

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

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SALIM AHMED HAMDAN,	)	
Petitioner,	)	
	)	
v.	)	Judge Robertson
	)	[No. 04-CV-1519-JR]
	)	
ROBERT GATES, et al.,	)	
Respondents.	)	
	)	
	)	

**MOTION OF OMAR KHADR AND AHMAD MOHAMMAD AL DARBI FOR LEAVE  
TO FILE AN AMICUS-CURIAE BRIEF IN SUPPORT OF PETITIONER’S MOTION  
FOR PRELIMINARY INJUNCTION**

Proposed amici Omar Khadr and Ahmad Mohammad Al Darbi respectfully move this Court for leave to file an amicus-curiae brief in support of Petitioner’s Motion for a Preliminary Injunction. In support of their motion, they state as follows:

1. Proposed amici are detainees at the United States detention facility in Guantánamo Bay, Cuba. Both have had charges referred against them for trial by military commissions convened under the Military Commissions Act of 2006 (“MCA”), and both are facing imminent trial. Amicus Khadr’s case is currently undergoing pre-trial briefing. Pre-trial hearings are scheduled for August 13 and September 10, 2008, and his trial is currently scheduled to start on October 8, 2008. Amicus Al Darbi’s case is also undergoing pre-trial briefing, with the next pre-trial hearing scheduled for July 30, 2008.

2. Proposed amici also have petitions for writs of *habeas corpus* pending before judges in this jurisdiction. See *O.K., et al. v. Bush, et al.*, No. 04-1136 (JDB); *Al Darby, et al. v. Bush, et al.*, No. 05-2371 (RCL). Like Hamdan’s petition, these petitions challenge (among

other things) the lawfulness and jurisdiction of the military commissions set to try them. Further, proposed amici anticipate filing motions that, like Hamdan's, seek to enjoin the military commission proceedings in their cases pending resolution of their habeas petitions.

3. This Court has "inherent authority to appoint or deny amici." *Jin v. Ministry of State Security*, No. 02-0627, 2008 U.S. Dist. LEXIS 43209, at \*9 (D.D.C. June 3, 2008) (internal quotation marks omitted). "An *amicus* brief should normally be allowed . . . when the *amicus* has an interest in some other case that may be affected by the decision in the present case . . . or when the *amicus* has unique information or perspective that help the court . . ." *Id.* at \*10 (quoting *Ryan v. Commodity Futures Trading Comm'n*, 125 F.3d 1062, 1064 (7th Cir. 1997)).

4. The proposed amici have a strong, direct interest in the outcome of Hamdan's motion. Both proposed amici have pending habeas petitions in this jurisdiction that raise legal and jurisdictional challenges to the military commissions set to try them. Both anticipate filing motions that seek to enjoin commission proceedings pending resolution of their habeas claims. Accordingly, this Court's decision regarding Hamdan's motion will likely be highly relevant authority in proposed amici's cases.

5. Further, proposed amici's brief would provide the court with a unique perspective on the present case. In particular, their brief describes jurisdictional issues presented by their cases that are not presented by Hamdan's case. Like Hamdan's legal and jurisdictional challenges, these are issues that can *only* be vindicated on pre-trial collateral review. Briefing on these issues would assist the Court in understanding the broader impact of its ruling beyond Hamdan's own case, and reinforce the importance of habeas corpus to detainees facing trial before a military commission.

For these reasons, proposed amici respectfully ask this Court for leave to file the attached amicus brief.

Dated: July 14, 2008

Respectfully submitted,

/s/ Rebecca S. Snyder

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**BRIEF OF AMICI CURIAE OMAR KHADR AND AHMAD MOHAMMAD AL DARBI  
IN SUPPORT OF PETITIONER’S MOTION FOR PRELIMINARY INJUNCTION**

Amici curiae Omar Khadr and Ahmad Mohammad Al Darbi respectfully submit this brief in support of Petitioner’s Motion for Preliminary Injunction.

