

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

IBRAHIM AHMED MAHMOUD AL  
QOSI,

Petitioner,

v.

GEORGE W. BUSH *et al.*,

Respondents.

1:04-cv-01937-PLF

**PETITIONER'S STATEMENT OPPOSING ABEYANCE**

In anticipation of the December 13, 2004 Status Conference before the Court, Petitioner Ibrahim Ahmed Mahmoud al Qosi submits this Statement setting forth the reasons he opposes holding his Petition for a Writ of Habeas Corpus in abeyance pending appellate resolution of *Hamdan v. Rumsfeld et al.*, 1:04-cv-1519 (D.D.C. Nov. 8, 2004). In brief, Mr. al Qosi opposes abeyance because:

(1) There is a strong presumption against abeyance in habeas proceedings. Nothing counsels in favor of overriding that presumption here;

(2) The United States continues to act as if Judge Robertson's *Hamdan* decision does not apply to Petitioner. The Government has not stayed the Military Commission proceedings against Mr. al Qosi in light of Judge Robertson's ruling and --unlike Mr. Hamdan, who has been returned to the general population of Guantanamo detainees -- continues to hold Mr. al Qosi in segregated, pre-commission confinement. There is thus no cause for the Court to stay this matter on the theory that it is governed by *Hamdan* when the Government itself, by its actions, has shown that the two cases are independent of one another; and

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WESTERN DISTRICT OF WASHINGTON  
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UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

Lieutenant Commander CHARLES SWIFT, a  
resident of the State of Washington, as next  
friend for SALIM AHMED HAMDAN,  
Military Commission Detainee,  
Camp Echo,  
Guantanamo Bay Naval Base,  
Guantanamo Bay, 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. CV 04-0777L

PETITION FOR WRIT OF  
MANDAMUS PURSUANT TO 28 U.S.C.  
§ 1361 OR, IN THE ALTERNATIVE,  
WRIT OF HABEAS CORPUS



04-CV-00777-PET

408682

PETITION FOR WRIT OF MANDAMUS PURSUANT  
TO 28 U.S.C. § 1361 OR, IN THE ALTERNATIVE,  
WRIT OF HABEAS CORPUS - i

[43439-0001/SL040950.008]

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3                   **PETITION FOR WRIT OF MANDAMUS**  
4                   **PURSUANT TO 28 U.S.C § 1361 OR, IN THE ALTERNATIVE,**  
5                   **WRIT OF HABEAS CORPUS**

6                   COMES NOW, Petitioner Charles Swift, Lieutenant Commander, Judge Advocate  
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8                   Generals Corps, United States Navy, by and through the undersigned counsel and, acting as  
9  
10                  "next friend" to and on behalf of Salim Ahmad Hamdan, files this Petition for Writ of  
11  
12                  Mandamus pursuant to 28 U.S.C § 1361 or, in the alternative, for a Writ of Habeas Corpus.  
13  
14                  Salim Ahmad Hamdan ("Mr. Hamdan") is one of six persons identified for trial by Military  
15  
16                  Commission. He is currently being held incommunicado in pre-trial custody by United  
17  
18                  States Military Authorities, including Respondents herein, at Naval Base Guantanamo Bay  
19  
20                  ("Guantanamo"). The incarceration of Mr. Hamdan under these circumstances violates the  
21  
22                  U.S. Constitution, U.S. law, and U.S. treaty obligations.  
23  
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26  
27                  On November 13, 2001, President George W. Bush ("Respondent President Bush")  
28  
29                  issued a Military Order that authorized the use of military tribunals to try noncitizens  
30  
31                  accused of terrorism and other war crimes. *See* President George W. Bush's Military Order,  
32  
33                  Nov. 13, 2001, attached as Exhibit B to the Declaration of Lieutenant Commander Charles  
34  
35                  Swift ("Swift Decl."), filed herewith. In that same month, Afghan paramilitary forces  
36  
37                  captured Mr. Hamdan while he was attempting to flee with his wife and child from the  
38  
39                  ongoing military conflict in Afghanistan. Subsequently Mr. Hamdan was turned over to  
40  
41                  United States forces and eventually transferred to Guantanamo. On July 3, 2003,  
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43                  Respondent President Bush found that there was "reason to believe" that Mr. Hamdan was  
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1 eligible for trial by military commission pursuant to his Military Order of November 13,  
2  
3 2001. *See* Press Briefing of Senior Department of Defense ("DOD") Official and Senior  
4  
5 Military Officer, July 3, 2004, attached as Exhibit A to the Swift Decl.  
6  
7

8 In early December 2003, in preparation for trial by military commission,  
9  
10 Mr. Hamdan was placed in Camp Echo, *"our facility where we hold the pre-commission*  
11  
12 *detainees."* Press Briefing of Army Major General Geoffrey D. Miller, Feb. 13, 2004, at 30,  
13  
14 attached as Exhibit C to the Swift Decl. (emphasis added). Conditions in Camp Echo are  
15  
16 tantamount to solitary confinement, in that Mr. Hamdan is held in isolation from all other  
17  
18 prisoners and permitted no visitors except Lieutenant Commander Swift. Yet as of the date  
19  
20 of this Petition, DOD still has not set a trial date or even advised Mr. Hamdan regarding the  
21  
22 nature of the charges on which he is to be tried.  
23  
24

25  
26 Lieutenant Commander Swift is under orders to serve as Defense Counsel within the  
27  
28 Office of Military Commissions in the Office of the General Counsel of the United States  
29  
30 Department of Defense, as established pursuant to the Military Order. *See* Official Change  
31  
32 of Duty Orders for Lieutenant Commander Swift, Sept. 2003, attached as Exhibit F to the  
33  
34 Swift Decl. On December 18, 2003, Lieutenant Commander Swift was assigned to serve as  
35  
36 Mr. Hamdan's appointed military defense counsel and he continues to serve in that capacity  
37  
38 as of the date of this Petition. Lieutenant Commander Swift is under legal and military  
39  
40 obligation to zealously represent Mr. Hamdan's interests and as such is a proper "next  
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42 friend" for the purpose of this Petition. Lieutenant Commander Swift is legally domiciled in  
43  
44 the Western District of Washington State and is entitled to seek relief in this Court.  
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1           On January 30, 2004, Mr. Hamdan first met with his detailed defense counsel,  
2  
3           Lieutenant Commander Swift. On February 12, 2004, Lieutenant Commander Swift  
4  
5           submitted on behalf of Mr. Hamdan, under Article 10 of the Uniform Code of Military  
6  
7           Justice ("UCMJ"), a demand for charges and a speedy trial. See Memorandum for the  
8  
9           Appointing Authority, Feb. 12, 2004, attached as Exhibit D to the Swift Decl. On  
10  
11           February 23, 2004, the appointing authority responded by summarily denying Mr. Hamdan's  
12  
13           right to a speedy trial. See Appointing Authority Opinion Letter, Feb. 23, 2004, attached as  
14  
15           Exhibit E to the Swift Decl.  
16  
17

