

UNITED STATES DISTRICT COURT
WESTERN WASHINGTON
AT SEATTLE

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Lieutenant Commander CHARLES SWIFT,)
a resident of the State of Washington,))
as next friend for SALIM AHMED HAMDAN,))
Military Commission Detainee,))
Camp Echo,))
Guantanamo Bay Naval Base,))
Guantanamo Bay, Cuba,))

Petitioner,))

-vs-

CASE NO. CO4-777L

DONALD H. RUMSFELD, United States)
Secretary of Defense; JOHN D.)
ALTENBURG, JR., Appointing Authroity)
for Military Commissions, Department)
of Defense; Brigadier General THOMAS)
L. HEMINGWAY, Legal Advisor to the)
Appointing Authority for Military)
Commissions; Brigadier General JAY)
HOOD, Commander Joint Task Force,)
Guantanamo, Camp Echo, Guantanamo)
Bay, Cuba; GEORGE W. BUSH, President)
of the United States,))

Defendant,))

Verbatim of Proceedings
before
THE HONORABLE ROBERT S. LASNIK

Date: Friday, July 16, 2004
Reported By: Susan A. Zielie, CCR, RPR

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A P P E A R A N C E S

For the Petitioner: HARRY H. SCHNEIDER, JR., ESQ.
 PROFESSOR NEAL KATYAL
 JOSEPH M. McMILLAN, ESQ.
 DAVID R. EAST, ESQ.

For the Respondent: BRIAN C. KIPNIS, AUSA
 GREGORY G. GARRE, ESQ.

1 SEATTLE, WASHINGTON; FRIDAY, JULY 16, 2004

2 11:00 A.M.

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4

5 THE CLERK: Case C04-777L, Lieutenant Commander
6 Charles Swift vs. Donald Rumsfeld, et al. Counsel, please
7 state your appearances.

8 MR. KIPNIS: Good morning, Your Honor, Brian
9 Kipnis, Assistant United States Attorney for the respondents.

10 THE COURT: Good morning, Mr. Kipnis.

11 MR. SCHNEIDER: Good morning. Harry Schneider on
12 behalf of Lieutenant Commander Swift, and with me at counsel
13 table is Joseph McMillan and David East, and I believe we
14 have someone on the speaker phone.

15 PROFESSOR KATYAL: Neal Katyal on the speaker
16 phone.

17 THE COURT: If you have any trouble hearing us,
18 please let us know. I think we have the volume cranked up as
19 much as we can here.

20 PROFESSOR KATYAL: Thank you very much, Your Honor.

21 THE COURT: Mr. Kipnis, you asked for this motion
22 regarding some motions the government wants to bring.

23 MR. KIPNIS: Yes, Your Honor, and thank you for
24 hearing this on such short notice. We believe that the
25 Supreme Court ruling on July 8 in the Gherebi case compelling

1 the conclusion, at a minimum, to the Western District of
2 Washington is an inappropriate venue for the habeas corpus
3 petition that's been filed in this action. And, this is a
4 threshold issue of importance, Your Honor, because it goes to
5 the territorial jurisdiction of the court to hear this
6 matter, as you know. And we have a couple of other threshold
7 issues that we would like to raise. We would like to
8 challenge the standing of Lieutenant Commander Swift to
9 represent Mr. Odah, both as his next friend and in his own
10 right, the third-party standing issue. That, as you know,
11 Your Honor, goes to the subject matter of jurisdiction of the
12 court.

13 We would also, to the extent that we anticipate
14 that there may be an argument that the mandamus remedy makes
15 this case appropriate in this court, we would also like to
16 argue that mandamus is not available to the petitioners in
17 this case; but, even if it were, the venue rules as applied
18 would require the case still be heard in the District of
19 Columbia as we believe was granted in the Padilla mandate.

20 So what we would like to do, Your Honor, is file a
21 motion, which we are prepared to file today, that raises
22 these threshold issues. We're willing to have this heard on
23 as expedited a basis as Court and counsel wish to move it and
24 have those issues decided before we do anything further in
25 this case. So that's the proposal, Your Honor.

1 THE COURT: Okay. And, in the meantime, Mr.
2 Kipnis, is the Government asking for relief from the existing
3 schedule of filing and a return by I think July 28th?

4 MR. KIPNIS: There are three sort of ancillary
5 things we would ask for. First of all, that we be allowed to
6 file a brief that's no more than 20 pages in length. Because
7 the petition is 72 pages, we think that's a fair request. We
8 would like to have the current motion for discovery stayed
9 and our response on the merits stayed. Or, not so much
10 stayed, but extended for a period of two weeks until after
11 the Court reaches its decision if the decision is against our
12 motion.

13 THE COURT: Okay. The first one, on the 20 pages,
14 on the brief related to the motion itself?

15 MR. KIPNIS: Correct. Just the threshold issues
16 that we intend to raise.

17 THE COURT: Thanks, Mr. Kipnis.

18 Mr. Schneider.

19 MR. SCHNEIDER: Yes, Your Honor. We have looked at
20 this issue, we will look at it more closely between now and
21 September 8th. We believe that the Padilla case does not
22 change status quo of the proceedings that are in place in
23 this case. If the Government wishes to file a motion on
24 those issues, obviously I think that that's an entitlement.
25 We believe strongly that the schedule that is in place and

1 which was put in place in May was done so with those
2 challenges in mind. And I recall that Assistant Associate
3 General Garre mentioned that there would be challenges after
4 the Supreme Court's rulings. He mentioned venue, mentioned
5 jurisdiction. No surprise. Where I think we really part
6 company, and Mr. Kipnis and I exchanged views I think a week
7 ago today, is that we believe that the existing schedule
8 should remain in place. A change of venue, which we do not
9 think would be granted but we understand could be briefed and
10 argued and will be decided, a change of venue obviously
11 doesn't change anything on the merits. It changes the
12 audience, it changes the geographic location of the decision.
13 Here we have in place a schedule which contemplates that
14 those challenges would be part and parcel of the response to
15 the petition. We believe there is no need to delay or defer
16 or postpone in any way the response to the petition simply
17 because a venue motion theoretically might be granted.
18 Because, if granted, the case goes intact. And, if there's a
19 deferral of the response on the merits to a petition that was
20 filed a couple months ago, it's inherently going to cause
21 delay. Inherently. There's no way to avoid it. If you put
22 off the response to the merits simply because the location of
23 the decision might be changed, it causes delay. And this is
24 the type of case, I think we all recognize, delay is not a
25 good thing.

