

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 SALIM AHMED HAMDAN'S MOTION FOR LEAVE
TO FILE PETITION FOR REHEARING OF
PETITION FOR CERTIORARI BEFORE JUDGMENT OUT-OF-TIME

Petitioner Salim Ahmed Hamdan respectfully seeks the Court's leave to file his Petition for Rehearing of Order Denying Certiorari Before Judgment outside the time limit prescribed in Rule 44.2.

1. On February 27, 2007 Petitioner Hamdan filed a Joint Petition for Certiorari and Petition for Certiorari Before Judgment in this case. Several days later, on March 5, 2007, the petitioners in *Boumediene v. Bush* (No. 06-1196) and *Al Odah v. United States* (No. 06-1195) filed petitions for certiorari. Both Petitioner Hamdan and the petitioners in *Boumediene* and *Al Odah* raised challenges to the scope and effect of the jurisdiction-stripping provisions of the Military Commission Act of 2006 ("MCA"), Pub. L. No. 109-148, 119 Stat. 2680. As explained in Petitioner Hamdan's February 27, 2007 petition, his case is a logical and necessary companion to *Boumediene* and *Al Odah*. The

Boumediene and *Al Odah* petitioners raise challenges to the MCA's jurisdiction-stripping provisions as they relate to detention pursuant to Combatant Status Review Tribunals. Hamdan's Petition, by contrast, challenges the MCA's jurisdictional provisions as applied to defendants facing criminal charges before a military commission. In addition, Hamdan's Petition presents constitutional challenges to the MCA not raised by the *Al Odah* and *Boumediene* petitioners.

2. On April 2, 2007, the Court denied the *Boumediene* and *Al Odah* petitions for certiorari. *Boumediene v. Bush*, 127 S.Ct. 1478 (2007). On April 30, 2007, the Court denied Hamdan's Petition for Certiorari Before Judgment. 550 U.S. – (Apr. 30, 2007). On June 29, 2007, acting on petitions for rehearing filed by the *Boumediene* and *Al Odah* petitioners, the Court granted certiorari in those cases and vacated its April 2, 2007 Order denying certiorari. 551 U.S. – (Jun. 29, 2007).

3. Although this Petition for Rehearing is filed after the expiration of the time prescribed in Rule 44.2, the grounds upon which it is based arose after that time. Petitioner Hamdan did not move for rehearing after the April 30 denial of certiorari because the Court had already denied certiorari in *Boumediene* and *Al Odah*, the cases to which Petitioner's case is a logical and necessary companion. Although the *Boumediene* and *Al Odah* petitioners sought rehearing, Petitioner Hamdan did not want to burden the Court at that time with multitudinous filings regarding the propriety of the now-vacated denial of certiorari in those cases. The Court's June 29, 2007 grant of certiorari in *Boumediene* and *Al Odah*, however, provides new grounds for rehearing that were not previously present. Now that *Boumediene* and *Al Odah* will be heard, the Court should have the opportunity to reconsider its denial of certiorari in Petitioner Hamdan's case as well.

4. The Court clearly has the power, in its discretion and in the interests of justice, to consider a petition for rehearing filed outside the formal limits imposed by Rule 44.2. *See United States v. Ohio Power Co.*, 353 U.S. 98 (1957) (granting certiorari out-of-time so that the “case might be disposed of consistently with [] companion cases”); *id.* at 99 (“We have consistently ruled that the interests in finality of litigation must yield where the interests of justice would make unfair the strict application of our rules.”); *Gondeck v. Pan Am. World Airways, Inc.*, 382 U.S. 25, 26-27 (1965) (granting untimely petition for rehearing where “intervening circumstances of substantial ... effect” merited grant of certiorari after deadline to file for rehearing); Robert L. Stern, et al., *Supreme Court Practice* § 15.3 (8th ed. 2002) (“But [it] is not necessarily the case [that petitions for rehearing must be filed in time or not at all], provided that the tardy petition is accompanied by a motion for leave to file the petition out of time.”). As recently as this Term, the Court has reaffirmed that “[t]he procedural rules adopted by the Court for the orderly transaction of its business are not jurisdictional and can be relaxed by the Court in the exercise of its discretion[.]” *Bowles v. Russell*, 551 U.S. – (2007) (slip op. at 7) (quoting *Schacht v. United States*, 398 U.S. 58, 64 (1970)).¹ The intervening grant of certiorari in *Boumediene* and *Al Odah* is, by any measure, an extraordinary and rare event representing a “substantial” change of circumstances that favors the Court exercising its discretion to consider Hamdan’s Petition for Rehearing. *See* Stern, et al., *Supreme Court Practice* § 15.5 (“Quite apart from the timeliness or untimeliness of a petition for rehearing, the plain fact is that the Supreme Court seldom grants a rehearing of any kind of order, judgment or decision.”).

¹ The absence of any jurisdictional language in Rule 44.4 confirms that it is a Rule governing the orderly processing of claims that can be relaxed by the Court where appropriate. *Compare* Rule 44.4 (“The Clerk will not file consecutive petitions and petitions that are out of time under this Rule.”) *with* Rule 13.2 (“The clerk will not file any petition for a writ of certiorari that is *jurisdictionally* out of time. *See, e.g.*, 28 U.S.C. § 2101(c).”) (emphasis added).

5. Here, justice is best served by granting leave to file the Petition for Rehearing. Most critically, the Court should have the opportunity to decide whether Hamdan's case – which presents additional constitutional challenges to the MCA raised in the context of military commissions – should be heard alongside *Boumediene* and *Al Odah* in keeping with the Court's practice of hearing closely related cases simultaneously. See, e.g. *Gratz v. Bollinger*, 539 U.S. 244, 259-60 (2003) (heard in conjunction with *Grutter v. Bollinger*, 539 U.S. 306 (2003)). Moreover, no substantive action has taken place in Petitioner Hamdan's civil case since the prior denial of certiorari; his case remains in the D.C. Circuit Court pending consideration of a Petition for Initial Hearing En Banc. The Government will thus suffer no prejudice by consideration of this Petition outside the time limits in Rule 44.2. Nor did Petitioner Hamdan engage in any substantial delay once the Court issued its June 29 Order in *Boumediene* and *Al Odah*. His Petition for Rehearing has been filed within one business day of that Order, and if certiorari is granted Petitioner Hamdan will be prepared to submit merits briefing on the same schedule established by either the Court or the Rules for briefing in *Boumediene* and *Al Odah*.

For the foregoing reasons, Petitioner Hamdan respectfully requests that the Court grant leave to hear his Petition for Rehearing outside the time limits contained in Rule 44.2.

Respectfully submitted² this 2nd day of July, 2007,

² By this Motion, and the accompanying Petition for Rehearing of Certiorari Before Judgment, only Petitioner Hamdan seeks relief and rehearing. Petitioner Omar Khadr, who is a party to the *Al Odah* action, is not joined in this Motion or the Petition for Rehearing.

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CERTIFICATE OF SERVICE

I hereby certify that on July 2, 2007, copies of the foregoing **Petitioner Hamdan's Motion for Leave to File Petition for Rehearing Out of Time**, were served by electronic mail upon the following:

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