court had already upheld the legitimacy of the World War II military commissions. 393 U.S. at 786 ("[W]e have held in the *Quirin* and *Yamashita* cases…that the Military Commission is a lawful tribunal to adjudge enemy offenses against the laws of war."). The petitioners in *Eisentrager* thus had no claim that the commission itself was illegitimate. Here, the prior military commission established to try Hamdan (which is identical in most material respects to the commission Petitioners face now) was deemed unlawful by this Court less than a year ago. *Rasul* observed that the *Eisentrager* petitioners had "been afforded access to [a] tribunal," a factor that weighed against the extension of habeas in that case. *Rasul*, 542 U.S. at 476. It cannot possibly be that access to an unprecedented, unlawful tribunal satisfies this criterion.

Third, the *Eisentrager* Court recognized that—as in *Quirin* and *Yamashita*—it had jurisdiction to consider whether the petitioners had been charged with an offense cognizable as a war crime. 339 U.S. at 787 (charges had "a basis in conventional and long-established law"). That is not the case here; a plurality of this Court determined that the previous "conspiracy" charge was *not* a violation of the laws of war. *Hamdan*, 126 S. Ct. at 2785-86. Reliance on *Eisentrager* to deny habeas review is misplaced where no court has had the opportunity to pass on that fundamental jurisdictional question.

C. The district court separately invoked *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), for the proposition that Hamdan cannot assert constitutional rights because he is a

non-national with an insubstantial connection with the United States. App. 15a. But the question in this case—whether federal courts retain jurisdiction over constitutional habeas corpus—is entirely independent from the question in *Verdugo-Urquidez*: the application of Fourth Amendment rights abroad. Like other structural protections, the Suspension Clause is not limited to a particular class of individuals, but rather constrains the power of Congress to act. *Cf. Downes v. Bidwell*, 182 U.S. 244, 277 (1901) (emphasizing that it is unnecessary to determine whether the Constitution applies extraterritorially because the Attainder Clause "go[es] to the very root of the power of Congress to act at all"); *see also Boumediene*, App. 77a (both the Suspension Clause and Attainder Clause are "limitations on Congress's powers") (Rogers, J., dissenting).

Hamdan relied on such a conclusion, for it held that the President's establishment of a military commission violated the UCMJ and the Geneva Conventions. Implicit in that ruling was the principle that a Guantanamo detainee *can* invoke constitutional restraints—in that case separation of powers—to contest government action. In other words, if the Constitution did not "protect" Guantanamo detainees, then there would have been nothing barring the President from defying the UCMJ and the Geneva Conventions in trying Hamdan. Indeed, in briefing to this Court the Government argued that *Eisentrager* barred Hamdan's merits claims precisely because the Constitution's structural protections did not extend to Hamdan.[19] Yet the Court nonetheless explicitly relied on separation of powers to rule in Hamdan's favor. 126 S. Ct. at 2774 n.23 ("[T]he President …may not disregard limitations that Congress has, in proper exercise of its own war powers, placed on his powers.") (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952)).

Furthermore, *Verdugo-Urquidez* does not purport to hold that the Constitution never applies to non-nationals located overseas. Although the Court held in that case that the Fourth

---

[19] Specifically, the Government stated that "Petitioner's argument…is predicated on the proposition that the Constitution places structural limits on the President's authority to convene military commissions… As an alien enemy combatant detained outside the United States, petitioner does not enjoy the protections of our Constitution." U.S. Merits Br., *Hamdan*, at 43.

