

No. 05-___

IN THE
Supreme Court of the United States

In re SALIM AHMED HAMDAN,
Military Commission Detainee, Guantanamo Bay
Naval Base, Guantanamo Bay, Cuba,
Petitioner.

**PETITION FOR AN EXTRAORDINARY WRIT,
OR, IN THE ALTERNATIVE, FOR AN ORIGINAL
WRIT OF HABEAS CORPUS**

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QUESTIONS PRESENTED

This petition for an extraordinary writ, or, in the alternative, an original writ of habeas corpus, is being filed to protect the Court's jurisdiction to decide the questions upon which the Court granted certiorari in *Hamdan v. Rumsfeld*, No. 05-184, on November 7, 2005:

1. Whether the military commission established by the President to try Petitioner and others similarly situated for alleged war crimes in the "war on terror" is duly authorized under Congress's Authorization for the Use of Military Force (AUMF), Pub. L. No. 107-40, 115 Stat. 224; the Uniform Code of Military Justice (UCMJ); or the inherent powers of the President?

2. Whether Petitioner and others similarly situated can obtain judicial enforcement from an Article III court of rights protected under the 1949 Geneva Convention in an action for a writ of habeas corpus challenging the legality of their detention by the Executive branch?

PARTIES TO THE PROCEEDING

Pursuant to Rule 14.1, the following list identifies all of the parties appearing here and in the court below:

The Petitioner here and in the United States Court of Appeals for the District of Columbia Circuit is Salim Ahmed Hamdan, a citizen of Yemen who is currently detained at Guantanamo Bay.

The Respondents in No. 05-184 and in the United States Court of Appeals for the District of Columbia Circuit are Donald H. Rumsfeld, United States Secretary of Defense; John D. Altenburg, Jr., 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, Commander Joint Task Force, Guantanamo, Camp Echo, Guantanamo Bay, Cuba; George W. Bush, President of the United States.

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**PETITION FOR AN EXTRAORDINARY WRIT, OR, IN
THE ALTERNATIVE, AN ORIGINAL WRIT OF
HABEAS CORPUS**

The Petitioner, Mr. Salim Ahmed Hamdan, is the petitioner in *Hamdan v. Rumsfeld*, No. 05-184, a case pending before this Court on a writ of certiorari. Although this Court has already granted certiorari to review petitioner's claims in No. 05-184, it appears that Congress will shortly enact legislation that the Government may argue deprives this Court of jurisdiction to decide the questions presented in that case through an exercise of its certiorari jurisdiction. The plain text of the current legislation does no such thing.

In an abundance of caution, however, Petitioner is filing this protective petition for mandamus, other appropriate extraordinary writ, or original writ of habeas corpus, in order to ensure this Court's jurisdiction to determine the issues raised in No. 05-184. This petition need not be considered unless the Court determines that the new legislation prevents the Court from reaching the merits of the claims in No. 05-184. Accordingly, Petitioner respectfully suggests that this petition be considered by the Court in tandem with its review in No. 05-184.

RELATED OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the District of Columbia Circuit (Pet. App.1a-18a)¹ is reported at 415 F.3d 33 (D.C. Cir. 2005). The opinion of the district court (Pet. App. 20a-49a) is reported at 344 F. Supp. 2d 152 (D.D.C. 2004). This Court's grant of certiorari in No. 05-184 is reported at 126 S. Ct. 622 (2005).

¹ References to "Pet." and "Pet. App." refer to the petition and petition appendix in No. 05-184.

JURISDICTION

This Court's jurisdiction is invoked pursuant to 28 U.S.C. §§ 1651(a), 2241(a), and 2242, and Article III of the U.S. Constitution.

STATEMENT

This petition presents the same underlying facts and procedural history as the petition for certiorari in No. 05-184; however, this petition seeks an original writ and other appropriate relief as necessary to protect this Court's jurisdiction, in light of certain events that have occurred since certiorari was granted, *see infra* at p.6.

