**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

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| **O.K.,** | **Case No. 1:04-CV-01136 (JDB)** |
| **Petitioner,** | |
| **v.** | |
| **GEORGE W. BUSH, *et al.*,** | |
| **Respondents.** | |

**PETITIONER O.K.'S MOTION TO**
**STAY MILITARY COMMISSION PROCEEDINGS**
**AND FOR EXPEDITED BRIEFING SCHEDULE**

Petitioner O.K. respectfully moves this Court to stay military commission proceedings that have been initiated against him by Respondents in Guantánamo Bay, Cuba until the Supreme Court has issued its decision in *Hamdan v. Rumsfeld,* 415 U.S. F.3d 33 (D.C. Cir. 2005), *cert. granted,* 74 U.S.L.W. 3108 (U.S. Nov. 7, 2005) (No. 05-184). Such a stay is necessary in order to protect Petitioner from the irreparable harm of being tried by a tribunal that lacks jurisdiction over the charges against him. Moreover, the issuing of this stay serves the interests of judicial economy and is in the public interest, as the exact, substantial issues to be resolved by the Supreme Court in *Hamdan* have been raised by Petitioner in his challenge to the legality of the military commission process. [1]

Because the commencement of military commission proceedings against O.K. is imminent, with hearings scheduled as early as January 9, 2006, Petitioner respectfully requests that the Court set an expedited briefing schedule on this matter.

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[1] Counsel for Respondents have indicated that they will oppose the present motion.

After subjecting Petitioner to over three years of detention without any charge against him, Respondents on November 7, 2005 for the first time announced charges. On November 23, 2005, those charges were referred to a military commission. That commission has now required counsel, including the undersigned, to be available for conferences with the presiding officer from January 9 to 12, 2006, and has scheduled an initial proceeding for January 11, 2006. Petitioner has filed with this Court and served on Respondents a Supplemental Petition for Writ of Habeas Corpus and Complaint for Declaratory and Injunctive Relief ("Supplemental Petition") [Dkt. No. 145], which, *inter alia,* challenges the jurisdiction of the military commission over the charges that have been brought against him, and alleges that the structural bias of the commission process and numerous procedural infirmities render it unconstitutional and in violation of international law.

Petitioner's substantive challenges to the military commission process include the identical issues to be resolved by the Supreme Court in *Hamdan.* Specifically, Petitioner has argued that (1) any trial by military commission violates the principle of separation of powers, as such commissions have not been authorized by Congress, and (2) the processes established for military commissions violate the Geneva Conventions. In *Hamdan,* the D.C. Circuit held that petitioner was entitled to pre-commission adjudication of both of these challenges. Although the D.C. Circuit ultimately resolved these challenges against Hamdan, and the Supreme Court subsequently granted *certiorari,* it is the Circuit Court's determination of these challenges that is being reviewed, and not the conclusion that petitioner was entitled to have them heard prior to the commission process. Thus, a decision by the Supreme Court reversing the D.C. Circuit would necessarily mean that the military commission process against Petitioner O.K. is illegitimate, and that O.K. is entitled to have that process stopped before it begins. A stay of the commission proceedings in O.K.'s case is therefore necessary in order to prevent irreparable harm to him in the form of nullification of his right to pre-commission adjudication of his claims.

Judge Kollar-Kotelly of this Court reached this conclusion in a recent opinion on a motion by David Hicks, another Guantánamo detainee against whom military commission proceedings have been initiated. Judge Kollar-Kotelly enjoined further proceedings against Hicks "until the Supreme Court has issued a final and ultimate decision in *Hamdan.*" *Hicks v. Bush,* 397 F. Supp. 2d 36 (D.D.C. November 14, 2005). The reasoning of that decision should apply with equal force to the present motion.

## I. FACTUAL BACKGROUND

1. Petitioner O.K. is a 19-year-old Canadian citizen detained by Respondents at Guantánamo Bay. For over three years, he was detained by Respondents without any charges against him.
2. On July 2, 2004, following the Supreme Court's decision in *Rasul v. Bush,* 542 U.S. 466, 124 S. Ct. 2686 (2004), counsel for Petitioner filed with this Court a Petition for Writ of Habeas and Complaint for Declaratory and Injunctive Relief [Dkt. No. 1] challenging the legality of Petitioner's ongoing detention. On August 17, 2004, counsel filed a First Amended Petition for Writ of Habeas Corpus and Complaint for Declaratory and Injunctive Relief [Dkt. No. 11].
3. On November 7, 2005, the United States Supreme Court granted *certiorari* in *Hamdan v. Rumsfeld,* 415 F. 3d 33 (D.C. Cir. 2005), *cert. granted,* 74 U.S.L.W. 3108 (U.S. Nov. 7, 2005) (No. 05-184). Hamdan presented two questions for review by the Supreme Court: (1) "Whether the military commission established by the President to try petitioner and others similarly situated for alleged war crimes in the 'war on terror' is duly authorized under Congress's Authorization for the Use of Military Force (AUMF), Pub. L. No. 10740, 115 Stat. 224; the Uniform Code of Military Justice (UCMJ); or the inherent powers of the President?" and (2) "Whether petitioner and others similarly situated can obtain judicial enforcement from an Article III court of rights protected under the 1949 Geneva Convention

in an action for a writ of habeas corpus challenging the legality of their detention by the Executive branch?" Petition for Writ of Certiorari, *Hamdan v. Rumsfeld,* 2005 WL 1874691 (August 8, 2005) (No. 05-184).

4. Later on in the day on November 7, 2005, after the granting of *certiorari* in *Hamdan* had been announced by the Supreme Court, Respondents, for the first time in over three years of custody of Petitioner, announced formal charges against O.K.

