

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

SALIM AHMED HAMDAN, Petitioner,

v.

ROBERT GATES, et al., Respondents,

and

OMAR KHADR, Petitioner

v.

GEORGE W. BUSH, et al., Respondents

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

PETITIONERS' MOTION TO EXPEDITE
CONSIDERATION OF PETITION FOR WRIT OF CERTIORARI BEFORE
JUDGMENT AND PETITION FOR WRIT OF CERTIORARI

In a joint Petition for Writ of Certiorari and Writ of Certiorari Before Judgment to be filed later this week pursuant to Supreme Court Rule 12.4, Petitioners Salim Hamdan and Omar Khadr (“Petitioners”) seek review of closely related judgments concerning the availability of habeas for persons facing imminent criminal prosecution before military commissions. Petitioner Hamdan seeks certiorari before judgment from a decision rendered by the United States District Court for the District of Columbia. Petitioner

Khadr seeks certiorari from a judgment of the United States Court of Appeals for the District of Columbia. Petitioners' joint Petition presents fundamental questions regarding the applicability of the Constitution to defendants in a criminal process created by Congress as a substitute for the military commissions deemed unlawful by this Court in *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006). The new commissions' primary distinguishing feature from the prior unlawful scheme is that it is promulgated by a statute which purports to eliminate the possibility of any pre-trial challenge to the commissions' jurisdiction through a withdrawal of the writ of habeas corpus. Both Petitioners' cases thus raise issues of extreme public and constitutional significance, and Petitioners therefore respectfully request that the Court consider their Petition on an expedited basis.

Petitioners Hamdan and Khadr are two of the three individuals at Guantanamo Bay who have had charges sworn against them under the MCA. The only other person facing a military commission at present is David Hicks of Australia. He is a petitioner in *Al Odah* and his counsel has represented that Mr. Hicks strongly supports the granting of certiorari in the Khadr and Hamdan cases.

1. Since May of 2002, Petitioner Hamdan has been detained at the U.S. Naval Station at Guantanamo Bay, Cuba, based on Respondents' determination that he is an "enemy combatant." Pursuant to the Military Commissions Act of 2006 ("MCA"), Pub. L. No. 109-366, 120 Stat. 2600, Hamdan has been designated for trial before a military commission on charges of "Conspiracy" and "Providing Material Support for Terrorism." The MCA authorizes military commissions designed to replace those struck down in *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006). The new conspiracy charge faced by Hamdan is essentially the same as the prior conspiracy charge that a plurality of this

Court determined was not an offense cognizable under the laws of war. *Hamdan*, 126 S. Ct. at 2775-86.

2. On remand to the district court, Petitioner Hamdan's case was dismissed based on § 7(a) of the MCA, which amends the habeas statute and thereby purports to strip federal courts of jurisdiction over habeas petitions brought by any alien "determined by the United States to have been properly detained as an enemy combatant or awaiting such determination." *See also* MCA § 3(a) (stripping federal courts of jurisdiction over cases related to the "prosecution, trial or judgment" of military commissions); *Hamdan v. Rumsfeld*, 464 F. Supp. 2d 9, 12 (2006). Although the district court concluded that the constitutional conditions for suspension of habeas effected by § 7 of the MCA had not been met, on the authority of *Johnson v. Eistentrager*, 542 U.S. 466, 481 (1950), the district court nonetheless held that that Guantanamo "lies outside the sovereign realm, and only U.S. citizens in such locations may claim entitlement to a *constitutionally* guaranteed writ." *Hamdan*, 464 F. Supp. 2d at 18. It also held that because Petitioner Hamdan's contact with the United States was involuntary, he lacked the "substantial connection with our country" to justify a constitutional right to the Writ. *Id.* (quoting *United States v. Verdugo-Urquidez*, 494 U.S. 259, 271 (1990)).

3. Petitioner Khadr has been detained by U.S. forces since July 2002, when he was fifteen years old, and has been detained at Guantanamo Bay since October 2002, based on Respondents' determination that he is an "enemy combatant." Petitioner Khadr is also facing prosecution before the military commissions reconvened pursuant to the MCA. New charges were sworn against Khadr on February 2, 2007. "Conspiracy" and "Providing Material Support for Terrorism" are likewise two of the five charges faced by Khadr.

4. Petitioner Khadr's case is one among many that had been consolidated for review before the Court of Appeals for the District of Columbia Circuit in *Boumediene v. Bush* and *Al Odah v. United States*, parallel litigation brought by other Guantanamo detainees challenging their detention as "enemy combatants." *Boumediene v. Bush*, No. 05-5062, 2007 WL 506581 (D.C. Cir. Feb. 20, 2007). On February 20, 2007, the circuit court issued its opinion in those cases. The circuit court determined that the MCA had stripped the court of jurisdiction over the petitioners' habeas claims and that by virtue of their status as aliens detained offshore at Guantanamo, those detainees could not rely on the Suspension Clause to protect their habeas rights. Slip op. at 18.

