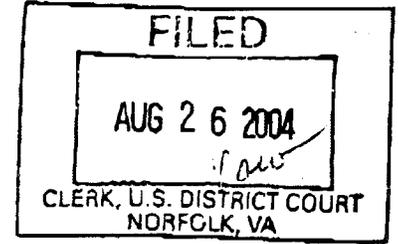


IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA  
NORFOLK DIVISION



YASER ESAM HAMDI, )  
)  
Petitioner, )  
)  
v. )  
)  
DONALD RUMSFELD, )  
Secretary of Defense )  
The Pentagon )  
Arlington, Va., )  
)  
COMMANDER C.T. HANFT, )  
Commander, Consolidated Naval Brig )  
1050 Remount Road )  
Charleston, South Carolina, )  
)  
Respondents. )

CASE NO. 2:02CV439

**MOTION TO STAY PROCEEDINGS  
AND MEMORANDUM IN SUPPORT**

The United States hereby moves the Court for an additional seven-day stay of proceedings in this matter on the grounds set forth below. This motion is unopposed, and the parties are very close to reaching a settlement that will result in petitioner's release and resolve this litigation.

**BACKGROUND AND PROCEDURAL HISTORY**

On June 28, 2004, the United States Supreme Court issued an opinion in this case. Hamdi v. Rumsfeld, 124 S. Ct. 2633 (2004). The Supreme Court vacated the judgment of the Fourth Circuit and remanded the case to that court for further proceedings. On August 6, 2004, the Fourth Circuit in turn issued an order remanding the case to this Court for further proceedings consistent with the Supreme Court's decision. On the same date, the Fourth Circuit issued its

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Judgment and Notice of Judgment, to the same effect.

On August 11, 2004, respondents and petitioner filed in this Court a joint motion to stay all proceedings for twenty-one days. (Dkt. no. 63) The parties advised the Court that they had been involved in negotiations to resolve this matter under terms and conditions acceptable to both parties that would allow Hamdi to be released from respondents' custody. The Court held a telephonic conference on August 19, 2004, in which it ruled that the motion for a stay would be granted in part. In particular, the Court stayed proceedings until Monday, August 30, 2004 (a period of nineteen days), for which date the Court set a hearing on the merits of the habeas petition.

The settlement discussions referenced in the parties' August 11 joint motion and reported to the Court during the August 19 teleconference have continued steadily, and considerable progress has been made. These settlement discussions have required coordination and consultation across multiple Government agencies. The rough outlines of an agreement are in place, with only the details remaining for negotiation between the parties. Respondents yesterday circulated a written draft of a settlement agreement to counsel for petitioner, and are in the process of trying to respond to a handful of issues raised by petitioner. In short, respondents believe that an agreement in principle that will result in Hamdi's release is imminent, and can be reached within the seven-day period for which a stay is sought. If an agreement could be reached during that time, the parties would jointly seek an additional stay to allow transportation and diplomatic arrangements to be finalized.

#### ANALYSIS

The Court has the inherent power to grant a further stay to allow the parties to negotiate a

mutually satisfactory resolution that will obviate the need for court intervention. See Landis v. North Am. Co., 299 U.S. 248, 254 (1936) ("[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants."). A stay is warranted here for several reasons.

1. Even in an ordinary case, "[p]ublic policy, of course, favors private settlement of disputes. A trial judge if possible should assist parties in their attempts at settlement, even to the point of encouraging them." Crandall v. United States, 703 F.2d 74, 75 (4th Cir. 1983). Over the past two weeks, the parties have worked diligently toward reaching a settlement that will resolve the issues in this case, and they believe an agreement in principle is imminent. To go forward with a plenary hearing on Monday, August 30, would substantially disrupt these efforts by forcing counsel to focus on preparing for such a hearing, and diverting attention and resources away from pursuing the negotiations that are so close to fruition. Thus, a limited stay at this time would well serve the public policy in favor of settlements and would be in keeping with the Court's function of encouraging the private resolution of disputes where possible.

2. While the imminence of a settlement would justify a stay even in an ordinary case, the extraordinary nature of the litigation that a settlement in this case would obviate provides clear grounds for a stay. This case is fraught with complex and thorny issues of first impression that call upon the Court to "pay proper heed both to the matters of national security that might arise in an individual case and to the constitutional limitations safeguarding essential liberties that remain vibrant even in times of security concerns." Hamdi, 124 S. Ct. at 2652. As counsel for petitioner remarked during the August 19 teleconference (Tr. of Aug. 19, 2004 Teleconf., at 7), there are a