Amendment did not apply in those circumstances, it regarded as established that certain "'fundamental' constitutional rights are guaranteed to inhabitants of...territories" under the control of the United States. 494 U.S. at 268. The Court emphasized the limited and highly contextual nature of its decision, which carefully examined the history of the Fourth Amendment. *See id.* The degree to which the Constitution applies extraterritorially is complex and dependent on many factors, including the particular provision, the status of the individual claiming its protection, and the territory in question. *See, e.g.*, *Balzac v. Porto Rico*, 258 U.S. 298 (1922); *Ocampo v. United States*, 234 U.S. 91 (1914); *Verdugo-Urquidez*, 494 U.S. at 277 (Kennedy, J., concurring) (explaining that the question is not whether the Constitution applies, as it must, but "what constitutional standards apply when the Government acts, in reference to an alien, within its sphere of foreign operations").[20]

Crucially, *Rasul* has already suggested that the "fundamental rights" reasoning of *Verdugo* applies to Guantanamo. 542 U.S. at 484 n.15; *id.* at 487 (Kennedy, J., concurring) ("the indefinite lease of Guantanamo Bay has produced a place that belongs to the United States, extending the 'implied protection' of the United States to it"). Yet neither court below gave weight to this portion of *Rasul*, and instead left detainees who are under the government's complete control entirely unprotected by the Constitution.

Finally, the issue of whether the Constitution protects Petitioners is crucial not simply for habeas corpus, but for the more fundamental matter of whether the Constitution constrains military commissions at all. Trying Petitioners on charges of "Conspiracy" and "Material Support"—newly minted offenses in the MCA—offends the Ex Post Facto Clause. A plurality of this Court already held that conspiracy is not a violation of the laws of war and "[b]ecause [that] charge does not support the commission's jurisdiction, the commission lacks authority to try Hamdan." 126 S. Ct. at 2785. Going forward with a trial under

---

[20] *Verdugo-Urquidez,* moreover, reserved the question whether a person whose "lawful but involuntary" stay was prolonged "by a prison sentence" might be entitled to constitutional protections. 494 U.S. at 271-72.

these conditions will not provide a better record for post-trial review by an Article III court, as every tactical decision Petitioners make would be controlled by the decisions below, which found even the most fundamental protections of the Constitution inapplicable.

If the Constitution truly does not constrain these trials, with the eyes of the world upon them and with the very life of these men at stake, such a pronouncement must come from this Court, and in advance of trial so that the litigants can plan accordingly.

Petitioners believe that those facing detention have access to the Great Writ. Regardless of whether this is so, access to the writ for those facing novel and untested military commissions lies at the core of traditional habeas jurisprudence – as *Milligan*, *Qurin*, and *Yamashita* each underscore. In this area of *criminal* enforcement, the Court's institutional competence is at its height, and the harmful consequences of the writ being granted (if any) are at their nadir.

D. Nor can the Government avoid Petitioners' Suspension Clause argument on the theory that the MCA provides an adequate substitute for habeas. At the very least, the timing of review under the MCA renders it insufficient. At common law, courts used habeas to consider pre-trial claims. *Ex parte Royall*, 117 U.S. 241, 253 (1886). By contrast, the DTA defers even its limited review until a "final decision" of a CSRT, DTA § 1005(e)(2), and the MCA defers review until a "final decision" of a military commission, MCA § 3(a) (adding 10 U.S.C. § 950g). Prohibiting judicial review until after these proceedings prevents detainees from vindicating rights violated by the very fact of being tried by an illegal tribunal in the first place. *Hamdan*, 126 S. Ct. at 2770 n.16 (quoting *Schlesinger v. Councilman*, 420 U.S. 738, 759 (1975)) ("abstention is not appropriate in cases in which individuals raise 'substantial arguments denying the right of the military to try them at all'").

Furthermore, under the MCA, the Executive can avoid *all* judicial review merely by failing to issue a final decision. This ability to avoid any review whatsoever is inconsistent with a core function of habeas, which "has always been available to review the legality of Executive detention." *St. Cyr*, 533 U.S. at 305. The scope of review under the MCA also falls short of the

inquiry authorized by constitutional habeas. *See Jones v. Cunningham*, 371 U.S. 236, 243 (1963) ("[habeas corpus] is not now and never has been a static, narrow, formalistic remedy; its scope has grown to achieve its grand purpose"). The MCA only permits review of "whether the final decision was consistent with the standards and procedures specified" by the MCA, and with federal law and the Constitution to the extent that they apply. MCA § 3(a).[21] Thus, for example, the MCA does not permit challenges to conditions of detention, a category of claims available under constitutional habeas.[22]

The MCA is also ambiguous as to whether the D.C. Circuit can review challenges to the constitutionality of the MCA as a whole. A broad constitutional challenge to the MCA does not clearly fall within the restrictive language describing the scope of review. But such a challenge is a central part of constitutional habeas. *See Ludecke v. Watkins*, 335 U.S. 160, 162 (1948).

