No. 06-1196

In the Supreme Court of the United States

KHALED A. F. AL ODAH, *ET AL.*,

Petitioners,

v.

UNITED STATES OF AMERICA, *ET AL.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court of Appeals for the District of Columbia Circuit

REPLY IN SUPPORT OF MOTION TO EXPEDITE BRIEFING SCHEDULE AND ORAL ARGUMENT

DAVID J. CYNAMON
MATTHEW J. MACLEAN
OSMAN HANDOO
PILLSBURY WINTHROP SHAW PITTMAN LLP
2300 N Street, N.W.
Washington, DC 20037
Telephone: 202-663-8000

THOMAS B. WILNER
Counsel of Record
NEIL H. KOSLOWE
AMANDA E. SHAFER
SHERI L. SHEPHERD
SHEARMAN & STERLING LLP
801 Pennsylvania Ave., N.W.
Washington, DC 20004
Telephone: 202-508-8000

GITANJALI GUTIERREZ
J. WELLS DIXON
SHAYANA KADIDAL
CENTER FOR CONSTITUTIONAL RIGHTS
666 Broadway, 7th Floor
New York, NY 10012
Telephone: 212-614-6438

GEORGE BRENT MICKUM IV
SPRIGGS & HOLLINGSWORTH
1350 "I" Street N.W.
Washington, DC 20005
Telephone: 202-898-5800

Counsel for Petitioners
Additional Counsel Listed on Inside Cover

JOHN J. GIBBONS
LAWRENCE S. LUSTBERG
GIBBONS P.C.
One Gateway Center
Newark, NJ 07102
Telephone: 973-596-4500

MARK S. SULLIVAN
CHRISTOPHER G. KARAGHEUZOFF
JOSHUA COLANGELO-BRYAN
DORSEY & WHITNEY LLP
250 Park Avenue
New York, NY 10177
Telephone: 212-415-9200

MARC D. FALKOFF
COLLEGE OF LAW
NORTHERN ILLINOIS
UNIVERSITY
DeKalb, IL 60115
Telephone: 815-753-0660

PAMELA CHEPIGA
ANDREW MATHESON
KAREN LEE
SARAH HAVENS
ALLEN & OVERY LLP
1221 Avenue of the Americas
New York, NY 10020
Telephone: 212-610-6300

ANDREW A. JACOBSON
JENNER & BLOCK LLP
330 N. Wabash Avenue
Chicago, IL 60611-7603
Telephone: 312-923-2923

JOSEPH MARGULIES
MACARTHUR JUSTICE CENTER
NORTHWESTERN UNIVERSITY
LAW SCHOOL
357 East Chicago Avenue
Chicago, IL 60611
Telephone: 312-503-0890

BAHER AZMY
SETON HALL LAW SCHOOL
CENTER FOR SOCIAL JUSTICE
833 McCarter Highway
Newark, NJ 07102
Telephone: 973-642-8700

DAVID H. REMES
COVINGTON & BURLING LLP
1201 Pennsylvania Avenue, NW
Washington, DC 20004
Telephone: 202-662-5212

SCOTT SULLIVAN
DEREK JINKS
UNIVERSITY OF TEXAS
SCHOOL OF LAW
RULE OF LAW IN WARTIME
PROGRAM
727 E. Dean Keeton Street
Austin, TX 78705
Telephone: 512-471-5151

MARC A. GOLDMAN
JENNER & BLOCK LLP
601 13th Street, N.W.
Suite 1200 South
Washington, DC 20005-3823
Telephone: 202-609-6087

CLIVE STAFFORD SMITH
JUSTICE IN EXILE
636 Baronne Street
New Orleans, LA 70113
Telephone: 504-558-9867

DOUGLAS J. BEHR
KELLER AND HECKMAN LLP
1001 G Street, NW, Ste 500W
Washington, DC 20001
Telephone: 202-434-4100

MICHAEL D. MORI
MAJOR, U.S. MARINE CORPS
Office Of Military Commissions
Office Of The Chief Defense Counsel
1099 14th Street, NW, Ste 2000E
Washington, DC 20005
Telephone: 202-761-0133 x116

