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

SALIM AHMED HAMDAN, *Petitioner-Appellee,* v. DONALD H. RUMSFELD, *et al.*, *Respondents*	No. 04-5393 [Civ. Action No. 1:04-cv-01519-JR]

MOTION TO STAY THE COURT'S MANDATE PENDING DISPOSITION OF A PETITION FOR WRIT OF CERTIORARI

Petitioner-Appellee Salim Ahmed Hamdan hereby moves for a stay of the Court's mandate pending disposition by the Supreme Court of his Petition for a Writ of Certiorari. The requested stay is a very limited one, since the Supreme Court is currently scheduled to consider the Petition at its first Conference, on September 26, 2005. Under D.C. Cir. R. 35(a) and D.C. Cir. R. 41, the mandate of this Court would otherwise issue on or near September 5, 2005, in the absence of a panel rehearing or rehearing en banc.

A stay of the mandate is warranted under Fed. R. App. P. 41(d)(2) and D.C. Cir. R. 41(a)(2). Mr. Hamdan's case presents legal issues of extraordinary national and international significance and contains questions of first impression on which Supreme Court guidance is necessary. This case challenges the President's use of military commissions in the "war on terror" in a manner that Mr. Hamdan contends violates the Geneva Convention, the Uniform Code of Military Justice, and the United States Constitution. The District Court agreed with Mr. Hamdan, granting in part his petition for a writ of habeas corpus and halting his trial by the military commission. This Court, despite its reversal of the District Court's decision, has characterized the claims presented by Mr. Hamdan as "not insubstantial." (slip. op. at 6.)

In addition, good cause exists for the stay. The President's resuscitation of military commissions as adjudicative bodies, after their disappearance from the legal landscape for over half a century, has generated grave national and international concern that the American commitment to international law and due process has been shaken. *E.g.*, Amicus Br. of 305 U.K. and European Parliamentarians, *Hamdan v. Rumsfeld*, No. 04-5393. A hastily-arranged trial by military commission in the weeks ahead, which is the publicly-announced intention of the Executive branch, will be seized upon by America's enemies and held up as evidence of alleged American hypocrisy and disregard for law. This harm to the national and public interest is appropriately considered on a motion to stay the mandate, and should not be courted before the Supreme Court has had the opportunity to determine the legality of the process. In addition, even if the proceeding were to be vacated *ex post*, the harm to Mr. Hamdan in being forced to preview his defense before the military tribunal is irreparable, and constitutes an independent basis for the issuance of the stay. Accordingly, this Motion to Stay the Court's Mandate Pending Disposition of a Petition for Writ of Certiorari ("Motion") should be granted.

DISCUSSION

A. Procedural History.

On April 6, 2004, Mr. Hamdan filed a Petition for Mandamus or, in the Alternative, Habeas Corpus in the Western District of Washington. After the Supreme Court's decision in *Rasul v. Bush*, 124 S.Ct. 2686 (2004), the case was transferred to the District Court for the District of Columbia, Judge Robertson presiding. On November 8, 2004, the District Court granted Mr. Hamdan's petition in part. The District Court ruled that military commissions can only be used to try offenses triable under the laws of war; that the 1949 Geneva Convention is judicially enforceable under habeas, and; that while Mr. Hamdan's prisoner of war status remains in doubt he must be tried by court-martial. *See Hamdan v. Rumsfeld*, 344 F. Supp. 2d 152 (D.D.C. 2004). The District Court further found that the military

commission procedures established by the President did not meet the requirements of the Uniform Code of Military Justice, because those procedures allow the government to remove Mr. Hamdan from his own trial and to deny him the right to confront witnesses. 10 U.S.C. §§ 836, 839; *Id.* The Respondents, Donald H. Rumsfeld, *et al.*, appealed.

Following the District Court ruling, Respondents voluntarily suspended proceedings in the three other cases pending before Military Commissions. Respondents have not preferred charges against anyone eligible for trial by Military Commission in over a year. Instead they have released three of the fourteen persons designated by the President as eligible for such trials. No opening statements have been made in any commission trial.

On July 15, 2005, the Circuit Court reversed the District Court in this case. The mandate has not yet issued, and, absent a panel rehearing or rehearing en banc, the mandate will issue on or near September 5, 2005.