18           Denial of a speedy trial in Mr. Hamdan's case and his consequential prolonged  
19  
20           detention in solitary confinement risks long-term psychological injury to Mr. Hamdan, and  
21  
22           threatens to impair materially his ability to assist in the preparation of his own defense  
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24           should charges ever be brought.  
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27           Lieutenant Commander Swift, as next friend to Mr. Hamdan, seeks a Writ of  
28  
29           Mandamus or, in the alternative, a Writ of Habeas Corpus ordering Mr. Hamdan's release  
30  
31           from pre-commission segregation and prohibiting further prosecution of his case before  
32  
33           military commission for Respondent's failure to provide him a speedy trial as required by the  
34  
35           UCMJ, military regulations including the Military Order, and the Geneva Conventions of  
36  
37           1949.  
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40           Furthermore, on behalf of Mr. Hamdan, Lieutenant Commander Swift seeks a Writ  
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42           of Mandamus or a Writ of Habeas Corpus that prohibits the Respondents from using a  
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44           military commission to try Mr. Hamdan, and that prohibits the indefinite detention of  
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1 Mr. Hamdan for an unscheduled trial before such a commission, when such a commission  
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3 will be held far beyond the theater of military operations and at a time when Congress has  
4  
5 not declared war. Absent relief from this Court, such a commission would act without the  
6  
7 necessary congressional approval, and would exist pursuant to a unilateral executive order  
8  
9 that purports to suspend the right of the accused to seek habeas review before Article III  
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11 courts. Indeed, it would also disregard fundamental precepts of equal protection by making  
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13 only noncitizens subject to these military commissions. A military commission so  
14  
15 constituted is an unprecedented, unconstitutional, and dangerously unchecked expansion of  
16  
17 executive authority. As such, the President's unilateral Military Order violates separation of  
18  
19 powers and equal protection principles of the U.S. Constitution, and constitutes an illegal  
20  
21 suspension of the writ of habeas corpus in violation of the suspension clause, U.S. Const.  
22  
23 Art. I § 9, cl. 2, and therefore is an illegal and invalid basis for Mr. Hamdan's continued pre-  
24  
25 commission segregation.  
26  
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30 As part of these alternative grounds of relief, therefore, Lieutenant Commander Swift  
31  
32 also challenges the attempt by Respondent President Bush to oust Article III courts of  
33  
34 habeas corpus jurisdiction over prosecutions of individuals apprehended in the course of  
35  
36 conducting military operations that occur within territories or leased properties of the United  
37  
38 States, solely by labeling such persons as "enemy combatants" under the terms of the  
39  
40 Military Order. Particularly because the duration of the war on terrorism is potentially  
41  
42 never-ending, and where Respondents have incarcerated Mr. Hamdan without advising him  
43  
44 of his status or even the charges on which he presumably will be tried at a place and time  
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1 undisclosed, it is essential that the U.S. Constitution protect the accused against otherwise  
2  
3 open-ended and unrestrained executive power, by assuring that an Article III court is  
4  
5 permitted to exercise its time-honored civilian review of the military justice system that the  
6  
7 United States Supreme Court has recognized to be essential since *In re Grimley*, 137 U.S.  
8  
9 147 (1890), and *Ex Parte Milligan*, 71 U.S. 2 (1866).<sup>1</sup>  
10  
11

12 Lieutenant Commander Swift also seeks, on behalf of Mr. Hamdan, a Writ of  
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14 Mandamus or a Writ of Habeas Corpus to prohibit the use of a military commission to  
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16 detain or prosecute Mr. Hamdan because he is not within the jurisdiction of a military  
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18 commission. Mr. Hamdan does not meet the criteria set out in the Military Order for  
19  
20 identifying specific individuals who are subject to its terms. Such individuals include  
21  
22 members of an organization recognized as a "terrorist" organization by the United States,  
23  
24 combatants actively engaged in acts of war or violence against the United States, and those  
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26 people who have participated in plans to kill or injure American citizens or to damage  
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28 American property. Mr. Hamdan is not a member of a terrorist organization, he was not a  
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30 combatant in Afghanistan at the time of his apprehension, he never has taken up arms  
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42 <sup>1</sup> Though this action may be understood as one seeking a writ of prohibition barring the trial of  
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44 Petitioner by military commission, as opposed to a writ of mandamus compelling a federal officer to perform a  
45  
46 nondiscretionary duty, the distinction between the two is of no moment. See *Calderon v. U.S. Dist. Court for*  
47  
*Northern Dist. of Cal.*, 134 F.3d 981, 983 n.3 (9th Cir. 1998) ("The writ of prohibition is the 'fraternal twin' of  
its more familiar sibling, the writ of mandamus. . . [and t]he two are evaluated under an identical standard."  
(citations omitted)). Because nearly all of the relevant precedents speak in terms of mandamus, this petition  
follows the more traditional nomenclature.

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against the United States, and he never has participated in any plan to kill or injure Americans or to damage American property.

**I. JURISDICTION**

1. This action arises under the Constitution, laws, and treaties of the United States, including Articles I, II, III, and VI, and Amendments 5 and 14 of the U.S. Constitution, 28 U.S.C. §§ 1361, 1391, 2241 and 2242, 5 U.S.C. § 702, the All Writs Act, 28 U.S.C. § 1651, 42 U.S.C. § 1981, and the Geneva Conventions.

2. This Court has subject-matter jurisdiction under 28 U.S.C. §§ 1361 and 1391, as well as 28 U.S.C. § 1331, and may grant relief pursuant to those statutes as well as 28 U.S.C. § 2241, 5 U.S.C. § 702, and the All Writs Act, 28 U.S.C. § 1651. Indeed, three of the five independent grounds for habeas jurisdiction in 28 U.S.C. § 2241(c) are met in this case, subsections (1), (3), and (4). Counsel for Respondent President Bush has observed that such judicial review is available. *See* Alberto R. Gonzales, Editorial, *Martial Justice, Full and Fair*, N.Y. Times, Nov. 30, 2001, at A27 (stating that the Military Order "preserves judicial review in civilian courts" because it permits those arrested "by a military commission . . . to challenge the lawfulness of the commission's jurisdiction through a habeas corpus action in a federal court"). Furthermore, Paragraph (a)12 of Article 2 of the UCMJ, 10 U.S.C. § 802(a)(12), grants jurisdiction over a petition for judicial review filed by or on behalf of parties incarcerated at Guantanamo.

3. This Court has personal jurisdiction over the parties. Lieutenant Commander Swift is a legal resident of the Western District of Washington. Respondents have substantial contacts with the State of Washington and its residents, and are officers or employees of the United States, or an agency thereof, acting in their official capacity or

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under color of legal authority throughout the United States, including the Western District of Washington.

