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5 04-CV-00777-BCST  
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7 UNITED STATES DISTRICT COURT  
8 WESTERN DISTRICT OF WASHINGTON  
9 AT SEATTLE

10 CHARLES SWIFT, as next friend for  
11 SALIM AHMED HAMDAN,

12 Petitioner,

13 v.

14 DONALD H. RUMSFELD, *et al.*,

15 Respondents.

Case No. C04-0777L

ORDER GRANTING MOTION TO  
HOLD PETITION IN ABEYANCE

16  
17 I. INTRODUCTION

18 This matter comes before the Court on a motion to hold petition in abeyance (Dkt. # 13)  
19 filed by Respondents Donald H. Rumsfeld, *et al.* ("Respondents"). For the reasons set forth in  
20 this Order the Court grants Respondents' motion.

21 II. DISCUSSION

22 A. Background.

23 On April 6, 2004, Petitioner Lieutenant Commander Charles Swift ("Petitioner"), as next  
24 friend of Salim Ahmed Hamdan ("Hamdan"), filed a petition for writ of mandamus or, in the  
25 alternative, writ of habeas corpus (the "Petition") (Dkt. #1). After having been taken into  
26 custody by United States military forces in Afghanistan, Hamdan has been detained at the United  
27 States Naval Base at Guantanamo Bay, Cuba. On July 3, 2003, the President, pursuant to a

28 ORDER GRANTING MOTION TO  
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1 November 13, 2001 presidential military order, determined that there was reason to believe that  
2 Hamdan was an Al Qaeda member or otherwise involved in terrorism directed at the United  
3 States and therefore designated Hamdan for trial before a military commission. The Department  
4 of Defense subsequently appointed Petitioner to defend Hamdan. In December of 2003,  
5 Hamdan was separated from other Guantanamo detainees at Camp Delta and moved to a  
6 different facility on the Guantanamo base, known as Camp Echo. Hamdan remains in solitary  
7 confinement in Camp Echo. Petitioner has met with Hamdan in his cell on several occasions.

8 Petitioner challenges Hamdan's continued detention on multiple grounds. See Petition at  
9 15-23. Petitioner seeks an order directing Respondents to release Hamdan from detention in  
10 Camp Echo and return him to Camp Delta, enjoining Respondents from enforcing the military  
11 order pursuant to which Hamdan is detained, compelling Respondents to justify as lawful his  
12 continued detention, and, in the absence of adequate justification, ordering Hamdan's release.  
13 See id. at 24-25.

14 This petition is the first to have reached a federal district court in which a petitioner  
15 challenges the detention, conditions of detention, and anticipated military justice procedures on  
16 behalf of an alien designated by the President to be eligible for trial by military commission.

17 **B. Analysis.**

18 Respondents seek an order holding this matter in abeyance pending the Supreme Court's  
19 disposition of Rasul v. Bush, S. Ct. No. 03-334, Al Odah v. United States, S. Ct. No. 03-343,  
20 and Rumsfeld v. Padilla, S. Ct. No. 03-1027. The Supreme Court heard oral argument on Rasul  
21 and Al Odah on April 20, 2004, and heard oral argument on Padilla on April 28, 2004. The  
22 Supreme Court's decisions on these matters are expected by June 28, 2004, prior to the Court's  
23 summer recess.

24 The Supreme Court granted certiorari in Rasul and Al Odah to determine "[w]hether  
25 United States courts lack jurisdiction to consider challenges to the legality of detention of  
26 foreign nationals captured abroad in connection with hostilities and incarcerated at the

1 Guantanamo Bay Naval Base, Cuba.” Rasul v. Bush, 124 S. Ct. 534 (2003) (S. Ct. No. 03-334);  
2 Al Odah v. United States, 124 S. Ct. 534 (2003) (S. Ct. No. 03-343). Respondents contend that  
3 if the Supreme Court upholds the United States Court of Appeals for the District of Columbia’s  
4 determination that aliens captured abroad and detained at the Guantanamo Bay Naval Base lack  
5 access to United States courts, then this petition must be dismissed. Respondents further  
6 contend that if the Supreme Court in Rasul and Al Odah permits “enemy combatants” captured  
7 and detained outside the United States access to federal court, the Supreme Court’s disposition  
8 of Padilla is likely to resolve issues present in this action. In Padilla, the government challenges  
9 the exercise of jurisdiction over that matter by a federal district court in New York. The  
10 government argues that if Secretary Rumsfeld were a proper respondent in Padilla, jurisdiction  
11 would be proper only in the Eastern District of Virginia or perhaps in the District of Columbia.  
12 Respondents here contend that if the government prevails in Padilla, this Court will be required  
13 to dismiss or transfer this action because no Respondents are located in this judicial district.