On August 8, 2005 Mr. Hamdan filed his Petition for Certiorari ("Petition"), well in advance of the 90-day filing deadline imposed by S. Ct. R. 13.1, approximately three weeks after this Court's decision in *Hamdan*. Assuming the Solicitor General files his Brief in Opposition in the 30-day period contemplated by S. Ct. R. 15.3, briefing would be completed on September 7. The case is currently slated for consideration at the September 26, 2005 conference.[1] Accordingly, only a brief stay is necessary to permit the Supreme Court the time to decide whether to issue a writ of certiorari.

B. The Motion Meets the Standards for Staying the Mandate.

A motion to stay a court's mandate pending the filing of a petition for certiorari should be granted if (1) the certiorari petition presents a "substantial question" and (2) there is "good

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[1] This schedule is, in effect, the same briefing schedule used in *Hamdan v. Rumsfeld*, No. 04-702, *cert. denied*, Jan. 18, 2005. Following the District Court's November 8, 2004, a Petition for Certiorari Before Judgment was filed on November 22, 2004. The Solicitor General, following the period specified for filing a Brief in Opposition under S. Ct. R. 15.3, submitted a Brief in Opposition on December 27, 2004, and the case was scheduled for the first available conference thereafter.

cause" for a stay. Fed. R. App. P. 41(d)(2); *see also* D.C. Cir. R. 41(a)(2) (requiring that movant for stay of mandate provide "facts showing good cause for the relief sought"). Both requirements are satisfied here.

To determine whether a certiorari petition presents a "substantial question" under Fed. R. App.P. 41(d)(2), a circuit court considers whether there is a reasonable probability that the Supreme Court will accept certiorari, and a reasonable possibility of reversal. *See United States Postal Service v. AFL-CIO*, 481 U.S. 1301, 1302 (1987) (Rehnquist, C.J., in chambers) (in considering stay of mandate court considers "whether four Justices will vote to grant certiorari [and] some consideration as to predicting the final outcome of the case in [the Supreme] Court"); *Books v. City of Elkhart*, 239 F.3d 826, 828 (7th Cir. 2001); *United States v. Holland*, 1 F.3d 454, 456 (7th Cir. 1993).[2] To guide this inquiry, the circuit court considers "the issues that the applicant plans to raise in the certiorari petition in the context of the case history, the Supreme Court's treatment of other cases presenting similar issues, and the considerations that guide the Supreme Court in determining whether to issue a writ of certiorari." *Williams v. Chrans*, 50 F.3d 1358, 1361 (7th Cir. 1995) (per curiam). A motion for stay of mandate, however, is excepted from the ordinary rule that a circuit court should not anticipate changes in the applicable law. *Books*, 239 F.3d at 828. Rather, the court must "perform the predictive function of anticipating the course of decision in the Supreme Court of the United States." *Id.* (citing *INS v. Legalization Assistance Project*, 510 U.S. 1301, 1304 (1993) (O'Connor, J., in chambers)).

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[2] The D.C. Circuit has to date employed a less stringent standard under Fed. R. App. 41(d)(2) and D.C. Cir. R. 41(a)(2), asking only whether the petition for certiorari "tenders [issues that] are substantial." *Deering Milliken, Inc. v. FTC*, 647 F.2d 1124, 1128 (D.C. Cir. 1978) (stay issued *sua sponte* where "appellate process has been completed; the questions presented to the Supreme Court . . . .are substantial; and the likelihood is that Supreme Court action on the petitions is relatively near at hand.").

Second, to determine whether there is "good cause" to stay the mandate, the circuit court should consider the equities of granting the stay and whether the applicant will suffer "irreparable injury" if the stay is denied. *Nanda v. Board of Trustees of the University of Illinois*, 312 F.3d 852, 853 (7th Cir. 2002). In application, however, the irreparable injury standard is not difficult to meet, merely requiring that the movant show some harm will accrue absent the stay, or that some public interest supports the stay. *See Books* 329 F.3d at 829 (equities favored issuance of stay in case involving public display of religious material where "public interest is best served [by] affording the City a full opportunity to seek review in the Supreme Court of the United States before its officials devote attention to formulating and implementing a remedy"); *Postal Service*, 481 U.S. at 1302-03 (equities favor stay where employer will face injury because "temporary reinstatement of [a discharged employee], a convicted criminal, will seriously impair the applicant's ability to impress the seriousness of the Postal Service's mission upon its workers."). Here, both the "substantial question" and "good cause" standards are easily met.[3]

1. Mr. Hamdan's Certiorari Petition Presents Substantial Legal Questions.

First, Mr. Hamdan's Petition clearly presents numerous "substantial questions." The questions presented in Mr. Hamdan's Petition are:

> 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?