**II. VENUE**

4. Venue is proper in the Western District of Washington for this mandamus action pursuant to 28 U.S.C. § 1391(e) as Lieutenant Commander Swift is a legal resident of the Western District, and Respondents are officers or employees of the United States, or an agency thereof, acting in their official capacity or under color of legal authority throughout the United States, including the Western District of Washington. Lieutenant Commander Swift, as next friend and representative of Mr. Hamdan's interests, is the appropriate person to choose a forum in this case as Mr. Hamdan is without the ability to initiate proceedings on his own behalf. Additionally, the Western District is also an appropriate venue to consider a Writ of Habeas Corpus under 28 U.S.C. §§ 1331 and 2241. *See Braden v. 30th Judicial Circuit Court of Ky.*, 410 U.S. 484, 493-500 (1973); *Gherebi v. Bush*, 352 F.3d 1278, 1304-05 (9th Cir. 2003); *Padilla ex rel. Newman v. Bush*, 233 F. Supp. 2d 564, 587 (S.D.N.Y. 2002), *rev'd in part, Padilla v. Rumsfeld*, 352 F.3d 695 (2003), *cert. granted*, 124 S. Ct. 1353 (U.S. Feb. 20, 2004).

**III. PARTIES**

5. Petitioner Lieutenant Commander Swift is a resident of the Western District of Washington, having resided in the Western District immediately prior to going on active duty as a member of the United States Military. He continues to maintain his voter registration address in the Western District of Washington State, and has done so since 1990.

6. Mr. Hamdan is a native and citizen of Yemen. He was first taken into United States Military custody in November 2001 and has remained in the custody of the United

1 States Government continuously since that date. Mr. Hamdan has no known family  
2 members within the United States or its territories.  
3

4  
5 7. Respondent Brigadier General Jay Hood is the Commander of Joint Task  
6 Force Guantanamo and is responsible for all matters concerning persons detained as enemy  
7 combatants in Guantanamo. General Hood's predecessor, Brigadier General Jeffrey Miller,  
8 ordered the placement of Mr. Hamdan in pre-trial segregation in Camp Echo where  
9 Mr. Hamdan currently is confined.  
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14 8. Respondent Donald H. Rumsfeld is the Secretary of Defense of the United  
15 States, serving at the pleasure of Respondent President Bush, and is ultimately responsible  
16 for the administration of the United States Military, including the Office of Military  
17 Commissions. As such, Mr. Rumsfeld has full custodial authority over Mr. Hamdan's  
18 continued detention and his announced prosecution.  
19  
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21  
22 9. Respondent John D. Altenburg, Jr., is the Appointing Authority for Military  
23 Commissions and exercises his authority over the entire military commission process,  
24 including over Mr. Hamdan and Lieutenant Commander Swift.  
25  
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27  
28 10. Respondent Brigadier General Thomas L. Hemingway is the Legal Advisor  
29 to the Appointing Authority.  
30  
31

32  
33 11. Respondent George W. Bush is the President of the United States of America  
34 and Commander-in-Chief of the United States Military and the person who decreed the  
35 Military Order pursuant to which all Respondents have acted.  
36  
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#### 39 40 41 **IV. STATEMENT OF FACTS**

42  
43 12. In the wake of the terrorist acts of September 11, 2001, the United States, at  
44 the direction of Respondent President Bush, initiated a military campaign against the  
45 Taliban, the organization then in governing power in Afghanistan. On September 18, 2001,  
46  
47

1 Congress passed a "Use-of-Force" Resolution that authorized Respondent President Bush to  
2 use force against "nations, organizations, or persons" that "planned, authorized, committed,  
3 or aided the terrorist attacks on September 11, 2001, or [that] harbored such organizations or  
4 persons." Joint Resolution 23, Authorization for Use of Military Force, Pub. L. No. 107-40,  
5 115 Stat. 224 (2001) ("Use-of-Force Resolution").  
6  
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10 13. In the course of the ensuing military campaign in Afghanistan that was  
11 conducted under the Use-of-Force Resolution, and as part of its effort to overthrow the  
12 Taliban, the United States provided military assistance to the Northern Alliance, a loosely  
13 knit coalition of Afghani and other military groups opposed to the Taliban government.  
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18 14. In October or November 2001, while working as a civilian driver in  
19 Afghanistan, Mr. Hamdan was seized by soldiers loyal to the former king of Afghanistan,  
20 Zahir Shah. Those soldiers were searching for Arabs to sell to American forces then  
21 engaged in military action against the Taliban. See Affidavit of Salim Ahmed Hamdan at  
22 10, attached as Exhibit B to the Declaration of Charles P. Schmitz, Ph.D., filed herewith.<sup>2</sup>  
23 Mr. Hamdan was delivered by the Afghani soldiers to the American forces.  
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31 15. Prior to his capture, Mr. Hamdan had been living and working in Afghanistan  
32 since 1996 or 1997. He initially had traveled to Afghanistan from his native Yemen in 1996  
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38 <sup>2</sup> Both the original Arabic Hamdan Affidavit and its English translation are being filed under seal in a  
39 manner consistent with the Classified Information Procedures Act, 18 U.S.C. app. 3 § 1 *et seq.* ("CIPA").  
40 Lieutenant Commander Swift adopts this procedure and hereby provides notice pursuant to CIPA § 5 in an  
41 abundance of caution. However, he does not believe that any of the information contained in this Petition, its  
42 attachments, or the supporting memorandum of law, contains any classified or protected material. In  
43 Lieutenant Commander Swift's view, any contention by Respondents that the material is protected would be  
44 without merit, as the Appointing Authority of DOD has given his permission to disclose publicly all facts  
45 alleged herein, and many other facts alleged herein have been publicly disclosed by Respondents themselves.  
46 See, e.g., Press Briefing of Senior DOD Official and Senior Military Officer, Ex. A to the Swift Decl.; Press  
47 Briefing of Army Major General Geoffrey D. Miller, Ex. C to the Swift Decl.; Press Interviews attached as  
Exhibit G to the Swift Decl.

