IN THE SUPREME COURT OF THE UNITED STATES

No. 06-1169

SALIM AHMED HAMDAN, PETITIONER

v.

ROBERT GATES, et al.

OMAR KHADR, PETITIONER

v.

GEORGE W. BUSH, et al.

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

RESPONDENTS' OPPOSITION TO MOTION TO EXPEDITE

The Solicitor General, on behalf of respondents George W. Bush and Robert Gates, et al., respectfully opposes petitioners' motion to expedite consideration of the petition for a writ of certiorari and for a writ of certiorari before judgment.

STATEMENT

Petitioners are alien enemy combatants detained at Guantanamo

Bay, Cuba, who have been designated for trial by military commission. They are parties to separate actions, at different procedural stages, raising different claims.

1. Petitioner Hamdan sought an injunction against military-commission proceedings in his case, and last year, this Court invalidated the military-commission system as it then existed on the ground that it lacked congressional authorization. See Hamdan v. Rumsfeld, 126 S. Ct. 2749 (2006).

In response to this Court's decision, Congress enacted the Military Commissions Act of 2006 (MCA), Pub. L. No. 109-366, 120 Stat. 2600, which expressly authorizes military commissions and prescribes their procedures, see id. § 3. The MCA also provides that "[n]o court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination." Id. § 7(a). This provision expressly applies to pending cases. See id. § 7(b).

Petitioner Hamdan has renewed his challenge to the military-commission process. Relying on the MCA, the district court dismissed Hamdan's habeas petition for lack of jurisdiction. See 464 F. Supp. 2d 9. Hamdan has filed a notice of appeal, but the case has not yet been briefed in the court of appeals.

2. Petitioner Khadr is one of a group of detainees who

challenged their detention as enemy combatants (but not the military-commission process) in Boumediene v. Bush, Nos. 05-5062, 05-5063, and Al Odah v. United States, Nos. 05-5064 etc. (D.C. Cir.). See Khadr v. Bush, Nos. 05-5103, 05-5104 (D.C. Cir. Apr. 12, 2005) (order consolidating cases with Al Odah). On February 20, 2007, the D.C. Circuit held that the MCA applied to the detainees' claims and removed the court's jurisdiction to review those claims. Many of the detainees in Al Odah and Boumediene (but not Khadr) have stated that they plan to file petitions for a writ of certiorari on March 5. The government has agreed to file a response on an expedited basis to the petitions by March 21. In its response, the government will address petitioners' extraordinary request for expedited briefing and argument this spring.

The government informed counsel for petitioners Khadr and Hamdan that it would agree to the same schedule for petitioner Khadr if he filed his own petition for a writ of certiorari or joined in a petition filed by other parties in the Al Odah and Boumediene cases. The government further indicated, however, that it would not agree to the same expedited schedule for responding to petitioner Hamdan's petition for a writ of certiorari before judgment, which by Hamdan's own admission raises distinct and novel legal claims that have not been decided by either the district court or the court of appeals.

3. Hamdan and Khadr have filed a joint petition for a writ of certiorari (as to Khadr) and certiorari before judgment (as to Hamdan). They have also filed a motion for expedited consideration of their petition. Under the schedule they propose, the government would be required to respond to their petition at the same time that it responds to the petitions in Al Odah and Boumediene.

ARGUMENT

1. As an initial matter, the unusual and makeshift nature of this combined petition makes it a poor candidate for review, much less expedited review. Petitioners, the parties to two separate cases in different procedural postures and raising different claims below, have purported to file a joint petition, but Supreme Court Rule 12.4 does not appear to permit them to do so. That rule allows parties to the same judgment -- which petitioners do not claim to be -- to file jointly; it also provides that "[w]hen two or more judgments are sought to be reviewed on a writ of certiorari to the same court and involve identical or closely related questions, a single petition for a writ of certiorari covering all the judgments suffices." (Emphasis added). Here, petitioners are not seeking review of "two or more judgments" of the court of appeals. Instead, they are seeking review of the judgment of the court of appeals in one case and review before judgment in another case. Particularly in light of the Court's general reluctance to grant certiorari before judgment, it seems doubtful that Rule 12.4

was designed to permit a joint petition for a writ of certiorari and a writ of certiorari before judgment, and petitioners identify no case in which this Court has permitted the filing of such a petition.