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[3] Recent interpretation of Fed. R. App.P. 41(d)(2) indicates that the factors set forth in the Rule are alternative, and that a stay may issue if *either* a substantial question is presented *or* there is good cause to grant the stay. *See Books*, 239 F.3d at 829 (where movant presented a "weak case for certiorari" under the first factor, stay still granted because "equities of granting a stay" merited relief). Although Mr. Hamdan's Motion satisfies both requirements of the Rule, even if he merely shows good cause the stay should issue.

> 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?

See Petition at i (a copy of the Petition is attached for the Court's reference as Appendix A).

The first question presented raises important and unresolved issues involving military commissions, an area of law where the Supreme Court has frequently granted certiorari. *Ex parte Vallandigham*, 68 U.S. (1 Wall.) 243 (1864); *Ex parte Milligan*, 71 U.S. 2 (1866); *Ex parte McCardle*, 73 U.S. (6 Wall.) 318 (1868); *Ex parte McCardle*, 74 U.S. (7 Wall.) 506 (1869); *Ex parte Quirin*, 317 U.S. 1 (1942); *Yamashita v. Styer*, 327 U.S. 1 (1946); *Johnson v. Eisentrager*, 337 U.S. 763 (1950); *Madsen v. Kinsella*, 343 U.S. 341 (1952) (all cases challenging military commissions).

Mr. Hamdan's Petition presents multiple issues of first impression, including (1) whether the President is constrained by the Uniform Code of Military Justice ("UCMJ"), 10 U.S.C. § 821, from convening a military commission under present circumstances, (2) whether the procedures of the military commission comply with UCMJ § 836, and (3) whether the AUMF against "terrorism" is the functional equivalent of a declaration of war against a nation-state, thereby investing the President with implied authority to convene military commissions. Likewise, Mr. Hamdan's second question presented regarding judicial enforcement in a habeas action of treaty-based rights under the 1949 Geneva Conventions is an issue on which the circuit courts are divided and there is no authoritative statement of law from the Supreme Court. Matters of first impression or circuit splits satisfy Rule 41's "substantial question" requirement. *Bricklayers Local 21 of Illinois v. Banner Restoration, Inc.*, 384 F.3d 911, 912 (7th Cir. 2004).

Both this Court and the District Court agreed that Mr. Hamdan's case presents substantial legal issues. *Hamdan*, 344 F.Supp.2d at 157-158 (refusing to abstain because of "substantial" legal arguments raised by Hamdan challenging commission); slip op. at 6

(same). These issues pose "important question[s] of federal law that [have] not been, but should be, settled" by the Supreme Court. U. S. Sup. Ct. Rule 10(c). *See generally* Petition; *see also Quirin*, 317 U.S. 1 (granting certiorari in military commission case, despite the exigencies of the war and the inconvenience to the members of the Court of sitting in Special Term).

For the reasons set out more fully in the attached Petition, Mr. Hamdan's Petition raises at least three substantial questions, any one of which would independently merit a stay of the mandate.

i. Mr. Hamdan's challenge to military commissions is worthy of certiorari and the Supreme Court may reverse.

First, Mr. Hamdan's challenge to the military commissions is an issue worthy of certiorari and one on which there is at least a reasonable possibility of Supreme Court reversal. Military commissions – because they are created and conducted by one branch, the Executive – break from the accepted mode of adjudication and have historically attracted close scrutiny from the Supreme Court. *Milligan*, 71 U.S. 2; *Quirin*, 317 U.S. 1; *Yamashita*, 327 U.S. 1; *Eisentrager*, 337 U.S. 763; *Madsen*, 343 U.S. 341. Mr. Hamdan's case represents the first challenge to the legality of a military commission since the post-World War II era. Yet in the intervening years, significant changes have occurred bearing on the legality of military commissions and their procedures. The United States has ratified the 1949 Geneva Conventions, transformed its understanding of how the Bill of Rights protects the accused in criminal proceedings, and enacted the Uniform Code of Military Justice, which thoroughly revised the predecessor Articles of War. In light of this history, and the Supreme Court's traditional interest in preventing abuse of military commissions, it is more than reasonably probable that the Supreme Court will grant certiorari in this case.[4] *Williams*, 50 F.3d at 1361.

