

No. \_\_\_\_\_

IN THE SUPREME COURT OF THE UNITED STATES

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SALIM AHMED HAMDAN, Petitioner,

v.

ROBERT M. GATES, et al., Respondents,

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

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PETITIONER'S MOTION TO EXPEDITE  
CONSIDERATION OF PETITION FOR WRIT OF  
CERTIORARI BEFORE JUDGMENT,  
PETITION FOR REHEARING, AND  
MOTION FOR LEAVE TO FILE PETITION FOR  
REHEARING OUT OF TIME

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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

Date: July 2, 2007

LT. CMDR. CHARLES SWIFT  
Office of Military Commissions

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## **BACKGROUND AND SUMMARY OF ARGUMENT**

Petitioner Salim Ahmed Hamdan (Petitioner) respectfully moves this Court for an Order expediting consideration of his case. He moves for the adoption of a schedule and for other procedural actions that will permit the Court to expedite consideration of the petition and briefing and argument on the merits such that oral argument in this case could be heard together with *Boumediene v. Bush* (06-1195) and *Al Odah v. United States* (06-1196) (collectively, *Boumediene*). Cf. U.S. Mot. to Expedite Consideration of Petition for Certiorari and to Establish Expedited Schedule for Briefing and Argument if Certiorari is Granted, *Rumsfeld v. Padilla*, No. 03-1027 (Jan. 16, 2004) (asking this Court to enter briefing schedule by mutual consent of the Parties regarding the Petition for Certiorari, and to set a briefing schedule on the merits if the case is granted to match that of the then-recently granted *Hamdi v. Rumsfeld*, No. 03-6696 (*cert. granted* Jan. 9, 2004)); *motion to expedite granted*, 540 U.S. 1159 (Jan. 23, 2004).

This case is a necessary counterpart to *Boumediene*. If certiorari is not granted in this case, the Court will not resolve the full array of legal challenges in the range of contexts that exists to the Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (“MCA”). As the nation is almost six years beyond September 11, 2001, there is substantial interest in the Court comprehensively addressing without further delay the lawfulness of the system for detaining, charging, and trying the Guantanamo detainees.

While the issues in this case are closely related to those in *Boumediene*, Mr. Hamdan presents legal claims that have not been raised by those petitioners. He argues

that the jurisdictional provisions of the MCA interfere with separation of powers, and that they violate both the Equal Protection and Bill of Attainder Clauses of the Constitution.

Further, *Boumediene* only presents this Court with the question of whether Congress may strip detainees of the right to habeas as a means to challenge Combatant Status Review Tribunals (CSRTs), while this case presents the vital corollary question of whether Congress can strip detainees of the right to challenge the jurisdiction of *military commissions* through habeas. If the Court fails to grant review in Mr. Hamdan's case, Respondents will no doubt press forward with the commission process, subjecting Petitioner and others to potential sentences of life imprisonment and even death.

A decision by this Court in *Boumediene* favorable to the detainees would cast a shadow over any conviction and sentence entered in the interim, but still not finally resolve the legality of the commission process, for it will remain an open question whether detainees may challenge commissions – as opposed to CSRTs – on habeas. Alternatively, if the *Boumediene* petitioners do not prevail in this Court, the distinct legal challenges raised by Petitioner here, and the lawfulness of the commission process generally, will still remain to be resolved in the course of a process that inevitably will take several further years to complete. If the Constitution truly does not apply to these trials, it is better for everyone to know that now – so that commission trials may begin, pleas may unfold, and other countries can proceed in their diplomatic and legal efforts with clarity. Given the centrality of the MCA to the legal war on terror, it is far better to dissipate the cloud of legal uncertainty around it and consider these challenges together, instead of deciding only a subset of them for one portion of detainees.

The questions Mr. Hamdan's Petition raises are tightly circumscribed and will not complicate this Court's consideration of *Boumediene*. To the contrary, as the Court of Appeals' decision in *Boumediene* reveals, any resolution of those cases will almost certainly require analysis of much of Hamdan's challenge as well as a determination of the meaning of the military-commission precedent *Johnson v. Eisentrager*, 339 U.S. 763 (1950). Accordingly, there are considerable efficiencies gained by putting these military-commission matters forward in a concrete case and controversy – particularly when it is within the framework of a case that this Court has recently decided.

