

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

AT SEA, W.L.
CENTRAL U.S. DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
DEPUTY

ORIGINAL

CHARLES SWIFT, et al.,)
) No. C04-777L
Petitioners,)
)
v.) U.S. Courthouse
) Seattle, Washington
) May 7, 2004
DONALD RUMSFELD, et al.,) 8:30 a.m.
)
Respondents.)

VERBATIM REPORTED PROCEEDINGS FOR; ORAL ARGUMENT
BEFORE THE HONORABLE ROBERT S. LASNIK
UNITED STATES DISTRICT COURT JUDGE

APPEARANCES:

For the Petitioners:

HARRY H. SCHNEIDER, JR., ESQ.
Perkins Coie
1201 Third Avenue, Suite 4800
Seattle, Washington 98101-3099

JOSEPH M. MCMILLAN, Esq.
Perkins Coie
1201 Third Avenue, Suite 4800
Seattle, Washington 98101-3099

CHARLES DAVIDSON SWIFT, ESQ.
Office of the Chief Defense
Counsel for Military Commissions
1931 Jefferson Davis
Hwy, Ste 103
Arlington, VA 22202

NEAL KATYAL, ESQ.
Georgetown University Law Center
600 New Jersey Avenue
Washington, D.C. 20001

CHARLES C. SIPOS, ESQ.
Perkins Coie
1201 Third Avenue, Suite 4800
Seattle, Washington 98101-3099

APPEARANCES

For the Petitioners:

DAVID R. EAST, ESQ.
Perkins Coie
1201 Third Avenue, Suite 4800
Seattle, Washington 98101-3099

For the Respondents:

BRIAN C. KIPNIS, ESQ.
Assistant United States Attorney
601 Union Street, Suite 5100
Seattle, Washington 98101

GREGORY C. GARRE, ESQ.
U.S. Department of Justice
Office of the Solicitor General
950 Pennsylvania Avenue NW Room 5612
Washington, D.C. 20530

Court Reporter:

DONNA HUNTER, CCR
#801 Washington Building
1019 Pacific Avenue
Tacoma, Washington 98402
(253) 627-2062

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 morning. 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. KATYAL: Neal Katyal for Petitioner Swift.

10 MR. SWIFT: Lieutenant Commander Charles Swift.

11 MR. SCHNEIDER: Harry Schneider on behalf of
12 Petitioner.

13 MR. MCMILLAN: Joe McMillan on behalf of
14 Petitioner.

15 MR. GARRE: Gregory Garre on behalf of the
16 Respondents.

17 MR. KIPNIS: Brian Kipnis, Assistant United States
18 Attorney also for the Respondents.

19 THE COURT: Thank you very much. This is
20 Respondents' motion for order holding the petition in
21 abeyance. Mr. Garre?

22 MR. GARRE: Thank you, Your Honor, for the
23 opportunity to appear today. The Government's position at
24 this point in the case is simple and straightforward. We
25 would ask the Court simply to hold this case in abeyance for

1 the approximately 60-day period until the Supreme Court is
2 expected to hand down its decisions in the *Rasul* and *Al Odah*
3 cases pending before the Supreme Court and the *Padilla*
4 pending before the Supreme Court which will shed substantial
5 light on, if not entirely resolve the fundamental threshold
6 jurisdictional issues before the Court.

7 Just by way of a brief background matter as to why
8 we're here, the Government -- the military is holding Mr.
9 Hamdan as an enemy combatant. He was captured in Afghanistan
10 in 2001 and was determined after several layers of screening
11 to meet the definition the Government has used for enemy
12 combatant. He was transferred to Guantanamo in May 2002, and
13 he has since admitted to being Usama bin Laden's driver.

14 Now, going -- just going back to the stay issue.
15 The two issues -- this case raises a number of extraordinary
16 legal challenges to the President's authority to detain enemy
17 combatants and the President's authority to try and punish
18 enemy combatants pursuant to military commission. Mr. Hamdan
19 has been designated pursuant to the President's military
20 order of 2000 and -- 2001, which means that he is eligible
21 for prosecution by military commission.

22 It means that the President has determined that he
23 is a member of al-Qaeda or may be involved in its terrorist
24 activities. No military commission has been appointed yet,
25 but Mr. Hamdan has been moved to the area at Guantanamo where

1 precommissioned detainees are held. The case raises a number
2 of issues challenging the President's authority to convene
3 those commissions, and the threshold presents a number of
4 jurisdictional issues for this Court.

5 The first issue is whether any U.S. court has
6 jurisdiction over a case challenging the legality of a
7 detention of an alien overseas at Guantanamo. That issue is
8 pending before the Supreme Court today in the *Rasul* case and
9 the *Al Odah* case. The second issue is a question of
10 territorial jurisdiction. If some U.S. court has
11 jurisdiction over such an action, which U.S. court would it
12 be? Our position would not be that any U.S. court would have
13 jurisdiction. Instead, we have argued in the alternative in
14 the *Rasul* case and in the *Al Odah* case that even assuming a
15 U.S. court has jurisdiction in the proper U.S. court in the
16 unusual circumstance where the challenges to an alien being
17 held overseas would be either the Eastern District of
18 Virginia where the Pentagon is located and Mr. -- Secretary
19 Rumsfeld is located, or possibly the District of Columbia.

20 That issue -- the Supreme Court, if it rules
21 against the Government in the *Rasul Al Odah* case may address
22 that issue since it would be the logical question of, if a
23 court -- if some U.S. court has jurisdiction, where should
24 that case be filed? The issue also is in a sense before the
25 Supreme Court in the *Padilla* case.

1 The *Padilla* case involves a challenge to the
2 detention of an American citizen who is being held currently
3 in South Carolina. The habeas petition in that case was
4 brought in New York City, and one of the threshold issues in
5 the *Padilla* case is whether the New York District Court had
6 territorial jurisdiction over habeas petition challenging the
7 legality of the detention of an individual being held in
8 South Carolina. And one of the arguments that -- the
9 argument the District Court adopted in that case was that Mr.
10 Rumsfeld, Secretary Rumsfeld, could be sued in a habeas
11 petition in the New York court under a long arm theory that
12 he would be present based on minimum contacts in the district
13 and based on the application of the long arm statute.

14 The United States has appealed that issue and has
15 raised it in the Supreme Court, and the Supreme Court is
16 currently considering that issue, and the Court's resolution
17 of that issue in the *Padilla* case may shed additional light
18 on whether this Court would have territorial jurisdiction
19 over habeas petition if -- if the Court got over the
20 threshold jurisdictional bar presented by *Eisentrager* and the
21 *Rasul* and *Al Odah* cases.

