IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Case No. 07-5042

SALIM AHMED HAMDAN,

Petitioner,

v.

ROBERT GATES, *et al.*,

Respondents.

PETITIONER'S MOTION TO STAY MILITARY COMMISSION PROCEEDINGS

Salim Hamdan faces imminent criminal trial before a military commission at Guantanamo Bay convened pursuant to the Military Commissions Act of 2006 ("MCA"), Pub. L. No. 109-366, 120 Stat. 2600 (2006), codified at 10 U.S.C. §§ 948a-950w. Absent an order from this Court, he will be tried by this commission beginning on May 28, 2008. *See* **App. A.** Mr. Hamdan's habeas appeal, which has been pending before this Court since February 5, 2007, presents a constitutional challenge to the MCA and to the legality of that criminal process. *See Hamdan v. Gates*, No. 07-5042 (D.C. Cir. July 24, 2007) (per curiam order), **App. B.** The Supreme Court has now heard oral argument in two cases closely related to Mr. Hamdan's to consider the constitutionality of portions of the MCA and whether the detainees at Guantanamo Bay have rights under the Constitution. The Court is expected to release its opinion in those cases within a month of

Mr. Hamdan's trial. *See Boumediene v. Bush* and *Al Odah v. United States*, 476 F.3d 981 (D.C. Cir.), *cert. granted*, 127 S. Ct. 3067 and 127 S. Ct. 3078 (2007) (Nos. 06-1195 & 06-1196).[1]

In order to preserve the relative positions of the parties in this challenge and to preserve this Court's jurisdiction over his pending appeal, Mr. Hamdan asks this Court to issue a stay (or other appropriate relief) pursuant to Circuit Rules 8 and 27 to suspend any further proceedings before a commission until this Court has an opportunity to consider the final decision by the Court in *Boumediene*. Such a course of action will not only promote judicial efficiency and avoid prejudice to Mr. Hamdan, it will also track this Court's decision to await resolution of *Boumediene* before considering whether to consider Mr. Hamdan's appeal en banc.

Every relevant entity in this litigation has signaled that a short stay to await the Supreme Court's decision in *Boumediene* is the prudent course of action. *First*, this Court has already suspended consideration of this case in light of the Court's decision to grant certiorari in *Boumediene*. *See Hamdan v. Gates*, No. 07-5042 (D.C. Cir. July 24, 2007) (per curiam order). **App. B.**

Second, the Solicitor General has written that Mr. Hamdan's case "raises the same legal issues" as *Boumediene* and has argued that *Boumediene* will almost certainly control Mr. Hamdan's habeas case. *See* Br. in Opposition to Certiorari,

[1] Petitioner will refer to these cases collectively as "*Boumediene*."

Hamdan v. Gates, No. 06-1169, at 10, 20. **App. C.** Notably, the Government itself sought a stay earlier in this very case because the Supreme Court had heard oral argument in a related case about the rights of the Guantanamo Bay detainees. *See* Notice of Motion and Motion for Order Holding Petition in Abeyance, *Swift v. Rumsfeld* (W.D. Wash. No. C04-0777-RSL at 6). **App. D.**

Third, the military commission recently issued a decision basing its jurisdiction to try Mr. Hamdan in part on the decision of this Court in *Boumediene*. **App. E.** *See United States v. Hamdan*, Order of Dec. 19, 2007, at 10; *see also id.* at 9 (rejecting Mr. Hamdan's equal protection challenge because "[t]he Court notes at the outset that the United States Court of Appeals for the D.C. Circuit has held that the Constitution of the United States does not protect detainees held at the U.S. Naval Base, Guantanamo Bay") (citing *Boumediene v. Bush*, 375 U.S. App. D.C. 48 (2007)). The *Boumediene* panel opinion on which the military commission's opinion relies for this holding is currently under review by the Supreme Court.