14 A federal court possesses “broad discretion to stay proceedings.” Clinton v. Jones, 520  
15 U.S. 681, 706 (1997). “Especially in cases of extraordinary public moment, the individual may  
16 be required to submit to delay not immoderate in extent and not oppressive in its consequences if  
17 the public welfare or convenience will thereby be promoted.” Landis v. North Am. Co., 299  
18 U.S. 248, 256 (1936). However, a party seeking a stay bears a heavy burden. “[T]he supplicant  
19 for a stay must make out a clear case of hardship or inequity in being required to go forward, if  
20 there is even a fair possibility that the stay for which he prays will work damage to some one  
21 else.” Id. at 255.

22 As noted *supra*, Respondents argue that given both the important threshold jurisdictional  
23 issues that this Court must resolve prior to reaching the merits of Petitioner’s petition, and the  
24 fact that the Supreme Court, within the next two months, is likely to issue opinions that may be  
25 dispositive of those jurisdictional issues, or at least will shed meaningful light upon those issues,  
26 a stay is warranted. Were the Court not to hold this matter in abeyance, and therefore proceed on  
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1 those jurisdictional issues, the parties and the Court likely would have to reconsider those issues  
2 after the Supreme Court issues the Rasul/Al Odah and Padilla opinions.

3       Petitioner contends that a stay is not warranted for three reasons. First, because this is a  
4 petition for mandamus, the jurisdictional issues raised in the habeas cases pending before the  
5 Supreme Court will not impact this case. Second, to the extent a habeas corpus issue is present  
6 in this matter, Ninth Circuit law requires the Court not to issue a stay. Third, Hamdan would be  
7 gravely harmed by a stay.

8       **1. The Relevance of the Pending Supreme Court Cases to this Matter.**

9       Petitioner contends that the primary relief he seeks is through mandamus and this Court  
10 would reach the habeas issue only if it determines that mandamus is not available. Therefore he  
11 argues that Rasul and Al-Odah are inapplicable as they concern habeas corpus and the  
12 Administrative Procedure Act. Similarly, Petitioner contends that the issue presented in Padilla  
13 has no relevance here because the Mandamus and Venue Act includes more permissive venue  
14 provisions than are available in a habeas corpus action.

15       Respondents contend that Petitioner's premise that this Court will not reach the habeas  
16 issue unless it determines that mandamus is unavailable is incorrect. Rather, Respondents argue  
17 that the challenge to Hamdan's detention at Camp Echo "sounds in a classic type of habeas  
18 action seeking an individual's release from allegedly unlawful confinement." (Reply at 2).  
19 Additionally, Respondents contend that the Mandamus and Venue Act, while providing  
20 nationwide venue, does nothing to extend jurisdiction over this matter, which challenges alien  
21 detention outside the United States.

22       The Court finds that the issues under the Supreme Court's consideration in Rasul and Al-  
23 Odah are closely related to the threshold jurisdictional issues present in this case. The Court  
24 recognizes that unlike Rasul and Al-Odah, which are being considered from a habeas  
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1 perspective, Petitioner has styled this action as primarily one for mandamus.<sup>1</sup> However, the  
2 Supreme Court is likely to address the fundamental jurisdictional issue here – whether aliens  
3 detained abroad as enemy combatants may seek recourse in federal courts. Additionally,  
4 although the district court considered Al Odah as a habeas case, Al Odah’s complaint cited the  
5 mandamus statute as a basis for jurisdiction. Given that the Supreme Court is certain to shed  
6 light upon, if not resolve, a fundamental jurisdictional issue present here, the Court finds that  
7 Respondents have established good cause to stay these proceedings.<sup>2</sup>

8 **2. Stays in Habeas Proceedings.**

9 Relying upon Yong v. Immigration & Naturalization Serv., 208 F.3d 1116 (9th Cir.  
10 2000), Petitioner contends that in almost every circumstance a court should decline to stay a  
11 habeas petition. See Response at 6-7. In Yong, the Ninth Circuit found that a district court had  
12 abused its discretion in staying Yong’s habeas corpus petition pending resolution of an appeal of  
13 another matter to the Supreme Court. The Yong Court noted the special nature of habeas  
14 proceedings:

15 [H]abeas proceedings implicate special considerations that place unique limits on a  
16 district court’s authority to stay a case in the interests of judicial economy. “The  
17 application for the writ usurps the attention and displaces the calendar of the judge  
18 or justice who entertains it and receives prompt action from him within the four  
corners of the application.” . . . Special solicitude is required because the writ is  
intended to be a “swift and imperative remedy in all cases of illegal restraint or  
confinement.”

19 Yong, 208 F.3d at 1120 (quoting Ruby v. United States, 341 F.2d 585, 587 (9th Cir. 1965) and

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21 <sup>1</sup>At oral argument Petitioner explained that the gravamen of this action concerns the  
22 conditions of Hamdan’s detention and the possibility that he will be subject to trial by a military  
23 commission. Petitioner stated that the ultimate relief sought (Hamdan’s release) is included in  
this petition so as to not later be barred by the successive petition rule.

24 <sup>2</sup>Petitioner also argues that the basis for jurisdiction is stronger here than in Rasul and Al-  
25 Odah because Hamdan is one of only six detainees designated by the President for trial before a  
26 military commission. See Response at 3. The Court does not foreclose the possibility that  
27 Petitioner is correct. However, that Hamdan has been designated as eligible for trial does not  
alter the fact that the Supreme Court’s disposition of Rasul/Al-Odah is likely to shed  
considerable light on the fundamental jurisdictional issues present here.

1 Fay v. Noja, 372 U.S. 391, 400 (1963)).

2 This Court must proceed with due speed on habeas matters. However, the Court cannot  
3 find that Yong precludes a stay given the circumstances here. The stay in Yong lasted five  
4 months, and “could [have] remain[ed] in effect for a lengthy period of time, perhaps for years.”  
5 Id. at 1119. Although Hamdan is detained in conditions significantly more difficult than those  
6 faced by Yong, see Section II.B.3, infra, the stay contemplated in Respondents’ motion is not  
7 lengthy or indefinite. Additionally, a Ninth Circuit panel stayed its own mandate in Gherebi v.  
8 Bush, 352 F.3d 1278 (9th Cir. 2003), after determining that the District Court for the Central  
9 District of California possesses jurisdiction to consider a habeas corpus petition filed on behalf  
10 of a Guantanamo detainee. The Supreme Court subsequently stayed those proceedings.<sup>3</sup> See  
11 Bush v. Gherebi, 124 S. Ct. 1197 (Feb. 5, 2004) (S. Ct. No. 03A637).

12 Although stays of habeas corpus proceedings are disfavored, Yong does not bar a stay of  
13 this matter.

### 14 3. Harm to Hamdan.

15 Petitioner has presented significant evidence regarding the conditions of Hamdan’s  
16 detention and has presented credible evidence of the risk of harm to Hamdan should his  
17 detention under these conditions continue. See, e.g., Swift Decl. ¶¶ 2-14; Matthews Decl. ¶¶ 2-  
18 16. Petitioner argues that continued detention at Camp Echo risks not only psychological harm  
19 to Hamdan, but also that such continued detention may impede his ability adequately to defend  
20 himself should he be tried before a military commission. At oral argument Petitioner correctly  
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23 <sup>3</sup>Petitioner contends that the Supreme Court’s stay of proceedings in Gherebi and the  
24 Ninth Circuit’s stay of the Gherebi mandate does not alter Gherebi’s precedential value. At oral  
25 argument the Court observed that the Gherebi Court appears to have stayed its mandate prior to  
26 the opportunity for the Ninth Circuit to consider the case *en banc*, and the Court questioned  
27 Petitioner’s counsel regarding whether that would affect the precedential value of that case.  
Because the Court finds that holding this matter in abeyance pending the Supreme Court’s  
disposition of Rasul/Al Odah and Padilla is warranted no matter whether Gherebi is the binding  
law of this Circuit, the Court need not resolve that question at this time.

1 noted that Respondents have provided only argument and no supporting evidence regarding the  
2 conditions of Hamdan's detention and whether he will suffer harm by delay in this matter.

