No. 06-1169

IN THE SUPREME COURT OF THE UNITED STATES

SALIM AHMED HAMDAN, Petitioner,

v.

ROBERT GATES, et al., Respondents,

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

PETITIONER'S REPLY IN SUPPORT OF MOTION FOR LEAVE TO FILE PETITION FOR REHEARING OUT-OF-TIME

Petitioner Salim Ahmed Hamdan respectfully submits this Reply in support of his motion for leave to file a Petition for Rehearing of Order Denying Certiorari Before Judgment outside the time limit prescribed by Sup. Ct. R. 44.2.

1. Respondents' Opposition to Petitioner's request for leave to file an untimely petition should be disregarded because that Opposition is itself untimely. Rule 21.4 requires that any response to a motion be filed "within 10 days of receipt," unless ordered otherwise. Petitioner moved for leave to file out of time on July 2, 2007, yet the Solicitor General failed to file the Respondents' Opposition to this motion until July 20. Unlike Petitioner, Respondents did not seek leave of the Court to file their Opposition out of time. Accordingly, the Opposition should not be considered by the Court.

2. In any event, Respondents' Opposition does not take issue with this Court's broad discretion, where appropriate in the interests of justice, to grant petitions

for rehearing filed outside the time limits set by Rule 44.2. The Court has exercised that discretion in precisely the context of an untimely petition for rehearing of a decision denying certiorari. *See Gondeck v. Pan Am. World Airways, Inc.*, 382 U.S. 25, 26-27 (1965) (granting petition for rehearing filed more than three years after denial of certiorari). In *Gondeck*, the Court concluded that a "strict application of the rules" would result in unfairness and exercised its discretion to hear the untimely petition for rehearing. *Id.* Where appropriate, the Court may relax non-jurisdictional procedural rules in order to promote the "orderly transaction" of the Court's business. *Bowles v. Russell*, 551 U.S. – (2007) (slip op. at 7) (internal citation and quotation omitted).[1]

3. The Court should exercise its discretion here by granting Petitioner's request for leave to file out of time. Granting Petitioner's motion will permit this Court to determine whether the Petition for Rehearing should be disposed of alongside and consistently with *Boumediene v. Bush* (No. 06-1196) and *Al Odah v. United States* (No. 06-1195), logical companion cases now before this Court. Petitioner Hamdan has consistently maintained that his case is an appropriate companion to *Boumediene* and *Al Odah*. *See, e.g.*, Pet., No. 06-1169, *Hamdan v. Gates, et al.*, at i (Feb. 27, 2007) (presenting three questions, one "presented by petitions for certiorari anticipated in *Boumediene v. Bush*, No. 05-5062 (D.C. Cir., Feb. 20, 2007) and *Al Odah v. United*

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[1] Respondents' claim that this case is interlocutory, U.S. Opp. to Mot. for Leave to File Pet. for Reh'g Out of Time, at 3-4, is similarly unavailing, just as it was in *Hamdan v. Rumsfeld* (No. 05-184). This Court has regularly reviewed, over the objection of the Solicitor General, interlocutory criminal cases. *E.g., Bates v. United States*, 522 U.S. 23 (1997); *Solorio v. United States*, 483 U.S. 435 (1987); *Oliver v. United States*, 466 U.S. 170 (1984). "[T]he interlocutory status of the case may be no impediment to certiorari where the opinion of the court below has decided an important issue, otherwise worthy of review, and Supreme Court intervention may serve to hasten or finally resolve the litigation." R. L. Stern, et al., Supreme Court Practice 260 (8th ed. 2002). *See also Land v. Dollar*, 330 U.S. 731, 734 n.2 (1947) ("Although the judgment below was not a final one, we consider it appropriate for review because it involved an issue 'fundamental to the further conduct of the case.'") (quoting *United States v. Gen. Motors*, 323 U.S. 373, 377 (1945)).

States, No. 05-5063 (D.C. Cir., Feb. 20, 2007)" and "two further questions, which make this case a logical and necessary companion to the *Boumediene* and *Al Odah* petitions").

4. It is implausible to suggest that this Court's extremely unusual steps to grant rehearing in *Boumediene* and *al Odah* and to set those cases for oral argument (without a request from those petitioners to do so) constitute anything less than a significant intervening event justifying consideration of a petition for rehearing out of time.[2] This case presents a crucial counterpart to *Boumediene*, without which this Court's inquiry into the MCA's attempted habeas stripping will be incomplete. While the *Boumediene* petitioners argue that their right to challenge their detention and the related CSRT process via habeas is protected by both statutes and the Constitution, Hamdan presents the other half of that question: whether statutes and the Constitution protect those facing commission trial. Together these cases occupy the field of challenges that may be brought to the MCA's habeas-stripping provisions, and to fully consider them, this Court should consider the cases together.

Review is particularly appropriate since Hamdan's case not only presents the distinct question whether habeas is available to challenge the MCA's commission process, but also raises on behalf of all detainees constitutional objections to the MCA that are narrower in scope than the Suspension Clause challenge.

