No. _____

IN THE SUPREME COURT OF THE UNITED STATES

SALIM AHMED HAMDAN, Petitioner,

v.

ROBERT GATES, et al., Respondents,

and

OMAR KHADR, Petitioner

v.

GEORGE W. BUSH, et al., Respondents

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

PETITIONERS' REPLY IN SUPPORT OF THEIR MOTION TO EXPEDITE CONSIDERATION OF PETITION FOR WRIT OF CERTIORARI BEFORE JUDGMENT AND PETITION FOR WRIT OF CERTIORARI

Petitioners' Motion to Expedite consideration of their Petition for a Writ of Certiorari seeks to provide this Court the opportunity to decide whether certiorari should be granted in this case together with the anticipated Petitions arising from *Boumediene v. Bush*, No. 05-5062, 2007 WL 506581 (D.C. Cir. Feb. 20, 2007). The government has already agreed to an expedited schedule for disposing of the *Boumediene* petitions. The only effect of accepting the government's Opposition to this Motion would be to deprive this Court of the chance to decide

whether the cases should be considered together. In addition, because Petitioners face the imminent prospect of commission proceedings, their case presents the *strongest* basis for expedited consideration. The further fact that the Motion calls for the government to respond only eight days earlier than this Court's Rules contemplate in any event reinforces that there is no reason that the government should force upon the Court separate consideration of the Petitions. This is no mere technical dispute: the government's Opposition would limit this Court's review to only a subset of challenges to the Military Commissions Act. It would preclude not only claims that habeas is available to detainees facing charges but also three substantial challenges to the MCA's constitutionality. That is not an efficient or sensible result. The government accordingly should respond to the Petition in this case at the same time as the Petitions in *Boumediene* so that the Court has the opportunity to consider them together.

1. Preliminarily, the government's Opposition is almost entirely a *non sequitur*. Its thrust is that no expedited response should be required because this Court will deny the Petition. That puts the cart before the horse. The Petition itself sets forth a compelling case for review, particularly as a necessary complement to the Petitions in the *Boumediene* litigation. Those issues are discussed further *infra*. But the relevant point for present purposes is that the prospect that this Court will decide to grant review in this case is obviously substantial enough that this Court at least should have the opportunity to consider whether to do so.

Through its Opposition, the government would deny the Court the chance to make that decision as a practical matter. The reason that the government has agreed to the expedited schedule in *Boumediene* is that it recognizes that there is a reasonable prospect that certiorari will be granted and the case expedited for consideration on the merits this Term. On the schedule to

which the government has agreed, the *Boumediene* Petitions are likely to be considered by the Court at its March 30, 2007 Conference. If this Motion to Expedite is denied, however, the Court will not have the opportunity to act on this case until perhaps six weeks later (given that the Solicitor General would almost certainly then take a further thirty-day extension of time to respond to the Petition). There is simply no sensible reason that the government should be permitted to deprive this Court of the opportunity to consider the petitions together.

The closest analogy in the Court's practice is the Solicitor General's own Motion to Expedite consideration in the *Booker / Fanfan* Sentencing Guidelines litigation. The government filed a Petition for Certiorari (in No. 04-104, *Booker*) and a Petition for a Writ of Certiorari Before Judgment (in No. 04-105, *Fanfan*), and moved for expedited consideration of both so that this Court could consider the two Petitions together. The issues in those cases were identical, and they were presented merely "as companion vehicles." *Booker / Fanfan* Motion to Expedite at 6. In the government's view it was sufficient to justify expedition and granting of certiorari before judgment in *Fanfan* merely "to assure that the Court has an appropriate vehicle in which to reach and resolve" the question presented. *Id.* This Court sensibly granted the government's request for expedited consideration. So it is surprising that the government now argues that "[c]ertainly, 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." Opp. 6.

2. This Petition is a necessary counterpart to those that are anticipated in *Boumediene*. Petitioners currently face charges before military commissions. As the Petition explains, the right of habeas corpus is at its apex with respect to individuals facing sentences of life

imprisonment or even death. A principal benefit of granting this Petition is that the Court will have before it briefing that presents the distinct considerations applicable to the individuals who face commission charges. Previous decisions, both from this Court and those below, reveal that the legal issues presented in cases of those detainees facing charges in military commissions are integrally related to the legal issues presented in non-commission detention cases. Some courts have suggested that those convicted in previously upheld commissions stand in a weaker position to assert habeas protections,[1] and others have suggested that those facing commissions have a stronger claim to habeas than do those that are not charged.[2] Whatever the merits of these positions may be, the fact is that each time courts have considered the non-commission cases they have had to use, as a baseline, the claims of those who face military commissions. Military commission cases such as *Quirin*, *Eisentrager*, *McCardle*, and *Milligan* are the most relevant precedents not simply for Petitioners in this case, but also for those that do not face commissions.