Moreover, the MCA precludes the federal courts from considering Petitioners' treaty claims, by restricting the scope of review to consistency with federal law and the Constitution. MCA § 3(a), § 950g(c). Under common law habeas, in contrast, courts consider and vindicate treaty-based rights. *See, e.g.*, *Mali v. Keeper of the Common Jail*, 120 U.S. 1, 17-18 (1887). Although Congress is free to abrogate treaties entirely, it must do so with a clear statement; otherwise, courts interpret federal

---

[21] The D.C. Circuit also has the power to review final decisions of a CSRT. The scope of review is analogous, except that the court is permitted to review whether the decision was "supported by a preponderance of the evidence." MCA § 7(a); DTA § 1005(e).

[22] *See Preiser v. Rodriguez*, 411 U.S. 475, 499 (1973) ("When a prisoner is put under additional and unconstitutional restraints during his lawful custody, it is arguable that habeas corpus will lie to remove the restraints making the custody illegal."); *In re Bonner*, 151 U.S. 242 (1894) (granting habeas petition alleging detention at the wrong type of prison). This is directly relevant in this case, as the new "Camp 6" facility at Guantanamo subjects detainees to virtual solitary confinement – inhumane conditions that violate Common Article 3. R. Jeffrey Smith & Julie Tate, *Uighurs Detention Conditions Condemned*, Wash. Post, Jan. 30, 2007, at A04. Although such challenges are brought under § 1983, *see, Preiser*, 411 U.S. at 498, "[habeas] review is available for claims of 'disregard of the constitutional rights of the accused, and where the writ is the only effective means of preserving his rights.'" *Wainwright v. Sykes*, 433 U.S. 72, 79 (1977) (citation omitted).

law as being consistent with international law obligations. *Cook v. United States*, 288 U.S. 102, 120 (1933); *see also The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804). The MCA does not constitute any such clear statement—on the contrary, it purports to uphold the Geneva Conventions, *see* MCA § 6—and Petitioners therefore retain their treaty rights but lack a forum in which to vindicate them.

Finally, the MCA precludes review of the sufficiency of the evidence after commission proceedings. This procedure departs significantly from the factual inquiry available under common law habeas. *See Ex parte Bollman*, 8 U.S. (4 Cranch) 75 (1807) (granting writ after considering the evidence and determining no crime had occurred); *Goldswain's Case*, 96 Eng. Rep. 711 (C.P. 1778); *The Case of Three Spanish Sailors*, 96 Eng. Rep. 775 (C.P. 1779) (examining an affidavit from alleged alien enemies supporting their claims for release); *Schiever*, 97 Eng. Rep. 551 (same); *see also* Dallin H. Oaks, *Legal History in the High Court—Habeas Corpus*, 64 Mich. L. Rev. 451, 457 (1966).

III. The MCA Is Unconstitutional.

Certiorari is also appropriate because this case presents fundamental questions concerning the separation of powers, specifically, whether the MCA's jurisdiction-stripping provisions interfere with the judicial function and violate Bill of Attainder and equal protection guarantees.

A. First, the MCA violates *United States v. Klein*, 80 U.S. 128 (1871), by stripping jurisdiction to prevent implementation of this Court's ruling that Petitioners can invoke rights secured by the Geneva Conventions. *Klein* struck down a statute that prevented courts from giving effect to a presidential pardon, and removed appellate jurisdiction over cases in which a pardon was used to evidence loyalty. It held that Congress's manipulation of jurisdiction, which "allowe[d] one party to the controversy to decide it in its own favor," violated separation of powers by "prescrib[ing] rules of decision to the Judicial Department of the government in cases pending before it." *Id.* at 146.