1 with the intention of entering Tajikistan, but his efforts to do so were unsuccessful.  
2  
3 Mr. Hamdan subsequently accepted a job in Afghanistan as a driver on a farm owned by an  
4 individual he came to know as Osama Bin Laden. The job entailed driving Afghani workers  
5 back and forth between a local village and the farm. After several months working in that  
6 capacity, Mr. Hamdan occasionally was asked to drive Osama Bin Laden to various  
7 locations as part of his employment. *See id.* at 9.  
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12 16. During the period that he was employed by Osama Bin Laden as a civilian  
13 driver, Mr. Hamdan returned to Yemen twice for entirely personal reasons unrelated to his  
14 employment. The first occasion was in 1998 to be married, and the second occasion was in  
15 2000 to attend the wedding of his brother-in-law and to participate in the Hajj, the annual  
16 pilgrimage to Mecca, which is a sacred holy event for persons of the Muslim faith such as  
17 Mr. Hamdan. In February of 2001, Mr. Hamdan returned to Afghanistan with his wife and  
18 daughter to continue working as a civilian driver. He was still working as a driver in  
19 October 2001 when American military action against the Taliban began. *See id.*  
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28 17. When Mr. Hamdan learned that Northern Alliance forces were attacking  
29 Kandahar, where his wife and two-year-old daughter then were residing, he borrowed a car  
30 for the purpose of evacuating them to Pakistan, with the intention of eventually returning  
31 with them to Yemen. Mr. Hamdan was able to drive his wife and daughter to Pakistan.  
32 Mr. Hamdan then drove back to Afghanistan to return the car to its owner and to sell his  
33 personal belongings in order to finance his family's return to Yemen. It was on this return  
34 trip to Afghanistan that Mr. Hamdan was seized by Afghan paramilitary forces and  
35 subsequently delivered into the custody of United States Military forces. *See id.* at 9-10.  
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44 18. Since his capture in Afghanistan and his surrender to the United States,  
45 Mr. Hamdan continuously has been in the physical custody of the United States Military.  
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1 He has been detained by Respondents now for more than two years. He currently is being  
2 detained unlawfully in pre-commission segregation at Camp Echo, a separate confinement  
3 facility apart from the Camp Delta detention center located in Guantanamo. Mr. Hamdan is  
4 under the direct control of Respondents and their agents.  
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9 19. Mr. Hamdan is not, and never has been, an enemy alien or unlawful  
10 combatant of the United States. He never has been a member of Al Qaida or any other  
11 organization recognized as a terrorist group by the United States. He never has taken up  
12 arms against the United States, or knowingly participated in any way in any plan to kill or  
13 injure Americans, or to damage American property, and he has not knowingly assisted  
14 anyone in such efforts. Furthermore, Mr. Hamdan did not plan, authorize, commit, or aid in  
15 the terrorist attacks against the United States that occurred on September 11, 2001, and he  
16 has not "harbored" anyone who had done so. *See id.* at 12.  
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25 20. Nevertheless, acting under the Military Order, in July 2003, approximately  
26 20 months after Mr. Hamdan's apprehension or arrest, Respondent President Bush decreed  
27 Mr. Hamdan one of six "enemy combatants" eligible to be tried before a military  
28 commission. *See* Military Order, Ex. B to the Swift Decl.; Press Briefing of Senior DOD  
29 Official and Senior Military Officer, Ex. A to the Swift Decl.; Press Briefing of Army Major  
30 General Geoffrey D. Miller, Ex. C to the Swift Decl.; Press Interviews, Ex. G to the Swift  
31 Decl. Pursuant to Respondent President Bush's unilateral determination, Mr. Hamdan was  
32 placed in pre-commission segregation in early December 2003. Pre-commission segregation  
33 entailed placing Mr. Hamdan in solitary confinement and restricting his access to sunlight as  
34 well as limiting his physical activity and exercise. *See* Press Briefing of Army Major  
35 General Geoffrey D. Miller, Ex. C to the Swift Decl.  
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21. On December 18, 2003, the Chief Defense Counsel for Military Commissions detailed Lieutenant Commander Swift to serve as Mr. Hamdan's appointed military defense counsel. *See* Appointment Letter, Dec. 18, 2003, attached as Exhibit H to the Swift Decl. Prior to that date, Mr. Hamdan was unrepresented by counsel and had no access to legal representation.

22. Lieutenant Commander Swift met with Mr. Hamdan at Guantanamo for the first time during the last weekend of January 2004. He subsequently met with Mr. Hamdan during the first and last weekends of February 2004 and during the third weekend of March 2004. During these meetings, Mr. Hamdan authorized Lieutenant Commander Swift, in writing, to serve as next friend for the purposes of bringing this Petition. *See* Next Friend Authorization attached as Exhibit I to the Swift Decl.

23. On February 12, 2004, Lieutenant Commander Swift, acting on behalf of Mr. Hamdan, informed the Appointing Authority via the assigned Prosecutor that, pursuant to the UCMJ, Mr. Hamdan "demands to be informed of the specific charges against him or to be released from pre-commission segregation into general detention." Memorandum for the Appointing Authority at 33, Ex. D to the Swift Decl.

24. On February 23, 2004, the Legal Advisor to the Appointing Authority responded to Lieutenant Commander Swift's Memorandum with an Opinion Letter that asserted that the UCMJ does not apply to Mr. Hamdan's detention. This assertion was not supported by any legal argument or any citation to authority. *See* Appointing Authority Opinion Letter, Ex. E to the Swift Decl. For all practical purposes, Mr. Hamdan's demand that charges be brought, that he be informed of such charges, and that trial on such charges occur were ignored as if Mr. Hamdan had no rights at all.

1           25.     The logical result of Respondents' conduct to date with regard to Mr. Hamdan  
2 is he could serve a potential life sentence without ever being charged with a crime and  
3 without being afforded a chance to prove his innocence. Absent relief from this Court,  
4 Mr. Hamdan may remain in custody without charges being filed or trial being afforded for  
5 the indefinite future, without any recourse to judicial review or any other check or balance  
6 on the power of the Executive Branch to keep Mr. Hamdan incarcerated under conditions of  
7 its unilateral choosing. The status quo also threatens to coerce unlawfully an admission of  
8 wrongdoing from Mr. Hamdan. Indeed, Respondents have informed Mr. Hamdan that he  
9 shall remain in custody until such time as he wishes to plead guilty to some unspecified  
10 crime against the United States in a manner satisfactory to Respondents, and that his  
11 appointed defense counsel is not authorized to mount any legal defense to either his  
12 detention or the circumstances of his incarceration, but rather is available only to assist  
13 Mr. Hamdan in pleading guilty to some unspecified offense. The treatment of Mr. Hamdan  
14 to date and the potential for further abuse strike at the heart of the Constitution's Founders'  
15 fears about trial delay – a fear recognized in more modern times by the drafters of the  
16 UCMJ.  
17

18           26.     Mr. Hamdan's transfer into pre-commission segregation at Camp Echo sets  
19 him apart from the approximately 600 individuals who have been detained at Camp Delta,  
20 Guantanamo, in that Mr. Hamdan is being detained for trial.  
21

22           27.     Mr. Hamdan's current conditions of confinement place him at significant risk  
23 for future psychiatric deterioration, possibly including the development of irreversible  
24 psychiatric difficulties. See Declaration of Dr. Daryl Matthews ("Matthews Decl."), filed  
25 herewith, at 4, ¶ 14.  
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28. Mr. Hamdan's current conditions of confinement in conjunction with the restrictions imposed on his legal representation by DOD make him particularly susceptible to mental coercion and false confession in conjunction with his trial before a potential military commission. *See id.*; Target Letter, Dec. 15, 2003, at ¶ 3 attached as Exhibit J to the Swift Decl.<sup>3</sup>

29. Mr. Hamdan's current conditions of confinement also may cause mental deterioration to the point of significant impairment of his ability to assess his legal situation and to assist in his own defense. *See Matthews Decl.* at 4, ¶ 15.

30. Mr. Hamdan's array of pre-isolation stressors place him at particularly high risk, as does the psychological stress of the uncertainty he faces due to the lack of charges against him and the nature and duration of his future confinement. *See id.*

#### V. EXHAUSTION OF REMEDIES

31. Lieutenant Commander Swift, acting on behalf of Mr. Hamdan, communicated his legal challenge to the pre-commission detention of Mr. Hamdan to the Appointing Authority, but was rebuked without recitation to any legal reasoning or legal citation. *See Appointing Authority Opinion Letter, Ex. E to the Swift Decl.* (denying speedy trial claim and applicability of UCMJ). There is no military commission in existence today in which a legal challenge may be raised, and until charges are brought against Mr. Hamdan, no military commission will exist in which he can seek relief. Accordingly, Lieutenant Commander Swift has exhausted any remedies that would be an alternative to this Petition. Because the injury to Mr. Hamdan arises from the Executive Branch's unlawful assertion of

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<sup>3</sup> In an abundance of caution, Petitioner also has filed the Target Letter under seal pursuant to CIPA § 5.

