IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SALIM AHMED HAMDAN,

Petitioner-Appellee,

v.

ROBERT GATES, *et al.*,

Respondents

No. 07-5042

[Civ. Action No. 1:04-cv-01519-JR]

PETITIONER SALIM AHMED HAMDAN'S
PETITON FOR INITIAL HEARING EN BANC

Pursuant to Fed. R. App. P. 35, Petitioner Salim Ahmed Hamdan respectfully submits this Petition for Initial Hearing En Banc.

INTRODUCTORY STATEMENT PURSUANT TO F.R.A.P. 35(b)

Rule 35 allows for initial hearing en banc when either (1) consideration by the full court is necessary to secure and maintain the uniformity of the court's decisions; or (2) the proceeding involves one or more questions of exceeding importance. Fed. R. App. P. 35(b)(1). Petitioner Hamdan's appeal, which appears to have been only one vote away from obtaining certiorari by the Supreme Court of the United States on certiorari *before* judgment, *Hamdan v. Gates*, 127 S. Ct. 2133, 2134 (2007), satisfies both requirements and initial hearing en banc is therefore appropriate and necessary.[1]

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[1] This Motion for Initial Hearing En Banc is timely pursuant to F.R.A.P. 35(c) which provides that such a motion is timely if filed "by the date when appellee's brief is due." No briefing has been ordered for Hamdan's appeal. Along with the filing of this Motion, Petitioner Hamdan is also filing a Motion to Govern Future Proceedings recommending initial en banc review.

First, the opinion of the panel in *Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007), holding that detainees at the Guantanamo Bay Naval Station in Cuba have neither statutory nor constitutional habeas rights would presumably be binding on any three-judge panel to hear Hamdan's appeal in this case. Because the *Boumediene* decision's language is so broadly written that it potentially conflicts with the Supreme Court's opinion in *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006) and *Rasul v. Bush*, 542 U.S. 466, 481-82 (2004), *en banc* hearing is appropriate. *En banc* consideration may either confine the *Boumediene* decision's broad language to non-military commission cases or call the holding into question altogether.

Second, this case challenges the constitutionality of the Military Commissions Act of 2006 ("MCA"), Pub. L. No. 109-336, 120 Stat. 2600 (2006), and raises multiple issues of exceptional importance, including:

1. Whether Petitioner, an individual detained as an alleged enemy combatant at Guantanamo Bay, has access to statutory habeas corpus, particularly to challenge an illegal trial scheme before that trial takes place.

2. Whether the MCA, which purports to strip federal courts of habeas jurisdiction with respect to Guantanamo Bay detainees, unconstitutionally violates separation of powers, the Bill of Attainder Clause, and Equal Protection guarantees.

3. Whether Petitioner, even if stripped of the statutory right of habeas by the MCA, is protected by fundamental rights secured by the Constitution, including the right to challenge the jurisdiction of that commission via the writ of habeas corpus.

STATEMENT OF THE CASE

Over five years ago, indigenous forces seized Hamdan in Afghanistan, where he was turned over to the U.S. military for a bounty, interrogated for months, and then brought to Guantanamo Bay. In July 2003, the President asserted that Hamdan was subject to his November 13, 2001 Military Order providing for trial by military commission. Hamdan's demand that charges be preferred and a speedy trial held under the UCMJ was rejected. In

April 2004, Hamdan's military counsel filed a petition for a writ of habeas corpus in federal district court. Ultimately, in June 2006, the Supreme Court ruled that Hamdan could not be tried by a military commission. *Hamdan*, 126 S. Ct. 2749. The 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.

On October 17, 2006 the President signed the MCA into law. Under the MCA, "alien unlawful enemy combatants" are subject to the jurisdiction of military commissions. 10 U.S.C. § 948(c), (d). The determination of "unlawful" combatancy may be made by a Combatant Status Review Tribunal ("CSRT") or "another competent tribunal." *Id.* Once made, those determinations are "dispositive for purposes of jurisdiction[.]" *Id.* In addition, the MCA purports to strip jurisdiction over any claims relating to "the prosecution, trial or judgment" of a commission. 10 U.S.C. § 950j(b).