The government notes that one party to *Boumediene* – Hicks – also has been charged. More important, however, is the fact that Hicks did not present before the D.C. Circuit any special considerations arising from his status as an individual not only subject to detention but also facing charges. Rather, the *Boumediene* litigation is dominated by parties who have not been charged and it is no doubt for that reason that, as the government omits, Hicks strongly supports review of this Petition. The special status of detainees charged at Guantanamo Bay is

[1] E.g., *Rasul*, 542 U.S. 466, 487 (Kennedy, J., concurring in the judgment); *Boumediene*, App. 91a & n.9 (Rogers, J., dissenting); *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 447 n.7 (D.D.C. 2005), *overruled by Boumediene, supra*.

[2] *E.g.*, *Hamdi*, 542 U.S. at 593 (Thomas, J., dissenting) (drawing the "punishment-nonpunishment distinction"); Amicus Br. of the Military Attorneys Assigned to the Def. in the Office of Military Commissions, *Al Odah*, No. 03-343, at 5-7. See also *Hamdan*, 126 S. Ct. at 2798 ("we do not today address[] the Government's power to detain").

not presented by the briefing in *Boumediene*, and presumably would not be fully elaborated if briefing on the merits in this Court is limited to *Boumediene*.

The government's argument that the issues presented in the Petition are, or will be, fully presented in a Petition for Certiorari anticipated in *Boumediene* and *Al Odah* is without merit. First, no Petition in those cases has yet been filed, so statements about what such a Petition may contain are speculative. Second, it is undisputed that the briefing on the MCA to the court of appeals in *Boumediene* and *Al Odah* did *not* address the Separation of Powers, Bill of Attainder, or Equal Protection issues that were presented by Hamdan to the district court. Presumably, petitioners in *Boumediene* and *Al Odah* will not seek to raise those challenges to the constitutionality of the MCA for the first time before this Court. *See Heckler v. Campbell*, 461 U.S. 458, 468-469, n.12 (1983) (the Court will consider arguments not presented to a federal court below only "in exceptional cases"). Full consideration of whether the MCA constitutionally strips the federal courts of jurisdiction over habeas petitions filed by alleged enemy combatants requires that these issues be addressed.

By contrast, denying certiorari would leave the status of the MCA unacceptably uncertain and would deprive this litigation over the scope of federal habeas jurisdiction of the finality that is obviously needed. As explained in the Petition (at 30), the district court in this case was plainly wrong in refusing to adjudicate Hamdan's non-Suspension Clause challenges to the MCA, for a court always has jurisdiction to determine its own jurisdiction; the government does not contend otherwise. If this Court leaves those challenges open by denying this Petition for Certiorari, the likely course is *years* of additional litigation: the D.C. Circuit will direct the

district court to consider the claims, followed by an appeal, and a Petition for Certiorari to this Court.

The government also fails to explain what further proceedings in the lower courts would accomplish. As the Petition explains, the D.C. Circuit has already held in *Boumediene* that the Constitution does not protect the detainees at Guantanamo:

> Precedent in this circuit also forecloses the detainees' claims to constitutional rights. In *Harbury v. Deutch,* 233 F.3d 596, 604 (D.C. Cir. 2000), *rev'd on other grounds sub nom. Christopher v. Harbury,* 536 U.S. 403 (2002), we quoted extensively from *Verdugo-Urquidez* and held that the Court's description of *Eisentrager* was "firm and considered dicta that binds this court." Other decisions of this court are firmer still. Citing *Eisentrager,* we held in *Pauling v. McElroy,* 278 F.2d 252, 254 n.3 (D.C. Cir. 1960) (per curiam), that "non-resident aliens ... plainly cannot appeal to the protection of the Constitution or laws of the United States." The law of this circuit is that a "foreign entity without property or presence in this country has no constitutional rights, under the due process clause or otherwise." *People's Mojahedin Org. of Iran v. U.S. Dep't of State,* 182 F.3d 17, 22 (D.C. Cir. 1999); *see also 32 County Sovereignty Comm. v. U .S. Dep't of State,* 292 F.3d 797, 799 (D.C. Cir. 2002)