Mr. Hamdan has already been detained for six years; waiting a short while longer to ensure that his trial operates under the guidance of the Supreme Court's considered judgment regarding the constitutional status of Guantanamo is appropriate and will cause no possible harm to the Government. Without such a stay, Mr. Hamdan would be irreparably harmed by being subjected to a trial that he believes is illegal and whose legal underpinnings depend on a case that the

Supreme Court may ultimately reverse.[2] The public interest strongly supports waiting so that Mr. Hamdan's trial proceeds on solid legal footing.

A short stay would also avoid substantial confusion in later proceedings that are likely to occur before this Court. This Court already has before it Mr. Hamdan's habeas appeal challenging the constitutionality of the MCA and his trial. If this Court declines to issue a stay, and military commission proceedings continue, they would take place under rules that may be invalidated by the Supreme Court. If the outcome of the commission proceeding is adverse to Mr. Hamdan, he is likely to file with this Court a Petition for Review of any final decisions or orders of the United States Court of Military Commission Review ("CMCR"), pursuant to his statutory right under the MCA. *See* 10 U.S.C. § 950g. At that point, this Court would be faced with two separate appeals in Mr. Hamdan's case, reaching this Court on distinct postures and governed by

[2] As explained below, a short stay would avoid putting Mr. Hamdan in a classic "catch-22" that forced him to either preview his defense in a military commission that he believes will ultimately be invalidated or to refrain from defending himself based on a guess that the Supreme Court will side against the Government in *Boumediene* and invalidate the current military commission system. Unlike any other criminal trial, where judicial abstention is properly the norm against a backdrop of fixed rules and precedent, the most basic questions concerning Mr. Hamdan's commission remain unanswered—including whether the Constitution of the United States imposes any constraint whatsoever on these trials. The situation is even more dire than that in *Rafeedie v. INS*, 880 F.2d 506, 517-18 (D.C. Cir. 1989), where the Circuit (in an opinion by then-Judge Douglas Ginsburg) refused to abstain in an immigration proceeding because of the "substantial practical litigation advantage" given to the Government in forcing an individual to choose whether to put on a defense in a proceeding that may be invalidated.

conflicting procedures. Staying the military commission until the Supreme Court decides *Boumediene* is particularly appropriate since that decision may resolve the issues in Mr. Hamdan's pending habeas appeal, and may eliminate any need for Mr. Hamdan to file a concurrent Petition for Review under the MCA.

Background and Procedural History

Over a year ago, on December 13, 2006, Judge Robertson concluded that Mr. Hamdan's "connection to the United States lacks the geographical and volitional predicates necessary to claim a constitutional right." *Hamdan v. Rumsfeld*, 464 F. Supp. 2d 9, 18 (D.D.C. 2006). Mr. Hamdan noted a timely appeal of that decision with this Court. D.D.C. Docket No. 89 (Feb. 5, 2007). Shortly after the district court issued its ruling, this Court concluded, in *Boumediene v. Bush*, 476 F.3d 981, 990-95 (D.C. Cir. 2007), that aliens detained at Guantanamo Bay could not invoke any constitutional protection.

The *Boumediene* petitioners sought, and were initially denied, a writ of certiorari. *Boumediene v. Bush*, 127 S. Ct. 1478 (2007). Following a petition for rehearing, the Supreme Court subsequently granted certiorari on June 29, 2007. 127 S. Ct. 3078 (2007). The grant of certiorari on rehearing required the votes of at least five Justices, not just the four required to grant certiorari on an initial application. *See* Sup. Ct. R. 44.1. As the district court has explained, the Supreme Court's "extraordinary grant of certiorari on rehearing [in *Boumediene*] indicates

the Supreme Court's view that this case raises an important federal question, and that there is a need for comprehensive and thorough reexamination of the Court of Appeals' decision." *Alhami v. Bush*, Civ. Action No. 05-359, slip op. at 5 (D.D.C. Oct. 2, 2007). In light of the Supreme Court's action, this Court, on July 27, 2007, withdrew the mandate in *Boumediene*. *See Boumediene v. Bush*, No. 05-5062 (D.C. Cir. July 26, 2007) (ordering that "the mandate be recalled" and that "[t]he Clerk of the United States District Court for the District of Columbia is directed to return forthwith to the United States Court of Appeals for the District of Columbia Circuit the mandate issued June 27, 2007"). This Court's recall of the mandate "sends a strong signal that the decision may well be modified or rescinded, and deprives a previously final decision of its finality." *Alhami*, slip op. at 5-6 (citing *Calderon v. Thompson*, 523 U.S. 538, 550, 557-58 (1998)).