Petitioner is presenting this Court with two procedural vehicles suited to bringing his case before it: (i) a petition for rehearing (together with a motion for leave to seek rehearing out of time); and (ii) a petition for certiorari before judgment. In petitioner's view, the first of these – which was the mechanism employed by the Court in *Boumediene* – is the simplest and most expedient.

The Solicitor General has agreed to expedited consideration of the Petitions filed today by Mr. Hamdan. Under the schedule worked out between the parties, the government will respond to petitioner's filings in approximately three weeks, on Friday, July 20, 2007. Petitioner will reply by Tuesday, July 24. That schedule permits the Court to issue an appropriate Order on its first summer Orders List. In the event the Court grants certiorari, petitioner requests that this Court set a merits briefing and oral argument schedule for this case that will match that of the *Boumediene* petitioners. Such

an order would mean that no disruption of the Court's existing schedule would result from hearing this case.<sup>1</sup>

The Court should accordingly grant this Motion to Expedite. Specifically, in the event certiorari or rehearing are granted, it should Order that the case be briefed and argued contemporaneously with *Boumediene*.

### STATEMENT

1. Since May of 2002, Petitioner Hamdan has been detained at the U.S. Naval Station at Guantanamo Bay, Cuba, based on Respondents' determination that he is an "enemy combatant." Pursuant to the Military Commissions Act of 2006 ("MCA"), Pub. L. No. 109-366, 120 Stat. 2600, Hamdan was designated for trial before a military commission on charges of "Conspiracy" and "Providing Material Support for Terrorism." The MCA authorizes military commissions designed to replace those struck down in *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006). The new conspiracy charge faced by Hamdan is essentially the same as the prior conspiracy charge that a plurality of this Court determined was not an offense cognizable under the laws of war. *Hamdan*, 126 S. Ct. at 2775-86.

2. On remand to the district court, Petitioner Hamdan's case was dismissed based on § 7(a) of the MCA, which amends the habeas statute and purports to strip federal courts of jurisdiction over habeas petitions brought by any alien "determined by the United States to have been properly detained as an enemy combatant or awaiting such determination." *See also* MCA § 3(a) (stripping federal courts of jurisdiction over cases related to the "prosecution, trial or judgment" of military commissions); *Hamdan v.*

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<sup>1</sup> The Solicitor General has previously responded to a Petition for a Writ of Certiorari Before Judgment in this case. Though petitioner has put forward two procedural vehicles from which the Court may choose, the considerations underlying each are essentially identical. The relevant questions for decision now are the extent to which this case is a valuable counterpart to *Boumediene* and whether, on that basis, it satisfies the criteria for a certiorari before judgment.

*Rumsfeld*, 464 F. Supp. 2d 9, 12 (2006). Although the district court concluded that the constitutional conditions for suspension of habeas effected by § 7 of the MCA had not been met, the district court nonetheless relied on *Johnson v. Eisentrager*, 339 U.S. 763 (1950), to hold that Guantanamo “lies outside the sovereign realm, and only U.S. citizens in such locations may claim entitlement to a *constitutionally* guaranteed writ.” *Hamdan*, 464 F. Supp. 2d at 18. It also held that because Petitioner Hamdan’s contact with the United States was involuntary, he lacked the “substantial connection with our country” to justify a constitutional right to the Writ. *Id.* (quoting *United States v. Verdugo-Urquidez*, 494 U.S. 259, 271 (1990)).

3. Mr. Hamdan previously asked this Court to hear his challenge in a joint Petition for Certiorari Before Judgment and Petition for Certiorari with Mr. Khadr. On April 30, 2007, the Court denied certiorari. Pet. App. 103a. Three Justices dissented.

4. On June 8, 2007, Mr. Hamdan asked the U.S. Court of Appeals for the D.C. Circuit to hear his case en banc, stating that the broad language of the *Boumediene* panel decision would control his case and render any panel hearing superfluous. The Government, at the request of the Court of Appeals, filed papers opposing that request. It agreed that the panel decision controlled Mr. Hamdan’s challenge to the military commission. *E.g.*, U.S. Opp. Pet. Initial En Banc, June 28, 2007, at 3 (“*Boumediene* plainly controls his appeal and forecloses any argument that he is entitled to constitutional habeas rights”). Yet the government opposed the only mechanism for additional percolation of the issues raised by Hamdan’s case—en banc review. At present, although the en banc motion is pending, there is no reasonable prospect of additional percolation given this Court’s action in *Boumediene*. Both parties agree that in the absence of a hearing en banc, summary judgment in the D.C. Circuit is appropriate.