5. On November 23, 2005, these charges were referred by Respondent Altemburg to a military commission. The referral states that military commission proceedings against O.K. are to commence "[a]s soon as practicable." The presiding officer appointed to the commission against O.K. has subsequently required counsel for O.K., including the undersigned, to be available to attend conferences with the presiding officer from January 9 to January 12, 2006. *See* Exhibit A, *Trial Term for Commissions Sessions, Week of 9 Jan 2006, Guantanamo Bay, Cuba,* Email from Keith Hodges dated December 9, 2006. A session in O.K.'s case is scheduled for 10:00 a.m. on January 11, 2006. *Id.*

6. On December 14, 2005, counsel for Petitioner filed with this court a motion for leave of Court permitting to file a supplemental petition, in accordance with Rule 15(d) of the Federal Rules of Civil Procedure [Dkt. Nos.142, 143]. That motion was granted by the Court on December 19, 2005, following which Petitioner filed his Supplemental Petition for Writ of Habeas Corpus and Complaint for Declaratory and Injunctive Relief ("Supplemental Petition") [Dkt. No. 145]. In the Supplemental Petition, Petitioner argues, *inter alia,* that the military commission has been illegally constituted, in violation of U.S. statutory and constitutional law and international law, that the commission lacks jurisdiction over the charges that have been brought against O.K., and that the procedures of the military commission violate O.K.'s rights of equal protection and due process under U.S. and international law.

## II. ARGUMENT

Injunctive relief is appropriate where, as here, (i) petitioner likely would suffer irreparable injury if this Court does not grant injunctive relief, (ii) the injunction would cause no irreparable harm to the respondents, (iii) such an injunction would serve the public interest, and (iv) petitioner's claims have a substantial likelihood of success on the merits. *See, e.g., Al Fayed v. CIA,* 254 F.3d 300, 303 (D.C. Cir. 2001); *Serono Labs. Inc. v. Shalala,* 158 F.3d 1313, 1317-18 (D.C. Cir. 1998). These factors are to be balanced against one another, with a recognition that all four need not be equally strong. *Serono Labs,* 158 F.3d at 1318; *CityFed Fin. Corp. v. Office of Thrift Supervision,* 58 F.3d 738, 746 (D.C. Cir.1995) ("If the arguments for one factor are particularly strong, an injunction may issue even if the arguments in other areas are rather weak").

Assuming that the Court finds that a stay is appropriate in light of the four-factor, sliding scale analysis, it may, under the All Writs Act, 28 U.S.C. § 1651(a), stay the military commission proceedings pending a final decision from the Supreme Court in *Hamdan.* As the D.C. Circuit made clear in *Hamdan,* challenges to the jurisdiction of a military commission over a petitioner are properly considered by the district court *prior* to the adjudication by military commission of that petitioner. *Hamdan,* 415 F. 3d at 36-37; *accord Hicks,* 397 F. Supp. 2d at 41. The All Writs Act, which empowers the Court to issue writs "necessary or appropriate in aid of [its] jurisdiction[]," therefore provides the court with the authority to stay the commission proceedings against Petitioner, in order to preserve the Court's jurisdiction over Petitioner's substantial jurisdictional challenges to the military commission.

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A. O.K. Will be Irreparably Harmed if He is Subjected to a Military Commission Which Lacks Jurisdiction Over Him

A stay is necessary in order to protect O.K. from irreparable harm. Irreparable harm is the keystone to injunctive relief, and the harm faced by the petitioner must be "both certain and great," and "'of such imminence that there is a "clear and present" need for equitable relief to prevent irreparable harm.'" *Wisconsin Gas Co. v. FERC,* 758 F.2d 699, 674 (D.C. Cir. 1985) (quoting *Ashland Oil, Inc. v. FTC,* 409 F. Supp. 297, 307 (D.D.C.), *aff'd,* 548 F.2d 977 (D.C. Cir. 1976) (internal citation omitted). The injury faced by O.K. if the military commission proceeds meets this exacting standard.

The D.C. Circuit's decision in *Hamdan* articulates the type and magnitude of harm that Petitioner faces if the military commission goes forward. As the Court stated, a decision by a court to overturn the judgment and conviction of a tribunal after the fact "insufficiently redresses the defendant's right not to be tried by a tribunal that has no jurisdiction." *Hamdan,* 415 F.3d at 36 (citing *Abney v. United States,* 431 U.S. 651, 662 (1977). As used by the D.C. Circuit, the phrase "insufficient[] redress[]" is, at base, a statement of irreparable harm. The injury that would be done to Petitioner if the military commission proceeded against him could not be cured if the Supreme Court reversed in *Hamdan.* As Judge Kollar-Kotelly has noted, the crux of that injury is "the fact that [Petitioner] would have been tried by a tribunal without any authority to adjudicate the charges against him in the first place, potentially subjecting him to a second trial before a different tribunal." *Hicks,* 397 F. Supp. 2d at 42.

As Judge Kollar-Kotelly suggests, the nature and magnitude of the injury that Petitioner would face is akin to that of double jeopardy. Indeed, the *Abney* case cited by the D.C. Circuit was a double jeopardy case. As the Supreme Court stated in *Abney*, "the guarantee against double jeopardy assures an individual that, among other things, he will not be forced, with certain exceptions, to endure the personal strain, public embarrassment, and expense of a

criminal trial more than once for the same offense." *Abney,* 431 U.S. at 661. This injury—so great as to undergird a constitutional right, and to find deep precedential support in Anglo-American common law—is indisputably sufficient to support a finding of irreparable harm to Petitioner.[2]

Similarly, the injury faced by O.K. if he is denied pre-commission adjudication of his jurisdictional challenges can be analogized to a claim of immunity. As with double jeopardy, interlocutory orders denying claims of official immunity are properly heard pre-trial. *See Mitchell v. Forsyth,* 472 U.S. 511 (1985). To do otherwise would obviate the very right of immunity claimed by the defendant. O.K.'s jurisdictional challenges constitute a claim to jurisdictional immunity with respect to the military commission. To allow the military commission to proceed against O.K. before these challenges are resolved would obviate the very rights that Petitioner claims, and specifically, the "right not to be tried by a tribunal that has no jurisdiction." *Hamdan,* 415 U.S. F.3d at 36.