On June 8, 2007, Mr. Hamdan asked this Court to hear his case en banc, reasoning that the broad language of the *Boumediene* panel decision would control his case and render a panel hearing superfluous. The Government opposed that request but agreed that the *Boumediene* panel decision controlled Mr. Hamdan's commission challenge. *See* U.S. Opp. Pet. Initial En Banc, June 28, 2007, at 3 ("*Boumediene* plainly controls his appeal and forecloses any argument that he is entitled to constitutional habeas rights."). In recognition of the importance of *Boumediene* to Mr. Hamdan's appeal, this Court has frozen developments in

Mr. Hamdan's case until the Supreme Court decides *Boumediene*. **App. B.**[3]

Recognizing that the resolution of *Boumediene* will affect virtually all legal matters related to the detainees, panels of this Court and judges at the district court level, following these remarkable developments, have frozen action to preserve the status quo in their cases. *See, e.g.*, *Kiyemba v. Bush*, No. 05-5487 (D.C. Cir. Sept. 7, 2007) (recalling the mandate in a case in which it had dismissed the appeals for lack of jurisdiction); *Paracha v. Bush*, No. 05-5194 (D.C. Cir. Sept. 7, 2007) (same); *Alhami v. Bush*, No. 05-359 (D.D.C. Oct. 2, 2007) (granting petitioner's motion for a preliminary injunction blocking transfer of a detainee pending the Supreme Court's decision in *Boumediene*); *Ruzatullah v. Gates*, No. 06-1707 (D.D.C. Oct. 2, 2007); *Al-Oshan v. Bush*, No. 05-0520 (D.D.C. Oct. 5, 2007).[4] The

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[3] Mr. Hamdan also sought certiorari to resolve whether he has rights under the Constitution. The Government opposed that grant, because it contended that the Court "will consider precisely th[e] issues" raised by Mr. Hamdan's case in *Boumediene*. *See* Br. in Opposition to Certiorari, *Hamdan v. Gates*, No. 07-15, July 2007, at 10. The Government argued that review in Mr. Hamdan's case would "duplicat[e] review of the same issues" the Court will resolve in *Boumediene*. *Id.*

[4] The numerous orders of this Court and the district court preserving the status quo in cases concerning the Guantanamo detainees until after the Supreme Court decides *Boumediene* stand in contrast to orders denying relief to Guantanamo petitioners *before* the Supreme Court had granted certiorari in *Boumediene* and this Court had withdrawn the mandate in that case. *See, e.g.*, *Khadr v. Gates*, No. 07-1156 (D.C. Cir. May 30, 2007) (denying a motion to stay military commission proceedings for lack of jurisdiction under the MCA, 10 U.S.C. § 950j(b)). The extraordinary changed circumstances render those earlier orders inapposite to Mr. Hamdan's motion; indeed, this Court's recent decisions indicate that it does have jurisdiction to issue orders preserving the status quo in cases before it while the Supreme Court considers the constitutionality of the MCA. So too, the "law of the

case here, which involves a man on trial in the nation's first military commission in a half century, is even more compelling than those precedents.

Moreover, more recently this Court has held that it has jurisdiction to consider requests for interim relief, such as the one here: "We hold . . . that when the Supreme Court grants certiorari to review this court's determination that the district court lacks jurisdiction, a court can, pursuant to the All Writs Act, 28 U.S.C. § 1651, and during the pendency of the Supreme Court's review, act to preserve the status quo in other cases raising the same jurisdictional issue if a party satisfies the criteria for issuing a preliminary injunction." *Belbacha v. Bush*, No. 07-5258, slip op. at 7 (D.C. Cir. Mar. 14, 2008). Mr. Hamdan's case, like Belbacha's, presents the same jurisdictional relationship to *Boumediene*. Because, as explained below, Mr. Hamdan easily satisfies the criteria for a preliminary injunction, this Court should act to "preserve the status quo" in his case.