On remand from the Supreme Court, the district court interpreted § 7 of the MCA to require dismissal of Hamdan's habeas petition. *Hamdan v. Rumsfeld*, 464 F. Supp. 2d 9 (D.D.C. 2006). The district court first held that the MCA removed statutory habeas jurisdiction. *Id.* at 12. It next held that the MCA did not suspend the constitutional right to habeas because the conditions for suspension did not exist and Congress "made no findings of the predicate conditions." *Id.* at 16. Nevertheless, the district court held that the general availability of constitutional (as opposed to statutory) habeas was of no help to Hamdan because, as an enemy alien at Guantanamo, he had no right to seek the writ. The district court dismissed as dicta the Supreme Court's statement that its interpretation of the habeas statute in *Rasul*, 542 U.S. at 481 was "consistent with the historical reach of the writ of habeas corpus." *Id.* at 16-17. Instead of following *Rasul*, the district court relied on *Johnson v. Eisentrager*, 339 U.S. 763 (1950), where the 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. *Id.* at 18-19. Having decided that it had been "divested of jurisdiction," the court opined that it could not consider Hamdan's remaining constitutional challenges. *Id.* at 19, n.16.

On February 20, 2007 this Court issued its decision in *Boumediene v. Bush*, 476 F.3d 981 (C.A.D.C. 2007). The Court in *Boumediene* likewise determined that MCA § 7 had statutorily removed jurisdiction over habeas petitions brought by "enemy combatants" held at Guantanamo Bay. 476 F.3d at 984, 987-88. The *Boumediene* Court went on to hold that persons held "at an overseas military base" such as Guantanamo could not lay claim to any constitutional protections on the rationale that "the Constitution does not confer rights on aliens without property or presence within the United States." *Id.* at 990-991. Although the *Boumediene* appeal, by its own terms, dealt with habeas challenges brought by those subject to detention pursuant to a CSRT, the Court's opinion appears to reach broadly to cut off any habeas claim by any alien held at Guantanamo. *Id.*

Hamdan, joined by a Petitioner from the *Boumediene* appeal, Omar Khadr, sought certiorari in a combined Petition for Certiorari Before Judgment and Petition for Certiorari filed February 27, 2007. On April 30, 2007, the Supreme Court denied Hamdan's Petition for Certiorari Before Judgment, with three Justices dissenting. *Hamdan*, 127 S. Ct. at 2134 (Souter, J., Breyer, J., Ginsburg, J., dissenting).[2]

During the pendency of Hamdan's civil case and appeal, commission proceedings were resumed against him pursuant to the MCA.[3] As mentioned, § 948d(a) of the MCA

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[2] The *Boumediene* petitioners likewise sought, and were denied, certiorari. *Boumediene v. Bush*, 127 S. Ct. 1478 (2007) (Stevens, J., denying certiorari). Those petitioners have petitioned for reconsideration of the Court's denial of certiorari; on June 4, 2007, the Government was invited to file a response to that petition. 551 U.S. – (Jun. 4, 2007).

[3] Commission proceedings were also resumed against Omar Khadr in April 2007. He filed an Emergency Motion to Stay Military Commission Proceedings in this Court on May 23, 2007. That Motion was denied in a May 20, 2007 per curiam Order stating "This court is without jurisdiction to grant the requested relief. *See* 10 U.S.C. § 950j(b)." *Khadr v. Gates*, No. 07-1156 (May 30, 2007 Order). His charges before the commission have been dismissed without prejudice for the same reason as those against Hamdan. *See* infra at pp. 5-6.

purports to subject "alien unlawful enemy combatants" to the jurisdiction of military commissions. On February 2, 2007, charges of "Conspiracy" and "Providing Material Support for Terrorism" were sworn against Hamdan, and formally served on May 14, 2007. Hamdan moved to dismiss for lack of jurisdiction, based on the Government's failure to show that he was, in fact, an "unlawful enemy combatant" subject to the commission's jurisdiction. At his arraignment on June 4, 2007, the Military Judge agreed, and ordered all charges against Hamdan dismissed without prejudice. *See* Declaration of Joseph M. McMillan in Support of Petition for Initial Hearing En Banc, Exhibit A.[4]