**IDENTITIES AND INTERESTS OF AMICI**

Amici are detainees at the United States detention facility at Guantánamo Bay, Cuba, who are facing trial before military commissions convened under the Military Commissions Act of 2006 (“MCA”). Amicus Khadr is a Canadian citizen captured in July, 2002 following a firefight between U.S. forces and unknown Arab fighters in Khost, Afghanistan. At the time of his capture, Khadr was fifteen years old. He was transferred to Guantánamo Bay in October 2002. His military commission case is currently undergoing pre-trial briefing. Pre-trial hearings are set for August 13 and September 10, 2008, and his case is set for trial on October 8, 2008. His case presents the unique question whether Congress intended military commissions convened under the MCA to try as war criminals children who were unlawfully used in armed conflict, and who as a result are entitled to special protections under U.S. and international law.

Amicus Al Darbi is a thirty-three year old citizen of Saudi Arabia who was arrested not in or as part of the armed conflict in Afghanistan, but rather by local civilian authorities at the airport in Baku, Azerbaijan in June 2002. After his arrest, Al Darbi was transferred to the custody of the United States military and held at Bagram Airbase, Afghanistan until August 2002, when he was transferred to Guantánamo Bay. Charges against Al Darbi were referred to a military commission on March 3, 2008. These charges relate primarily to Al Darbi's alleged efforts to procure a boat and crew in Qatar, the United Arab Emirates, Yemen and Somalia. Because Al Darbi was not apprehended on anything resembling a traditional "battlefield," his case presents the question whether he (and those similarly situated) can properly be regarded as "combatants" in an armed conflict amenable to military jurisdiction at all.

Amici have a strong interest in the outcome of Petitioner's motion. Both amici have filed petitions for writs of habeas corpus in this jurisdiction. See *O.K., et al. v. Bush, et al.*, No. 04-1136 (JDB); *Al Darby, et al. v. Bush, et al.*, No. 05-2371 (RCL). Like Hamdan's petition, amici's habeas petitions challenge the lawfulness and jurisdiction of the military commissions set to try them. However, as suggested above, amici's cases also present unique jurisdictional claims not raised by the facts of Hamdan's case, involving not simply whether they must be presumed to be lawful rather than unlawful combatants under the Geneva Conventions, but also whether they may be regarded as "combatants" at all. Amici anticipate filing motions that, like Hamdan's, seek to enjoin military commission proceedings in their cases pending resolution of their habeas petitions. And this Court's decision regarding Hamdan's motion is likely to be highly relevant to the disposition of those motions. If this Court were to rule against Petitioner, its ruling could impair amici's ability to raise the critical jurisdictional issues presented by their habeas petitions—including those issues not presented by the facts of Petitioner's case.

Concurrently with this brief, amici have filed a motion for leave to participate in this case as amici curiae.

## ARGUMENT

Amici agree with Petitioner that a stay of military commission proceedings is critical to permit Petitioner, and other detainees facing military commission proceedings, to vindicate their challenges to the legality and jurisdiction of the military commissions set to try them. As Petitioner explains in his brief, and as is discussed below, pre-trial challenges to military jurisdiction are a long-established feature of habeas corpus jurisprudence. *See* Memorandum of Law in Support of Petitioner’s Motion for Preliminary Injunction (“Pet. Br.”) 11-12; *infra* Section I. Amici further agree that abstention would be inappropriate in these cases; that Section 950j of the MCA cannot be read to bar habeas review of detainees’ claims; and that if it were so read, it would constitute an unconstitutional suspension of the writ of habeas corpus. *See* Pet. Br. 11-18.<sup>1</sup> Finally, amici agree that the challenges Hamdan raises to the legality and jurisdiction of his military commission are meritorious, and justify both a stay of the military commission proceedings and a grant of habeas relief. *See* Pet. Br. 4-45.