ARGUMENT: THIS COURT SHOULD STAY MILITARY COMMISSION PROCEEDINGS TO PRESERVE THE STATUS QUO UNTIL THE SUPREME COURT'S DECISION IN *BOUMEDIENE*.

This Court considers four factors in assessing whether to grant a stay: (1) whether the moving party has "demonstrate[d] at least some irreparable injury,"

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circuit" doctrine presents no barrier to relief for Mr. Hamdan, as this Court's recent opinions have acted to "temper or stay the 'law of the circuit' in order to preserve the status quo until that law can be validated or rejected by the Supreme Court." *Ayuda, Inc. v. Thornburgh*, 919 F.2d 153, 156 (D.C. Cir. 1990) (per curiam) (Wald, C.J., concurring in part and dissenting in part).

Hicks v. Bush, 397 F. Supp. 2d 36, 40 (D.D.C. 2005) (citing *CityFed Fin. Corp. v. Office of Thrift Supervision*, 58 F.3d 738, 747 (D.C. Cir. 1995)); (2) whether a stay would substantially injure other interested parties; (3) whether the public interest would be furthered by the stay; and (4) whether the movant is likely to succeed on the merits. *See, e.g.*, *Mova Pharm. Corp. v. Shalala*, 140 F.3d 1060, 1066 (D.C. Cir. 1998). In this case, all four factors weigh heavily in favor of a stay.

A. Mr. Hamdan Faces an Imminent and Irreparable Injury

Mr. Hamdan would suffer an irreparable injury if he is subjected to trial before the Supreme Court's resolution of whether he has any constitutional rights at all. Mr. Hamdan's habeas petition challenges the jurisdiction of the commission, its rules and procedures, and the legality of the particular substantive offenses for which he will be tried. *See Hamdan v. Rumsfeld*, 464 F. Supp. 2d 9 (D.D.C. 2006). Without an opportunity to raise these challenges before his trial, Mr. Hamdan will be irreparably harmed. His right to pre-trial review and to not be tried by a tribunal that lacks the requisite independence and procedural safeguards will be forever lost. As this Court has previously explained in Mr. Hamdan's case, "setting aside the judgment after trial and conviction insufficiently redresses the defendant's right not to be tried by a tribunal that has no jurisdiction." *Hamdan v. Rumsfeld*, 415 F.3d 33, 36 (D.C. Cir. 2005), *rev'd on other grounds*, 126 S. Ct. 2749, 2798 (2006).

Permitting the trial to go forward would incurably prejudice Mr. Hamdan by revealing his defense strategy and by exposing evidence that would be inadmissible under any constitutional regime. In addition, without knowing in advance whether the commission has jurisdiction over him, what evidence it may consider and for which offenses he may be tried, he will be unable to develop an effective defense strategy. He will be forced to evaluate any plea offer without knowing whether the proceedings and the tribunal itself (not to mention its procedural rules and the charges against him) are lawful.

This Court has previously held that requiring an individual to submit to a procedure that may be unlawful will cause him "a significant and irreparable injury." *Rafeedie v. INS*, 880 F.2d 506, 517-18 (D.C. Cir. 1989). In that case, the Court of Appeals affirmed a preliminary injunction that prevented an alien from having to participate in a summary exclusion proceeding. In an opinion written by then-Judge Douglas Ginsburg, the Court concluded that Mr. Rafeedie "would be irreparably and seriously injured" merely by being forced to participate in this possibly inapplicable procedure. *Id.* at 518. As the Court explained, an individual "will suffer a judicially cognizable injury" and "be deprived of a substantial practical litigation advantage." *Id.* at 517 (internal quotation marks omitted). For if an individual actively "presents his defense" in a proceeding that is subsequently found unlawful, the Government will "know his defense in advance of any

subsequent . . . proceeding." *Id.* But, if to avoid this harm, the individual "does not present his factual defense now, he risks forsaking his only opportunity to" do so. *Id.*