ERWIN CHEMERINSKY
STEPHEN YAGMAN
DUKE LAW SCHOOL
Science Drive &
Towerview Rd.
Durham, NC 27708
Telephone: 919-613-7173

In reply to respondents' opposition to the motion to expedite briefing and oral argument, petitioners state as follows:

1. Respondents do not dispute that petitioners have been detained for more than five years without any meaningful judicial review. Their habeas corpus cases have been stalled in the courts for nearly three years since this Court ordered the district court "to consider in the first instance the merits of petitioners' claims." *Rasul*, 542 U.S. at 485; *see also Stack v. Boyle*, 342 U.S. 1, 4 (1952) ("[habeas corpus relief] must be speedy if it is to be effective"). Nor do respondents contest that this case raises issues of the highest importance – both for petitioners and the nation. *See Ex parte Quirin*, 317 U.S. 1, 19 (1942).

2. Instead, respondents principally oppose expedited consideration on the ground that petitioners have not sought review of their Combatant Status Review Tribunal ("CSRT") decisions in the United States Court of Appeals for the District of Columbia Circuit pursuant to Section 1005(e)(2) of the Detainee Treatment Act of 2005 ("DTA").[1] Petitioners will address respondents' arguments concerning exhaustion of remedies more fully in their reply to the opposition to the petition for certiorari. But the DTA provides no reason for this Court to wait to address the sufficiency of the DTA procedures.

3. As Judge Rogers recognized in her dissent, "Far from merely adjusting the mechanism for vindicating the habeas right, the DTA imposes a series of hurdles while saddling each Guantanamo detainee with an assortment of handicaps that make the obstacles insurmountable."

---

[1] There is substantial doubt as to whether such review is even available to the petitioners. Pursuant to § 1005(e)(2)(B)(ii) of the DTA, review in the Court of Appeals is available only to detainees "for whom a Combatant Status Review Tribunal has been conducted, pursuant to applicable procedures specified by the Secretary of Defense." The Secretary of Defense did not promulgate such procedures until July 14, 2006. Petitioners' CSRT proceedings were completed long before those procedures were promulgated. This substantial doubt about the availability of D.C. Circuit review for the CSRT decisions is a further reason why the Court should not defer review of this petition.

(App. 41).[2] Respondents may disagree with Judge Rogers, but the issue is squarely presented in this case and is ripe for a decision.

4. Respondents argue that the Court should await resolution of DTA § 1005(e)(2) cases now pending in the Court of Appeals. They claim that the Court of Appeals "has already begun expedited consideration of petitions properly filed under the DTA" (Respondents' Opposition to Motions to Expedite Briefing and Oral Argument, at 4), but this is incorrect. *Parhat v. Gates*, No. 06-1397 (D.C. Cir.), and *Bismullah v. Gates*, No. 06-1197 (D.C. Cir.) have not been expedited. The petitioner in *Parhat* moved to expedite two and a half months ago, but respondents opposed the motion and moved to stay the case pending resolution of *Boumediene v. Bush* and *Al Odah v. United States*. The Court of Appeals granted respondents' motion to stay and never ruled on the motion to expedite. Following its decision in *Boumediene* and *Al Odah*, the court dissolved the stay, issued a briefing schedule, and set an oral argument for May 15, 2007, on pending procedural motions, but the parties have been ordered not to brief the merits of their cases.

5. Respondents similarly argued in *Hamdan v. Gates* and *Khadr v. Bush* that the Court should not expedite review in those cases because the issues could be considered in *Boumediene*