Pet. App. 68a-69a. See also, e.g., *id.* at 68a (distinguishing *Insular Cases*). In light of this authority, briefing these issues in the circuit court would simply delay final resolution of these issues by this Court, as the Government no doubt will maintain that the D.C. Circuit precedent forecloses each of Petitioner's challenges. This is thus the rare instance in which certiorari before judgment should be granted rather than awaiting "the normal decisional process that a case undergoes before reviewing plenary review in this Court." Contra Opp. 7.

It therefore makes most sense to consider this Petition on the schedule necessary to assess whether this case is an appropriate companion to *Boumediene*—even if that means considering the petition on the slightly accelerated schedule requested.

3. As a logical matter, this Petition presents the strongest basis for expedited consideration: Petitioners face imminent commission proceedings, and their right not to be subject to an unlawful trial will be lost irreparably if review is delayed. That right by definition cannot be vindicated "on review of a final judgment." Contra Opp. 9. The government's contention that trial defects can be remedied after the commission concludes has already been rejected by this Court. "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." *Hamdan*, 126 S. Ct. at 2772 (emphasis added). *See also id.* at 2770 n.16 (quoting *Schlesinger v. Councilman*, 420 U.S. 738, 759 (1975)) ("abstention is not appropriate in cases in which individuals raise 'substantial arguments denying the right of the military to try them at all'").[3] Among other things, the government's preferred course of action would permit them to preview Hamdan's defense. *See Rafeedie v. INS*, 880 F.2d 506, 517 (D.C. Cir. 1989) ("Rafeedie will suffer a judicially cognizable injury in that he will . . . 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."). In addition, as the Petition explains, post-judgment review under the MCA is quite circumscribed.[4]

The government nonetheless contends that "[p]etitioners will not be prejudiced" by the denial of expedited consideration. Opp. 9. More relevant for present purposes, as noted, is that

[3] The Government's mention of *Schlesinger v. Councilman*, 420 U.S. 738 (1975), Opp. 11, therefore cuts the other way, as this Court has held in this very case. 126 S. Ct. 2749, 2772 (2006).

[4] Reiterating its bold view of its own absolute supremacy in this field, the Administration responds that "petitioners might face military-commission proceedings even if this Court grants expedited review." Opp. 9. If the government insists on pursuing such a course, this Court can of course consider whether to grant an appropriate injunction.

the government's position would prejudice this Court's ability to evaluate the detainee petitions together and decide whether certiorari should be granted in both this case and *Boumediene*. The government states that this Court can hold this Petition and dispose of it as appropriate in light of *Boumediene*. That ignores, of course, the arguments that are presented *only* by this Petition, and which as discussed must be considered in order to resolve the pressing question of federal habeas jurisdiction over the Guantanamo detainees.

4. The government nonetheless attempts to argue that the Petition is procedurally improper. That assertion lacks merit. The Clerk's Office was required to review the Petition for its compliance with the Court's Rules before docketing it. If the Clerk believed that the Petition was improper, it would have been rejected for filing.[5]

Rule 12.4 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." The government first asserts that the "rule allows parties to the *same* judgment – which petitioners do not claim to be – to file jointly." Opp. 4 (emphasis added). To the extent the government is suggesting that the Petition runs afoul of such a requirement, that is plainly incorrect. On its face, as the government proceeds to acknowledge, the Rule applies to a consolidated petition from "*two or more* judgments" (R. 12.4 (emphasis added)) not the "same judgment" (Opp. 4). There is no need for a special provision authorizing a single Petition by multiple parties to a single judgment. That

[5] In the event the Court disagrees, it can simply deem the Petition two separate filings (analogous to its practice of deeming an application for a stay to be a Petition for Certiorari) or can direct the Clerk of the Court to instruct Petitioners to file separately. Petitioner Hamdan's time to seek review in this Court does not expire until March 13, 2007, and Petitioner Khadr's time does not run until May. That such an exercise would be an empty formality is an excellent illustration of the fact that the government's argument lacks merit.

question is separately addressed by the first sentence of the same Rule: "Parties interested jointly, severally, or otherwise in a judgment may petition separately for a writ of certiorari; or any two or more may join a petition." R. 12.4.