Mr. Hamdan faces precisely the same dilemma that constituted a "judicially cognizable injury" meriting injunctive relief in *Rafeedie*. If he offers his full factual defense before the very commission that he believes is unlawful, and the Supreme Court holds in *Boumediene* that he possesses rights under the Constitution, then the Government will know his defense in any subsequent proceeding. But if, in order not to prejudice himself in a later proceeding, Mr. Hamdan "does not present his factual defense" before the commission, then "he risks forsaking his only opportunity" to defend himself. *Id.* Accordingly, like *Rafeedie*, Mr. Hamdan will suffer "a significant and irreparable injury" if forced to undergo trial before *Boumediene* is resolved. The balance of equities—particularly now that six years have elapsed without trial and the *Boumediene* decision is expected soon after Mr. Hamdan's trial is to begin—tips heavily in his favor.

For similar reasons, the district court has required that a military commission be stayed "pending the issuance of a final and ultimate decision by the Supreme Court" about the underlying issues in the case. *Hicks*, 397 F. Supp. 2d at 45. Staying the proceedings was necessary because the "Petitioner face[d] the clear and imminent risk of being subjected to a military commission which has not been

ultimately determined by the Supreme Court to have jurisdiction over Petitioner." *Id.* at 42. The "irreparable injury," that court explained, is "the fact that [the Petitioner] would have been tried by a tribunal without any authority to adjudicate the charges against him in the first place, potentially subjecting him to a second trial before a different tribunal." *Id.*[5]

The Supreme Court has recognized the necessity of allowing a pre-trial habeas challenge to a military trial in Mr. Hamdan's very case. In 2006, the Supreme Court held in *Hamdan v. Rumsfeld* that "abstention is not appropriate in cases in which individuals raise 'substantial arguments denying the right of the military to try them at all.'" 126 S. Ct. 2749, 2770 n.16 (2006) (internal quotation marks and citations omitted). Given the unprecedented nature of the MCA commissions, Mr. Hamdan continues to have a "compelling interest in knowing in advance whether [he] may be tried by a military commission that arguably is without any basis in law." *Id.* at 2772. Indeed, had the Supreme Court (or this Court in 2005) accepted the Government's request for abstention, Mr. Hamdan would have been placed in *Rafeedie*'s "catch 22"—forced to decide whether to

[5] While the circumstances of Mr. Hamdan's motion are analogous to Hicks's 2005 motion, they differ significantly from Hicks's 2007 motion. In 2007, the District Court concluded it had no jurisdiction to consider the latter petition because the D.C. Circuit panel opinion in *Boumediene* remained in effect, and the Supreme Court had not yet granted certiorari. *See Hicks v. Bush*, Civil Action No. 02-299, 2007 WL 902303, at *5-6 (D.D.C. Mar. 23, 2007). Now, however, this Court has withdrawn the mandate in *Boumediene*, and the Supreme Court has granted certiorari in that very case.

preview his defense in an invalid procedure or to risk putting on no defense at all. That trial would have been invalidated, and Mr. Hamdan would be forced to start over, with the government handed a preview of his defense.

B. The Government Will Suffer No Harm If the Trial Is Delayed Until It Is Placed on a More Sound Legal Footing

Mr. Hamdan was captured in November 2001 and has been detained in U.S. custody ever since. Given that Mr. Hamdan has already been detained for over six years, and has been awaiting trial since the President's July 2003 written determination to bring him to trial, a short delay cannot prejudice the Government. There can be no possible evidentiary loss or other harm to the Government's ability to try Mr. Hamdan.[6] In other cases before this Court related to the Guantanamo detainees, the Government itself has recently sought delays pending action by the Supreme Court, indicating its willingness to halt proceedings under the DTA and MCA until they are on proper legal footing. *See, e.g.*, Motion to Stay Order to File Certified Index of Record, *Paracha v. Gates*, No. 06-1038 (D.C. Cir. Feb. 8, 2008) (seeking a stay "pending the disposition of the Government's petition for certiorari in *Bismullah v. Gates*").