Here, the MCA prescribes rules of decision within the meaning of *Klein* by simultaneously voiding this Court's

holding in *Hamdan*[23] and stripping federal courts of the power to review that nullification. Because this Court has made clear that the detainees at Guantanamo, including Hamdan and Khadr, have rights under the Geneva Conventions that must be respected, *Hamdan*, 126 S. Ct. at 2796, the jurisdiction-stripping provisions are tantamount to allowing one party to decide a controversy it in its own favor by removing jurisdiction from courts that would otherwise give effect to the Court's ruling. *See Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 227 (1995) ("Congress may not declare by retroactive legislation that the law applicable *to that very case* was something other than what the courts said it was.").[24] The MCA's provisions are particularly problematic as applied to Hamdan because they purposefully interfere with the ability of the federal courts (such as the court below on remand) to enforce this Court's previous disposition of Hamdan's case. *Cf. id.* at 228 (separation of powers is "violated when an individual final judgment is legislatively rescinded for even the *very best* of reasons"). This Court's guidance on *Klein*'s scope would clarify whether jurisdiction-stripping legislation that targets a specific ruling "passe[s] the limit which separates the legislative from the judicial power." *Klein*, 80 U.S. at 147.

B. Second, the jurisdiction-stripping provisions of the MCA also violate the prohibition on bills of attainder, a mechanism

---

[23] The MCA provides that "[n]o alien unlawful enemy combatant subject to trial by military commission under this chapter may invoke the Geneva Convention as a source of rights." MCA § 3(a), § 948b(g). This provision invades the judicial function because this Court has already ruled that the Geneva Convention protects Petitioners. *Hamdan*, 126 S.Ct. at 2796 ("Common Article 3...is applicable here and requires that Hamdan be tried by a regularly constituted court"). *See also Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669, 2684 (2006) ("If treaties are to be given effect as federal law under our legal system, determining their meaning as a matter of federal law 'is emphatically the province and duty of the judicial department,' headed by the 'one supreme Court' established by the Constitution.") (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 173, 177 (1803)).

[24] By stripping Petitioners of Geneva Convention protections guaranteed by this Court's June 2006 decision, the MCA removes all treaty-based defenses and effectively operates as a "means to an end" in the same manner as the unconstitutional statute at issue in *Klein*. 80 U.S. at 145.

for ensuring the separation of powers. Laws are Attainders when they inflict "legislative punishment, of any form or severity, on specifically designated persons or groups." *United States v. Brown*, 381 U.S. 437, 447 (1965); *see also Selective Serv. Sys. v. Minn. Pub. Interest Rsch. Group*, 468 U.S. 841, 841 (1984).[25]

The MCA singles out non-citizens who—like Petitioners—the Government has unilaterally and extra-judicially labeled "unlawful enemy combatants," i.e., criminals, and then punishes them by depriving them of full and complete habeas review based solely on that status. MCA § 7. A law meets the "singling out" requirement if it operates against a group based on past actions or status designations that cannot be changed. *Cummings v. Missouri*, 71 U.S. 277, 323 (1866) (striking down a law that punished former confederates as an unlawful Attainder); *Ex parte Garland*, 71 U.S. 333, 376 (1866).

The MCA inflicts punishment by stripping detainees of access to federal courts via habeas. First, this Court has historically recognized that the deprivation of full and complete access to the courts is "punishment." *Pierce v. Carskadon*, 83 U.S. 234, 237-38 (1872) (holding that a West Virginia law limiting the access to the courts afforded to former confederate sympathizers was an unlawful attainder).[26] Second, the jurisdiction-stripping provisions of the MCA impose a burden on Petitioners that greatly outweigh any non-punitive purpose in depriving them of habeas rights. The Attainder Clause is intended to prevent "punishment without trial by duly

---

[25] The Attainder Clause, which acts as a bulwark against Congress's interference with the prerogatives of the Judiciary, was prompted by "the fear that the legislature, in seeking to pander to an inflamed popular constituency, will find it expedient openly to assume the mantle of judge or, worse still, lynch mob." *Nixon v. Admin. of Gen. Serv.*, 433 U.S. 425, 480 (1977). Although Petitioners are protected by the Due Process Clause, this Attainder Clause argument does not depend on that fact since structural limits on Congress's power are exempt from an analysis of whether the claimant has individual constitutional rights. *See supra* pages 18-21.