1 authority, and because he is not being held in a state but rather within a territory or leased  
2 property of the United States, only the federal courts can provide a remedy in this case.  
3

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5 **VI. CLAIMS FOR RELIEF**

6  
7 **COUNT ONE**

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9 **DENIAL OF A SPEEDY TRIAL IN VIOLATION OF ARTICLE 10 OF THE**  
10 **UNIFORM CODE OF MILITARY JUSTICE**

11  
12 32. Lieutenant Commander Swift re-alleges and incorporates by reference  
13 paragraphs 1 through 31 above.  
14

15  
16 33. The Military Order pursuant to which Mr. Hamdan has been detained for trial  
17 purports to be based, in part, on congressional authorization embodied in selected provisions  
18 of the UCMJ. In promulgating the Military Order, Respondent President Bush relied, in  
19 part, on his authority under 10 U.S.C. § 836, which allows the Executive Branch to prescribe  
20 rules for military commissions, so long as they are not inconsistent with the UCMJ. *See*  
21 Military Order at 15, Ex. B to the Swift Decl. However, Article 10 of the UCMJ, 10 U.S.C.  
22 § 810, provides that any arrest or confinement of an accused must be terminated unless  
23 charges promptly are brought and made known to the accused, and speedy trial afforded for  
24 a determination of guilt on such charges:  
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35 When any person subject to this chapter is placed in arrest or  
36 confinement prior to trial, immediate steps shall be taken to inform  
37 him of the specific wrong of which he is accused and to try him or  
38 dismiss the charges and release him.  
39

40 10 U.S.C. § 810.  
41

42 34. Mr. Hamdan is a person subject to the UCMJ by virtue of Respondent  
43 President Bush's Military Order, as well as by virtue of Article 2 of the UCMJ, 10 U.S.C.  
44 § 802(a)(12), which provides that "persons within an area leased by or otherwise reserved or  
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1 acquired for the use of the United States" and under the control of any of the various  
2 branches of the military are subject to the UCMJ.  
3

4 35. Courts have recognized that delays of the type imposed on Mr. Hamdan are  
5 intolerable in the absence of extraordinary or compelling circumstances, and Respondents  
6 have provided no reason whatsoever for their indefinite delay in charging Mr. Hamdan.  
7 Because Respondents did not take "immediate steps . . . to inform" Mr. Hamdan "of the  
8 specific wrong of which he is accused," they now have a clear and nondiscretionary duty  
9 under the UCMJ to "release him" from his pre-commission confinement.  
10

11 **COUNT TWO**

12 **VIOLATION OF ARTICLE 103 OF THE THIRD GENEVA**  
13 **CONVENTION AND UNITED STATES GOVERNMENT**  
14 **REGULATIONS**

15 36. Lieutenant Commander Swift re-alleges and incorporates by reference  
16 paragraphs 1 through 35 above.  
17

18 37. The lengthy pre-trial confinement of Mr. Hamdan violates Article 103 of the  
19 1949 Geneva Convention, as well as United States Government regulations. Article 103 of  
20 the Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6  
21 U.S.T. 3316, 3394, 75 U.N.T.S. 135, provides that  
22

23 [j]udicial investigations relating to a prisoner of war shall be  
24 conducted as rapidly as circumstances permit and so that his trial shall  
25 take place as soon as possible. A prisoner of war shall not be  
26 confined while awaiting trial unless a member of the armed forces of  
27 the Detaining Power would be so confined if he were accused of a  
28 similar offence, or if it is essential to do so in the interests of national  
29 security. *In no circumstances shall this confinement exceed three*  
30 *months.*  
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32 (Emphasis added.) Additionally, Article 5 of the Geneva Convention states:  
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1 [S]hould any doubt arise as to whether persons . . . belong to  
2 any of the categories [entitled to protection as a POW under the  
3 Convention], such persons shall enjoy the protection of the present  
4 Convention until such time as their status has been determined by a  
5 competent tribunal.  
6

7  
8 38. Likewise, Army Regulation 190-8, Enemy Prisoners of War, Retained  
9 Personnel, Civilian Internees and Other Detainees § 1-6(a) (1997), at 70, attached as Exhibit  
10 K to the Swift Decl, requires that United States military forces abide by the provisions of  
11 Article 5 of the Geneva Convention. Finally, Department of the Navy, NWP 1-14M: The  
12 Commander's Handbook on the Law of Naval Operations 11.7 (1995), at 77, attached as  
13 Exhibit L to the Swift Decl, states that "individuals captured as spies or as illegal  
14 combatants have the right to assert their claim of entitlement to prisoner-of-war status before  
15 a judicial tribunal and to have the question adjudicated."  
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23 39. Again, defendants have a clear nondiscretionary duty to release Mr. Hamdan  
24 under the Geneva Convention and under the United States Government's own regulations  
25 because he has been detained in pre-commission segregation for more than three months.  
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29  
30 **COUNT THREE**

31  
32 **VIOLATION OF COMMON ARTICLE 3 OF THE GENEVA**  
33 **CONVENTIONS**

34  
35 40. Lieutenant Commander Swift re-alleges and incorporates by reference  
36 paragraphs 1 through 39 above.  
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38  
39 41. Even the few individuals who lack Article 5 and Article 103 protections of  
40 the Third Geneva Convention are entitled to the protection of Common Article 3 of that  
41 treaty. Common Article 3 prohibits the contracting parties from "the passing of sentences  
42 . . . without previous judgment pronounced by a regularly constituted court, affording all the  
43 judicial guarantees which are recognized as indispensable by civilized people."  
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Neither the Use-of-Force Resolution nor any other act of Congress grants to the Executive Branch under the circumstances presented here the authority to establish military commissions, or to define the offenses that will be subject to their exclusive jurisdiction.

46. In addition to enabling the unlawful exercise of legislative powers, the Military Order also purports to suspend the Writ of Habeas Corpus and to circumscribe the jurisdiction of the federal courts in violation of Art. I § 9 and Art. III § 2 of the Constitution, by denying to persons held subject to the Military Order any access, remedy, or proceeding before "any court of the United States." Military Order at § 7, Ex. B to the Swift Decl. To allow the Chief Executive to proceed in this manner to dismantle the jurisdiction of the federal courts, redesigning the very architecture of American justice, is to succumb to an executive unilateralism decried by both our Founders and twentieth-century courts, and all who came between. *See, e.g., Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). Respondents are under a clear and nondiscretionary duty to obey the Constitution and its foundational command of the separation of powers.