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[6] If a short delay imposes any harm at all, it is not the type that is cognizable to this Court. *See* Josh White, *Pressure Alleged in Detainees' Hearings, Ex-Prosecutor Says Pentagon Pushing 'Sexy' Cases in '08*, Wash. Post, Oct. 21, 2007, at A15 ("Politically motivated officials at the Pentagon have pushed for convictions of high-profile detainees ahead of the 2008 elections, the former lead prosecutor for terrorism trials at Guantanamo Bay said last night, adding that the pressure played a part in his decision to resign earlier this month.").

Mr. Hamdan here seeks nothing more than what the Government itself sought at an earlier stage of this case. In April 2004, the Solicitor General requested a stay in this litigation because the Supreme Court had heard oral argument in a related case about the rights of the Guantanamo Bay detainees. The Government sought that stay because "[t]he D.C. Circuit's decision [in *Rasul* and *Al Odah*] is now before the Supreme Court, which granted certiorari to consider '[w]hether United States courts lack jurisdiction to consider challenges to the legality of the detention of foreign nationals captured abroad in connection with hostilities and incarcerated at the Guantanamo Bay Naval Base, Cuba.'" Notice of Motion and Motion for Order Holding Petition in Abeyance, *Swift v. Rumsfeld*, No. C04-0777RSL, at 6 (W.D. Wash. 2004) (quoting *Rasul v. Bush*, 124 S. Ct. 534 (2003) (S. Ct. No. 03-334); *Al Odah v. United States*, 124 S. Ct. 534, 534-35 (2003) (S. Ct. No. 03-343)). Today, once again, the D.C. Circuit's panel opinion is "now before the Supreme Court," this time in *Boumediene* and *Al Odah*. And the Government's previous argument—that "Federal courts routinely exercise their discretion to hold cases in abeyance when an impending decision from the Supreme Court is likely to shed light on the issue(s) before them," *id.* at 7, 8—is no less relevant today.

Further, as explained above, the Government itself has recognized that a foundational issue in Mr. Hamdan's case—whether the Constitution provides

rights to detainees at Guantanamo Bay—will be resolved by the Supreme Court in *Boumediene*. If the Court in *Boumediene* determines that the detainees at Guantanamo do have rights under the Constitution, then it will likely have to mount an attempt to re-try Mr. Hamdan. In fact, the Supreme Court has explained that not just Mr. Hamdan but also "the Government ha[s] a compelling interesting in knowing in advance whether Hamdan may be tried by a military commission that arguably is without any basis in law." *Hamdan*, 126 S. Ct. at 2772.

Finally, regardless of when and whether Mr. Hamdan is tried, he will be detained during the short period of the stay. A brief delay does not create any risk that he will be released and cannot in any way endanger national security. As Justice Kennedy stated over a year ago, "the circumstances of Hamdan's trial present no exigency requiring special speed or precluding careful consideration of evidence. For over five years, Mr. Hamdan has been detained at a permanent United States military base in Guantanamo Bay, Cuba. And regardless of the outcome of the criminal proceedings at issue, the Government claims authority to continue to detain him based on his status as an enemy combatant." *Id.* at 2805 (Kennedy, J., concurring in part); *see also Hicks*, 397 F. Supp. 2d at 42-43 ("Considering that Petitioner in this case has been held by the U.S. government since November of 2002 and in the event of an injunction that he will simply continue to be detained by the government, the Court fails to see how further delay

will harm the government. . . . [T]he minor logistical reshuffling caused by an injunction [is not] injury to Respondents in any material fashion.").

C. Enjoining a Trial Until the Supreme Court's Decision in *Boumediene* Will Further the Public Interest

An injunction to stay commission proceedings until the Supreme Court determines whether Mr. Hamdan has any constitutional rights will further the public interest. As Judge Kollar-Kotelly previously explained, "It would not be in the public interest to subject Petitioner to a process which the highest court in the land may determine to be invalid. It is in the public interest to have a final decision, leaving no doubts as to this key jurisdictional issue, before Petitioner's military commission proceedings begin." *Hicks*, 397 F. Supp. 2d at 43.