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[4] Because of the infrequency of military commissions there is limited precedent establishing their jurisdictional limits and procedures, and the precedent that does exist raises significant

Moreover, given the Supreme Court's recent decision in *Rasul*, 124 S.Ct. 2686, there is a distinct possibility that the Supreme Court will reverse this Court on at least some aspects of Mr. Hamdan's challenge to these commissions. In *Rasul*, both the D.C. District Court and this Court held that federal courts did not have jurisdiction over habeas claims of prisoners detained at Guantanamo Bay in connection with the "war on terror." Despite this uniform perspective on the part of the lower courts, the Supreme Court reversed, stating that "Petitioners' allegations…unquestionably describe 'custody in violation of the Constitution or laws or treaties of the United States.'" *Id.* at 2698 n.15 (quoting 28 U.S.C. § 2241(c)(3)).

Here, of course, the opinions of the District Court and this Court are in direct opposition and express irreconcilable views on the application of statutes and Supreme Court precedent to this military commission. *Compare, e.g., Hamdan*, 344 F. Supp. 2d at 159-62 (holding that 10 U.S.C. § 821 limits military commissions to a circumscribed jurisdiction as traditionally recognized under the law of war, of which the Geneva Conventions now forms an integral part; and that 10 U.S.C. §§ 836 and 839, along with *Crawford v. Washington*, 124 S. Ct. 1354 (2004), require a defendant's presence at all stages of his trial by military commission, consistent with fundamental principles of U.S. and international law) *with* slip op. at 18 (*Madsen* supports broad Executive authority to establish procedures for this military commission, which as currently promulgated are not inconsistent with statutes or international law). In light of this tension, and the clear and recent indication that lower court disposition is not predictive of Supreme Court resolution of cases brought by detainees at Guantanamo Bay, reversal of this Court is at least a possibility. This possibility requires a stay of the mandate. *Holland*, 1 F.3d at 456 (stay warranted if reversal is possible); *Deering*,

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questions in application. For example, there is considerable tension between *Quirin*, a case this Court relied upon heavily in its decision and *Milligan*. *See, e.g., Hamdi v. Rumsfeld*, 124 S.Ct. 2633, 2670 n.4 (Scalia, J., dissenting); *id.* at 2682 (Thomas, J., dissenting). Supreme Court review to resolve this tension is likely to occur. *See* Petition at 10-15.

647 F.2d at 1129 ("likelihood of Supreme Court action on the petitions [for certiorari]" merits stay); *Books*, 239 F.3d at 828 (circuit court to predict whether reversal is a *possibility*).

This likelihood is exacerbated by the fact that this Court relied significantly on applications of *Eisentrager* and *Quirin* to the war on terrorism. Just as at least a portion of *Eisentrager*'s vitality was questioned by *Rasul*, it is likely that a footnote of *Eisentrager*, viz., footnote 14, which was dicta to begin with, may be reconsidered, alongside the anomalously rendered *Quirin* decision. Particularly in this new conflict, not against a nation-state, but against a series of stateless groups, questions about the vitality and fit of conventional-war precedent likely will loom large in subsequent proceedings.

ii. Mr. Hamdan's assertion of a judicially enforceable treaty right presents a circuit split.

Another measure of whether a certiorari petition presents a "substantial question" for purposes of Fed. R. App. P. 41(d)(2) is whether the petition presents an issue on which the circuit courts are divided. *Bricklayers Local 21 of Illinois*, 384 F.3d at 912 (circuit split "favorably indicate[s] success for a petition for a writ of certiorari" to support stay of mandate). Mr. Hamdan's case presents the important and unresolved question of whether the 1949 Geneva Convention is judicially enforceable in a habeas action. This Court's ruling on that issue creates a circuit split with decisions from other Circuits in habeas actions involving treaty-based rights. *Compare* slip. op. at 13 ("The availability of habeas may obviate a petitioner's need to rely on a private right of action, but it does not render a treaty judicially enforceable.") (internal citation omitted) *with Wang v. Ashcroft*, 320 F.3d 130, 140-41 (2d Cir. 2003) (rights protected under the Convention Against Torture (CAT) held judicially enforceable in habeas action, despite express disapproval of judicial enforcement in

implementing statute); *see also Ogbudimkpa v. Ashcroft*, 342 F.3d 207 (3d Cir. 2003); Petition at 24 (citing cases).[5]

