No. _____

IN THE
Supreme Court of the United States

SALIM AHMED HAMDAN,

PETITIONER,

V.

ROBERT M. 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

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PETITION FOR WRIT OF CERTIORARI BEFORE JUDGMENT

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Date: July 2, 2007

QUESTIONS PRESENTED

This case presents a question also presented by the petitions for certiorari granted in *Boumediene v. Bush*, No. 06-1195, and *Al Odah v. United States*, No. 06-1196:

1. Do detainees 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 it a logical and necessary companion to *Boumediene* and *Al Odah*:

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, is the petitioner in this case, who faces a criminal *prosecution* before a military tribunal and sentence of life imprisonment, 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.

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, Petitioner states that no parties are corporations.

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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).

JURISDICTION

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). This Court denied Mr. Hamdan's joint Petition for Certiorari Before Judgment and Petition for Certiorari with another detainee on April 30, 2007. As Petitioner has confirmed with the Clerk's Office of the Court, this second Petition satisfies the rules governing Petitions for Certiorari Before Judgment.[1]

RELEVANT LEGAL PROVISIONS

The relevant legal provisions are reproduced in Appendix C.

STATEMENT

Respondents have detained Petitioner at the Guantanamo Bay Naval Base, deemed him to be an "enemy combatant," charged him with "Conspiracy" and "Providing Material Support for Terrorism," and plan to try him before a military commission. On a previous appeal, when 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

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[1] In a separate document filed today, Mr. Hamdan asks the Court to rehear the denial of certiorari in that case. Either procedural vehicle will permit the Court to hear his case. Should the Court wish, it may also treat this filing as a Petition for an Extraordinary Writ under 28 U.S.C. 1651(a). *Cf. In re Yamashita*, 326 U.S. 694 (1945).

remand, the district court held that Congress has now stripped it of jurisdiction to consider Hamdan's habeas petition.

1. Over five years ago, indigenous forces seized Petitioner 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.

2. In July 2003, over one year after Hamdan was transferred to Guantanamo, the President asserted that Petitioner was subject to his November 13, 2001 Military Order. Hamdan 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.

3. 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.

4. 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 only allows for a narrow, *post hoc* review of a subset of defendant 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.*

5. On remand from this Court, the district court interpreted MCA § 7 to require dismissal of Hamdan's habeas petition. That court first held that the MCA removed statutory habeas jurisdiction from the federal courts. 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. *Id.* 11a-12a. Nevertheless, it 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 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. Having decided that it had been "divested of jurisdiction," the court held 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.

6. On May 10, 2007, charges of "Conspiracy," and "Providing Material Support for Terrorism" were referred against Hamdan. App. 32a. On June 4, those charges were dismissed without prejudice because Hamdan's CSRT found him to be an "enemy combatant" rather than an "unlawful enemy combatant" as required by the MCA. The government has called that order "technical and semantic;" moved for reconsideration; and announced it would work around the order 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.

7. Mr. Hamdan asked this Court to hear his challenge in a Petition for Certiorari Before Judgment and Petition for Certiorari with Omar Khadr. On April 30, the Court denied certiorari, with three Justices dissenting. App. 103a.

8. On June 8, 2007, Mr. Hamdan asked the U.S. Court of Appeals for the D.C. Circuit to hear his case en banc, reasoning that the broad language of the *Boumediene* and *Al Odah* panel decision would control his case and render a 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 Hamdan's commission challenge. 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 en banc review, the only

mechanism by which Hamdan could argue that *Boumediene* was wrongly decided. 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.

9. Petitioner Hamdan is one of three individuals who have had charges sworn against them under the MCA. David Hicks of Australia 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. Omar Khadr of Canada is a Party in the *Boumediene* and *Al Odah* cases. However, the Solicitor General has argued that "[w]hat 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.[2] As such, the *Boumediene* and *Al Odah* cases cannot be expected to vindicate the interests of those detainees actually facing trial and conviction by military commission rather than mere detention.

REASONS FOR GRANTING THE PETITION

I. The Questions Presented Are Exceptionally Important and Require Immediate Determination.

Certiorari before judgment may be granted when a "case is of such imperative public importance as to justify deviation

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[2] 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. Mot. Exp., *Hamdan v. Gates et al.,* No. 06-1169, at 7. *See also* U.S. Opp. Cert., No. 06-1169, *Hamdan v. Gates et al.*, at 20 ("[Khadr] 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*").