The Military Judge found that Hamdan's CSRT, which was convened for the sole and limited purpose of determining whether he was an "enemy combatant" subject to continued detention, could not be retroactively converted into a finding that Hamdan was an "*unlawful* enemy combatant" as required by the MCA. Nor, according to the Military Judge, was the President's February 7, 2002 memo, setting forth the Executive's unilateral determination that all "Taliban detainees are unlawful combatants," sufficient to provide the necessary "individualized determination that *this accused* actually supported or engaged in hostilities [against the United States]." Ex. A at 3 (emphasis added). The Military Judge ruled that, before the Commission could properly assert jurisdiction, an individualized determination of "unlawful" enemy combatancy was required.

> [Hamdan] is either entitled to the protections accorded to a Prisoner of War, or he is an alien unlawful combatant subject to the jurisdiction of a Military Commission, or he may have some other status. The Government having failed to determine, by means of a competent

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[4] Hamdan's charges were not sworn or referred until after the district court's ruling on remand, thus, the district court did not have occasion to consider the legality of the MCA's attempted jurisdiction-strip for those facing trial. Similarly, the petitioners in *Boumediene* did not present a challenge to the MCA based on its applicability to those facing charges before a military commission. Although the district court and *Boumediene* decisions could be read to withdraw jurisdiction over the habeas petitions of any persons held at Guantanamo, neither court has directly addressed the jurisdictional question of whether those facing trial before a military commission are entitled to habeas to test the validity and jurisdiction of the commission created to try them.

> tribunal, that the accused is an "unlawful enemy combatant" using the definition established by Congress, it has not shown, by a preponderance of the evidence, that the accused is subject to the jurisdiction of this Commission.

Id. at 4. The Government has stated it will move to reconsider the Military Judge's Order.

ARGUMENT

I. Initial hearing en banc is necessary to overrule *Boumediene* and secure the uniformity of this Court's decisions.

Federal Rule of Appellate Procedure 35 allows for initial hearing en banc when consideration by the full court is "necessary to secure or maintain uniformity of the court's decisions" including where "a panel decision conflicts with a decision of the United States Supreme Court." Fed. R. App. Proc. 35(a), (b)(1)(a). Here, en banc review is necessary because the panel decision of this Court in *Boumediene* is wrongly decided and in conflict with the Supreme Court's decisions in *Hamdan*, 126 S. Ct. 2749 and *Rasul*, 542 U.S. at 481-82. And because the language of the panel's opinion in *Boumediene* is overly broad in scope, that wrongly-decided case would most likely serve to bind any panel assigned to hear Hamdan's case. The *Boumediene* panel framed the issue before the court as whether "federal courts have jurisdiction over petitions for writs of habeas corpus filed by aliens captured abroad and detained as enemy combatants at the Guantanamo Bay Naval Base in Cuba." *Boumediene*, 476 F.3d at 984, 987-88. That question does not distinguish between those detainees challenging the CSRT process and a detainee challenging the legality of a military commission trial, and is therefore broad enough to cover Hamdan's claims. Further, the panel broadly held that there was no general constitutional right of habeas distinct from the statutory grant, a holding that would also cover Hamdan's claim on that point. *Id.* at 988 n.5. Thus, without *en banc* review, any panel of this Court assigned to hear Hamdan's appeal will most likely be bound by *Boumediene*. *LaShawn A. v. Barry*, 87 F.3d 1389, 1395 (D.C. Cir. 1996)

(en banc) (one three-judge panel may not overrule a prior panel's decision, only the full court en banc may do so).

To be sure, Hamdan's case differs from that of the *Boumediene* appellants in that he raises a challenge to the legality of his impending military trial under the MCA while the latter challenged only the legality of the CSRT process.[5] As was demonstrated at Hamdan's arraignment, however, the MCA's slipshod creation of a new criminal court and the aggressive manner in which its jurisdiction may be asserted by the Executive, counsel even more strongly for *en banc* review in this case than in *Boumediene*.