5. On June 29, 2007, this Court granted rehearing in *Boumediene*, vacated its

prior Order denying certiorari, and granted certiorari.

### ARGUMENT

The Motion to Expedite Consideration of this case should be granted in order to permit the Court to hear the case contemporaneously with *Boumediene*. This case and *Boumediene* are necessary complements to each other. 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”); *United States v. Fanfan, rep. sub nom. United States v. Booker*, 543 U.S. 220 (2005); *Hannah v. Larche*, 363 U.S. 420, 422 (1959) (granting motion to advance briefing and oral argument in related cases, one heard pursuant to writ of certiorari before judgment).

Expediting review would serve a dual purpose, promptly determining the legality of the jurisdiction-stripping provisions of the MCA in the two related contexts in which it is presented: (1) those, like Petitioner, facing imminent criminal prosecution pursuant to the MCA, and (2) those detained as “enemy combatants” under the MCA and either awaiting or moving through the CSRT process. This is particularly important because the petitioners in *Boumediene* have suggested that those in the former category do not possess the same rights as those in the latter. See *Rumsfeld v. Padilla*, 540 U.S. 1159 (Jan. 23, 2004) (granting Solicitor General’s motion to expedite consideration of certiorari Petition in light of the recently granted *Hamdi v. Rumsfeld*, No. 03-6696).

Moreover, reviewing the propriety of Congress’s attempted removal of habeas jurisdiction from the federal courts requires consideration of both of these possible varieties of habeas review. For example, if this Court were to conclude in *Boumediene*

that detainees challenging CSRTs have access to habeas, the government could immediately charge those detainees before military commissions, thereby removing them from the ambit of the Court's decision and placing them in the same position as Mr. Hamdan.<sup>2</sup> And given that the Court of Appeals is not likely to act on Mr. Hamdan's case until this Court decides *Boumediene* sometime in 2008, the earliest prospect for this Court's review over the MCA's military commission provisions is the following Term, placing a decision approximately two years away. By that point, approximately eight years would have elapsed since the September 11 attacks, and dozens of individuals may have been tried and sentenced in the military commissions. Those convictions will be enormously difficult to undo, and the uncertainty and delay that would inevitably permeate them would be destabilizing.

1. The petitioners in *Boumediene* are challenging the MCA's removal of habeas jurisdiction only as it relates to those detainees challenging the CSRT process. Those cases have therefore rightly focused on the CSRT procedures and the rights of persons who do not face commissions. See *Boumediene*, Pet. App. 53a-54a (describing the issue presented as whether habeas extends to aliens "detained as enemy combatants"). By contrast, Hamdan challenges the MCA's stripping of habeas jurisdiction over pre-trial jurisdictional challenges to the military commission process.

Petitioner Hamdan is one of three individuals at Guantanamo Bay who have had charges sworn against them under the MCA. One of the others, David Hicks of Australia,

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<sup>2</sup> This is not entirely speculative. See T. Golden, *After Terror, A Secret Rewriting of Military Law*, N.Y. Times, Oct. 24, 2004, at A1 (stating that the then-Counsel to the Vice President "urged" the then-White House Counsel Alberto Gonzales to "seek a blanket designation of all the detainees being sent to Guantanamo as eligible for trial under the President's order" and that Mr. Gonzales "agreed").

recently pled guilty and will finish serving his sentence at the end of this year in Australia. See W. Glaberson, *Plea of Guilty from Detainee in Guantanamo*, N.Y. Times, March 27, 2007, at A1. The other, Omar Khadr of Canada, is a Party in the joined *Boumediene* and *Al Odah* cases. However, with respect to those cases, as the Solicitor General has warned, “What precludes either Hicks or Kahdr [sic] 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.” U.S. Opp. Cert., No. 06-1169, *Hamdan v. Gates et al.*, at 17 n.2.<sup>3</sup>

While it decided that detainees at Guantanamo have no constitutional right to habeas, the Court of Appeals’ decision in *Boumediene* did not address pre-trial challenges to the jurisdiction of a military commission, a central feature of this Petition. These differences have been widely noted in previous court decisions.<sup>4</sup>

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<sup>3</sup> According to the Solicitor General, Mr. Khadr did not “file a separate brief from the *Al Odah* detainees, so he has not presented or preserved any of the arguments” that challenge the military commission. U.S. Opp. to Mot. Expedite, No. 06-1169, *Hamdan v. Gates.*, at 7. See also U.S. Opp. Cert., No. 06-1169, *Hamdan v. Gates et al.*, at 20 (“[D]espite 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....[J]oining 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*”).