The government next argues that "petitioners are not seeking review of 'two or more judgments' of the court of appeals." Opp. 4. That is correct, but irrelevant because the government again misstates the Rule. By its terms, the Rule is not limited to a petition from multiple judgments "of the court of appeals." Contra *id.* Rather, the Rule actually applies to a petition that seeks review of "two or more judgments [that] are sought to be reviewed on *a writ of certiorari to the same court*." R. 12.4 (emphasis added). Both petitioners in this case seek a writ of certiorari to the D.C. Circuit; indeed the government acknowledges that review is sought "of the court of appeals." Opp. 4. Petitioner Hamdan's case is pending before that Court on appeal. Petitioner Khadr's case has been decided by that Court.

The government next argues that "[t]here is nothing special about petitioners' status as detainees awaiting military commissions that warrants a 'joint' petition in these separate cases." Opp. 5. Again, the government's arguments are not tethered to the plain text of the Rule, which looks not to the "status" of the Petitioners (contra *id.*) but whether their cases "involve identical or closely related questions." The point of the Rule is thus to permit like cases to be presented to the Court together for efficient disposition. The government notably does not doubt that the actual requirement of the Rule – that the *questions* be closely related – is easily satisfied here. Petitioners contend that the federal district court has habeas corpus jurisdiction over their claims, and that the Military Commissions Act does not lawfully strip the district court of that jurisdiction. Their arguments on that question are logically considered together.

Notwithstanding the text of the Rule, the government asserts that, to it, "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." Opp. 5. The opposite is true. The obvious point of the Rule is to make practice more efficient, including for the Court itself, minimizing unnecessary filings. The government does not doubt that Petitioners could have filed separate Petitions; indeed, it repeatedly suggests that course. But all the efficiencies of a joint submission are equally gained with respect to a consolidated petition for a writ of certiorari and a writ of certiorari before judgment. Put another way, nothing would be gained and the burden on this Court would be multiplied if Petitioners had filed separately.

The government finally notes that "petitioners identify no case in which this Court has permitted the filing of such a petition." Opp. 5. It is equally fair to say that "[the government] identif[ies] no case in which this Court has [refused] the filing of such a petition." When both the text of the Rule and its purpose authorize the Petition, there is no basis for acceding to the government's position, which would unnecessarily multiply the number of filings for this Court to address.[6]

5. The government finally complains of the burden of responding to the Petition on an expedited basis. Opp. 8. That argument rings hollow. This Court's Rules contemplate that the government will respond to petitions within thirty days. This Motion seeks to direct a response

[6] It is easy to illustrate that the government's objection elevates form over substance. For example, in *Gratz v. Bollinger*, 539 U.S. 244 (2003), this Court granted certiorari before judgment in a case challenging the consideration of race as a factor in university admissions, to allow it to be considered alongside a separate challenge that had already been decided by the Sixth Circuit, *Grutter v. Bollinger*, 539 U.S. 306 (2003). Although the petitions for writ of certiorari were submitted by the petitioners separately rather than in a single joint petition, the Court granted certiorari in both cases, as the judgments appealed from (one from the court of appeals, and one from the district court) were closely related. Respondents' argument implies that the grant of certiorari in both those cases would not have occurred if the petitioners had filed jointly rather than separately. That seems implausible. A joint filing would only have made consideration of the cases more efficient.

within twenty-two days, as the Petition was filed and delivered to the government immediately by email on February 27. That schedule is hardly an imposition, particularly given that this is the unusual case in which the Solicitor General's Office has been intimately involved in briefing these very questions in the lower courts, such that it is already familiar with (indeed, has framed) the issues involved. When the government has agreed to respond to the parallel *Boumadiene* petitions (which will be filed on March 5) in only sixteen days, there is no reason to conclude that the schedule proposed by this Motion is inappropriate or unworkable.

For the reasons stated in this Reply and in their Motion, Petitioners respectfully request that the Court grant expedited review of their Petition, requiring that Respondents file their opposition by March 21, 2007, and for the Court to consider that Petition at its March 30, 2007 Conference.

Respectfully submitted this 1st day of March, 2007,

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CERTIFICATE OF SERVICE

I hereby certify that on March 1, 2007, copies of the foregoing **Petitioners' Reply In Support of Their Motion to Expedite Consideration of Petition for Writ of Certiorari Before Judgment and Petition for Writ of Certiorari**, were served by electronic mail upon the following:

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