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[2] Notably, the sparse and ever-changing rules of the military commission provide no guarantee against double jeopardy. The current incarnation of the rules does provide that an accused detainee "shall not again be tried by any Commission for a charge once a Commission's finding on that charge becomes final." *See* Department of Defense Military Commission Order No. 1 (August 31, 2005) (superseding Military Commission Order No. 1 issued March 21, 2002) ¶ 5(P), *available at* http://www.defenselink.mil/news/Sep2005/d20050902order.pdf. However, there is nothing in the rules to prevent Respondents from retrying a defendant at any time if the Commission conviction is not deemed "final" (by the President or the Secretary of Defense), or from removing Petitioner from military custody and seeking to try him in federal court, as Respondents are presently attempting in the case of José Padilla. *See Padilla v. Hanft,* -- F. 3d. -- (4th Cir. December 21, 2005) (No. 05-6396), *available at* http://pacer.ca4.uscourts.gov/opinion.pdf/056396R1.P.pdf (denying government motion to transfer Padilla, an "enemy combatant" as designated by the President, from military custody in South Carolina to civilian law enforcement custody in Florida). Moreover, Respondents have argued throughout this litigation that the detainees at Guantánamo Bay are not entitled to any constitutional protections whatsoever, including due process under the Fifth Amendment (a position rejected by Judge Green with respect to Petitioner O.K., *see In re. Guantanamo Detainee Cases,* 355 F.Supp.2d 443 (D.D.C. 2005)), and presumably would argue that Petitioner is not entitled to the Fifth Amendment's protection against double jeopardy either. However, O.K. need not demonstrate here that he is entitled to a constitutional right against double jeopardy; rather, the fact that the injury he faces is equivalent to that for which the Constitution provides specific protection establishes the requisite harm for injunctive relief to be granted. And if Respondents are correct that Petitioner is not entitled to assert a right against double jeopardy, then the injury he would suffer is all the more irreparable.

O.K. faces additional irreparable harm if he is required to participate in a military commission that is structurally biased in favor of Respondents. O.K. has made exactly this claim in his Supplemental Petition, and this issue is on review before the Supreme Court in *Hamdan*. As the D.C. Circuit held in *Cobell v. Norton*, 33 F. 3d 1128 (D.C. Cir. 2003), post-trial review of partial proceedings is inadequate because the injury done by a partial judicial authority is irreparable:

> "The remedy by appeal is inadequate. It comes after the trial and, if prejudice exist, it has worked its evil and a judgment of it in a reviewing tribunal is precarious. It goes there fortified by presumptions, and nothing can be more elusive of estimate or decision than a disposition of a mind in which there is a personal ingredient."

*Cobell*, 33 F.3d at 1139 (quoting *Berger v. United States*, 255 U.S. 22, 36, (1921)).

Just as the magnitude of the harm faced by O.K. cannot be disputed, nor can its imminence. Respondent Altenburg, the Appointing Authority for the military commissions, has ordered that commission proceedings against O.K. commence "[a]s soon as practicable." The presiding officer of the commission constituted in O.K.'s case has since required counsel for O.K., including the undersigned, to be available to attend conferences at Guantánamo Bay with the presiding officer from January 9 to January 12, 2006, and has scheduled a formal hearing for January 11, 2005. Thus, the harm faced by O.K. is on the immediate horizon, thereby necessitating a stay.

Any suggestion that the harm faced by O.K. is speculative must be rejected. If, as Petitioner has argued and the Supreme Court is now considering in *Hamdan*, the military commission is illegitimate and lacks jurisdiction over O.K., then the harm done to him, as recognized by the D.C. Circuit, commences with the first commission proceeding. To permit the commission proceedings to go forward before adjudicating the jurisdictional claims would subject O.K. to exactly the injury for which, according to the D.C. Circuit, post-commission

review would provide insufficient redress. The only way that this harm can be avoided is by having Petitioner's substantial jurisdictional claims adjudicated by the Court pre-commission, and in light of Respondents' decision to initiate commission proceedings during the week of January 9, 2006, such adjudication can only be done if the commission process against O.K. is stayed.

B. Staying the Military Commission Proceeding Against O.K. Will Not Prejudice Respondents

The staying of the military commission proceeding against O.K. pending a final decision in *Hamdan* would not prejudice Respondents. Respondents have incarcerated O.K. for nearly three and a half years without initiating military commission proceedings against him. Thus, while O.K. is eager to bring his indefinite detention to an end, in light of this long delay on Respondents' part it is difficult to see how Respondents would be prejudiced by awaiting a decision by the Supreme Court in a case already pending there. Moreover, in the past Respondents themselves have expressed a desire to stay Guantánamo proceedings in order to permit an appeal in the *Hamdan* case to be decided. Specifically, in the case of *Hicks v. Bush,* 1:02-cv-00299 (CKK), Respondents asked for an abeyance of proceedings in Guantánamo detainee David Hicks's habeas case pending a decision by the D.C. Circuit in *Hamdan,* arguing that judicial economy so warranted because the D.C. Circuit's decision might require reevaluation of issues by the habeas court if it were to act in the interim. *See* Exhibit B, Response to Order to Show Cause, No. 1:02-cv-00299 (CKK)) (D.D.C. filed 11/29/2004).

In *Hamdan* itself (filed as *Swift v. Rumsfeld*), Respondents moved to hold the original habeas petition in abeyance on the grounds of judicial economy in light of then-pending Supreme Court Cases that might effect the outcome. *See* Exhibit C, Motion for Order Holding Petition in Abeyance, *Swift v. Rumsfeld,* No. C04-777RSL, at 8-9 (W.D. Wash. Filed April 23, 2004)

(exhibits excluded). Respondents' earlier appeals to judicial economy in *Hicks* and *Hamdan* justify the issuance of a stay here just as they did in those cases. The argument in favor of a stay is made only stronger by the fact that *Hamdan* is now pending before the Supreme Court, such that the highest court in the land is now poised to rule upon, and may well invalidate, the commission process.