Moreover, petitioners have provided no reason why such a peculiar "joint" petition should be allowed in this case. Petitioner Khadr is a party to the Al Odah and Boumediene cases, and had he filed his own petition for a writ of certiorari or joined in the petition filed by other parties to those cases, the government would have agreed to the same schedule for responding to the petition as it has for other parties to those cases. The government indicated, however, that it would not agree to the same expedited schedule for petitioner Hamdan's petition for certiorari before judgment because it raises distinct issues and because there is no reason to resort to the extraordinary step of granting certiorari before judgment on his claims. There is nothing special about petitioners' status as detainees awaiting military commissions that warrants a "joint" petition in these separate cases, as evidenced by the fact that another party to the Al Odah and Boumediene cases, David Hicks, is also awaiting a military commission and did not join this joint petition but instead will be included in the petitions to be filed by the remaining parties to those cases on March 5.

2. Even if their "joint" petition were proper under Rule

12.4, petitioners have not shown that expedited treatment of their petition would be appropriate. Petitioners place primary reliance (Motion at 5) on the imminent filing of a petition for a writ of certiorari in Al Odah and Boumediene, but the pendency of those cases does not provide a reason to expedite this case.

To the extent that this case presents issues that overlap with those in Al Odah and Boumediene, the issues can be fully considered in that case should the Court decide to grant certioriari there. There are no "efficiencies to be gained" (Motion at 5) from granting another case to consider the same issues. Certainly, hearing the same issues in another case is not "of such imperative public importance as to justify deviation from normal appellate practice," Sup. Ct. R. 11, by granting highly expedited consideration of a petition for a writ of certiorari before judgment.

Conversely, to the extent that petitioners seek to raise issues that are different from those presented in Al Odah and Boumediene, expedition is also inappropriate. Petitioners assert (Motion at 4) that Hamdan's case differs from Al Odah and Boumediene in that it involves "pre-trial challenges to the jurisdiction of a military commission" and because he, unlike the Al Odah and Boumediene petitioners (including Khadr), has raised "separation of powers, Bill of Attainder, and Equal Protection challenges to the MCA." Even if those issues warranted this

Court's review, the joint petition would be a poor vehicle for considering them. As indicated, petitioner Khadr was a party to the Al Odah case. He did not, however, file a separate brief from the Al Odah detainees, so he has not presented or preserved any of the arguments that petitioners wish to advance before this Court that are different from those that will be raised by the other Al Odah and Boumediene petitioners. While petitioner Hamdan did raise distinct and novel arguments in the district court, the district court had no occasion to consider them, because it found that Section 7(a) of the MCA -- the same provision at issue in the Al Odah and Boumediene decision, see slip op. 8-9 -- deprived it of jurisdiction. See 464 F. Supp. 2d at 12, 19 n.16. And Hamdan's appeal has yet to be briefed, much less decided, by the court of appeals. As a result, the issues petitioners seek to raise here have not previously been addressed by any court. To the extent that the issues are of the great importance claimed by petitioners, they surely would benefit from the normal decisional process that a case undergoes before receiving plenary review by this Court.

3. If this Court wishes to consider how the MCA applies to detainees who, like petitioners, are facing trial by military commission, it can do so without accepting review in this case. As petitioners note (Motion at 2), the Al Odah case already includes a detainee, David Hicks, who is facing trial by military commission. Petitioners do not explain why Hicks cannot raise the

issues that they seek to raise. In addition, if this Court decides to review the D.C. Circuit's decision, then Khadr, as a party to those cases, presumably would be free to file a brief on the merits as a respondent supporting petitioners on whatever schedule the Court deems appropriate for the parties in those cases, and Hamdan would be free to file an amicus brief supporting petitioners. If the answer is that neither Hicks nor Khadr can properly raise the issues in Al Odah and Boumediene because the issues were not raised before or decided by the court of appeals, then it is difficult to see why that provides a reason to expedite consideration of those issues in this Court.

