Judge Lasnik

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

Lieutenant Commander CHARLES SWIFT, etc., Petitioner, v. DONALD H. RUMSFELD, etc., et al., Respondents.	NO. C04-0777RSL **RESPONDENTS' REPLY IN SUPPORT OF MOTION FOR ORDER HOLDING PETITION IN ABEYANCE**

It is undisputed that this Court has discretion to grant a temporary stay of the proceedings in this case. In less than two months, the United States Supreme Court will almost certainly issue decisions that will substantially inform, if not completely dispose of, the threshold jurisdictional issues presented by this extraordinary legal challenge to the authority of the Commander in Chief and his military forces in wartime to detain and subject to military trial aliens who are captured abroad and determined to be enemy combatants. In light of those impending Supreme Court decisions, the Ninth Circuit itself stayed its own mandate in Gherebi v. Bush, and the Supreme Court subsequently stayed all proceedings in Gherebi. See 124 S.Ct. 1197 (Feb. 5, 2004). Petitioners provide no adequate reason for this Court to follow any different course here.

I. PETITIONER'S REQUEST FOR MANDAMUS AND, IN THE ALTERNATIVE, HABEAS DOES NOT DISTINGUISH THE THRESHOLD ISSUE IN RASUL AND AL ODAH

Petitioner's attempt to distinguish this case from Rasul and Al Odah on the ground that the petition asks for mandamus relief – in addition to habeas relief – is meritless. First, the Complaint

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in Al Odah itself cites the mandamus statute (28 U.S.C. § 1361) in addition to the habeas statute and various other federal statutes as a basis for jurisdiction. See Joint Appendix, No. 03-343, at 19. So the fact that petitioner Swift has cited the mandamus statute as a source of jurisdiction is neither novel nor provides a basis for distinguishing this case from the Al Odah case now pending before the Supreme Court. Moreover, even if the Supreme Court's decision in Rasul and Al Odah does not expressly address the mandamus statute, it is likely to address the more fundamental issue (raised by Al Odah) as to whether the limits on traditional habeas jurisdiction in challenging the detention of aliens held outside the sovereign United States may be evaded simply by citing the mandamus statute, the federal question statute, or the Administrative Procedure Act.

Second, petitioner has it precisely backwards when he claims (Opp. 3) that "[t]he only way in which a habeas issue would arise is if this Court were to decide, on the merits, that mandamus is not available." That is because "mandamus review may not generally be used when a statutory mode of review has been prescribed." Nova Stylings, Inc. v. Ladd, 695 F.2d 1179, 1180-1181 (9th Cir. 1983). And it is well-settled that "[c]hallenges to the validity of any confinement or to particulars affecting its duration are the province of habeas corpus." Muhammad v. Close, 124 S. Ct. 1303, 1304 (2004) (per curiam); see Preiser v. Rodriguez, 411 U.S. 475, 489-490 (1973).

Petitioner's challenge to the legality of Hamdan's detention at Camp Echo (see Claims For Relief 1-3) and to Hamdan's wartime detention at Guantanamo in general pursuant to the Military Order (see Claims for Relief 4-7) sounds in a classic type of habeas action seeking an individual's release from allegedly unlawful confinement, which no doubt explains why petitioner himself has partially styled this action as a petition for a writ of habeas corpus. See Preiser, 411 U.S. at 484 ("[T]he essence of habeas corpus is an attack by a person in custody upon the legality of that custody."); id. at 486. Petitioner cannot circumvent the restrictions on habeas jurisdiction, or, for purposes of this motion, the potentially dispositive impact on the petition of a ruling by the Supreme Court upholding the D.C. Circuit's decision in Rasul and Al Odah, simply by recasting this habeas action as a request for mandamus. See, e.g., Rasul v. Bush, 215 F. Supp. 2d 55, 62 (D.D.C. 2002), aff'd sub nom., Al Odah v. United States, 321 F.3d 1134 (D.C. Cir.), cert. granted, Rasul v. Bush, 124 S. Ct. 435 (2003); cf. United States v. McVeigh, 106 F.3d 325, 333 (10th Cir. 1997)

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("[M]andamus may not be used to circumvent the policies effectuated by the restrictive provisions of Section 3731[.]").

Moreover, contrary to petitioner's suggestion (Opp. 3), the Mandamus and Venue Act of 1962 did not expand the jurisdiction of the federal courts to hear claims filed by aliens outside the territorial jurisdiction of the United States, such as those filed by aliens at Guantanamo. Rather, "Congress intended nothing more than to provide nationwide venue for the convenience of individual plaintiffs in actions which are nominally against an individual officer but are in reality against the Government." Stafford v. Briggs, 444 U.S. 527, 542 (1980) (emphasis added); Jarrett v. Resor, 426 F.2d 213, 216 (9th Cir. 1970). That Act thus provides no basis for concluding that it extended jurisdiction to aliens challenging their wartime detention outside the United States, a category of claims over which no United States court previously had jurisdiction.

Petitioner is also wrong in asserting (Opp. 4) that the Padilla case "has no bearing on the Petition." One of the questions presented in Padilla is whether the federal district court in New York has habeas jurisdiction over Secretary Rumsfeld, who works at the Pentagon in Virginia. That same question will be presented by this case in the event the Supreme Court holds in Rasul and Al Odah that Guantanamo detainees may seek habeas relief in the federal courts. In that event, the Supreme Court may provide guidance on whether such a habeas petition must be filed in the Eastern District of Virginia or, perhaps, the District of Columbia, as the government has argued in the alternative in Rasul and Al Odah.