Indeed, if this Court were to rule against the *Boumediene* detainees by finding that Congress' CSRT review provisions are an adequate substitute for habeas, that decision would leave unanswered Hamdan's argument that habeas should be available to allow challenges to the separate commission process. *Compare* MCA § 7(a) (attempting to strip

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[2] Respondents' argument to the contrary ignores the fact that they previously claimed that this Court's denial of certiorari was exceptionally relevant. *See* U.S. Opp. to Initial En Banc, at 1, 2-3, 14, *Hamdan v. Gates* (D.C. Cir. 2007) (using this Court's denial of certiorari in *Boumediene* as a reason to oppose en banc consideration of Mr. Hamdan's case).

habeas for enemy combatants), *with* MCA § 3 (attempting to strip habeas for commission challenges). Alternatively, if this Court were ultimately to hold that the *Boumediene* petitioners are protected by the constitutional right of habeas because the statutory review process is an inadequate substitute, again, the Court's ruling would have no bearing on the question of whether Hamdan was similarly protected by constitutional habeas. No inquiry into the adequacy of MCA § 3 review could take place in *Boumediene* without this case.

Furthermore, the Court's rehearing in *Boumediene* raises the possibility that Respondents will alter the status of detainees at Guantanamo to evade the spirit of habeas. Respondents have already admitted that they plan to reclassify 80 of the current detainees at Guantanamo by charging them before military commissions. *See* Josh White, *16 Detainees Transferred from Guantanamo*, Wash. Post, July 17, 2007, at A3 ("Military prosecutors say they hope eventually to try another 80 or so detainees at hearings of military commissions"). Absent this Court's review of this case, the Government will likely argue that habeas petitions cannot challenge *commissions* (and would likely do so even if this Court were to conclude that habeas petitions are permissible to challenge CSRTs). Indeed, this argument could end up being correct inasmuch as no such challenges are before this Court in *Boumediene*. Detention and criminal trials differ in fundamental respects, with the consequence that this Court's holdings on the availability of habeas to challenge one do not necessarily apply with equal force to the other.

Quite apart from the *Government*'s claim, the petitioners themselves in *Boumediene* have suggested repeatedly that those facing military commissions may lack access to the Great Writ. *See* Pet. 11-12 (detailing examples). That substantial point of

conflict between Hamdan and the *Boumediene* petitioners itself furnishes a significant reason to grant review here.

By hearing this case, this Court can fully determine the rights of detainees regardless of the Government's shifting classifications and guarantee speedy resolution of any resulting habeas petitions in accordance with law.

5. While the typical case on rehearing is one where the Court is asked to balance the need for finality against the interests of justice, granting the Petition for rehearing in this case will ultimately *serve* the interests not only of justice, but of finality as well.[3] Hearing Petitioner's case will allow for resolution of issues that are distinct from, but no less important than, the issues involved in *Boumediene* and *Al Odah*. *See* Reh'g Pet., 1-4 (No. 06-1169). For reasons explained at length in the Petition for Certiorari Before Judgment in Nos. 06-1169 and 07-15, as well as in Petitioner's Reply Brief in No. 07-15 (which has been filed concurrently with this document), determination of these issues now, rather than later, will help bring the multitude of detainee cases closer to a final resolution, particularly given the myriad interrelationships between the two sets of claims.

For the foregoing reasons, this Court should grant Petitioner's motion for leave to file his otherwise untimely Petition for Rehearing.

Respectfully submitted this 24th day of July, 2007.

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[3] *E.g., Gondeck*, 382 U.S. at 26-27 (1965) ("We are now apprised, however, of 'intervening circumstances of substantial . . . effect,' justifying application of the established doctrine that 'the interest in finality of litigation must yield where the interests of justice would make unfair the strict application of our rules.'") (quoting *United States v. Ohio Power Co*., 353 U.S. 98, 99 (1957)).

NEAL KATYAL
COUNSEL OF RECORD

By /s/ *Neal K. Katyal*
Neal K. Katyal
600 New Jersey Avenue, NW
Washington, D.C. 20001
(202) 662-9000

LAURENCE H. TRIBE

By /s/ *Laurence H. Tribe*
Laurence H. Tribe
Harvard Law School
Supreme Court Litigation Clinic
1575 Mass. Ave.
Cambridge, MA 02138

KEVIN K. RUSSELL
By /s/ *Kevin K. Russell*
Kevin K. Russell
Howe & Russell, P.C.
4607 Asbury Pl., NW
Washington, D.C. 20016

LIEUTENANT COMMANDER CHARLES SWIFT

By /s/ *Lieutenant Commander Charles Swift*
Lieutenant Commander Charles Swift

PERKINS COIE LLP

By /s/ *Joseph M. McMillan*
Joseph M. McMillan
Harry H. Schneider
Eric S. Merrifield
Attorneys for Petitioner Salim Ahmed Hamdan

CERTIFICATE OF SERVICE

I hereby certify that on July 24, 2007, copies of the foregoing **Petitioner Hamdan's Reply in Support of Motion for Leave to File Petition for Rehearing Out of Time**, were served by electronic mail upon the following:

Jonathan L. Marcus
David B. Salmons
U.S. Department of Justice
Office of the Solicitor General
950 Pennsylvania Ave, NW
Room 5252
Washington, D.C. 20530
(202) 514-2217
Jonathan.L.Marcus@usdoj.gov
David.B.Salmons@usdoj.gov

Terry Henry
Thomas Swanton
Civil Division
Federal Programs Branch
U.S. Department of Justice
20 Massachusetts Avenue, NW, Room 7144
Washington, DC 20530
(202) 514-4107
(202) 616-8470 (facsimile)
Terry.Henry@usdoj.gov
Thomas.Swanton2@usdoj.gov

Attorneys for Respondents

/s/ *Joseph M. McMillan*
Joseph M. McMillan