<sup>4</sup> *E.g.*, *Hamdan*, 126 S. Ct. at 2798 (“It bears emphasizing that Hamdan does not challenge, and we do not today address, the Government’s power to detain him for the duration of active hostilities in order to prevent such harm.”); *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) (“This Memorandum Opinion does not address the legality of the military commission proceedings but rather focuses on the issue of the rights of detainees with respect to their classification as ‘enemy combatants’ regardless of whether they have been formally charged with a war crime.”), *overruled in Boumediene*, *supra*; *Boumediene*, 476 F.3d at 1010 (Rogers, J., dissenting)

*Boumediene* does not implicate the MCA’s military commission provisions at all, as those Petitioners are largely not facing charges – a distinction that they have relied upon to allege a more favorable jurisdictional position than Petitioner. *See, e.g.*, Supp. Brief of Pet’rs Boumediene, et al., and Khalid, *Boumediene v. Bush*, No. 05-5062, at 18 (D.C. Cir.) (“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, *Al Odah v. United States*, No. 05-5064, at 13. By contrast, Petitioner contends that those formally charged and facing prosecution are protected by the Great Writ in full measure. *See Br. for Pet. at 8, Hamdan*, No. 05-184, 126 S.Ct. 2749.

The *Boumediene* petitioners adopt a theory at odds with that of Mr. Hamdan, and at odds with the one accepted by a majority of this Court last Term, that those facing charges unquestionably have access to the Writ. *See Boumediene Pet. Cert.*, at 15 n. 12 (“An evolving interpretation of the Suspension Clause is particularly appropriate in cases of indefinite executive detention--like that at issue here--as opposed to detention pursuant to the judgment of a duly constituted criminal court or military tribunal.”); *id.* at 23; *id.* at 28; *Al Odah Cert. Pet.* at 13; *Boumediene Reply Opp. Rehearing*, at 1; *Pet. Br., Al Odah v. United States*, 542 U.S. 466 (2004) (No. 03-343) at 26 (“*Eisentrager* did not adjudicate—nor is there any reason to suppose it intended to pass upon—the rights of

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(distinguishing between those convicted in previously upheld military commissions and Guantanamo petitioners). Because detention raises different concerns than punishment, consideration of Petitioner’s case is necessary to review fully the MCA’s constitutionality. *E.g.*, *Hamdi v. Rumsfeld*, 542 U.S. 507, 593 (2004) (Thomas, J., dissenting) (drawing a “punishment-nonpunishment distinction”); Amicus Br. of the Military Attorneys Assigned to the Def. in the Office of Military Commissions, *Al Odah*, No. 03-343, at 5-7.

nonresident aliens who are nationals of countries friendly to the United States and who have never been charged, let alone convicted by a court or military tribunal.”); *id.* at 27.

The *Boumediene* petitioners in fact claim that the *Eisentrager* decision cannot govern their cases because they do not face military commission charges. This theory, if adopted by the Court, would leave the approximately 75 individuals like Mr. Hamdan who are currently anticipated to be charged (as well as the quite possibly larger number that would be immediately charged if this Court were to adopt that theory) without access to the Great Writ—despite this Court’s holdings in *Hamdan*, *Quirin*, *Yamashita*, and *Milligan*. Access to the Writ for those facing commissions is not only compelled by longstanding precedent, it carries a less drastic remedy than it does in the context of *Boumediene*, where a detainee might conceivably be freed by a federal court order.

There is no reasonable way to untangle this set of issues about the meaning of *Eisentrager* without confronting the potentially adverse relationship between the reading of that case given by the *Boumediene* petitioners and that offered by Mr. Hamdan. *E.g.*, *Boumediene* Pet. Cert. 17 (“The court of appeals also erred by relying on *Eisentrager*. As this Court explained in *Rasul*, Guantanamo prisoners are ‘differently situated from the *Eisentrager* detainees’ for several reasons. Justice Kennedy further agreed that the situation of Guantanamo prisoners is ‘distinguishable from . . . *Eisentrager* in two critical ways’: because Guantanamo is ‘in every practical respect a United States territory,’ and because the prisoners were imprisoned indefinitely and lacked ‘any legal proceeding to determine their status.’”) (citations and footnote omitted); *Al Odah* Cert. Pet. 14 (*Rasul*

shows that the Petitioners are “fundamentally different from *Eisentrager*” because, inter alia, “they have never been charged or convicted of any wrongdoing.”).

