

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

FILED *NY*
OCT - 5 2004
CLERK, U.S. DISTRICT COURT
NORFOLK, VA

YASER ESAM HAMDI,

Petitioner,

v.

CIVIL ACTION NO. 2:02cv439

DONALD RUMSFELD
and
COMMANDER C.T. HANFT,

Respondents.

UNDER SEAL UNTIL
10-11-04

UNDER SEAL UNTIL FRIDAY, OCTOBER 8, 2004 AT 12:00 P.M. EST (NOON)

ORDER

On June 28, 2004, the United States Supreme Court held that "due process demands that a citizen held in the United States as an enemy combatant be given a meaningful opportunity to contest the factual bases for that detention before a neutral decisionmaker." Hamdi v. Rumsfeld, 542 U.S. ____, 124 S.Ct. 2633, 2635 (2004). To date, three months later, Mr. Hamdi has not been provided with a hearing of any kind by this Court, the military, or any other tribunal. Charges still have not been proffered. Mr. Hamdi, as far as this Court is aware, remains in solitary confinement, although, according to the Government, that confinement has been "relaxed" somewhat since he signed an Agreement with the Government ensuring his release. Meanwhile, the Government also represents that other enemy combatants have had hearings before a military tribunal of some kind after the Supreme Court's ruling in this case and are not held in solitary confinement. The Court remains mystified why Mr. Hamdi continues to be and has been treated differently from other enemy combatants. It disturbs the Court that the only factor distinguishing Mr. Hamdi from the other

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“enemy combatants” is his United States citizenship, causing him to be held in solitary confinement, incommunicado, without television, newspapers or any form of communication except for interrogation by the authorities.

The following is a brief review of what has happened since the Supreme Court’s decision in this case. After the Supreme Court’s decision, the United States Court of Appeals for the Fourth Circuit issued its Judgment remanding the case to this Court on August 6, 2004, for further proceedings consistent with the Supreme Court’s opinion. On August 11, 2004, the parties jointly filed a Motion to Stay Proceedings for twenty-one days to permit negotiations – negotiations that remain ongoing almost two months later – for Mr. Hamdi’s release. Mr. Hamdi also filed a Motion for Leave to File an Amended Petition of Habeas Corpus.

On August 19, 2004, this Court granted in part a joint Motion by the parties to stay the proceedings until August 30, 2004 in order to facilitate a settlement of the case. The parties asked on August 26, 2004 to stay the proceedings for seven days, and the Court stayed the matter until August 31, 2004 and ordered the defendants to produce the documents which they would utilize in their presentation to the petitioner’s counsel for his eyes alone.

On August 30, 2004, on motion by the Government, the United States Court of Appeals for the Fourth Circuit determined that this Court did not have jurisdiction to hear this matter, nullifying this Court’s order to the Government to produce documentation. It held that this Court would not receive the mandate reconfering jurisdiction until September 27, 2004, which the United States Court of Appeals for the Fourth Circuit held is the date that the mandate from that Court’s August 6, 2004 remand of this matter to this Court would issue. No. 02-7338 (CA-020439-2); see also Fed. R. App. P. 40(a)(1); 41(b). On September 24, 2004, Mr. Hamdi made a motion to this Court, which

had no jurisdiction pursuant to the order of the United States Court of Appeals for the Fourth Circuit, to stay the pending proceedings until October 1, 2004 because the parties had entered into an Agreement establishing the terms under which Mr. Hamdi was to be released. The Government made the same motion before the United States Court of Appeals for the Fourth Circuit. On September 24, 2004, the United States Court of Appeals for the Fourth Circuit stayed issuance of the mandate, which in effect denied jurisdiction to this Court until September 30, 2004 to act on the habeas corpus petition. The United States Court of Appeals for the Fourth Circuit subsequently remanded the case to this Court on October 1, 2004. Pursuant to the United States Court of Appeals for the Fourth Circuit's October 1, 2004 Order, the mandate has now issued and this Court now has jurisdiction over this matter.