[26] This Court continues to read *Pierce* for the proposition that denying complete access to courts qualifies as attainder. *E.g. Brown*, 381 U.S. at 448 n.21. And it has long recognized that more than criminal sanctions qualify as attainders. *Cummings*, 71 U.S. at 320 ("deprivation of any rights, civil or political, previously enjoyed may be punishment").

constituted courts." *See United States v. Lovett*, 328 U.S. 303, 317-18 (1946) (citing *Kahanamoku*, 327 U.S. 304). And third, the legislative history of the MCA illustrates that stripping the courts of habeas jurisdiction reflected a desire to punish those whom Congress viewed as unworthy of trial in U.S. courts.[27] This Court should clarify the scope of the Attainder Clause by determining whether the MCA runs afoul of that provision.

C. Certiorari before judgment is also appropriate to address whether the MCA interferes with the fundamental right of equal access to the courts in contravention of the Equal Protection guarantee of the Fifth and Fourteenth Amendments.[28] *Clark v. Jeter*, 486 U.S. 456, 461 (1988) (laws withdrawing access to fundamental rights are subject to strict scrutiny); *Griffin v. Illinois*, 351 U.S. 12, 17 (1956) (discrimination in providing access to courts violates equal protection). In using alienage as the dividing line, the MCA is subject to heightened scrutiny. *Graham v. Richardson*, 403 U.S. 365, 371 (1971) ("[C]lassifications based on alienage...are inherently suspect and subject to close judicial scrutiny."); *In re Griffiths*, 413 U.S. 717, 721-22 (1973); *Nyquist v. Mauclet*, 432 U.S. 1, 7 (1977). Congress cannot selectively exclude a suspect class from access to the courts without satisfying strict scrutiny review.[29] The

---

[27] *See, e.g.*, 152 Cong. Rec. S10238-01, at S10239 (daily ed. Sept. 27, 2006) (statement of Sen. Lott) ("Now we have this huge discussion about habeas corpus. Bring on the lawyers. What a wonderful thing we can do to come up with words like this. Our forefathers were thinking about citizens, Americans. They were not conceiving of these terrorists who are killing these innocent men, women, and children.").

[28] The Equal Protection Clause of the Fourteenth Amendment applies to all "persons" regardless of citizenship. *See Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886) ("The Fourteenth Amendment to the Constitution is not confined to the protection of citizens."). The Supreme Court has recognized that the Fifth Amendment's Due Process Clause embraces the same "concept of equal justice under law," *Hampton v. Mow Sun Wong*, 426 U.S. 88, 100 (1976), and accordingly "require[s] the same type of analysis." *Id*.

[29] Congress was able to pass the MCA so quickly—just three weeks after the Administration proposed the bill—only because it affects a class with no say in the political process, namely aliens. *See United States v. Carolene Products*, 304 U.S. 144, 153 n.4 (1938) (noting that statutes directed at "discrete and insular minorities" may "curtail the operation of those political processes ordinarily to be relied upon to protect minorities,

Constitution's guarantee of equal protection serves to ensure that the most vulnerable are in some sense represented by those with an adequate voice in the polity. *See Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 300 (1990) (Scalia, J., concurring) ("Our salvation is the Equal Protection Clause, which requires the democratic majority to accept for themselves and their loved ones what they impose on you and me.").

Strict scrutiny is separately appropriate because the MCA unequally obstructs access to what is arguably the Constitution's most fundamental right—the right to seek relief under habeas corpus. *Carafas v. LaVallee*, 391 U.S. 234, 238 (1968) (habeas is "shaped to guarantee the most fundamental of all rights"). Far less intrusive measures restricting access to courts have failed strict scrutiny. *E.g.*, *Douglas v. California*, 372 U.S. 353, 358 (1963) (striking down law allowing appellate courts to decide whether indigent defendants would receive appellate counsel); *Griffin*, 351 U.S. at 15-16 (invalidating regulation denying access to court transcript).