22 There are other threshold obstacles that we think
23 that would be presented that concern venue, that concern
24 whether Commander Swift is a proper next friend to file
25 either a mandamus petition or to file a habeas petition given

1 that Mr. Hamdan is not inaccessible. Mr. Swift obviously has
2 access to him, and we think at an appropriate time the
3 Government would brief those.

4 At this point we think the Court should stay the
5 proceedings for the Supreme Court's guidance on those
6 jurisdictional issues, and we think that the *Gherebi* case out
7 of the Ninth Circuit is the appropriate model to follow.
8 Now, that case was filed long before the Supreme Court
9 granted certiorari in the *Rasul* and *Al Odah* cases. It was
10 briefed and argued before the Ninth Circuit in August of last
11 year, and although it was decided after the Supreme Court had
12 granted certiorari in the *Rasul* and *Al Odah* cases, the bulk
13 of the work had been done on that case before the Supreme
14 Court granted certiorari.

15 But what the Ninth Circuit did after it decided the
16 case, and what the Supreme Court did we think is helpful
17 guidance for this Court and the situation that litigants face
18 here. After the Ninth Circuit held that there was
19 jurisdiction over the petition in *Gherebi*, which was a
20 petition filed on behalf of the detainee at Guantanamo, the
21 Ninth Circuit itself stayed its mandate in that case.

22 Now, subsequently to the Ninth Circuit staying its
23 mandate in the case, the petitioners in that case filed a
24 motion asking that the fact of the litigation be brought to
25 the attention to the detainee in that case, and the Ninth

1 Circuit, despite the fact that it had stayed its mandate,
2 issued an order directing the Government to provide such
3 notice to the detainee.

4 Now, that order in itself notice of a pending
5 action to the detainee, it is really a far cry from what the
6 Petitioners have asked this Court to do in the interim before
7 it has made any determination as to its jurisdiction to act
8 at all in this case. But at that point the United States
9 asked the Supreme Court to stay all proceedings in the
10 *Gherebi* case, and the Supreme Court granted the United
11 States' request and stayed all proceedings in the *Gherebi*
12 case, because at that time those cases were pending before
13 the Supreme Court, and the Supreme Court is expected to
14 decide those cases by the end of June.

15 Now, if the Court were not to grant the stay in
16 this case, then I think that it's easy, or I think that one
17 could predict how the proceedings would follow. There would
18 be a period of briefing on the fundamental jurisdictional
19 issues presented, subject matter jurisdiction, or territorial
20 jurisdiction of the Court and the other issues I have
21 addressed, including venue, and then the Court would
22 presumably issue a decision on those important issues.

23 And then at that point we would be even closer to
24 the point in time where the Supreme Court would issue its
25 decisions in those cases, and once the Supreme Court issued

1 its decisions in these cases, it's likely, if not quite
2 probable, that that would prompt the Court and the parties to
3 have to reconsider the jurisdictional issues that they had
4 already addressed.

5 So we think that granting a stay at this point in
6 the proceedings would avoid that situation where the parties
7 in effect and the Court would have to go through two rounds
8 of proceedings on the fundamental question of jurisdiction.
9 That question, although in some cases may not be that
10 difficult, in the unique setting of litigation challenging
11 the detention of aliens at Guantanamo has been the focus of
12 considerable litigation.

13 There have been a number of prior cases involving
14 the challenge of aliens at Guantanamo, and in each of those
15 cases in the District Court of Columbia, as well as in the
16 Central District of California has -- had been focused at the
17 outset on litigation of the Court's jurisdiction on the
18 applicability of the *Eisentrager* precedent, as well as on
19 question of territorial jurisdiction.

20 So following the model, at least of the other
21 cases, those cases there's been -- at the outset there has
22 been considerable attention and briefing and consideration of
23 the fundamental jurisdictional issues presented. Courts have
24 ruled, and then at that point there have been appeals, and we
25 now are at the point where the Supreme Court is considering

1 those issues. We think, again, that the practical solution
2 and the legal solution to ensure that these issues are
3 correctly decided in the first instance is simply to stay the
4 proceedings for the relatively brief period in time until the
5 Supreme Court rules.

6 Now, Petitioners have suggested the fact that the
7 petition in this case is a habeas petition, and in the
8 alternative a mandamus petition, somehow takes this case
9 completely out of the rubric of *Rasul* and *Al Odah* and the
10 *Padilla* case now pending before the Supreme Court. We
11 disagree. First of all, even taking at face value the fact
12 that they have made this into a mandamus petition, there
13 still is the aspect of the habeas petition, and the Supreme
14 Court's ruling on the issues in *Rasul* and *Padilla* is almost
15 certain to provide guidance on the fundamental issues
16 presented to this Court.

17 But second and more particularly, the *Al Odah*
18 plaintiffs in the *Al Odah* case, which is consolidated with
19 *Rasul* in the Supreme Court, specifically cited the mandamus
20 statute in their complaint. Now, what they did is instead of
21 bringing a direct habeas challenge to the military's
22 authority to detain twelve Kuwaiti detainees at Guantanamo,
23 they took a different tact. They styled their complaint as a
24 civil action both under the APA under the federal question
25 statute, and under the mandamus statute, as well as citing

1 habeas as a potential basis of jurisdiction.

2 And what the Courts in D.C. did in that case was to
3 say, no, we're going to treat your habeas petition, or your
4 civil action as if it were a habeas petition and treat it as
5 subject to the same fundamental jurisdictional principles
6 that the Supreme Court had established in the *Eisentrager*
7 case 50 years ago.

8 That's the way the District Court treated it.
9 That's the way the Court of Appeals treated it, and, of
10 course, the issue is now pending before the Supreme Court.
11 But because the *Al Odah* plaintiffs did cite the mandamus
12 statute as a potential basis for jurisdiction, the fact that
13 Petitioners here have done that does not take *Al Odah* and
14 *Rasul* off the table.

15 And then the more fundamental question of whether
16 the jurisdictional limits on habeas petition in this context
17 can be so easily evaded as simply by citing the mandamus
18 statute, or the federal question statute, we think is wrapped
19 up with the overriding issues now before the Supreme Court in
20 the *Rasul* and *Al Odah* case.

21 Now, Petitioners also have cited the risk of harm
22 to Hamdan as a basis for denying the Government's request for
23 stay. We think that the Court should reject those arguments.
24 Mr. Hamdan is visited -- or is monitored continuously by the
25 military. He is in a cell in the part of Guantanamo known as

1 Camp Echo which is a -- has two units in it, one for a guard,
2 one for Mr. Hamdan, and a wire mesh separates the two. The
3 guard is with Mr. Hamdan 24 hours a day, so he is
4 continuously monitored.