To be sure, the MCA purports to remove habeas jurisdiction over *both* types of claims by operation of section 7(b) of the Act. But the Court’s analysis into whether such a removal is permissible will necessarily proceed differently with respect to each type of challenge. For example, in assessing the propriety of the removal of jurisdiction, this Court will need to consider whether Congress has provided an adequate alternate remedy to replace habeas corpus. In *Boumediene*, this will require a determination whether § 1005(e)(2) of the Detainee Treatment Act of 2005, Pub. L. No. 109-148, div. A, tit. X, 119 Stat. 2739 (2005) (“DTA”), which provides for review of CSRT determinations after the fact, is such an adequate alternate remedy. *Boumediene*, 476 F.3d at 1006 (Rogers, J., dissenting); *Boumediene* Pet. for Cert. at 18-20; *Al Odah* Cert. Reply at 1-3. But in Hamdan’s case, determination of the *same question* will require inquiry into whether MCA § 3(a), an entirely different provision which governs review of decisions by military commissions, is an adequate substitute for the Great Writ. Thus in order to properly assess whether or not Congress has provided an appropriate alternate scheme for review, the Court needs both *Boumediene* and this case before it.

2. Petitioner Hamdan moreover raises constitutional challenges to the MCA that are not presented in *Boumediene*. If the government prevails in *Boumediene* – and review is not granted in this case – a constitutional cloud will continue to hang for many years over the military commission process as these matters continue to be litigated. The national interest calls for bringing certainty to this perpetually muddled area of law.

For example, Mr. Hamdan has argued that the MCA's habeas-stripping provision interferes with the fundamental right of equal access to the courts in contravention of the Equal Protection guarantee of the Fifth and Fourteenth Amendments. *See 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.”). Congress cannot selectively exclude a suspect class from access to the courts without satisfying strict scrutiny review.<sup>5</sup> The 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 one of the Constitution's most fundamental rights—the right to habeas corpus. And if withdrawal of habeas jurisdiction is necessary to “win” the War on Terror, then there is no rational reason that it should not be withdrawn for similarly situated American citizens rather than only the powerless.<sup>6</sup>

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<sup>5</sup> 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, and...may call for a correspondingly more searching judicial inquiry.”).

<sup>6</sup> 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.,

Separately, the MCA violates *United States v. Klein*, 80 U.S. 128 (1871), by stripping jurisdiction to prevent implementation of this Court’s ruling that Petitioner can invoke rights secured by the Geneva Conventions. Here, the MCA prescribes rules of decision within the meaning of *Klein* by simultaneously voiding this Court’s holding in *Hamdan*<sup>7</sup> and stripping federal courts of the power to review that nullification. Because this Court has made clear that the detainees at Guantanamo, including Hamdan, 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 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).

The jurisdiction-stripping provisions of the MCA also violate the prohibition on bills of attainder. 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.*

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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.”).

<sup>7</sup> 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 Petitioner. *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)).

*Group*, 468 U.S. 841, 841 (1984). The MCA singles out non-citizens who—like Petitioner—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).

3. The Government has indicated that it intends to commence military commission trials pursuant to the MCA at the earliest opportunity. Neil A. Lewis, *Judge Sets Back Guantanamo Detainees*, N.Y. Times, Dec. 14, 2006 at A32 (“Once the Military Commissions Act was adopted this fall, senior Pentagon officials said they hoped to resume war crimes trials before the newly reconstituted commissions this summer.”). Charges against Hamdan have recently been dismissed because the CSRT designated him an “enemy combatant” but not an “unlawful enemy combatant” as required by the MCA. The government called that order “technical and semantic;” requested reconsideration of it; and announced it would be able to work around it anyway by “redesignat[ing]” Hamdan for new charges if the appeal failed. W. Glaberson, *Military Judges Dismiss Charges for 2 Defendants*, N.Y. Times, June 5, 2007, at A6.