Because *Boumediene* was wrongly decided, is in conflict with the Supreme Court's decision in *Rasul*, and yet would bind any panel assigned to hear Hamdan's appeal, this Court should grant the petition for initial hearing en banc to overrule or limit *Boumediene*.

A. The *Boumediene* panel erred in creating a legal black hole at Guantanamo, at least for those facing *criminal* sanctions.

Regardless of whether the MCA strips the federal courts of statutory jurisdiction to consider habeas petitions filed by Guantanamo detainees, Hamdan's petition is cognizable under the writ of habeas corpus conferred by the Constitution. The Constitution provides that "[t]he privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it." Art. I, § 9, cl. 2. This Court should make clear that, contrary to the *Boumediene* panel's ruling, the detention and trial of alleged enemy combatants held for years at Guantanamo is subject to judicial review under the

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[5] 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)).

common law writ, what the Supreme Court has described as the "highest safeguard of individual liberty" in our legal system. *Smith v. Bennett*, 365 U.S. 708, 712 (1961).

"Habeas corpus is...a writ antecedent to statute,... throwing its roots deep into the genius of our common law.... The writ appeared in English law several centuries ago [and] became an integral part of our common-law heritage by the time the Colonies achieved independence." *Rasul*, 542 U.S. at 473-74. The Founders ensured that the availability of the writ was not dependent upon executive or legislative grace. *See St. Cyr*, 533 U.S. at 304 n.24 (the Suspension Clause "was intended to preclude any possibility that the privilege itself would be lost by either the inaction or the action of Congress"). Thus, the constitutional right to habeas relief exists even in the absence of statutory authorization, and may be suspended only by explicit congressional action under strictly limited conditions.[6]

The conclusion that Petitioner has a constitutional right to habeas follows from the history of the writ and the Supreme Court's precedents. Hamdan's claims falls within the scope of the writ as it existed in 1789 as well as subsequent periods, and the right to habeas review under the Constitution reaches to the Guantanamo Bay Naval Station. And while it is permissible for the Government to provide an alternative process if it truly allows a defendant to adequately challenge the legality of the tribunal, the meager review provisions of the MCA are no substitute for the robust protections of the Great Writ.

1. Hamdan's petition falls squarely within the scope of the habeas inquiry historically available under the common law. The Supreme 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

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[6] *E.g., Swain v. Pressley*, 430 U.S. 372, 380 & n. 13 (1977) (citing Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142, 171 (1970)) (noting that "Judge Friendly observed that '[w]hat Congress has given, Congress can *partially* take away'" an observation "more cautious than the conclusion that Congress may *totally* repeal all post-18th century developments in this area of the law") (emphasis added by the Court); *Scaggs v. Larsen*, 396 U.S. 1206, 1208 (1969) (Douglas, J.) ("[Section] 2241 is not a measure of the constitutional scope of the guarantee [of habeas]....").

301 (quoting *Felker v. Turpin*, 518 U.S. 651, 663-64 (1996)). The Court in *Rasul* interpreted the pre-MCA habeas statute to apply to Guantanamo detainees because that construction was consistent with the "historical reach of the writ," which was available even "where ordinary writs did not run,...[in] all...dominions under the sovereign's control." *Rasul*, 542 U.S. at 481-82. Thus, the *Boumediene* Court's holding that no non-statutory right to habeas has ever existed is counter to the Supreme Court's understanding of the Great Writ and should be reversed. *Boumediene*, 476 F.3d at 995 (Rogers, J., dissenting) (recognizing that the majority opinion was in direct conflict with the Supreme Court's decision in *Rasul*).

