

THE HONORABLE ROBERT S. LASNIK

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10 UNITED STATES DISTRICT COURT  
11 WESTERN DISTRICT OF WASHINGTON  
12 AT SEATTLE  
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14 Lieutenant Commander CHARLES SWIFT, a  
15 resident of the State of Washington, as next  
16 friend for SALIM AHMED HAMDAN,  
17 Military Commission Detainee,  
18 Camp Echo,  
19 Guantanamo Bay Naval Base,  
20 Guantanamo Bay, Cuba,  
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Petitioner,

NO. CV04-0777L

**PETITIONER'S MOTION FOR ORDER  
AUTHORIZING LIMITED  
DISCOVERY**

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,

**Note on Motion Calendar:  
July 23, 2004**

Respondents.

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**I. PRELIMINARY STATEMENT**

Petitioner Lieutenant Commander Charles Swift respectfully requests leave to engage in limited discovery from Respondents, designed to elicit evidence regarding the claims set forth in the Petition filed herein. It is well settled that this Court has both the authority and the duty to permit such discovery under the circumstances present here, where Petitioner has had no opportunity to review or challenge the evidence against him, and no opportunity to develop facts that would establish the illegality of his continued detention. The discovery sought by this motion consists of seven (7) document requests, and a single Rule 30(b)(6) deposition of a representative of Respondents.

**II. FACTUAL BACKGROUND**

Petitioner is acting as “next-friend” for Salim Ahmed Hamdan, who is currently being held in solitary confinement by U.S. military authorities at Camp Echo, Guantanamo Bay Naval Base, Cuba. As set forth in the Petition, Mr. Hamdan was seized in Afghanistan and sold into the custody of U.S. military forces in late 2001. He was subsequently transported to Guantanamo Naval Base, where he is being held as an alleged enemy combatant. In July 2003, Mr. Hamdan was identified as one of six individuals subject to President Bush’s November 13, 2001, Executive Order relating to the Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism (“the Military Order”). The Military Order purports to provide, by Executive fiat, that anyone subject to its terms, if tried, shall be tried by military commission, without the right of review by any civilian court, whether federal, state, or international.

1 Mr. Hamdan denies that he ever was a combatant engaged in hostilities against the  
2 United States or its allies. Mr. Hamdan further denies that he ever planned or participated in  
3 terrorist acts against the United States or its citizens, or harbored anyone who did.  
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6 The Petition filed in this matter seeks either a writ of mandamus, or in the alternative,  
7 a writ of habeas corpus. The Petition asserts, among other things, that no commission  
8 established pursuant to the Military Order can have personal jurisdiction over Mr. Hamdan,  
9 because he never engaged in the activities enumerated in the Military Order to identify  
10 persons subject to its terms. The Petition further alleges that the Military Order is  
11 unconstitutional, and that Respondents, by their lengthy and continuing detention of Mr.  
12 Hamdan in solitary confinement, have violated the Constitution, laws, treaties, and regulations  
13 of the United States in numerous respects. It alleges that statutes, including those governing  
14 mandamus, habeas corpus, and the Administrative Procedures Act, confer power on this Court  
15 to hear these claims.  
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17 Mr. Hamdan has been given no opportunity to face his accusers, to review or  
18 challenge the evidence against him (if it exists), or to marshal facts and offer evidence in his  
19 own defense. In this respect, of course, this proceeding is different from a typical habeas  
20 action, where a trial has already occurred and a prisoner nevertheless asserts that the process  
21 was flawed. In this case, no legal process has been afforded to Mr. Hamdan, other than the  
22 process under way in this action.<sup>1</sup>  
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26 The discovery sought by Petitioner consists of seven (7) document requests and a  
27 single Rule 30(b)(6) deposition of a representative of Respondents. The document requests  
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<sup>1</sup> While Mr. Hamdan has been told that he will be charged and tried before a military commission, and assigned military defense counsel (Lt. Commander Swift) for purposes of negotiating a plea, no charges have been brought.