5 Mr. Hamdan is visited by medical officials, or
6 doctors at Guantanamo every day at which point in time he can
7 make any claims or concerns known to that medic at
8 Guantanamo. Mr. Hamdan is visited by mental health
9 professionals at Guantanamo at least once a week. He was
10 last examined by those professionals a week ago, last
11 Thursday. They found no evidence of significant
12 psychological harm or deterioration. At that time they
13 offered to provide Mr. Hamdan with weekly visits with the
14 mental health professionals, and he agreed and accepted those
15 visits.

16 Now, in addition to that medical care and
17 supervision, and I should add that all the guards at
18 Guantanamo, and particularly the guards in these units are
19 trained to detect signs of serious psychological
20 deterioration, or signs that would suggest a concern for
21 safety. Mr. Hamdan has access to his attorney, Commander
22 Swift, who may visit Mr. Hamdan at any time he wishes. He
23 may go down to Guantanamo, and my understanding is he has
24 done so already on numerous occasions, at least 15 I think by
25 his own count in one of the news transcripts appended to his

1 declaration filed in this case.

2 Mr. Hamdan has visited, and may continue to visit
3 with representatives of the International Red Cross --
4 Committee for the Red Cross which visit Guantanamo on a
5 periodic basis. Mr. Hamdan has an opportunity for 45 minutes
6 to one hour of exercise each day, either during the nighttime
7 hours or daytime hours, depending on his wishes. Mr. Hamdan
8 has access to reading material as well.

9 And I also want to emphasize that the military, who
10 is carefully monitoring and overseeing Mr. Hamdan, as well as
11 the other detainees at Guantanamo, has no interest at all in
12 the serious psychological deterioration of a detainee at
13 Guantanamo, particularly a detainee who may be subject to a
14 commissions process. Those are the points that I wanted to
15 stress today in support of our request that the Court simply
16 stay the proceedings. I would be happy to answer any
17 particular questions Your Honor has.

18 THE COURT: Well, I am interested, Mr. Garre, in
19 factors that make this case slightly different than the ones
20 that you have described, and I assume you either were at the
21 U.S. Supreme Court for those arguments, or you listened to
22 them. And while the issues may be framed a certain way, the
23 Court seems to go from point A to point Z in there, and it's
24 a little bit difficult to predict where they're going to go
25 in a decision, but one of the factors that was not present in

1 any of those cases argued was that here we have an individual
2 who is one of only six who have been designated for trial in
3 the military tribunal. Does that change our circumstance?

4 MR. GARRE: Your Honor, we don't think that it
5 does. First, I want to agree with you that no one can
6 predict how the Supreme Court is ultimately going to rule in
7 those cases, and certainly the number of amicus briefs and
8 other briefs and issues brought to the Court's attention
9 suggests that a number of different variables could enter the
10 mix.

11 But in particular with respect to the fact that
12 this individual has been designated pursuant to the
13 military's -- or the President's November 13, 2001 order,
14 that -- that doesn't change Mr. Hamdan's status as an enemy
15 combatant, and that is why he is being detained at Guantanamo
16 to the extent that that puts Mr. Hamdan into a military
17 commissions process, and of course, no military commissions
18 has yet been appointed with respect to Mr. Hamdan, or any
19 other detainee at Guantanamo.

20 But to the extent that they suggest that in this
21 case where the military commission's sphere, that, if
22 anything, only brings us closer to *Eisentrager*, because in
23 *Eisentrager* the prisoners in that case were tried and
24 convicted by a military commission and then imprisoned.

25 And ironically one of the principal bases that the

1 petitioners in the *Rasul* and *Al Odah* cases have asserted in
2 arguing that there should be jurisdiction in those cases is
3 that the detainees in those cases had not been subjected to a
4 military commissions process, so in that respect we don't
5 think that the fact that the individual in this case has been
6 designated pursuant to the President's military order makes a
7 difference.

8 We also don't think it makes a difference that Mr.
9 Hamdan has been moved from one part of the facilities at
10 Guantanamo to another. The fundamental question of whether
11 the courts have jurisdiction under the habeas statute, or
12 under the Constitution, or under another fundamental source
13 of authority doesn't turn on the place at Guantanamo that the
14 individual is detained, or the particular conditions of
15 detention.

16 The actions in *Rasul*, in *Al Odah*, in *Gherebi* and
17 *Habib*, the prior cases the Courts have faced involving the
18 challenges to the detention of Guantanamo detainees, the
19 relief requested in those cases has all ranged from outright
20 release to lesser conditions of confinement. So the fact
21 that this case involves a situation where an individual has
22 been moved from one facility to another, we think doesn't
23 distinguish this case from *Rasul* and *Al Odah*.

24 THE COURT: Okay. Thank you very much, Mr. Garre.
25 Mr. Katyal?

1 MR. KATYAL: Thank you for allowing us to be here,
2 and may it please the Court, the Government has come forward,
3 Your Honor, to ask for extraordinary relief. We have found
4 no case in which a lawsuit has been delayed before an answer
5 has yet been filed when someone is in solitary confinement,
6 and the Government has not cited anything either.

7 It quite simply has never, ever been done. In
8 effect, what the relief that they're asking this Court to do
9 is really tantamount to -- for all practical purposes we're
10 asking this Court to issue a dismissal without prejudice of
11 this case. They're asking to stop this lawsuit in its tracks
12 for the next 60 or 90 days, the precise date of which I'm not
13 very clear on what the Government is asking for, but 60 or 90
14 days on the hope that maybe the Ninth Circuit decisions that
15 currently bind this Court will somehow be -- will somehow be
16 changed by the United States Supreme Court.

17 That's why it's so hard to find anything -- any
18 precedent that supports their position. That's why the
19 precedent they cite winds up boomeranging on them. Stays
20 are not entered when no factual records have been developed,
21 and they certainly aren't entered when the central issue in a
22 case itself is illegal delay on the parties. We're asking
23 for relief in this Court that is so much broader than the
24 typical relief sought in a stay. They're asking to end the
25 proceeding before it has yet begun. Does that happen in

1 habeas or mandamus cases? To our knowledge, never.

2 And the Government, which bears a heavy burden of
3 proof in moving for a stay as their own case *Landis* suggests,
4 has minimum -- they -- they're required to show a clear
5 showing of hardship to them. The only hardship they have
6 been able to induce is whether -- is what Mr. Garre just
7 said, which is you might have to go through two rounds of
8 proceedings on the jurisdictional question.