Indeed, the writ has been a 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 v. Pressley*, 430 U.S. 372, 380 n. 13 (1977) (Burger, C.J., concurring) ("[T]he traditional Great Writ was largely a remedy against executive detention."). Moreover, the writ historically has been available to test the detention of alleged enemy aliens and prisoners of war, as illustrated by *King v. Schiever*, 2 Burr. 765, 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 482. The Supreme Court in *Rasul* correctly read *Schiever* as proof that suspected enemy aliens can invoke habeas. Early American courts similarly recognized that habeas extends to enemy aliens. *See, e.g.*, *Lockington's Case, Bright.* (N.P.) 269 (Pa. 1813) (considering the habeas petition of a British citizen imprisoned during the War of 1812); *Laverty v. Duplessis*, 3 Mart. (o.s.) 42, at *1 (La. 1813) (summarizing the district court's decision to release the petitioner on habeas because he had been incorrectly classified as an enemy alien).

Further, Guantanamo falls within the geographic coverage of the common law writ, which historically had an "extraordinary territorial ambit." *Rasul*, 542 U.S. at 482 (quoting R.

Sharpe, *Law of Habeas Corpus* 188-89 (2d ed. 1989)). In the Eighteenth Century, habeas not only extended beyond the Kingdom of England, it was recognized as "a writ of such a sovereign and transcendent authority, that no privilege of person or place can stand against it. It runs, at 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) (emphasis added). In *King v. Cowle*, 97 Eng. Rep. 587, 598-99 (K.B. 1759), Lord Mansfield described the broad reach of the writ, saying there was "no doubt" it could issue in any territory "under the subjection of the Crown," even if that territory was "no part of the realm." Thus, habeas jurisdiction has always turned on control, not sovereignty.[7]

2. Nor can the *Boumediene* Court's erroneous decision be justified on the theory that the MCA's provisions for judicial review provide an adequate substitute for constitutional habeas corpus. At the very least, the timing of review under the MCA alone renders it insufficient as a replacement for constitutional habeas. At common law, habeas corpus was a means by which courts could consider *pre-trial* claims. *Ex Parte Royall*, 117 U.S. 241, 253 (1886). By contrast, the DTA defers even the limited review available to detainees under the statute until a "final decision" of a CSRT, DTA § 1005(e)(2), and the MCA defers review until a "final decision" of a military commission, MCA § 3(a) (adding 10 U.S.C. § 950g). Prohibiting judicial review until after criminal proceedings conclude prevents detainees from

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[7] For instances in which the writ issued from a court in England to locations outside the realm but under the control of the Crown, *see King. v. Salmon*, 84 Eng. Rep. 282 (K.B. 1669) (writ issued to Channel Island of Jersey on behalf of individual committed on "suspicion of treason"); *King. v. Overton*, 82 Eng. Rep. 1173 (K.B. 1668) (writ issued to Jersey); Sir Matthew Hale, The History of the Common Law, The History of the Common Law of England 120 (1755) (writ issued to Channel Islands because "the King may demand, and must have an Account of the Cause of any of his Subjects Loss of Liberty"). *See also Bourn's Case*, 79 Eng. Rep. at 466 (reported more fully at Lincoln's Inn, MS Maynard 22, fol. 406v.) (writ issued to Calais when formerly subject to king of England); M. Bacon, A New Abridgement of the Law, Tit. Habeas Corpus (B) (7th ed. 1832) (same); 3 William Blackstone, *Commentaries* *131 ("high prerogative writ" of habeas corpus "run[s] into all parts of the king's dominions; for the king is at all times entitled to have an account why the liberty of any of his subjects is restrained, wherever that restraint may be inflicted") (footnotes omitted).

vindicating rights that are violated by the very fact of being tried by an illegal tribunal in the first place. *Cf. Hamdan*, 126 S. Ct. at 2770 n.16 (2006) (quoting *Schlesinger v. Councilman*, 420 U.S. 738, 759 (1975)) ("[A]bstention is not appropriate in cases in which individuals raise 'substantial arguments denying the right of the military to try them at all.'"). Furthermore, while Petitioner voices no opinion on the likelihood of such an event, under the MCA the Executive could possibly avoid *all* judicial review merely by failing to issue a final decision. The mere ability to avoid any review whatsoever is fundamentally inconsistent with a core function of habeas corpus. *See St. Cyr*, 533 U.S. at 305 ("The writ of habeas corpus has always been available to review the legality of Executive detention.").