1 call for all documents that refer or relate to Mr. Hamdan personally, the circumstances of his  
2 capture and confinement, the information obtained from Mr. Hamdan, the reasons for his  
3 detention and his identification as a person subject to the Military Order, and the reasons for  
4 the delay in bringing charges against him. The proposed topics for examination of a Rule  
5 30(b)(6) representative are essentially the same, in order that the deponent might authenticate  
6 and answer questions about the documents produced. Copies of Petitioner's Requests for  
7 Production of Documents, and the Notice of Rule 30(b)(6) Deposition, are attached to the  
8 Proposed Order submitted herewith.  
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### 16 **III. ARGUMENT**

#### 17 **A. Discovery is Appropriate in Mandamus Actions, and Justified Here**

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19 Discovery is permissible in mandamus actions such as this, and amply justified in this  
20 case. See, e.g., Judicial Watch, Inc. v. National Energy Policy Development Group, 233 F.  
21 Supp.2d 16, 29 (D.D.C. 2002) (“courts have found discovery to be appropriate [in mandamus  
22 actions] where an agency has either completely abrogated its enforcement responsibilities or  
23 acted clearly outside the bounds of relevant statutes”); see also Conservation Law Foundation  
24 of New England, Inc. v. Clark, 590 F. Supp. 1467, 1472-73 (D. Mass. 1984) (“Courts have  
25 indicated that independent fact finding under mandamus is appropriate in some  
26 circumstances, even where agency action is under review”) (citing cases). In this case,  
27 Petitioner alleges that Respondents have acted clearly outside the bounds of applicable  
28 statutes and regulations governing the confinement and treatment of Mr. Hamdan, and  
29 violated the Constitution and the Geneva Conventions by failing to perform clear, non-  
30 discretionary duties owed to Mr. Hamdan. (See Petition, counts I – VIII.) Accordingly, the  
31 requested discovery into the facts relating to those topics should be permitted.  
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1 **B. The Court Has the Authority and the Duty to Permit Discovery in a**  
2 **Habeas Proceeding if Necessary to “Dispose of the Matter as Law and**  
3 **Justice Require”**  
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5 Even if this Court were to decline to permit discovery for purposes of Petitioner’s  
6 request for a writ of mandamus, discovery is permissible and justified in connection with  
7 Petitioner’s alternative request for a writ of habeas corpus. Discovery in a habeas corpus  
8 proceeding is permitted at the discretion of the court “for good cause shown.” Hayes v.  
9 Woodford, 301 F.3d 1054, 1065 n.6 (9<sup>th</sup> Cir. 2002). “Good cause” to permit discovery exists  
10 “where specific allegations before the court show reason to believe that the petitioner may, if  
11 the facts are fully developed, be able to demonstrate that he is... entitled to relief.” Bracey v.  
12 Gramley, 520 U.S. 899, 908-909 (1997) (quoting Harris v. Nelson, 394 U.S. 286, 299 (1969)).  
13 The Supreme Court’s observations in Harris, the seminal case on the issue of discovery in  
14 habeas actions, are particularly pertinent here, such that lengthy quotation from that opinion is  
15 justified:  
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27 The writ of habeas corpus is the fundamental instrument for  
28 safeguarding individual freedom against arbitrary and lawless state  
29 action. Its pre-eminent role is recognized by the admonition in the  
30 Constitution that: “The Privilege of the Writ of Habeas Corpus shall  
31 not be suspended....” U.S. Const., Art. I, § 9, cl. 2. The scope and  
32 flexibility of the writ – its capacity to reach all manner of illegal  
33 detention – its ability to cut through barriers of form and procedural  
34 mazes – have always been jealously guarded by courts and lawmakers.  
35 The very nature of the writ demands that it be administered with the  
36 initiative and flexibility essential to insure that miscarriages of justice  
37 within its reach are surfaced and corrected.  
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43 It is now established beyond the reach of reasonable dispute that the  
44 federal courts not only may grant evidentiary hearings to applicants, but  
45 must do so upon an appropriate showing. And this Court has  
46 emphasized, taking into account the office of the writ and the fact that  
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1 the petitioner, being in custody, is usually handicapped in developing  
2 the evidence needed to support in necessary detail the facts alleged in  
3 his petition, that a habeas corpus proceeding must not be allowed to  
4 founder in a “procedural morass.”  
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7 There is no higher duty of a court, under our constitutional system,  
8 than the careful processing and adjudication of petitions for writs of  
9 habeas corpus, for it is in such proceedings that a person in custody  