9 That harm, the judicial economy harm is we think --
10 it may be present. We think there may be something there.
11 We think it's far, far outweighed by the harm to Mr. Hamdan
12 in the interim. And, so, let me start the argument by saying
13 that there are two reasons why this Court should deny the
14 request for a motion, even if the issues are precisely
15 identical to those before the Supreme Court. We believe
16 they're not for any number of reasons.

17 The first is the harm to Mr. Hamdan and the
18 possibility of irreparable damage to him. Mr. Hamdan, as you
19 know, sits in solitary confinement. He sees virtually no
20 one. The Government just said today that there is a guard
21 that monitors him 24 hours -- that is with him 24 hours a
22 day. That is not true anymore. The only evidence in this
23 record is para -- paragraph 10 of Commander Swift's
24 declaration which says that the guard is being removed and
25 that cameras are being installed instead.

1 Now, we have brought forward evidence that there is
2 a likelihood of irreparable harm in this case, that there is
3 a cause and effect relationship between Mr. Hamdan's solitary
4 confinement in those conditions and his mental condition and
5 his ability to defend himself at trial later on. And our
6 argument shows that the trend line is getting worse for Mr.
7 Hamdan's mental condition, and particularly we have given the
8 Court four pieces of evidence, first, the declaration by Dr.
9 Matthews; second, the declaration by Commander Swift; third,
10 Mr. Hamdan's own declaration; and fourth, the verified
11 petition in this case. That, Your Honor, is the evidence in
12 this record on irreparable harm.

13 Now let's turn to what the Government's evidence is
14 since, of course, they bear the burden of proof in moving for
15 a stay. And you look and you look, and the evidence is
16 missing entirely. They have offered no evidence at all to
17 this Court on irreparable harm. You have before you
18 uncontroverted evidence that if this stay is granted,
19 irreparable harm to Mr. Hamdan will result.

20 Now, they have today and in the reply papers
21 offered some arguments about why they think delay might not
22 be harmful, monitoring and the like, but that is not evidence
23 before this Court, and they stand before this Court without
24 presenting that evidence when they're in a far better
25 position frankly than us to do so. They have access to Mr.

1 Hamdan continually. They can bring psychologists in as they
2 say they evidently are. We have faced much greater burdens
3 in trying to develop our evidence, but we have tried to do so
4 to the Court.

5 And, so, as such, not only has the Government
6 failed to meet its heavy burden of proof in showing a need
7 for a stay, they have also disregarded what their own
8 precedent say when a stay is requested, which is that they
9 have to mitigate the damage of harm -- the -- mitigate the
10 damage from the delay. That's what *Landis* says, the Supreme
11 Court case they cite.

12 Here they completely trivialize it by saying he can
13 exercise for 45 minutes a day, and he may be monitored by
14 guards or something like that. That is not sufficient when
15 we're talking about keeping someone in solitary confinement,
16 depriving them of absolute relief for 60 or 90 days when
17 there is evidence before the Court that shows that doing that
18 will result in serious harm to him. We're not trying to be
19 unreasonable here. We even said to the Government, if you
20 really think that judicial economy is so strong, then let's
21 try and work out a way in which we can mitigate the damage to
22 Mr. Hamdan. We'll abey the case in the interim if you think
23 it's that serious. They have not responded to that.

24 So that is our first reason for why we think the
25 stay shouldn't be granted, the likelihood of irreparable

1 harm. The second reason we think is that this case is really
2 different from other cases in which stays have been granted,
3 that the burden in this case for the Government is much
4 higher than even the ordinary high burden in seeking a stay
5 that *Landis* suggests. That's because of what the Ninth
6 Circuit has said in the *Hall* case.

7 The Ninth Circuit has said that the two main cases
8 that the Government relies on in seeking a stay, *Leyva* and
9 *Landis*, are inapplicable to habeas corpus proceedings because
10 of the specific statutory emphasis on speed and habeas cases.
11 Now, we're not citing that case just for its facts. We're
12 citing it for its proposition of law, which is that habeas
13 cases are different. They involve confinement. They're
14 supposed to be resolved quickly by the courts.

15 Now, to the extent the facts become relevant, it's
16 worth noting that the Ninth Circuit found that the stay
17 entered by the District Court was an abuse of discretion when
18 the stay was five months long and the person wasn't even in
19 serious confinement. He was in a halfway house. Here, the
20 Government is asking Mr. Hamdan to stay in solitary
21 confinement for 60 or 90 days, and the harm as we have said
22 has been -- is tremendous. Courts have recognized that even
23 a few days of being in solitary confinement imposes serious
24 harm.

25 THE COURT: But isn't it true that in *Younger* in

1 footnote 2 the Court indicated that although it is true that
2 once the Federal Circuit Court issues a decision, the
3 district courts within that circuit are bound to follow it
4 and have no authority to later ruling by the Supreme Court
5 before applying the Circuit Court's decision as binding
6 authority. A single justice of the Supreme Court may stay
7 the mandate of the Court of Appeals pending an application
8 for certiorari. Isn't it true that Younger talked about the
9 things that can affect whether a panel decision is binding,
10 and one of them is the stay being issued?

11 MR. KATYAL: Yes, I believe that language is a
12 little unclear about exactly what might -- what might affect
13 the binding nature on a district court -- on a lower court.
14 I think we would say two things about that. Number 1, we
15 don't dispute that the Government is able to go to the
16 Supreme Court and ask for a stay in these proceedings if they
17 think that it is so similar to the case here.

18 The Supreme Court justices know far better than of
19 course the people in this room whether an issue is so
20 sufficiently intertwined with some other proceeding that a
21 stay should be granted. The second thing is that as we've
22 cited to the Court in -- in our supporting memorandum, as
23 well as in our response to this motion, there is binding
24 Ninth Circuit precedent from 1983. It's called the *Wedbush*
25 which says that a stay -- a stay of a mandate by itself

1 doesn't eviscerate the precedential effect of the decision
2 that lower courts are bound to obey it.

3 That is a much clearer statement, we submit, than
4 that footnote in *Younger*. But we certainly acknowledge that
5 the Government, if they do seek a stay before the Supreme
6 Court, will be able to make their argument of that case.

7 THE COURT: But the *Gherebi* case, you know,
8 normally in the Ninth Circuit when we get opinions,
9 particularly two to one decisions, and particularly two to
10 one decisions where the third vote is a senior judge from a
11 district not even in the Ninth Circuit, that one of the
12 protections we have is the ability to seek an en banc, and
13 that was cut off by the stays that were entered here. So, I
14 mean, the Ninth Circuit hasn't really had a chance to speak
15 beyond one Ninth Circuit judge going one way, another Ninth
16 Circuit judge going another way, and a senior judge from
17 Illinois weighing in with one of those judges.