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. Like *Boumediene* and *Al Odah*, this Petition presents the exceptionally important question of whether the federal courts have any jurisdiction—constitutional or statutory—to consider habeas petitions filed by Guantanamo Bay detainees. The nature and scope of federal habeas jurisdiction over the claims of detainees is a matter of profound national and international importance and 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 Writ in "maintaining this delicate balance of governance, serving as an important judicial check on the Executive's discretion in the realm of detentions").

As explained in detail below, while *Boumediene* and *Al Odah* present these questions as they relate to detainees seeking review of the CSRT process, the instant petition presents them as applied to detainees challenging the jurisdiction of the military commission trials.[3] *See infra* at 9-10. 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 that may be sought by detainees. Otherwise the status of individual detainees may be changed to avoid the impact of this Court's anticipated ruling, and this Court's guidance function will be undermined. That is, if this Court were to only review *Boumediene* and *Al Odah* and hold that detainees had a right to review of their detention and CSRT processes, the government could immediately charge those individuals before military commissions and escape the ambit of the Court's ruling. By considering this case along with *Boumediene*, the Court can conclusively determine the nature and scope of constitutional rights, including habeas, enjoyed by all the detainees.

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[3] 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) who are "facing an imminent trial." App. 91a & n.9 (Rogers, J., dissenting).

B. 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 immunize the proceedings of military tribunals from searching review by Article III courts, despite the summary nature of those proceedings, which were justly regarded with 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 the balance of power.

C. Indeed, this Court's grant of certiorari in the closely-related *Al Odah* and *Boumediene* cases shows that there are "compelling reasons" to grant Hamdan's petition as well. S. Ct. R. 10. And the Court has previously granted certiorari before judgment in cases much like this one, involving important questions about the government's use of military commissions and raising separation of powers concerns. *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 foreign policy); *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).

Additionally, more than five years since the start of Hamdan's detention and more than three years after his initial filing of a habeas petition, there is nothing to be gained by

further delay. Both Hamdan and the government agree that the *Boumediene* decision is binding on this case – and the Government has opposed en banc review of it. *See supra* p. 5.

D. Finally, this Court has 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.[4] 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." *Hamdan*, 126 S. Ct. at 2795. This Court should resolve—for the benefit of Respondents as well as Petitioner—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 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.[5]

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[4] *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 validity of an attempt to suspend it. *See Mot. Expedite*, *Hamdan v. Gates*, at 17.

[5] "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 Petitioner faces. He has been held in U.S. custody for approximately five years, including extended periods in solitary confinement. It is impossible for him to plan for his 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 of

II. This Case Serves as a Necessary Counterpart to Cases In Which This Court Has Granted Certiorari

Petitioner's case is a necessary and indispensable companion to the *Boumediene* and *Al Odah* cases in which this Court recently granted certiorari. While each case challenges the MCA's purported stripping of jurisdiction and the scope of constitutional protections for a subset of the Guantanamo detainees, each only presents part of the ultimate question to be decided. Consideration of these cases together is necessary for this Court to fully resolve the issues raised by the MCA.

A. First, the petitioners in *Al Odah* and *Boumediene* are challenging the MCA's removal of habeas jurisdiction only as it relates to those detainees challenging the fact of their *detention* and the CSRT process. Those cases have therefore rightly focused on the CSRT procedures and the rights of persons who do not face commissions. *Boumediene*, App. 53a-54a (describing 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 commission process.[6]

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

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all—does the Constitution apply—is in doubt.

[6] Several decisions distinguish between 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), *rev'd by Boumediene, supra*. Because detention raises different concerns than punishment, consideration of Petitioner's case is necessary to review fully the MCA's constitutionality. *E.g.*, *Hamdi*, 542 U.S. at 593 (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.

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* and *Al Odah*, this will require a determination as to whether DTA § 1005(e)(2), 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. Cert. at 18; *Al Odah* Cert. Reply at 1-3; *Boumediene* Pet. Reh'g at 3-4. 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. *See infra* at p. 21-23 (setting forth why § 3(a) is a wholly inadequate remedy). Thus in order to properly assess whether or not Congress has provided an appropriate alternate scheme for review, the Court needs to consider both *Boumediene/Al Odah* and this case.

