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December 15, 2006

Mark J. Langer  
Clerk, United States Court of Appeals for the  
District of Columbia Circuit  
E. Barrett Prettyman U.S. Courthouse  
333 Constitution Avenue, N.W.  
Washington, D.C. 20001

Re: *Al Odah v. United States* (D.C. Cir., Nos. 05-5064, 05-5095 through 05-5116)

Dear Mr. Langer:

I submit this letter under Fed.R.App.P. 28(j) on behalf of appellees-cross-appellants (the "Detainees"), in response to the letter submitted yesterday by government counsel citing *Hamdan v. Bush*, No. 04-1519 (D.D.C. Dec. 13, 2006).

The district court incorrectly decided *Hamdan* for the reasons stated in the Detainees' supplemental briefs regarding the Military Commissions Act of 2006 ("MCA"). Moreover, the district court's decision does not even address, much less reject, the Detainees' arguments that reading section 7(b) to apply to pending habeas cases renders new section 28 U.S.C. § 2241(e)(1) superfluous; ignores the difference between section 3 of the MCA, which explicitly withdraws jurisdiction over pending "habeas" cases and section 7(b), which makes no mention of habeas; and disregards the relevant drafting history. *See* Pet. Supp. Br. at 3-6; Pet. Supp. Rep. Br. at 2-4.

On the key issue of whether the Suspension Clause protects the Detainees' right to habeas, the district court in *Hamdan* considered the fact that Hamdan will be tried before a military commission, distinguishing his case from the vast majority of Detainees who have not been charged with any crime and who will never have the opportunity to challenge their detentions in any court if the courts are stripped of jurisdiction over pending habeas cases. Moreover, the district court seems to have foresaken the majority opinion's confirmation in *Rasul v. Bush*, 542 U.S. 466, 481-482 (2004) that the Detainees would have been entitled to the writ of habeas corpus at common law in 1789 in favor of Justice Scalia's contrary dissent (*see id.* at 502-505). Under *INS v. St. Cyr*, 533 U.S. 289, 301 (2001), "at an absolute minimum, the

Suspension Clause protects the writ ‘as it existed in 1789,’” before there was a Fifth Amendment. Therefore, regardless of whether the Detainees have a Fifth Amendment right to habeas, under *Rasul* they have a common law right to habeas which is protected by the Suspension Clause, and the district court in *Hamdan* erred in holding that Congress could take away that right in the MCA. *See* Pet. Supp. Br. at 5-6; Pet. Supp. Rep. Br. at 6-7.

Sincerely,

  
Neil H. Koslowe

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