1 Professor Katyal may have additional argument, if
2 you'll permit it.

3 THE COURT: Sure.

4 Professor, is there anything you'd like to add?

5 PROFESSOR KATYAL: No, Your Honor, thank you.

6 THE COURT: Mr. Kipnis, has the solicitor been
7 working on the underlying -- what is the need for the delay
8 if staying on schedule with the underlying motion? I can't
9 believe they haven't been looking at the issues in the
10 interim.

11 MR. KIPNIS: We have been looking at the issues in
12 the interim, Your Honor, there's no question. And we are
13 going ahead with the briefing on that. The number of issues
14 raised in the petition are considerable, and our plan would
15 be, if forced, to meet the schedule if we can. We disagree
16 that this is just simply a change of audience, though. If
17 this case is transferred, it may be a different judge who
18 decides to handle the case entirely differently, or he or she
19 may want to focus on different issues or define different
20 issues, so we're trying to handle it. We have a number of
21 cases to deal with. If the cases are moved to DC, we think
22 all the cases are handled in some comprehensive step-wise
23 way. So it isn't just a change of audience.

24 THE COURT: You're ready to file the motion today,
25 you say?

1 MR. KIPNIS: Yes, sir.

2 THE COURT: Then, Mr. Schneider, do you think that
3 your team can respond to the motion in a week?

4 MR. SCHNEIDER: Yes.

5 THE COURT: So, if it's filed today, then a
6 response from the petitioners by the 23rd.

7 And, Mr. Kipnis, when would you need for a reply?

8 MR. KIPNIS: Is the 23rd a Friday, Your Honor?

9 THE COURT: Yes.

10 MR. KIPNIS: If we could have until the following
11 Tuesday, I think that should be sufficient.

12 THE COURT: Tuesday the 27th. And I will commit to
13 get a decision out by let's say Monday, August 2nd. And I'll
14 try for sooner. And that way, I think if we -- in the
15 meantime, to the extent there are discovery motions, I think
16 those should be held in abeyance until we decide this issue.
17 The 20 pages is fine for the motion, and I'm not going to put
18 a limit on the response, but it should be proportionate.

19 In regard to delaying the schedule we're under now,
20 just to give the Government a little bit of a breather,
21 what's due on the July 28th, I'll extend to one week, to
22 Wednesday, August 4th. And then the reply which is now --
23 Jeremy, what day?

24 THE LAW CLERK: Reply would now be due the 11th.

25 THE COURT: August 11th?

1 THE LAW CLERK: Right.

2 THE COURT: So we'll keep our September 8th date.

3 THE LAW CLERK: But, it was due the 11th, so it
4 would move to the 18th.

5 THE COURT: It would go to the 18th. It was August
6 11th. It goes back one week to the 18th. We'll keep our
7 hearing date of September 8th. I think, if Mr. Kipnis is
8 correct, if the case is transferred to the DC district, all
9 dates are off and the new judge would have to establish a
10 schedule consistent with their other cases. But this will
11 allow us to deal with obviously these cases which came down
12 in the last week of June, which are being studied carefully
13 by scholars such as the professor and other attorneys such as
14 those here and in other parts of the country, so I think it's
15 certainly worthy of paying attention to in the interim. And
16 I think the request is appropriate, and the response to the
17 question, which was, sure, let's hear these, but let's not
18 delay our basic schedule, is also appropriate, and I think we
19 can accommodate both sides. So that's what we'll do then.

20 Anything else, Mr. Kipnis?

21 MR. KIPNIS: No, nothing.

22 THE COURT: Anything else, Mr. Schneider?

23 MR. SCHNEIDER: Area of clarification. I'm sure
24 we'll know the answer by the end of the day. We were
25 thinking about venue. Do I understand this brief will

1 contemplate the next friend status and standing?

2 MR. KIPNIS: That is correct.

3 THE COURT: Right. Next friend status on the
4 standing of Commander Swift to bring it, and also I think the
5 motion should assume mandamus is available and still argue
6 the venue issues, rather than go to the merits of the
7 mandamus itself.

8 MR. KIPNIS: That is what we'll do, Your Honor.

9 MR. SCHNEIDER: Understood. Thank you.

10 THE COURT: So do you have that motion ready to
11 electronically file today?

12 MR. KIPNIS: Yes. I'm waiting for comments back
13 from the Solicitor General's office. And, once I get those,
14 then it should be, I hope, this afternoon, it should be
15 coming in.

16 THE COURT: Excellent. Thanks very much. We'll be
17 adjourned. Thanks very much, counsel.

18 (11:20 a.m., Proceedings Concluded.)

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CERTIFICATE

I, Susan A. Zielie, RPR, CCR, Official Court Reporter, do hereby certify that the foregoing transcript is correct.

/S/ Susan A. Zielie, RPR, CCR
Susan A. Zielie, RPR, CCR