18 MR. KATYAL: Right. And we -- I'm not sure whether
19 or not -- I frankly don't know, Your Honor, whether or not
20 that cut off the en banc proceedings, whether something could
21 have been filed in the interim or something like that. We
22 are saying that this case is really quite different from
23 *Gherebi*. We're not like the *Gherebi* plaintiffs asking this
24 Court to resolve the exact same issue that the Supreme Court
25 has before it.

1 It's really quite a different set of circumstances,
2 and we would point out that it's not only Younger but a
3 Aguirre v. Clark in which the Government -- in which the
4 Government made a very similar argument there which was that
5 -- that there was a rehearing en banc pending in the Ninth
6 Circuit on a related case. And -- and the case should be --
7 should be stayed -- should be held in abeyance for it, and
8 Judge Pregerson said, no, we won't do that because this is a
9 habeas case. It raises different issues, issues of speed and
10 finality needs to be decided in a different way.

11 THE COURT: Counsel, we try to move habeas cases
12 along expeditiously, but I can assure you that I have habeas
13 cases from 1999 that are still pending in front of me, and
14 occasionally we do stay process awaiting a U.S. Supreme Court
15 that may affect us, even though it means the continued
16 confinement of the prisoner.

17 I recognize you have evidence about unusual
18 circumstances here and the psychological -- or at least the
19 risk of psychological harm to Mr. Hamdan, but when you talk
20 about judicial economies, sometimes we're talking about like
21 a heavy docket. I would not let a heavy docket stand in the
22 way of this case. It's the most important case on my docket.
23 I can see that clearly.

24 But judicial economy in this circumstance would be
25 to -- with when you know you are going to have an opinion

1 from the U.S. Supreme Court possibly two, maybe even three if
2 you throw in *Al Odah* and *Gherebi* and -- and that these issues
3 are, if not unprecedented, have not been revisited by the
4 U.S. Supreme Court in 50 years since the cases that came out
5 of World War II. Doesn't it make sense to, for the briefing
6 at least, setting aside the factual issues of Mr. Hamdan's
7 confinement, to wait and take those opinions out -- I'm not
8 sure when the term ends, whether it's --

9 MR. KATYAL: Around July 1st.

10 THE COURT: And, you know, they have a tradition of
11 always getting their decisions done by the end of the term,
12 and while I recognize there are reasons that they might set
13 it for re-argument and so on, I think the Government has
14 conceded that we would abide by that end of the term date and
15 take us 30 days from there. Is that not unreasonable under
16 these circumstances?

17 MR. KATYAL: It sounds -- in many ways I understand
18 it sounds practical. It sounds reasonable, and it might be
19 were it not for two things, the first is that Mr. Hamdan is
20 in oppressive solitary confinement where the conditions are
21 really severe. If the Government wanted to mitigate the
22 damage to Mr. Hamdan in the interim, I think we wouldn't be
23 standing here today. They're really talking about tacking on
24 an extra amount of time to his stay in this oppressive
25 solitary confinement.

1 Now, remember that the damage here isn't just the
2 psychological harm in terms of its intrinsic harm, but we
3 have also deduced uncontroverted testimony in the record that
4 the continued solitary confinement will cause memory loss and
5 impede with his ability to defend himself at trial, so that
6 is the first thing.

7 The second is that there's -- it's always a weigh
8 and cal -- you know, there is obviously a waiting that is
9 going on here, and the waiting -- the Government bears the
10 significant burden of proof in general, and a special one in
11 the habeas context. I'm not obviously familiar with what
12 cases you might have before you from 1999 in which you might
13 be holding a case in abeyance or something like that.

14 THE COURT: Capitol cases.

15 MR. KATYAL: Okay. Here, what we're -- here, what
16 we're arguing is that -- that the conditions are just -- are
17 so dramatic, and the possibility the Supreme Court might
18 address the issues of -- so speculative that it doesn't make
19 sense to -- to hold this case in abeyance. And let me talk
20 for a moment about why we think there is some major
21 differences between this case and those pending before the
22 Supreme Court.

23 So first when we talk about *Rasul*, we allege four
24 different areas of jurisdiction, none of which depend on
25 *Gherebi*. And if you read our papers, we've -- we want to be

1 clear. We're not trying to say, ha, we got you. We got this
2 Ninth Circuit *Gherebi* decision. You now have jurisdiction.
3 You are bound by it and that's the way that you have to
4 resolve this case. We think there are many other avenues for
5 a jurisdiction here, clear avenues about mandamus, the
6 Uniform Code of Military Justice, Section 1331, and a
7 different habeas corpus argument that I'll talk about in a
8 moment. All of those are the reasons why we think you have
9 jurisdiction in addition to the *Gherebi* decision that binds
10 this Court.

11 So let me talk for a moment about mandamus. This
12 is primarily the challenge the military condition process and
13 the solitary confinement in Camp Echo. We're not trying to
14 challenge Mr. Hamdan's detention in its entirety in the first
15 instance, rather we're saying that these conditions of
16 solitary confinement for purposes of holding him for trial
17 violate his rights. And lots of courts have made clear that
18 these types of challenges found in mandamus, *Mead v. Parker*
19 is a case we have cited to you many times in this regard.
20 I'd also ask that a couple of additional cases be brought to
21 you on this, and we'll provide copies to the Government.

22 We apologize for providing additional cases, but
23 the reason why we have to do so is we're responding to
24 arguments in their Wednesday filing. So *Holmes v. U.S.*
25 *Board of Parole* and *Workman v. Mitchell* which are at tabs

1 four (sic) and five are all cases that say that these types
2 of challenges to the conditions of confinement are ones that
3 sound in mandamus.

4 And it's also been the case that mandamus and hab
5 -- mandamus and habeas relief has been granted simultaneously
6 by courts. And lots of cases on that. We have provided to
7 you, *Mead v. Parker*, as I've said, and other cases at tabs
8 nine and ten in which that's occurred. Mandamus does not
9 have the extra territorial limits on it that habeas corpus
10 does, and this is important. Whatever the Supreme Court says
11 about the writ of habeas corpus does not apply to the writ of
12 mandamus. The Ninth Circuit has said that the territorial
13 limits in mandamus are different.

