

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

SALIM AHMED HAMDAN,

Petitioner,

v.

DONALD H. RUMSFELD, United States  
Secretary of Defense, *et al.*,

Respondents.

CIVIL ACTION NO. 1:04-cv-01519-JR

**PETITIONER'S OPPOSITION TO RESPONDENTS' MOTION FOR  
ENLARGEMENT OF PAGE AND TIME LIMITATIONS**

Dissatisfied with the consequences of their strategic decision to seek dismissal of this case by simply "notifying" the Court of their view that it lacks subject-matter jurisdiction, Respondents now make a last-minute request to be relieved from this Court's October 27, 2006 Order and the Local Rules. Respondents provide no consistent or reasoned basis for their requested relief. Accordingly, Respondents' Motion for Enlargement of Page and Time Limitations ("Resp. Mot.") should be denied.

1. First, Respondents summarily seek relief by asking that the Court stay this matter until separate detainee cases pending before the D.C. Circuit are resolved, based on the purported similarity between this case and those ones. Resp. Mot. at 1. Indeed, Respondents have already submitted thirty-one pages of briefing to the D.C. Circuit in the *Al-Odah* and *Boumediene* cases regarding the jurisdictional effect of the Military Commissions Act of 2006 ("MCA") in those cases on November 1, 2006. Respondents nevertheless simultaneously maintain that, if its request for a stay is denied, *differences* between Mr. Hamdan's case and those before the D.C. Circuit necessitate more time and pages for briefing now. *Id.* at ¶¶ 5-6. These arguments cannot be reconciled.

Leaving aside the obvious tension between that request and the government's other request (for more time to brief the issues involved in *Hamdan* which evidently were not briefed fully to the Court of Appeals on November 1), the stay is particularly unwarranted here, where Hamdan would be incarcerated potentially for additional time as the result of their stay. Even were this an ordinary case, in moving for delay, Respondents "bear[] the burden of establishing its need." Clinton v. Jones, 520 U.S. 681, 706 (1997). As the Supreme Court held in Landis v. North American Co., 299 U.S. 248, 255 (1936):

[T]he supplicant for a stay must make out a clear case of hardship or inequity in being required to go forward, if there is even a fair possibility that the stay for which he prays will work damage to some one else. Only in rare circumstances will a litigant in one cause be compelled to stand aside while a litigant in another settles the rule of law that will define the rights of both.

In this case, the government has not made, and cannot make, that "clear case of hardship or inequity in being required to go forward."

Indeed, in Yong v. INS, 208 F. 3d 1116, 1120 (9th Cir. 2000), the United States made the same argument that it does here, that the issues in the district court were already being heard by the Ninth Circuit in another pending matter. The Ninth Circuit reversed the district court's decision to grant such a stay as an abuse of the lower court's discretion. In making this determination, the Court distinguished between habeas actions and other types of cases, and observed that "habeas proceedings implicate special considerations that place unique limits on a district court's authority to stay a case in the interests of judicial economy.... Special solicitude is required because the writ is intended to be a " 'swift and imperative remedy in all cases of illegal restraint or confinement." Id., at 1119-20 (citations omitted). Unlike Mr. Hamdan, Mr. Yong was not subject to incarceration during the period of delay in his case—he was in a halfway house. Id., at 1118 & n.1. Mr. Hamdan has been held in confinement by the Government for over four years; additional delay now denies him the "speedy" remedy afforded by habeas. *See* Petitioner's Opposition to Respondents' Motion to Dismiss at 18.

2. Respondents next contend that "additional" arguments raised by Mr. Hamdan

addressing the jurisdictional effect of the MCA necessitate their requested relief. Resp. Mot. at ¶ 6. Yet Respondents elsewhere argue that their work is already complete because they have addressed those issues in briefing to the D.C. Circuit. *Id.* ¶ 5. Respondents' failure to anticipate and brief *all* of the arguments in Mr. Hamdan's Opposition prior to its filing does not justify relief from the Local Rules or this Court's Order. Such a rationale would excuse compliance nearly every time briefs were filed. Regardless, in this case, Respondents already had considerable advance notice of the specific arguments raised by Mr. Hamdan. In briefing before the Supreme Court regarding the jurisdictional effect of the Detainee Treatment Act of 2005, which Respondents unsuccessfully relied upon to seek dismissal of this case, Mr. Hamdan raised the Bill of Attainder, Equal Protection, and separation of powers arguments Respondents claim are "additional" here. See Petitioner's Opposition to Motion to Dismiss at 25; 38-39; n.39 (available at [www.hamdanvrumfeld.com/HamdanOppositiontoMotiontoDismissFinal.pdf](http://www.hamdanvrumfeld.com/HamdanOppositiontoMotiontoDismissFinal.pdf), (January 31, 2006)).