C. The Public Interest Favors Awaiting a Decision From the Supreme Court on the Exact Issues to Be Litigated in the Present Case

Just as Respondents have argued previously in *Hicks* and *Hamdan,* it is in the public interest for the military commission to await guidance from the Supreme Court on issues relating directly to the legality of the commissions. Not only are the interests of judicial economy served by a stay, so, too, is a broader interest in ensuring the legitimacy of the commission process.

While the granting of *certiorari* does not tell us the ultimate outcome of the issues in *Hamdan,* the fact that the case is now pending before the Supreme Court does create the possibility that the commission process will be held illegal. The legitimacy of the commission process therefore hangs in the balance. If the Supreme Court has granted *certiorari,* it is fair to conclude that there is at least reason to believe that the commission may be illegal. For the commission against O.K. to go forward with *Hamdan* in its current posture would necessarily raise questions about the fairness of the process, thereby doing damage to a public interest in maintaining the integrity of American judicial processes. Indeed, the granting of *certiorari* in *Hamdan* has intensified concerns, both domestically and internationally, regarding standards of justice at Guantánamo, concerns that previously have been fueled by Respondents' insistence on their right to hold indefinitely those individuals designated as "enemy combatants," and by the numerous, substantiated allegations of torture and abuse of detainees at Guantánamo. As Judge Kollar-Kotelly concluded, "It would not be in the public interest to subject Petitioner to a process

which the highest court in the land may determine to be invalid. It is in the public interest to have a final decision, leaving no doubts as to this key jurisdictional issue, before Petitioner's military commission proceedings begin." *Hicks,* 397 F. Supp. 2d at 43.

D. The D.C. Circuit's Decision in *Hamdan* Does Not Preclude the Staying of the Military Commission Against O.K.

Although the D.C. Circuit has decided the merits of *Hamdan* against the petitioner, this does not preclude the staying of the military commission against O.K. As noted previously, the present request for a stay is to be adjudicated along a sliding scale. Thus, an injunction may issue "where there is a particularly strong likelihood of success on the merits even if there is a relatively slight showing of irreparable injury," *CityFed Financial Corp. v. Office of Thrift Supervision,* 58 F.3d 738, 745 (D.C. Cir. 1995), but may also issue in "a case in which the other three factors strongly favor interim relief ... if the movant has made a *substantial* case on the merits." *Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc.,* 559 F.2d 841, 843 (D. C. Cir. 1977) (emphasis added).

While the D.C. Circuit ruled against petitioner on the merits in *Hamdan,* it stated explicitly that the arguments raised by petitioner were substantial. *Hamdan,* 415 F.3d at 36-37. The fact that the Supreme Court has granted *certiorari* further supports the view that petitioner's case on the merits is substantial. *See Hicks,* 397 F. Supp. 2d at 44 ("Recognizing the importance of the D.C. Circuit's ruling in *Hamdan* and the 'substantial' issues raised by those challenging the military commission's jurisdiction, the Supreme Court has already granted *certiorari* in the case for immediate briefing and oral argument this term."). Even if the Court were to conclude that the likelihood of success on the merits is weak, injunctive relief is still warranted in light of the overwhelming strength of the other three factors.

A weighing of all four factors for injunctive relief therefore favors granting the request to stay the military commission proceeding against O.K. Such relief fulfills the purpose of interim injunctive relief, "to maintain the status quo pending a final determination of the merits of the suit," *Holiday Tours,* 559 F.2d at 844, and is especially appropriate in light of the impending, ultimate determination of the issues by the Supreme Court.

## III. CONCLUSION

Based on the foregoing analysis, Petitioner O.K. respectfully requests that this court stay the military commission proceedings against him pending a final decision from the Supreme Court in *Hamdan v. Bush,* and order an expedited briefing schedule in light of the impending commission hearings scheduled for the week of January 9, 2006.

Respectfully submitted,

/s/ Muneer I. Ahmad
Muneer I. Ahmad, Bar No. 438131
Richard J. Wilson, Bar No. 425026

INTERNATIONAL HUMAN RIGHTS LAW
CLINIC, AMERICAN UNIVERSITY
WASHINGTON COLLEGE OF LAW
4801 Massachusetts Ave., NW
Washington, DC 20016
(202) 274-4004
(202) 274-0659 (fax)

Counsel for Petitioner

**Hodges, Keith**

**From:** Hodges, Keith
**Sent:** Friday, December 09, 2005 3:36 PM
**To:** [redacted]
**Cc:** [redacted]
**Subject:** Trial Term for Commissions Sessions, Week of 9 Jan 2006, Guantanamo Bay, Cuba

1. Colonels Brownback and Chester have scheduled a trial term for Military Commissions during the week of 9 Jan 2006 at Guantanamo Bay, Cuba.

2. Counsel in US v. al Bahlul and US v. Khadr will be prepared to attend conferences at the call of the respective Presiding Officers during the period 1200 hours, 9 Jan through 12 Jan.

3. A session will be held in the case of United States v. al Bahlul at 1000, 10 Jan 2006. This will be the earliest session for that case during the trial term. Other sessions may be held during the trial term.

4. A session will be held in the case of United States v. Khadr at 1000, 11 Jan 2006. This will be the earliest session for that case during the trial term. Other sessions may be held during the trial term.

5. This trial term docket is subject to change, however the first session in a specific case will not be held earlier than as indicated in paragraphs 3 and 4 above.

6. The Presiding Officers anticipate that if sessions other than those indicated in paragraphs 3 and 4 above are held, the latest session would be on 12 Jan. However, all parties must realize that the trial term will not end until each Presiding Officer is satisfied that a further session during the trial term would be of no additional benefit.