Although the MCA triggers strict scrutiny both by interfering with a fundamental right and by targeting a suspect class, *Wong Wing v. United States*, 163 U.S. 228, 237-38 (1896), the district court refused to grant *any* scrutiny whatsoever to Hamdan's claims and the circuit court's decision did not address equal protection issues. The statute's dramatic disparity between aliens and citizens should not go unchecked by this Court. If withdrawal of habeas jurisdiction is necessary to "win" the War on Terror, then it should be withdrawn for similarly situated American citizens, not simply the powerless.[30]

---

and…may call for a correspondingly more searching judicial inquiry.").

[30] Judicial invalidation of the MCA on this ground would leave the Government with tremendous flexibility. *Cf. Ry. Express Agency, Inc. v. New York*, 336 U.S. 106, 112 (1949) (Jackson, J., concurring) ("Invocation of the equal protection clause [compared to the due process clause] . . . does not disable any governmental body…It merely means that the prohibition or regulation must have a broader impact.….[N]othing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected.").

IV. The Federal Courts Retain Statutory Jurisdiction To Consider Hamdan and Khadr's Petition.

A. The courts below erred in concluding that the MCA's jurisdiction-stripping provisions applied to pending cases. Ignoring well-settled canons of construction, they interpreted ambiguous statutory language as repealing habeas jurisdiction retroactively, in a way that presented constitutional questions of the highest order. Instead, the courts should have applied the "[o]rdinary principles of statutory construction" used earlier by this Court to conclude that the DTA did not remove jurisdiction over this pending case. *Hamdan*, 126 S. Ct. at 2764. Those principles include presumptions against habeas repeal, against retroactivity, and against interpretations that trigger constitutional questions, all of which favor the continued exercise of jurisdiction in this case. *See id.* at 2765; *St. Cyr*, 533 U.S. at 298. The only cases in which this Court has ever found retroactive effect have involved statutory language "'so clear that it could sustain only one interpretation.'" *Id.* at 317 (quoting *Lindh v. Murphy*, 521 U.S. 320, 328 n.4 (1997)).

Section 7(a) of the MCA adds a new subsection (e) to the federal habeas statute, 28 U.S.C. § 2241. Subsection (e) is divided into two subparts. Subpart (1) divests courts of jurisdiction over *habeas applications* filed by aliens determined to be enemy combatants, or awaiting such determination. Subpart (2) divests courts of jurisdiction, except as preserved in the DTA, over any *other actions "relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien*" determined to be an enemy combatant, or awaiting such determination. (Emphasis added.) Section 7(b) of the MCA provides that § 7(a) takes effect on the date of enactment (which was October 17, 2006) and applies to "all cases, without exception, pending on or after the date of enactment of this Act *which relate to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien* detained by the United States since September 11, 2001." (Emphasis added.)

Significantly, § 7(b) does not expressly refer to *habeas*

cases pending on the date of enactment.[31] Instead, the language of § 7 tracks, virtually word for word, the language used in (e)(2) to refer to "*other actions*" relating to detention, transfer, treatment, et cetera, of detainees. (Emphasis added.) In determining that similar jurisdictional provisions of the DTA did not apply to this case because it was pending on the date of enactment of the DTA, this Court relied on a "negative inference [that] may be drawn from the exclusion of language from one statutory provision [when that language] is included in other provisions of the same statute." *Hamdan*, 126 S. Ct. 2765. Here, the same negative inference may be drawn from the absence of any express reference to a pending *habeas application* in § 7(b), in contrast to § 7(b)'s use of exactly the same terms as (e)(2) to identify the cases to which it applies. This indicates that the pending cases to which the new statute is intended to apply are precisely those described in (e)(2).