Respondents also contend that there is an "additional" argument of Mr. Hamdan, that this Court's previous order impacts the jurisdictional analysis. Resp. Mot. at ¶ 6. Just why Respondents' counsel was previously unaware of that argument is elusive, since that was, after all, one of the arguments Mr. Hamdan advanced in arguing to the D.C. Circuit that this case should be remanded to this Court in the wake of the Supreme Court's decision. See Petitioner Hamdan's Motion to Govern Further Proceedings, *Hamdan v. Rumsfeld*, No. 04-5393, Aug. 30, 2006, at 15-16. Indeed, the D.C. Circuit *rejected* the Government's request to have this case heard by the Circuit court, and instead remanded the case here. See Respondents' Motion to Govern Future Proceedings, *Hamdan v. Rumsfeld*, No. 04-5393, Aug. 30, 2006, at 11. Yet the Government evidently wishes now to reopen that determination and have this Court wait for a decision that the Circuit court already knew was pending when it remanded this case to this Court.

3. Respondents also argue that the briefing schedule, which provided them fourteen days to prepare their Reply, is simply too onerous. Resp. Mot. at 4. Respondents have

known for over a month that they would be required to file their brief this Friday, and that they would have the time allotted by the Court's Order to do it. But instead of approaching the Court in the days after its October 27 Order issued, Respondents once again made the strategic choice to wait until 48 hours before their papers were due. Indeed, Respondents did not even raise the possibility of delaying and enlarging their Reply until the afternoon of Monday, November 27, when they contacted undersigned counsel asking that Petitioner support their request to this Court for more time and pages. See Declaration of Joseph M. McMillan in Support of Petitioner's Opposition to Respondents' Motion for Enlargement of Page and Time Limitations ("McMillan Decl.") ¶ 1, Ex. A. Petitioner's counsel responded within 90 minutes, declining Respondents' request and providing reasons for that denial. *Id.* Yet, Respondents continued to wait until after the Court was closed on November 29th to file their Motion. Any time pressure felt by Respondents is a result of their dilatory conduct, not the briefing schedule.<sup>1</sup>

4. In a final attempt to gain relief from this Court's Order and the Local Rules, Respondents suggest an inequity between the number of pages Mr. Hamdan receives under the Rules, and the number of pages the Rules provide for replies. *See* Resp. Mot. ¶ 7 (citing LCvR 7(e)). Again, this is a consequence of Respondents' summary assertion to this Court in its October 18, 2006 filing that because of the passage of the MCA, this case must be dismissed. Although Respondents now disclaim any attempt to convey "argument" in that filing, Resp. Mot. ¶ 3, their October 18 notice pointed out both (1) the jurisdiction stripping language of the MCA, and (2) the effective date provisions purporting to make that language effective against "all cases, without exception, pending on or after the date of enactment of this Act." This Court properly read the import and effect of Respondents' filing. Respondents' argument that

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<sup>1</sup> Although briefing during a holiday period may be unpleasant, it has not in the past prevented Petitioner from timely filing his papers. When Respondents sought expedited appeal of this Court's November 8, 2004 Order, Petitioner's brief to the D.C. Circuit became due on December 29, 2004, necessitating work over the Christmas and Thanksgiving holidays. That brief was filed on time, without any request for relief from the briefing schedule.

Mr. Hamdan submitted an overlong brief is also unsupported. Resp. Mot. ¶ 7. Mr. Hamdan's Opposition complied with the Rules regarding spacing. McMillan Decl. ¶ 2. Respondents point to no Local Rule offended by the format of that brief's footnotes, because the Rules contain no such restriction.

For all the foregoing reasons, Respondents' Motion for Enlargement of Page and Time Limitations should be DENIED.

Respectfully submitted this 30th day of November, 2006.

