

IN THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF COLUMBIA

AL HALMANDY, <i>et al.</i> ,)	
)	
Petitioner,)	Civil Action No. 05-2385 (ESH)
)	(Jawad, ISN 900)
v.)	
)	
BARACK OBAMA,)	
President of the United States, <i>et al.</i> ,)	
)	
Respondents.)	
)	

**PETITIONER’S OPPOSITION TO RESPONDENTS’
MOTION FOR AN EXTENSION OF TIME TO COMPLY WITH THE COURT’S
APRIL 27, 2009 ORDER**

The government’s eleventh-hour motion for an extension of time to respond to this Court’s April 27, 2009 Order (dkt. no. 238) (“the Order”) is yet another unjustifiable attempt to frustrate Petitioner Mohammed Jawad’s right to challenge his imprisonment by the United States. *See* Respondents’ Mot. for an Extension of Time to Comply with the Court’s April 27, 2009 Order (dkt. no. 256) (“Gov’t Mot.”). The Court’s Order directed the government, *inter alia*, to produce a short statement of each material fact upon which the government intends to rely in making its case-in-chief (including the names of any witnesses it intends to call), to identify all evidence the government expects to elicit in support of those facts and how it intends to present that evidence, to provide recordings and/or transcripts of and information about any statements on which the government intends to rely in its statement of material facts, and to disclose all reasonably available evidence in the government’s possession that tends to materially undermine the evidence that the government intends to rely in its case-in-chief (including any evidence or information that undercuts the reliability and/or credibility of the

government's evidence). Order at 1-4. The Order, in short, sought a *prompt* resolution of the legality of Petitioner's detention because that is what the Supreme Court mandated in *Boumediene v. Bush*, 553 U.S. ___, 128 S. Ct. 2229, 2275 (2008), and because, as this Court stressed, this habeas case has already been delayed for far too long, Tr. of Apr. 27, 2009 Hearing, at 52.¹ The government's extension motion repackages the same arguments the Court rejected last month in refusing to dismiss Mr. Jawad's petition or, alternatively, to hold it in abeyance. *See* Order dated Apr. 22, 2009 (dkt. no. 234). The motion is without basis and should be denied.²

Once again, the government is trying to use uncertainty about possible future prosecution to delay Mr. Jawad's ongoing habeas corpus action. Any such prosecution remains speculative. As the government just told the Court of Military Commission Review ("CMCR"), "the Government does not at this time know precisely how the military commissions will be reformed, or even what the disposition of [Mr. Jawad] will be, *including whether he will be tried by military commission.*" Gov't Mot. for

¹ The Order also directed the government to produce evidence discovered during the ongoing review of Guantánamo cases ordered by President Obama on January 22, 2009. *See* Order at 2. The government has sought reconsideration of that portion of the Court's Order, along with similar orders issued by other judges in the Guantánamo habeas cases. Judge Hogan has ordered a consolidated response to the government's motion and scheduled argument for June 9, 2009. Mr. Jawad and other Guantánamo detainees have moved to strike the government's reconsideration motion in light of its procedural defects or, alternatively, to deny the reconsideration motion on the merits. *See* Mem. in Support of Mot. to Strike, and in Opp. to, Respondents' Mot. for Reconsideration for Orders Regarding Discovery from the Guantanamo Review Task Force, *In re Guantanamo Bay Detainee Litigation*, Misc. No. 08-442 (TFH) (dkt. no. 257-2).

² The government's effort to confer with undersigned counsel under Local Rule 7(m) amounted to the following. At approximately 7:00 p.m. on May 26, 2009, the Court-ordered due date for the government's filing, undersigned counsel contacted counsel for the government via e-mail to inquire as to the status of the filing. Counsel for the government then informed undersigned counsel for the first time that the government intended to seek an extension of the time to comply with the Court's Order.

Additional Stay of Decision at 6, attached as Ex. A (“Additional Stay Mot.”) (emphasis added).

At the same time, the government is seeking to prevent Mr. Jawad from challenging his detention in any forum, including by denying him his right to a speedy trial in any military prosecution. On January 23, 2009, the government moved the CMCR to stay its decision in the government’s appeal until May 20, 2009.³ The CMCR granted that motion on February 4, 2009, citing Mr. Jawad’s habeas petition as the reason why he would not be unfairly prejudiced by the delay. On May 15, 2009, the government filed a second stay request with the CMCR, seeking an additional 120-day delay (until September 17, 2009)—a fact the government failed to tell the Court in its motion. The government relied on Mr. Jawad’s ongoing habeas case in explaining to the CMCR why the stay was in the interests of justice and did not unfairly prejudice Mr. Jawad. *See* Additional Stay Mot. at 1 (“[Mr. Jawad’s] habeas case continues to proceed in federal district court.”). And the CMCR relied on Mr. Jawad’s ongoing habeas case in granting the government’s additional stay request. *See* CMCR Order dated May 22, 2009, attached as Ex. B (citing this Court’s April 22, 2009 Order denying the government’s prior motion to dismiss or delay Mr. Jawad’s habeas action to show that he would not be unfairly prejudiced by the stay).

