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February 6, 2007

Mr. Mark J. Langer  
Clerk of the Court  
United States Court of Appeals  
for the District of Columbia Circuit  
333 Constitution Avenue, N.W.  
Room 5423  
Washington, D.C. 20001

**Re: Civ. Action No. 07-5042  
Petitioner-Appellant's Motion to Hold Appeal in Abeyance  
[Case below: Civ. Action No. 04-cv-01519-JR]**

Dear Mr. Langer:

Please find enclosed an original and four copies of Petitioner-Appellant's Motion to Hold Appeal in Abeyance, filed on behalf of Salim Ahmed Hamdan.

Thank you for your assistance.

Very truly yours,

  
Jennifer A. MacLean

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT  
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SALIM AHMED HAMDAN,

*Petitioner-  
Appellant,*

v.

DONALD H. RUMSFELD, *et al.*,

*Respondents*

No. 07-5042

[Case below: Civ. Action No. 04-cv-01519-JR]

**PETITIONER HAMDAN'S MOTION TO HOLD APPEAL IN ABEYANCE**

Petitioner Salim Hamdan respectfully requests that the Court hold his February 5, 2007 appeal in abeyance and stay the issuance of a briefing schedule or related action. Mr. Hamdan's appeal presents a challenge to the Military Commissions Act of 2006 ("MCA"), Pub. L. 109-366, 120 Stat. 2600. The District Court below held that Section 7 of the MCA, one of the Act's jurisdictional provisions, retroactively deprives the federal courts of jurisdiction over Mr. Hamdan's habeas action. Based on that reading of Section 7, and its determination that Mr. Hamdan could not rely on the Constitution's Suspension Clause to prevent that withdrawal, the District Court dismissed Mr. Hamdan's action. The jurisdictional effect of Section 7, and the extent to which aliens detained at Guantanamo Bay may rely on the Suspension Clause to prevent any such withdrawal of jurisdiction are issues presented in two cases brought by other Guantanamo detainees that are currently before this Court: *Boumediene v. Bush*, Nos. 05-5062, 05-5063 and *Al-Odah v. United States*, Nos. 05-5064, 05-5095 through 05-5116.

Because, unlike many of the petitioners in the *Boumediene* and *Al-Odah* cases, Mr. Hamdan is currently being detained in anticipation of trial before a military commission, there are aspects of his case that differ from those cases. Nonetheless, this Court's ruling in

*Al-Odah* and *Boumediene* may bear considerably on Mr. Hamdan's appeal. Moreover, Mr. Hamdan plans to file a Petition for Writ of Certiorari Before Judgment in the U.S. Supreme Court very shortly. If granted, this Petition would render briefing to the Court of Appeals unnecessary and redundant. For these reasons, Mr. Hamdan asks that this Court hold his case in abeyance until the Court issues its decision in *Al-Odah* and *Boumediene*, and until action has been taken on his Petition for Writ of Certiorari Before Judgment.

## **I. PROCEDURAL HISTORY.**

Mr. Hamdan filed a Petition for Writ of Mandamus, or in the Alternative Writ of Habeas Corpus, in the U.S. District Court, Western District of Washington on April 7, 2004, challenging the legality of the military commission established by the Executive to try him, as well as his detention. His case was later transferred to the D.C. District Court, which ruled in his favor on November 8, 2004, issuing an injunction halting his commission. On appeal, the D.C. Circuit Court reversed. In June 2006, the Supreme Court reversed. The Supreme Court ruled that Mr. Hamdan could not be tried by military commission, as the Executive's action in establishing that commission and subjecting him to its jurisdiction violated the UCMJ and the Geneva Conventions. *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006). The Court further held that the laws of war applied because the statute defining the jurisdiction of military commissions (10 U.S.C. § 821) incorporated the Geneva Conventions, and that the commission violated Common Article 3 of the Conventions. The Court determined that Common Article 3 applied in the armed conflict in which Mr. Hamdan was captured, and among other things, entitled him to trial by "a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples." *Id.* at 2797-98. Mr. Hamdan's case was remanded to the Circuit Court and after briefing by both parties on where the remainder of Mr. Hamdan's case should be heard, the case was ultimately remanded to the District Court on September 27, 2006.

On October 17, 2006 the MCA was signed into law. The MCA, in addition to laying down substantive rules regarding the establishment and procedure of military commissions, contains a jurisdictional provision that purports to divest federal courts of jurisdiction over pending habeas challenges raised by “alien enemy combatants,” including Guantanamo detainees. MCA, § 7. On October 27, 2006 the District Court ordered briefing on the jurisdictional effect of Section 7. Mr. Hamdan argued that Section 7 did not have the requisite clarity to alter the habeas statute and thus retroactively divest the court of jurisdiction over his case, and if it did, then it unconstitutionally suspended the writ. Hamdan Opp. to Resp. Mot. to Dismiss at 12-28. Mr. Hamdan further argued that if Section 7 did divest the court of habeas jurisdiction, then it offends separation of powers principles under *United States v. Klein*, 80 U.S. 128 (1870), is an unlawful Bill of Attainder, and violates Equal Protection. *Id.* at 28-45.

