

No. 06-1169

IN THE

Supreme Court of the United States

SALIM AHMED HAMDAN,
Petitioner,

v.

ROBERT GATES, ET AL.,
Respondents

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

PETITION FOR REHEARING

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Date: July 2, 2007

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Salim Ahmed Hamdan (“Petitioner”) respectfully petitions for rehearing of the Court’s order denying certiorari in this case. Specifically, Petitioner moves this Court for an order (1) vacating its denial of the petition for writ of certiorari before judgment, entered on April 30, 2007, and (2) granting the petition.¹ By separate motion accompanying this petition, Petitioner seeks leave to file this petition for rehearing outside the 25 day time limit set forth in Rule 44.2.

GROUNDS FOR REHEARING

THE GRANT OF CERTIORARI IN *BOUMEDIENE* AND *AL ODAH* JUSTIFIES REHEARING IN THIS CASE

Petitions for rehearing of an order denying certiorari may be granted where a petitioner can demonstrate “intervening circumstances of a substantial or controlling effect or...other substantial grounds not previously presented.” Rule 44.2. In this case, that standard is met by the recent decision of this Court to grant certiorari in *Boumediene v. Bush* (06-1195) and *Al Odah v. U.S.* (06-1196).

On June 29, 2007, following the denial of certiorari in the instant case, this Court granted certiorari in *Boumediene* and *Al Odah*, two cases involving closely related questions concerning the detention of alleged enemy combatants at the Guantanamo Bay Naval Station. That action vacated this Court’s April 2, 2007, denial of certiorari in those cases, and represents an intervening circumstance that justifies rehearing of the certiorari petition in this matter.

¹ Petitioner’s request for rehearing only extends to the denial of the Petition for Writ of Certiorari Before Judgment relating to Mr. Hamdan, not to the denial of the Petition for Writ of Certiorari submitted by Omar Khadr that was joined to the Petition pursuant to Rule 12.4. Mr. Khadr does not join in this Petition for Rehearing. The Solicitor General has contended that Mr. Khadr cannot raise any arguments specific to military commissions, because such arguments were “neither pressed nor passed on below,” in the *Al Odah* case in which Mr. Khadr is a party. U.S. Opp. Cert., No. 06-1169, *Hamdan v. Gates et al.*, at 17 n.2.

The questions presented in *Boumediene* and *Al Odah* include whether the D.C. Circuit erred in holding that the petitioners “have no common law right to habeas protected by the Suspension Clause and no constitutional rights whatsoever,” and whether individuals “detained without charge or trial for more than five years...[are] entitled to the protection of the Fifth Amendment right not to be deprived of liberty without due process of law.” *Al Odah*, Petition for Writ of Certiorari (March 5, 2007) at i.

This case serves as a necessary companion to *Boumediene* and *Al Odah* because it presents those questions in a closely related and arguably even more urgent context, *i.e.*, in the context of a Guantanamo detainee charged with war crimes and held for trial by a military commission.² The petitioners in *Al Odah* and *Boumediene* are challenging the legality of their *detention*, and assert that their right to do so *via* habeas is protected by the Suspension Clause of the U.S. Constitution. By contrast, Petitioner in the instant case is challenging the *jurisdiction of the military commission* convened to try him on charges of “Conspiracy” and “Providing Material Support for Terrorism,” and asserts not only a habeas right to bring that challenge, but also other constitutional arguments as to why the exercise of such jurisdiction over him is illegal. The District Court in this case, like the D.C. Circuit in *Boumediene* and *Al Odah*, dismissed Petitioner’s habeas action based on the jurisdictional strip contained in section 7 of the Military Commissions Act of 2006 (“MCA”). Pub. L. No. 109-366, 120 Stat. 2600. The courts in both instances rejected constitutional challenges to the MCA based on *Johnson v. Eisentrager*, 339 U.S. 763 (1950), which was read broadly (and erroneously) by both courts below to preclude any constitutional protections for

² See *Reid v. Covert*, 352 U.S. 813 (1956) (ordering, in a military justice case, Solicitor General to respond to request for Rehearing within 15 days of Court’s order); 352 U.S. 901 (1956) (granting Petition for Rehearing); 354 U.S. 1 (1957) (deciding case upon Petition for Rehearing). Mr. Hamdan asks for the same treatment that this Court previously extended in *Reid*, and in a case where a companion set of cases has already been granted through a Petition for Rehearing.

the petitioners and any constitutional limitations on the exercise of power by the Government in these cases.

A grant of certiorari in this case will allow the Court to consider the full range of issues presented by the D.C. Circuit's sweeping decision in *Boumediene* and *Al Odah*. Specifically, this case is a vehicle to resolve whether the Suspension Clause protects not only the right to challenge detention, but also the right to challenge the legitimacy of a military tribunal convened to try a civilian defendant. This was the momentous question before this Court in the landmark case of *Ex parte Milligan*: "Had this tribunal the legal power and authority to try and punish this man? No graver question was ever considered by this court, nor one which more nearly concerns the rights of the whole people." 71 U.S. (4 Wall.) 2, 118-19 (1866). 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 any basis in law." *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2772 (2006). That compelling interest can only be vindicated if this Court grants certiorari in this case now and addresses whether Petitioner's constitutional challenges to the commission's jurisdiction can be heard.

This case also presents another question of imperative public importance not squarely presented in *Boumediene* and *Al Odah*: whether any constitutional protections at all—for example, the due process guarantees of the Fifth Amendment—apply to the conduct of the military commission trials. The answer to this question will significantly impact the integrity and credibility of these trials. Defendants cannot fairly evaluate their position or develop their litigation strategy without knowing whether the fundamental law of the land applies in these proceedings. Moreover, the constitutional questions presented here extend beyond individual rights to reach structural issues concerning the role of the federal judiciary, the powers of Congress, and the proper balance of powers within our framework of government. *Id.* at 2800 (2006) (Kennedy, J., concurring) ("Trial by military commission raises separation-of-powers concerns of the highest order."). The structural issues presented to the District Court in this case, but absent in

Boumediene and *Al Odah*, include Separation-of-Powers, Bill of Attainder, and Equal Protection challenges to the MCA's jurisdictional provisions. Review of this case will allow the Court to clarify that such challenges must be heard and considered by Article III courts, before the right not to be tried by a military tribunal has been irrevocably lost.

A more complete discussion of the range of issues presented by this case, and why it stands as a necessary companion to this Court's consideration of *Boumediene* and *Al Odah*, is set forth in the Petition for Writ of Certiorari Before Judgment and Motion to Expedite Consideration filed by Petitioner herewith. Petitioner incorporates by reference and relies upon the argument and authority in those contemporaneous filings as grounds for the granting of this petition as well.

CONCLUSION

The June 29, 2007, grant of certiorari in *Boumediene* and *Al Odah* is an intervening circumstance of a substantial effect that satisfies the requirements of Rule 44.2 and amply justifies rehearing in this case. Accordingly, this Petition for Rehearing should be granted.

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Date: July 2, 2007

CERTIFICATE OF COUNSEL

I hereby certify that this petition for rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Supreme Court Rule 44.2.

Dated: July 2, 2007

Neal K. Katyal
Counsel for Petitioner