A. Statement of the Facts

1. In the immediate wake of the terrorist acts of September 11, 2001, Congress authorized the President to "use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons." Authorization for Use of Military Force, § 2(a), 115 Stat. 224, 224 (Sept. 18, 2001) (AUMF). Under the AUMF, the United States commenced armed conflict in Afghanistan in October 2001.

The next month, in contrast to the limited AUMF, the President issued a Military Order to authorize military commissions. Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 13, 2001). The Commission's rules are starkly different from the fundamental protections mandated by Congress in the Uniform Code of Military Justice (UCMJ). *See, e.g.*, Military Order No. 1 (August 31, 2005) (available at <http://www.defenselink.mil/news/Sep2005/d20050902order.pdf>). For example, the rules allow the accused to be excluded from portions of his trial, *id.* § 6(B)(3); permit the admission

of unsworn statements in lieu of testimony, *id.* § 6(D); and vest the Secretary of Defense with the judicial power to rule in matters that terminate the proceedings, *id.* § 6(H)(1)-(6). The rules even state that the limited protections with which defendants are provided – such as the presumption of innocence and protection from compelled testimony – are not “rights” that are in any way “enforceable,” *id.* § 10, and warn that these “protections” can be withdrawn at any time, *id.* § 11.

2. Petitioner has been in the custody of the United States military for over four years. He was originally captured by indigenous forces while attempting to flee Afghanistan and return his family to Yemen. Pet. App. 1a. After being turned over to U.S. forces, he was held under the inherent detention authority given to military officials under the law of war. In June 2002, he was taken to the Guantanamo Bay Naval Base, where he was placed with the general detainee population at Camp Delta. In July 2003, the President found that apart from the authority to detain Petitioner in conjunction with the conflict in Afghanistan, Petitioner was moreover eligible for trial by commission. *Id.* 1a-2a. Accordingly, Petitioner was placed in solitary confinement in Camp Echo from December 2003 until late October 2004 – four days before this case was argued in the District Court. *Id.* 2a.

3. In December 2003, pursuant to a request by the Prosecutor that defense counsel be appointed for the limited purpose of negotiating a plea, Lieutenant Commander Swift was detailed to serve as Petitioner’s military counsel. Petitioner first met Swift on January 30, 2004. Twelve days later, Petitioner filed a demand for charges and a speedy trial under UCMJ Article 10. That demand was rejected in a legal opinion which asserted that Petitioner was not protected by the UCMJ. In July 2004, eight months after the start of his solitary detention, he was charged with a single count of conspiracy that allegedly began in 1995.

B. Procedural History

1. On April 6, 2004, Petitioner filed a Petition for Mandamus or, in the Alternative, Habeas Corpus, in the U.S. District Court for the Western District of Washington. Pet. App. 21a. In light of this Court's decision in *Rumsfeld v. Padilla*, 542 U.S. 426 (2004), the case was transferred to the United States District Court for the District of Columbia in August 2004. Pet. App. 21a.

The petition alleged that Mr. Hamdan's detention violated: (a) his right to a speedy trial in violation of Article 10 of the Uniform Code of Military Justice; (b) his speedy trial rights under Article 103 of the Third Geneva Convention and federal regulations; (c) his right to pre-sentencing judicial process under Common Article 3 of the Geneva Conventions; (d) his constitutional right not to be tried by a military commission that had not been authorized by Congress; (e) his right to equal protection of the laws under the Due Process Clause of the Fifth Amendment; (f) his rights under 42 U.S.C. § 1981; (g) his constitutional and statutory right not to be tried by a military commission whose subject matter jurisdiction contravenes the recognized laws of war; (h) his right to be subject to prosecution only for the offenses authorized in the presidential order creating the military tribunals.