5. Although Petitioner Khadr was among the pool of dozens of detainees before the circuit court, the *Boumediene* and *Al-Odah* decision does not address pre-trial challenges to the jurisdiction of a military commission, which is a central feature of Hamdan and Khadr's Petition. These differences have been widely noted in previous court decisions.¹ Nor do *Boumediene* and *Al Odah* raise separation of powers, Bill of Attainder, and Equal Protection challenges to the MCA, as was presented by Petitioner Hamdan to the district court. As will be set forth in the joint Petition to be filed later this week, these differences in posture make Petitioners' cases logical and necessary

¹ *E.g.*, *Hamdan*, 126 S. Ct. at 2798 ("It bears emphasizing that Hamdan does not challenge, and we do not today address, the Government's power to detain him for the duration of active hostilities in order to prevent such harm."); *id.* at 2817 (Scalia, J., dissenting) ("The vast majority of pending petitions, no doubt, do not relate to military commissions at all, but to more commonly challenged aspects of 'detention' such as the terms and conditions of confinement."); *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 447 n.7 (D.D.C. 2005) ("This Memorandum Opinion does not address the legality of the military commission proceedings but rather focuses on the issue of the rights of detainees with respect to their classification as 'enemy combatants' regardless of whether they have been formally charged with a war crime."), *overruled in Boumediene, supra; Boumediene*, dissent slip op. at 31 (Rogers, J., dissenting) (distinguishing between those convicted in previously upheld military commissions and Guantanamo petitioners).

companions to this Court's consideration of the habeas claims in *Al Odah* and *Boumediene*, should certiorari be granted in those cases as well.²

6. There are considerable efficiencies to be gained through an expedited review of Khadr and Hamdan's joint Petition. The Government has already agreed to a briefing schedule that permits the *Boumediene* and *Al Odah* petitioners to have their petition for certiorari reviewed on an expedited basis. The *Boumediene* and *Al Odah* petitioners are expected to file their petition for certiorari by March 5, 2007. The Government has agreed to file their opposition brief no later than March 21, 2007. The Government has nonetheless refused to consent to the same schedule for its response to Khadr and Hamdan's joint Petition. As discussed above, although the issues presented by Petitioners' joint Petition are in many ways distinct from those presented by the *Al Odah* and *Boumediene* petitioners, the cases are so closely related in presenting complementary challenges to the MCA that they should be considered on the same schedule. Indeed, that would be far more efficient for this Court than separate schedules, given the intention of Petitioners here to request that their cases be reviewed as necessary companions to *Boumediene* and *Al Odah*.

7. Expedited consideration of the joint Petition for certiorari is appropriate for multiple reasons. First, the Government has indicated that it intends to commence trials before military commissions pursuant to the MCA at the earliest opportunity. Neil A. Lewis, *Judge Sets Back Guantanamo Detainees*, N.Y. Times, Dec. 14, 2006 at A32

² Indeed, *Boumediene* and *Al-Odah* do not implicate the MCA's military commission provisions, as almost all of those detainees, unlike Hamdan and Khadr, are not facing charges – a distinction that certain of those petitioners rely upon to assert that they stand in a more favorable jurisdictional position than Petitioners. See, e.g., Supp. Brief of Pet'rs Boumediene, et al., and Khalid, *Boumediene v. Bush*, No. 05-5062, at 18 (“The common law accorded persons who—like Petitioners—had no reasonable prospect of a trial a significantly broader inquiry on habeas than was available to persons awaiting trial on a criminal charge.”); Guantanamo Detainees' Supp. Brief, *Al Odah v. United States*, No. 05-5064, at 13. By contrast, Petitioners contend that those 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.

(“Once the Military Commissions Act was adopted this fall, senior Pentagon officials said they hoped to resume war crimes trials before the newly reconstituted commissions this summer.”); Michelle Shephard, *Khadr Faces Fresh Charges*, Toronto Star, Feb. 3, 2007 (“Col. Morris Davis, the chief prosecutor, said in an interview last night that he hopes Khadr’s case will be tried before military commissions held on the U.S. Navy base at Guantanamo Bay, Cuba, as early as this summer.”). Petitioners are presently two of only three defendants against whom charges have been “sworn,” and their trials can reasonably be expected to begin in the late spring or summer of 2007. Under the newly promulgated Rules for Military Commissions (“RMC”), the “swearing” of charges is followed by their “referral” to a military commission “in a prompt manner.” RMC 307, 401. Then, within 30 days of the service of charges, the accused must be arraigned, and “[w]ithin 120 days of the service of charges, the military judge shall announce the assembly of the military commission.” RMC 707(a). Formal referral of the charges against Petitioners, which begins the tolling of these deadlines, is imminent.