Not only is this Court's decision on the enforceability of treaty rights at odds with the Second and Third Circuits, the viability of this Court's holding on that point is placed in doubt by the recent observations of four Supreme Court Justices in *Medellin v. Dretke*, 125 S.Ct. 2088 (2005). In that case, Justice O'Connor, in a dissent joined by Justices Stevens, Souter and Breyer, stated, "This Court has repeatedly enforced treaty-based rights of individual foreigners, allowing them to assert claims arising from various treaties. These treaties…do not share any special magic words. Their right-conferring language is arguably no clearer than the Vienna Convention's is, and they do not specify judicial enforcement." *Id.* at 2104 (O'Connor, J., dissenting) (citing cases). Other Justices did not reach the enforceability question due to procedural problems not present in this case.[6] *See also* Petition at 20-21. The matter, moreover, involves our most solemn treaties – treaties that protect our troops in treacherous and difficult conditions. *See* Amicus Brief of General David M. Brahms, et al. as Amici Curiae Supporting Petitioner, *Hamdan v. Rumsfeld*, No. 04-5393. Regardless of whether the issue of individual enforceability of treaty rights under the Geneva Convention is treated as one of first impression or as a circuit split, a stay is warranted. *Bricklayers Local 21 of Illinois*, 384 F.3d at 912.

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[5] Although this Court cited *Wang* favorably in its discussion of the Geneva Conventions, slip op. at 13, this Court's holding regarding the judicial enforceability of treaties is at odds with the holding of *Wang*.

[6] In addition, this Court's treatment of *The Head Money Cases*, 112 U.S. 580, 598 (1884) departs from the understanding of that case by the four dissenting Justices in *Medellin*. This Court reads *Head Money Cases* to prevent individual judicial enforceability of treaty rights. Slip op. at 10 (quoting *Head Money Cases*, 112 U.S. at 598). Four Justices in *Medellin*, citing the exact same portion of *Head Money Cases* but reading that passage in its entirety, reached the opposite conclusion. *Medellin*, 125 S.Ct. at 2099-2100 (quoting *Head Money Cases*, 112 U.S. at 598) ("a treaty may also contain provisions which confer certain rights upon the citizens or subjects of one of the nations residing in the territorial limits of the other, which partake of the nature of municipal law, and which are capable of enforcement as between private parties in the courts of the country.").

iii. Mr. Hamdan's challenge to military commissions as constrained by the UCMJ presents an issue of first impression.

Finally, the operation of the UCMJ as a constraint on the Executive's authority to set procedures for this military commission is an issue of first impression and one that merits Supreme Court review. The Supreme Court has not offered guidance on what procedures are "contrary to or inconsistent with" the UCMJ within the meaning of § 836, or on whether Congress and the UCMJ meaningfully constrain the President in establishing military commission procedures. This Court relied on *Madsen*, 343 U.S. 346-48, to support its conclusion that the UCMJ imposes "only minimal restrictions upon the form and function of the military commissions." *See* slip op. at 18. However, the petitioner in *Madsen* only raised a jurisdictional challenge to her commission; the case did not present the question of whether, and to what extent, § 836 imposes procedural restrictions on military commissions. 343 U.S. at 346-347. Indeed, the case pre-dated the effective date of the UCMJ (just as *Eisentrager* pre-dated the 1949 Geneva Convention). Thus, the Supreme Court has never analyzed the issue.

Correspondingly, the conclusion drawn from that premise – that because the UCMJ imposes "only minimal restrictions," Mr. Hamdan may be excluded from his own trial and prevented from confronting witnesses – is one that has no precedential support and runs counter to hundreds of years of criminal jurisprudence, and to modern military law. *Crawford*, 124 S.Ct. at 1362-63 ("'It is a rule of the common law, founded on natural justice, that no man shall be prejudiced by evidence which he had not the liberty to cross-examine.'") (quoting *State v. Webb*, 2 N.C. 103 (1794)); *Lewis v. United States*, 146 U.S. 370, 372, 375 (1895) ("A leading principle *that pervades the entire law of criminal procedure* is that, after indictment found, nothing shall be done in the absence of the prisoner.") (emphasis added); *United States v. Dean*, 13 M.J. 676, 678 (A.F.C.M.R. 1982) ("The accused must be present at

all stages of his trial. The *integrity of the military justice system* is jeopardized where a hearing is held and witnesses questioned without all parties to the trial being present.") (emphasis added); *see also* Petition at 18-19. The constraints placed on the President by the UCMJ, and the consequences that flow from an absence of those constraints, are "substantial questions" of first impression that demand Supreme Court review and justify a stay. *Williams*, 50 F.3d at 1361.