Amici submit this brief to make two additional points. First, they offer additional authority confirming that challenges to a military commission’s jurisdiction are a long-standing part of habeas corpus jurisprudence. Second, to assist this Court in understanding the broader impact of its ruling, they describe briefly two fundamental personal jurisdiction challenges to military commission authority raised in their cases, but not presented in Hamdan’s case. These challenges raise particularly sharply the question whether amici can be considered “combatants”

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<sup>1</sup> *See also* Brief of Richard D. Rosen and the Georgetown University Law Center Appellate Litigation Program as Amici Curiae in Support of Petitioner Addressing the Issue of Abstention, *Hamdan v. Rumsfeld*, 126 S.Ct. 2749 (2006) (No. 05-184), 2006 WL 53987.

in an armed conflict subject to military jurisdiction at *all*. And they are challenges that can *only* be vindicated through pre-trial review by an Article III court. Their existence therefore reinforces the importance of holding that the writ of habeas corpus must be made available to all charged detainees *before* they are tried by military commissions.

## **I. HABEAS CORPUS HAS LONG BEEN USED TO BRING PRE-TRIAL CHALLENGES TO MILITARY COMMISSION JURISDICTION**

There should be no serious dispute that a petition for writ of habeas corpus is an appropriate vehicle for challenging the legality and jurisdiction of military commissions. Indeed, two years ago, in this very case, the Supreme Court reviewed Petitioner's own pre-trial habeas challenge to the jurisdiction of the military commission then slated to try him. *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006). Hamdan's petition alleged that the commission lacked authority to try him for the alleged crime of "conspiracy." *Id.* The Supreme Court agreed that the commission lacked the power to try Hamdan, and four Justices went on to find that "conspiracy" was not an offense that could be tried by military commission. *Id.* at 2759-60.

Most notably for present purposes, there was *no* dispute in *Hamdan* that a habeas petition was an appropriate vehicle to challenge, *before* trial, the authority of a military commission to try a prisoner for the offenses charged. Indeed, the Court expressly observed that "Hamdan and the Government both have a compelling interest in knowing in advance whether Hamdan may be tried by a military commission that arguably is without any basis in law." *Id.* at 2772. It further observed that pre-trial consideration of military commission jurisdiction was fully consistent with its precedent, pointing to *Ex parte Quirin*, 317 U.S. 1 (1942), as "compelling historical precedent for the power of civilian courts to entertain challenges that seek to interrupt the processes of military commissions." *Hamdan*, 126 S.Ct. at 2772 (internal quotation marks omitted); *see also Quirin*, 317 U.S. at 25 (resolving before trial the question whether a military

commission had “jurisdiction to try the charge preferred against petitioners”); *In re Yamashita*, 327 U.S. 1, 8 (1946) (recognizing that pre-trial habeas was available to test “the lawful power of the commission to try the petitioner for the offense charged”). The Court also noted that the scope of “jurisdictional” challenges cognizable on pre-trial habeas is broad, encompassing (for example) Hamdan’s argument that the commission convened to try him was irregularly constituted and therefore “ultra vires.” *Hamdan v. Rumsfeld*, 126 S.Ct. at 2772 n. 20.

These cases are consistent with long-standing historical practice. The writ of habeas corpus has for centuries been used to test and resolve basic jurisdictional questions. As a leading historian on habeas corpus has written, “[t]here can be little doubt . . . that habeas corpus in its cum causa form was being used for [testing the capacity of inferior tribunals] independently of privilege or certiorari by the mid-fifteenth century, and in 1433 there is a statute referring to the use.” R.J. Sharpe, *The Law of Habeas Corpus* 5 (2d ed., Oxford Univ. Press 1989); *see also* Edward Jenks, *The Prerogative Writs in English Law*, 32 Yale L.J. 523, 525 (1923) (“[T]here is clear evidence in the common books that the writ of *Habeas Corpus* was freely used in the fifteenth and sixteenth centuries to decide claims of privilege, that is, exemption from jurisdiction.”). In the American colonies and in the early Nineteenth century United States, habeas was principally used as a pre-trial means of attacking jurisdiction. *See, e.g.*, Dallin H. Oaks, *Habeas Corpus in the States 1776-1865*, 32 U. Chi. L. Rev. 243, 258 (1965) (“In the Nineteenth Century . . . most petitions involving criminal commitments preceded conviction. In fact, many were submitted immediately upon the defendant’s being arrested and before he was even brought before a judicial officer for formal commitment.”). Moreover, the writ has always been available—as it was in *Hamdan*, *Quirin*, and *Yamashita*—to resolve the legality of military jurisdiction. In the United Kingdom, it was through habeas corpus petitions that the common