Accompanying Petitioner's September 24, 2004 Motion is a signed Agreement setting forth the terms under which Petitioner is to be released from custody. See Pet.'s Mot. to Stay Proceedings Ex. A. Based on the representation of Petitioner's attorneys, Federal Public Defender Frank Dunham and Assistant Federal Public Defender Jeremy Kamens, that "Petitioner's decision to enter into this Agreement is an informed and voluntary one." See id. at 4. The Agreement also states that, "[i]f, for reasons beyond the control of the Government of the United States, Hamdi cannot be transported to the Kingdom of Saudi Arabia on or before September 30, 2004, the United States shall not be in breach of this Agreement, provided Hamdi is transported to the Kingdom of Saudi Arabia as soon thereafter as it is within the power of the United States to do so. However, Hamdi may, in such event, seek relief concerning his conditions of confinement from the United States District Court in the Eastern District of Virginia while awaiting transport."

At this point, however, in spite of the many opportunities this Court and the United States

Court of Appeals for the Fourth Circuit have provided the parties to reach an Agreement in this matter, Mr. Hamdi remains in custody – in some kind of “relaxed” solitary confinement – and has not been released. The Court therefore **ORDERED** both parties to participate in a status conference on Tuesday, October 5, 2004 at 12:30 p.m. As a result of that conference, this Court **ORDERS** the following:

- Mr. Hamdi should ~~XXXX~~  be returned to the Kingdom of Saudi Arabia by Friday, October 8, 2004 at 12:00 p.m. (noon) Eastern Standard Time. An affidavit must be filed in this Court by Friday, October 8, 2004 at 12:00 p.m. (noon) Eastern Standard Time certifying that Mr. Hamdi indeed was securely delivered to the Kingdom of Saudi Arabia by that date and time. This certification may be delivered to this Court by facsimile.
- If this Court does not receive, by Friday, October 8, 2004 at 12:00 p.m. (noon) Eastern Standard Time, certification that Petitioner Mr. Hamdi is in the Kingdom of Saudi Arabia, a hearing on the merits of Mr. Hamdi's habeas corpus petition will be held on Tuesday, October 12, 2004, at 10:00 a.m. Eastern Standard Time. Mr. Hamdi shall appear at this hearing unless he is back in the Kingdom of Saudi Arabia by Friday, October 8, 2004 at 12:00 p.m. (noon) Eastern Standard Time.
- If this Court does not receive, by Friday, October 8, 2004 at 12:00 p.m. (noon) Eastern Standard Time, certification that Petitioner Mr. Hamdi is in the Kingdom of Saudi Arabia, copies of all statements made by Mr. Hamdi, including conversations including Mr. Hamdi, and/or transcripts or reports of such statements and conversations which the Government may have in its possession or seek to offer into evidence at the hearing must be delivered to Federal Public Defender Frank Dunham, with a copy to this Court, all of which must be filed under seal, by Friday, October 8, 2004, at 2:00 p.m. Eastern Standard Time and shall be held confidential by Mr. Dunham and perused in camera by the Court.
- This Order will remain under **SEAL** until Friday, October 8, 2004 at 12:00 p.m. (noon) Eastern Standard Time.
- The Court will consider any future motions counsel for the Government may have based on its inability to deliver the Petitioner Mr. Hamdi to the Kingdom of Saudi Arabia by Friday, October 8, 2004 at 12:00 p.m. (noon) Eastern Standard Time.

The Clerk of the Court is **DIRECTED** to transmit this Order via facsimile and U.S. mail to all counsel of record to be under seal until Friday, October 8, 2004 at 12:00 p.m. (noon) Eastern Standard Time.

IT IS SO ORDERED.

/s/ Robert G. Doumar

UNITED STATES DISTRICT JUDGE

Norfolk, Virginia

October 5, 2004

Handwritten notes and signatures at the bottom of the page.