One of the primary rights Petitioners seek to vindicate in this case is the right *not* to be tried by a military tribunal that lacks jurisdiction over them. As this Court has already noted, “Hamdan and the Government both have a *compelling interest* in knowing *in advance* whether Hamdan may be tried by a military commission that arguably is without basis in law....” *Hamdan*, 126 S. Ct. at 2772 (emphasis added); *see also id.* at 2770 n.16 (“[A]bstention is not appropriate in cases in which individuals raise ‘substantial arguments denying the right of the military to try them at all.’”) (quoting *Schlesinger v. Councilman*, 420 U.S. 738, 759 (1975)). In the absence of expedited consideration, it is entirely possible that whatever right Petitioners may have to avoid such a trial will be irretrievably lost.³

³ Because the decisions below remove the Constitution’s fundamental protections, such as the Suspension Clause, from Petitioners, it is impossible for them to plan for trial, as they do not even know if due process

8. Second, the questions presented by Petitioners’ petition are sufficiently imperative from a national and international legal and policy perspective to justify expedited consideration:

[T]his Court’s decision in *Quirin* is the most relevant precedent.... Far from abstaining pending the conclusion of military proceedings, which were ongoing, we convened a special Term to hear the case and *expedited our review*. That course of action was warranted, we explained, “[i]n view of the public importance of the questions raised by [the cases] and of the duty which rests on the courts, in time of war as well as in time of peace, to preserve unimpaired the constitutional safeguards of civil liberty, and because in our opinion the public interest required that we consider and decide those questions without any avoidable delay.

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

9. Third, Petitioners’ joint Petition stands as a logical and complementary companion to consideration of the *Al Odah* and *Boumediene* cases, which are already set for review on an expedited basis by agreement of the parties. Again, this places the Petition in circumstances – a petition for certiorari before judgment considered alongside

and other fundamental rights secured by the Constitution will govern their 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 all—does the Constitution apply to it—are in doubt.

a related companion case – where the Court has in the past agreed to hear both cases on accelerated schedule. *Hannah v. Larche*, 363 U.S. 420, 422 (1959) (granting motion to advance briefing and oral argument in related cases, one heard pursuant to writ of certiorari before judgment). Expediting review would serve the dual purpose of prompt determination of the legality of the jurisdiction-stripping provisions of the MCA in the two related contexts in which it is presented: (1) those, like Petitioners, facing imminent criminal prosecution pursuant to the MCA, and (2) those detained as “enemy combatants” under the MCA.

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

11. For reasons stated above, Petitioners request that the Court enter a briefing schedule that would require Respondents to file their response to the Petition by March 21, 2007, the same schedule already agreed to for the *Boumediene* and *Al Odah* petitioners. For purposes of this motion, Petitioners waive the 10-day period provided for in this Court’s Rule 15.5 between the filing of a brief in opposition and the distribution

of the petition and other materials to the Court. Should certiorari be granted, Petitioners are ready to prepare merits briefing on whatever schedule the Court deems appropriate in order to have the matter calendared and argued this Term.

Respectfully submitted this 27th day of February, 2007,

**NEAL KATYAL
COUNSEL OF RECORD**

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

LAURENCE H. TRIBE

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

KEVIN K. RUSSELL

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

**LIEUTENANT COMMANDER CHARLES
SWIFT**

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

PERKINS COIE LLP

By /s/ Joseph M. McMillan
Joseph M. McMillan
Harry H. Schneider
Charles C. Sipos

Attorneys for Petitioner Salim Ahmed Hamdan

AND

MUNEER I. AHMAD

By /s/ Muneer I. Ahmad

Muneer I. Ahmad

Richard J. Wilson

Kristine A. Huskey

Int'l Human Rights Clinic

American University Washington

College of Law

Washington, D.C. 20016

(202) 274-4147

Attorneys for Petitioner Omar Khadr

CERTIFICATE OF SERVICE

I hereby certify that on February 27, 2007, copies of the foregoing **Petitioners' Motion to Expedite Consideration of Petition for Writ of Certiorari Before Judgment and Petition for Writ of Certiorari**, were served by electronic mail upon the following:

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

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

Attorneys for Respondents

/s/ Joseph M. McMillan

Joseph M. McMillan