law courts reviewed whether military courts had lawfully exercised personal jurisdiction over a petitioner. *See, e.g., The Case of Wolfe Tone*, 27 How. St. Tr. 614 (Irish K.B. 1798). Likewise, both in the context of the Civil War, *see Ex parte Yerger*, 75 U.S. (8 Wall.) 85 (1869), and during the peak of World War II, *see Ex parte Quirin*, 317 U.S. 1 (1942), as in *Hamdan*, the United States Supreme Court has entertained habeas petitions in order to resolve the legality of military jurisdiction before military commission trials took place. *See also* Pet. Br. 11-12.

## **II. PRE-TRIAL COLLATERAL REVIEW IS CRITICAL TO VINDICATING AMICI'S JURISDICTIONAL CLAIMS**

Such pre-trial habeas review of military commission jurisdiction is critical to amici's ability to vindicate their jurisdictional claims. Amici's habeas petitions, like *Hamdan's*, raise a variety of challenges to the legality and jurisdiction of their military commissions. Many of these challenges are similar to those raised by *Hamdan*. But amici's cases also raise personal jurisdiction issues not presented by the facts of *Hamdan's* case. These jurisdictional challenges raise in particularly stark form the question whether amici can be considered "combatants" in armed conflict subject to military jurisdiction at *all*. And, because of the harm amici would suffer if subjected to trial, these challenges cannot be vindicated on post-conviction review. Pre-trial habeas is therefore critical to amici's right to vindicate these threshold jurisdictional claims.

### **A. Amicus Omar Khadr Requires Pre-Trial Habeas Review to Vindicate Jurisdictional Claims Based on his Juvenile Status**

Amicus Omar Khadr requires pre-trial habeas review to vindicate his right as a juvenile not to be tried by a military commission. As noted above, Khadr was only 15 years old when he allegedly committed the acts for which he has been charged. But military commissions convened under the MCA lack jurisdiction over offenses committed by persons under the age of 18, for at least two reasons. *First*, as Petitioner notes in his Motion, *see* Pet. Br. 23, the MCA

grants jurisdiction only over “unlawful enemy combatants,” and under U.S. and international law, juveniles detained in armed conflict cannot be treated as “enemy combatants.” In 2002—a month prior to Khadr’s capture—the United States ratified the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (“Optional Protocol”).<sup>2</sup> This Protocol prohibits juveniles under the age of 18 from being recruited or used by non-state armed forces under “any circumstances,” and further provides that if (despite the Protocol) they are so used, they must be treated as victims of inappropriate recruitment, and offered rehabilitation services and assistance re-integrating into society. *See* Optional Protocol, art. 4. As a result, even if all the Government’s allegations against Khadr are true, the Optional Protocol requires that he be treated as a child soldier subject to rehabilitation—not as an “unlawful enemy combatant” subject to trial by military commission.

*Second*, the MCA does not expressly grant military commission jurisdiction over minors, and in light of the legal background against which the MCA was enacted, it cannot be read to have done so implicitly. Initially, many provisions of the MCA, such as the unlimited applicability of the death penalty, are inconsistent with U.S. restrictions on the treatment of juveniles. *Cf. Roper v. Simmons*, 543 U.S. 551, 574 (2005). The courts-martial on which MCA military commissions are expressly based have repeatedly held that they lack jurisdiction over juveniles. *See United States v. Blanton*, 7 C.M.A. 664 (1957); MCA § 3, 10 U.S.C. § 948b(c) (MCA military commission procedures are “based upon the procedures” for courts-martial under the Uniform Code of Military Justice). And there is *no* indication that in enacting the MCA, Congress intended to abrogate the provisions of the Juvenile Delinquency Act (“JDA”), 18 U.S.C. §§ 5031, *et. seq.*, an extensive statutory framework that governs the prosecution of