3 Petitioner further contends that he would not oppose a stay in this matter if Respondents  
4 were to take measures to mitigate any harm to Hamdan by releasing him from solitary  
5 confinement and returning him to the general population of Guantanamo detainees at Camp  
6 Delta or to another detention facility. See Schneider Decl. Ex. A. Respondents contend that  
7 requiring them to return Hamdan from solitary confinement at Camp Echo to general detention  
8 at Camp Delta would be the equivalent of granting partial relief on this petition. Furthermore,  
9 Respondents argue that returning Hamdan to Camp Delta "would create an undue risk of  
10 destroying the environment that the military is trying to create at Guantanamo in order to  
11 facilitate intelligence gathering." (Reply at 5).

12 The Court recognizes that, based on the evidence currently before the Court, Hamdan is at  
13 risk of harm from continued detention at Camp Echo. However, given the fundamental  
14 importance of the threshold jurisdictional issues present here – issues regarding which the  
15 Supreme Court will provide guidance within fifty days – the Court finds that it would not be  
16 appropriate to proceed on this matter prior to the Supreme Court's anticipated clarification of  
17 those jurisdictional issues. For the same reason, the Court cannot impose as a condition of a stay  
18 that Hamdan be transferred from solitary confinement in Camp Echo.

19 Because the threshold jurisdictional issues are so important here, the Court finds that it  
20 must stay this matter pending the Supreme Court's disposition of Rasul/Al Odah and Padilla.  
21 Unlike the usual case where a stay is sought for traditional reasons of judicial economy, here the  
22 Court recognizes that this is a case of monumental significance that will continue to receive the  
23 prioritization it deserves. As Judge Susan Graber observed in her dissent in Gherebi, "It is of  
24 grave concern when federal courts, traditionally the guardians of our Constitution and our  
25 liberties, turn away claims that governmental officials have violated an individual's rights."  
26 Gherebi, 352 F.2d at 1313. However, to act on Petitioner's claims without the guidance that will

1 come from the United States Supreme Court in the next few weeks would be shortsighted and  
2 precipitous.

3 **III. CONCLUSION**

4 For the foregoing reasons, the Court GRANTS Respondents' motion to hold petition in  
5 abeyance (Dkt. # 13). This matter is STAYED pending the Supreme Court's disposition of  
6 Rasul/Al Odah and Padilla. The stay will expire on June 28, 2004, should the Supreme Court  
7 not have issued decisions in Rasul/Al Odah and Padilla before that date. Respondents' return is  
8 due the earlier of thirty days after the Supreme Court's disposition of Rasul/Al Odah and Padilla  
9 or July 28, 2004. Petitioner's reply is due two weeks after the filing of Respondents' return.  
10 The Court schedules oral argument on the petition for 9:00 a.m. on Wednesday, September 8,  
11 2004.<sup>4</sup>

12 DATED this 11<sup>th</sup> day of May, 2004.

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14   
15 Robert S. Lasnik  
16 United States District Judge

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18 <sup>4</sup>The oral argument will be one of the first cases heard in the new United States  
19 Courthouse, which will open in the end of August. It is very appropriate that a case of this  
20 significance bridges both the last days of the present Nakamura Courthouse and the opening of  
21 our new federal courthouse. The present Nakamura Courthouse has been the venue for many  
22 important cases in its 65 years of use, including the trial of Gordon Hirabayashi in October of  
23 1942, for violating a military curfew order and failing to report for internment. The cases of  
24 Hirabayashi v. United States, 320 U.S. 81 (1943), and Korematsu v. United States, 323 U.S. 214  
25 (1944), both of which occurred in the aftermath of the Japanese attack on Pearl Harbor in 1941,  
26 serve as constant reminders of how our country and our courts must always remain true to the  
27 core principles embodied in our United States Constitution, even in the aftermath of devastating  
28 attacks on our people and even in times of war. The hearing leading to the decision that Mr.  
Hirabayashi's conviction for failing to report for internment was in error also occurred in the  
Nakamura Courthouse 44 years later. See Hirabayashi v. United States, 627 F. Supp. 1445  
(W.D. Wash. 1986). The Ninth Circuit Court of Appeals upheld that determination, and further  
found that Mr. Hirabayashi's conviction for violation of the military curfew order was in error.  
See Hirabayashi v. United States, 828 F.2d 591 (9th Cir. 1987).