On December 13, 2006 the District Court issued a Memorandum Opinion and Order, dismissing Mr. Hamdan’s habeas petition for lack of subject-matter jurisdiction based on Section 7 of the MCA. The District Court read Section 7 to contain sufficiently clear language to amend the habeas statute and thus withdraw subject-matter jurisdiction over Mr. Hamdan’s case. *Hamdan v. Rumsfeld*, No. 04-1519 (JR) (December 13, 2006) Slip Op. at 3-5. Turning to whether that removal of habeas jurisdiction was constitutional, the District Court agreed that the MCA is not a constitutionally valid suspension of the Great Writ. *Id.* at 7. On the authority of *Eisentrager v. Johnson*, 339 U.S. 763 (1950), however, the District Court nonetheless held that Mr. Hamdan, by virtue of his alien status and detention at Guantanamo, could not invoke constitutionally based habeas protected by the Suspension Clause. *Id.* at 15. The District Court failed to reach Mr. Hamdan’s remaining constitutional challenges to the MCA. *Id.* at 22 n. 16.

Mr. Hamdan timely filed a Notice of Appeal from the District Court Order on February 5, 2007. Fed. R. App. P. 4(a)(1)(B). Mr. Hamdan intends to file his Petition for

Writ of Certiorari Before Judgment very shortly, asking that the Supreme Court hear his Petition now. Because either this Court's decision in *Al-Odah* and *Boumediene*, or Supreme Court action on Mr. Hamdan's Petition for Writ of Certiorari Before Judgment will bear significantly on whether or how his appeal will be presented to this Court, Mr. Hamdan requests that this Court hold his case in abeyance and stay the issuance of a briefing schedule or other action on his appeal.

## **II. CASES PENDING BEFORE THIS CIRCUIT MAY AFFECT HAMDAN'S APPEAL.**

Federal courts, including this Circuit, routinely hold cases in abeyance and stay further briefing when a case with related issues is on appeal and has yet to be decided. *See, e.g., Canadian Ass'n. of Petroleum Producers v. FERC*, 308 F.3d 11, 14 (D.C. Cir. 2002) ("briefing [] held in abeyance pending [] disposition of [] a related petition"); *Hensala v. Dep't of the Air Force*, 343 F.3d 951, 955 (9th Cir. 2003) (submission of case deferred pending Supreme Court decision on related case); *Majors v. Abell*, 361 F.3d 349, 352 (7th Cir. 2004) (same). *Cf. Mokit v. Bush*, 347 F.Supp.2d 106 (D.D.C. 2005) (Guantanamo detainee case stayed pending resolution of *Al-Odah* and *Boumediene* detainee appeals in D.C. Circuit).

One of the central issues in Mr. Hamdan's appeal is whether the District Court erred in holding that Section 7 of the MCA speaks with the clarity needed to divest federal courts of habeas jurisdiction over pending cases. This issue is already before the Circuit Court in the *Al-Odah* and *Boumediene* cases, and both the petitioners and respondents in those cases have submitted extensive briefing on that subject. Similarly, the parties in *Al-Odah* and *Boumediene* have also already submitted briefing on whether the MCA violates the Suspension Clause, and if so, whether detainees at Guantanamo Bay can lay claim to constitutionally-protected habeas. Waiting for the D.C. Circuit's ruling on these issues may

provide substantial guidance as to how these issues should be resolved in the context of Mr. Hamdan's case.

As pointed out by Mr. Hamdan in his briefing to the District Court, there are additional issues in his case (and consequently his appeal) that are distinct from the issues posed in the *Al-Odah* and *Boumediene* appeals. Specifically, Mr. Hamdan's status as a pre-commission detainee, the fact that new charges have been sworn against him (including for an offense that a plurality of the Supreme Court has already held invalid), the operative effect of the Supreme Court's existing ruling in his case, and additional constitutional challenges to the MCA not raised by the other detainees, all set Mr. Hamdan's case apart from *Al-Odah* and *Boumediene*.<sup>1</sup> Nonetheless, the jurisdictional effect of Section 7 of the MCA, as well as availability of constitutionally-based habeas relief for Mr. Hamdan and the *Al-Odah* and *Boumediene* detainees, are issues that the D.C. Circuit may address in its forthcoming ruling in those cases. That ruling may provide the parties and this Court with guidance regarding the scope of Mr. Hamdan's appeal, and will conserve judicial resources by avoiding re-briefing on those issues already before the Circuit Court. Although Mr. Hamdan seeks adjudication of his claims as quickly as possible, the *Al-Odah* and *Boumediene* cases have been on appeal since March of 2005 and those cases are now fully briefed and submitted.