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<sup>2</sup> G.A. Res. 54/263, U.N. Doc. A/RES/54/263 (May 25, 2000), *entered into force* Feb. 12, 2002 (“Optional Protocol”) arts. 8, 7.

federal crimes “committed by a person prior to his eighteenth birthday.” The very purpose of the JDA is to govern trial of juveniles who commit crimes in places, such as military bases and foreign territory, where “the juvenile court or other appropriate court of a State does not have jurisdiction,” 18 U.S.C. § 5032 ¶ 1(1). And the military has agreed that the JDA applies to the prosecution of juveniles who are not members of U.S. forces and commit criminal acts overseas. See International and Operational Law Department, The Judge Advocate General’s Legal Center and School, *Operational Law Handbook*, JA 422, 139 (2006). In light of these provisions of U.S. and military law, and in light of the MCA’s total silence with respect to juveniles, it is clear that Congress did not intend MCA military commissions to be the first in modern history to prosecute child soldiers.

Khadr’s right to raise this threshold jurisdictional challenge in a habeas petition is firmly established: courts have long recognized the right of juveniles to use habeas corpus to challenge military jurisdiction.<sup>3</sup> And this is emphatically *not* a right that can be vindicated after the fact. Even assuming that the MCA’s post-conviction review procedures would permit consideration of these issues, *but see* Pet. Br. at 17-18, “setting aside [a] judgment after trial and conviction insufficiently redresses the defendant’s right not to be tried by a tribunal that has no jurisdiction.” *Hamdan v. Rumsfeld*, 415 F.3d at 36, *rev’d on other grounds*, 126 S.Ct. at 2798. That is

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<sup>3</sup> The availability of habeas corpus to release children from military jurisdiction dates back to at least 1758, when the Kings Bench in England heard the petition of a minor who was charged before a court-martial. See *Rex v. Parkins*, [1758] 2 Kenyon 295, 96 Eng. Rep. 1188. According to the case report, “[t]he question was, whether he was to be considered as a soldier?” The Kings Bench held that because of his age, his enlistment had been unlawful, and thereby ordered him “out of the hands of the military.” Habeas corpus in civilian courts was similarly available throughout the nineteenth century to remove juveniles from military custody. See *In re McDonald*, 1 Low. 100, 16 F. Cas. 33 (1866); *In re Higgins*, 16 Wis. 351 (1863); *Dabb’s Case*, 21 How. Pr. 68, 12 Abb. Pr. 113 (1861); *Bamfield v. Abbot*, 2 F.Cas. 577, 9 Law Rep. 510 (1847); *Webster v. Fox*, 7 Pa. L.J. 227, 7 Pa. 336, 7 Barr. 336 (1847); *Comm. v. Downes*, 24 Pick. 227, 41 Mass. 227 (1836); *Comm. v. Callan*, 6 Binn. 255 (1814).

particularly true in Khadr’s case, because subjecting a juvenile to adult criminal processes risks causing psychological and developmental harm. *Cf. Application of Gault*, 387 U.S. 1 (1967) (noting that the juvenile justice system was established in part to protect juveniles from the “rigidities, technicalities, and harshness” of the “substantive and procedural criminal law” applicable to adults). Moreover, as the Supreme Court recently emphasized, it is critical that detainees be permitted to bring habeas challenges promptly—not after undergoing processes (such as MCA review) that would introduced “additional months, if not years, of delay.” *Boumediene v. Bush*, 128 S.Ct. 2229, 2275 (2008); *see also Schlesinger v. Councilman*, 420 U.S. 738, 763 (1975) (petitioners who have “raised substantial arguments denying the right of the military to try them at all” need not exhaust military remedies before bringing these arguments before an Article III court).