II. A STAY OF THE PROCEEDINGS UNTIL THE SUPREME COURT RULES IS A COMMON SENSE AND PRUDENT EXERCISE OF THIS COURT'S DISCRETION

Relying on Yong v. INS, 208 F.3d 1116 (9th Cir. 2000), petitioner contends (Opp. 6-9) that habeas cases should not be delayed, notwithstanding that the Supreme Court has stayed proceedings in a habeas case filed by another Guantanamo detainee. See Bush v. Gherebi, 124 S. Ct. 1197 (2004). Yong is readily distinguishable. There, the Ninth Circuit held that a district court abused its discretion in imposing a stay, but in doing so stressed that the term of the stay was "indefinite" and could last "for years," 208 F.3d at 1119 (emphasis added); see id. at 1120 ("The stay it crafted * * * placed a significant burden on Yong by delaying, potentially for years, any progress on his

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petition.").

In this case, by contrast, the term of the requested delay is definite and brief: less than 60 days from the initial status conference.[1] Moreover, the justifications for imposing a stay are much stronger than those cited in Yong. Petitioner's challenge to military process during wartime raises profound separation-of-powers concerns, the very concerns the Court in Johnson v. Eisentrager, 339 U.S. 763, 774, 779 (1950), cited in concluding that the federal courts lacked jurisdiction to hear the detainees' claims. Because the Supreme Court, in less than 60 days, may determine the very power of this Court to adjudicate the petition and will, at a minimum, address separation-of-powers issues of relevance to this petition, the balance in this case tips decidedly in favor of deferring proceedings.

In any event, the far more relevant Ninth Circuit precedent in this regard is Gherebi. After issuing its decision in Gherebi last December, the Ninth Circuit stayed its own mandate in Gherebi. And the Supreme Court subsequently stayed all proceedings in Gherebi. 124 S. Ct. 1197. Particularly in light of the manner in which the Ninth Circuit and the Supreme Court have handled Gherebi, nothing in Yong provides any reason for this Court to leap frog Gherebi by proceeding with the resolution of the threshold jurisdictional issues presented by this case.[2]

III. PETITIONER'S ALLEGATIONS OF HARM DO NOT COMPEL A DIFFERENT COURSE

Petitioner argues (Opp. 9-12) that the risk of psychological harm to Hamdan requires the Court to plunge ahead with this case before the Supreme Court has provided guidance on the threshold jurisdictional issues presented. That argument should be rejected. Hamdan is continuously monitored by military personnel who are trained to respond to safety concerns to Hamdan and others. If any problem arises, such personnel will immediately notify the medical staff at Guantanamo. In

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[1] Petitioner opines (Opp. 7 n.2) that the abeyance may last longer than the end of the Court's Term. Respondents are not seeking a postponement beyond the Court's disposition of Rasul/Al Odah and Padilla this Term, whatever that disposition might be.

[2] Petitioner (Opp. 9 n.4) seeks to distinguish the stay entered in the second Gherebi case, Gherebi v. Bush, CV 04-0210-RSWL (MANX) (Ex. B. to Respondents Motion), on the ground that that case, which is a civil action seeking monetary damages, raises "the same threshold jurisdictional issue" as Rasul/Al Odah. Petitioner's acknowledgment that Gherebi II, a non-habeas action, presents the same jurisdictional issue as Rasul/Al Odah, reinforces respondents' contention that petitioner's request for mandamus relief does not set this case apart from Rasul/Al Odah.

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addition, Hamdan is frequently visited by mental health professionals at Guantanamo, and may make any medical requests at that time. Mental health professionals last examined Hamdan on April 29, 2004, and found no evidence of significant psychological harm or deterioration. At that time, Hamdan was offered and accepted visits by mental health professionals on a weekly basis.

More generally, Hamdan is permitted to exercise for approximately 45 minutes to one hour every day, and he is permitted to choose whether to do so during the daytime or in the evening. In addition, he has met numerous times with his attorney. Hamdan is segregated from the other detainees at Guantanamo for several important reasons. First, because he has been afforded unmonitored access to an attorney for several months, his return to the general detainee facility at Guantanamo – where he could communicate with detainees who do not enjoy such access – would create an undue risk of destroying the environment that the military is trying to create at Guantanamo in order to facilitate intelligence gathering. Second, the cell units at Camp Echo are carefully designed to accommodate the unique security concerns presented by Hamdan's private meetings with his attorney, petitioner Swift. Third, detainees at Camp Echo are allowed to keep paperwork related to their cases in the cell units, along with pens and pads of paper to assist in the preparation of their case. Hamdan could not retain such materials in the general population for security reasons.

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CONCLUSION

For the reasons stated above and in our memorandum in support of our motion, this Court should hold the petition in abeyance pending the Supreme Court's decisions in Rasul/Al Odah and Padilla.

DATED this 5th day of May, 2004.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 5, 2004, I electronically filed the foregoing Respondent's Reply in Support of Motion for Order Holding Petition in Abeyance with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following CM/ECF participants:

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