10 charges that error, neglect, or evil purpose has resulted in his unlawful  
11 confinement and that he is deprived of his freedom contrary to law.  
12 This Court has insistently said that the power of the federal courts to  
13 conduct inquiry in habeas corpus is equal to the responsibility which  
14 the writ involves: “The language of Congress, the history of the writ,  
15 the decisions of this Court, all make clear that the power of inquiry on  
16 federal habeas corpus is plenary.” Townsend v. Sain, [372 U.S. 293], at  
17 312, 83 S.Ct. [745,] at 757.  
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22 Petitioners in habeas corpus proceedings, as the Congress and this  
23 Court have emphasized,... are entitled to careful consideration and  
24 plenary processing of their claims including full opportunity for  
25 presentation of the relevant facts. Congress has provided that once a  
26 petition for a writ of habeas corpus is filed, unless the court is of the  
27 opinion that the petitioner is not entitled to an order to show cause, the  
28 writ must be awarded “forthwith,” or an order to show cause must be  
29 issued. 28 U.S.C. § 2243. Thereafter, if the court concludes that the  
30 petitioner is entitled to an evidentiary hearing, it shall order one to be  
31 held promptly. 28 U.S.C. § 2243.  
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35 Flexible provision is made for the taking of evidence by oral  
36 testimony, by deposition, or upon affidavit and written interrogatory.  
37 28 U.S.C. § 2246. Cf. §§ 2245, 2254(e). The court shall “summarily  
38 hear and determine the facts, and dispose of the matter as law and  
39 justice require.” 28 U.S.C. § 2243. But with respect to the method for  
40 securing facts where necessary to accomplish the objective of the  
41 proceedings Congress has been largely silent. Clearly, in these  
42 circumstances, the habeas corpus jurisdiction and the duty to exercise it  
43 being present, the courts may fashion appropriate modes of procedure,  
44 by analogy to existing rules or otherwise in conformity with judicial  
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1 usage. Where their duties require it, this is the inescapable obligation  
2 of the courts.  
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6 At any time in the proceedings, when the court considers that it is  
7 necessary to do so in order that a fair and meaningful evidentiary  
8 hearing may be held so that the court may properly “dispose of the  
9 matter as law and justice require,” either on its own motion or upon  
10 cause shown by the petitioner, it may issue such writs and take or  
11 authorize such proceedings with respect to development, before or in  
12 conjunction with the hearing of the facts relevant to the claims  
13 advanced by the parties, as may be “necessary or appropriate in the aid  
14 of (its jurisdiction)... and agreeable to the usages and principles of  
15 law.” 28 U.S.C. § 1651 [the All Writs Act].  
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21 Where specific allegations before the court show reason to believe that  
22 the petitioner may, if the facts are fully developed, be able to  
23 demonstrate that he is confined illegally and is therefore entitled to  
24 relief, it is the duty of the court to provide the necessary facilities and  
25 procedures for an adequate inquiry. Obviously, in exercising this  
26 power, the court may utilize familiar procedures, as appropriate,  
27 whether these are found in civil or criminal rules or elsewhere in the  
28 “usages and principles of law.”  
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31 Harris, 394 U.S. at 290-92, 298-300 (reversing an appellate decision disallowing the use of  
32 interrogatories in a habeas action, and remanding for further proceedings) (some citations  
33 omitted).  
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37 **C. Discovery in a Habeas Proceeding is Appropriate Despite Allegations that**  
38 **the Petitioner is an Enemy Combatant**  
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40 The fundamental principles of Harris v. Nelson were recently reaffirmed by the  
41 Supreme Court in Hamdi v. Rumsfeld, 542 U.S. \_\_\_\_ (June 28, 2004), a habeas proceeding  
42 where, as here, the Government alleges that the petitioner is held as an enemy combatant. In  
43 Hamdi, the Court rejected the Government’s argument that inquiry into the facts surrounding  
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1 the detention would “intrude on the sensitive secrets of national defense and result in a futile  
2 search for evidence buried under the rubble of war.” Id., slip op. at 25. Despite these protests  
3 about the burden allegedly posed by discovery and factfinding, the Court held that a “citizen-  
4 detainee seeking to challenge his classification as an enemy combatant must receive notice of  
5 the factual basis for his classification, and a fair opportunity to rebut the Government’s factual  
6 assertions before a neutral decisionmaker.” Id., slip op. at 26.<sup>2</sup> The Court stated:

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13 The Government has made clear in its briefing that documentation  
14 regarding battlefield detainees already is kept in the ordinary course of  
15 military affairs. Any factfinding imposition created by requiring a  
16 knowledgeable affiant to summarize these records to an independent  
17 tribunal is a minimal one. Likewise, arguments that military officers  
18 ought not have to wage war under the threat of litigation lose much of  
19 their steam when factual disputes at enemy combatant hearings are  
20 limited to the alleged combatant’s acts. This focus meddles little, if at  
21 all, in the strategy or conduct of war, inquiring only into the  
22 appropriateness of continuing to detain an individual claimed to have  
23 taken up arms against the United States. While we accord the greatest  
24 respect and consideration to the judgments of military authorities in  
25 matters relating to the actual prosecution of a war, and recognize that  
26 the scope of that discretion is necessarily wide, it does not infringe on  
27 the core role of the military for the courts to exercise their own time-  
28 honored and constitutionally mandated roles of reviewing and resolving  
29 claims like those presented here. Cf. Korematsu v. United States, 323  
30 U.S. 214, 233-234 (1944) (Murphy, J., dissenting) (“[L]ike other  
31 claims conflicting with the asserted constitutional rights of the  
32 individual, the military claim must subject itself to the judicial process  
33 of having its reasonableness determined and its conflicts with other  
34 interests reconciled”); Sterling v. Constantin, 287 U.S. 378, 401 (1932)

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42 <sup>2</sup> While this case involves an alien rather than a U.S. citizen, the Court noted in Rasul v. Bush, 542 U.S.  
43 \_\_\_\_ (June 28, 2004), that “the [habeas] statute draws no distinction between Americans and aliens held in  
44 federal custody.” Id., slip op. at 12. The Court therefore concluded that “Aliens held at the [Guantanamo Naval  
45 Base in Cuba], no less than American citizens, are entitled to invoke the federal courts’ authority under § 2241.”  
46 Id., slip op. at 12-13. Accordingly, as the statute does not distinguish between citizens and non-citizens, the  
47 discovery available to a non-citizen who seeks the Great Writ should be no less complete than that available to a  
U.S. citizen.