2. On November 8, 2004, following oral argument, the district court (Robertson, J.) granted the petition in part. See Pet. App. 20a. The court rejected Respondents' argument that it should abstain from considering the merits of Petitioner's claims until after the trial, holding that abstention would be inappropriate because Petitioner had "raised substantial arguments denying the right of the military to try [him] at all." *Id.* 24a (citing *Schlesinger v. Councilman*, 420 U.S. 738, 759 (1975)). The district court ruled that commissions may be used only to try offenses that are triable under the laws of war, including the Geneva Conventions; that the Geneva Convention Relative to the Treatment of Prisoners of

War, 6 U.S.T. 3316 (1949) (GPW) is judicially enforceable; and that, as long as his prisoner-of-war (POW) status is in doubt, he must be tried by court-martial. Pet. App. 25a-38a. The court found that the Military Order did not satisfy either the GPW or the UCMJ, particularly insofar as it deprived Petitioner of the right to attend his trial and hear the evidence presented against him. *Id.* 39a-47a.

3. On November 16, 2004, the government filed a notice of appeal and a Motion for Expedited Appeal. On July 15, 2005, following oral argument, the court of appeals reversed the district court in an opinion written by Judge Randolph and joined by then-Judge Roberts (in full) and Judge Williams (in part). Pet. App. 1a-18a.

The court of appeals held that Congress authorized commissions in the AUMF. It found further authorization in 10 U.S.C. § 821, which states that the UCMJ does not “deprive military commissions . . . of concurrent jurisdiction” to try war crimes, and 10 U.S.C. § 836, which permits the President to prescribe some procedures for military trials.

The court of appeals also rejected the district court’s holding that the Geneva Conventions constrain Petitioner’s trial. It found that *Johnson v. Eisentrager*, 339 U.S. 763 (1950) – which, as the court acknowledged, involved only the 1929 Convention and reached the question only in an “alternative holding” – also precluded judicial enforcement of the GPW because that convention was not, in the court’s view, substantively different from the earlier Convention.

The court further held that the habeas statute, 28 U.S.C. § 2241, did not enforce the GPW, and that Petitioner did not meet one of the several definitions of a POW.

With respect to Common Article 3 of the Convention, which prohibits “the passing of sentences . . . without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as essential by a civilized people,” the court

deferred to the President's interpretation that the conflict with al Qaeda is international and therefore exempt.

The court rejected the district court's conclusion that UCMJ provisions such as 10 U.S.C. § 839, which requires an accused's presence at all stages of his trial, apply.

Judge Williams concurred, disagreeing with the court's treatment of Common Article 3 because "the Convention's language and structure compel the view that Common Article 3 covers the conflict with al Qaeda." Pet. App. 18a.

4. Petitioner filed a petition for certiorari seeking review of the D.C. Circuit's decision and invoking this Court's appellate jurisdiction pursuant to 28 U.S.C. § 1254(1). See Pet. 1. This Court granted the petition on November 7, 2005. 126 S. Ct. 622 (2005).

C. Developments Since The Petition For Certiorari In No. 05-184 Was Granted.

As of the time of the writing of this petition, Congress is reportedly scheduled to vote within the next several days on the National Defense Authorization Act (NDAA). An amendment to that Act, commonly referred as the "Graham-Levin Amendment," is included as one section. Among other provisions, the Graham-Levin Amendment purports in certain circumstances to limit the jurisdiction of federal courts to hear certain petitions for writs of habeas corpus from aliens detained in Guantanamo Bay, Cuba.

The Amendment's text applies only certain provisions to pending cases and does not bar this Court's consideration of the merits of Mr. Hamdan's claims in No. 05-184. Although the Amendment has not been the subject of hearings or significant debate, statements by one of its two principal authors expressly indicate that the Amendment is *not* intended to interfere with *this* case. *E.g.*, 151 Cong. Rec. S12,802 (Nov. 15, 2005) (statement of Sen. Levin) (the Graham-Levin amendment "avoids repeating the unfortunate precedent in *Ex Parte McCardle*, in which Congress intervened to strip the Supreme Court of jurisdiction over a case which was pending