**LIEUTENANT COMMANDER CHARLES SWIFT**

By /s/ Lieutenant Commander Charles Swift  
Lieutenant Commander Charles Swift  
N.C. Bar #21084

**PERKINS COIE LLP**

By /s/ Joseph M. McMillan  
Harry H. Schneider, Jr. (*pro hac vice*)  
Joseph M. McMillan (*pro hac vice*)  
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**NEAL KATYAL**

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Attorneys for Petitioner Salim Ahmed Hamdan

**CERTIFICATE OF SERVICE**

I hereby certify that on November 30, 2006, copies of the foregoing **Petitioner's Opposition to Respondents Motion for Enlargement of Page and Time Limitations**, was served by electronic mail upon the following:

Jonathan L. Marcus  
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/s/ Joseph M. McMillan  
Joseph M. McMillan

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**DECLARATION OF JOSEPH M. MCMILLAN IN SUPPORT OF  
PETITIONER'S OPPOSITION TO RESPONDENTS' MOTION FOR  
ENLARGEMENT OF PAGE AND TIME LIMITATIONS**

I, Joseph M. McMillan, am one of the attorneys representing Petitioner Salim Ahmed Hamdan. I make this declaration based on personal knowledge and I am competent to do so.

1. On the afternoon of Monday, November 27, 2006, I received an email from counsel for Respondents asking whether we would join in Respondents' anticipated request to the Court for either a stay of these proceedings or, additional time and pages for Respondents' Reply brief due Friday, December 1, 2006. I responded to that email the same afternoon, declining the request and stating the reasons for the decision to do so. Attached to this declaration as Exhibit A, is a true and correct copy of the email communications regarding Respondents' request and my response thereto.

2. I oversaw the preparation and filing of Petitioner's Opposition to Respondents Motion to Dismiss for Lack of Subject Matter Jurisdiction, filed November 17, 2006. That Opposition was formatted double-spaced using Microsoft Word.

Respectfully submitted this 30th day of November, 2006.

/s/Joseph M. McMillan  
Joseph M. McMillan

**CERTIFICATE OF SERVICE**

I hereby certify that on November 30, 2006, copies of the foregoing **Declaration of Joseph M. McMillan in Support of Petitioner's Opposition to Respondents' Motion for Enlargement of Page and Time Limitations**, together with all attached exhibits thereto were served by electronic mail upon the following:

Jonathan L. Marcus  
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*Attorneys for Respondents*

/s/ Joseph M. McMillan  
Joseph M. McMillan



**From:** McMillan, Joseph M. (Perkins Coie)  
**Sent:** Monday, November 27, 2006 5:45 PM  
**To:** 'Jean.Lin@usdoj.gov'  
**Cc:** 'katyaln@law.georgetown.edu'  
**Subject:** RE: Hamdan reply in support of motion to dismiss

Dear Ms. Lin:

Thank you for your message earlier today requesting a stay and/or additional time and pages to submit your brief. For reasons articulated in our Opposition, as well as our previous briefing in the D.C. Circuit, Mr. Hamdan is situated differently from the detainees in the Al Odah and Boumediene cases before the D.C. Circuit, and it is therefore inappropriate to stay his case awaiting the outcome of those case. So, we cannot agree to any such stay.

We understand your request for additional briefing time and pages. Given Judge Robertson's October 27, 2006 Order, however, which set forth a specific briefing schedule after receiving input from both parties, we cannot join in any request to either extend the briefing deadline called for in that Order or to waive the page limits imposed by the rules. The Judge's briefing Order as been in place now for a month, and we do not see a reason at this point to reopen the Judge's ruling.

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-----Original Message-----

From: Jean.Lin@usdoj.gov [mailto:Jean.Lin@usdoj.gov]  
Sent: Monday, November 27, 2006 1:12 PM  
To: katyaln@law.georgetown.edu; McMillan, Joseph M. (Perkins Coie)  
Subject: Hamdan reply in support of motion to dismiss

Dear Counsel:

As you know, the government's reply in support of its motion to dismiss is currently due this Friday, December 1, 2006. I am writing to ask whether you would agree to stay this case pending the outcome of the Court of Appeals' decision in Al Odah, et al. v. United States, 05-5064 (D.C. Cir.), and Boumediene v. Bush, et al., No. 05-5062 (D.C. Cir.). The Court of Appeals has ordered additional briefing in those appeals on the significance of the MCA, and we believe that resolution by the DC Circuit on the constitutionality of the MCA will be dispositive of the MCA issue here. To the extent your client has raised additional MCA related arguments, they similarly will be affected by the DC Circuit's resolution of issues such as whether Guantanamo detainees have any constitutional rights.

If you do not consent to a stay, would you nevertheless be willing to consent to our motion for an extension of time to and including Tuesday, December 19 and an enlargement of page limitation from 25 pages to 45 pages? As you know, the court construed our two-page notice regarding the enactment of the MCA as a motion to dismiss. This "reply" brief will be the first opportunity for us to fully set forth our position in this case on the issue of the MCA. Given the significance of the issue, we believe that additional pages and time would be necessary.

I would appreciate it if you would let me know your response at your earliest convenience. Thank you.

Jean Lin

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