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UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

AT SEATTLE
CLERK OF DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
ORIGINAL
DEPUTY

CHARLES SWIFT, et al.,)	BY
)	No. C04-777L
Petitioners,)	
)	
v.)	U.S. Courthouse
)	Seattle, Washington
DONALD RUMSFELD, et al.,)	May 6, 2004
)	1:30 p.m.
Respondents.)	

VERBATIM REPORTED PROCEEDINGS FOR: STATUS CONFERENCE
BEFORE THE HONORABLE ROBERT S. LASNIK
UNITED STATES DISTRICT COURT JUDGE

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1 THE CLERK: All rise. United States District Court
2 for the Western District of Washington is now in session, the
3 Honorable Robert S. Lasnik presiding.

4 THE COURT: Good afternoon. Thank you. Please be
5 seated.

6 THE CLERK: Case C04-777L, *Lieutenant Commander*
7 *Charles Swift v. Donald Rumsfeld, et al.* Counsel, would you
8 please make your appearances.

9 MR. SCHNEIDER: Good afternoon, Your Honor, Harry
10 Schneider on behalf of the Petitioner. With me in court
11 today is Joe McMillan, my partner. I would also like to
12 introduce and make the appearances of Lieutenant Commander
13 Swift, United States Navy, and Neal Katyal from Washington,
14 D.C., our co-counsel.

15 THE COURT: Thank's very much, Mr. Schneider.
16 Welcome to Commander Swift and to Professor Katyal. Thank
17 you for coming.

18 MR. GARRE: Good afternoon, Your Honor, Gregory
19 Garre from the Department of Justice representing the federal
20 respondents in this case. I believe Mr. Kipnis filed an
21 application for pro hac vice.

22 THE COURT: Yes, and welcome. Thank you for coming
23 out on such a nice day for Seattle, and Mr. Kipnis.

24 MR. KIPNIS: Good afternoon, Your Honor, Brian
25 Kipnis, Assistant United States Attorney for the Government.

1 THE COURT: Always a pleasure to have you in my
2 court.

3 MR. KIPNIS: Thank you, Your Honor.

4 THE COURT: Well, we are here on Petitioners'
5 request for an early status conference, and I think Mr.
6 Schneider in his request identified two general areas, a
7 briefing schedule on the petition for writ of mandamus, or in
8 the alternative, a writ of habeas corpus, and then wanted to
9 raise issues about discovery, both timetable and procedure.

10 So, Mr. Schneider, let me ask you first to address
11 those two areas if you would, and I know we have the
12 Government's -- you can also address at this time the
13 Government's requests to stay everything until the U.S.
14 Supreme Court has ruled on the pending cases that may touch
15 upon some of the issues in our case.

16 MR. SCHNEIDER: Your Honor, some of these topics we
17 may split up among ourselves with your permission.

18 THE COURT: That's fine.

19 MR. SCHNEIDER: Let me take them from the top. The
20 return date on the petition, we have proposed a return date
21 of May 14. Our position simply stated as, even if a petition
22 or a motion for stay, or a motion to hold petition in
23 abeyance is pending, we would still like to have a return
24 date set up until such time, if any, that the matter is
25 stayed. We believe it is appropriate that a response to the

1 petition be filed and served, assuming of course, and perhaps
2 presumptively assuming that the Court entertains the
3 petition.

4 With respect to the limited discovery, we
5 anticipate -- I'm going to be quite forthcoming here. We
6 anticipate there will be an evidentiary hearing in this case,
7 and in order to prepare for that, we believe that there is a
8 need for some focused discovery, particularly document
9 requests. We're happy to discuss those things with the U.S.
10 Attorney.

11 Frankly, I don't anticipate that there is going to
12 be much difficulty in communicating what we think our needs
13 are and reaching a decision whether or not they'll be
14 accommodated. I don't know that there will be a motion
15 practice, but we wanted to bring that to the Court's
16 attention. Frankly we view this case as extraordinary and we
17 thought we should get in front of you early in order to
18 anticipate what may be coming down the road.

19 With respect to -- let me mention a third item,
20 which is not in our papers, and that is that there is an
21 issue of classified information in these proceedings. We
22 expect that that is something we will be able to resolve, but
23 I also wanted to alert the Court that that may be coming down
24 the track at the appropriate time.

25 On the motion for stay, we would request for oral

1 argument on that motion, motion to hold petition in abeyance.
2 We believe that -- our position to anticipate the argument,
3 but not provided right now, is we believe that this case is
4 not of the type that should be stayed entirely pending the
5 Supreme Court cases.

6 The preparation of this case prior to this Court's
7 determination whether the original issue is important to be
8 underway at this time and not to await the outcome of those
9 cases to begin preparing this case. Your ultimate decision
10 on the merits of whether the original issue may not occur
11 prior to the end of June, and given the Supreme Court's term,
12 your ultimate decision may not be before the Supreme Court
13 rules.

14 The important thing is to focus on, are we to be
15 frozen in place today, tomorrow, or next week until the
16 Supreme Court rules? And our argument would be that we
17 should not. Professor Katyal is prepared to respond in more
18 detail if the Court wishes, but that is our position.