**COUNT FIVE**

**CONSTITUTIONAL VIOLATION:  
TRIAL BEFORE MILITARY COMMISSIONS IN VIOLATION OF  
EQUAL PROTECTION**

47. Lieutenant Commander Swift re-alleges and incorporates by reference paragraphs 1 through 46 above.

48. Mr. Hamdan is being detained under the authority of a Military Order that violates Mr. Hamdan's right to equal protection of the laws of the United States. Mr. Hamdan may only be held for trial by a military commission by dint of his noncitizenship. The Military Order, by its terms, applies only to noncitizens. The Military

1 Order is, to the best of Petitioner's understanding, the first of its kind to make this  
2 citizen/alien distinction. It runs afoul of the very purpose of the Equal Protection Clause of  
3 the United States Constitution. The Framers of the Clause understood that discrimination  
4 against aliens was pervasive and problematic and therefore intentionally extended the reach  
5 of the Clause to "persons" rather than confining it to "citizens." Foremost in their minds was  
6 the language of *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 449 (1856), which had been  
7 utilized to limit due process guarantees by framing them as nothing more than the  
8 "privileges of the citizen."  
9

10  
11 49. The Military Order reverts back to an antebellum concept of fundamental  
12 rights, one in which aliens are singled out for lesser forms of justice than other citizens.  
13 While the government is given considerable latitude in areas such as immigration, under the  
14 Constitution there is little or no room for government by approximation when it puts people  
15 on one side or the other of a crude line that differentiates between individuals who are given  
16 access to the fundamental protections of civilian justice (including indictment, a jury trial  
17 presided over by a judge not answerable to the prosecutor, and access to an appeal before a  
18 commission independent of the prosecuting authority) and those afforded only a distinctly  
19 less protective and inferior brand of adjudication.<sup>4</sup> If the Executive Branch ever may take  
20 such a step—shunting aliens into a procedure from which all U.S. citizens are spared—he  
21 may do so only upon a convincing showing of necessity that matches the claim of threat to  
22 the fact of alienage. This singling out of aliens for such fundamental disfavor might be  
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45 <sup>4</sup> The Military Commission rules thus violate notions of procedural due process and Article III  
46 protections, not simply in the ways indicated above, but also in matters such as access to exculpatory evidence  
47 and the right to confront witnesses. Were a trial of Mr. Hamdan ever to take place before a military  
commission, Petitioner expects that those matters would become the subject of collateral attack.

1 justified in rare circumstances, but it is hard to imagine—and, absent explicit congressional  
2 action, impossible to assume that such circumstances are present today.

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5 **COUNT SIX**

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7 **DETENTION IN VIOLATION OF 42 U.S.C. § 1981**

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9 50. Lieutenant Commander Swift re-alleges and incorporates by reference  
10 paragraphs 1 through 49 above.

11  
12 51. Mr. Hamdan is being detained under the authority of the Military Order  
13 which contravenes 42 U.S.C. § 1981. That fundamental statutory provision guarantees  
14 equal rights for all persons to give evidence, to receive equal benefit of all laws and  
15 proceedings for the security of persons, and to receive like punishment. Mr. Hamdan is  
16 being unlawfully detained for purposes of trial by military commission because he is a  
17 noncitizen—a citizen who committed the very same acts as Mr. Hamdan could not be  
18 detained under the Military Order and held for trial before a military commission.  
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27 **COUNT SEVEN**

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29 **CONSTITUTIONAL AND STATUTORY VIOLATION:  
30 INVESTING MILITARY COMMISSIONS WITH SUBJECT-  
31 MATTER JURISDICTION CONTRARY TO THE RECOGNIZED  
32 LAWS OF WAR**

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35 52. Lieutenant Commander Swift re-alleges and incorporates by reference  
36 paragraphs 1 through 51 above.

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38 53. In the Military Order, the Respondent President Bush purports to derive his  
39 authority, in part, from provisions of the UCMJ that he claims authorize the use of military  
40 commissions in accordance with the laws of war.  
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45 54. The jurisdiction of military commissions is strictly limited to (1) violations of  
46 the laws of war, or (2) other crimes occurring during or in the immediate aftermath of a  
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1 declared war while United States forces occupy, and hence must adequately police, territory  
2 captured from the enemy. As a plurality of the Supreme Court held in *Reid v. Covert*, 354  
3 U.S. 1, 21 (1957),  
4  
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6 [t]he jurisdiction of military tribunals is a very limited and  
7 extraordinary jurisdiction derived from the cryptic language in Art. I,  
8 § 8 [granting Congress the power to "define and punish. . . Offences  
9 against the Law of Nations"], and, at most, was intended to be only a  
10 narrow exception to the normal and preferred method of trial in courts  
11 of law. Every extension of military jurisdiction is an encroachment  
12 on the jurisdiction of the civil courts, and, more important, acts as a  
13 deprivation of the right to jury trial and of other treasured  
14 constitutional protections.  
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18 55. In the present case, by identifying as individuals subject to its terms anyone  
19 who "is or was a member of the organization known as al Qaida," the Military Order  
20 unlawfully invests military commissions with jurisdiction far exceeding that recognized  
21 under the customary laws of war and the UCMJ.  
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24  
25 56. Moreover, there is no indication that Mr. Hamdan has committed any offense  
26 as to which a military commission might have jurisdiction to try him. Thus, even if  
27 Respondent President Bush is deemed to have been granted congressional authorization to  
28 establish military commissions, he has unlawfully exceeded that authorization by expanding  
29 the jurisdiction of the commissions beyond all legitimate bounds. Such conduct violates  
30 both the UCMJ and the Separation of Powers mandated by the U.S. Constitution.  
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### 38 COUNT EIGHT

#### 39 40 **THE APPOINTING AUTHORITY, AND ANY MILITARY** 41 **COMMISSION THAT MAY BE ESTABLISHED, LACKS PERSONAL** 42 **JURISDICTION OVER MR. HAMDAN** 43

44  
45 57. Lieutenant Commander Swift re-alleges and incorporates by reference  
46 paragraphs 1 through 56 above.  
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1           58. Before a military commission can lawfully assert jurisdiction or detain  
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3 Mr. Hamdan, the Military Order requires Respondent President Bush to have reason to  
4  
5 believe that Mr. Hamdan:

- 6  
7           (i) is or was a member of the organization known as al Qaida;  
8  
9           (ii) has engaged in, aided or abetted, or conspired to commit, acts of  
10 international terrorism, or acts in preparation therefore, that have  
11 caused, threaten to cause, or have as their aim to cause, injury to  
12 or adverse effects on the United States, its citizens, national  
13 security, foreign policy, or economy; or  
14  
15           (iii) has knowingly harbored one or more individuals described [in  
16 the categories above].  
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18  
19 Military Order at § 2(a)(1), Ex. B to the Swift Decl.