14 I cited to you many other cases in that regard, so
15 even were the Court to decide, the Supreme Court to decide
16 that habeas corpus jurisdiction does not lie in Guantanamo,
17 that doesn't bear whatsoever on whether mandamus jurisdiction
18 lies. The Government's argument and response is to say,
19 well, the Odah petitioners cited in their complaint in the
20 district court the mandamus statute. That's one of 20
21 statutes they've cited, Your Honor. They never mentioned it
22 again. It's not in the District Court's opinion. It's not
23 in the Court of Appeals' opinion. It's not in the
24 Government's briefing before the United States Supreme Court.
25 It's not in Odah's brief before the United States Supreme

1 Court.

2 Mandamus is just simply not present in those cases.
3 The Government -- it's also worth pointing out the issue in
4 *Odah*. The question presented in the *Odah* case, which I
5 believe is at tab one of your -- it's tab -- tab one or two
6 your -- of what we just provided to you, it's tab two, is
7 whether the United States Courts lack jurisdiction to
8 consider challenges of legality of detentions of foreign
9 nationals at Guantanamo Bay. This is not first and foremost
10 a challenge to detention. It's a challenge to Camp Echo and
11 the conditions of confinement.

12 It is true that in our prayer for relief we have
13 asked for certain -- for -- for relief from ultimate
14 detention at Camp Delta. We think that's speculative for --
15 for later in time. The only reason it's in our petition is
16 because as you well know, the successive habeas petition
17 rules for a second filing. The gravamen of this action is
18 release from Camp Echo and to have Mr. Hamdan put in Camp
19 Delta. In other words, all we're asking is for Mr. Hamdan to
20 be in the same position as where the *Rasul* and *Odah*
21 plaintiffs start today. They're able to start at Camp Delta.

22 And we think that that also explains why there is a
23 difference in habeas corpus. Even if this Court were to
24 treat this as a simple habeas corpus action, the claim we're
25 making is a dramatically different one, that this not a

1 forward looking detention claim like *Rasul* and *Odah* are
2 making in which the President is detaining people to preserve
3 the peace or something like that. This is a backward
4 adjudication of guilt and innocence before a military
5 process, before a military court, and in those circumstances
6 civilian courts have always reviewed determinations.

7 And, so, Mr. Hamdan and what we're arguing is
8 really quite different than the other 600 people at
9 Guantanamo Bay, and if you are asking yourself for any
10 additional proof of that, all you need to do is look at
11 Commander Swift here who is, of course, Mr. Hamdan's military
12 lawyer. *Rasul* and *Odah* do not have military lawyers, only
13 Mr. Swift (sic) and the other two individuals who are at Camp
14 Echo do.

15 The bottom line on this particular issue is that
16 even if the Government is -- everything that the Supreme
17 Court that they're asking for, this Court would still have
18 jurisdiction for two reasons. The first is that we have
19 alternative bases of jurisdiction not present at all, not --
20 at least not involved in the Supreme Court mandamus, Section
21 1331, Uniform Code of Military Justice, and the habeas corp
22 -- the different habeas corpus claim at issue here, which is
23 retrospective as opposed to forward looking adjudications.

24 The second thing is that the mandamus -- that if
25 there is any doubt in your mind as to whether or not the

1 issues are the same, we suggest that the burden of hardship
2 here in which the only evidence you have before you in the
3 record, the only evidence of hardship is the -- is what we
4 have provided to you. The Government has offered none.

5 Just briefly now on the question of whether *Padilla*
6 is similar to this case. There are two reasons why *Padilla*
7 is different. The first is this is a case of mandamus with
8 completely different jurisdictional rules than habeas corpus.
9 The second that even if this were simply treated as a habeas
10 corpus petition, it is a completely default within -- in an
11 exception to the issue in the *Padilla* case.

12 The issue in the *Padilla* case is which district
13 court must Mr. *Padilla* sue in, South Carolina or New York?
14 It is the so-called ultimate or intermediate custodian
15 requirement at issue in the case. There has always been an
16 exception to that requirement, which is that if the person is
17 outside the -- the United States, the detainee, and the
18 custodian is not subject to process, then you can sue the
19 ultimate custodian.

20 So cases like *Burns v. Wilson* and *Toth v. Falls*,
21 the Supreme Court cases we have cited to you, say that there
22 is this exception to the intermediate custodial requirement
23 which is not at issue in *Padilla* at all. The Government
24 doesn't take issue with this intermediate ultimate custodial
25 matter.

1 Today the Government said that the ultimate
2 custodial issue is also in *Rasul* and *Odah*. We submit if you
3 look at the papers in the case the question presented, the
4 ultimate or intermediate custodial issue is not before the
5 Supreme Court in any way, shape or form. This argument has
6 no merit.

7 The last thing to say that this mandamus *Padilla*
8 issue -- excuse me, the habeas *Padilla* issue, is that the
9 Ninth Circuit has already decided several times that in
10 habeas the ultimate custodian can be sued. You don't need to
11 sue the intermediate custodian. That's the Armentero
12 decision. And, indeed, even three days ago the Ninth Circuit
13 issued an opinion in *Thai v. Ashcroft*, a unanimous panel
14 decision which rejected the indefinite detention of an
15 illegal alien. The Government argued he was a threat to
16 national security and a terrorist, and the Court rejected
17 that and upheld this lawsuit, and it styled of course *Thai v.*
18 *Ashcroft*, the ultimate custodian.

19 Let me say one last word about the Government's
20 argument, because yesterday they said that the hardship would
21 be one of discovery. They didn't mention that today. But I
22 would like to reassure the Court and talk for a moment about
23 what we would like to see happen in the interim. We're not
24 asking this Court, Your Honor, and this goes to the question
25 you asked me a moment ago, we're not asking this Court to

1 rule by July 1st. What we're asking this Court to do is set
2 a schedule to -- to tee up the issues for your consideration
3 in the next month or so.

4 You can -- of course, it's within your discretion
5 as to whether to decide those jurisdictional issues before or
6 after the Supreme Court rules. To the extent the Government
7 feels there is harm from the discovery, we're seeking very
8 limited discovery. We don't -- aren't seeking very much. We
9 believe that we have already set out the facts necessary to
10 make the prima facie case, and the only thing is that if the
11 Government chooses to dispute any facts, we would like to
12 test that. The Government can make this choice.

13 And, so, to the extent that discovery would exist,
14 we envision it being very modest. We're not seeking to
15 depose Secretary Rumsfeld or members of the admin -- senior
16 members of the administration, or senior folks at Guantanamo.
17 We have no desire to impede in any way on their time. Rather
18 this lawsuit raises quintessential legal questions, the kind
19 that Mr. Garre has talked about, venue, jurisdiction,
20 separation of powers, equal protection. We believe there is
21 no reason why those issues can't be set for briefing now.