1 (“What are the allowable limits of military discretion, and whether or  
2 not they have been overstepped in a particular case, are judicial  
3 questions”).  
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7 [W]e necessarily reject the Government’s assertion that separation of  
8 powers principles mandate a heavily circumscribed role for the courts  
9 in such circumstances. Indeed, the position that the courts must forgo  
10 any examination of the individual case and focus exclusively on the  
11 legality of the broader detention scheme cannot be mandated by any  
12 reasonable view of separation of powers, as this approach serves only  
13 to *condense* power into a single branch of government.... Whatever  
14 power the United States Constitution envisions for the Executive in its  
15 exchanges with other nations or with enemy organizations in times of  
16 conflict, it most assuredly envisions a role for all three branches when  
17 individual liberties are at stake.... Likewise, we have made clear that,  
18 unless Congress acts to suspend it, the Great Writ of habeas corpus  
19 allows the Judicial Branch to play a necessary role in maintaining this  
20 delicate balance of governance, serving as an important judicial check  
21 on the Executive’s discretion in the realm of detentions. See [INS v.]  
22 St Cyr, 533 U.S. [289], at 301 [(2001)] (“At its historical core, the writ  
23 of habeas corpus has served as a means of reviewing the legality of  
24 Executive detention, and it is in that context that its protections have  
25 been strongest”).  
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32 [A] habeas court in a case such as this may accept affidavit evidence  
33 like that contained in the Mobbs Declaration [in which a Defense  
34 Department official summarized the relevant records and reports  
35 relating to the capture and detention of the petitioner], so long as it also  
36 permits the alleged combatant to present his own factual case to rebut  
37 the Government’s return. We anticipate that a District Court would  
38 proceed with the caution that we have indicated is necessary in this  
39 setting, engaging in a factfinding process that is both prudent and  
40 incremental. We have no reason to doubt that courts faced with these  
41 sensitive matters will pay proper heed to both the matters of national  
42 security that might arise in an individual case and to the constitutional  
43 limitations safeguarding essential liberties that remain vibrant even in  
44 times of security concerns.  
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1 Hamdi, 542 U.S. \_\_\_\_, slip op. at 28-30, 32 (June 28, 2004).

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3 Accordingly, assertions by the Government in this case that the requested discovery  
4 will jeopardize national security, or otherwise impose an undue burden on the military, should  
5 not be grounds for denying the limited discovery sought by Petitioner. Rather, consistent with  
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7 Hamdi, this Court should authorize discovery that permits Petitioner to “receive notice of the  
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9 factual basis for his classification [as an enemy combatant], and a fair opportunity to rebut the  
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11 Government’s factual assertions.” The discovery requested by this motion is calculated to do  
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13 just that, without going beyond what is necessary to develop facts sufficient to support  
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15 Petitioner’s claims. Petitioner is not seeking to depose high-ranking government officials, nor  
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17 use the discovery process to interfere in any way with military operations. Instead, Petitioner  
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19 has carefully limited his requests to the minimum necessary to examine whether the  
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21 President's determination of July 3, 2003, that Mr. Hamdan is an illegal enemy combatant, is  
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23 accurate.<sup>3</sup>  
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27 **D. There is Good Cause to Permit the Requested Discovery**

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29 The requested discovery is reasonably calculated to develop facts relevant to the  
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31 claims asserted in the Petition, which if established, entitle Petitioner to relief from this Court.  
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33 Petitioner denies that he was ever a combatant engaged in, or planning, hostilities against the  
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35 United States or its allies. If he is correct, then his detention is illegal. In this connection, it is  
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37 important to emphasize that Petitioner has had no opportunity to challenge or respond to the  
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39 allegation that is an enemy combatant. The Government has presented no evidence, in any  
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41 forum, to support that allegation. Likewise, Petitioner has been given no opportunity to test  
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47 <sup>3</sup> Petitioner has not been provided a copy of the July 3, 2003, determination that Mr. Hamdan is an  
illegal enemy combatant, nor has he seen any documentation that led to that Presidential finding.