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21           59. Mr. Hamdan meets none of the criteria set forth in the Military Order to  
22  
23 identify individuals subject to its terms. Respondents have come forward with no evidence  
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25 to justify detention of Mr. Hamdan pursuant to the Military Order, and have adopted a  
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27 process and procedure whereby they never will be required to do so and, absent relief from  
28  
29 this Court, whereby Mr. Hamdan never can compel them to do so.  
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**PRAYER FOR RELIEF**

WHEREFORE, Petitioner prays that this Court grant the following relief:

1. Grant Petitioner Lieutenant Commander Charles Swift "next friend" status as next friend of Salim Ahmed Hamdan;
2. Award the Writ of Mandamus or issue an Order directing the respondents to show cause why the writ should not be granted.
3. If an Order to show cause is issued, to include as part of the Order a prompt schedule to receive briefing from the parties, including a Response from Respondents, and a Reply from Petitioner, on the issues raised in this Petition, followed by a hearing before this Court on any contested factual or legal issues, and production of the body of Mr. Hamdan as appropriate;
4. After notice and hearing, determine that Mr. Hamdan has been denied a speedy trial; that his incarceration violates the Constitution, laws, treaties and regulations of the United States; that the Military Order is unconstitutional; and that Respondents have no jurisdiction over Mr. Hamdan.
5. After notice and hearing, issue a Writ of Mandamus that directs Respondents to obey their clear, nondiscretionary duty to follow the Constitution, laws, regulations, and treaties of the United States, and therefore to release Mr. Hamdan from Camp Echo and from further solitary confinement;
6. After notice and hearing, issue a Writ of Mandamus that orders Respondents not to use the Military Order of November 13, 2001 to detain or bring charges against Mr. Hamdan or anyone else in a Military Commission because that Order violates the U.S. Constitution, U.S. law, and U.S. treaty obligations, both facially and as applied to Mr. Hamdan, and is therefore ultra vires and illegal;

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7. Order Respondents promptly to justify as lawful any continued detention of Mr. Hamdan;

8. Enter an Order that the Court shall retain jurisdiction over this matter to permit Mr. Hamdan to respond to arguments advanced by Respondents on matters related to his continued detention;

9. In the absence of adequate justification, order Mr. Hamdan's release; and

10. Grant such other and further relief on behalf of Petitioner and against Respondents as this Court deems just and proper, including but not limited to, as an alternative to a Writ of Mandamus, a Writ of Habeas Corpus.

DATED: April 6, 2004.

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PETITION FOR WRIT OF MANDAMUS PURSUANT  
TO 28 U.S.C. § 1361 OR, IN THE ALTERNATIVE,  
WRIT OF HABEAS CORPUS - 26  
(43439-0001) (SLA-0930,007)

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VERIFICATION

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I, Lieutenant Commander Charles Swift, hereby declare under penalty of perjury that to the best of my knowledge and belief the matters set forth in the foregoing Petition for Writ of Mandamus, or, in the Alternative, Writ of Habeas Corpus, are true and correct.

  
Lieutenant Commander Charles Swift  
Next Friend of Salim Ahmed Hamdan

VERIFICATION

I, Neal Katyal, hereby declare under penalty of perjury that to the best of my knowledge and belief the matters set forth in the foregoing Petition for a Writ of Mandamus, or, in the Alternative, a Writ of Habeas Corpus, are true and correct.

  
Neal Katyal

PETITION FOR WRIT OF MANDAMUS PURSUANT TO 28 U.S.C. § 1361 OR, IN THE ALTERNATIVE, WRIT OF HABEAS CORPUS - 27  
(+3-99-1201/21040530.00\$)

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(3) Mr. al Qosi's Petition stands independently of Judge Robertson's *Hamdan* ruling. Petitioner in this case has presented a number of issues not submitted in *Hamdan*, including not least a challenge to his detention as an enemy combatant. Even more, Judge Robertson rendered his *Hamdan* decision on relatively narrow grounds and did not address many additional issues common to Mr. al Qosi's and Mr. Hamdan's Petitions. In either case, there are various important questions that merit immediate attention from this Court, including several that, by themselves, are sufficient to put a stop to the on-going Military Commission proceedings against Petitioner. Mr. al Qosi's case should go forward now.

**I. Abeyance Is Rarely Appropriate In Habeas Proceedings, And Certainly Not In This One.**

While a district court has an inherent power to manage its docket, *see Landis v. American Water Works & Electric Co.*, 299 U.S. 248 (1936), that power should rarely be used to delay consideration of a habeas petition. The very notion of abeyance is in tension with the purpose of the writ itself. Habeas corpus is intended to afford a "swift and imperative remedy in all cases of illegal restraint or confinement." *Fay v. Noia*, 372 U.S. 391, 400 (1963) (quoting *Sec'y of State for Home Affairs v. O'Brien* [1923] A.C. 603, 609 (H.L.)). Indeed, "the function of the Great Writ would be eviscerated" by delay, especially where such delay is not voluntary. *Johnson v. Rogers*, 917 F.2d 1283, 1284 (10th Cir. 1990).

The Ninth Circuit addressed the question of when habeas proceedings may be delayed pending appellate resolution of another case -- and when they may not -- in *Yong v. INS*, 208 F.3d 1116 (9th Cir. 2000). In that case, a United States District Judge deferred consideration of a habeas petition pending resolution of an appeal that raised the same legal issues. The Court of Appeals found that "habeas proceedings implicate special considerations that place unique limits on a district court's authority to stay a case in the interests of judicial economy." *Id.* at 1120.

While it conceded that a short delay might be appropriate when the *same* court is considering a parallel case (*e.g.*, a panel awaiting an *en banc* decision of a common question), *id.*, the court held that an indefinite delay “terminat[ing] upon the resolution of the [other case]” amounted to an abuse of discretion. *Id.* at 1119 (internal quotation marks omitted). Other circuits have reached similar conclusions. *See, e.g., McClellan v. Young*, 421 F.2d 690, 691 (6th Cir. 1970) (holding that a district court judge was “without authority to defer action in petitioner’s habeas corpus case . . . to await a ruling by the Supreme Court”); *cf. Johnson v. Rogers*, 917 F.2d 1283 (10th Cir. 1990) (issuing a writ of mandamus where a district court’s backlog had delayed prompt consideration of a habeas petition).

Beyond the presumption against abeyance in habeas actions, suspension of this case is particularly inappropriate because it is by no means certain that the delay would be short. Briefing in the *Hamdan* case before the D.C. Circuit will not be completed until January 10, 2005; oral argument is scheduled for March 8, 2005. And even after the Court of Appeals issues its judgment, the losing party is all but certain to seek a rehearing *en banc* and/or *certiorari* from the United States Supreme Court. Final resolution even of the limited issues raised in Judge Robertson’s *Hamdan* opinion may thus be more than a year away. When added to the other factors discussed in the following sections, abeyance is the wrong choice.

## **II. The Government Is Not Treating Petitioner As If The *Hamdan* Case Applies.**

Whether abeyance is proper here turns ultimately on the question of whether *Hamdan* controls Mr. al Qosi’s case. Yet, by its conduct since Judge Robertson issued his *Hamdan* decision, the Military has signaled that it does not think it does. It would thus be unfair to for the Court to take action based upon a premise the Government itself does not accept.