B. Second, this case raises issues distinct from those raised by *Boumediene* and *Al Odah*. In contrast to the petitioners in those cases, Hamdan faces imminent criminal prosecution in a process that permits the introduction of testimony extracted through coercion, tries him 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 him of the right to invoke treaty-based defenses that this Court has already ruled apply. *Al Odah* and *Boumediene* do not test whether a decision of this Court affording Petitioner treaty-based rights can be side-stepped by a subsequent jurisdictional statute, one which essentially nullifies the law of the case and impermissibly interferes with the judicial function in contravention of *United States v. Klein*, 80 U.S. 128 (1871). Similarly, the *Al Odah* and *Boumediene* petitioners, unlike Hamdan, do not argue that the MCA offends Bill of Attainder and Equal Protection guarantees. These are significant challenges to the jurisdictional provisions of the MCA and a proper review of the Act requires that they be addressed. *See, e.g., 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").

Simultaneous consideration is necessary for the additional reason that the litigating positions of the *Al Odah* and *Boumediene* detainees and Hamdan 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, *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. Br., *Al Odah v. United States*, No. 05-5064, at 13. By contrast, Hamdan 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.

Indeed, the *Boumediene* and *Al Odah* Petitioners go so far as to suggest that those actually facing criminal charges may *not* 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. Reh'g 1. Of course, this theory conflicts with this Court's recent decision in *Hamdan* and is certainly not shared by the Petitioner in this case.

The *Boumediene* and *Al Odah* Petitioners 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 Great Writ for those facing commissions is not only compelled by longstanding precedent, it carries a less drastic remedy than it does in *Boumediene* and *Al Odah*, where a detainee might conceivably be freed altogether by a federal court order.

There is no reasonable way to untangle this set of issues about *Eisentrager*'s meaning without confronting the adverse readings of that case given by the *Boumediene* and *Al Odah* Petitioners and that offered by Mr. Hamdan. *See, e.g., Boumediene* Pet. Cert., at 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 Petitioners to be "fundamentally different from *Eisentrager*" because, *inter alia*, "they have never been charged or convicted of any wrongdoing").

C. Finally, the grant of certiorari before judgment on these grounds would be consistent with this Court's general practice of bringing before it the logical companion to an important case in which certiorari has been granted. For 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]

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[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*,

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

Even if the MCA validly strips the federal courts of statutory jurisdiction, Petitioner's 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; *see Smith v. Bennett*, 365 U.S. 708, 712 (1961) (describing the writ as "the highest safeguard of liberty"). This Court has made clear that "habeas corpus is…a writ antecedent to statute,…throwing its roots deep into the genius of our common law…. [and was] 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 strict conditions.

The conclusion that Hamdan has a constitutional right to habeas follows inexorably from the history of the writ and this Court's precedents, which establish that (1) his claims fall within the scope of the writ as it existed in 1789, (2) his status as alleged enemy combatant presents no bar, and (3) the constitutional right to habeas stretches to Guantanamo Bay.

A. *First*, Petitioner's claims fall 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)).[8] *Rasul* applied the pre-MCA habeas statute to

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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).

[8] *Boumediene* "truncated" *St. Cyr*'s analysis by eliminating the key words "at the 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." 542 U.S. at 481-82. *Rasul*'s understanding was correct and the courts below erred in ignoring its guidance. *Boumediene*, 476 F.3d at 1002 (Rogers, J., dissenting) (noting that the majority opinion ignored this Court's carefully reasoned and authoritative statement in *Rasul* to reach the opposite conclusion on the territorial reach of common law habeas).

Indeed, the writ has been the primary vehicle for challenges to executive detention since at least 1340. William F. Duker, *A Constitutional History of Habeas Corpus* 24 (1980). And 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....").[9]

Second, the writ historically has been specifically available to test the detention of alleged enemy aliens and prisoners of war. This principle is perfectly 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 (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

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1789. *E.g., Felker*, 518 U.S. at 663-64 (1996).

[9] *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.

Schiever as proof that suspected enemy aliens can invoke habeas under common law principles.

Early American courts similarly recognized that habeas rights extend to suspected 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 as an incorrectly classified enemy alien).

Third, Guantanamo falls within the geographic scope of the common law writ, which historically had an "extraordinary territorial ambit."[10] Habeas jurisdiction has always turned on de facto control, not formalistic notions of sovereignty.[11]

B. The court below incorrectly denied the right of constitutional habeas to Petitioner based on a misreading of *Johnson v. Eisentrager*, 339 U.S. 763, 770 (1950), and an erroneous belief that detention outside the "sovereign realm" of

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[10] *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 was recognized to extend 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. By 1775, judges began to issue common-law habeas writs to British subjects *and* "natives." *E.g.*, N. Hussain, *The Jurisprudence of 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 Boumediene,* App. 83a (Rogers, J., dissenting).