7. Parties will be kept advised of any changes so that travel and other logistical arrangements can be made.

BY DIRECTION OF THE PRESIDING OFFICER

Keith Hodges
Assistant to the Presiding Officers
Military Commission
[redacted]

**EXHIBIT B**

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

| | | |
|---|---|---|
| **DAVID M. HICKS,** | ) | |
| **Petitioner,** | ) | |
| **v.** | ) | **Civil Action No. 1:02-CV-00299 (CKK)** |
| | ) | **ECF** |
| **GEORGE WALKER BUSH,** | ) | |
| **President of the United States,** | ) | |
| ***et al.*,** | ) | |
| **Respondents.** | ) | |

**RESPONSE TO ORDER TO SHOW CAUSE REGARDING RESPONDENTS' MOTION TO DISMISS OR FOR JUDGMENT AS A MATTER OF LAW WITH RESPECT TO CHALLENGES TO THE MILITARY COMMISSION PROCESS**

On November 18, 2004, this Court ordered that "counsel for petitioners and respondents shall file written submissions on or before November 29, 2004 showing cause why the respondents' Motion to Dismiss or for Judgment as a Matter of Law with Respect to Challenges to the Military Commission Process should not be held in abeyance pending resolution of all appeals in Hamdan v. Rumsfeld." Order to Show Cause Regarding Respondents' Motion to Dismiss or for Judgment as a Matter of Law with Respect to Challenges to the Military Commission Process at 2 (dkt. no. 123) ("Order"). For the following reasons, respondents do not oppose the suggestion that their pending Motion to Dismiss on military commission issues be held in abeyance.

It is not in the interest of the efficient administration of justice for this Court to review the legality of military commission proceedings at this time. As this Court has stated, "respondents recently filed a notice of appeal in Hamdan seeking expedited review of the legality of the

military commission proceedings that are also at issue in this case." Order at 1. Briefing in the Hamdan appeal is proceeding on an expedited basis and is scheduled to be completed by January 10, 2005.[1] Holding the military commission issues in abeyance is warranted in the instant case because a decision from the D.C. Circuit in Hamdan would provide guidance on how to address these issues. Any decision on the military commission issues in this case that came before the D.C. Circuit's ruling in Hamdan would need to be reevaluated in light of the D.C. Circuit's decision. In the interests of judicial efficiency, the resolution of these issues should be stayed pending the Hamdan decision.

Further, the trial in Mr. Hicks' military commission proceeding is not until March 15, 2005, as currently scheduled. No additional proceedings in the military commission matter are scheduled; thus, it does not appear that the Court needs to resolve the issues raised in this case concerning the military commission proceedings anytime soon. It is quite possible that the D.C. Circuit, working on an expedited review schedule, will make a decision in Hamdan before March 15, 2004. Respondents are willing to notify this Court if the situation regarding the scheduling of the military commission proceedings or the appeal changes.

Therefore, there is currently no reason for this Court not to wait for the D.C. Circuit's decision in Hamdan before addressing these significant issues.

DATED this 29th day of November, 2004.

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[1] The petitioner in Hamdan has petitioned the Supreme Court to grant certiorari before judgment in the Court of Appeals, and has sought expedited consideration of the matter. To date, the Supreme Court has not ruled on petitioner's requests.

**EXHIBIT B**

Respectfully submitted,

PETER D. KEISLER
Assistant Attorney General

KENNETH L. WAINSTEIN
United States Attorney

BRIAN D. BOYLE
Principal Deputy Associate Attorney General

JONATHAN L. MARCUS
DAVID B. SALMONS
Assistants to the Solicitor General

DOUGLAS N. LETTER
Terrorism Litigation Counsel

ROBERT D. OKUN
Assistant United States Attorney
Chief, Special Proceedings Section

/s/ Nicholas J. Patterson
JOSEPH H. HUNT (D.C. Bar No. 431134)
VINCENT M. GARVEY (D.C. Bar No. 127191)
TERRY M. HENRY
NICHOLAS J. PATTERSON
Attorneys
U.S. Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Ave., N.W., Room 7220
Washington, D.C. 20530
Telephone: (202) 514-4523
Fax: (202) 616-8470

Attorneys for Defendants

**EXHIBIT C**

Judge Lasnik

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

Lieutenant Commander CHARLES SWIFT, as next friend for SALIM AHMED HAMDAN, Military Commission Detainee, Camp Echo, Guantanamo Bay Naval Base, Guantanamo, Cuba,

Petitioner,

v.

DONALD H. RUMSFELD, United States Secretary of Defense; JOHN D. ALTENBURG, Jr., Appointing Authority for Military Commissions, Department of Defense; Brigadier General THOMAS L. HEMINGWAY, Legal Advisor to the Appointing Authority for Military Commissions; Brigadier General JAY HOOD, Commander Joint Task Force, Guantanamo, Camp Echo, Guantanamo Bay, Cuba; GEORGE W. BUSH, President of the United States,

Respondents.

NO. C04-0777RSL

**NOTICE OF MOTION AND MOTION FOR ORDER HOLDING PETITION IN ABEYANCE; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF**

(Note on Motion Calendar for: May 14, 2004)

Respondents, through their attorneys, hereby move this Court for an order that the petition filed herein be held in abeyance. This motion is made on the ground that prior practice, principles of judicial economy, and considerations of inter-branch comity and separation of powers, strongly support respondents' request.



UNITED STATES ATTORNEY
601 UNION STREET, SUITE 5100
SEATTLE, WASHINGTON 98101-3903
(206) 553-7970

**EXHIBIT C**

This motion is made and based on the accompanying memorandum of points and authorities, the pleadings and papers filed herein, and such oral argument as the Court may entertain.

DATED this 23 day of April, 2004.