host of legal issues that the Supreme Court left open and that would have to be addressed in connection with an evidentiary hearing such as that scheduled for August 30. In view of the novelty and extraordinary importance of the issues involved, the Supreme Court specifically urged the lower courts to "proceed with the caution that is necessary in this setting." Id.; cf. Hamdi v. Rumsfeld, 296 F.3d 278, 284 (4th Cir. 2002) (advising this Court, in a different context, to "consider the most cautious procedures first, conscious of the prospect that the least drastic procedures may promptly resolve Hamdi's case and make more intrusive measures unnecessary"). The pending settlement negotiations are likely to produce a final agreement in a matter of days that will cause these difficult and important issues to become moot. The Court should exercise its discretion to grant a limited stay of finite duration that will likely both conserve scarce judicial resources, and obviate the need to reach out and decide constitutional issues of first impression unnecessarily.<sup>1</sup> See, e.g., Kremens v. Bartley, 431 U.S. 119, 128 (1977)

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<sup>1</sup> It is particularly appropriate for the Court to forbear from expediting proceedings at this time because it appears that jurisdiction has not yet been returned to this Court. "A district court does not regain jurisdiction until the issuance of the mandate by the clerk of the court of appeals." United States v. Montgomery, 262 F.3d 233, 239 (4th Cir. 2001) (quoting United States v. Rodgers, 101 F.3d 247, 251 (2d Cir. 1996)). The Fourth Circuit issued its Order, its Judgment, and its Notice of Judgment on August 6, 2004, but the issuance of those documents is not equivalent to the formal issuance of the Court of Appeals' mandate by its Clerk. Federal Rule of Appellate Procedure 41(a) provides that "[t]he court's mandate must issue 7 calendar days after the time to file a petition for rehearing expires." Here, the time to file a petition for rehearing in the Fourth Circuit was 45 days. Fed. R. App. P. 40(a)(1). Thus, the mandate will not issue until 53 days after August 6, 2004. Although Fed. R. App. P. 41(a) allows the Court of Appeals to shorten or extend the time for issuance of its mandate, the Court of Appeals did not do so here; to the contrary, the Notice of Judgment issued by that Court on August 6 recites that "the mandate issues 7 calendar days after the expiration of the time for filing a petition for rehearing." Notice of Judgment dated Aug. 6, 2004, at unnumbered page 2; see also dk. no. 61 (docket entry made Aug. 9, 2004, reflecting receipt of copy of Court of Appeals opinion but indicating that "attached copy of judgment [of Fourth Circuit] will not take effect until issuance of the mandate"); Aug. 9, 2004 Tr. at 10 (representations of petitioner's counsel that Fourth Circuit Clerk's Office staff confirmed mandate will issue 53 days from August 6).

(stressing the importance of avoiding premature and potentially unnecessary decision of constitutional questions of "great gravity and delicacy" (internal quotation marks omitted)).

3. During the August 19, 2004, telephonic conference, the Court ordered the Government to produce Hamdi at the hearing set for Monday, August 30, 2004. However, as the Court is aware, Hamdi is now being detained several hundred miles away, at the Consolidated Naval Brig in Charleston, South Carolina.<sup>2</sup> Physically transporting Hamdi to Norfolk to produce him in Court on Monday, August 30, would serve no useful purpose given the likelihood of his imminent release and repatriation to Saudi Arabia.

### CONCLUSION

A seven-day stay to enable what the parties hope to be the completion of settlement discussions will reap great dividends of "economy of time and effort for [the Court], for counsel, and for litigants." Landis, 299 U.S. at 254. Therefore, respondents respectfully request that their unopposed motion for a stay of proceedings be granted.

Dated: August 26, 2004

Respectfully submitted,

PETER D. KEISLER  
Assistant Attorney General

PAUL J. McNULTY  
United States Attorney

THOMAS R. LEE  
Deputy Assistant Attorney General

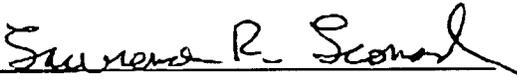
DAVID B. SALMONS  
Assistant to the Solicitor General

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<sup>2</sup> Indeed, as the Fourth Circuit indicated in its remand to this Court, there remains an issue of venue. That is just one of the many issues the Court could avoid by granting this unopposed motion for a stay.

LAWRENCE R. LEONARD (Va. Bar #37995)  
Managing Assistant United States Attorney

MICHAEL A. RHINE (Va. Bar #01266)  
Assistant United States Attorney

  
 \_\_\_\_\_  
 JOSEPH H. HUNT                      By MR  
 TERRY HENRY  
 ROBERT KATERBERG  
 United States Department of Justice  
 Civil Division  
 Federal Programs Branch  
 20 Massachusetts Avenue, N.W.  
 Washington, D.C. 20530  
 Tel.: (202) 616-8298  
 Fax: (202) 616-8460

Attorneys for the United States