[11] 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 for individual with "suspicion of treason"); *King v. Overton*, 82 Eng. Rep. 1173 (K.B. 1668) (Jersey); Sir Matthew Hale, *The History of the Common Law of England* 120 (1739) (Channel Islands). *See also Bourn's Case*, 79 Eng. Rep. 465, 466 (K.B. 1619) (Calais); M. Bacon, *A New Abridgement of the Law*, Tit. Habeas Corpus (B) (7th ed. 1832) (same).

the United States compelled 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 that: (1) Petitioner is not a national of a country at war with the United States; (2) he disputes his status as an alleged enemy combatant; and (3) the United States exercises exclusive jurisdiction and control at Guantanamo. *Rasul*, 542 U.S. at 476 (identifying these factors to distinguish *Eisentrager*).[12] Thus "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.[13]

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[12] *Eisentrager* does not stand for the proposition that courts are closed to those in Petitioner's 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 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)).

[13] 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 U.S. 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 U.S., "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, Petitioner is a citizen of Yemen, a nation not at war with the U.S., and he does not share the presumptive enemy affiliation of the *Eisentrager* petitioners. *Boumediene*, App. 95a ("These detainees are citizens of friendly nations…[including] Yemen[.]") (Rogers, J., dissenting).

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.[14] Following their convictions, they were detained at Landsberg Prison in occupied Germany, where the United States shared jurisdiction over detentions with the other Allies.[15] 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 present in occupied Germany—are absent in the unique case of Guantanamo.

Finally, *Eisentrager* predicated the denial of habeas relief

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[14] *Eisentrager*, Index to Pleadings, Ex.4—Message of 6 July 1946 to Gen. Wedemeyer from Joint Chiefs of Staff. J.A. 167.

[15] *See Basic Principles for Merger of the Three Western German Zones of Occupation and Creation of an Allied High Commission, in Docs. on Germany*, 1944-1970, Comm. For. Rel., 92nd Cong. (1971), at 150-51.

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 is Petitioner within the territorial jurisdiction of the United States, for years the Government held him within what this Court deemed 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 extends to Guantanamo). The Administration has continued to hold Petitioner 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 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 he faces now) was deemed *unlawful* by this Court only 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 is inconceivable to think that subjection to an unprecedented and unlawful tribunal could satisfy this criterion.

Third, *Eisentrager* 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 (concluding that the charges had "a basis in conventional and long-established law"). That is not the case here; in fact, 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 when 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*, which involved 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 precisely such a conclusion when 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.[16] Yet the Court rejected the government's position and explicitly relied on

[16] 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.

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)).

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").[17] Yet the court below gave no consideration to this portion of *Rasul*, and instead left Petitioner, who is under the government's complete control, entirely unprotected by the Constitution.

Finally, the issue of whether the Constitution protects Petitioner is crucial not simply for habeas corpus, but for the more fundamental matter of whether the Constitution constrains military commissions at all. For example, trying Petitioner on charges of "Conspiracy" and "Material Support"—offenses newly minted in the MCA—offends the Ex Post Facto Clause. In fact, a plurality of this Court already held that conspiracy is not a violation of the laws of war and "[b]ecause [that] charge

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[17] 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 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"). *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.

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 these conditions will not provide a better record for post-trial review by an Article III court, as every tactical decision Petitioner makes would be controlled by the decision below, which found even the most fundamental protections of the Constitution inapplicable. Granting this Petition will provide a concrete case to examine the broad claims of raw power at Guantanamo advanced by the Government, which they have thus far advanced in the context of the Suspension Clause but which will spill over into other constitutional realms, such as the Ex Post Facto Clause.

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

Petitioner believes that all Guantanamo detainees have access to the 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* 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. Just as with the *Boumediene* and *Al Odah* challenges to the CSRT procedures, the Government cannot avoid Petitioner's Suspension Clause argument on the theory that the MCA provides an adequate substitute for habeas challenges to the military commission process. *See* Boumediene Pet. at 18-21; *Boumediene*, 476 F.3d at 1006 (Rogers, J., dissenting). At the outset, the timing of review under the MCA renders it an insufficient substitute. At common law, courts used habeas to consider pre-trial claims. *Ex parte Royall*, 117 U.S. 241, 253 (1886). By contrast, 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).[18] Thus, for example, the MCA does not permit challenges to conditions of detention, a category of claims available under constitutional habeas.[19]

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

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[18] 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).