2. The Equities Favor a Stay and Mr. Hamdan Will Suffer Irreparable Injury if the Stay is Denied.

There is good cause to stay the mandate in this case, whether that cause is measured by the public interest favoring a stay or the irreparable harm that will occur to Mr. Hamdan if the mandate is issued. Fed. R. App. P. 41(d)(2); D.C. Cir. R. 41(a)(2); *Books* 329 F.3d at 829; *Postal Service*, 481 U.S. at 1302-03. Harm to the public interest shifts the equities heavily in favor of a stay. *Books*, 329 F.3d at 829; *Postal Service*, 481 U.S. at 1302-03.

Certainly, neither the public interest nor the interested parties will be harmed by the temporary maintenance of the status quo. On the contrary, it is the prospect of rushed proceedings posed by the denial of this motion that threatens to harm both groups. Absent a stay, these military commissions – widely decried as unjust throughout the international community, even among America's friends and allies – will move forward without the benefit and imprimatur of Supreme Court review. Staying the mandate will allow the Supreme Court to consider and address Mr. Hamdan's fundamental challenges to these commissions, and will give credence and support to the perception here and abroad that *all* criminal proceedings conducted by the United States are subject to full judicial review and are governed by the rule of law.

Moreover, issuance of the mandate prior to Supreme Court review presents a panoply of irreparable harms to Mr. Hamdan: he will be forced to preview his defense to the prosecution; he will be forced to defend in a proceeding where he challenges the very

jurisdiction of the commission to try him at all; he may be returned to solitary confinement during pre-commission detention (a form of detention that will impair his ability to defend himself once the commission resumes); and it may interfere with his ability to complete briefing at the Supreme Court. Given these compound harms, and the lenient standard by which "irreparable injury" is measured on a motion to stay a mandate, a stay is amply warranted in this case. *Books*, 329 F.3d at 829; *Postal Service*, 481 U.S. at 1302-03.

i. The equities and public interest strongly favor a stay.

There is great potential harm to the public interest if these commissions are allowed to proceed before there is a meaningful opportunity for Supreme Court review. Fed. R. App. P. 41(d)(2); D.C. Cir. R. 41(a)(2); *Books*, 329 F.3d at 829. Rushed proceedings would undermine the legitimacy of the Government's actions in Guantanamo and confuse and possibly delay the Supreme Court's review of this case. *See generally Quirin*, 317 U.S. at 19 (finding that the public interest required that the Court avoid all delay in reaching the merits of a challenge to military commissions).

The harm to the public interest in this case is not ephemeral or undefined – military commissions that flout the protections afforded by the Geneva Conventions bring the scorn of the international community and endanger the lives of U.S. servicemen and civilians captured and detained abroad. Amicus Brief of General David M. Brahms, et al., *supra*, at 5-10. The public interests implicated here are at least as strong as the interests found in other cases where the mandate has been stayed. *Books*, 239 F.3d at 829 (mandate stayed because public interest would be harmed if the city of Elkhart, Indiana, had to "devote attention to formulating and implementing" city policy regarding public display of religious symbols without the benefit of Supreme Court review). Allowing the Supreme Court the time it needs to review these proceedings would benefit the public interest by helping to clarify and legitimize the proceedings in Guantanamo. *See Quirin*, 317 U.S. at 19 (observing, in case raising similar issues, that "public interest required that we consider and decide these

questions without any avoidable delay."); *see also* Slip Op. at 6 ("[W]e are thus left with nothing to detract from *Quirin*'s precedential value.").

Moreover, the potential harm to the public interest is not offset by any harm to the Government if Mr. Hamdan's military commission is very briefly delayed. The Government's actions during Mr. Hamdan's detention clearly reveal that it does not consider delay harmful, and that immediate proceedings are not necessary to protect the Government's interests. Mr. Hamdan has been in the custody of the U.S. military since approximately November 2001, but wasn't declared eligible for trial by military commission until July 3, 2003. He then languished in pre-trial segregation (*i.e.*, solitary confinement) for nearly nine months. Mr. Hamdan was not able to meet with his counsel until January 30, 2004. After Mr. Hamdan's counsel filed his mandamus and habeas action the Government moved to hold Mr. Hamdan's petition in abeyance. *See* Notice of Motion and Motion for Order Holding Petition in Abeyance (filed April 23, 2004, D.D.C. docket no. 1).[7]