before that Court”). *See also id.* at S12,803 (statement of Sen. Reid) (“I agree with Senator Levin that his amendment does not divest the Supreme Court of jurisdiction to hear the pending case of *Hamdan v. Rumsfeld*. . . . It would be highly irregular for the Congress to interfere in the work of the Supreme Court in this fashion, and the Amendment should not be read to do so.”); Press Conference with Senator Levin, Nov. 15, 2005, Federal News Service (“The amendment does not apply the prohibition -- that habeas prohibition that’s in Paragraph 1 to pending cases. The Graham amendment last week did apply the prohibition on habeas to pending cases. The Graham-Levin amendment explicitly does not do it. It strikes that prohibition on use of habeas as it applies to pending cases, which is the Hamdi case, plus other cases as well. That was one of my goals, frankly, so I’m very clear on this, and Senator Graham was very clear on this.”).²

Petitioner believes it possible, however, that the Government may take a different view and urge this Court to dismiss the petition in No. 05-184 in light of the new legislation.

² Petitioner emphasizes that he does not waive his right to contest the applicability, or, to the extent it is applicable, the constitutionality, of the Amendment to his petition for a writ of certiorari, No. 05-184. This Petition, however, is filed to protect this Court’s jurisdiction only as necessary, *i.e.*, to the extent that the Court concludes that the Graham-Levin Amendment precludes ruling on the merits of Petitioner’s claims in No. 05-184.

REASONS FOR GRANTING THE WRIT

Petitioner respectfully files this protective petition for an extraordinary writ pursuant to the All Writs Act, 28 U.S.C. § 1651, or, in the alternative, for an original writ of habeas corpus pursuant to 28 U.S.C. § 2241(a), in the event that post-certiorari Congressional legislation may be crafted to deprive the Court of jurisdiction or otherwise precluding this Court from considering *Hamdan v. Rumsfeld*, No. 05-184, on the merits.

Nothing in the language of the current version of the NDAA precludes this Court's jurisdiction over No. 05-184 or prevents it from reaching a decision on the merits. Nevertheless, this Petition is filed out of an abundance of caution to preserve the multitude of possible avenues for this Court's exercise of jurisdiction over Hamdan's appeal. As lawyers for Petitioner, undersigned counsel have an obligation to ensure that all of this Court's jurisdiction remains available. In that regard, this Petition is modeled after the precedent of the *Yamashita* case, in which General Yamashita filed both a petition for certiorari and an application for leave to file a petition for an original writ. See *Yamashita v. Styer (In re Yamashita)*, 327 U.S. 1 (1946). The Court in those cases heard Yamashita's claims on the merits, although it ultimately rejected his claims. *Id.* at 25.³ This same path – filing both an original writ and a petition for certiorari out of an abundance of caution – was followed in *Ex parte Yerger*. See 75 U.S. (8 Wall.) 85, 85 (1869) (considering case “on motion and petition for writs of *habeas corpus and certiorari*”) (emphasis added). Cf. *Felker v. Turpin*, 518 U.S. 651, 660-61 (1996) (explaining that an “original” writ of habeas corpus remained an available

³ Today, no one seriously contends that a similar trial for Yamashita would be permissible. The 1949 Geneva Conventions require his trial to take place in the same way as a member of the U.S. armed forces would be tried. See GPW Art. 3, 5, 102.

appellate remedy even when this Court's appellate jurisdiction via certiorari was proscribed by Congress). Should the Amendment's text be altered prior to final passage to deprive the Court of its extant appellate jurisdiction, consideration of this application for an original writ would obviate the need for this Court to decide several complex questions about the constitutionality of such unprecedented legislation, especially as applied to alter the jurisdiction of this Court in a pending case.

If this Court is called upon to act on this petition, it will be because exceptional circumstances have arisen that warrant the exercise of this Court's discretionary powers. S. Ct. R. 20.4(a). This Court's grant of certiorari in No. 05-184 demonstrates that this case presents questions of "compelling" importance. S. Ct. R. 10. Indeed, as described in the petition for certiorari, the questions pending in this case implicate fundamental questions in the nation's "war on terror," questions that are of surpassing national and international significance. The current petition for an original writ need be considered only if the Graham-Levin Amendment were construed to deprive this Court of the power to decide those exceedingly important questions by review on a writ of certiorari. The need to resolve those questions, as well as to protect this Court's authority from unwarranted interference from other branches of government, would only arise at that point. In those circumstances, the confluence of events would combine to create an unprecedented need for resort to this Court's power to issue extraordinary writs.