22 We're not going to seek unreasonable amounts of
23 discovery. We're not affirmatively seeking any discovery
24 right now, except a little bit about the conditions of
25 confinement, because the Government has offered some argument

1 as to why they want to contest the allegations we have made.
2 But the discovery we're making -- the discovery request we're
3 making can at all times be calculated to be surgically
4 narrow, not to intrude on the Government's time in any way,
5 to -- to the extent any classified information is at issue,
6 to be done in a way sensitive to that, the way district
7 courts do all the time, the way the Fourth Circuit just
8 recently in the *Moussaoui* case said it could be done. And if
9 any intrusive requests were to issue one day by us, of course
10 the Supreme Court has said that the proper remedy is to have
11 the District Court review that discovery request and issue a
12 protective order, *Clinton v. Jones* case.

13 And, so, it's not that Clinton says that the
14 District Court should offer a blanket kind of stop discovery
15 in its tracks, rather it should on a case by case about --
16 case by case basis evaluate the discovery request. If you
17 have any additional questions, Your Honor?

18 THE COURT: No, thank you very much, Professor.
19 That's great. Mr. Garre, you have about five minutes of
20 rebuttal. And if you would, Mr. Garre, and I don't mean to
21 -- I just want to give you the opportunity to address, there
22 is always this question about, what about Mr. Hamdan's
23 rights, and where does the Government's position that he has
24 no ability to get into federal court under any circumstances,
25 where are his rights addressed, if he has any rights, in this

1 stay situation?

2 MR. GARRE: Sure. Well, let me begin with that
3 briefly and then make some points in response to Mr. Katyal's
4 arguments. That issue too I think is bound up in the
5 questions before the Supreme Court in *Rasul* and *Eisentrager*,
6 but one of the central points of the *Eisentrager* decision
7 issue that has been briefed in the Supreme Court is whether
8 aliens abroad have constitutional rights. And in *Eisentrager*
9 the Supreme Court held that aliens abroad had lack of
10 constitutional rights under the Fifth Amendment, and the
11 Supreme Court subsequently repeated that in recent rulings,
12 including *Verdugo-Urquidez* and *DeMore v. Kim*.

13 But that doesn't mean that detainees aren't subject
14 to a process. I think the Government has laid out in its
15 *Rasul* brief, which I think Your Honor has as an attachment,
16 the numerous layers of screening that enemy combatants at
17 Guantanamo Bay have been subjected to, there is in place an
18 international process for state by state communications in
19 these sorts things. As I mentioned before today, Mr. Hamdan,
20 as well as all other detainees in Guantanamo, are visited on
21 a periodic basis by representatives of the International
22 Committee for the Red Cross. And as I have tried to stress
23 today, the military is continuously monitoring Mr. Hamdan's
24 condition.

25 The President has made clear, the military has made

1 clear that it's treating all detainees at Guantanamo humanely
2 and consistent with the general privileges accorded prisoners
3 of war, although these detainees do not meet the definitions
4 or the requirements of the Geneva Convention to qualify as
5 lawful combatants, so those are the processes in place.

6 If I could respond quickly to some of Mr. Katyal's
7 points. With respect to the question of precedent and the
8 argument that this is unheard of in the habeas context, I
9 would just point this Court back to *Gherebi*, which is perhaps
10 the closest analogous case on point in its all fours
11 involving the detention of aliens at Guantanamo, and yet,
12 both the Ninth Circuit in staying its mandate, and the
13 Supreme Court in staying all proceedings has seen fit,
14 perhaps because both Courts understood that the Supreme
15 Courts would soon -- the Supreme Court would soon be
16 addressing these fundamental jurisdictional issues to take
17 the step of temporarily staying the proceedings in that case
18 for the 60 days that remain for the period that remains until
19 the Supreme Court resolves those decisions.

20 With respect to the argument that this case is
21 different because they're not seeking first and foremost
22 relief, or their release, that is precisely the argument that
23 the petitioners in the *Al Odah* case made, and I'll just read
24 to Your Honor from the complaint in *Al Odah*, which is in the
25 joint appendix at page 19 of the *Rasul* case.

1 Plaintiffs do not seek release from confinement in
2 the amended complaint, rather they seek modest but essential
3 relief while they are being detained, interrogated by the
4 defendants. And then they go on to seek the lesser relief
5 that they request. So in that respect the Petitioners'
6 arguments here to suggest that, no, this is not a classic
7 habeas action. We're just seeking something short of habeas,
8 although, of course, at the beginning of the day we're
9 seeking outright relief as well doesn't in any way
10 distinguish this case from *Rasul* and the manner in which the
11 Supreme Court might treat those arguments in *Rasul*.

12 On the argument the civilian courts have always
13 reviewed military commissions, of course that's flatly
14 consistent with *Eisentrager* in which the prisoners that had
15 been tried and convicted before a military commission, and
16 the Supreme Court held that U.S. Courts lack jurisdiction to
17 hear habeas petitions challenging the detention of such
18 individuals.

19 The argument that Petitioners -- Petitioners
20 suggest that they have offered a reasonable way to mitigate
21 harm to Mr. Hamdan by removing him back to Camp Delta. First
22 of all, that's -- that is a specific request in the prayer
23 for relief at point five of their petition. So, ordering
24 that as a temporary matter for the stay would be tantamount
25 to granting them partial relief, and we think clearly the

1 Court would have to satisfy itself that it had jurisdiction
2 before it ordered that.

3 And if I could just explain as a practical matter
4 the significance of that request for relief. Mr. Hamdan was
5 moved from Camp Delta to Camp Echo when he was designated
6 pursuant to the President's military order, and therefore,
7 eligible for military commissions process. Now, that -- that
8 designation was followed by access to counsel. Mr. Hamdan,
9 unlike the vast majority of detainees or the detainees in the
10 general population area of Guantanamo, has access to counsel
11 and has met with counsel on numerous occasions.

12 Camp Echo is specifically designed so that
13 detainees can have access to counsel in an environment which
14 is safe for Counsel, for the detainees, and for the guards at
15 Guantanamo. That is why Mr. Hamdan and the other individuals
16 at Camp Echo are in that separate facility. Mr. Hamdan --
17 returning Mr. Hamdan to the general facility at Guantanamo
18 would create a great risk of disrupting the environment that
19 the military has attempted to create at Guantanamo in order
20 to facilitate the Government's developing interest in
21 gathering intelligence with respect to the Guantanamo
22 detainees, which as the military has explained, has proved
23 already to be very helpful in fighting the ongoing war in
24 Afghanistan as well as elsewhere around the world against the
25 al-Qaeda terrorist organization.