Respectfully submitted,

JOHN McKAY
United States Attorney

PAUL C. CLEMENT
Deputy Solicitor General

GREGORY G. GARRE
Assistant to the Solicitor General

JONATHAN L. MARCUS
Attorney
Appellate Section, Criminal Division
U.S. Department of Justice
601 D. Street, N.W. Suite 6206
Washington, D.C. 20530
Telephone: (202) 305-3210
Fax: (202) 305-2121
E-mail: jonathan.marcus@usdoj.gov

s/ Brian C. Kipnis
BRIAN C. KIPNIS
Assistant United States Attorney
601 Union Street, Suite 5100
Seattle, WA 98101-3903
Telephone: (206) 553-7970
Fax: (206) 553-0116
E-mail: brian.kipnis@usdoj.gov

Attorneys for Respondents

**EXHIBIT C**

## MEMORANDUM OF POINTS AND AUTHORITIES

Respondents respectfully request that this Court hold in abeyance the above-captioned petition for writ of mandamus pursuant to 28 U.S.C. 1361 or, in the alternative, writ of habeas corpus ("petition"), pending the Supreme Court's disposition of Rasul v. Bush, S. Ct. No. 03-334 and Al Odah v. United States, S. Ct. No. 03-343 (argued Apr. 20, 2004), and Rumsfeld v. Padilla, S. Ct. No. 03-1027 (to be argued Apr. 28, 2004). As explained below, prior practice, principles of judicial economy, and considerations of inter-branch comity and separation of powers, strongly support respondents' request.[1]

## STATEMENT OF FACTS

1. In response to the September 11 attacks, the President dispatched the U.S. armed forces to Afghanistan to seek out and subdue the al Qaeda terrorist network and the Taliban regime that had supported it. U.S. and coalition forces have captured or taken control of thousands of individuals in connection with the ongoing hostilities in Afghanistan. As in virtually every other armed conflict in the Nation's history, the military has determined that many of those individuals should be detained during the conflict as enemy combatants. Such detention serves the vital military objectives of preventing captured combatants from rejoining the conflict and gathering intelligence to further the overall war effort and prevent additional attacks.

Individuals taken into U.S. control in connection with the ongoing hostilities undergo a multi-step screening process to determine if their detention is necessary. Detainees whom the U.S. military determines, after conducting this screening process, have a high potential intelligence value or pose a particular threat may be transferred to the U.S. Naval Base at Guantanamo Bay, Cuba. Only a small fraction of those captured in connection with the current conflict and subjected to the screening process have been designated for detention at

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[1] This response is limited to respondents' request to hold the petition in abeyance. By filing this request, respondents do not waive any grounds for dismissal of the petition, including but not limited to lack of jurisdiction, lack of venue, failure to exhaust remedies, and failure to state a claim on which relief could be granted. Respondents propose that, in the event this Court determines that a response to the petition is warranted, it direct respondents to file their response 30 days after the Supreme Court's ruling in Rasul/Al-Odah and Padilla, whichever comes later.



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601 UNION STREET, SUITE 5100
SEATTLE, WASHINGTON 98101-3903
(206) 553-7970

Guantanamo. Upon their arrival at Guantanamo, detainees are subject to an additional assessment by military commanders regarding the need for their detention. The military is currently detaining about 595 aliens at Guantanamo.

Pursuant to the November 13, 2001 military order, the President may exercise his authority as Commander in Chief to subject to trial before a military commission any non-citizen detained at Guantanamo or elsewhere who the President has reason to believe (1) is a member of al Qaeda; (2) is engaged in international terrorism aimed at harming the United States; or (3) has knowingly harbored an individual who fits into one of the first two categories. Military Order (Ex. B to Declaration of Lieutenant Commander Charles Swift ("Swift Decl.") § 2(a).

2. On July 3, 2003, the President designated Salim Ahmed Hamdan, on whose behalf this petition has been filed, for trial by military commission, upon determining that there was reason to believe that Hamdan was a member of al Qaeda or otherwise involved in terrorism against the United States. July 3, 2003 Background Briefing on Military Commissions (Ex. A to Swift Decl.), at 1. As a result of this designation, the Department of Defense (DOD) assigned Lieutenant Commander Charles Swift to meet with and defend Hamdan, whom DOD may charge with a violation of the laws of war before a military commission. In addition, Hamdan, who had been housed with other enemy combatants at Guantanamo, was moved in December 2003 to a different facility at Guantanamo, Camp Echo, where he has his own cell in which he may have private discussions with his lawyer. Briefing on Detainee Operations at Guantanamo Bay (Ex. C to Swift Decl.), at 10.

3. On April 6, 2004, Swift filed this next-friend habeas petition on behalf of Hamdan challenging Hamdan's pre-trial confinement, prospective trial, and continued detention on multiple constitutional, statutory, and treaty-based grounds. Pet. 15-23 (Claims For Relief). The petition requests, among other things, an order mandating Hamdan's release from confinement in Camp Echo, enjoining respondents from enforcing the Military Order of November 13, 2001, compelling respondents to justify Hamdan's continued detention as an enemy combatant, and mandating Hamdan's release from U.S. custody in the absence of



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(206) 553-7970

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adequate justification. Pet. 24-25 (Prayer For Relief).

4. Hamdan is not the first Guantanamo detainee to have a federal court challenge filed on his behalf. On February 19, 2002, the parents of four British and Australian nationals at Guantanamo filed in District Court for the District of Columbia a next-friend petition for habeas corpus on behalf of those detainees. On May 1, 2002, the family members of 12 Kuwaiti nationals detained at Guantanamo filed in Washington, D.C. a civil action on their behalf. And on June 10, 2002, the wife of another Guantanamo detainee, Mamdouh Habib, also filed in Washington, D.C. a petition for habeas corpus on his behalf.