There are several reasons why it is in the public interest to enjoin Mr. Hamdan's military trial until the Supreme Court decides *Boumediene*. First, a stay will increase judicial economy and military efficiency by avoiding the need for a second trial if the Supreme Court in *Boumediene* rules that Mr. Hamdan does have rights under the Constitution. Second, a failure to resolve the constitutionality of Mr. Hamdan's trial before it begins will create inefficiencies during the course of the trial, as neither the parties nor the judges will be able to resolve motions on procedural and evidentiary issues with any certainty.

Finally, trying Mr. Hamdan under a questionable regime whose very legality is under review in our own Supreme Court would reduce the legitimacy of the

proceedings in this country and in the eyes of the world. The rule of law requires that a criminal defendant know, in advance, the charges for which he may be tried and the procedures that will be used to try him. The issues at stake in Mr. Hamdan's case—the prohibition on Ex Post Facto laws, the separation of powers, due process and equal protection—are foundational to our Constitution. As the district court has noted, quoting then-Chief Judge Wald of this Court, "a justice system that did not allow courts to 'provide interim relief to ensure the survival in the coming months of the alien claimants in this case' pending the Supreme Court's decision in a separate controlling case would be 'a cruel and irrational system of justice indeed.'" *Alhami*, slip op. at 7 (quoting *Ayuda*, 919 F.2d at 154, 156 (Wald, C.J., dissenting)).

D. Mr. Hamdan Is Likely to Succeed on the Merits

Mr. Hamdan is likely to succeed on the merits of his claim that (1) he is protected by the Constitution and has a right to habeas corpus and (2) the military commission in which the Government intends to try him is unconstitutional.[7] As

[7] To the extent this Court is uncertain as to whether Mr. Hamdan's challenge to the military commissions will ultimately succeed, this is no barrier to granting a stay. The Petitioner is not required to prevail on each of the four factors. *Hicks*, 397 F. Supp. 2d at 44 (citing *Wash. Metro Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977)). Thus, this Court may issue a stay when the petitioner faces "either a high probability of success and some injury, or *vice versa*." *Cuomo v. U.S. Nuclear Regulatory Comm'n*, 772 F.2d 972, 974 (D.C. Cir. 1985). In this case, the overwhelming weight of the factors favors staying the commission proceedings until the Court's decision in *Boumediene*.

explained above, the Supreme Court's decision to grant certiorari in *Boumediene* on a petition for rehearing required five votes, which "sends a strong signal that the decision may well be modified or rescinded." *Alhami*, slip op. at 5-6. If the Supreme Court modifies or rescinds this Court's decision in *Boumediene*, it will almost certainly do so based on a conclusion that the Constitution applies to the detainees at Guantanamo Bay. Such a holding would establish both that the federal courts have jurisdiction to consider Mr. Hamdan's constitutional challenge to the military commissions and that those commissions must satisfy the Constitution.

If, as expected, the Supreme Court concludes that the detainees possess any rights under the Constitution, then the commission slated to try Mr. Hamdan is almost certainly unconstitutional. For example, trying Mr. Hamdan on charges of "Conspiracy" and "Material Support of Terrorism"—offenses newly minted in the MCA—offends the Ex Post Facto Clause. A plurality of the Supreme Court has already held that conspiracy is not a violation of the laws of war and "[b]ecause [that] charge does not support the commission's jurisdiction, the commission lacks authority to try Hamdan." 126 S. Ct. at 2785. So too, the MCA's procedures, which permit the use of coerced evidence and apply only to aliens and not citizens, violate the Due Process and Equal Protection Clauses.