**B. Amicus Ahmad Al Darbi Requires Pre-Trial Habeas Review to Vindicate Jurisdictional Claims Based on His Arrest by a Third Country’s Civilian Authorities, More Than a Thousand Miles Away from Any “Battlefield”**

Amicus Al Darbi’s case also raises unique personal jurisdictional claims that can only be vindicated on pre-trial habeas review. Like the named Petitioner in *Boumediene v. Bush*, 128 S. Ct. 2229 (2008), Al-Darbi was not “apprehended on the battlefield in Afghanistan” and is not a “citizen of a nation now at war with the United States.” *Id.* at 2241. To the contrary, Al Darbi was arrested by the local civilian authorities at the airport in Baku, Azerbaijan—more than a thousand miles away from the battlefield in Afghanistan—and he is a citizen of Saudi Arabia, an ally of the United States. Moreover, the charges referred against Al Darbi purportedly arise from his alleged attempts to procure a boat and crew in Qatar, the United Arab Emirates, Yemen, and Somalia, allegedly for use in a future, unaccomplished attack in the Strait of Hormuz or off the coast of Yemen, both of which are also far from the battlefield in Afghanistan.

While the trial of captured battlefield combatants for war crimes is, when conducted lawfully, a recognized incident of warfare, *see, e.g., Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (2004), the trial of international organized crime suspects, domestic as well as foreign, has been and remains the purview of the federal courts. *See, e.g., United States v. Yousef*, 327 F.3d 56, 87-88 (2d Cir. 2003) (asserting jurisdiction over a charge of extraterritorial conspiracy to attack non-United States-flag aircraft); *United States v. Bin Laden*, 93 F. Supp. 2d 484, 486 (S.D.N.Y. 2000) (asserting jurisdiction over conspiracy count alleging acts committed outside the United States); *see also United States v. Bout*, No. 08-Cr.-365 (S.D.N.Y. filed Feb. 27, 2008) (foreign national charged under federal statute with, *inter alia*, conspiracy to provide material support to a foreign terrorist organization). A military commission simply cannot assert jurisdiction over an individual who is not alleged to have committed crimes on or near a battlefield, but rather is accused of engaging in a criminal conspiracy hundreds of miles away. Al Darbi's case therefore presents a fundamental challenge to the jurisdiction of his military commission trial based on the fact that he is not even *accused* of committing a battlefield crime, and therefore falls outside the scope of valid military commission jurisdiction as this has been historically understood. *See, e.g., Reid v. Covert*, 354 U.S. 1, 19-41 (1957). And, like the jurisdictional challenges at issue in Khadr's and Hamdan's cases, this challenge goes to the core of the military commission's ability to try Al Darbi at all. It therefore cannot be effectively addressed after trial has taken place. *See Hamdan*, 415 F.3d at 36; *Schlesinger*, 420 U.S. at 763; *Boumediene*, 128 S.Ct. at 2275.

## CONCLUSION

Petitioner's Motion for a preliminary injunction should be granted, and this Court should affirm the right of all detainees facing military commission trials to vindicate their legal and jurisdictional challenges to commission authority before their trials take place.

Dated: July 14, 2008

Respectfully submitted,

/s/ Rebecca S. Snyder

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**PROPOSED ORDER**

Pursuant to Local Civil Rule 83.2(d), the Motion of Omar Khadr and Ahmad Mohammad Al-Darbi for Leave to File an Amicus-Curiae Brief in Support of Petitioner’s Motion for Preliminary Injunction is hereby GRANTED.

Dated this \_\_\_\_ day of \_\_\_\_\_, 2008.

\_\_\_\_\_  
United States District Judge

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing MOTION OF OMAR KHADR AND AHMAD MOHAMMED AL-DARBI FOR LEAVE TO FILE AN AMICUS-CURIAE BRIEF IN SUPPORT OF PETITIONER'S MOTION FOR PRELIMINARY INJUNCTION has been served by U.S. Mail, first-class prepaid, this 14th day of July, 2008 upon the following individuals:

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