One of the primary rights Petitioner seeks to vindicate is the right *not* to be tried by a military tribunal that lacks jurisdiction over him. As this Court has already noted, “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 basis in law....” *Hamdan*, 126 S. Ct. at 2772 (emphasis added); *see also id.* at 2770 n.16 (“[A]bstention is not appropriate in cases in which individuals raise ‘substantial arguments denying the right of the military to try them at all.’”) (quoting *Schlesinger v. Councilman*, 420 U.S. 738, 759 (1975)).<sup>8</sup> In the absence of expedited consideration, it is entirely possible that whatever right Petitioner may have to avoid such a trial will be irretrievably lost.<sup>9</sup>

The questions presented by the Petition are sufficiently imperative from a national and international perspective to justify expedited consideration:

[T]his Court’s decision in *Quirin* is the most relevant precedent.... Far from abstaining pending the conclusion of military proceedings, which were ongoing, we convened a special Term to hear the case and *expedited our review*. That course of action was warranted, we explained, “[i]n view of the public importance of the

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<sup>8</sup> Courts have found irreparable injury in similar circumstances. For example, in *Rafeedie v. INS*, 880 F.2d 506, 517 (D.C. Cir. 1989), Judge Douglas Ginsburg, writing for the Court, pointed to the “substantial practical litigation advantage” forfeited by forcing a petitioner to go through a summary exclusion proceeding when he claimed he was entitled to a more robust procedure. The Government had argued that he should go through the summary proceeding first, and only if excluded should he be able to challenge the process. This Court disagreed due to the irreparable injury engendered by forcing a preview of the defense:

Rafeedie will suffer a judicially cognizable injury in that he will thus be deprived of a “substantial practical litigation advantage.” Rafeedie spells out this dilemma: if he presents his defense in a § 235(c) proceeding, and a court later finds that section inapplicable to him, the INS will nevertheless know his defense in advance of any subsequent § 236 proceeding; if, however, he does not present his factual defense now, he risks forsaking his only opportunity to present a factual defense. . . Rafeedie has thus established a *significant and irreparable injury*. *Id.* at 518 (emphasis added).

<sup>9</sup> Because the decision below removes the Constitution’s protections, such as the Suspension Clause, from Petitioner, it is impossible to plan for trial, as he does not even know if due process and other fundamental rights secured by the Constitution will govern his trial and punishment. Such uncertainty, in turn, makes a plea nearly impossible. Ordinary criminal trials apply fixed rules in advance. Here, everything about the trial, including the most basic question—whether the Constitution applies—is in doubt.

questions raised by [the cases] and of the duty which rests on the courts, in time of war as well as in time of peace, to preserve unimpaired the constitutional safeguards of civil liberty, and because in our opinion the public interest required that we consider and decide those questions without any avoidable delay.

*Hamdan*, 126 S. Ct. at 2771-72 (quoting *Ex parte Quirin*, 317 U.S. 1, 19 (1942)) (emphasis added). Indeed, the same considerations that make a grant of certiorari before judgment appropriate in this case counsel in favor of expedited consideration. Where certiorari before judgment is warranted, the Court has historically granted review on an expedited basis. See *United States v. Nixon*, 418 U.S. 683, 690 (1974) (granting certiorari before judgment, ordering merits briefing and conducting argument within six weeks of filing of the petition); *Dames & Moore v. Regan*, 452 U.S. 932 (1981) (on June 11, 1981 granting petition for certiorari before judgment filed June 10, 1981 and setting case for argument on June 24, 1981) and 453 U.S. 654 (1981) (case decided July 2, 1981).

Finally, the arguments presented in the Petition mirror those that Petitioner and Respondents already briefed last Term, further adding to the efficiency of expedited review. In *Hamdan v. Rumsfeld*, Petitioner Hamdan, along with the other parties and this Court, devoted substantial attention to the same questions presented in this Petition: the availability of the Writ and the constitutional validity of an attempt to suspend it. *E.g.*, Pet. Opp'n to Gov't Mot. Dis., 32-39; Reply Br. in Support of Gov't Mot. Dis., 17-20; Amicus Br. for the Bar Human Rights Comm'ee of the Bar of England and Wales and the Commonwealth Lawyers Assoc., 4-29; Amicus Br. of Burt Neuborne, et al., 18-24; Amicus Br. of More Than 300 Detainees, 16-21; Amicus Br. for the Center for Nat'l Sec. Studies and The Const. Project, 12-30; Amicus Br. of Judges Hufstedler and Norris, 7-20; Amicus Br. of Senators Graham and Kyl, 22-28; Amicus Br. of Crim. Justice Legal Found'n, 18-26; Transcript 56-61.