The government moved to dismiss all three actions for lack of subject- matter jurisdiction under Johnson v. Eisentrager, 339 U.S. 763 (1950), where the Supreme Court held that neither the Constitution nor the federal habeas statutes conferred jurisdiction to consider a habeas petition filed on behalf of German nationals who had been seized overseas following the German surrender in World War II, tried by a military commission, and imprisoned at a U.S.-controlled facility in Germany. As the government explained in its motions to dismiss, under the principles recognized by the Supreme Court in Eisentrager, the U.S. courts lack jurisdiction over claims filed on behalf of Guantanamo detainees because all of them are aliens with no connection to the United States, and they are being detained outside of the sovereign territory of the United States. The district court agreed with the government and dismissed the challenges for lack of jurisdiction. Rasul v. Bush, 215 F. Supp. 2d 55, 65-73 (D.D.C. 2002).

The D.C. Circuit affirmed. Al Odah v. United States, 321 F.3d 1134 (D.C. Cir.), cert. granted sub nom., Rasul v. Bush, 124 S. Ct. 435 (2003). The court of appeals concluded that "the detainees [in this case] are in all relevant respects in the same position as the prisoners in Eisentrager" and thus held that, under the fundamental principles established by the Supreme Court in Eisentrager, "the [United States] courts are not open to them." Id. at 1145. As the court explained, like the prisoners in Eisentrager, the Guantanamo detainees "too are aliens, they too were captured during military operations, they were in a foreign country when captured, they are now abroad, they are in the custody of the American



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601 UNION STREET, SUITE 5100
SEATTLE, WASHINGTON 98101-3903
(206) 553-7970

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military, and they have never had any presence in the United States." Id. at 1140.

The D.C. Circuit's decision is now before the Supreme Court, which granted certiorari to consider "[w]hether United States courts lack jurisdiction to consider challenges to the legality of the detention of foreign nationals captured abroad in connection with hostilities and incarcerated at the Guantanamo Bay Naval Base, Cuba." Rasul v. Bush, 124 S. Ct. 534 (2003) (S. Ct. No. 03-334); Al Odah v. United States, 124 S. Ct. 534 (2003) (S. Ct. No. 03-343). A copy of the government's brief in Rasul/Al Odah is attached as Exhibit A.

The Supreme Court heard argument in Rasul and Al-Odah on April 20, 2004, and a decision is expected by late June 2004 before the Court's summer recess. If the Supreme Court upholds the D.C. Circuit's ruling that aliens held abroad cannot access the U.S. courts, then this petition must be dismissed for lack of jurisdiction.[2]

5. Additional federal court challenges have been filed on behalf of Guantanamo detainees and have been stayed pending the Supreme Court's decision in Rasul/Al Odah. For example, following the Ninth Circuit's ruling that the District Court for the Central District of California had jurisdiction to consider a petition for a writ of habeas corpus filed on behalf of Salim Gherebi, a Guantanamo detainee, Gherebi v. Bush, 352 F.3d 1278 (9th Cir. 2003), the Ninth Circuit stayed its mandate and then the Supreme Court granted the government's application for a stay of proceedings in the case pending the filing and disposition of a petition for a writ of certiorari asking the Supreme Court to hold Gherebi for the decision in Rasul/Al Odah. Bush v. Gherebi, No. 03A637, 124 S. Ct. 1197 (Feb. 5, 2004). That stay is still in effect.

Similarly, on April 9, 2004, the District Court for the Central District of California stayed a second action filed on behalf of Gherebi "in light of the Supreme Court's imminent decision in [Rasul and Al Odah] raising the same threshold jurisdictional issue as this case."

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[2] Petitioner in this case filed an amicus brief in the Supreme Court in Al-Odah urging the Court "to preserve the option of case-by-case review to assess jurisdiction" rather than issue a broad ruling foreclosing access to the federal courts by all those held in Guantanamo regardless of the nature of the challenge. Brief Of The Military Attorneys Assigned To The Defense In The Office Of Military Commissions As Amicus Curiae In Support Of Neither Party, Al-Odah v. United States, No. 03-343, at 4.



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601 UNION STREET, SUITE 5100
SEATTLE, WASHINGTON 98101-3903
(206) 553-7970

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Gherebi v. Bush, CV 04-0210-RSWL (MANX), Order Granting Application For A Stay And Extension Of Time (attached as Exhibit B), at 2.

6. The case of Jose Padilla, a U.S. citizen enemy combatant detained at the naval brig in Charleston, South Carolina, raises an issue that this Court would face if the Supreme Court held in Rasul/Al Odah that aliens captured, detained, and prosecuted outside the United States during wartime are permitted to file habeas challenges in federal court – namely, whether this Court's habeas jurisdiction under 28 U.S.C. 2241 extends to respondents who are located outside its territorial jurisdiction.

In Padilla, the government argued before the federal district court in New York and the court of appeals that even if Secretary Rumsfeld were a proper respondent, the district court for the Southern District of New York did not have habeas jurisdiction over him because he is located in the Eastern District of Virginia. That issue is now before the Supreme Court, which will hear argument in the case on April 28, 2004. See Brief For The Petitioner, Rumsfeld v. Padilla, S. Ct. No. 03-1027, at (I), 21-26 (attached as Ex. C). If the government prevails on that issue in Padilla, then this Court would be obliged to dismiss or transfer this petition, because none of the respondents that petitioner has named is located in the Western District of Washington. Moreover, however the Supreme Court ultimately resolves Rasul/Al Odah and Padilla, its decisions almost certainly will shed additional light on, inter alia, the jurisdiction of the federal courts to entertain a habeas challenge to the detention of enemy combatants.