1 the Government's assertion that he is an illegal combatant subject to trial before a military  
2 commission. Here again, the Government has presented no evidence, in any forum, to show  
3 that Petitioner is a person subject to the President's Military Order (i.e., the Executive Order  
4 that purports to suspend the writ of habeas corpus for non-citizens and subject those detained  
5 pursuant to that Order to trial by military commission). Indeed, despite the fact that he has  
6 now been held in solitary confinement (or, as the Government styles it, "pre-commission  
7 segregation") for over two hundred days (and that after having been already detained for  
8 approximately two years), Petitioner has not even been charged with an offense that would  
9 make him subject to trial before any tribunal. Under these circumstances, there is "good  
10 cause" to permit the limited discovery requested by this motion. Indeed, Petitioner's  
11 requested discovery is essential to "permit[] the alleged combatant to present his own factual  
12 case to rebut the Government's return." Hamdi, slip op. at 32.  
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25 Consistent with the guidance provided by the Supreme Court in Hamdi, the discovery  
26 requests propounded by Petitioner in this case are narrowly tailored to elicit evidence specific  
27 to Petitioner's individual circumstances and conduct. The requests relate to him personally,  
28 seeking evidence bearing on the Government's determination that he was an enemy  
29 combatant at the time of his capture, that by his conduct he falls within the categories  
30 identified in the President's Military Order, as well as evidence concerning the conditions of  
31 his confinement that bear on the reliability of whatever prejudicial admissions the  
32 Government conceivably may have obtained from him during his lengthy incarceration.  
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41 In Hamdi, the Government acknowledged that "documentation regarding battlefield  
42 detainees already is kept in the ordinary course of military affairs." If true in that case, then  
43 presumably the same is true with respect to Mr. Hamdan. Petitioner believes that obtaining  
44 whatever documents exist concerning Mr. Hamdan's activities, capture, and detention will be  
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1 crucial to his ability to show that he was not a combatant, he never planned or participated in  
2 acts hostile to the United States or its allies, and he never harbored anyone who did.  
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4 Likewise, a single Rule 30(b)(6) deposition of a representative of Respondents regarding Mr.  
5 Hamdan's conduct, capture, and detention is necessary to authenticate and answer questions  
6 about the documents produced. Petitioner is prepared to travel to any location proposed by  
7 Respondents to conduct this deposition. This is a minimal imposition on Respondents,  
8 particularly when balanced against the complete deprivation of liberty suffered by Mr.  
9 Hamdan in this case, a condition imposed upon him without any process, any opportunity to  
10 review or challenge the evidence against him, or to develop and offer counter evidence in his  
11 own defense.  
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#### 20 21 **IV. CONCLUSION**

22 For all of the foregoing reasons, Petitioner requests that the Court authorize discovery  
23 in the form of the Requests for Production of Documents and the Rule 30(b)(6) Deposition  
24 Notice attached to the Proposed Order submitted herewith.  
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30 Respectfully submitted this 7th day of July, 2004.  
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34 **NEAL KATYAL**

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37 By  /s/  
38 Neal Katyal, D.C. Bar #462071  
39 600 New Jersey Avenue, NW  
40 Washington, D.C. 20001  
41 (202) 662-9000  
42 Attorney for Petitioner  
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**LIEUTENANT COMMANDER CHARLES SWIFT**

By  /s/  
Lieutenant Commander Charles Swift  
N.C. Bar #21084  
Petitioner, as Next Friend for Salim Ahmed Hamdan

**PERKINS COIE LLP**

By  /s/ Harry H. Schneider, Jr.  
Harry H. Schneider, Jr., WSBA #9404  
Joseph M. McMillan, WSBA # 26527  
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Attorneys for Petitioner

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**CERTIFICATE OF SERVICE**

I certify under penalty of perjury under the laws of the State of Washington that on this 7th day of July, 2004, I caused to be served a true and correct copy of **Petitioner's Motion for Order Authorizing Limited Discovery and [Proposed] Order Granting Petitioner's Motion for Order Authorizing Limited Discovery** upon the following, at the addresses stated below, via the method of service indicated:

Mr. John McKay	<u>  X  </u>	Via hand delivery
Brian C. Kipnis	<u>      </u>	Via Certified Mail, Return Receipt Requested
U.S. Attorney's Office	<u>      </u>	Via Overnight Delivery
601 Union Street, Suite 5100	<u>      </u>	Via Facsimile
Seattle, WA 98101	<u>      </u>	Via E-filing

DATED at Seattle, Washington, this 7th day of July, 2004.

**PERKINS COIE LLP**

By   /s/ Harry H. Schneider, Jr.    
Harry H. Schneider, Jr., WSBA #9404  
Joseph M. McMillan, WSBA # 26527  
David R. East, WSBA #31481  
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