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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.

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

4 DATED this 23 day of April, 2004.

5 Respectfully submitted,

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7 United States Attorney

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Attorneys for Respondents

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

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

9 **STATEMENT OF FACTS**

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

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

25  
26 <sup>1</sup> This response is limited to respondents’ request to hold the petition in abeyance. By filing this  
27 request, respondents do not waive any grounds for dismissal of the petition, including but not limited  
28 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.

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

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

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

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

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

2 4. Hamdan is not the first Guantanamo detainee to have a federal court challenge filed  
3 on his behalf. On February 19, 2002, the parents of four British and Australian nationals at  
4 Guantanamo filed in District Court for the District of Columbia a next-friend petition for  
5 habeas corpus on behalf of those detainees. On May 1, 2002, the family members of  
6 12 Kuwaiti nationals detained at Guantanamo filed in Washington, D.C. a civil action on their  
7 behalf. And on June 10, 2002, the wife of another Guantanamo detainee, Mamdouh Habib,  
8 also filed in Washington, D.C. a petition for habeas corpus on his behalf.

9 The government moved to dismiss all three actions for lack of subject- matter  
10 jurisdiction under Johnson v. Eisentrager, 339 U.S. 763 (1950), where the Supreme Court  
11 held that neither the Constitution nor the federal habeas statutes conferred jurisdiction to  
12 consider a habeas petition filed on behalf of German nationals who had been seized overseas  
13 following the German surrender in World War II, tried by a military commission, and  
14 imprisoned at a U.S.-controlled facility in Germany. As the government explained in its  
15 motions to dismiss, under the principles recognized by the Supreme Court in Eisentrager, the  
16 U.S. courts lack jurisdiction over claims filed on behalf of Guantanamo detainees because all  
17 of them are aliens with no connection to the United States, and they are being detained outside  
18 of the sovereign territory of the United States. The district court agreed with the government  
19 and dismissed the challenges for lack of jurisdiction. Rasul v. Bush, 215 F. Supp. 2d 55, 65-  
20 73 (D.D.C. 2002).

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

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

2 The D.C. Circuit’s decision is now before the Supreme Court, which granted certiorari  
3 to consider “[w]hether United States courts lack jurisdiction to consider challenges to the  
4 legality of the detention of foreign nationals captured abroad in connection with hostilities and  
5 incarcerated at the Guantanamo Bay Naval Base, Cuba.” Rasul v. Bush, 124 S. Ct. 534  
6 (2003) (S. Ct. No. 03-334); Al Odah v. United States, 124 S. Ct. 534 (2003) (S. Ct.  
7 No. 03-343). A copy of the government’s brief in Rasul/Al Odah is attached as Exhibit A.

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

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

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

25 \_\_\_\_\_  
26 <sup>2</sup> Petitioner in this case filed an amicus brief in the Supreme Court in Al-Odah urging the Court  
27 “to preserve the option of case-by-case review to assess jurisdiction” rather than issue a broad ruling  
28 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.

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

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

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

## 21 ARGUMENT

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

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

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

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

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

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

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

1 **CONCLUSION**

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

4 DATED this 23 day of April, 2004.

5 Respectfully submitted,

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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

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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:

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