IN THE SUPREME COURT OF THE UNITED STATES

No. 06-1195

LAKHDAR BOUMEDIENE, ET AL., PETITIONERS

v.

GEORGE W. BUSH,
PRESIDENT OF THE UNITED STATES, ET AL.

No. 06-1196

KHALED A.F. AL ODAH, NEXT FRIEND OF
FAWZI KHALID ABDULLAH FAHAD AL ODAH, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

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

RESPONDENTS' OPPOSITION TO MOTIONS TO
EXPEDITE BRIEFING AND ORAL ARGUMENT

The Solicitor General, on behalf of respondents George W. Bush, et al., respectfully opposes petitioners' motions to expedite briefing and oral argument of these cases.

STATEMENT

As explained in respondents' brief in opposition to certiorari in these cases, petitioners are aliens detained by the Department of Defense at the Naval Base at Guantanamo Bay, Cuba. Their

detention is based on individualized determinations by military Combatant Status Review Tribunals (CSRTs) that they are enemy combatants. Under the Detainee Treatment Act of 2005 (DTA), Pub. L. No. 109-148, Tit. X, 119 Stat. 2739, those determinations are subject to review in the United States Court of Appeals for the District of Columbia Circuit. Challenges to the scope of review provided by the DTA may also be presented to the District of Columbia Circuit. Unlike some other detainees, petitioners have not availed themselves of the review provided by the DTA. Instead, they have challenged their detention by filing petitions for writs of habeas corpus. On appeal from the decisions of two different district judges, the court of appeals held that the district court lacked jurisdiction under the Military Commissions Act of 2006 (MCA), Pub. L. No. 109-366, 120 Stat. 2600.

Petitioners have sought a writ of certiorari and have filed motions to expedite this Court's consideration of these cases should the Court decide to grant certiorari. Under the highly expedited schedule proposed by petitioners, if the Court were to grant certiorari at its March 30 Conference, petitioners would file their opening briefs on April 16, respondents would file their brief on April 27, and petitioners would file reply briefs on May 1. Petitioners propose to schedule oral argument for May 7.

ARGUMENT

For several reasons, even if this Court were to grant certiorari in these cases, it should deny petitioners' request for expedition.

1. The premise of the motions to expedite is that petitioners are being detained "indefinitely and without meaningful judicial review." 06-1196 Mot. to Expedite 4; see 06-1195 Mot. to Expedite 1 ("this case raises fundamental questions regarding * * * the limits of Executive power to detain individuals indefinitely without charge or lawful judicial review"). As explained in respondents' brief in opposition, that premise is false.

Petitioners have been determined to be enemy combatants after a hearing before a CSRT, and that determination is subject to review in the D.C. Circuit under the DTA. The DTA provides that the D.C. Circuit must consider "whether the status determination of the [CSRT] with regard to such alien was consistent with the standards and procedures specified by the Secretary of Defense for [CSRTs] (including the requirement that the conclusion of the Tribunal be supported by a preponderance of the evidence and allowing a rebuttable presumption in favor of the Government's evidence)." DTA § 1005(e)(2)(C), 119 Stat. 2742. In addition, the court must consider, "to the extent the Constitution and laws of the United States are applicable, whether the use of such standards and procedures to make the determination is consistent with the

Constitution and laws of the United States." Ibid. Far from being deprived of any meaningful process, the DTA makes available judicial review to an extent unprecedented in the military habeas context. See Br. in Opp. 13-15.

Petitioners have asserted various objections to the procedures used by the CSRTs and to the sufficiency of the evidence supporting the CSRT determinations, but all of those objections could be presented to the D.C. Circuit in review under the DTA. The D.C. Circuit has already begun expedited consideration of petitions properly filed under the DTA. See, e.g., Parhat v. Gates, No. 06-1397 (D.C. Cir.), and Bismullah v. Gates, No. 06-1197 (D.C. Cir.) (Set for oral argument on May 15, 2007). Thus, petitioners are wrong when they assert that they lack an opportunity for meaningful judicial review of the basis for their detention. Petitioners simply have chosen not to pursue that opportunity and, instead, have decided to come to this Court in the first instance. Petitioners thus do not have the same equitable claim to expedited review as someone who has no alternative avenue for judicial review. Indeed, this Court typically refuses to grant review -- let alone the type of extraordinary expedition sought here -- when parties have declined to exhaust their avenues for relief in the lower courts.