For the reasons set forth in the petition for certiorari in No. 05-184, which will be elaborated in Petitioner's brief on the merits, this Court should reject the D.C. Circuit's decision denying Petitioner relief on his federal claims. Contrary to the decision of the court of appeals, see Pet. App. 4a-7a, Petitioner is being illegally detained for trial before a military tribunal that is unlawfully constituted. See Pet. 10-20. Contrary to clear principles of separation of powers, the

President – without any congressional authorization – unilaterally created these commissions, defined the offenses and persons subject to their jurisdiction, and established rules of procedure to apply in commission proceedings. *Id.* Those procedures depart in substantial ways from the process that has always been afforded to those subject to trial by military tribunal in the past. See *id.* 16-20. Moreover, those procedures deprive Petitioner of vital rights under the Geneva Convention, rights that are properly subject to enforcement by Petitioner in these proceedings. See *id.* 20-27.

This Court has already determined that Petitioner’s claims warrant review, granting the petition for certiorari in No. 05-184. The Government may argue, however, that the Graham-Levin Amendment has withdrawn this Court’s authority to resolve those claims through the exercise of its certiorari jurisdiction. If this Court were to agree with that position, it should nonetheless review the decision of the court of appeals by granting this petition for an appropriate extraordinary writ. *Cf. Felker*, 518 U.S. at 660-61 (holding that the Court could review the court of appeals’ decision through an original writ of habeas corpus notwithstanding that Congress withdrew the Court’s appellate jurisdiction via certiorari); *Yerger*, 75 U.S. (8 Wall.) 85 (same for case in which the petitioner challenged detention for trial by a military commission). Importantly, even if the Graham-Levin Amendment were read to deprive this Court of jurisdiction to issue an original writ of habeas corpus pursuant to 28 U.S.C. § 2241(a), this Court retains jurisdiction under the All Writs Act, 28 U.S.C. § 1651, to issue an extraordinary writ of mandamus “in aid of [its] respective jurisdiction[.]”

A. If Necessary, The Court Should Issue A Writ Of Mandamus Or Other Extraordinary Writ To Review Petitioner's Claims.

Petitioner satisfies the requirements for a writ of mandamus or other appropriate extraordinary writ under the All Writs Act, 28 U.S.C. § 1651,⁴ and this Court's Rule 20:

1. Pursuant to Supreme Court Rule 20.3(a), Petitioner seeks a writ of mandamus or other appropriate extraordinary writ directing the court of appeals to affirm the district court's grant of habeas relief, or providing such other relief as this Court may deem appropriate.⁵ Petitioner separately seeks a writ of mandamus or other appropriate extraordinary writs directed at Respondents in No. 05-184, whose names and titles are therein provided, to obey their duties under the Constitution, laws, treaties, and regulations of the United States.

2. Issuance of the writ is warranted because, as described above and in the petition for certiorari in No. 05-184, Petitioner's continued detention and impending trial under the procedures promulgated for military commissions in Guantanamo Bay are in violation of the Constitution, laws

⁴ It is well established that this Court has authority under the All Writs Act to issue the common-law writ of mandamus against inferior federal courts when in aid of this Court's appellate jurisdiction. *See, e.g., Ex parte Republic of Peru*, 318 U.S. 578, 582-85 & n.3 (1943); *Ex parte United States*, 287 U.S. 241 (1932); *see also Felker*, 518 U.S. at 666 (Stevens, J., concurring) (noting that, in depriving this Court of appellate jurisdiction, the relevant provisions of AEDPA did not affect the Court's jurisdiction to issue an original writ under § 1651); *id.* at 667 (Souter, J., concurring) (same).