## ARGUMENT

A federal court has "broad discretion to stay proceedings as an incident to its power to control its own docket." Clinton v. Jones, 520 U.S. 681, 706 (1997). "Especially in cases of extraordinary public moment, [a plaintiff] may be required to submit to delay not immoderate in extent and not oppressive in its consequences if the public welfare or convenience will thereby be promoted." Landis v. North American Co., 299 U.S. 248, 256 (1936); see also Leyva v. Certified Grocers of Cal., Ltd., 593 F.2d 857, 863 (9th Cir. 1979) (Kennedy, J.) (It is well-settled that "trial court may, with propriety, find it is efficient for its own docket and



UNITED STATES ATTORNEY
601 UNION STREET, SUITE 5100
SEATTLE, WASHINGTON 98101-3903
(206) 553-7970

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the fairest course for the parties to enter a stay of an action before it, pending resolution of independent proceedings which bear upon the case.").

Federal courts routinely exercise their discretion to hold cases in abeyance when an impending decision from the Supreme Court is likely to shed light on the issue(s) before them. See, e.g., United States v. Toliver, 351 F.3d 423, 429 n.3 (9th Cir. 2003) ("[W]e deferred consideration of the defendants' consolidated appeals pending [Supreme Court decision]."); Hensala v. Dep't of the Air Force, 343 F.3d 951, 955 (9th Cir. 2003) ("We ordered the submission of this case deferred pending [Supreme Court decision]."); Majors v. Abell, 361 F.3d 349, 352 (7th Cir. 2004) (deferring consideration of challenge to constitutionality of state statute until the Supreme Court decided challenge to constitutionality of "rather similar" federal law); Marshel v. AFW Fabric Corp., 552 F.2d 471, 472 (2d Cir. 1977) (per curiam) (directing district court to stay further proceedings pending Supreme Court's resolution of "closely related case" that will "in all likelihood" decide question presented).

Because the Supreme Court's impending decision in Rasul/Al Odah will be potentially dispositive of the threshold jurisdictional issue presented by the petition, and because Padilla will be potentially dispositive of the propriety of filing the petition in the Western District of Washington, this Court should hold the petition in abeyance until those cases are decided. Indeed, it would be an unnecessary expenditure of resources for the parties to litigate – and for this Court to adjudicate – the very same jurisdictional issues the Supreme Court is virtually certain to address over the next two months and resolve in a manner that will dispose of this petition or, at a minimum, provide substantial guidance regarding its viability in the federal courts and the Western District of Washington in particular.

Not only do the interests in judicial economy and conservation of resources tip decidedly in favor of temporarily suspending these proceedings, but the prejudice to Hamdan is also minimal. The Supreme Court is expected – in accordance with its custom of deciding argued cases before its summer recess – to hand down its decisions in Rasul/Al Odah and Padilla by the end of June, little more than two months from now. Those decisions either will require the outright dismissal or transfer of the petition or, if they do not, will considerably



UNITED STATES ATTORNEY
601 UNION STREET, SUITE 5100
SEATTLE, WASHINGTON 98101-3903
(206) 553-7970

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narrow the issues that this Court must address in the motion to dismiss that respondents intend to file. Either way, Hamdan suffers little by deferring proceedings briefly until the Supreme Court rules. And, at the same time, both parties, not to mention the Court, are likely to benefit from the guidance provided by those decisions in framing and resolving the threshold issues presented by the petition in this case.

Finally, especially where these matters are pending before the Supreme Court, requiring the Executive to respond at this time to the petition in this case filed on behalf of an alien held abroad in connection with ongoing hostilities raises inter-branch comity and separation-of-powers concerns. The Court may avoid those concerns simply by holding this case in abeyance for the relatively brief period until the Supreme Court issues its decisions in Al Odah/Rasul and Padilla.



UNITED STATES ATTORNEY
601 UNION STREET, SUITE 5100
SEATTLE, WASHINGTON 98101-3903
(206) 553-7970

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## CONCLUSION

For the foregoing reasons, respondents respectfully urge this Court to hold the petition in abeyance pending the Supreme Court's decisions in Rasul/Al Odah and Padilla.

DATED this 23 day of April, 2004.

Respectfully submitted,

JOHN McKAY
United States Attorney

PAUL C. CLEMENT
Deputy Solicitor General

GREGORY G. GARRE
Assistant to the Solicitor General

JONATHAN L. MARCUS
Attorney
Appellate Section, Criminal Division
U.S. Department of Justice
601 D. Street, N.W. Suite 6206
Washington, D.C. 20530
Telephone: (202) 305-3210
Fax: (202) 305-2121
E-mail: jonathan.marcus@usdoj.gov

s/ Brian C. Kipnis
BRIAN C. KIPNIS
Assistant United States Attorney
601 Union Street, Suite 5100
Seattle, WA 98101-3903
Telephone: (206) 553-7970
Fax: (206) 553-0116
E-mail: brian.kipnis@usdoj.gov

Attorneys for Respondents

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on April 23, 2004, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following CM/ECF participant(s):

David Roy East

Joseph McMillan

Harry H. Schneider

Charles Christian Sipos

and I further certify that on the same date I caused to be mailed by United States Postal Service the document to the following non-CM/ECF participants:

Neal Katyal
Georgetown University Law Center
600 New Jersey Avenue
Washington, D.C. 20001

Charles Davidson Swift
Office of the Chief Defense Counsel for Military Commissions
1931 Jefferson Davis Hwy, Suite 103
Arlington, VA 22202

s/ Christine Leininger
CHRISTINE LEININGER
Supervisory Legal Assistant
United States Attorney's Office



UNITED STATES ATTORNEY
601 UNION STREET, SUITE 5100
SEATTLE, WASHINGTON 98101-3903
(206) 553-7970

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

| | |
|---|---|
| **O.K.,** | **Case No. 1:04-CV-01136 (JDB)** |
| **Petitioner,** | |
| **v.** | |
| **GEORGE W. BUSH, *et al.*,** | |
| **Respondents.** | |

**[PROPOSED] ORDER**

Petitioner's Motion to Stay Military Commission Proceedings and for Expedited Briefing Schedule is hereby GRANTED.

Dated: _____, 2005

_____
Hon. John D. Bates
United States District Court Judge