Mr. Hamdan's military commission itself recently underscored the importance of *Boumediene* to the resolution of these legal claims. In rejecting

Hamdan's equal protection challenge, the commission relied on nothing more than this Court's decision in *Boumediene*. *United States v. Hamdan*, Order of Dec. 19, 2007, at 10; *see also United States v. Khadr*, Order of Mar. 15, 2008, at 2 (finding jurisdiction because no current authority holds that a detainee at Guantanamo Bay "is entitled to all of the protections of the Constitution" or "to assert the Equal Protection Clause of the Constitution"). Unlike challenges on other issues, where the commission made multiple alternative holdings, this Court's decision in *Boumediene* was the *only* basis advanced by the military commission to reject Mr. Hamdan's equal protection challenge. Should the Supreme Court depart from this Court's analysis in *Boumediene*, the legal underpinnings of the entire trial system will be cast aside. There should not be two sets of military commission trials, one taking place before the Supreme Court's resolution of *Boumediene* in which defendants have zero constitutional rights, and one taking place after the decision, where defendants will have the fundamental protections of our nation's most cherished document.[8]

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[8] Mr. Hamdan's motion differs substantially from that before this Court in *Khadr v. United States*, No. 07-1405, Order of Nov. 6, 2007. First, the importance of *Boumediene* was not clear in *Khadr*. Here, by contrast, Mr. Hamdan's commission has explicitly held that it is proceeding in part on the basis of *Boumediene*. Moreover, this Court has itself stayed appellate proceedings in this case pending *Boumediene*. Second, Khadr requested a stay pending this Court's resolution of his Petition for Review of decisions of the CMCR. Here, in contrast, Hamdan requests a stay pending the Supreme Court's decision regarding the constitutionality of the MCA. Third, the two motions seek stays to avoid different injuries. Khadr's

CONCLUSION

For these reasons, Mr. Hamdan respectfully requests that this Court stay military commission proceedings in his case until the Supreme Court decides the case of *Boumediene v. Bush*. He requests that this Court enter an order that would modify the existing order in this case found at Appendix B by (1) staying Mr. Hamdan's military commission pending the outcome of the Supreme Court's decision in *Boumediene* and (2) requiring motions to govern the proceedings to be filed by both parties within 30 days after the Supreme Court *Boumediene* decision with reply briefs to be filed simultaneously 14 days afterwards.

Respectfully submitted this 9th day of April, 2008.

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asserted injury was "being *designated* an 'unlawful enemy combatant' by a judge who lacks the authority to make such a determination." Khadr Brief at 2. Here, in contrast, Mr. Hamdan will suffer the irreparable injury of being forced to put on a defense in a *trial* before a tribunal he believes is unlawful, which would deprive him of a "substantial practical litigation advantage." *See Rafeedie*, 880 F.2d at 517. Fourth, the underlying merits issues in the two detainees' appeals are distinct. Khadr's Petition concerned whether a commission may determine that a detainee is an "alien unlawful enemy combatant." Mr. Hamdan's appeal, in contrast, asserts that his trial must be governed by the Constitution. Whether the Constitution's fundamental guarantees extend to Guantanamo is precisely the question on which five Justices of the Supreme Court granted rehearing to reconsider the *Boumediene* decision from this Court. For these reasons, this Court's order in Khadr's case in no way bears on the appropriateness of staying the proceedings against Hamdan.

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CERTIFICATE OF SERVICE

I hereby certify that on this April 9, 2008, I caused copies of the foregoing Motion to Stay Military Commission Proceedings to be sent by hand delivery to the Court and the following counsel of record:

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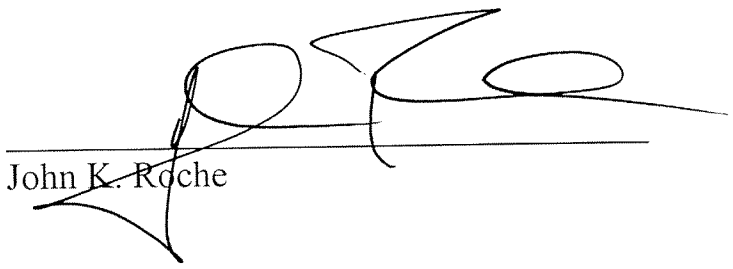

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