It was not until the Supreme Court ruled that habeas jurisdiction extended to Guantanamo Bay in *Rasul* on June 28, 2004, that the Government finally presented Mr. Hamdan with the charge against him, a fortnight later, in July, 2004. In November 2004 when the D.C. District Court halted Mr. Hamdan's commission, the Government never sought a stay of the district court injunction, despite its stated promise to do so. *See* DOJ Press Release, Nov. 8, 2004, *available at* http://www.usdoj.gov/opa/pr/2004/November/ 04_opa_ 735.htm. Following this injunction the government *on its own accord* suspended proceedings in the three other cases pending before Military Commissions. The Government

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[7] In support of its Motion to Hold in Abeyance, the Government invoked the importance and finality of Supreme Court review. *Id.* at 4 ("[I]t would be an unnecessary expenditure of resources for the parties to litigate – and for [the district court] to adjudicate – the very same jurisdictional issues the Supreme Court is virtually certain to address over the next two months and resolve in a manner that will dispose of this petition or, at a minimum, provide substantial guidance regarding its viability in the federal courts[.]").

has never sought a speedy commission for Mr. Hamdan, and it has no equitable claim to seek one now.

Moreover, granting a stay merely preserves this status quo, a state of affairs that the Government accepted in November and which has been in place for over eight months. Under the District Court's order, Mr. Hamdan still remains subject to the threat of both military (court-martial) and civil (Article III court) prosecutions for his alleged past violations of the laws of war. He will not, moreover, be free on bail in the interim, but rather detained at Guantanamo Bay. The Supreme Court has held that in habeas cases the possibility of flight and danger to the public – neither of which exists in this case – are both relevant factors for courts to consider in granting stays. *See Hilton v. Braunskill*, 481 U.S. 770, 777 (1987) (remanding for reconsideration of the government's motion for a stay). Finally, the public interest would be harmed if a hastily convened commission was permitted to go forward prior to an opportunity for Supreme Court review.[8]

ii. Mr. Hamdan will be irreparably injured if the stay is denied.

There is also good cause to stay the mandate because Mr. Hamdan will be irreparably injured if his commission is allowed to go forward without Supreme Court review. Fed. R. App. P. 41(d)(2); D.C. Cir. R. 41(a)(2); *Postal Service*, 481 U.S. at 1302-03. There are at least three concrete harms to Mr. Hamdan that demonstrate irreparable injury sufficient to stay the mandate. *Postal Service*, 481 U.S. at 1302-03 (harm requirement satisfied where

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[8] Indeed, if expediency was truly an important goal for the Government, its decision to prosecute Mr. Hamdan via this commission—rather than, for example, a court-martial—is entirely illogical. *See* 10 U.S.C. § 818 (permitting trial by the existing system of courts-martial and conferring jurisdiction over violations of the laws of war); *id.* § 810 ("When any person subject to this chapter is placed in arrest or confinement prior to trial, immediate steps shall be taken to inform him of the specific wrong of which he is accused and to try him or to dismiss the charges and release him.").

temporary reinstatement of discharged employee will send a negative message to other employees).

First, the right Mr. Hamdan seeks to vindicate is the right not to be tried at all by this military commission. If the mandate issues before the Supreme Court has the opportunity to review Mr. Hamdan's case, the trial proceedings will resume where they left off. Mr. Hamdan will be asked to enter a plea pursuant to rules that do not facially permit *Alford* or conditional pleas. Substantial aspects of the rights Hamdan asserts in this petition will be vitiated by the resumption of the trial, and they will be impossible for the federal courts to fully vindicate *ex post*. Likewise, issuance of the mandate before Supreme Court resolution would subject Hamdan to trial by military commission even as he presses his challenge in Article III courts to the jurisdiction of those commissions to try him. *Cf. Gilliam v. Foster*, 75 F.3d 881, 904 (4th Cir. 1996) (en banc) ("[A] portion of the constitutional protection [the Double Jeopardy Clause] affords would be irreparably lost if Petitioners were forced to endure the second trial before seeking to vindicate their constitutional rights at the federal level." (quoting *Abney v. United States*, 431 U.S. 651, 660 (1997)).

In this respect, the issue is the same as that governing abstention, where the Court in this case has already concluded that "setting aside the judgment after trial and conviction insufficiently redresses the defendant's right not to be tried by a tribunal that has no jurisdiction." Slip op. at 6 (citing *Abney*, 431 U.S. at 662); *cf. McSurely v. McClellan*, 697 F.2d 309, 317 (D.C. Cir. 1982) ("A showing of irreparable injury will generally be automatic from invocation of the immunity doctrine if the trial has begun or will commence during the pendency of the petitioner's appeal.").

