

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division**

<p>YASER ESAM HAMDI,)) and)) FRANK W. DUNHAM, JR., As Next) Friend of Yaser Esam Hamdi,)) Petitioners,)) v.)) DONALD RUMSFELD,) Secretary of Defense,)) and)) COMMANDER W.R. PAULETTE,) Norfolk Naval Brig, Norfolk, Virginia,)) Respondents.) _____)</p>	<p>CIVIL ACTION NO. 2:02CV348</p>
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**RESPONDENTS' MOTION TO STAY MAGISTRATE JUDGE'S
MAY 20, 2002 ORDER REGARDING ACCESS AND MEMORANDUM IN SUPPORT**

Respondents, by and through undersigned counsel, hereby move to stay the magistrate judge's May 20, 2002 order requiring that the federal public defender's office be given immediate unmonitored access to Yaser Hamdi.

I. PROCEDURAL BACKGROUND

On May 10, 2002, public defender Frank Dunham filed the Section 2241 habeas petition in this case along with a motion that he be appointed counsel to Yaser Hamdi. The petition seeks Dunham's appointment as Hamdi's next friend and asks the Court to order the government to permit counsel to meet with Hamdi in private and without monitoring; to cease interrogating

Hamdi while litigation is pending; to order Hamdi's release from custody as violating the Fifth and Fourteenth Amendments; and to schedule an evidentiary hearing.

The case was referred to Magistrate Judge Tommy E. Miller, and on May 14, 2002, the magistrate judge appointed the federal public defender's office to serve as counsel for Hamdi and directed the government to respond to the petition by May 23. On May 20, after hearing argument on the government's motion for more time to respond, the magistrate judge extended the deadline to June 13. However, the magistrate judge also ordered that within five days respondents allow an attorney from the public defender's office, and, if necessary, an interpreter, both with appropriate governmental security clearances, to meet with Hamdi without military personnel present. Respondents have on this date submitted to this Court their objections to the magistrate judge's order, pursuant to Fed.R.Civ.P. 72 and 28 U.S.C. § 636(b). They respectfully ask the Court to enter an order staying the magistrate judge's order compelling the government to grant the public defender's office access to Hamdi until this Court has had an opportunity to rule on their objections to that order.

II. RESPONDENTS REQUEST A STAY OF THE ORDER UNTIL THIS COURT HAS HAD AN OPPORTUNITY TO RULE ON THEIR OBJECTIONS TO THE MAGISTRATE JUDGE'S ORDER

The factors governing whether a party is entitled to a stay of an order pending review are (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether the issuance of the stay will substantially injure the other parties' interests in the proceeding; and (4) where the public interest lies. *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987). The Court must weigh the relative importance of these factors in balancing the hardships likely to befall the parties if the stay is or is not granted. *Blackwell Furniture Co. v. Seilig Mfg. Co.*, 550 F.2d 189, 196 (4th Cir. 1977).

A. RESPONDENTS ARE LIKELY TO SUCCEED IN THEIR OBJECTIONS TO THE ORDER

As shown in the accompanying objections to the order, respondents are likely to succeed in demonstrating that the order is flawed. The order grants a mandatory injunction requiring respondents to grant the public defender's office unmonitored access to Hamdi – despite the public defender's inability to satisfy the requirements of next-friend status and his lack of standing to file the underlying habeas petition. Nor did the magistrate judge have the power to appoint counsel for Hamdi. Hamdi has not sought relief in any court of the United States and he has not sought to have counsel appointed for him. Finally, the magistrate judge clearly exceeded his statutory authority by granting injunctive relief requiring that the public defender be granted access to Hamdi. The Federal Magistrates Act, 28 U.S.C. § 631, *et seq.*, explicitly prohibits a magistrate judge from deciding a motion for injunctive relief without the parties' consent. The order granting the public defender access to Hamdi cannot be characterized as anything other than precisely the injunctive relief the public defender sought. As such, the magistrate judge exceeded his authority.

The question presented on these objections to the Order is not whether the detainee, who may be a U.S. citizen, may be held without any access to counsel because he is an enemy combatant. The question here, rather, is whether the magistrate judge improperly ordered relief without addressing a series of issues demonstrating that the Court's power to act (and the statutory authority of the Public Defender to proceed) had not been properly established.

B. RESPONDENTS WILL BE IRREPARABLY HARMED IF A STAY IS NOT GRANTED

The respondents will suffer irreparable harm if the Court does not stay the magistrate judge's order. That order bars respondents from denying the public defender's office private, unmonitored access to Hamdi. In the context of the conflict that began with the September 11 al Qaida attack on the United States, the order, which demands that respondents grant unmonitored

access to an enemy combatant, necessarily implicates important national security concerns. Al Qaida manuals tell us that captured al Qaida members are trained to pass messages through unwitting intermediaries. *See* The Al Qaida Manual, www.usdoj.gov:80/ag/trainingmanual.htm. The Department of Justice has addressed that concern with special regulations which permit monitoring even of attorney-client communications in appropriate circumstances. *See* 28 C.F.R. §§ 501.2, 501.3. Here, by ordering public defender access to Hamdi without allowing the government sufficient opportunity to address these concerns, the magistrate judge has raised a significant risk to national security.

C. PETITIONERS WILL SUFFER LITTLE HARM IF A STAY IS ISSUED

Maintenance of the status quo pending review will not irreparably harm the public defender's office or the enemy combatant. At most, there will be a delay in enforcing the order, but that is the normal cost of the appellate process and does not constitute a cognizable basis for denying respondents a stay. Respondents only seek a stay pending the Court's resolution of the issues on review from the magistrate judge.

D. THE PUBLIC INTEREST WILL BE SERVED BY GRANTING A STAY

The public defender's habeas petition challenges the legality of detaining an enemy combatant. Such a petition necessarily raises sensitive questions related to the proper role of the courts in reviewing actions taken under the President's authority as Commander in Chief. Among those questions are the standing of a purported next friend, the statutory authority of the public defender to proceed, the authority of the magistrate judge to enter an order that he has entered, and the risk to our national security of granting unmonitored access to an enemy combatant. Orderly treatment of these questions is especially appropriate because the Court is being asked to review the actions of the military undertaken under the President's power as Commander in Chief during wartime operations. Courts are normally circumspect in such

matters and will proceed only when required to do so. *See, e.g., Dames & Moore v. Regan*, 453 U.S. 654, 660-61 (1981); *Johnson v. Eisentrager*, 339 U.S. 763 (1950) (describing inherent interference with conduct of war entailed in habeas litigation by enemy prisoners).

CONCLUSION

For the foregoing reasons, the Court should stay that part of the magistrate judge's May 20 order requiring that the federal public defender's office be given immediate unmonitored access to Yaser Hamdi.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Respondents' Motion to Stay Magistrate Judge's May 20, 2002 Order Regarding Access and Memorandum in Support was hand delivered

this 23rd day of May, 2002, to:

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