1 And, finally, I just wanted to mention that
2 commanders -- or I believe Mr. Katyal has suggested that the
3 military would not be continuously monitoring Mr. Hamdan. I
4 can assure you that the military will continuously monitor
5 Mr. Hamdan during the brief period in which a stay might be
6 entered from this Court, and also that our position is that
7 we don't want to hold this up. We're asking the Court to
8 temporarily stay things until we have guidance from the
9 Supreme Court, but then at that time the Government would be
10 willing to do whatever we can to brief the issues and to move
11 the case forward.

12 Our position is simply the Court should hold things
13 where they are now until everyone has the guidance of the --
14 of what the Supreme Court's thinking is on this. And that to
15 take the extraordinary step of allowing any discovery, the
16 Court would at a minimum have to assure itself that it has
17 jurisdiction before taking that step.

18 THE COURT: Okay. Thank you, very much, Mr. Garre.
19 You want to say something more, Mr. Katyal?

20 MR. KATYAL: If you wouldn't mind if I could just
21 have two minutes.

22 THE COURT: The usual thing is the moving party
23 goes, and then the respondent, and then the reply, but I will
24 give you two minutes.

25 MR. KATYAL: Thank you very much. Two fundamental

1 arguments we have. Number 1, there is hardship to Mr.
2 Hamdan, and two, that it is speculative that the Court will
3 -- the Supreme Court will preclude this Court's jurisdiction.
4 The Government mentions the Gharebi case is precedent to you.
5 It's important to note the Ninth Circuit rejected the
6 Government's argument for a stay, and that is at tab one of
7 our -- of our papers.

8 The Supreme Court did stay it, but it's in the
9 exact same issue and in a case in which there is no evidence
10 of irreparable harm from the stay itself. Here the only
11 evidence you have before you is that evidence that Mr. Hamdan
12 will be harmed. The Government says that Odah raises the
13 same issues that they weren't seeking release from
14 confinement. We refer you to the District Court's opinion at
15 page 62 which rejected that characterization of what the Odah
16 plaintiffs were seeking. They said this is really a frontal
17 challenge on confinement itself. Mandamus issues as we said
18 never ever again appeared before -- after the complaint was
19 filed.

20 But, finally, on the relief and mitigation issues,
21 the Government says it's -- it would be tantamount to
22 granting relief to move him out of Camp Echo. Well, that's
23 right, because after all, they're seeking to delay the relief
24 that we're seeking in this lawsuit. If they want to seek a
25 delay, then they're under the duty to mitigate the harm from

1 that delay.

2 Now, we're not saying you have to move him to Camp
3 Delta. You can move him to any of the 500 or so other
4 prisons that the federal government operates or has an
5 interest in, here and abroad. All we're saying is that if
6 they keep him in this solitary confinement proceeding, the
7 only evidence you have before you shows that there is a
8 likelihood of irreparable harm and that one day, 60 days from
9 now, Mr. Hamdan's condition may have degraded to the point
10 where he won't be able to defend himself at trial. We're not
11 asking this Court necessarily to rule in this 60-day period.
12 All we're asking this Court to do is set up the issues so
13 that it can rule at an expeditious time. Thank you, Your
14 Honor.

15 THE COURT: Thank you, Mr. Katyal. I will rule on
16 the motion to hold the petition in abeyance by Monday or
17 Tuesday of next week. And basically the schedule will be one
18 of these two things: Either if I deny the motion, then we
19 will have the Government's response approximately 30 days out
20 from that, which will be early June; a reply from Petitioners
21 in the middle of June, about two weeks later; and then oral
22 argument at the very end of June, such as the 28th or 29th or
23 30th, depending on how these things come in.

24 If the Court decides to grant the request, then we
25 will be operating on the 30 days after the decisions come

1 out, and presuming they will come out towards the end of
2 June, the Government's response, their answer would be due
3 the end of July, the Petitioners' in the middle of August,
4 and we would argue the case in early part of September. So
5 those are the parameters that we're looking at here, just so
6 it's understood that if the stay is not granted, or order --
7 request for the order holding petition in abeyance is not
8 granted, that's the timeline that you need to be working
9 towards. And if it is, it's not an indefinite stay, or a
10 lengthy stay but a measured one, that will keep us again on
11 as fast a track as possible.

12 And I do want to say how much I appreciate the
13 suburb lawyering on both sides on an important case such as
14 this, and I am sure Commander Swift has by now gotten over
15 the slings and arrows of, *how could you possibly represent*
16 *someone under these circumstances?* It's the highest
17 tradition, not of just the profession of being an attorney,
18 but the highest tradition of military justice to give
19 everyone the right to an attorney under these circumstances.

20 And, you know, by the same token, the Justice
21 Department and the Solicitor's Office should have the best
22 representation possible to represent the interests of the
23 people of the United States. And the fact that we're in
24 federal court talking about these things I hope sends the
25 message to the executive branch that part of what makes this

1 country so great is not just that we have the most military
2 power, or the most wealth, but we have a system in the
3 federal courts where the most vulnerable and the most
4 powerless still can get into the courthouse and have their
5 cases heard to some degree.

6 And I think if you go around the world and see some
7 of the troubles America gets in -- because we lose track of
8 that. And while the third branch may be the least powerful
9 and the least important in some respects, it's what separates
10 this country from other very powerful, very rich, and very
11 militarily strong countries to have an independent judiciary
12 that can make decisions that are respected by the executive
13 branch and the congressional branch, even when they strongly
14 disagree with it.

15 But we have no army ourselves to enforce our
16 orders. We have no ability to raise money to fund what we
17 do, but when it comes to defending rights, the federal
18 judiciary has a pretty good record of being independent and
19 fair in this area, and ultimately I think that's the best
20 thing for foreign policy to advertise that that is what makes
21 the United States the United States.

22 So I think the performance here today by both
23 Counsel, by Commander Swift, Mr. Garre and Mr. Schneider's
24 firm taking on a case they're not going to get paid for is in
25 the greatest tradition of the bar and the country, so I

1 commend you all. Thank you.

2 THE CLERK: All rise. Court is now adjourned.

3 (Proceedings concluded 9:32 a.m.)

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

C E R T I F I C A T E

STATE OF WASHINGTON)

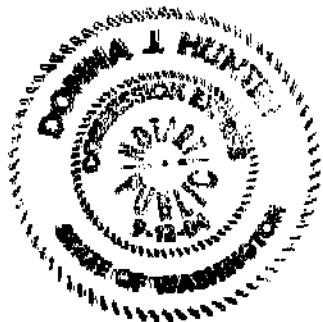
) SS

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.



A handwritten signature in cursive script, appearing to read "Donna J. Hunter", written over a horizontal line.

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