B. The federal courts have statutory jurisdiction to hear Hamdan's petition.

The *Boumediene* court also erred in concluding that the MCA's jurisdiction-stripping provisions applied to pending cases. Ignoring well-settled presumptions and canons of construction, the panel interpreted ambiguous statutory language as repealing habeas jurisdiction retroactively, in a way that presents constitutional questions of the highest order.

1. Although *Boumediene* interpreted the MCA to strip the courts of habeas jurisdiction in all pending cases, the text, purpose, and drafting history of the Act suggest an alternative interpretation. The structure of the jurisdiction-stripping provision implies that Congress intended to distinguish between two types of challenges, and that courts retain jurisdiction over pending habeas cases such as Hamdan's. Section 7(a) adds a new subsection (e) to the federal habeas statute, 28 U.S.C. § 2241. Subsection (e) is divided into two subparts. Subpart (1) divests courts of jurisdiction over *habeas applications* filed by aliens determined to be enemy combatants, or awaiting such determination. Subpart (2) divests courts of jurisdiction, except as preserved in the DTA, over any *other actions "relating to any*

aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien" determined to be an enemy combatant, or awaiting such determination. 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*[]." § 7(b).

Significantly, subsection 7(b) does not expressly refer to *habeas cases* pending on the date of enactment. Instead, the language of § 7(b) tracks, virtually word for word, the language used in new-28 U.S.C. § 2241(e)(2) to refer to "*other actions*" relating to detention, transfer, treatment, et cetera, of detainees. 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, the Supreme 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 (citations omitted). Here, the same negative inference must 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.

2. There are also independent barriers to *Boumediene*'s interpretation of the MCA. First, the panel's interpretation must confront the "longstanding rule requiring a clear statement of congressional intent to repeal [statutory] habeas," *St. Cyr*, 533 U.S. at 298. Any alternative interpretation that preserves jurisdiction in this case should therefore be preferred. Second, by construing the MCA to strip federal courts of habeas jurisdiction in *pending cases*,

the district court's interpretation runs up against the presumption against retroactivity, of which the Supreme Court took notice earlier in this case. *See Hamdan*, 126 S. Ct. at 2765. Third, *Boumediene*'s interpretation raises serious questions about the constitutionality of the MCA. *See infra* at 13. "[I]f an otherwise acceptable construction of a statute would raise serious constitutional problems, and where an alternative interpretation of the statute is fairly possible, [a court is] obligated to construe the statute to avoid such problems." *St. Cyr*, 533 U.S. at 299-300. This triple presumption—against habeas repeal, retroactivity, and triggering constitutional questions—requires that any ambiguity in the statutory language be resolved in favor of federal jurisdiction. That ambiguity exists in this case.

Because the *Boumediene* decision, which is wrongly-decided and in clear conflict with Supreme Court law, will most likely be viewed as binding by any panel that would hear Hamdan's appeal, requiring the ordinary appeals process in this case would be futile. As such, en banc hearing is required now to overrule *Boumediene* and bring Circuit law into congruence with the Supreme Court's decisions. *See Alley v. Little*, 452 F.3d 620, 621 (Martin, J., dissenting from denial) (noting that initial hearing en banc is "especially appropriate" where the panel has spoken unequivocally on the petitioner's argument).

II. Initial hearing en banc is necessary to address the unique questions of exceptional importance raised by the Petitioner.

Hamdan will very likely face trial before a military commission convened under the MCA and devoid of many of the procedural protections present in ordinary criminal trials or courts-martial. His habeas action presents an ongoing challenge to the legality of that military commission process, which is empowered to impose a sentence that may take Hamdan's entire liberty away. Petitioner's challenge raises three questions (1) whether Petitioner retains

a statutory right to habeas after the MCA; (2) whether the MCA is unconstitutional; and (3) whether the Constitution protects Petitioner's fundamental rights, including the right to challenge the legality of his military commission trial through constitutional habeas. Each of these questions is of "exceeding importance" sufficient to warrant the grant of initial hearing en banc.