Second, if the mandate issues before Supreme Court review and the commission resumes, it will irreversibly provide the prosecution a preview of Mr. Hamdan's trial defense. This Circuit has already acknowledged this as an irreparable injury, and in a context that involved simple exclusion from the United States in immigration proceedings, and not the far

more burdensome and stigmatizing possibility of a criminal conviction with life imprisonment. In *Rafeedie v. INS*, 880 F.2d 506, 517 (D.C. Cir. 1989), then-Judge Douglas Ginsburg pointed to the "substantial practical litigation advantage" forfeited by forcing the petitioner to go through a summary exclusion proceeding when he claimed he was entitled to a more robust plenary procedure. The Government had argued that he should go through the summary proceeding first, and only if excluded should he be able to challenge the process. This Court disagreed due to the irreparable injury engendered by forcing a preview of the defense:

> Rafeedie will suffer a judicially cognizable injury in that he will thus be deprived of a "substantial practical litigation advantage." Rafeedie spells out this dilemma: if he presents his defense in a § 235(c) proceeding, and a court later finds that section inapplicable to him, the INS will nevertheless know his defense in advance of any subsequent § 236 proceeding; if, however, he does not present his factual defense now, he risks forsaking his only opportunity to present a factual defense. . . Rafeedie has thus established a *significant and irreparable injury*.

Id. at 518 (emphasis added). *Cf. United States v. Philip Morris Inc*., 314 F.3d 612, 622 (D.C. Cir. 2003) (granting a stay upon finding that "the general injury caused by the breach of the attorney-client privilege and the harm resulting from the disclosure of privileged documents to an adverse party is clear enough" to satisfy the irreparable injury prong).

Third, if the mandate issues, Judge Robertson's injunction barring Mr. Hamdan's continued placement in solitary confinement will cease. Mr. Hamdan has already been subject to eleven months of solitary confinement, and, as the only evidence relevant to this issue and in the record confirms, continued solitary confinement threatens Mr. Hamdan's health and ability to defend himself at trial. *See* Brief of Amici Curiae Human Rights First, Physicians for Human Rights, *et al*, in Support of Petitioner at 9-18 (solitary confinement seriously impairs an ability to defend, and Mr. Hamdan is vulnerable to the consequences of solitary confinement). The harm to Mr. Hamdan's ability to defend himself by a return to

solitary confinement is at least as harmful as the symbolic harms held to favor a stay in other cases. *Postal Service*, 481 U.S. at 1302-03 (equities favor stay where employer will face irreparable harm because "temporary reinstatement of [a discharged employee], a convicted criminal, will seriously impair the applicant's ability to impress the seriousness of the Postal Service's mission upon its workers.").

Fourth, if this Court does not grant a stay, there is a possibility that Mr. Hamdan's trial proceedings at Guantanamo may occur at the same time as his Reply Brief in the Supreme Court is due. Because commission proceedings have not been scheduled, it is impossible to know whether this possibility will materialize. If it does, Petitioner cannot hope to adequately pursue his claims simultaneously in both Washington and Cuba, given the amorphous and uniquely difficult nature of the proceedings in Guantanamo and the lack of sufficient access to research materials and law libraries. Both Mr. Hamdan and the judicial branch will suffer if the petitioner in such a pivotal case cannot pursue his claims with the utmost vigor. Indeed, the Government itself suffers in that scenario, given its interest in making sure that the proceedings in Guantanamo command the respect of the international community and of its own citizens.

In sum, if military commissions are worth conducting, they are worth conducting lawfully and being *perceived* as so conducted. Their deployment in jurisdictionally dubious contexts or in legally clouded conditions can only work a disservice to their potential utility when confined to proper circumstances and conducted under legally appropriate ground rules. Only the Supreme Court's prompt and decisive resolution of the questions presented by the use of military commissions in the circumstances of this case can dispel those clouds swiftly and with the certitude that those conditions require.

Petitioner has acted with the utmost of dispatch to ensure that the Supreme Court can resolve his Petition at its first available date, the first Conference, on September 26, 2005. Accordingly, only a brief stay is necessary.

CONCLUSION

For all the foregoing reasons, the Motion should be granted and this Court's mandate should be stayed pending the Supreme Court's review of Mr. Hamdan's Petition for Certiorari.

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CERTIFICATE OF SERVICE

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