IN THE SUPREME COURT OF THE UNITED STATES

No. 07-_____

ROBERT M. GATES, SECRETARY OF DEFENSE, ET AL., PETITIONERS

v.

HAJI BISMULLAH, ET AL.

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

MOTION FOR EXPEDITED CONSIDERATION OF
THE PETITION FOR A WRIT OF CERTIORARI AND FOR
EXPEDITED MERITS BRIEFING AND ORAL ARGUMENT
IN THE EVENT THAT THE COURT GRANTS THE PETITION

The Solicitor General, on behalf of the Secretary of Defense and the other federal petitioners, hereby moves, pursuant to Supreme Court Rule 21, for expedited consideration of the petition for a writ of certiorari, filed today, to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered on July 20, 2007, and amended on October 23, 2007 (Pet. App. 1a-54a). Petitioners request that respondents be directed to file a response to the petition on or before March 4, 2008; that petitioners be permitted to file a reply in support of the petition on or before March 11, 2008; and that the petition be considered at the Court's conference on March 14, 2008.*

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* The government has separately filed an application with the Chief Justice requesting a stay of the court of appeals' decision pending disposition of this case by this Court in the expedited

The government's petition for a writ of certiorari requests that the petition be held pending this Court's decision in Boumediene v. Bush, No. 06-1195 (argued Dec. 5, 2007), and Al Odah v. United States, No. 06-1196 (argued Dec. 5, 2007), and be disposed of in accordance with the Court's decision in those cases. In the alternative, however, the petition requests that the Court grant certiorari and schedule expedited briefing and argument so that the case can be decided this Term. Accordingly, if this Court grants the petition, petitioners also hereby request that petitioners' brief be due on April 11, 2008; that respondents' brief be due on May 1, 2008; that petitioners' reply brief be due on May 8, 2008; and that oral argument be heard on May 14, 2008. Under that proposed schedule, amicus briefs supporting the parties would be due on the dates the parties' briefs are due.

STATEMENT

As explained in the petition, respondents are foreign nationals captured abroad and detained at the naval base at Guantanamo Bay. Pet. App. 3a. Each of them has been adjudicated by a Combatant Status Review Tribunal (CSRT) to be an enemy combatant. Ibid. Under the Detainee Treatment Act of 2005 (DTA), Pub. L. No. 109-148, 119 Stat. 2739, those determinations are subject to judicial review in the United States Court of Appeals for the District of Columbia Circuit.

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fashion requested by this motion.

Respondents sought review of their CSRT determinations in the D.C. Circuit under the DTA and requested wide-ranging discovery. Pet. App. 2a-3a. In order to evaluate respondents' discovery requests, the court of appeals defined "the record to which th[e] court must look as it reviews a CSRT's determination." Id. at 10a. The court held that the record on review "consists of all the information a Tribunal is authorized to obtain and consider," called the "Government Information," which includes all "reasonably available information in the possession of the U.S. Government bearing on the issue of whether the detainee meets the criteria to be designated as an enemy combatant." Id. at 2a. That is, the court defined the record for judicial review to include not only the evidence actually presented to and considered by the CSRT, but also every piece of potentially relevant, reasonably available information possessed by each and every government agency. Id. at 2a, 13a-14a.

The government sought rehearing, explaining that it does not have a file containing this type of "record" for each detainee's case, as the court defined it; that records of materials actually obtained by the recorder were not retained; and that creating and producing such a "record" would require an enormous outlay of government resources and, in conjunction with the panel's treatment of classified information, could jeopardize national security. Pet. App. 182a-224a (declarations). The panel denied rehearing,

but it recognized that its holding would require the government to expend significant resources to either recreate an expanded "record" for each detainee or "convene a new CSRT" for each detainee. Id. at 62a-63a.

The en banc court of appeals denied a request for expedited rehearing on a 5-5 vote. The judges issued five separate opinions explaining their votes, Pet. App. 67a-102a, in which they expressly noted the need for this Court to address the question presented in this case expeditiously, particularly because it is interconnected with the questions presented in Boumediene and Al Odah. See id. at 82a (Ginsburg, J., concurring in denial of rehearing en banc); id. at 83a (Garland, J., concurring in denial of rehearing en banc); id. at 89a n.6 (Henderson, J., dissenting from denial of rehearing en banc); id. at 96a (Randolph, J., dissenting from denial of rehearing en banc).

The government has filed herewith a petition for a writ of certiorari to review the judgment of the court of appeals.

ARGUMENT

Expedited consideration of the petition for a writ of certiorari is warranted in this case because the question presented in the petition is integrally related to issues now before the Court in Boumediene v. Bush and Al Odah v. United States. The question presented by this case is also one of exceptional importance in its own right and, if left undisturbed by this Court,

the decision below would impose extraordinary compliance burdens on the government and create a serious threat to national security, under circumstances in which that extraordinary effort may be rendered either useless or at a minimum misdirected at the point this Court renders its decision in Boumediene and Al Odah.

1. In Boumediene v. Bush and Al Odah v. United States, this Court is considering a variety of challenges to the restrictions on judicial review Congress enacted in the DTA and the Military Commissions Act of 2006 (MCA), Pub. L. No. 109-366, § 7(a), 120 Stat. 2636. In particular, this Court is reviewing the court of appeals' holding that the DTA is the only means by which Guantanamo Bay detainees may challenge their detention as enemy combatants in federal court and is considering the detainees' challenges to the adequacy of judicial review under the DTA. Pet. at i, Boumediene v. Bush, No. 06-1195 (argued Dec. 5, 2007); Pet. at i, Al Odah v. United States, No. 06-1196 (argued Dec. 5, 2007); see also Boumediene v. Bush, 476 F.3d 981 (D.C. Cir.), cert. granted, 127 S. Ct. 3078 (2007).