A. First, this appeal presents the important question of whether federal courts retain any jurisdiction—constitutional or statutory—to consider habeas petitions filed by detainees at Guantanamo Bay after passage of the MCA. The right of habeas review has always been recognized as crucial to our nation's carefully attuned separation of powers. *E.g.*, *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004) (noting the "necessary role" of the Great Writ in "maintaining this delicate balance of governance, serving as an important judicial check on the Executive's discretion in the realm of detentions"); *Rasul*, 542 U.S. at 470 (noting that the case raised the "important question" of federal jurisdiction over claims by alien detainees at Guantanamo); *Boumediene v. Bush*, 127 S. Ct. 1478 (2007) (Stevens, J., denying certiorari) (noting the "obvious importance of the issues raised in these cases"); *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"). As such, the question of whether federal courts have jurisdiction to consider this habeas action is undoubtedly of exceeding importance.

B. Second, the question of whether the political branches can circumvent the Constitution and strip federal courts of power to hear challenges to their enactments is of even greater importance when the circumvention involves establishing extraordinary criminal prosecutions before military tribunals. These types of summary proceedings were regarded with the utmost suspicion by our Founders for good reason. *Hamdan*, 126 S. Ct. at 2759 ("trial by military commission is an extraordinary measure raising important questions about

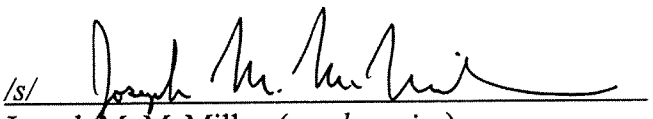
the balance of powers in our constitutional structure"); *id.* at 2800 (Kennedy, J., concurring) ("Trial by military commission raises separation-of-powers concerns of the highest order.").

C. Third, Hamdan challenges the constitutionality of the MCA, Congress's latest attempt at drafting comprehensive legislation to establish procedures to deal with the detention and trial of detainees at Guantanamo. Hamdan contends that the MCA violates separation of powers by simultaneously nullifying the Supreme Court's decision in *Hamdan* and purporting to strip federal courts of jurisdiction to review that nullification, thereby unconstitutionally prescribing the rules of decision for a pending case. *See United States v. Klein*, 80 U.S. 128 (1871). He further contends that the MCA violates the Bill of Attainder Clause by singling out aliens designated as enemy combatants by the Executive and stripping them, and only them, of the right to habeas review. *See United States v. Brown*, 381 U.S. 437, 447 (1965). Finally, Hamdan argues that the MCA violates the Equal Protection Clause by discriminating against aliens, a protected class, and burdening the fundamental right of access to habeas review. *See Graham v. Richardson*, 403 U.S. 365, 371 (1971); *Douglas v. California*, 372 U.S. at 358. These serious constitutional challenges to an important piece of legislation meant to govern the conduct of the United States in the War on Terror are of exceeding importance sufficient to warrant initial hearing en banc. *See In re Cheney*, 406 F.3d 723 (D.C. Cir. 2005) (granting initial hearing en banc upon the government's urging that the case involved "weighty separation-of-powers" concerns, U.S. Motion to Govern Future Proceedings, *In re Cheney*, Aug. 10, 2004, at 10-11).

CONCLUSION

For the foregoing reasons, this Court should grant the petition for initial hearing en banc under Rule 35.

Respectfully submitted this 8th day of June, 2007.

/s/ 

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CERTIFICATE OF SERVICE

I hereby certify that on this June 8, 2007, I caused copies of the foregoing Motion for Initial Hearing En Banc, the Addendum thereto, and the supporting declaration of Joseph M. McMillan (with exhibits) to be sent by hand delivery to the Court and the following counsel of record:

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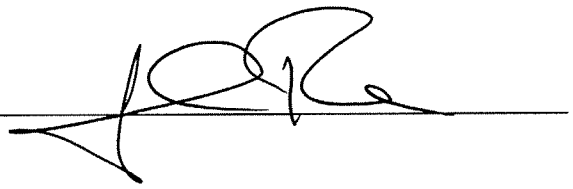
/s/ 

ADDENDUM