⁵ Such an order may be directed to the Honorable A. Raymond Randolph and the Honorable Stephen F. Williams of the United States Court of Appeals for the District of Columbia Circuit, or other appropriate judges and officers of that court. *Cf. Ex parte Republic of Peru*, 318 U.S. at 583.

and treaties of the United States, which impose clear duties upon the Government that are the proper subjects of a writ of mandamus. Such actions are the historical heart of the mandamus statute. See 28 U.S.C. § 1361.

3. If the Graham-Levin Amendment were to be construed to deprive this Court of the ability to review that decision by writ of certiorari, the requested extraordinary relief would be in aid of this Court's appellate jurisdiction, allowing the Court to engage in the appellate review of the lower courts' decision when all other avenues of appellate review have been barred. See S. Ct. R. 20.1. Moreover, for the reasons described *supra*, exceptional circumstances would, in that case, warrant the exercise of this Court's discretionary powers and adequate relief would not be obtainable in any other form or from any other court. S. Ct. R. 20.1. See, *e.g.*, *Maryland v. Soper*, 270 U.S. 9, 30 (1926) (review by mandamus available in case in which “[e]xcept by the issue of mandamus, [petitioner] is without an opportunity to invoke the decision of this Court upon the issue it would raise”).

4. As required by this Court's Rule 20.3(a), a copy of the judgment and opinions of the court of appeals and district court are attached as appendices A and B to this petition.

B. In The Alternative, If Necessary, This Court Should Issue An Original Writ Of Habeas Corpus

If the Graham-Levin Amendment were construed to deprive this Court of jurisdiction over Petitioner's petition for a writ of certiorari, then – to the extent that this Court declines to issue an extraordinary writ – this Court should exercise its prerogative to issue an “original” habeas petition.⁶

⁶ As Justice Souter explained in *Felker*, “[s]uch a petition is commonly understood to be ‘original’ in the sense of being filed in the first instance in this Court, but nonetheless for constitutional purposes an exercise of this Court's appellate (rather than original) jurisdiction.” 518 U.S. at 667 n.1 (Souter, J., concurring).

This petition satisfies the requirements for an original petition for habeas corpus, as set forth in 28 U.S.C. §§ 2241-42 and this Court's Rule 20:

1. Petitioner is in custody under or by color of the authority of the United States. See 28 U.S.C. § 2241(c)(1). In particular, Petitioner is in the custody of the Respondents in No. 05-184, by virtue of a claim of authority pursuant to an order issued by the President on November 13, 2001. See Pet. App. 1a-2a.

2. If the Graham-Levin Amendment were construed to deprive this Court of the authority to decide the questions presented in No. 05-184, and if this Court declines to issue an extraordinary writ pursuant to the All Writs Act, there will be no other court from which Petitioner will be able to obtain adequate relief in any form. S. Ct. R. 20.4(a). No other court has authority to review a decision of the United States Court of Appeals for the District of Columbia Circuit. Moreover, if left unreviewed by this Court, the decision of the court of appeals may preclude Petitioner from seeking further consideration of those claims in any other court. See 28 U.S.C. § 2244 (addressing second and successive habeas petitions).

3. Because no other court may review the decision of the court of appeals in this case, Petitioner has just excuse for not presenting this petition to a lower federal district court. See 28 U.S.C. § 2242; S. Ct. R. 20.4(a). In any event, the claims in this petition were in fact submitted to the U.S. District Court for the District of Columbia and reviewed by the U.S. Court of Appeals for the District of Columbia Circuit.

CONCLUSION

For the foregoing reasons, Petitioner prays that, to the extent necessary to protect this Court's jurisdiction over Mr. Hamdan's petition for certiorari, the Court issue an extraordinary writ, or, in the alternative, an original writ of habeas corpus, to provide directions or otherwise reverse the decision of the court of appeals and provide such additional relief and process as may be necessary and appropriate under the circumstances.

Respectfully submitted,

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