19 THE COURT: Okay. Professor?

20 MR. KATYAL: I'm happy, Your Honor, to go into more
21 detail on our position on the motion, however, I would like
22 to just point out I have just received their response papers
23 to it.

24 THE COURT: Right. And we're not arguing the
25 merits of the motion here, but just in terms of, you know,

1 how we set things forward, and Mr. Schneider said that your
2 side would like oral argument on the Government's request to
3 stay, and I know you don't -- you know, taking the trip out
4 here to Seattle can be a two day proposition at least. Is
5 that something that you would want to come back for?

6 MR. KATYAL: I'm happy to -- I'm literately only
7 wearing the clothes on my back. I was supposed to fly out
8 tonight, but I'm happy if you would like, and it would suit
9 the Court and opposing Counsel to have the argument tomorrow
10 if that would be suitable. My only point is just literally I
11 just stepped off the plane, got the papers, and it's a little
12 hard for me to go into very much detail in the form of an
13 oral argument as to this motion for abeyance, but I'm happy
14 to outline the general contours of our position at this time
15 if you would like.

16 THE COURT: No, that's fine. I think we want to
17 stay pretty much to schedule and the procedure on this,
18 unless the Government says, oh, yeah, we're ready right now
19 and then we can just go forward. But when Mr. Schneider
20 talks about, we anticipate an evidentiary hearing, I didn't
21 ask him this, but let me ask you, what type of evidentiary
22 hearing and what length, and what -- who is at counsel table
23 with you in the evidentiary hearing you imagine might happen
24 here?

25 MR. KATYAL: Absolutely. And what I'm going to do

1 here, and I hate to be passing the buck, but the way they
2 have divided this is that Lieutenant Commander Swift, who has
3 access to certain information that not all of us have is the
4 person who is best able to discuss those evidentiary issues,
5 and with your permission?

6 THE COURT: Sure. Absolutely.

7 MR. SWIFT: Good afternoon, Your Honor. In an
8 evidentiary hearing what we would pose to put forth, and I
9 think will be important to the Court, is the differentiation
10 between the person, Mr. Hamdan, who I am serving as next
11 friend from and the other detainees at Guantanamo Bay.

12 Mr. Hamdan is unique in that he is subject to the
13 President's reason to believe order of 3 July, although I
14 have not received a copy of that order, it has been so
15 reported, and is incarcerated in Camp Echo which is unique
16 and different than the general detentions in Camp Delta.

17 Now, Camp Echo has been termed to be
18 precommissioned segregation, and that is one of the reasons
19 and lies at the heart of our petition is that once designated
20 into precommission segregation, that speedy trial and the
21 other rights and issues concerning commissions now raise
22 themselves. This is the appropriate time to do that. And,
23 therefore, it will be a factual threshold for the Court to
24 determine whether they agree with us that he is, in fact,
25 different than the other detainees, and that this doesn't

1 fall military commissions, and as such, the appropriate law
2 to then apply.

3 So we anticipate a brief factual hearing in that
4 particular area, but the Government has taken, to my
5 understanding, a different position. Now, if the Government
6 agrees that he is unique and that he is not like other
7 detainees, then that certainly would not be required. But we
8 anticipate the Government is going to dispute that.

9 THE COURT: Okay. Thank you very much. Mr. Garre?

10 MR. GARRE: Thank you, Your Honor. I'm happy to
11 address any issues that the Court would like to address as --
12 including the stay motion. I'm happy to address that today.
13 I'm happy to address that tomorrow if that would accommodate
14 the Court and the other side, whichever way the Court would
15 like to proceed.

16 We do think, though, that the stay motion is
17 critical and really overlaps with the other issues that we
18 have already talked about today in this hearing, the issue of
19 setting a return date, and the issue of an evidentiary
20 hearing and discovery. The type of evidentiary hearing that
21 Commander Swift has just described would be unprecedented.
22 It would involve the taking of discovery and fact finding in
23 a federal court with respect to the President's detention of
24 enemy combatants in wartime outside the United States
25 territory, and at a bare minimum we would think that the

1 Court would want to satisfy itself that it had jurisdiction
2 to proceed at all with this case, much less to proceed in
3 such an unprecedented matter.

4 So in that critical respect, that brings us back to
5 the stay motion where we've asked this Court to take the
6 step, which the Ninth Circuit itself took in the *Gherebi* case
7 by staying its mandate in which the Supreme Court took by
8 staying all proceedings in the *Gherebi* case by simply holding
9 the proceedings in this case in abeyance while the Supreme
10 Court decides the important cases it now has before it which
11 will shed substantial light on it, if not entirely dispose of
12 the fundamental jurisdictional issues that now present itself
13 to this Court.