Thus, the government is once again telling different stories to different courts to achieve its desired goal of delay. It has urged the CMCR to stay a ruling on its appeal

³ The government had appealed the military trial judge’s ruling suppressing statements Mr. Jawad made to U.S. officials the night of his arrest in Afghanistan, finding that they were the product of torture. The government did not appeal the judge’s separate ruling suppressing statements made by Mr. Jawad to Afghan officials the day of his arrest, also on the ground that they were the product of torture. Nevertheless, the government has continued to rely on both sets of suppressed statements in this habeas proceeding.

because the military prosecution of Mr. Jawad may never go forward. At the same time, the government is using the same uncertainty about military prosecution to prevent Mr. Jawad from challenging his continued detention in this Court. To grant the government's request would not only prejudice Mr. Jawad but would undermine the Supreme Court's mandate in *Boumediene* for prompt habeas hearings.

The government claims that "this habeas action has the potential to improperly interfere or overlap with the pending criminal prosecution of Petitioner." Gov't Mot. at 2. That is nonsense. The prosecution against Mr. Jawad has been suspended and, as the government has stated, it remains unclear whether any such prosecution will ever go forward. This Court rejected the government's same abstention-based argument last month, when it denied the government's motion to dismiss or hold in abeyance. The possibility of Mr. Jawad's prosecution remains as speculative now as it was then.

Mr. Jawad, moreover, was previously prosecuted in the military commissions for the same conduct for which he is being detained—*i. e.*, his alleged role in a hand grenade attack on an American military vehicle that injured two U.S. Special Forces soldiers and their Afghan interpreter. If there is no factual or legal basis to detain Mr. Jawad, *a fortiori* there is no basis to prosecute him. And an inquiry by this Court into Mr. Jawad's six-plus year detention—an inquiry *constitutionally* mandated under *Boumediene*—could not "improperly interfere or overlap" with a future prosecution (were such prosecution ever to take place).

Also, military commission discovery rules, while not as broad as the comparable rules in courts-martial, are similar in scope to the discovery ordered by the Court in this habeas action. Thus, there is no basis to believe that Mr. Jawad would gain any

advantage in either litigation from the other. In fact, since the allegations that formed the basis for Mr. Jawad's military commission prosecution are identical to the facts asserted in the government's return to his habeas petition, the discovery turned over would be nearly identical. Indeed, virtually everything provided by the government thus far in this habeas action had previously been provided to the defense by the military prosecution office.⁴

It also bears noting that the military commission prosecution against Mr. Jawad was already on life support even before the military judge, Colonel Stephen R. Henley, suppressed the government's only evidence against him as the product of torture (specifically, "physical intimidation" and death threats against Mr. Jawad and threats to kill his family). Amended Habeas Pet'n ¶ 62 (citing D-201 and D-202 suppression rulings). Mr. Jawad had previously moved to dismiss the case for lack of jurisdiction. While Judge Henley denied the motion, his ruling defining the elements of the offense and the evidence that would be required to gain a conviction thoroughly rejected the government's theory of the case. Specifically, Judge Henley rejected the government's contention that Mr. Jawad could be prosecuted under the Military Commissions Act for attempted murder in violation of the law of war—the only charge against him—based on his alleged status as an "unlawful combatant." See D-007 Ruling on Defense Mot. to Dismiss—Lack of Subject Matter Jurisdiction, at 3-4, attached as Ex. C ("D-007

⁴ The Criminal Investigative Task Force conducted an additional investigation into Mr. Jawad's alleged role in the hand grenade attack between February 15 to 27, 2009. That investigation was completed well before the government's March 31, 2009 deadline to provide the factual return and supporting documentation in this case. The witness statements collected in February were provided in discovery to Mr. Jawad's military commission defense team on May 20, 2009, although they have not been provided through habeas discovery. Undersigned counsel and Mr. Jawad's military defense team are unaware of any additional or ongoing investigation.

Ruling”).⁵ Dissatisfied with Judge Henley’s reasoning, the government sought reconsideration. The government explained that Judge Henley’s rejection of its status-based theory of the case left it without any basis to prosecute Mr. Jawad. Gov’t Reply to Defense Response to Mot. for Reconsideration of D-007 Ruling at 12, attached as Ex. D. Judge Henley denied the government’s motion. See Ruling on Gov’t Mot. for Reconsideration of D-007 Ruling, attached as Ex. E. The original lead prosecutor, Lt. Col. Darrel Vandeveld, meanwhile, had already resigned from the military commissions, stating that he could not ethically continue prosecuting Mr. Jawad’s case. See Amended Habeas Pet’n ¶¶ 72-82; Vandeveld Decl., Ex. B to Amended Habeas Pet’n.⁶

While any future prosecution remains speculative, the ongoing harm to Mr. Jawad is real. Mr. Jawad has already been imprisoned by the United States for six-and-one-half years. During that time he has been tortured, abused, and subjected to extreme isolation. A teenager when seized and rendered from Afghanistan, he has literally grown up behind bars at Guantánamo. The government should not be permitted to delay further Mr. Jawad’s challenge to his continued and prolonged imprisonment.

For the foregoing reasons, the government’s motion should be denied. The government should be ordered to produce not later than 5 p.m. on June 5, 2009, the materials and information specified in the Court’s April 27, 2009 Order.

⁵ Judge Henley had dismissed the other charge against Mr. Jawad—intentional infliction of serious bodily injury—as a lesser included offense of the attempted murder charge. See D-007 Ruling at 1 n.4.

⁶ Even were the government again to prosecute Mr. Jawad in a military commission, abstention would be inappropriate because there are “substantial arguments” that the military tribunal lacks jurisdiction. See *Hamdan v. Gates*, 565 F. Supp. 2d 130, 136 (D.D.C. 2008) (quoting *Hamdan v. Rumsfeld*, 548 U.S. 557, 589 n.20 (2006)).

Respectfully submitted,

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