4. The government has already agreed to extraordinary expedition of consideration of the petitions in the Al Odah and Boumediene cases. Under the schedule agreed to with counsel for the detainees in those cases, the Al Odah and Boumediene petitioners will file a petition by March 5, and the government will file a response by March 21. Should the Court decide to grant certiorari, this schedule will give the Court the option of hearing argument and deciding the cases on the merits either this Term or next Term. The government should not be subjected to the added burden of responding on a highly expedited basis to an additional set of arguments that, by petitioners' description, are "in many ways distinct from those presented by the Al Odah and Boumediene petitioners." Motion at 5. Moreover, if this Court were inclined

to grant review in Al Odah and Boumediene and brief and argue the cases this spring, then it is difficult to see how the extraordinarily compressed decisional process necessary to resolve those cases this Term would benefit from injecting new issues into the case that have not yet been decided by any court. Moreover, if this Court denies certiorari or grants certiorari and schedules argument for the fall, then petitioners will suffer no conceivable prejudice from having their unusual joint petition considered in the ordinary course.

5. Petitioners will not be prejudiced by consideration of this case in the ordinary course. Denial of petitioners' motion to expedite will produce only minimal delay; if the Court hears Al Odah and Boumediene this Term, it will likely issue a decision by June, and it can then dispose of the petition in this case as appropriate in light of its decision. Moreover, petitioners cannot show any prejudice by delay. Petitioners assert (Motion at 6) that "[f]ormal referral of charges" to begin the military-commission process "is imminent," which, if true, means that petitioners might face military-commission proceedings even if this Court grants expedited review. More fundamentally, petitioners cannot show that they would be harmed by military-commission proceedings, since any legal defect in those proceedings could be remedied on review of a final judgment. The MCA grants petitioner a right to judicial review of any conviction by a military commission, and if

petitioners believe that they are entitled to additional forms of review they may challenge the adequacy of the judicial review provided under the MCA in challenging any conviction.

Significantly, Congress has now made clear its preference that review of the military-commission process take place like review of most criminal proceedings, that is, on appeal from a judgment of conviction. See MCA § 9. In its decision invalidating the earlier military-commission system, this Court emphasized the lack of "specific congressional authorization." 126 S. Ct. at 2775; see id. at 2799 (Breyer, J., concurring) ("The Court's conclusion ultimately rests upon a single ground: Congress has not issued the Executive a 'blank check.' * * * Nothing prevents the President from returning to Congress to seek the authority he believes necessary."); ibid. (Kennedy, J., concurring) ("Where a statute provides the conditions for the exercise of governmental power, its requirements are the result of a deliberative and reflective process engaging both of the political branches."). Congress's actions in joining with the Executive Branch to provide a military-commissions process reflecting the considered judgments of both political Branches of government have greatly reduced any asserted need for this Court's review, much less the need for expedited review before any commission proceedings have even begun.

Indeed, pretrial appellate review of legal challenges to a prosecution is strongly disfavored and rarely permitted.

Petitioners' suggestion (Motion at 6) that they could suffer irreparable harm from going to trial before a tribunal without jurisdiction has been flatly rejected by this Court. See Schlesinger v. Councilman, 420 U.S. 738, 754-755 (1975). Moreover, while Hamdan continues to maintain that his military commission will lack jurisdiction, he can no longer press his central claim that the commission lacks congressional authorization, and his claims that the commission lacks jurisdiction for other reasons will have to overcome far more substantial hurdles, for Congress has now specified that his adverse CSRT finding "is dispositive for purposes of jurisdiction for trial by military commission," MCA § 3(a) (adding 10 U.S.C. 948d(c), and that conspiracy is a crime triable by military commission, see MCA §3(a) (adding 10 U.S.C. 950v(b)(28)). Requiring petitioners to await the outcome of their prosecution to challenge the constitutionality of the MCA places them in the same position as the vast majority of criminal defendants facing trial before courts that presumptively have jurisdiction.

CONCLUSION

The motion to expedite should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General
Counsel of Record

MARCH 2007