Judge Robertson’s *Hamdan* decision ordered the Military, *inter alia*, to stay the Military Commission “trial” of Mr. Hamdan and that Mr. Hamdan “be released from the pre-Commission

detention wing of Camp Delta and returned to the general population of detainees ....” *Hamdan*, *slip op.* at 44-45. Judge Robertson’s decision was not based on any facts unique to Mr. Hamdan’s case; its reasoning was general and equally applicable to all other pre-commission detainees. Yet, the Government is continuing to treat Mr. al Qosi as if *Hamdan* were never decided.

To date, the Military has offered no assurance that it will refrain from proceeding with the Military Commission “trial” of Mr. al Qosi pending the outcome of *Hamdan* on appeal. Indeed, all indications are to the contrary. To be sure, there is, at present, a pause in the Commission proceedings while the Appointing Authority looks for additional members of Petitioner’s Military Commission, a process it expects to complete soon after the New Year. Yet, the Military has indicated that it will resume its prosecution of Mr. al Qosi by Military Commission at that time.

In addition, while Mr. Hamdan has been moved from pre-commission confinement and returned to the general detainee population per Judge Robertson’s order, Mr. al Qosi (and others, for that matter) remains incarcerated in a segregated section of cages set aside for pre-commission detainees. To hold Mr. al Qosi’s Petition in abeyance pending resolution of *Hamdan* even as the wheels of the Military Commission process against him (but not Mr. Hamdan) continue to spin would represent manifest unfairness to Mr. al Qosi.

### **III. Mr. al Qosi’s Petition Is Not Controlled By The Fate Of Mr. Hamdan’s.**

#### *A. Abeyance Is Not Appropriate With Respect To The Military Commission Aspect Of Mr. Al Qosi’s Petition.*

Even were the Government to conform its behavior to the dictates of *Hamdan*, there would be another self-sufficient reason not to hold Petitioner’s case in abeyance. As stated

above, Mr. al Qosi's and Mr. Hamdan's Petitions are not the same.<sup>1</sup> Petitioner here presents a range of challenges to the fairness and lawfulness of the Military Commission that do not appear in Mr. Hamdan's Petition. And even where the two do submit overlapping complaints, Judge Robertson's *Hamdan* ruling is frequently silent. The combined result is that, above and beyond the reasons set forth in Judge Robertson's ruling, there are other, independent bases for halting the Military Commission process. Continued action by this Court is thus not only warranted, it is necessary to guarantee that Mr. al Qosi is not tried before an invalid Military Commission.

The grounds for enjoining the Military Commission process as to which either Mr. Hamdan and/or Judge Robertson were silent include several jurisdictional challenges. For example, Mr. al Qosi has been charged by the Government with a single count of "conspiracy." Yet, with only two irrelevant exceptions,<sup>2</sup> under Article 21 of the Uniform Code of Military Justice ("UCMJ"), 28 U.S.C. § 821, only violations of the "law of war" may be tried by military commission. Respondent Bush himself recognized this limitation in Military Commission Order No. 1, which expressly provides that trials by military commission shall be limited to individuals alleged to have violated the law of war. MCO No. 1 § 3(B). Conspiracy never has been and is not now part of the laws of war. This alone is fatal to the Government's attempt to try Petitioner by Military Commission.

There are yet further flaws in the Government's attempt to exert jurisdiction over Mr. al Qosi. Under Supreme Court precedent, for instance, only military field commanders or other officers competent to appoint a general court-martial may appoint a military commission, and even then they have no jurisdiction far from the locality of actual war. *See In re Yamashita*, 327

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<sup>1</sup> For the Court's convenience, a copy of Mr. Hamdan's Petition is attached hereto as Exhibit 1.

<sup>2</sup> The two exceptions are spying, 10 U.S.C. § 904, and aiding the enemy. *Id.* § 906.

U.S. 1, 10 (a “[military] commission may be appointed by any field commander, or by any commander competent to appoint a general court martial....”) (relied upon heavily by the Government in *Hamdan*); *Ex parte Milligan*, 71 U.S. 2, 127 (“As necessity creates the rule, so it limits its duration... Martial rule ... is also confined to the locality of actual war.”). Yet, here, the Appointing Authority designated by Respondent Rumsfeld (himself a civilian) is a civilian -- Mr. John D. Altenburg. And by attempting to try Mr. al Qosi, who was taken prisoner in Pakistan in the chaos ensuing from the war in Afghanistan, half a world away at Guantanamo Bay, the Military has stretched the inherent limitations in the Military Commission process beyond their breaking point. Accordingly, the Military Commission must be stopped for reasons wholly apart from the issues decided in *Hamdan*.

In addition, the question of the adequacy of the processes by which the Military Commission proceedings will be conducted, and whether they comport with the UCMJ, United States treaty obligations and/or the Constitution, deserves more searching examination from the Court than it has received. Judge Robertson rejected the Military Commission rules to the extent they violate the detainee’s rights to confront the witnesses against him. *Hamdan*, slip op. at 41-42. But the problems go far deeper than that. In fact, the proposed procedures (when they exist at all) are inconsistent with the most basic notions of fundamental fairness. For example, the rules contemplate admitting evidence of essentially any kind so long as it would have “probative value to a reasonable person” -- an undefined standard no one seems really to understand. Whatever it might mean, Government counsel have stated in open court that statements extracted from detainees *under torture* are admissible. *Benchellali et al. v. Bush et al.*, 1:04-cv-1142, Trans. of Oral Arg. at 86 (Dec. 3, 2004) (Dept. of Justice stating that if the military “were to determine that evidence of a questionable providence, the result of torture perhaps, was reliable,

I don't think there is anything in the due process clause as it pertain to these petitioners that would prevent the evidence from being relied upon.”) To say that this should not be tolerated -- in the United States of America -- is an understatement.

Moreover, the fact that Petitioner was long denied counsel, and even now is given only begrudging, heavily impeded access to counsel, has denied him and continues to deny him the effective assistance of counsel. Even more broadly, the ways in which the Commission is making its rules up as it goes along make a mockery of the entire process. For instance, Military Defense Counsel has had repeated difficulties figuring out who the right authority is for presentation of important pre-trial issues that need decision. At times, they have approached the Appointing Authority and it has passed the buck down to the Presiding Officer. Yet, at other times they have gone to the Presiding Officer and been referred to the Appointing Authority. It thus appears that no one knows who is really responsible for what. The regularity and certainty that are the hallmarks of due process are entirely absent from the Military Commission process.

*B. Abeyance Is Not Appropriate With Respect To The Aspect Of Mr. Al Qosi's Petition Challenging His Detention As An "Enemy Combatant."*

Quite apart from the issues relating to the fairness and lawfulness of the Military Commission process, Mr. al Qosi's Petition (unlike Mr. Hamdan's) also challenges his detention as an enemy combatant and the adequacy of the so-called process he received in the Military's hastily organized "Combatant Status Review Tribunals." Under no view of the facts is abeyance appropriate with respect to this aspect of Petitioner's case. Accordingly, even if abeyance were proper with respect to the Military Commission aspect of the case (which it is not), the "enemy combatant" portion of the case must go forward.

**Conclusion**

Wherefore, Petitioner respectfully submits that abeyance pending resolution of appeal in the *Hamdan* matter would be inequitable and inappropriate.

Respectfully submitted,

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PETITIONER

By his attorneys,

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