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<sup>1</sup> Respondents acknowledged these differences, by seeking additional time and pages before the District Court in order to fully address those issues in Mr. Hamdan's case which differed from the *Al-Odah* and *Boumediene* detainee cases. See Resp. Mot. for Enlargement of Page and Time Limitations at 3 ("Petitioner here, however, has raised additional arguments, including that the MCA unconstitutionally interferes with core functions of the judiciary; that the MCA is an unlawful bill of attainder; and that the MCA's jurisdiction-limiting provision violates equal protection. Furthermore, petitioner in this case has raised various arguments that the existence of this Court's November 8, 2004 injunction respecting military commission proceedings against petitioner impacts the jurisdictional analysis.").

**II. ACTION ON HAMDAN'S PETITION FOR WRIT OF CERTIORARI BEFORE JUDGMENT MAY RENDER REVIEW IN THIS COURT UNNECESSARY.**

Courts of Appeal have discretion to hold appeals in abeyance pending the outcome of a related petition for writ of certiorari. *See, e.g., U.S. v. Provost*, 237 F.3d 934, 937 (8th Cir. 2001) (holding appeal in abeyance pending the outcome of the Government's petition for writ of certiorari in related case); *Spagnola v. Mathis*, 859 F.2d 223, 224 (D.C. Cir. 1988) (proceedings in appeal held in abeyance pending Supreme Court disposition on a petition for writ of certiorari). Mr. Hamdan intends to file his Petition for Writ of Certiorari Before Judgment very shortly, and the pendency of that Petition is yet another reason why holding Mr. Hamdan's appeal in abeyance is the proper course here. If granted, that Petition would obviously obviate the need for any action on Mr. Hamdan's appeal in this Court.

There are compelling reasons why the Supreme Court may decide to take Mr. Hamdan's appeal before review in this Court. Once this Court renders a decision in the *Al-Odah* and *Boumediene* cases, given the interrelated nature of those appeals and Mr. Hamdan's, it would be consistent with the Supreme Court's longstanding historical practice to consolidate all three cases and hear them together. *See, e.g. The New Haven Inclusion Cases*, 399 U.S. 392 (1970) (consolidated litigation regarding railroad merger); *United States v. Thomas*, 362 U.S. 58 (1960) (considered with *United States v. Raines*, 362 U.S. 17 (1960)); *Taylor v. McElroy*, 360 U.S. 709 (1959) (considered with *Greene v. McElroy*, 360 U.S. 474 (1959)); *Kinsella v. Krueger*, 352 U.S. 487 (1956) (considered with *Reid v. Covert*, 351 U.S. 487 (1956)). Moreover, on the merits, Mr. Hamdan's appeal presents issues of significant importance where the Supreme Court has granted certiorari before judgment in the past. *See, e.g., Ex parte Quirin*, 317 U.S. 1 (1942) (certiorari before judgment in a case involving the legitimacy of a military commission); *Wilson v. Girard*, 354 U.S. 524 (1957) (certiorari before judgment to determine whether the Constitution applies extraterritorially to restrain military trials). Given the potential for the Supreme Court to

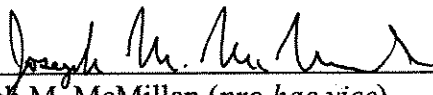


grant certiorari before judgment in his case, particularly if consolidated with review of the *Al-Odah* and *Boumediene* cases, abeyance would be a proper and prudent exercise of this Court's discretion here.

### CONCLUSION

Although Mr. Hamdan continues to seek expeditious review of his case, in light of the pendency of the *Al-Odah* and *Boumediene* appeals, holding briefing and related action on his appeal in abeyance at this time is likely to be the most efficient way to move the case forward and avoid what may ultimately be redundant briefing on issues that either this Court will resolve shortly, or will be taken up directly by the Supreme Court. For all the foregoing reasons, Mr. Hamdan respectfully requests that the Court hold Mr. Hamdan's appeal in abeyance and stay any related briefing until this Court's ruling in the pending *Al-Odah* and *Boumediene* cases, or until action is taken on his Petition for Writ of Certiorari Before Judgment.

Respectfully submitted this 6th day of February, 2007.

/s/   
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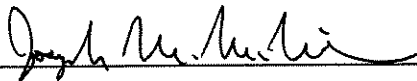
*Attorneys for Petitioner Salim Ahmed Hamdan*

**CERTIFICATE OF SERVICE**

I hereby certify that on this February 6, 2007, I caused copies of the foregoing Motion to Hold Appeal in Abeyance to be sent by hand delivery to the Court and the following counsel of record:

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/s/  \_\_\_\_\_

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