As this Court recognized when granting certiorari in Boumediene and Al Odah, the questions presented in those cases are intertwined with the question presented here, see Boumediene, 127 S. Ct. 3078, and this Court's decision in Boumediene and Al Odah will almost certainly directly impact this case. For example, if this Court reaches the adequacy of the DTA procedures in Boumediene

and Al Odah, it may have occasion to interpret the scope of the DTA procedures, including the scope of the record on review, in order to avoid any constitutional difficulties with the MCA's limitation on habeas corpus review. Such a resolution would essentially decide or at least shed light on the very issues presented in this case in ways that may obviate the need for a remand or change the scope of the government's task on remand. Either way, a prompt consideration of whether to grant or hold the petition in this case would be appropriate.

If, on the other hand, this Court determines that detainees do not have Suspension Clause rights, it would not need to consider the adequacy of the DTA procedures in the first instance, but instead could permit the court of appeals to revisit its ruling on the scope of the record for judicial review in light of the Court's explanation of what rights (if any) detainees have to judicial review. Alternatively, this Court could accept review in this case to clarify the appropriate procedures for DTA review, without further delay. Finally, if this Court rejects the adequacy of DTA review altogether, there would be little practical value in performing the remand option provided by the court below. In any event, this Court's decision in Boumediene and Al Odah is likely to directly inform the question in this case.

At the same time, there is no reason to require the government to be put to the dilemma created by the court of appeals' decision

in this case while the Boumediene and Al Odah cases are pending before this Court. As discussed, the decision below forces the government to engage in a practically infeasible attempt to recreate the Government Information the recorder might have reviewed under the court of appeals' decision at the risk of great harm to national security, or conduct mass remands of DTA cases for an additional round of CSRT proceedings in the midst of an ongoing armed conflict. Because it is possible that this Court's decision in Boumediene and Al Odah will obviate the need for either course, there is no reason to put the government to that choice while those cases are pending. And even if the Court's decision in Boumediene and Al Odah is adverse to the government and the government is required to convene new CSRT proceedings, there is no reason to require the government to undertake that task before it has the benefit of this Court's guidance on what procedures are required.

2. Although this case meets the settled criteria for certiorari in its own right, because the case is interconnected with Boumediene and Al Odah, which have been fully briefed and argued, the government's petition for a writ of certiorari asks the Court to hold this case pending the Court's decision in Boumediene and Al Odah and dispose of this petition accordingly. In the alternative, however, if this Court does not wish to pursue that course, the government requests that the petition be granted and that the case be briefed and argued on an expedited basis, and

decided this Term. Such expedited consideration is warranted given the extraordinary importance of this case, the exceptional burdens potentially imposed by the court of appeals' decision, and the need to provide detainees with the appropriate form of judicial review without any unnecessary delay.

As explained in the government's petition, the scope of the record on review in DTA actions is an important threshold question for all DTA actions. There are cases pending under the DTA on behalf of more than 180 detainees, and cases may eventually be brought on behalf of the other Guantanamo Bay detainees.

Moreover, the court of appeals' decision would place enormous compliance burdens on the United States and could seriously jeopardize national security. In seeking rehearing in the court of appeals, the government submitted sworn declarations from the Directors of the Central Intelligence Agency, the National Security Agency, and the Federal Bureau of Investigation; the Director of National Intelligence; and the Deputy Secretary of Defense, all of whom explained that the production of the materials required by the court of appeals would require the government to divert limited resources from performing critical national security duties during a time of war and could cause "exceptionally grave damage to the national security." Pet. App. 186a-187a; see id. at 191a-192a.

In particular, the Nation's top intelligence officials explained that either creating new "records" for each detainee or

convening a new CSRT for each detainee would be a monumental undertaking for the government and would divert limited intelligence and defense resources in a time of war. Id. at 188a, 191a-194a, 218a-219a, 221a-223a. Moreover, the intelligence officials explained that the disclosure of materials required by the court of appeals' decision would pose a grave threat to national security, because the material that the government would be required to disclose as part of the "record" likely would include highly sensitive classified material, and the disclosure of that material will make foreign governments and human sources less likely to cooperate in the United States' intelligence gathering in the future. Id. at 186a-187a, 196a.

If this Court declines to hold this case pending Boumediene and Al Odah, expedited consideration of the question presented on the merits is therefore warranted based on the following proposed schedule:

April 11, 2008	Petitioners' Brief and any Supporting Amicus Briefs due
May 1, 2008	Respondents' Brief and any Supporting Amicus Briefs due
May 8, 2008	Reply Brief due
May 14, 2008	Oral Argument.

CONCLUSION

For the reasons stated, petitioners respectfully request that the Court expedite consideration of the petition for a writ of certiorari based on the schedule proposed above and, if the Court declines to hold the petition for Boumediene and Al Odah and instead chooses to grant certiorari, that the Court expedite briefing and oral argument based on the schedule proposed above.

PAUL D. CLEMENT
Solicitor General
Counsel of Record

FEBRUARY 2008