In sum, the importance of the MCA as the defining piece of legislation governing how the United States conducts itself in the detention and trial of suspected enemies counsels this Court's timely review of challenges to that Act. Now that the Court has granted certiorari in *Boumediene* to consider such challenges, it should take the opportunity to fully consider the legality of the MCA – including *both* i) challenges to the same jurisdiction-stripping provision at issue in *Boumediene* but raised by a Party facing the more dire military commission process and a different limited review of that process; and ii) constitutional challenges to the same Act that are different and some of which are more limited in their scope than that offered by the *Boumediene* petitioners. Review of these questions is particularly important since the litigating position of the Petitioners in those cases is adverse to Mr. Hamdan and the 75 others who potentially face a military commission at Guantanamo Bay under the same Act of Congress.

As stated above, the Solicitor General has agreed to expedited consideration of the Petitions filed today by Mr. Hamdan. Under the schedule worked out between the parties, the government will respond to petitioner's filings in approximately three weeks, on Friday, July 20, 2007. Petitioner will reply by Tuesday, July 24. That schedule permits the Court to issue an appropriate Order on its first summer Orders List.

The Court should accordingly grant this Motion to Expedite. Specifically, in the event certiorari or rehearing are granted, it should Order that the case be briefed and argued contemporaneously with *Boumediene*.<sup>10</sup>

Respectfully submitted this 2nd day of July, 2007,

**NEAL KATYAL**  
**COUNSEL OF RECORD**

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<sup>10</sup> For purposes of his Certiorari Before Judgment Petition, Petitioner waives the 10-day period provided for in this Court's Rule 15.5 between the filing of a brief in opposition and the distribution of the petition and other materials to the Court.

By           /s/ Neal K. Katyal            
Neal K. Katyal  
600 New Jersey Avenue, NW  
Washington, D.C. 20001  
(202) 662-9000

**LAURENCE H. TRIBE**

By           /s/ Laurence H. Tribe            
Harvard Law School  
Supreme Court Litigation Clinic  
1575 Massachusetts Ave.  
Cambridge, MA 02138

**KEVIN K. RUSSELL**

By           /s/ Kevin K. Russell            
Kevin K. Russell  
Howe & Russell, P.C.  
4607 Asbury Pl., NW  
Washington, D.C. 20016

**LIEUTENANT COMMANDER CHARLES SWIFT**

By           /s/ Lieutenant Commander Charles Swift            
Lieutenant Commander Charles Swift

**PERKINS COIE LLP**

By           /s/ Joseph M. McMillan            
Joseph M. McMillan  
Harry H. Schneider  
Charles C. Sipos  
*Attorneys for Petitioner Salim Ahmed Hamdan*

**CERTIFICATE OF SERVICE**

I hereby certify that on July 2, 2007, copies of the foregoing Petitioner's Motion to Expedite Consideration of Petition for Writ of Certiorari Before Judgment and Motion for Reconsideration were served by electronic mail upon the following:

Jonathan L. Marcus  
David B. Salmons  
U.S. Department of Justice  
Office of the Solicitor General  
950 Pennsylvania Ave, NW  
Room 5252  
Washington, D.C. 20530  
(202) 514-2217  
[Jonathan.L.Marcus@usdoj.gov](mailto:Jonathan.L.Marcus@usdoj.gov)  
[David.B.Salmons@usdoj.gov](mailto:David.B.Salmons@usdoj.gov)

Terry Henry  
Thomas Swanton  
Civil Division  
Federal Programs Branch  
U.S. Department of Justice  
20 Massachusetts Avenue, NW, Room 7144  
Washington, DC 20530  
(202) 514-4107  
(202) 616-8470 (facsimile)  
[Terry.Henry@usdoj.gov](mailto:Terry.Henry@usdoj.gov)  
[Thomas.Swanton2@usdoj.gov](mailto:Thomas.Swanton2@usdoj.gov)

*Attorneys for Respondents*

/s/ Joseph M. McMillan  
Joseph M. McMillan