[19] *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).

habeas. *See Ludecke v. Watkins*, 335 U.S. 160, 162 (1948).

Moreover, the MCA precludes the federal courts from considering Petitioner's 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 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 Petitioner therefore retains his treaty rights but lacks 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).

IV. The MCA Is Unconstitutional.

Certiorari is also necessary because this case presents questions concerning the constitutionality of the MCA that are not presented by *Boumediene* and *Al Odah*. Specifically, Hamdan challenges the MCA's jurisdiction-stripping provisions as impermissible interference with the judicial function and in violation of Bill of Attainder and Equal Protection guarantees.

A. First, certiorari before judgment is 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.[20] *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.[21] 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. *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

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[20] 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*.

[21] 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.").

down law allowing appellate courts to decide whether indigent defendants would receive 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 to Hamdan's claims and the circuit court's decision in *Boumediene* did not address equal protection issues at all. 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 there is no rational reason that it should not be withdrawn for similarly situated American citizens rather than only the powerless.[22]

B. Second, 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. *Klein* struck down a statute that prevented courts from giving effect to a presidential pardon, and removed jurisdiction in cases where 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

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[22] 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.").

[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

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) ("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 own 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.

C. Third, the jurisdiction-stripping provisions of the MCA also violate the prohibition on bills of attainder, a mechanism 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.*

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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)).

[24] By stripping Petitioner of the 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.

v. Minn. Pub. Interest Rsch. Group, 468 U.S. 841, 841 (1984).[25]

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).

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 detainees that greatly outweighs any non-punitive purpose in depriving them of habeas rights. The Attainder Clause is intended to prevent "punishment without trial by duly 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

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[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).

[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").

[27] *See, e.g.*, 152 Cong. Rec. S10238-01, at S10239 (daily ed. Sept. 27, 2006) (statement of Sen. Lott).

determining whether the MCA runs afoul of that provision.

The importance of the MCA as the defining piece of legislation governing how America 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* and *Al Odah* to bring one such challenge before it, it should take the opportunity to develop a more complete set of facts and arguments – including *both* i) challenges to the very same jurisdiction-stripping provision but raised by a Party facing the more dire military commission process and a different but limited review of that process; and ii) constitutional challenges to the same Act, some of which are more limited than those offered by the *Boumediene* Petitioners.

V. The Federal Courts Retain Statutory Jurisdiction To Consider Hamdan's Petition.

A. The court below erred, along with the D.C. Circuit in *Boumediene*, in concluding that the MCA's jurisdiction-stripping provisions applied to pending cases. Instead, the courts should have applied the "[o]rdinary principles of statutory construction" used earlier by this Court to hold 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. *Id.* at 2765; *St. Cyr*, 533 U.S. at 298. The only cases in which this Court has found retroactive effect have involved statutory language "'so clear that it could sustain only one interpretation.'" *St. Cyr*, 533 U.S. at 317 (quoting *Lindh v. Murphy*, 521 U.S. 320, 328 n.4 (1997)).

Section 7(a) of the MCA adds 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.[28] Instead, the language of § 7(b) 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 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

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[28] 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 Petitioner's challenge because, as the section's title makes clear, it concerns routine challenges to the commission's "Procedures and Actions." Petitioner is not challenging a discrete procedure or action of the commission—he is 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, Petitioner's action would still survive, because he includes a separate challenge to his detention as an enemy combatant, which is not affected by § 3(a).

challenging the system as a whole.[29] This interpretation of the MCA is also consistent with its drafting history.[30]

B. Finally, this case asks whether Congress has exceeded its legislative power. As described above, Petitioner contends 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. App. 15a-16a & n.16. But jurisdiction-stripping provisions that are themselves unconstitutional cannot shield an Act 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 this case is appropriate because Petitioner raises a constitutional challenge to the effort by Congress and the President to nullify a ruling of this Court in the *Hamdan* case, a ruling which protects Petitioner as he attempts to defend himself in his impending trial.

CONCLUSION

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

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[29] 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.

[30] Congress declined to enact two 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 enacted a bill that did not expressly divest courts of jurisdiction over pending habeas cases *and* lacked 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 that court's interpretation.

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