---

[2] The CSRTs themselves do not provide a meaningful opportunity for the detainees to challenge the grounds for their detentions. Among other defects, the CSRTs (a) provide no opportunity to see or challenge classified allegations or evidence, (b) lack a neutral decisionmaker, (c) may rely on statements obtained through torture or coercion, and (d) are far removed from the time and place of capture with no process to compel attendance of witnesses or production of evidence. Petitioners were allowed no assistance of counsel in their CSRT proceedings, but instead were assigned "personal representatives" who were not their advocates and were required to report their communications with petitioners to military superiors. Moreover, like the DTA § 1005(e)(2) review, the CSRTs cannot order a release. In at least three occasions when a CSRT found detainees not to be enemy combatants, their cases were heard by new CSRTs, without the detainees' presence or knowledge, until the CSRTs returned findings that the detainees were enemy combatants. *See* Mark Denbeaux, No-Hearing Hearings: CSRT: The Modern Habeas Corpus?, at 37-39 (2006), http://law.shu.edu/news/final_no_hearing_hearings _report.

and *Al Odah*. *See Hamdan v. Gates*, No. 06-1169, Respondents' Opposition to Motion to Expedite, at 5. Now that *Boumediene* and *Al Odah* are before the Court, respondents are asking the Court to wait for the D.C. Circuit to decide *Parhat* and *Bismullah*. In respondents' view, no case is ready for a decision while any other case remains undecided. The issues are squarely before the Court now. There is no need to require petitioners to wait any longer.

6. Finally, respondents complain that petitioners' proposed schedule leaves them insufficient time to brief their case. There is no reason why more time should be required. Respondents are already familiar with the issues, having gone through a full round of briefing and three rounds of supplemental briefing in the D.C. Circuit during the two years the case was pending there.[3] Therefore, petitioners believe that their proposed schedule is appropriate. Nevertheless, petitioners do not oppose respondents' proposed schedule for briefing and argument, if acceptable to the Court:

April 16	Petitioners' brief and joint appendix
May 3	Respondents' brief
May 10	Petitioners' reply brief
May 21	Oral argument

See Respondents' Opposition to Motions to Expedite Briefing and Oral Argument, at 7.

---

[3] In *Felker v. Turpin*, 517 U.S. 651 (1996), cited in respondents' opposition to the motion to expedite, this Court expedited review over the dissent of Justices Souter, Ginsberg, and Breyer, who would not have disposed of the case on an expedited basis. One of the principal issues in *Felker* was whether 28 U.S.C. § 2244(b)(3)(E) validly stripped the Supreme Court of jurisdiction to review the gate keeping function of the courts of appeals over second and subsequent habeas petitions (*see* 517 U.S. at 661), an issue that, by its nature, would not have been briefed before the court of appeals. Unlike in *Felker*, all of the significant issues in this case have been thoroughly briefed in the court below.

Conclusion

For the reasons stated above, petitioners respectfully request this Court to grant their motion to expedite briefing and oral argument, and to order either the schedule proposed in their motion, or the schedule proposed by the respondents and not opposed by petitioners in this reply.

Respectfully submitted,

DAVID J. CYNAMON
MATTHEW J. MACLEAN
OSMAN HANDOO
PILLSBURY WINTHROP
SHAW PITTMAN LLP
2300 N Street, N.W.
Washington, DC 20037
Telephone: 202-663-8000

GITANJALI GUTIERREZ
J. WELLS DIXON
SHAYANA KADIDAL
CENTER FOR
CONSTITUTIONAL RIGHTS
666 Broadway, 7th Floor
New York, NY 10012
Telephone: 212-614-6438

THOMAS B. WILNER
Counsel of Record
NEIL H. KOSLOWE
AMANDA E. SHAFER
SHERI L. SHEPHERD
SHEARMAN & STERLING LLP
801 Pennsylvania Ave., N.W.
Washington, DC 20004
Telephone: 202-508-8000

GEORGE BRENT MICKUM IV
SPRIGGS & HOLLINGSWORTH
1350 "I" Street N.W.
Washington, DC 20005
Telephone: 202-898-5800

Counsel for Petitioners

MARCH, 2007

CERTIFICATE OF SERVICE

I certify that all parties required to be served in this matter have been served with Petitioners' Motion to Expedite Briefing Schedule and Oral Argument. On March 22, 2006, I caused the foregoing motion to be served by hand delivery upon the following:

Solicitor General of the United States
Room 5614
Department of Justice
950 Pennsylvania Ave., N.W
Washington, DC 20530-0001

Matthew J. MacLean