Such a reading is consistent with congressional intent to separate, and treat differently, two different types of actions: mundane challenges to only an "aspect" of detention or trial versus those challenging the system as a whole.[32]

Furthermore, this interpretation of the MCA is consistent with its drafting history. Congress declined to enact two

---

[31] The absence of any mention of habeas in § 7(b) is made even more conspicuous by the fact that habeas actions are explicitly mentioned in MCA § 3(a), which divests courts of jurisdiction over all actions, including habeas petitions, "relating to the prosecution, trial, or judgment of *a military commission* under this chapter." (Emphasis added.) This section of the MCA does not revoke the Court's jurisdiction over Petitioners' challenges because, as the section's title makes clear, it concerns routine challenges to the commission's "Procedures and Actions." Petitioners are not challenging a discrete procedure or action of the commission—they are challenging the new system in its entirety. Furthermore, even if § 3(a) were implausibly read to bar challenges to the military commission system as a whole, Petitioners' actions would still survive, because they include a separate challenge to their detention as enemy combatants, which are not affected by § 3(a).

[32] This Court found a similar distinction when it considered the DTA, noting that Congress may have had "good reason" to preserve jurisdiction for those cases that "challenge the very legitimacy of the tribunals whose judgments Congress would like to have reviewed," while "channel[ing] to a particular court and through a particular lens of review" those "more routine challenges to final decisions rendered by those tribunals." 126 S. Ct. at 2769.

versions of MCA § 7 that would have expressly stripped jurisdiction over pending habeas cases. *See* H.R. 6054, 109th Cong. § 5 (2006); S. 3886, 109th Cong. § 105 (2006). Congress instead decided to enact a bill that did not expressly divest courts of jurisdiction over pending habeas cases *and* without an explicit retroactivity provision. Congress's rejection of the very language that would have achieved the result the district court found here weighs heavily against the lower court interpretation.

B. Finally, this case tests whether Congress has exceeded its legislative authority in enacting the MCA. As described above, Petitioners contend that the MCA's jurisdiction-stripping provisions interfere with the judicial function, violate the Bill of Attainder Clause, and contravene Equal Protection guarantees. The district court erred in failing to reach these arguments because it determined that the MCA had divested it of jurisdiction to consider the habeas petition. App. 15a-16a & n.16. But jurisdiction-stripping provisions that violate the Constitution, as those in the MCA do, cannot shield themselves from judicial review. *United States v. United Mine Workers of America*, 330 U.S. 258, 291-97 (1947). To allow such bootstrapping would undermine the principle that "the federal judiciary is supreme in the exposition of the law of the Constitution." *Cooper v. Aaron*, 358 U.S. 1, 18 (1958). This Court should consider whether the MCA is unconstitutional because Congress lacked the authority to enact it. Review of these cases is appropriate because Petitioners' constitutional challenges include one based on an effort by Congress and the President to nullify a ruling of this Court in the *Hamdan* case, a ruling which protects both Hamdan and Khadr as they attempt to defend themselves in their impending trials.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari and a Writ of Certiorari Before Judgment should be granted.

NEAL K. KATYAL
Counsel of Record
600 New Jersey Ave., NW

MUNEER I. AHMAD
RICHARD J. WILSON
KRISTINE A. HUSKEY

Washington, D.C. 20001
(202) 662-9000

HARRY H. SCHNEIDER
JOSEPH M. MCMILLAN
CHARLES C. SIPOS
Perkins Coie LLP

LAURENCE H. TRIBE
KEVIN K. RUSSELL
Harvard Law School
Supreme Court Litigation Clinic

LT. CMDR. CHARLES SWIFT
Office of Military Commissions

Attorneys for Salim Hamdan

American University
Washington College of Law
Int'l Human Rights Law Clinic
Washington, D.C. 20016
(202) 274-4147

LT. COL. COLBY C. VOKEY
USMC, Regional Defense Counsel

LT. CMDR. WILLIAM C. KUEBLER
Office of Military Commissions

Attorneys for Omar Khadr

Date: February 27, 2007