2. The fact that petitioners are urging this Court to consider these petitions -- on the highly expedited schedule that

they have proposed -- before petitioners have exhausted their available statutory avenues of judicial review in challenging their detentions distinguishes this case from the other cases in which this Court has granted expedited review, including Felker v. Turpin, 517 U.S. 1182 (1996) (order granting review).

In Felker, this Court granted review to consider whether Title I of the Anti-Terrorism and Effective Death Penalty Act of 1996 was an unconstitutional restriction on habeas corpus, including, in particular, whether the application of the Act was a "suspension of the writ of habeas corpus in violation of Art. I, § 9, cl. 2 of the Constitution." 517 U.S. at 1183. The Court set the case for expedited briefing and argument in May (opening briefs were due May 17, and the case was set for argument on June 3). Ibid.

Four Justices dissented from the Court's decision to set the case for expedition, stating:

> [I]t is both unnecessary and profoundly unwise for the Court to order expedited briefing of the important questions raised by the petition for certiorari and application for a writ of habeas corpus. Even if the majority were right that this petition presents substantial constitutional questions about the power of Congress to limit this Court's jurisdiction, our consideration of them surely should be undertaken with the utmost deliberation, rather than unseemly haste.

517 U.S. at 1183. (Stevens, J., joined by Souter, Ginsburg, and Breyer, JJ., dissenting). Those considerations apply with special force here. The Court already has an unusually large complement of cases scheduled for oral argument in late April. Adding a May argument involving multiple petitioners and multiple issues of

potential complexity will only add to the Court's burdens at a particularly busy juncture. Especially in light of the review available under the DTA, there is no reason to shoulder those burdens unnecessarily, rather than calendar the case in the ordinary course.

3. If this Court grants certiorari and declines to grant the request for expedition, the cases could be briefed in the ordinary course over the summer and the cases could be scheduled for oral argument on the first day of argument in October. Alternatively, the Court could consider setting the cases for oral argument in September. See, e.g., McConnell v. Federal Election Commission, 539 U.S. 911 (2003) (noting probable jurisdiction and setting the case for briefing over the summer and oral argument on September 3, 2003). Either option would permit the cases to be briefed and considered without undue haste, while also permitting a degree of expedition.

If the Court decides to grant certiorari and to hear the cases this Term, it should reject the schedule proposed by petitioners and adopt one more consistent with those adopted in previous expedited cases. Petitioners' schedule gives petitioners significantly more time for briefing the cases than respondents. If the Court were to grant certiorari on March 30, petitioners' proposed schedule would give petitioners and their amici 17 days for their briefs, and respondents and their amici only 11 days for

their briefs. That time period is particularly short given the volume of amicus briefs that were filed in the prior detainee cases (e.g., Rasul v. Bush, 542 U.S. 466 (2004)) and that would presumably be filed in this case. Instead, respondents propose the following schedule:

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

That schedule largely tracks the schedule that this Court has set for other expedited cases, such as Swidler & Berlin v. United States, 523 U.S. 1057 (1998) (order granting motion to expedite) (expedition granted April 6, 1998; petitioners' brief due April 29; respondent's brief due May 20; petitioner's reply brief due June 1; oral argument June 8), and United States v. Eichman, 494 U.S. 1063 (1990) (order noting probable jurisdiction) (probable jurisdiction noted March 30, 1990; appellant's brief due April 18; appellees' brief due May 3; appellant's reply brief due May 10; oral argument May 14). In addition, the Court is already scheduled to sit (for a non-argument session) on May 21, 2007. That schedule also allows a more reasonable interval for both the Court and the advocates between the end of the April argument calendar and any oral argument in these cases.

As discussed, however, even assuming that the Court grants certiorari, respondents do not believe that these cases warrant expedited consideration during what is traditionally already the busiest period of the Term for the Court.

CONCLUSION

The motions to expedite should be denied. In the alternative, if the Court grants certiorari and decides to set the case for briefing and argument this Term, the Court should adopt the alternative schedule set forth above.

Respectfully submitted.

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Solicitor General
Counsel of Record

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