14 Now, with respect to the issue of a return date,
15 again, that brings me back to our request for a stay and our
16 motion to hold the proceedings in abeyance, we suggested that
17 the Court have briefing within 30 days of the Supreme Court's
18 decision in the *Rasul* and *Al Odah* case which is the two
19 cases, consolidated cases, which present the question of
20 subject matter of jurisdiction, that is, whether any United
21 States Court has jurisdiction of a petition filed on behalf
22 of aliens held at Guantanamo. Or the *Padilla* case which
23 presents an issue of territorial jurisdiction, which is, even
24 assuming the Government does not prevail in the Guantanamo
25 cases, then you would be presented with the question of which

1 District Court in the United States would have territorial
2 jurisdiction over such an action?

3 Certainly our position would not be every single
4 district court in the United States. We suggested in the
5 alternative in the Guantanamo cases in the lower court that
6 the Eastern District of Virginia would be an appropriate
7 district court if the Court got to that point, because that
8 is where the Pentagon and Secretary Rumsfeld is located, or
9 possibly the District of Columbia, which is where the Supreme
10 Court in the *ex parte Hayes* case I believe referred a
11 petition filed on behalf of the U.S. servicemen overseas.

12 And then with respect to classified information,
13 again, I think that the issue of exchanging classified
14 information, or revealing classified information wouldn't be
15 presented urgently if the Court stayed the proceedings.
16 However, we would be happy to at least speak with opposing
17 counsel on that to see if we could work out an arrangement
18 consistent with the schedule of this Court.

19 THE COURT: Okay. And on that point, Mr. Garre, I
20 believe that Commander Swift has filed certain documents
21 under seal in a sense of caution, but notes that most of the
22 information in those documents has been in the public in one
23 way or the other. Do you see a need to keep any of those
24 documents sealed from the Government's perspective?

25 MR. GARRE: Your Honor, I think that is a question

1 that would be presented first to the military authorities who
2 are responsible with the commissions process and appointing
3 authority, but certainly we would take the position that it
4 would be appropriate to leave those documents under seal at
5 this time.

6 And we think that the information that has been
7 publically discussed in the papers is -- provides an
8 appropriate framework to approach the stay motion which we
9 think is the critical issue before the Court at this stage in
10 the proceedings.

11 THE COURT: Okay. Well, thank you very much, Mr.
12 Garre. Let me turn back to this side and say, do you want to
13 argue the motion for stay right now? The Government has said
14 they're willing to do it, and I'm ready. I have read all the
15 briefs, including the one that came in late yesterday. And
16 -- or I could do it tomorrow morning if you can find a place
17 to put up -- I could do it at 8:30 tomorrow morning.

18 MR. SCHNEIDER: We'll find that place, Your Honor.

19 THE COURT: So which one would you rather do?

20 MR. SCHNEIDER: We have a preference for tomorrow
21 given Professor Katyal's schedule.

22 THE COURT: And, Mr. Garre, then are you able to
23 stay over the night?

24 MR. GARRE: Yes, Your Honor.

25 THE COURT: Okay. Do you want to do it -- I think

1 an hour would be plenty of time.

2 MR. SCHNEIDER: I think so.

3 THE COURT: Okay. So let's do it at 8:30 tomorrow
4 morning. That will give everyone a chance to get over their
5 jet lag and be sharp tomorrow morning, and we'll hear
6 everything tomorrow. Because I think that is the threshold
7 that we need to hear from first, and then we can take the
8 other issues from there.

9 MR. SCHNEIDER: We appreciate the Government's
10 prompt, if not even early response on the reply to our
11 opposition.

12 THE COURT: It was early.

13 MR. SCHNEIDER: It was, and we appreciate it. We
14 asked for that and we were accommodated.

15 THE COURT: And I considered that it would be an
16 extreme unfair burden to summon Secretary Rumsfeld out for
17 the hearing, but considering what is ahead of him in
18 Congress, he might actually prefer to be out here in Seattle.

19 MR. SCHNEIDER: All the other issues for today then
20 will be postponed until after tomorrow.

21 THE COURT: We'll deal with those after the
22 argument tomorrow. And do check with your colleagues,
23 though, Mr. Schneider because if I'm going to move this case
24 too fast, it's going to go right into the Nouri time slot,

25 MR. SCHNEIDER: The form of notebooks on the table

1 over there look familiar and I know you have that case coming
2 up in less than two weeks.

3 THE COURT: Just make sure you clear it with Mr.
4 Aslin and Mr. Hollingsworth and Ms. Hartman that --

5 MR. SCHNEIDER: I'll try my best.

6 THE COURT: If you win, you get their time slot.
7 All right. Thank you very much. See you tomorrow.

8 (Proceedings concluded 1:46 p.m.)

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C E R T I F I C A T E

STATE OF WASHINGTON)

) SS

COUNTY OF KING)

I, Donna Hunter, Certified Shorthand Reporter and Notary Public duly and qualified in and for the State of Washington do hereby certify that the foregoing transcript is a true and correct transcript of my original stenographic notes.

I further certify that I am neither attorney or counsel for, nor related to or employed by any of the parties to the action in which this testimony is taken; and furthermore, that I am not a relative or employee of any attorney or counsel employed by the parties hereto or financially interested in the action.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my Notarial Seal this 8th day of May, 2004.



NOTARY IN AND FOR THE STATE OF
WASHINGTON, RESIDING IN SEATTLE